

IN THE SUPREME COURT OF MISSISSIPPI

CASE No. 2010-CA-00446

GRAND LEGACY, LLP and  
GRAND LEGACY OF MISSISSIPPI, L.P.

APPELLANTS

VS.

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

APPELLEES

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REPLY BRIEF OF THE APPELLANTS

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Appealed from the Circuit Court of Harrison County, Mississippi

ORAL ARGUMENT REQUESTED

David C. Dunbar (MSF [REDACTED])  
G. Clark Monroe II (MSF [REDACTED])  
DUNBARMONROE, P.A.  
270 Trace Colony Park, Suite A  
Ridgeland, MS 39157  
Office: (601) 898-2073  
Facsimile: (601) 898-2074

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## SUMMARY OF THE REPLY

The trial court prematurely ruled on issues of law about which facts remained in dispute allowing the Appellees (the “Gant Parties”) to continue to avoid examination of fraudulent conduct that netted from their *partners* \$4.4 million and 30 percent of a \$15 million deal without investing a penny of their own money. The Gant Parties request that this Court re-write partnership law and re-define obligations among fiduciaries in order to sanction their conduct and justify their vulgar profits.

### ***The Acknowledgement Agreement contains a false statement.***

It is fraud to conceal fraud. Specifically, the Acknowledgement Agreement that is so highly regarded by the Gant Parties and relied on by the trial court states “both purchases have confidentiality clauses in the contracts that prohibit disclosure of the terms of the purchases.” [R. at 2211; R.E. at 137]. This sentence is false, but it is consistent with oral representations made by the Gant Parties and attorney Jay Jordan (“Jordan”) to Scott Sanders (“Sanders”). *See* Affidavit of Sanders at ¶¶ 9-12 [R. at 2538-39]; Deposition of Sanders at 160-61, 276-77 [R. at 487, 519]; Deposition of Jordan at 176 [R. at 1369].

The November 10, 2004 Agreement for Purchase and Sale between Orange Grove Utilities, Inc. (“Orange Grove”) and Charles Gant (“Gant”) did contain a confidentiality clause, however, the clause allowed disclosure of the terms of the contract to “*lenders and investors in connection with the acquisition of the property.*” [R. at 2149; R.E. at 52]. The members of the limited partnership, the Gant Parties and Grand Legacy, LLP, were all *investors* and Grand Legacy of Mississippi, L.P. (“GLMS”) was a lender or investor to whom the contract with Orange Grove could have been disclosed. The Gant Parties used the Appellants’ (the “Grand Legacy Parties”) earnest money to fund their own escrow obligations without permission or knowledge of the Grand Legacy Parties. Without their use of the Grand Legacy Parties’ earnest

money and without the \$14.5 million “loan” by GLMS in the first closing, Gant & Shivers, LLC would not have been able to purchase the Bernard Bayou Property (the “Property”).<sup>1</sup>

The Grand Legacy Parties do not contend that the Gant Parties should have donated the deal to the partnership as the Gant Parties suggest. *See* Brief of Appellees at 11. Rather, the Grand Legacy Parties contend that the Gant Parties needed funds to make his “deal” work and the Gant Parties became equity stakeholders in the partnership, which was the consideration for Gant’s agreeing to sell the Property for the same price that he paid. Instead, of doing what he agreed to do, Gant and his company took a profit that Gant said he was not making, secured funding that he could not obtain alone, *and* took an equity stake in the partnership *without contributing one dime*.

The trial court erred when it refused to let the jury consider whether the actions of the Gant Parties and the attorneys constituted non-disclosure or misrepresentation that caused Grand Legacy, LLP to *first* enter the limited partnership with the Gant Parties in March 2005 due to verbal misrepresentations of their false assertion of confidentiality among other things, and *second* to allow the transaction to close by providing much needed financing and cash based on a *written* misrepresentation of the same false statement in the Acknowledgement Agreement.

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<sup>1</sup> The Gant Parties’ admitted use of the Grand Legacy Parties’ earnest money (\$400,000.00) to fund the Gant Parties’ earnest money obligations on November 15, 2004 (\$100,000.00) and on January 5, 2005 (\$100,000.00) evidences an intention to form a partnership from November 2004 forward. Otherwise, the Gant Parties would not have had any legitimate access to the Grand Legacy Parties’ earnest money deposited into their attorneys’ escrow account. *See* November 10<sup>th</sup> Agreement requiring \$200,000.00 earnest money from the Gant Parties [R. at 2138-39; R.E. at 41-42]; November 12<sup>th</sup> Agreement requiring \$400,000.00 earnest money from the Grand Legacy Parties [R. at 2169; R.E. at 69]; Disbursement Statement of Schwartz, Orgler & Jordan, PLLC showing misuse of the Grand Legacy Parties’ earnest money [R. at 2368-69; R.E. at 146-47]; Affidavit of Sanders at ¶ 15 regarding the use of the Grand Legacy Parties’ earnest money to fund the Gant Parties’ earnest money obligations [R. at 2541]; and HUD-1 Settlement Statement [R. at 2440; R.E. at 140].

*The meaning of “difference in the purchase price” is for a jury to determine.*

Crafty legal work by the parties’ joint attorneys, fundamental misrepresentation by the Gant Parties, misdirection, and non-disclosure is apparent in the Acknowledgement Agreement and in the disputed facts that lead to its execution. The record includes the following testimony:

- In the fall of 2004, Gant verbally represented to Sanders that Gant, individually, had the property “locked up” with the original seller, Orange Grove, and that the purchase price was around \$15 million. *See* Deposition of Sanders at 132-33 [R. at 480]; Deposition of Pankratz at 82-83 [R. at 2590]; Deposition of Gant at 196-98 [R. at 1094-95].
- Gant assured Sanders that although he could not actually show Sanders the contract (a misrepresentation), that Gant’s purchase price was around \$15 million and that he would not make a profit on his sale of the Property to GLMS, but Gant added that he desired, in return for his work, an equity interest in the partnership that would own the Property. *See* Deposition of Sanders at 132-33, 139 [R. at 480, 482]; Affidavit of Sanders at ¶ 7 [R. at 2537].
- Sanders agreed that if Gant would not be making a profit on the sale, Gant would get a 30 percent interest in the entity that would be formed to purchase and develop the Property. *See* Deposition of Sanders at 132-33, 139 [R. at 480, 482]; Affidavit of Sanders at ¶ 7 [R. at 2537]; Deposition of Gant at 104-106, 228 [R. at 1071-72, 1102]. This was part of the to-be-formed partnership noted in the November 12, 2004 Agreement for Purchase and Sale and was not merged into the November 12<sup>th</sup> Agreement because it was a specific condition precedent in the contract. [R. at 2168; R.E. at 68].
- Sanders agreed that Gant would be able to recoup any expenses incurred from the transaction. *See* Deposition of Sanders at 211-12 [R. at 500]; Affidavit of Sanders at ¶ 5 [R. at 2537].
- Sanders instructed his attorneys that Sanders was only interested in the Property if Sanders’ company would be purchasing the property for the same net price as Gant was purchasing it and Jordan assured Sanders that the contracts would be mirror contracts. *See* Deposition of Sanders at 160-61, 276-77 [R. at 487, 519]; Affidavit of Sanders at ¶ 9 [R. at 2538].
- The Acknowledgement Agreement represents crafty legal work by the lawyers of the limited partnership who knew one party was profiting as to the other and knew something had to be drafted to “protect” the lawyers, not their clients.

Certainly, the Gant Parties hotly contest the statements above and do so in their Brief.

But, that is the whole point – issues of fact are present and are sufficient to require denial of

summary judgment, “where one party swears to one version of the matter in issue and another says the opposite.” *Miller v. Meeks*, 762 So. 2d 302, 304 (Miss. 2000) (citing *American Legion Ladnier Post No. 42 v. Ocean Springs*, 562 So. 2d 103, 105 (Miss. 1990)).

A jury should have had the opportunity to determine whether the Gant Parties’ verbal statements that misled the Grand Legacy Parties in regard to what a “difference in the purchase price” meant was sufficient to show both a direct misrepresentation in oral conversations and a written misrepresentation in the Acknowledgement Agreement itself. Simply stating there is a “difference” in the purchase prices, was insufficient to inform the Grand Legacy Parties that the Gant Parties would make over \$4.4 million from the Grand Legacy Parties’ cash investment in the limited partnership, on top of the Gant Parties’ 30 percent equity position in the partnership.<sup>2</sup> Partners are required to disclose all material facts to a transaction. Nevertheless, the Gant Parties not only failed to disclose all material facts, but also actively concealed the actual difference in the purchase prices from the Grand Legacy Parties with the intention of defrauding the Grand Legacy Parties of \$4.4 million. A jury should have been allowed to determine if this concealment negated any “attempt” to make a disclosure of a difference in purchase price based upon the conflicting testimony of the parties. The trial court erred in taking this from the jury.

***The HUD-1 Statements are categorically false and designed to conceal.***

The two HUD-1 Settlement Statement used at the simultaneous closing are part of the Appellants’ Record Excerpts at pages 140-43. Nothing about those documents is accurate or true and the one used in the closing between the Gant Parties and Grand Legacy, LLP furthered the illusion that the price GLMS was acquiring the Property for was almost identical to that paid. Specifically, in line 504 it falsely indicates a first mortgage loan was paid off in the amount of \$14,551,754.10 when no such loan actually existed. [R. at 2443; R.E. at 142]. While the

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<sup>2</sup> The Gant Parties invested not one cent of their own money in this transaction.

Acknowledgement Agreement states no actual loan or deed of trust was drafted, it also states that “said loan and funds shall be used to fund both closings.” [R. at 2212; R.E. at 138]. This statement can mislead a reader to believe the bank loan and cash were all necessary to fund the first closing, which is precisely what Sanders was told and what he believed to be true.

***The trial court ignored the fiduciary obligations of the parties.***

The Court should not lose sight of the fact that the November 12<sup>th</sup> Agreement for Purchase and Sale was a contract that either party could have walked away from due to the condition precedent it contained. [R. at 2168; R.E. at 68]. The November 12<sup>th</sup> Agreement was not binding because of the huge “out clause” making the entire deal contingent on a satisfactory limited partnership being entered between the parties and a business arrangement being constructed that presumably would benefit both parties. The jury should have been allowed to consider what happened after November 12, 2004, and before April 15, 2005, because the facts are hotly contested between these parties and are not precluded by any merger clause.

After the November 12<sup>th</sup> Agreement was signed, many other agreements and representations were made. Grand Legacy, LLP agreed to contribute \$5 million to the GLMS limited partnership to fund its purchase of the Property. *See* Assignment of Sales and Purchase Agreement [R. at 2191-92; R.E. at 135-36]. Gant and Grand Legacy, LLP agreed that the agreement to purchase the Property would be contributed to GLMS. *See* Assignment of Sales and Purchase Agreement [R. at 2191-92; R.E. at 135-36]. These are the actions of partners subsequent to the signing of the November 12<sup>th</sup> Agreement and actually contemplated by that agreement to occur. The Gant Parties proclaim it is unclear when exactly partnership duties arose between the parties. *See* Brief of Appellees at 18-22. If so, then there are disputed facts pertaining to the time between November 12, 2004 and March 23, 2005 that should be considered by a jury. But, one fact is certain, on March 23, 2005, when the Limited Partnership



Agreement was signed, the parties to that agreement became fiduciaries of one another and that cannot be disputed. *See* Limited Partnership Agreement [R. at 2085-2120; R.E. at 90-125]. In its Order, the trial Court erroneously reached a conclusion based only on the Acknowledgement Agreement but ignored other facts that a jury should be allowed to consider:

- The trial court ignored the false statements in the Acknowledgment Agreement.
- The trial court concluded, but failed to explain, why no evidence outside of the Acknowledgement Agreement was relevant yet the Acknowledgment Agreement did not have a merger clause precluding consideration of clearly disputed factual evidence.
- The trial court ignored the fiduciary obligations of the parties during the relevant time but certainly after an actual limited partnership was formed on March 23, 2005 and the non-disclosure of material facts by the limited partners.
- The trial court substituted itself for the jury and concluded “it seems as though Sanders would have made sure the contract contained a provision” that the price to the limited partnership was to be the same as the price paid to Orange Grove. [R. at 3073; R.E. at 39]. But it did not explain why a jury could not conclude from the same evidence that it was plausible the Gant Parties misled their partners about the price and its confidential nature, put the misrepresentation in writing, and intended to withhold the truth from their partners when contributing to the limited partnership the right to purchase the Property and stating that additional funds were required for them to buy it from Orange Grove.
- The trial court erroneously started with the Purchase and Sale Agreement that had a merger clause, but clearly set aside the terms of the partnership for later discussions. Yet, it ultimately concluded that the Acknowledgement Agreement controlled but never explained why none of the evidence, parole and direct, concerning the parties agreements as partners would not be admissible and relevant disputed facts a jury should have been allowed to consider.

*See* Order [R. at 3069-73; R.E. at 35-39].

In summary, the trial court’s error has turned partnership law and the fiduciary obligations of partners on its ear. To allow a deal that clearly violates all concepts of partnership law to be summarily disposed with a half page discussion of the applicable facts and in the manner by which the trial court reached its decision is not only a miscarriage of justice but a fundamental misapplication of legal principles.

## ARGUMENT

The Gant Parties filed the Motions for Summary Judgment in this matter and, therefore, they have the burden of demonstrating that no genuine issue of material fact exists in this case. *Miller v. Meeks*, 762 So. 2d 302, 304 (Miss. 2000). The Gant Parties clearly did not meet that burden, particularly since the Order (submitted by the Gant Parties) granting summary judgment failed to address all of the Grand Legacy Parties' claims. Numerous questions of fact remain that should be determined by a jury and this case is fraught with "genuine issues of material fact" surrounding fraud, fraud in the inducement, and intentional misrepresentation by the Gant Parties and their breach of the fiduciary duties that they owed to the Grand Legacy Parties. The trial judge did not address these issues, and nevertheless, summary judgment is improper where **any** triable issue of fact exists. *Lane v. Grand Casinos of Mississippi, Inc.-Gulfport*, 708 So. 2d 1377, 1380 (Miss. 1998). This Court, therefore, should reverse the trial court's Order and require a trial of the case on the merits before a jury.

### **I. The Acknowledgement Agreement contained a false statement that memorialized an oral misrepresentation of the Gant Parties.**

The fiduciary nature of the partnership means that a partner should not engage in self-dealing. *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057 (2d Cir. 1977); *Reddington v. Thomas*, 262 S.E.2d 841 (N.C. App. 1980). The duty of loyalty requires that partners deal fairly with the partnership and act in the interest of the partnership, rather than in their own personal interests, when conducting transactions related to the partnership. PARTNERSHIP L. & PRAC. § 12:4 (2009). The duty of loyalty also requires that partners "not usurp business opportunities that might be taken by the partnership." *Id.* See also MISS. CODE ANN. § 79-13-404 (1972). Partners are also required to "*refrain from making false representations to their co-partners and may not*

*deceive their co-partners by concealing material facts.”* PARTNERSHIP L. & PRAC. § 12:4 (2009) (emphasis added).

The confidentiality provision that Gant and the closing attorneys used as a shield to justify non-disclosure of the purchase price from Orange Grove states the following, in pertinent part:

SELLER, PURCHASER AND TITLE COMPANY AGREE NOT TO CAUSE ANY PUBLIC ANNOUNCEMENTS TO BE MADE OF THE EXECUTION OF THIS CONTRACT, AND FURTHER AGREE NOT TO DISCLOSE TO ANY PARTY, THE PURCHASE PRICE PAYABLE HEREUNDER OR THE TERMS HEREOF ... NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN ... (ii) **PURCHASER MAY DISCLOSE THIS CONTRACT AND THE TERMS THEREOF TO ITS ATTORNEYS, . . . , LENDERS AND INVESTORS IN CONNECTION WITH THE ACQUISITION OF THE PROPERTY . . . .”**

[R. at 2149; R.E. at 52].

Sanders asked the attorneys, who were acting on behalf of all parties to the transaction, on several occasions about the original purchase price and the contract from Orange Grove. The attorneys repeatedly assured Sanders that the contracts were identical. *See* Affidavit of Sanders at ¶¶ 9-12 [R. at 2538-39]; Deposition of Sanders at 160-61, 276-77 [R. at 487, 519]; Deposition of Jordan at 176 [R. at 1369]. The attorneys and the Gant Parties refused to show Sanders the contract with Orange Grove and claimed that a confidentiality provision in the contract prevented them from doing so. *See* Affidavit of Sanders at ¶ 10 [R. at 2538]; Deposition of Sanders at 160-61, 168, 276-77 [R. at 487-89, 519]; Deposition of Jordan at 101-102 [R. at 1351]. Ultimately, the Acknowledgement Agreement even represented this ongoing falsehood in writing. [R. at 2211; R.E. at 137].

The confidentiality provision did not apply to the Grand Legacy Parties because it plainly stated that the terms of the contract *could* be disclosed to “lenders and investors in connection with the acquisition of the property.” [R. at 2149; R.E. at 52]. The Gant Parties and the mutual lawyers for both parties could have, and pursuant to their fiduciary duties *should* have, shown the

Orange Grove contract to Sanders, but they blatantly lied about the confidentiality provision to avoid revealing the true purchase price. This falsity is evident on the first page of the Acknowledgement Agreement, which was executed after Gant & Shivers, LLC and Grand Legacy, LLP had entered into a limited partnership agreement. [R. at 2211; R.E. at 137].

The Gant Parties argue that “Sanders is presumed to have read and understood each of the documents he signed....” *See* Brief of Appellees at 15. If the Court concludes this “Acknowledgement Agreement” is deemed read by Sanders, then the Court must necessarily conclude that Sanders read the *false statement* and *relied on the false statement* contained therein that the Orange Grove/Gant Contract was completely confidential. This *false statement* was verbally repeated by Gant and then put in front of Sanders by his so-called lawyers and business partners at the closing. *See* Affidavit of Sanders at ¶ 6 [R. at 2537]; Deposition of Sanders at 157-61 [R. at 486-87]. Had Sanders and Grand Legacy, LLP, the General Partner of GLMS, been allowed to review the Orange Grove/Gant Contract it would have done so and refused to enter the limited partnership in March 2005 and the April 2005 closing would have never occurred. Clearly, multiple fact issues exist as to the one document on which the trial court placed virtually all of its reliance. A jury should be allowed to evaluate whether the Acknowledgement Agreement memorialized a continuing oral false representation by one partner to another that caused Grand Legacy, LLP to allow the transaction to close.

“Omission or concealment of a material fact can constitute fraud.” *Morgan v. Green-Save, Inc.*, 2 So. 3d 648 (Miss. Ct. App. 2008). In order to create liability for nondisclosure, the silence “must relate to a material fact or matter known to the party and as to which it is his legal duty to communicate to the other contracting party.” *Id.* (citing *Mabus v. St. James Episcopal Church*, 884 So. 2d 747, 762-63 (Miss. 2004)). As limited partners in the transaction, the Gant Parties had an affirmative duty to disclose all material information to Grand Legacy, LLP which

certainly included the true purchase price of the Property, which it instead orally and in writing falsely stated it could not disclose. The reason for this false statement could be viewed by the finder of fact as evidence of a breach of fiduciary duties. Not only did the Gant Parties refuse to disclose the price, but they actively concealed it during closing while partners after March 23, 2005 and precluded the Grand Legacy Parties from examining the contract.

**II. If the statement in the Acknowledgement Agreement constituted some form of “disclosure,” it was ambiguous at best and the question was for the jury.**

If the statement in the Acknowledgment Agreement was meant to disclose the \$4.4 million difference in the purchase price as the Gant Parties claim, then the statement is vague and ambiguous at best, and blatantly and intentionally misleading at worst. Considered in light of the “Reimbursement” provision in the Assignment and other misleading language in the Acknowledgement Agreement, a jury might conclude that the Acknowledgment Agreement appears to solidify the idea that the “difference” in the prices was only to reimburse Gant for his earnest money and other expenses incurred in purchasing the Property from Orange Grove or was immaterial. [R. at 2191-92, 2212; R.E. at 135-36, 138]. If the Acknowledgement Agreement was actually meant to disclose the \$4.4 million difference in the prices then a jury should be allowed to consider why that same so called “disclosure” had a false statement indicating the Orange Grove/Gant Contract could not be disclosed and that the funds provided by Grand Legacy, LLP would be used to fund the first closing.

The Acknowledgment Agreement also states, “Grand Legacy, LLP . . . has agreed to contribute to Grand Legacy of Mississippi, LP, the *balance of the funds necessary* to Purchase the property from Gant & Shivers, LLC, with *said funds also being used to fund the initial purchase* of the property by Gant & Shivers, LLC, from the initial Seller.” [R. at 2212; R.E. at 138]. This statement is repeated in paragraph 2 of the Acknowledgement Agreement in which it

states, “said loan and funds shall be used to fund both closings...” [R. at 2212; R.E. at 138]. These statements indicated that the entire loan and funds provided by Grand Legacy, LLP would be used to make the initial purchase, and again this statement is consistent with what Sanders and Grand Legacy, LLP thought was happening. These statements are ambiguous because a jury could conclude that the Acknowledgement Agreement, and similar oral statements before the day of closing, were ambiguous and could have lead Sanders to believe the entire amount of the funds was required to close the initial purchase. Otherwise, only a portion of the cash would have needed to pass through to the initial closing. Again, this is protected by the other fundamental falsehood in the document, that the confidentiality provision precluded examination of the Orange Grove/Gant Contract. The Gant Parties believe a partial ambiguous disclosure meets their fiduciary duties, but it does not and a jury could have reached the conclusion that the attempted disclosure in the Acknowledgement Agreement was ambiguous and insufficient.

The Gant Parties gloss over testimony that Sanders knew of *a* difference in the purchase price to the extent that Gant would be able to recoup his expenses from his original purchase of the Property. The Gant Parties took advantage of Sanders’ understanding of the “difference” in the purchase price and refused to disclose the real difference in the prices under the false guise of confidentiality.<sup>2</sup> Certainly a jury could believe that based on representations made leading up to the formation of the limited partnership and prior to closing, Sanders may have believed the difference to be immaterial in amount. More pertinent, the trial court failed to identify that what the contract meant was an issue of fact.

The Gant Parties claim that the Grand Legacy Parties have “changed their story” and that at the trial court level the Grand Legacy Parties argued that they did not know of *any* difference in the purchase price. *See* Brief of Appellees at 28. However, as shown in multiple pleadings and

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<sup>2</sup> This was particularly misleading in light of the false HUD-1 Statements signed at closing.

deposition testimony, the Grand Legacy Parties have maintained throughout this case that Sanders knew of a *minimal* difference in the purchase prices. *See* Deposition of Sanders at 212 [R. at 500]; Affidavit of Sanders at ¶ 5 [R. at 2537]; Reply to Attorney Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment at 10; Memorandum Brief in Opposition to Defendants' Motion for Summary Judgment at 23 [R. at 392]. Sanders' understanding of the minimal difference in the purchase prices came from discussions with Gant and the attorneys and this understanding was memorialized with the "Reimbursement" provision in the Assignment to GLMS recognizing the cost recovery. *See* Affidavit of Sanders at ¶ 5 [R. at 2536]; Assignment to GLMS [R. at 2191-92; R.E. at 135-36]. Therefore, the Gant Parties contention that the Grand Legacy Parties have "changed their story" is without merit.

The Assignment to GLMS, the Acknowledgment Agreement, and the false HUD-1, among other documents, were all signed by the same parties, on the same day, and as part of the real estate closing transaction. [R. at 2211-13, 2191-92; R.E. at 135-39]. Mississippi law provides that "separate agreements executed contemporaneously by the same parties, for the same purposes, and as part of the same transaction, are to be construed together." *One South, Inc. v. Hollowell*, 963 So. 2d 1156, 1164 (Miss. 2007) (quoting *Doleac v. Real Estate Professionals, LLC*, 911 So. 2d 496, 506 (Miss. 2005)). The Mississippi Supreme Court has held "that cases which involve issues of **contractual ambiguity and interpretation as well as allegations of fraud or misrepresentation** generally are inappropriate for disposition at the summary-judgment stage." *Great Southern Nat. Bank*, 595 So. 2d at 1289 (emphasis added). *See also Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985) ("[W]e take a dim view of the practice of resolving contract ambiguities via summary judgment."). This case was clearly inappropriate for summary judgment as it involves contractual ambiguity, misrepresentation, and fraud. There

were multiple fact questions that a jury should have been allowed to consider and that should not have been disposed of via summary judgment.

**III. Parol evidence is allowed when a contract is ambiguous and where fraud and misrepresentation are involved.**

The November 12<sup>th</sup> Agreement and the Acknowledgment Agreement are *not* the only documents that were part of this transaction. Numerous agreements, contracts, and amendments were signed on behalf of the parties as part of the formation of the partnership and the closing on the Property well after the so called “merger clause” was part of the November 12<sup>th</sup> Agreement. These documents should all be construed *together* and subsequent oral statements and agreements after November 12, 2004 certainly were not merged “after the fact” into the November 12<sup>th</sup> Agreement and the Acknowledgment and Waiver did not contain a merger clause. Where a contract is ambiguous, parol evidence should be admitted. Further, as discussed in detail in Appellants’ Brief, where fraud and misrepresentation are involved, parol evidence is allowed. 3 MS PRAC. ENCYCLOPEDIA MS LAW § 21:40 (2009); *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1181-82 (Miss. 1990).

The November 12<sup>th</sup> Agreement itself includes a condition precedent that explains that the November 12<sup>th</sup> Agreement was not the only agreement between the parties and discussions regarding the partnership were to continue. The November 12<sup>th</sup> Agreement states that it is “contingent on purchaser and seller forming a limited partnership mutually acceptable to both seller and purchaser.” [R. at 2168; R.E. at 68]. This statement means the parties expected to form a partnership and presumably one in which each partner could trust and rely on the other. There is no agreement to waive fiduciary obligations contained in this condition precedent. Further, the fact that this statement is in the contract supports that partnership discussions took place prior to November 12, 2004, and that is the very evidence the Gant Parties seek to have the merger



clause conceal. It is nonsensical for a merger clause to say “all terms” of a partnership agreement are merged when it is clear from the contract that there was more to discuss and that partnership terms had already been discussed before the contract was signed.

Obviously the November 12<sup>th</sup> Agreement did not constitute the “entire agreement” of the parties because the contingency of forming a limited partnership directly conflicts with the merger clause and left open major issues concerning the manner in which the parties would proceed in the future, and if the Gant Parties position is followed even who the partners were was not settled. The trial court gave no explanation for why these facts were not relevant or how the law applied to these facts and should not have taken from the jury the question of what the parties intended when the right to purchase the Property was contributed to the limited partnership in April 2005 via the Assignment. [R. at 2191-92; R.E. at 135-36].

**IV. The *Davis v. Paepke* case does not support the trial court or the Gant Parties’ position on appeal.**

In the Gant Parties’ Brief, they argue that the Grand Legacy Parties are incorrect in distinguishing the case of *Davis v. Paepke* from the facts in the case at hand, but the Gant Parties fail to address the issues that the Grand Legacy Parties cited as distinguishable. *See* Brief of Appellees at 23-26. The contract at issue in *Davis* was one transaction-specific partnership agreement in which the parties outlined their partnership understanding concerning certain property. *Davis v. Paepke*, 3 So. 3d 131, 133-34 (Miss. Ct. App. 2009). The contract in the *Paepke* case covered the purchase and the partnership arrangements all in a single simple letter. There were no issues, as in this case, in which after the basic Purchase and Sale Agreement was entered with a condition precedent hinging on entry of a subsequent partnership agreement with terms to be discussed. Further, that case did not deal with issues such as misrepresentation

concerning the ability of one partner to disclose the price and the false statement, orally and later in writing, that such information was confidential.

In *Davis*, the issue of fraudulent inducement was tried to the jury, which is all the Grand Legacy Parties seek, which found against Davis because apparently the jury believed that the alleged fraudulent statements by Paepke were opinions rather than false statements of fact. *Paepke*, 3 So. 3d at 138-9. The Court simply stated it could not find any evidence to overturn that finding, however, it should be noted the statements were admitted and the case went to the jury. Finally, there were no assertions in the *Davis* case regarding breach of fiduciary obligations by partners or that one partner failed to disclose information to the other partner.

The Gant Parties also claim that Sanders should have ensured that the November 12<sup>th</sup> Agreement contained a provision regarding the purchase price. At the time the November 12<sup>th</sup> Agreement was drafted, the specifics of the partnership were to be worked out based on the oral understandings between the parties at that time. The November 12<sup>th</sup> Agreement anticipated this due to the condition precedent and these oral understandings could not be subsumed by the merger clause because they were intentionally set aside to be addressed later.

Sanders asked his attorneys about the purchase price and he was told by his attorneys that a confidentiality clause prevented them from disclosing the purchase price and that the contracts would be "mirror" contracts. *See* Affidavit of Sanders at ¶¶ 9-12 [R. at 2538-39]; Deposition of Sanders at 160-61, 168, 276-77 [R. at 487-89, 519]; Deposition of Jordan at 101-102, 176 [R. at 1351, 1369]. Sanders relied on the representations the Gant Parties and his attorneys and believed that they were being honest. In addition, Sanders was not required to outline the duties imposed on partners in every agreement between the parties. The law imposes a duty to disclose to your partner any possible gains you may make in a transaction, it does not impose on the non-gaining partner the obligation to document there will not be any profit or other benefit to the

198 So. 2d 227, 230 (Miss. 1967); *Rankin v. Brokman*, 502 So. 2d 644, 646 (Miss. 1987); *Davidson v. Rogers*, 431 So. 2d 483, 485 (Miss. 1983).

The fact that Gant and Shivers, via Gant & Shivers, LLC, were to personally profit over \$4.4 million and their company was to receive a 30 percent equity interest while depriving the partnership of the opportunity to purchase the Property for \$10 million were material facts that the Grand Legacy Parties should have known and which would have impacted the decision to complete the transaction of closing on the Property and entering into the limited partnership. Shivers also knew that the Orange Grove/Gant Contract was not confidential to lenders or investors and failed to make disclosure of the false statement in the Acknowledgement Agreement. Instead, Shivers simply signed it as an affirmative misrepresentation.

**B. Shivers can be held individually liable for knowingly signing a false HUD-1 Settlement Statement in order to conceal material information from the Grand Legacy Parties.**

Shivers is personally liable in this case because he knowingly misrepresented the facts in the HUD-1 to be true and concealed information. By signing the HUD-1 form, Shivers guaranteed that the form was an accurate account “of all receipts and disbursements” made in connection with the transaction. He expressly affirmed that Gant and Shivers *owed* money into the closing rather than the truth – that Gant and Shivers were *receiving* \$4.4 million. [R. at 2440-43; R.E. at 140-43]. Directly under Shivers’ signature, the HUD-1 has the following warning: “It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine or imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.” [R. at 2444; R.E. at 143].

Shivers signed the HUD-1 closing statement that he knew to be false. The Grand Legacy Parties agree that actions of LLC members are generally protected by the limited liability shield and further, that members of limited liability companies cannot be held liable for acts of the LLC

entity solely by reason of their membership in the LLC. MISS. CODE ANN. § 79-29-305 (1972). However, MISS. CODE ANN. § 79-29-305 is *not* an all encompassing shield against liability and individual liability for members is not precluded so long as that liability is not simply based on the member's affiliation with the LLC or other acts of the LLC's members. Shiver's liability here is because of what he did as an individual owner, not simply because he happened to be a member of the LLC.

Other courts have held that an individual member of a limited liability company *can* be held individually liable for his own acts or omissions, and the Grand Legacy Parties urge this Court to do the same.<sup>3</sup> The Delaware Limited Liability Act includes language identical to Mississippi's Act and Delaware courts have held that the phrase "solely by reason of being a member" in DEL. CODE ANN. tit. 6, § 18-303(a), implies that there are situations where LLC members and managers would *not* be shielded by this provision. *Pepsi-Cola Bot. Co. of Salisbury, Md. v. Handy*, 2000 WL 364199, \*3 (Del. Ch. 2000). In addition, when fraud or misrepresentation is involved, the corporate veil of the limited liability company can be pierced in order to hold individual members personally liable, even if the individual was acting on behalf of the corporation.<sup>4</sup> For the same reasons the Gant Parties as a group should not have been dismissed, there are questions of fact applicable to Shivers that were prematurely disposed of that are disputed issues of fact for the jury.

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<sup>3</sup> See *Gunnings v. Internet Cash Enterprise of Asheville, LLC*, 2007 WL 1931291 (W.D.N.C. 2007) (citing N.C. GEN. STAT. ANN. § 57C-3-30(a)); *Causey v. Dipak Lachmandes*, 2005 WL 2000625 (M.D. Tenn. 2005) (citing TENN. CODE ANN. § 48-217-101); *Clement Contracting Group, Inc. v. Coating Systems, L.L.C.*, 881 So. 2d 971 (Ala. 2003) (citing ALA. CODE § 10-12-20 (1975)).

<sup>4</sup> See e.g., *Westmeyer v. Flynn*, 889 N.E.2d 671 (Ill. App. Ct. 2008); *Young v. Hamilton*, 92 Fed. App'x 389 (9th Cir. 2003); *Business Ins. Co., Ltd. v. World Trade Center Properties, LLC*, 375 F. Supp. 2d 238 (S.D.N.Y. 2005) (applying Delaware law); *Pepsi-Cola Bottling Co. of Salisbury, Maryland. v. Handy*, 2000 WL 364199 (Del. Ch. 2000); *Vertrue Inc. v. Meshkin*, 429 F. Supp. 2d 479 (D. Conn. 2006) (applying Delaware law); *Taurus IP, LLC v. DaimlerChrysler Corp.*, 534 F. Supp. 2d 849 (W.D. Wis. 2008) (applying Texas law); *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573 (Tex. App. 2007).

Shivers should be personally liable in this case not only because he personally concealed material information from his partners, which he had a duty to disclose, but also because of his status of managing member acting personally with knowledge of the misrepresentations and fraud. As such, there is at least a question of fact as to Shivers' personal liability for his actions and omissions in furtherance of the fraud and the trial court erred in granting his motion for summary judgment. Stephen L. Shivers, Sr.'s Separate Motion for Summary Judgment should have been denied because evidence of fraud and intentional misrepresentation exists, creating a genuine issue of material fact that entitles the Grand Legacy Parties to a jury trial.

### **CONCLUSION**

At the end of it all, fraud, fraud in the inducement, and intentional misrepresentation are at issue in this case and dismissal of a case through summary judgment is always inappropriate where fraud is at issue. Further, as set forth above, numerous other questions of fact remain in this matter as to breach of fiduciary duty and breach of the duty of good faith and fair dealing. The Gant Parties have not met their burden of proving that no issues of fact remain to be determined. The trial court erred in granting summary judgment to the Gant Parties without considering all of the Grand Legacy Parties' claims, including contractual ambiguity, fraud, fraud in the inducement, negligent and intentional misrepresentation, breach of fiduciary duty, and breach of the duty of good faith and fair dealing, in addition to the numerous questions of fact that are at issue in this case and which should be heard by a jury.

For the reasons set forth above, the Appellants, Grand Legacy, LLP and Grand Legacy of Mississippi, L.P., respectfully request that this Court reverse the Order of the Circuit Court of Harrison County granting summary judgment and remand this matter for a jury trial on the questions of fact presented.

## CERTIFICATE OF SERVICE

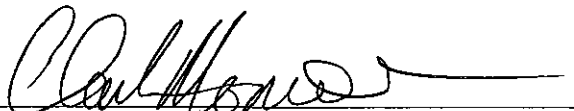
I, the undersigned, do hereby certify that I have this day caused to be mailed, via U.S. Postal Service, a true and correct copy of the above and foregoing to the following interested parties, to-wit:

Tim C. Holleman, Esq.  
*Boyce Holleman & Associates*  
Post Office Box 1030  
Gulfport, MS 39502

Donald C. Doman, Jr., Esq.  
John M. Herke, Esq.  
*Spyridon, Palermo & Dornan, LLC*  
Post Office Box 154  
Biloxi, MS 39533

Judge Lawrence P. Bourgeois  
*Circuit Court of Harrison County*  
Post Office Box 1461  
Gulfport, Mississippi 39502

THIS the 17<sup>th</sup> day of November, 2010.

  
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David C. Dunbar  
G. Clark Monroe