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**

BRIEF OF THE APPELLANT

Appealed from the Circuit Court of Harrison County, Mississippi

ORAL ARGUMENT REQUESTED

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

IN THE SUPREME COURT OF MISSISSIPPI

CASE No. 2010-TS-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**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an 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 L. Shivers, Sr., *Appellee*
7. Gant & Shivers, LLC, *Appellee*
8. Schwartz, Orgler and Jordan, PLLC, *Defendant in the underlying case*
9. Robert Schwartz, *Defendant in the underlying case*
10. Jay Jordan, *Defendant in the underlying case*
11. David C. Dunbar, *Attorney for Appellant*

12. G. Clark Monroe II, *Attorney for Appellant*

13. Tim C. Holleman, Esq., *Attorney for Appellee*

14. Donald C. Dornan, Esq., *Attorney for Appellee*

15. Judge Lawrence P. Bourgeois, *Circuit Court of Harrison County*

Respectfully Submitted,

David C. Dunbar by permission of G.C.M.

David C. Dunbar
G. Clark Monroe
Counsel for Appellants

OF COUNSEL:
David C. Dunbar (MSB#6227)
G. Clark Monroe II (MSB#9810)
DUNBARMONROE, P.A.
270 Trace Colony Park, Suite A
Ridgeland, MS 39157
Office: (601) 898-2073
Facsimile: (601) 898-2074

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE COURT CASES:

CIRCUIT COURT OF APPEALS CASES:

STATUTES:

OTHER:

STATEMENT OF THE ISSUES

The following issues are before this Court:

I. Whether the trial court erred by granting summary judgment for the Appellees and finding that no genuine issues of material fact exist as to the fiduciary duties that the Appellees owed to the Appellants as partners, which are not excused by obscure statements in the November 12th Agreement and the Acknowledgement Agreement.

II. Whether the trial court erred by granting summary judgment for the Appellees because a question of fraud is involved and the Mississippi Supreme Court has made it clear that questions of fraud are inappropriate for disposition at the summary judgment stage.

III. Whether the trial court erred in granting Shivers' Separate Motion for Summary Judgment because Shivers can be held individually liable in this case.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Court Below

Grand Legacy, LLP, individually and as Managing General Partner of Grand Legacy of Mississippi, L.P., and Grand Legacy of Mississippi, L.P. filed their Complaint against Charles M. Gant, Stephen L. Shivers, Sr., Gant & Shivers, LLC, Robert T. Schwartz, Jay K. Jordan, Schwartz, Orgler, & Jordan, PLLC, and SOJ Properties, LLC on or about April 11, 2008, for fraud, fraud in the inducement, breach of fiduciary duties, negligent misrepresentation, and gross negligence, seeking disgorgement and punitive damages. An Amended Complaint was filed on or about September 19, 2008, which added certain pertinent facts that had been discovered, as well as a count for breach of the implied covenant of good faith and fair dealing and another count that is no longer relevant. [R. at 37].

Robert T. Schwartz, Jay K. Jordan, Schwartz, Orgler, & Jordan, PLLC, and SOJ Properties, LLC (the "Attorney Defendants") reached a settlement with Grand Legacy, LLP and Grand Legacy of Mississippi, L.P. and the Attorney Defendants were dismissed pursuant to separate agreed orders of final judgment and dismissal entered on or about December 30, 2009.

Charles M. Gant, Stephen L. Shivers, Sr., and Gant & Shivers, LLC filed a Motion for Summary Judgment on or about November 16, 2009. [R. at 168]. Stephen L. Shivers, Sr. also filed a Separate Motion for Summary Judgment on the same day. [R. at 264]. Grand Legacy, LLP and Grand Legacy of Mississippi, L.P. responded and a hearing occurred on January 20, 2010. [R. at 3069]. On February 19, 2010, Judge Lawrence P. Bourgeois entered an Order granting the Motion for Summary Judgment of Charles M. Gant, Stephen L. Shivers, Sr., and Gant & Shivers, LLC and the Separate Motion for Summary Judgment of Stephen L. Shivers, Sr. [R. at 3069; R.E. at 35]. This Order is the subjects of this appeal.

B. Statement of the Facts

Stephen L. Shivers, Sr. ("Shivers") and Charles M. Gant ("Gant") have known each other for several years and have formed several business entities together. [R. at 2010-11]. Shivers and Gant are 50/50 owners in all of their entities. [R. at 1053]. Shivers and Gant formed Gant & Shivers, LLC in January of 2003 for the purpose of building homes and buying property. [R. at 2011, 2847].

Around October of 2004, real estate agent Sherry Owen contacted Gant to see if he and Shivers were interested in purchasing the certain property known as the Bernard Bayou Property (the "Property") in Gulfport, Mississippi, which consisted of approximately 105 acres being offered at approximately Ten Million Dollars ($10,000,000.00). [R. at 1065-67]. Shortly after learning about the Bernard Bayou Property in the Fall of 2004, Gant approached J. Scott Sanders ("Sanders"), the managing member of Grand Legacy, LLP ("Grand Legacy"), about purchasing the Property together with the intent to enter into a business venture for the purchase, sale, and development of the Property. [R. at 480, 1094, 2536]. Gant had been introduced to Sanders by their mutual friend and attorney, Jay Jordan ("Jordan") in the summer of 2004. [R. at 1068]. Jordan had facilitated at least one other business deal between Gant and Sanders prior to the Fall of 2004. [R. at 1081-82].

Gant took Sanders and Dr. Duane Pankratz ("Pankratz"), Sanders' business partner, out on his boat to see the Bernard Bayou Property. [R. at 484, 2578]. At that time, Gant verbally represented to Sanders that Gant had the property "locked up" with the original seller, Orange Grove Utilities, Inc. ("Orange Grove"), and that his purchase price was around Fifteen Million Dollars ($15,000,000.00). [R. at 480, 1094-95, 2578, 2590]. Gant suggested to Sanders that if Sanders, through his company, Grand Legacy, would provide the money necessary to obtain financing, that Gant would purchase the property and in turn sell it for the same price to a

successor entity, the to-be-formed Grand Legacy of Mississippi, L.P. ("GLMS"), for the purpose of developing the property together. [R. at 2537]. The entire conversation regarding the purchase began as a proposed partnership among the parties, not an arms-length sale. Ultimately, the parties agreed that Gant and Grand Legacy would be partners in GLMS.

Gant assured Sanders that although he could not actually show Sanders the contract, due to confidentiality provision,[1] Gant would be buying the property for approximately $15 million and would *not* make a profit on his sale of the property to GLMS, but added that he desired, in return for his work, an equity interest in the entity that would own the property. [R. at 480, 482, 2537]. Sanders agreed that Gant would get a thirty percent (30%) interest in the entity that would be formed to purchase and develop the Bernard Bayou Property. [R. at 480, 482, 1071-72, 1102, 2537].

Subsequently, Sanders told his attorney, Jordan of Schwartz, Orgler & Jordan, PLLC ("SOJ"), that Sanders was only interested in the Bernard Bayou Property if Sanders' company would be purchasing the property for the same net price as Gant was purchasing it. [R. at 487, 519, 2538]. Jordan assured Sanders that the contracts would be identical. [R. at 487, 519, 2538]. During that time, Jordan requested and Grand Legacy agreed that SOJ would receive a ten percent (10%) interest in the to-be-formed entity as a fee for bringing the parties together. [R. at

---

[1] Of note, the confidentiality provision which Gant, and later the attorneys, used as a shield to refuse to disclose the purchase price from Orange Grove provided 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, CONSULTANTS, AGENTS, REPRESENTATIVES, ENGINEERS, INSPECTORS, AND PROSPECTIVE AND ACTUAL TENANTS, **LENDERS AND INVESTORS IN CONNECTION WITH THE ACQUISITION OF THE PROPERTY**..."

[R. at 2148; R.E. at 51 (emphasis added)].

486, 1373]. SOJ's interest would later be reduced to seven percent (7%). [R. at 1378, 2207-09]. Ultimately, following closing, SOJ abandoned its right to the seven percent (7%) but participated in the closing as both the closing attorneys and partners in the venture with its two clients.

Later, on November 10, 2004, Gant entered into a contract (the "November 10th Agreement") with Orange Grove, to purchase the Bernard Bayou Property.[2] [R. at 2138-50; R.E. at 41-53]. The price per acre in the November 10th Agreement was $100,000.00. [R. at 2138; R.E. at 41]. Jordan, with Robert Schwartz ("Schwartz") also of SOJ, drafted, negotiated, and/or prepared the November 10th Agreement as attorneys for Gant. [R. at 625, 1335, 2499].

On November 12, 2004, Gant entered into a separate contract (the "November 12th Agreement") for the sale of the Bernard Bayou Property to an unnamed partnership entity to be formed at a later date, which Grand Legacy, Gant, or his successor-in-interest, and SOJ would own together. [R. at 2168-80; R.E. at 68-80]. The purchase price per acre in the November 12th Agreement was $144,231.00. [R. at 2168; R.E. at 68]. This contract was one of the first instances in which the intent to form a limited partnership was documented, clearly distinguishing it from one at arms-length. [R. at 2168; R.E. at 68].

Jordan, on behalf of SOJ, drafted the November 12th Agreement as the attorney for both Gant and Grand Legacy, and presented the contract to Sanders. [R. at 1348]. When asked about the terms of the November 12th Agreement, Jordan told Sanders that it was "mirror contract" to the November 10th Agreement. [R. at 487, 519, 1369-70, 2538]. Jordan made this representation at a time when he was aware of the material provisions of the November 10th Agreement, including its purchase price and the terms of the confidentiality agreement, and when he was in an attorney-client relationship with both Gant and Grand Legacy. [R. at 1349].

[2] The reason Shivers was not a party to the November 10th Agreement was because he was out of the country at the time. [R. at 2016]. Although, had he been in the country, he would have authorized the contract and proceed as Gant & Shivers, LLC. [R. at 2016].

The November 12th Agreement was later amended to reflect that Gant & Shivers, LLC, rather than Gant, individually, was the seller of the property. [R. at 2185-86; R.E. at 83-84]. In fact, both Agreements were amended a number of times. [R. at 2152-66, 2181-86; R.E. at 55-67; 81-84]. On each occasion, Jordan and/or Schwartz represented Gant, Shivers, Gant & Shivers, LLC, Grand Legacy, and later GLMS. [R. at 2499-2500].

Relying on Gant's representations, as well as the legal and factual representations of Schwartz and Jordan, Grand Legacy agreed to form and fund the limited partnership GLMS, in which all parties, and their joint attorneys, would be partners. Grand Legacy, as the general partner of GLMS, agreed to close the purchase of the Bernard Bayou Property for GLMS. In order to close, Grand Legacy funded GLMS by investing $5,000,000.00 cash, believing it necessary for GLMS to purchase the Property, and borrow and deliver to the closing $9,653,617.26 to purchase the Property. [R. at 2545]. Prior to the closing and at the time of the investment by Grand Legacy, Gant & Shivers, LLC were limited partners in GLMS along with the closing attorneys. [R. at 480, 1084, 1102-03, 1338-39, 2537].

On April 15, 2005, Jordan conducted two closings at the SOJ office. The first was for Orange Grove selling the Bernard Bayou Property to Gant & Shivers, LLC. [R. at 2440-41; R.E. at 140-41]. The second closing was for Gant & Shivers, LLC selling the Bernard Bayou Property to GLMS. [R. at 2443-44; R.E. at 142-43]. During the closings and unbeknownst to the Appellants, Gant and Shivers, each acting individually and on behalf of each other and for Gant & Shivers, LLC, closed the purchase of the property by Gant & Shivers, LLC from Orange Grove for approximately $10,110,00.00. [R. at 2440-41; R.E. at 140-41]. Immediately thereafter, Gant and Shivers, each acting individually and on behalf of each other and for Gant & Shivers, LLC, closed the sale of the same property from Gant & Shivers, LLC to GLMS for $14,581,754.10. [R. at 2443-44; R.E. at 142-43]. Gant and Shivers thereby secured an immediate

profit of $4,471,736.06, on top of the thirty percent 30% equity interest in GLMS by which they intended to profit in the future. [R. at 2027, 2030, 2358].

Appellants were never advised by *any* of the Appellees or their joint counsel that Gant & Shivers, LLC had profited by over $4.4 million on April 15, 2005, in addition to receiving the thirty percent (30%) interest in the partnership or that Gant and Shivers, individually, each took distributions from Gant & Shivers, LLC of $2.1 million following the closing. [R. at 2545-46; *see also* R. at 2358, 2360, 2362; R.E. at 149-51]. The deposition testimony of Jordan, Schwartz, Gant, and Shivers bears no revelation that Sanders was advised of the profit and Sanders testified that he did not know about the profit and believed that none was made. [R. at 2546]. It was not until the Fall of 2007 that Sanders learned from real estate agent Sherry Owen that the Appellees had profited by over $4.4 million on the sale of the Property. [R. at 503].

STANDARD OF REVIEW

The standard of review for a grant of summary judgment is *de novo*. *Lane v. Grand Casinos of Mississippi, Inc.-Gulfport,* 708 So. 2d 1377, 1379 (Miss. 1998); *Rolison v. City of Meridian,* 691 So. 2d 440, 443 (Miss. 1997); *Short v. Columbus Rubber and Gasket Co., Inc.,* 535 So. 2d 61, 63 (Miss. 1988). On appeal, the Court should apply the same standard that the trial court applied in determining whether summary judgment was appropriate. *Cities of Oxford, Carthage, Louisville, Starkville and Tupelo v. Northeast Mississippi Elec. Power Ass'n,* 704 So. 2d 59, 64 (Miss. 1997); *Taylor Machine Works, Inc. v. Great American Surplus Lines Ins. Co.,* 635 So. 2d 1357, 1361 (Miss. 1994). "If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed." *Lane,* 708 So. 2d at 1380.

This Court is no doubt familiar with Rule 56(c) of the Mississippi Rules of Civil Procedure and understands that it allows summary judgment only where there are no genuine issues of material fact such that the moving party is entitled to judgment as a matter of law. "[T]he evidence must be viewed in the light most favorable to the party against whom the motion has been made." *Green v. Allendale Planting Co.,* 954 So. 2d 1032, 1037 (Miss. 2007) (quoting *Price v. Purdue Pharma Co.,* 920 So. 2d 479, 483 (Miss. 2006)). "The moving party has the burden of demonstrating that no genuine issue of material fact(s) exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact." *Id.* (quoting *Howard v. City of Biloxi,* 943 So. 2d 751, 754 (Miss. Ct. App. 2006)).

SUMMARY OF THE ARGUMENT

This case is not about the reformation of a real estate contract, nor is it about the single purchase and re-sale of 104 acres of land fronting on the Bernard Bayou in Harrison County, Mississippi. Appellees would like this Court to conclude this is nothing but an arms-length transaction in which property was sold via a single contract. The more focus they can place on the real estate contract, the less attention will be placed on what the trial court ignored—partners fraudulently and negligently breaching legal obligations of disclosure, fair dealing, and loyalty to one another and sufficient facts to present a *prima facie* case that a jury should have been allowed to consider.

The trial court erred in finding that no genuine issues of material fact exist in this case and by granting summary judgment where fraud is at issue. The Appellees breached numerous fiduciary duties that they owed to the Appellants in the formation of a partnership and questions of fact exist on these issues that the trial court did not consider. There was evidence the Appellees made fraudulent statements and blatant misrepresentations to the Appellants on which the Appellants relied in agreeing to form a partnership and provide all of the funding for the purchase of the Bernard Bayou Property. Questions of fraud are inappropriate for summary judgment, yet the trial court granted summary judgment in favor of the Appellees without even mentioning the fraud at issue in the Order.

Instead, the trial court focused only on the "merger clause" located in the November 12th Agreement and the April 15, 2005 Acknowledgement Agreement, which contained a statement regarding a difference in the purchase price. The Appellees convinced the trial court to erroneously narrow the issues and allow them to escape liability based on two ambiguous provisions in two documents, among a multitude of documents involved in this case. The trial court erred as a matter of law by failing to consider all of the relevant documents to this

transaction, including the agreements dated November 10, 2004 and November 12, 2004, the April 15, 2005 Acknowledgement Agreement, the GLMS Limited Partnership Agreement and its amendments, and the HUD-1 closing statements, among others.

Further, the breach of fiduciary duties, fraud, misrepresentation, and other claims are not grounded solely in November 12th Agreement and the April 15, 2005 Acknowledgement Agreement. Rather, these issues are grounded in the general partnership that existed prior to, during, and after the execution of the November 12th Agreement, and the funding and formation of the limited partnership in March of 2005, prior to closing the sale. The partnership was formed in October of 2004 when Gant took Sanders and Pankratz out on his boat to see the Bernard Bayou Property and they discussed the formation of a partnership, the funding of the partnership and its purchase of the Property, and the development of the Property. The partnership duties applied from the day of the agreement on the boat forward. The November 12th Agreement confirmed the existence of the partnership and the limited partnership was established on or about March 28, 2005 when the Limited Partnership Agreement was signed. There are abundant factual disputes centered around the breach of fiduciary duties owed by the Appellees to their partners, and the commission of fraud, misrepresentation, and breach of fiduciary duties by all of the Appellees in the consummating the ultimate funding of the limited partnership by Grand Legacy.

The "merger clause" and Acknowledgement Agreement do not avoid evidence of fraud, fraudulent inducement, misrepresentations, and omissions by the Appellees in relation to their business relationship with Grand Legacy, the formation of GLMS, and the method by which GLMS would be funded. It certainly does not merge statements, misrepresentations, or obligations among the partners occurring after the November 12 Agreement was signed. Grand Legacy had a right to expect, without putting it in writing, that its partners would not lie and

cheat in order to obtain $4.4 million (in addition to a thirty percent (30%) interest in the partnership) via a fraudulent scheme of self-dealing and use those funds to line their personal bank accounts.

The trial court also erred in granting Shivers' Separate Motion for Summary Judgment because an individual member of a limited liability company *can* be held individually liable for his own acts or conduct. Shivers acted with knowledge of the fraudulent scheme and personally concealed material information from his partners, which he had an affirmative duty to disclose, in furtherance of the fraud and to personally obtain $2.1 million dollars. Further, because fraud is involved, the court can pierce the corporate veil and hold Shivers personally liable even if he was acting only in his capacity as a member of the LLC. Again, the trial court erred in finding that no genuine issues of material fact exist as to Shivers and by granting summary judgment where fraud is at issue.

ARGUMENT

I. The trial court erred by granting summary judgment for the Appellees and finding that no genuine issues of material fact exist as to the fiduciary duties that the Appellees owed to the Appellants as partners, which are not excused by obscure statements in the November 12th Agreement and the Acknowledgement Agreement.

Summary judgment should be denied "if *any* triable issues of fact exist." *Lane,* 708 So. 2d at 1380 (emphasis added). This case is fraught with "genuine issues of material fact" surrounding the fraud by the Appellees, the fiduciary duties that the Appellees owed to the Appellants, and the Appellees' breach of those duties. The trial court erred by granting summary judgment for the Appellees and denying the Appellants a jury trial as to these questions of fact.

A. Genuine issues of material fact exist as to the Appellees' breach of the fiduciary duties that they owed to the Appellants as partners.

The cornerstone of this case has always been that the parties agreed to form a limited partnership to purchase and develop together the Bernard Bayou Property. [R. at 480, 1084, 1102-03, 1338-39, 2537]. That partnership was formed on Gant's boat in October of 2004 when Gant, Sanders, and Pankratz inspected the Property and discussed the formation of a partnership, the funding of the purchase of the Property, and the development of the Property. The very first written agreement entered into by the parties clearly indicated that Gant was both a seller *and* a partner in the to-be-formed limited partnership. The November 12th Agreement for Purchase and Sale provided:

> THIS AGREEMENT is made and entered into as of this 12 day of November, 2004 ("Purchase Agreement") by and between a Limited Partnership to be formed between Grand Legacy Limited Partnership [sic] and Charles M. Gant, (hereinafter referred to as "Purchaser"), and Charles M. Gant (hereinafter collectively [sic] referred to as "Seller").
>
> * * *
>
> **BOTH PURCHASER AND SELLER ACKNOWLEDGE THAT THIS CONTRACT IS CONTINGENT ON PURCHASER AND SELLER FORMING A LIMITED PARTNERSHIP MUTUALLY ACCEPTABLE TO BOTH SELLER AND PURCHASER.**

[R. at 2168; R.E. at 68 (emphasis in original)].

The above agreement confirms the discussions between Gant and Sanders there was a partnership in its formative stages, carrying with it all the attendant duties that parties agreeing to go into business together owe to one another. Gant admitted that he understood that he was entering into a partnership with the Appellants and that the parties had begun to form that partnership. [R. at 1102-03]. The Appellees entered willingly into a partnership to which a number of affirmative legal duties attached and then proceeded to violate every single one in their scheme to defraud the Appellants and get rich quickly.

A partnership can arise by operation of law and a formal written agreement is not required. The Mississippi Uniform Partnership Act provides that "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." MISS. CODE ANN. § 79-13-202(a) (1972). Common law is, of course, used to supplement statutory law and according to common law, the three main factors of partnership are (1) intent, (2) control, and (3) profit sharing. *Smith v. Redd,* 593 So. 2d 989, 993-994 (Miss. 1991). "The Mississippi Supreme Court recognized that absent an express agreement, the chief criterion in determining the existence of a partnership is the parties' intent....This intent may be inferred from the parties' actions and conduct." *Hatfield v. Green,* 840 So. 2d 759, 762 (Miss. Ct. App. 2003) (citing *Allied Steel Corp. v. Cooper,* 607 So. 2d 113, 117 (Miss. 1992) (citing *Hults v. Tillman,* 480 So. 2d 1134, 1143 (Miss. 1985)).

Gant and Sanders verbally agreed, prior to the execution of the November 12th Agreement, to form a partnership to develop the Bernard Bayou Property. [R. at 1102-03]. That intent was then memorialized in the November 12th Agreement. [R. at 2168; R.E. at 68]. The parties' conduct was evidence of a partnership, but the facts go even further than conduct alone, because express intention is present in the November 12th Agreement as well. If a partnership

can be found to exist even without express intention, then in this case with affirmative conduct *and* express intention, a partnership must be found to exist as a matter of law.

Since the conduct in question, including the agreement to form the partnership and the statements that induced Grand Legacy, via Sanders, to agree to the funding and formation of the partnership, took place prior to the formation of the limited partnership, their actions resulted in a general partnership by operation of law during the formation period in October 2004. At that point, Grand Legacy and the Appellees became partners with all attendant duties. "[W]hen all of the conditions exist which by law create a legal relationship, the effects flowing legally from such relation follow whether the parties foresaw and intended them or not." *Stephens v. Stephens,* 50 S.E.2d 577, 579 (S.C. 1948). The general partnership continued until the filing of the Certificate of Limited Partnership[3] and execution of the Limited Partnership Agreement in March of 2005. [R. at 2128-29, 2085-2120; R.E. at 88-125].

Contrary to what was asserted by Shivers in his Motion for Summary Judgment, he was likewise aware of the intent of the parties to form the partnership and participated in its formation. [R. at 2018]. Shivers was aware of Gant's statements as well as Sanders' expectations on behalf of Grand Legacy and failed to insure that Gant, his partner, disclosed material facts.

The duty of loyalty requires that partners act in the interest of the partnership rather than in their own personal interests when conducting transactions related to the partnership business. PARTNERSHIP L. & PRAC. § 12:4 (2009). "The duty of loyalty also requires that partners not represent a party adverse to the partnership, not secretly compete against the partnership, not use confidential partnership information for their own benefit, and not usurp business opportunities that might be taken by the partnership if they are offered to the partnership." *Id. See also* MISS. CODE ANN. § 79-13-404(a), (b) (1972).

[3] MISS. CODE ANN. § 79-14-201 (1972) (stating limited partnership formed only by filing of Certificate of Limited Partnership with Secretary of State).

A partner's duty of care to the partnership and the other partners includes "refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." MISS. CODE ANN. § 79-13-404(c) (1972). Each partner also has an "obligation of good faith and fair dealing" in the fulfilling of his duties and functions in the partnership. MISS. CODE ANN. § 79-13-404(d) (1972). "The highest duty which partners owe to each other is perfect good faith." *Enochs v. Therrell*, 61 Miss. 178 (Miss. 1883).

In *Corley v. Ott*, a South Carolina case that is very similar to the case at hand, the South Carolina Supreme Court held that a partner breached his fiduciary duty, even though a formal partnership agreement did not exist yet, when he failed to disclose a prior purchase that was "intimately connected with formation of partnership and its purchase of land." 485 S.E.2d 97, 99 (S.C. 1997). Specifically, the South Carolina Supreme Court affirmed the trial court's decision that,

> Ott breached his fiduciary duty to Corley by *failing to disclose* to Corley that he, Ott, had individually purchased Lakewood Estates, including the pond tract, for $27,000 less than the partnership paid on the same day for the same property minus the pond tract. The trial judge found Corley, who provided the capital for the purchase, was damaged in the amount of $27,000, the difference in the purchase price, plus $41,000, the value of the pond tract, for a total of $68,000.

Id. (emphasis added). Further, under the SOUTH CAROLINA CODE (and, likewise, the previous version of the MISSISSIPPI CODE, which was in effect at all times relevant to this case[4]), "a partner must account to the partnership for any benefit from any transaction connected with the formation of the partnership." *Id.* (citing S.C. CODE ANN. § 33-41-540 (1990)).[5] Ott's prior undisclosed purchase of the property was intimately connected with the formation of the partnership and purchase of the property and should have been disclosed to Corley. *Id.* The importance here is an affirmative legal duty to disclose that has nothing to do with whether a

[4] MISS. CODE ANN. §79-12-21 (1972) (repealed effective Jan. 1, 2007).
[5] Based on the Uniform Partnership Act § 21 (1914).

representation was or was not made. The South Carolina Supreme Court also dismissed Ott's arguments that the partnership was not formed until *after* the purchase and sale was signed in that case. The Court looked at the conduct of the parties prior to the execution of contract and concluded that "[t]his evidence indicates the partnership was formed, at the latest, concurrently with that transaction on March 30" (the date the purchase agreement was signed). *Id.*

The Mississippi Uniform Partnership Act and the cases discussed above clearly indicate that partnerships are not formed only by the signing of an agreement, but often partnerships arise by operation of law prior to that time, during the formation stages. In this case, a general partnership was formed between Gant, Shivers, Gant & Shivers, LLC, and Grand Legacy on Gant's boat in October of 2004, and all attendant partnership duties attached at that time.

i. Limited partners owe the same fiduciary duties as general partners.

Appellees will likely argue that their duties were somehow "limited" because they intended to form a limited partnership. The general partnership duties certainly applied while the parties were acting as a general partnership by operation of law until the Limited Partnership Agreement was signed in March of 2005. However, even after that date, the Appellees duties were not "limited" simply by their status as a limited partnership and their intent to form a limited partnership did not limit the duties owed to their partners before that date.

The Mississippi Limited Partnership Act ("MLPA") does not address the fiduciary duties of general or limited partners in a limited partnership. The 1976 Uniform Limited Partnership Act (on which the MLPA is based) was created to be dependent on the Uniform Partnership Act. 59A AM. JUR. 2D *Partnership* § 774 (2010).[6] Where the MLPA is silent, the provisions of the

[6] The 2001 Revised Uniform Limited Partnership Act "diverges from the 1976 Revision and its amendments in presenting a standalone act, rather than one dependent on the various Uniform Partnership Acts." 59A AM. JUR. 2D *Partnership* § 774 (2010). The 2001 version specifically addresses the duties of general and limited partners. This version has not been adopted in Mississippi, which supports the finding

Mississippi Uniform Partnership Act apply. "In any case not provided for in this chapter, the provisions of the Mississippi Uniform Partnership Act govern." MISS. CODE ANN. § 79-14-1107 (1972).

Therefore, because the MLPA does not address fiduciary duties, the fiduciary duties provided in the Uniform Partnership Act apply to all partners in a limited partnership. Section 79-13-404(a) provides that a partner owes the fiduciary duties of loyalty and care to the partnership. MISS. CODE ANN. § 79-13-404(a)-(d) (1972). Although there are not any Mississippi cases dealing with the application of § 79-14-1107, there are cases on the equivalent statute from other jurisdictions.

In re Cole, is a bankruptcy case that dealt with partnership property. 205 B.R. 382, 385-86 (Bankr. E.D. Tex. 1997). The bankruptcy court quoted TEX. REV. CIV. STAT. ANN. art. 6132a-1, § 13.03, which says that the "Texas Uniform Partnership Act applies to limited partnerships in any case not provided for by the Texas Revised Limited Partnership Act" and held that a partner is prohibited from claiming a homestead interest in property which belongs to the partnership. *Id.*

McBeth v. Carpenter, is a 2009 case from the Fifth Circuit that originated in Texas. 565 F.3d 171 (5th Cir. 2009). Applying Texas partnership law (which is similar to Mississippi partnership law), the Fifth Circuit held that "two entities that were limited partners in partnership created to purchase property owed fiduciary duties to individuals who were also limited partners, particularly where general partner exerted control over partnership in his capacity as president of both entities." *Id.* at 177. Further, the court found that "Texas law recognizes such obligations between limited partners, applying the same partnership principles that govern the relationship between a general partner and limited partners" and that the Texas Supreme Court has stated that

---

that the Mississippi Legislature intended the fiduciary duties of a partnership to apply to a limited partnership by way of § 79-14-1107.

"fiduciary duties arise as a matter of law in certain formal relationships, including attorney-client, *partnership,* and trustee relationships." *Id.* (quoting *Ins. Co. of No. Am. v. Morris,* 981 S.W.2d 667, 674 (Tex. 1998) (emphasis added)).

Damages have also been awarded to a limited partnership for a limited partner's breach of fiduciary duties. *See Dunnagan v. Watson,* 204 S.W.3d 30, 46-47 (Tex. App. 2006) (affirming judgment awarding damages to limited partnership based on limited partner's breach of fiduciary duty). The applicable Texas statute on point is Art. 6132b-4.04, which governs the general standards of partner's conduct and sets forth virtually identical duties as those in the Mississippi statute. TEX. REV. CIV. STAT. ANN. art. 6132b-4.04 (Vernon 2002).

In *Zinda v. McCann St., Ltd.,* the court determined that the limited partner had not breached the fiduciary duties he owed to another limited partner, but held that each limited partner does owe "fiduciary duties to the other limited partners in the limited partnership." 178 S.W.3d 883, 890 (Tex. App. 2005). In addition to the duties of loyalty and care, limited partners "have a duty to one another *to make full disclosure* of all matters affecting the partnership and to account for all partnership profits and property." *Id.* (emphasis added) (citing TEX. REV. CIV. STAT. ANN. art. 6132b-4.04. Further, partners owe one another a fiduciary duty, including a strict duty of good faith and candor. *Id.* at 891.

In a North Dakota case, where the limited partners participated in the business of the partnership they were "subject to the fiduciary duties of loyalty and care and the obligation of good faith and fair dealing applicable to partners in a general partnership." *Red River Wings, Inc. v. Hoot, Inc.*, 751 N.W.2d 206 (N.D. 2008). The applicable North Dakota statute is identical the Mississippi statute. *See* N.D. CENT. CODE § 45-16-04(1) – (4).

"It is axiomatic in Mississippi that the 'law in force at the time that a contract is made forms a part of it and is written into the contract as much as if expressly incorporated therein."

Ivison v. Ivison, 762 So. 2d 329, 335 (Miss. 2000) (citing *Mississippi Valley Gas Co. v. Boydstun,* 230 Miss. 11, 92 So. 2d 334, 340 (Miss. 1957)).[7] An equally well-settled rule, recognized in Mississippi, is that courts will imply that the laws in force when a contract was made were intended by the parties to be a part of the contract as much as if they had been expressly incorporated therein. *Mid-Continent Telephone Corporation v. Home Telephone Company,* 319 F. Supp. 1176 (N.D. Miss. 1970).

Thus, while the Appellees may take a position that a limited partner's duties are somehow "limited," the Court should make short work of any such position as it is clear in the MLPA that the Uniform Partnership Act applies as to fiduciary duties owed by the general and limited partners to one another. Thus, Gant, Shivers, and Gant & Shivers, LLC, owed legal obligations of loyalty not to profit at the expense of their partners, had the duty not to take a partnership opportunity, and had the fiduciary obligation to disclose all material facts. Ultimately, the existence of this legal obligation to disclose eviscerates each argument set forth in the Appellees Motion for Summary Judgment and that motion should have been denied. The trial court did not even address these duties, much less the facts in dispute surrounding the duties.

ii. Gant, Shivers, and Gant & Shivers, LLC all breached fiduciary obligations to their partner, Grand Legacy, by appropriating a partnership opportunity.

"Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from **any transaction connected with the formation**, conduct, or liquidation of the partnership or from any use by

[7] Some states have expressed this rule specifically as to limited partnership agreements. *See Kelsey v. Kelsey,* 714 N.E.2d 187, 191 (Ind. Ct. App. 1999) (A limited partnership agreement "incorporates the terms of the governing statutes, and by signing it, the partners agree to the provisions so incorporated."); *In re Smith,* 185 B.R. 285, 290 (Bankr. S.D. Ill. 1995) (the Illinois' Revised Uniform Limited Partnership Act and the Illinois' Uniform Partnership Act are "deemed part of limited partnership agreement to same extent as though expressly referred to or incorporated in contract between limited and general partners."). *In re Smith* supports the rule that Limited Partnership Act relies on the Partnership Act as well as the rule that the statutes are incorporated in the limited partnership agreement.

him of its property." MISS. CODE ANN. § 79-12-21 (1972) (repealed effective Jan. 1, 2007) (emphasis added). The November 10th Agreement was a "transaction connected with the formation" of the limited partnership; it was initially signed during the formation process and was part of the later purchase of the Bernard Bayou Property as part of the conduct of the to-be-formed limited partnership, GLMS. Therefore, Gant & Shivers, LLC, along with Gant and Shivers individually, all hold the profits that they derived in constructive trust for GLMS. They are required to account for those profits—which exceed $4.4 million—and disgorge such profits back to the limited partnership. Gant and Shivers, individually, are responsible because of their own personal involvement. Both also hold funds that must be individually disgorged because they knew of the facts not disclosed, they personally signed the HUD-1 knowing it was false, and they did not make any further disclosure. [R. at 409-434, 2360, 2362, 2440-44; R.E. at 140-43, 150-51].

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. Ct. App. 1980). More specifically, a partner has a duty to share with the partnership those business opportunities clearly related to the subject of its operations. *Green v. Bellerive Condominiums Ltd. Partnership*, 763 A.2d 252 (Md. 2000); *Jennison v. Bierer*, 601 F. Supp. 1167 (D. Vt. 1984); *Reddington*, 262 S.E.2d 841; *Wright v. Ogle*, 584 P.2d 737 (Or. 1978). "There is an obvious and essential unfairness in one partner's exploitation of a partnership opportunity for his or her personal benefit and to the resulting detriment of his or her copartners." *Leff v. Gunter*, 658 P.2d 740, 744 (Cal. 1983). Therefore, a partner must refrain from taking any advantage of another partner by the slightest adverse conduct of any kind. *Id.* Specifically, once Gant (and Shivers through Gant) became partners with Grand Legacy on the boat, Gant was obligated to provide the Orange Grove sales price. Instead, he finalized his deal

with Orange Grove in the November 10th Agreement and then wrongfully took the $10,000,000.00 opportunity for himself rather than conveying it to the limited partnership. Even if the partnership did not form on the boat, it certainly formed on the date the parties signed the November 12th Agreement which contemplated a "to be formed partnership." Of course, when the partnership formed was a question of fact that should have been presented to the jury.

A partner owes to the partnership and the other partners the duty of loyalty and the duty of care. MISS. CODE ANN. § 79-13-404(a) (1972). The duty of loyalty requires that partners act in the interest of the partnership rather than in their own personal interests when conducting transactions related to the partnership business. PARTNERSHIP L. & PRAC. § 12:4 (2009). "The duty of loyalty also requires that partners not represent a party adverse to the partnership, not secretly compete against the partnership, not use confidential partnership information for their own benefit, and not usurp business opportunities that might be taken by the partnership if they are offered to the partnership." See *Starr v. Fordham*, 648 N.E.2d 1261 (Mass. 1995); *Smith v. Brown & Jones,* 633 N.Y.S.2d 436 (N.Y. 1995). "In addition, the duty of loyalty requires that partners deal fairly with the partnership and communicate to their copartners all material facts related to partnership affairs. Partners must *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 Appellees made material misrepresentation and concealed material facts. Gant denies that he stated to Sanders that he would sell the property for the same price and the Appellees claim that the Acknowledgement Agreement indicated there was a "difference" in the price. The point that the Appellees miss entirely is that the affirmative duty was on the Appellees to disclose all material facts. Simply stating there is a "difference" in the purchase prices, is insufficient to inform Grand Legacy that the Appellees would profit by over $4,400,000.00 from

Grand Legacy's "investment" in the limited partnership. Assuming, *arguendo*, that Gant did not state that he would sell the property for the same price, he was still obligated to disclose he was making a profit of $4,400,000.00 on the transaction with his own partners. Had the parties simply kept the transaction at arm's length, two businessmen making a deal, then Gant likely would have had no affirmative obligations to disclose. However, when Gant agreed to the formation of a *partnership* with Grand Legacy, both orally and then on November 12, 2005 in writing, the fiduciary obligation of disclosure attached and the Appellees cannot hide behind a merger clause or a vague last minute acknowledgement. At the very least, a genuine issue of material fact exists regarding the breach of duty and causation.

During the Fall of 2004, when negotiations were ongoing between Gant and Sanders and the contracts for the sale of the Bernard Bayou Property were signed, the members of the "to be formed limited partnership" were operating as a general partnership and were held to the duties required of general partners, including the legal obligations of loyalty not to profit at the expense of their partners. The conduct of Gant and Shivers in defrauding their partners of $4.4 million clearly constitutes self-dealing on behalf of Gant and Shivers and their company, Gant & Shivers, LLC. Their actions harmed the other partners and later the limited partnership, and violated of the fiduciary duties that they clearly owed to Grand Legacy. The trial court failed to consider these issues. Summary judgment should have been denied because this case is fraught with "genuine issues of material fact" surrounding the fraud by the Appellees and the Appellees breach of the fiduciary duties that they owed to the Appellants.

B. The Acknowledgement Agreement highlights the failure of the Appellees to disclose material facts and does not preclude the Appellants' claims as it does not constitute sufficient disclosure.

The Acknowledgement Agreement did not sufficiently disclose the difference in the purchase price as it did not put the Appellants on notice that the difference in the prices would be

almost $5 million dollars, rather than the minimal difference that Appellants believed it to be. The existence of the Acknowledgement Agreement is proof of the Appellees plan to fraudulently conceal material information.

i. Stating that the "difference" would be distributed was simply inadequate and failed to disclose a material fact to Grand Legacy, the general partner, on which it relied to fund the closing.

The premise of the Appellees' defense is that the Acknowledgement Agreement is proof that the Appellants knew that the Appellees were making a profit from the transaction. The Acknowledgment Agreement, dated April 15, 2005, provided, "...the difference in the initial Purchase Price paid by Gant & Shivers, LLC, and the purchase price paid for [sic] by Grand Legacy of Mississippi, LP, shall be disbursed to Gant & Shivers, LLC." [R. at 2212; R.E. at 138]. In reality, the Appellants *knew* that there was a difference in the prices – a *minimal* difference to reimburse Gant and Shivers for their out-of-pocket expenses related to the initial contract with Orange Grove. [R. at 500]. This understanding was supported by the Assignment to GLMS, which provided that Gant was to be reimbursed for his out-of-pocket expenses from the transaction:

> Reimbursement.
> Assignee shall reimburse Assignor for earnest money deposits previously deposited and other items and fees by separate written agreement. Assignor agrees to provide to Assignee copies of all studies, surveys and/or reports which it may be possessed of relating to the subject property.

[R. at 2191-92; R.E. at 135-36].

Gant and Shivers knew what Sanders understood the "difference" in the purchases prices to mean and they allowed Sanders to enter into the transaction with this mistaken belief and actually used it to their benefit. The statement in the Acknowledgement Agreement regarding the "difference" in the prices was consistent with Sanders mistaken belief that the difference in the price was only enough to reimburse the Appellees and the statement certainly would not have

alerted him that the "difference" amounted to over $4.4 million. An obscure statement in a large stack of closing documents, inserted at the eleventh hour, that there was a "difference" in the prices is insufficient disclosure under the legal and fiduciary duties owed by the Appellees, as partners in the transaction, to disclose all information material to the transactions. At a minimum, this presents a fact issue as to the sufficiency of the "disclosure."

Assuming, *arguendo*, that this statement in any way, shape, or form abrogated the affirmative duty to disclose all material facts, including the actual purchase price, to all partners, then the meaning of "the difference in the initial Purchase Price paid by Gant & Shivers, LLC, and the purchase price paid for [sic] by Grand Legacy of Mississippi, LP" is certainly ambiguous, particularly in light of the "reimbursement" provision in the Assignment. [R. at 2191-92, 2212; R.E. at 135-36, 138]. Where a transaction involves more than one document, an additional rule applies in regard to contract construction. 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) (emphasis in original) (quoting *Doleac v. Real Estate Professionals, LLC*, 911 So. 2d 496, 506 (Miss. 2005) (quoting *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) ("although the parties used multiple agreements to delineate their relationship, each agreement was dependent upon the entire transaction. . . . The individual agreements were integral and interrelated parts of the one deal."))).

Further, 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 v. McCullough Environmental Services, Inc.*, 595 So. 2d 1282, 1289 (Miss. 1992); *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."). Certainly an issue of material fact exists as to the ambiguity of this statement, and this issue is subject to a jury decision as to what it means or purports to disclose, if anything, as well as its sufficiency and its effect on the parties.

The so-called "disclosure" of the "difference" in the prices was insufficient to meet the fiduciary obligations of the Appellees. Gant and Shivers knew what Sanders understood the "difference" in the purchase prices to mean and the Assignment to GLMS supported Sanders' belief about the "difference" in the purchase prices. Yet, the Appellees knowingly allowed Sanders to enter into the transaction with this mistaken belief. Further, as shown above, ambiguity exists in the contracts, which creates a genuine issue of material fact that is for the jury to decide. According to well-established Mississippi law, the trial court erred in granting summary judgment for the Appellees where there are genuine issues of material fact, as well as issues of contractual ambiguity for which summary judgment is inappropriate.

ii. The existence of the Acknowledgement Agreement is proof of fraudulent concealment by the Appellees.

To meet their legal duties, the Appellees were required to disclose the actual sales price paid to Orange Grove, nothing less. "Omission or concealment of a material fact can constitute fraud." *Morgan v. Green-Save, Inc.*, 2 So. 3d 648, 653 (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.* As previously discussed, the Appellees had a legal obligation to disclose all material facts. That legal obligation to disclose material facts was not met by having their attorney draft a document at the eleventh hour that was vague and ambiguous at best, false and intentionally deceptive at worst. At that point, Grand Legacy had already obtained the loan, transferred the $5 million in

cash required into GLMS, and taken numerous other major steps in consummating the limited partnership obligations and funding the entity.

To wait until the morning of closing to slip in the Acknowledgment Agreement, offering no explanation of it and making no reference to the document, is insufficient to meet their fiduciary obligations of disclosure. If anything, this conduct indicates that the Appellees were concerned about the difference in the sale price, *and its magnitude*, and requested this last minute document to create just the argument they are making now. This document is evidence of the fraudulent scheme employed by the Appellees and of the active concealment of a fact that the Appellees had a legal obligation to disclose. The existence of the Acknowledgment Agreement, it is not the "get out of jail free" card the Appellees wish it to be. Certainly, these actions create fact issues surrounding the Appellees breach of the fiduciary duties to their partners.

In the Appellees' Brief in support of their Motion for Summary Judgment, they asserted that Appellants were unable to show fraudulent or negligent misrepresentation, with much of their argument centered on the Acknowledgment Agreement. They argued that the case of *Davis v. Paepke* supported their argument. 3 So. 3d 131 (Miss. Ct. App. 2009). However, their theory ignores the fiduciary obligations that existed between the Appellees and their partner, Grand Legacy, and ultimately, the fiduciary obligation to make full disclosures to their own company, GLMS.

Davis v. Paepke is factually dissimilar to the case before this Court. In *Davis,* the contract at issue was not the purchase and sale contract on the land. Rather, it was a very transaction-specific partnership agreement where the parties outlined their partnership understanding concerning the piece of property. The November 12th Agreement was not intended to outline the partnership agreement, nor was it the basis on which the partnership was formed. The November 12th Agreement was simply an agreement between Gant and the "limited partnership to be

formed" to buy the Property and to form a limited partnership in the future; the issues related to the partnership were specifically set forth as a separate contingency to the contract.

In the case at hand, Grand Legacy was fraudulently induced to enter into a limited partnership with the Appellees, fund GLMS, obtain financing, and provide personal guaranties, all based on the false representations and omissions of the Appellees, and occurring both before and after November 12, 2004. In *Davis,* the issue of fraudulent inducement was tried by the jury, which found against Davis because the jury believed that the alleged fraudulent statements by Paepke were opinions ("the Mossy Oak People are paying up to $1,000.00 per acre on some good hunting grounds") rather than false statements of fact. *Davis*, 3 So. 3d at 138-9. The court stated that it simply could not find any evidence to overturn that finding. *Davis*, 3 So. 3d at 138-9. However, it should be noted the statements were admitted and the case went to the jury.

Another issue in *Davis v. Paepke* was that Paepke's attorney drafted the agreement. In the case at hand, the joint attorneys for both parties drafted the agreement; therefore, neither party should be found to be the "drafter" of the agreement and neither party should have the terms of the agreement, or lack of terms, construed against them. Because there were additional oral agreements and numerous other written documents later entered into by the parties regarding the limited partnership, unlike *Davis* in which one single document controlled, *Davis* is distinguishable and does not control the case at hand.

The statement in the Acknowledgement Agreement regarding the difference in the purchase prices was clearly insufficient to put Grand Legacy on notice that the difference in the prices was $4.4 million (and the Appellees were getting 30 percent of the deal!). The statement of the difference in purchase prices was consistent with Sanders belief that there would be a slight difference in the purchase prices to cover Gant's expenses for locating and initially purchasing the Property, his earnest money, and the Appellees intentionally let him rely on that

false belief. The existence of the Acknowledgement Agreement is evidence that the Appellees were concerned about their concealment of the difference in the prices and that they had this document drafted at the last minute in furtherance of the fraud. This document is evidence of the fraudulent scheme employed by the Appellees and of the active concealment of a fact that the Appellees had a legal obligation to disclose.

C. Genuine issues of material fact exist as to the effect of the "merger clause" and its application to Grand Legacy.

i. The contingency provision opens the door to parol evidence and defeats the merger clause argument.

Under Mississippi law, where the contract is not ambiguous (a point that the Appellants do not concede as discussed above), the intention of the contracting parties should be gleaned solely from the wording of the contract. *Heritage Cablevision v. New Albany Elec. Power Sys.*, 646 So. 2d 1305, 1312 (Miss. 1994). Parol evidence will not be received to vary or alter the terms of a written agreement that is intended to *express the entire agreement* of the parties on the subject matter at hand. *Grenada Auto Co. v. Waldrop,* 188 Miss. 468, 195 So. 491, 492 (Miss. 1940). The parol evidence rule is one of substantive law rather than of evidence. *Estate of Parker v. Dorchak,* 673 So. 2d 1379, 1383 (Miss. 1996).

Appellees apparently persuaded the lower court that the only relevant documents to this transaction are the November 12th Agreement and the Acknowledgment Agreement in an attempt to construe this as an arms-length transaction. These two documents are certainly important pieces of the overall transaction, but the overall transaction cannot reasonably be narrowed to two documents and the transaction is a far cry from being arms-length. As discussed in detail above, the issue is that the Appellees blatantly failed in their legal duty to affirmatively disclose all material facts to its partner, Grand Legacy, during the formation and consummation of a

general partnership and a limited partnership, and as a result of this failure both Grand Legacy and GLMS were damaged in the amount that the Appellees profited.

The November 12th Agreement was not the entire agreement concerning the relationship of the parties or the ongoing business relationship between them, as was stated clearly on the face of that document.

> **BOTH PURCHASER AND SELLER ACKNOWLEDGE THAT THIS CONTRACT IS CONTINGENT ON PURCHASER AND SELLER FORMING A LIMITED PARTNERSHIP MUTUALLY ACCEPTABLE TO BOTH SELLER AND PURCHASER.**

[R. at 2168; R.E. at 68 (emphasis in original)]. Based on this contingency, a condition precedent to the contract, the Appellees "merger clause" argument is without merit. This provision contemplates other agreements. Put simply, the November 12th Agreement was clearly and expressly not the only agreement between the parties; the business relationship had yet to be completed and was still in formative stages. The framework for forming the relationship was agreed to on the boat as outlined by Gant and Sanders in their depositions. [R. at 1111, 2536-37]. It continued to evolve as the matter moved forward through 2004 and to closing and Grand Legacy's principal, Sanders, continued to be lead to believe that Gant and Shivers would not profit from the transaction.

The parties agreed prior to execution of the November 12th Agreement that an entity would be formed and that the formation of said entity was a condition precedent to the sale. This was left as an open contingency in the November 12th Agreement. Therefore, it cannot be argued that the November 12th Agreement constitutes the "entire agreement" of the parties because the contingency creates a direct conflict with the merger clause. If the parties intended to memorialize their entire agreement in the November 12th Agreement, then the contingency would not have been needed. There was nothing else that could have been added to this

document because the partnership, in its formative stages on November 12, 2004, was still being negotiated based on Gant's representations to Sanders, among other representations, and the intent of the parties to form a partnership for the development of the Bernard Bayou Property. The formation of the partnership was the basis for that agreement and the duties arising from that partnership are in dispute here, not the terms of the agreement.[8, 9]

The representations made by Gant to Sanders and Pankratz on the boat were certainly relevant to the overall decision for Grand Legacy to join Gant in a partnership through which they would purchase the Bernard Bayou Property. What occurred on the boat and in subsequent conversations was the underpinning of the inducement by the Appellees to convince Grand Legacy to become its partner. Further, the Appellees and their partner, Grand Legacy, both wanted to retain control in the formative stages of this partnership, thus, the contingency was placed in the November 12th Agreement. Finally, the testimony of the parties, as well as the Limited Partnership Agreement of GLMS, supports that Gant and Shivers and Grand Legacy intended to share ownership and profits from the partnership. [R. at 1111, 2537, 2085-2120; R.E. at 90-125].

Misrepresentations and omissions by the Appellees induced Grand Legacy to move forward to negotiate and ultimately sign the Limited Partnership Agreement in March of 2005 (a contingency in the November 12th Agreement), and to agree to fund the limited partnership, which allowed GLMS to buy the Bernard Bayou Property, and ultimately to close the transaction. The statements, inducements, misrepresentations, and omissions of the Appellees are

[8] It is worth noting that the later drafted Limited Partnership Agreement of GLMS does not contain a merger clause; however, the inclusion of one would be irrelevant because the legal obligations of a fiduciary are not limited by such a clause. In fact, the logical need for the affirmative legal obligation overrides the effect of any merger clause because otherwise a partner could simply avoid his duty though the use of such clause.

[9] Other contingencies had not yet been satisfied by November 12, 2004. For instance, the due diligence period for the inspection of the Property did not expire until January 2005.

all directed at the formation of GLMS and Grand Legacy's decision to fund the limited partnership, all of which fall outside of the November 12th Agreement. Alternatively, to the extent these statements may implicate the November 12th Agreement, the undecided terms of the to-be-formed limited partnership take the discussions out of reach of the merger clause via the contingency provision and the legal duties of disclosure.

Appellees apparently persuaded the trial court that the only relevant documents to this transaction were the November 12th Agreement and the Acknowledgment Agreement in an attempt to construe this as an arms-length transaction. The trial court erred as a matter of law by failing to consider all of the relevant documents to this transaction, including the agreements dated November 10, 2004 and November 12, 2004, the GLMS Limited Partnership Agreement and its amendments, the April 15, 2005 Acknowledgement Agreement, and the HUD-1 closing statements, among others. [R. at 2138, 2168, 2085, 2202, 2211, 2440, 243; R.E. at 41, 68, 90, 126, 137, 140, 142].

ii. Alternatively, Grand Legacy was not a party to the November 12th Agreement and is not bound by a merger clause.

The November 12th Agreement identified the "purchaser" as "a Limited Partnership to be formed between Grand Legacy Limited Partnership [sic] and Charles M. Gant." [R. at 2168; R.E. at 68]. Grand Legacy was not a party to the Agreement and is not bound by any merger clause. The signature blocks show that Sanders signed on behalf of the to-be-formed limited partnership, not on behalf of Grand Legacy, which was not identified as the general partner. [R. at 2180; R.E. at 80].

Later, in the First Amendment to Agreement for Purchase and Sale the parties' intentions become ambiguous. The first page of this Amendment states it is by and between "Charles Gant, (the "Seller"), and Grand Legacy Limited Partnership [sic] (the "Purchaser")." [R. at 2181; R.E.

at 81]. This description by the parties conflicts with the initial November 12th Agreement whereby the Purchaser is described not as "Grand Legacy Limited Partnership" but as a "Limited Partnership to be formed," and Grand Legacy was not even a party to that contract. It becomes even more confusing when the actual operative language of the original Agreement is amended to read:

> 2. First Paragraph is hereby amended in its entirety to read as follows:
>
> > THIS AGREEMENT is made and entered into as of this the 12th day of November, 2004 ("Purchase Agreement") by and between a Limited Partnership to be formed between Grand Legacy, LLP, A Florida Limited Liability Partnership and Gant & Shivers, LLC, (hereinafter referred to as "Purchaser"), and Charles M. Gant (hereinafter collectively [sic] referred to as "Seller").
>
> 3. Except as amended hereby, the original Agreement to Purchase and Sell [sic] as Amended, dated November 12, 2004, shall remain in full force and effect.

[R. at 2182; R.E. at 82].

This operative paragraph, which is the text of the Amendment, defines the "Purchaser" as "a Limited Partnership to be formed between Grand Legacy, LLP, A Florida Limited Liability Partnership and Gant & Shivers, LLC." [R. at 2182; R.E. at 82]. Again, Grand Legacy is not identified as a party to the contract and signs only in its capacity as one of the two partners to the "Limited Partnership to be formed." [R. at 2182; R.E. at 82]. Paragraph 3 then states that nothing else is amended from the original contract, therefore, the parties do not change from the original contract to which Sanders, not Grand Legacy, is a signatory. Later, in early April 2005, the Agreement for Purchase and Sale is amended again; this time to identify the "Purchaser" as "Grand Legacy of Mississippi, LP, A Mississippi Limited Partnership." [R. at 2185-86; R.E. at 83-84]. GLMS had been formed on or about March 28, 2005. The Second Amendment provided, in pertinent part:

1. Both parties mutually agree that the closing of the transaction shall be between Gant & Shivers, LLC, as Seller, and Grand Legacy of Mississippi, LP, A Mississippi Limited Partnership, as Purchaser.

2. Except as amended hereby, the original Agreement to Purchase and Sell [sic] as Amended, dated November 12, 2004, shall remain in full force and effect.

[R. at 2185-86; R.E. at 83-84]. Again, these provisions emphasize that the "Purchaser" and party to the Agreement for Purchase and Sale is the "Limited Partnership to be formed," which has now been identified as "Grand Legacy of Mississippi, LP, A Mississippi Limited Partnership." [R. at 2185-86; R.E. at 83-84].

The original agreement and both amendments are consistent in that either the "limited partnership to be formed" or the now formed limited partnership, was the only "Purchaser" named. At no time during the execution of these documents does Grand Legacy become a party to the November 12th Agreement. Therefore, as a non-party, the merger clause does not apply to Grand Legacy and cannot bar the introduction of parol evidence concerning the misrepresentations and omissions by the Appellees that caused Grand Legacy to fund the limited partnership and enter into business with the Appellees.

iii. Alternatively, the November 12th Agreement is ambiguous as to who is bound.

If the above-argument does not convince the Court that Grand Legacy was not a party to the November 12th Agreement, then, at a minimum, the variations in the original Agreement and the subsequent amendments make the November 12th Agreement ambiguous. Thus, the question of whether Grand Legacy was an actual party to the Agreement and is bound by the Agreement is a question for the jury. If ambiguity is found to exist in a contract, "its interpretation is a matter for the trier of fact." *Crisler v. Crisler,* 963 So. 2d 1248, 1251 (Miss. Ct. App. 2007). Therefore, the trial court erred in granting summary judgment based on the merger clause because a jury must first determine if Grand Legacy is even a party to the November 12th

Agreement before a court can conclude whether Grand Legacy's evidence concerning the representations by the Appellees would be excluded.

II. The trial court erred by granting summary judgment for the Appellees because a question of fraud is involved and the Mississippi Supreme Court has made it clear that questions of fraud are inappropriate for disposition at the summary judgment stage.

The Mississippi Supreme Court has made it clear that "questions of fraud and misrepresentation are fact based questions, and therefore are inappropriate for disposition at the summary judgment stage." *Great Southern Nat. Bank,* 595 So. 2d at 1289. In *Great Southern National Bank*, the court held that the need to determine "whether the facts or evidence support the allegation that fraud and misrepresentation were involved in the loan transaction/assignment of contractual rights presents an issue of material fact that should be tried." 595 So. 2d at 1289. Based on the amount of evidence in this case, some direct and some circumstantial, it was entirely premature for the trial court to unilaterally dismiss the fraud and misrepresentation claims, especially in light of the fact that no reference is made to the issue of fraud in the Order.

A. Fraud by the Appellees can be proven by clear and convincing evidence.

It is well-settled in Mississippi law that in order to recover on a fraud theory, one "must prove by clear and convincing evidence knowledge of falsity and an intention to deceive or defraud." *Berkline Corp. v. Bank of Mississippi*, 453 So. 2d 699, 702 (Miss. 1984). Parol evidence can be used where fraud and misrepresentation are at issue. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1181-82 (Miss. 1990). Evidence of similar acts, omissions, and acts of concealment, as well as circumstantial evidence can all be used to prove fraud by clear and convincing evidence.

i. Parol evidence can be introduced where fraud and misrepresentation are involved.

When the party acknowledges that the writing reflects the agreement but asserts that the agreement never came into being because of fraud, duress, mistake, or illegality, the parol evidence rule will not bar extrinsic evidence to prove the existence of said fraud, duress, mistake, or illegality. 3 MS PRAC. ENCYCLOPEDIA MS LAW § 21:40 (2009). When a party is fraudulently induced to enter into a contract, the parol evidence rule does not bar extrinsic evidence. *Davis v. Paepke*, 3 So. 3d 131, 138 (Miss. Ct. App. 2009). Parol evidence is also allowed where misrepresentations, not rising to the level of fraud, are involved. *Andrew Jackson Life Ins. Co.*, 566 So. 2d at 1181-82.

Thus, the evidence of Gant's statements that he had the property "locked up" and would enter into the partnership with Grand Legacy, the failure of Gant and Shivers to disclose the true price they paid for the property, signing of a false HUD-1 by Gant and Shivers,[10] the testimony of Mr. Rizio and Mr. Quillen, and other evidence is available to prove fraud in this case. [*See* R. at 2440-44, 2449-50, 2452-53]. [R. at 2440-41; R.E. at 140-41]. Appellants presented fifty-seven (57) exhibits in support of their response in opposition to the Appellees' Motion for Summary Judgment.[11] When taken together, this evidence is sufficient to show fraud and meet the clear and convincing standard. At the very least, there is enough evidence to present a question of fact, and summary judgment should not have been granted for the Appellees.

---

[10] Sanders saw only the HUD-1 closing statement for GLMS's purchase of the Property. The false representations that Gant and Shivers made to the parties at the closing by signing the HUD-1 was that they as sellers were paying over $200,000 into the closing, rather than truthfully revealing that they were receiving $4.4 million, in actuality. [R. at 2440-41; R.E. at 140-41].

[11] Appellants were compelled to produce this number of exhibits because numerous documents were relevant to the transactions underlying this case and all of the documents must be considered in order to understand the full picture and the magnitude of the fraud that was committed.

ii. Evidence of similar acts, omissions, and acts of concealment show the Appellees' intent to commit fraud.

To show intent on the part of the person committing the fraud, "[i]t is a well-established rule that other similar frauds may be shown in order to show the intent with which the representations complained of were made." *Nash Mississippi Valley Motor Co. v. Childress*, 156 Miss. 157, 125 So. 708, 710 (Miss. 1930). In *Citizens National Bank of Meridian v. Pigford*, the court held that a customer suing his bank for the "principal and interest on bonds which he purchased relying upon bank's representations that bonds were guaranteed" was allowed to submit the "testimony of other witnesses than plaintiff as to **similar transactions** and representations made out of plaintiff's hearing" for the purpose of showing intent to deceive. 176 Miss. 517, 166 So. 749, 752 (Miss. 1936) (emphasis added).

In this case, it appears that the Appellees attempted to run the same scam on Grand Legacy and GLMS a second time, as evidenced in Shivers' deposition:

> Q. Did you agree and were you in favor of GSW Holdings, LLC, entering into this purchase and sale agreement where you all agreed to purchase Mr. Blackledge's 1,000 acres for nine thousand dollars an acre?
> A. I knew about that, yes, sir.
> Q. Okay. Did you object to that?
> A. No, sir.
> Q. Did you voice that you were -- that you had approve it?
> A. Yes, sir.
> Q. Okay. Similarly, sir, did you approve entering into a contract and two weeks later to sell the same property to Grand Legacy, LLC, [sic] for fourteen thousand dollars an acre?
> A. I don't remember the figures, but I do recall there was definitely some profit in it. ***That's what we're in the business for.***

[R. at 2037 (emphasis added)]. Apparently, Mr. Shivers had no concept of the duties he owed to his partners and was concerned only with lining his pockets. His intent and lack of any remorse is evident in his statement, "[t]hat's what we're in the business for." This callous statement is

clearly an admission that Gant and Shivers intended to make a profit on the Blackledge Property deal, as they had on the Bernard Bayou Property deal shortly before.

Chris Quillen ("Quillen"), pilot for Sanders, accompanied Sanders and Gant when they viewed the Blackledge Property. When Gant and Sanders discussed purchasing the property, Quillen heard Gant tell Sanders on two occasions that Gant would not make any profit on the front end of the deal. [R. at 2452]. Obviously, this is in direct contradiction to the testimony of Shivers, who admitted that he and Gant intended to profit off of the deal, which is further evidence of Gant and Shivers plan to defraud the Appellants a second time.

Real estate broker Howard Rizio ("Rizio") accompanied Gant and Sanders to view the Blackledge Property. Rizio was present when Gant told Sanders that he "wasn't making any money on this deal at all, and that it was no different from the deal on the 100 acres on the Back Bay." [R. at 2449-50]. Gant was, of course, referring to the Bernard Bayou Property deal in which he fraudulently obtained over $4.4 million from the Appellants. Like the Bernard Bayou deal, Gant wanted Sanders to believe that Gant was not making any money on the front end and only getting a thirty percent (30%) interest on the back end. This is additional evidence that Gant and Shivers intended to defraud the Appellants a second time and is also an admission against interest that will be admissible at trial as to the fraud in this case. Clearly, these subsequent similar actions support Appellants' fraud claims.

"Omission or concealment of a material fact can constitute fraud." *Morgan v. Green-Save, Inc.*, 2 So.3d 648, 653 (Miss. Ct. App. 2008), *cert. denied*, 999 So. 2d 1280 (Miss. Feb. 26, 2009). "In order to create liability for nondisclosure, the defendant's 'silence must relate to a material fact or matter known to the party and as to which it is his legal duty to communicate to the other contracting party.'" *Morgan*, 2 So.3d at 653. As already explained, Gant and Shivers had a legal duty to communicate certain facts to their partners. The issue of non-disclosure does

not appear to be disputed. Gant and Shivers agree that they were paid over $4,400,000.00 of their partner's money and they did not disclose this fact to Grand Legacy.

iii. Circumstantial evidence is additional proof of the Appellees' intent to deceive and defraud the Appellants.

Proof of intent to deceive is almost always made by circumstantial evidence. *IFC Credit Corp. v. Specialty Optical Systems, Inc.*, 252 S.W.3d 761, 770 (Tex. App. 2008). Further, courts have held that "[t]he element of intent is peculiarly a **question for the trier of fact**. In determining intent, the fact finder can look to the circumstances, the relationship, and the interests of the parties, the nature of their transaction, the failure to perform, and the nature of any efforts to perform." *Id.* (emphasis added). Another Texas case held that breach of contract alone is not sufficient evidence to prove fraudulent intent, but breach of contract "combined with 'slight circumstantial evidence' of fraud is enough to support a verdict for fraudulent inducement." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006).

In this case there is sufficient evidence presented of misrepresentations, subsequent similar actions, admissions of guilt, and other circumstantial evidence that when viewed as a whole constitute clear and convincing evidence sufficient to prove that the Appellees defrauded the Appellants of $4.4 million. The evidence is clearly sufficient to preclude summary judgment on the fraud claims in this case and the trial court erred in granting summary judgment for the Appellees.

B. Contracts induced by fraud and misrepresentation are voidable.

As a general rule, parties to a written contract are bound by the instrument they sign; however, "agreements reached by misrepresentations or illegal concealment of facts are not enforceable." *Green Realty Management Corp. v. Mississippi Transp. Comm'n*, 4 So.3d 347, 350 (Miss. 2009). Where a party is induced to enter into a transaction with another by such other

person's **fraud or misrepresentation of a material fact, the transaction is voidable against the other party.** 3 MS PRAC. ENCYCLOPEDIA MS LAW § 21:55 (2009) (emphasis added). When a party assents to a contract relying on the representations of the other, it is presumed that the assent is given on the condition that the representations are true. *Duncan v. Hogue*, 24 Miss. 671, *1 (Miss. Err. & App. 1852). The Mississippi Supreme Court has said, "[f]raud vitiates everything it enters into." *J.A. Fay & Egan Co. v. Louis Cohn & Bros.*, 158 Miss. 733, 130 So. 290, 292 (Miss. 1930).

Contracts induced by fraud are voidable. *Allen v. Mac Tools, Inc.*, 671 So. 2d 636, 641 (Miss. 1996). "Fraud in the inducement arises when a party to a contract makes a fraudulent misrepresentation," such as "by asserting information he knows to be untrue, for the purpose of inducing the innocent party to enter into a contract." *Davis,* 3 So. 3d at 138. Most importantly, failure to read a contract before signing it, although it may constitute negligence, **will not bar equitable relief to one who has executed a contract in reliance upon false representations made to him or her by the other party**. *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.*, 584 So. 2d 1254, 1254 (Miss. 1991) (emphasis added).

When a contract is voidable, the party induced to enter the contract by fraud has several remedies: hold the other party to the contract according to its terms, repudiate the contract and sue to set it aside, or affirm the contract and hold the other party accountable for profits it received. *Knox Glass Bottle Co. v. Underwood*, 228 Miss. 699, 89 So. 2d 799, 829 (Miss. 1956). Thus, restitution is available when a contract has been induced by fraud or misrepresentation. *See* 3 MS PRAC. ENCYCLOPEDIA MS LAW § 21:63, *Restitution.* "The principle of restitution is that a person who has been unjustly enriched at the expense of another is required to make restitution to that other." *Fourth Davis Island Land Co. v. Parker*, 469 So. 2d 516, 524 (Miss. 1985).

Clearly, in this case, sufficient evidence exists of fraudulent inducement by the Appellees that caused the Grand Legacy to enter into the partnership, fund the purchase of the Property, and form GLMS. This fraudulent inducement is sufficient to create a question of fact for the jury and summary judgment should have been denied.

III. The trial court erred in granting Shivers' Separate Motion for Summary Judgment because Shivers can be held individually liable in this case.

The trial court should have denied Shivers' Separate Motion for Summary Judgment because Shivers cannot hide behind the limited liability company shield and escape liability for his actions. Shivers can be held personally liable for his conduct in signing a false document and affirmatively concealing material information from his partners, the Appellants, in order to steal $4.4 million dollars from them. Further, because fraud is involved, the court can pierce the corporate veil and hold Shivers personally liable.

A. Shivers owed fiduciary duties to the Appellants at all relevant times and Shivers can be held individually liable for his conduct in affirmatively concealing material information.

As discussed in detail under Section I above, Gant and Shivers owed certain legal duties to Grand Legacy in the formation of a partnership. Gant and Shivers, individually and on behalf of Gant & Shivers, LLC, had a legal duty to inform Grand Legacy of all material facts related to the transaction because they were subject to the fiduciary duties imposed on partners at all times relevant to this transaction. Although the conduct in question took place prior to the formation of the limited partnership, the parties had the intention to form a limited partnership and they were "carrying on" a business for profit. Therefore, their actions resulted in a general partnership by operation of law, under which the partners can be held individually liable. As such, the trial court should not have granted summary judgment to Shivers because he is subject to personal liability for failing to disclose material information to the Appellants, which he had a legal duty to

disclose pursuant to the fiduciary duties that partners owe to the partnership and other partners, as well as for his signing of the HUD-1 closing statement that he knew to be false.[12]

Further, Shivers is not protected under the "LLC" shield of Gant & Shivers, LLC. Shivers' primary argument was that he "cannot be held personally liable for actions taken in his capacity as a member of Gant & Shivers, LLC." [R. at 351]. Appellants 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. An individual member of a limited liability company *can* be held individually liable for his own acts or omissions. *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)); *Pepsi-Cola Bot. Co. of Salisbury, Md. v. Handy*, 2000 WL 364199 (Del. Ch. 2000) (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).

Shivers should be personally liable in this case because he misrepresented the HUD-1 facts to be true and concealed information in furtherance of the fraud that he and Gant committed

[12] 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. 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].

against Grand Legacy and GLMS. Shivers would not have gone through with the deal if he and Gant were not going to make a profit. [R. at 2037]. Shivers knew the details of the deal, he knew that he and Gant were going to clear over $4.4 million profit without investing a penny, and he clearly intended to defraud Sanders in order to make that profit.

Shivers pointed out that Sanders said in his deposition that Shivers "did not say anything deceptive" prior to the closing. [R. at 266-67]. However, Shivers missed the point. Shivers is not liable for he *said*, he is liable for what he *failed* to say. Shivers failed to disclose and affirmatively concealed material information. It is a well-established rule that the "omission or concealment of a material fact can constitute fraud." *Morgan,* 2 So.3d at 653. Shivers' argument that he did not take any actions or make any statements to Sanders is exactly why Shivers *should* be held liable.

"In order to create liability for nondisclosure, the defendant's 'silence must relate to a material fact or matter known to the party and as to which it is his legal duty to communicate to the other contracting party.'" *Mabus v. St. James Episcopal Church*, 884 So. 2d 747, 762-63 (Miss. 2004). Clearly, the fact that Gant and Shivers were going to profit over $4.4 million off of their partners and deprive the partnership of the opportunity to purchase the property for $10 million were material facts that the Appellants should have known and which would have impacted the deal. Although Shivers claimed that he did not make any representations to Sanders, he knew all of the details of the deal and he affirmatively concealed material information to further the fraud. Further, the signing of the HUD-1 constitutes a statement that the facts therein were true. [R. at 2444; R.E. at 143].

Gant testified in his deposition that upon learning about the Bernard Bayou Property the first thing he did was call Shivers and that Shivers knew the details of deal:

Q. When was the first time, to your knowledge, that Steven [sic], Senior was aware of the Bernard Bayou property?
A. I called him when Sherry brought it to my attention. That's the first thing I did, was called Steve.
Q. What's the reason you did that?
A. He was my partner.

[R. at 1074].

Q. So, at the time that you then communicated with Steve Shivers, Senior, did you tell him that you had an oral agreement with the representatives of Grand Legacy to sell them the property for approximately fifteen million dollars?
A. Yes, I did.
Q. At that time, did Mr. Shivers, Steven [sic] Shivers, Senior, know that your contract and agreement to acquire the property was for the amount of approximately ten million dollars?
A. Yes, he did.
Q. So when Mr. Shivers agreed to enter into the deal, he was aware that you stood to-- you, as a group, stood to gain or profit at approximately four and a half million dollars; is that correct?
A. Yes.
Q. What did Mr. Shivers know about the issue of the 30 percent interest going forward when he decided to become involved as Gant and Shivers?
A. I told him what happened on the boat and told him about the 30 percent that was mentioned.

[R. at 1111].

The following statements from Shivers' deposition are proof that from the time Gant informed Shivers about the property Shivers knew all of the details of the deal and meant to defraud the Appellants.

Q. Did Mr. Gant tell you in November of 2004 what his agreement was with Scott Sanders for the acquisition of Bernard Bayou property?
A. Again, I do not remember the dates, but I knew the arrangements.
Q. What were the arrangements?
A. That we were going to sell the property for roughly fifteen and have 30 percent ownership in it.

[R. at 2017].

Q. Mr. Shivers, were you involved at all in the work that was done with Schwartz, Orgler and Jordan on the limited partnership, Grand Legacy of Mississippi, LP?
A. I was kept informed by Charlie of what was going on with that.

[R. at 2018].

Q. Were you aware of the letter of intent that Mr. Gant obtained in late October of 2004 to acquire the property from Orange Grove Utilities?
A. Yes.
Q. Were you aware of it at the time he gained it, about that time?
A. Yes, sir.

[R. at 2019].

Q. On Exhibit 37, there is no doubt that Gant & Shivers actually did receive the four million, four hundred seventy-one thousand, seven hundred thirty-six dollars and six cents as is indicated on this HUD-1; do you agree? That would be block 303.
A. Yes, sir.

[R. at 2027].

Q. So my question is, do you recognize Exhibit 6 [referring to the settlement statement for the Grand Legacy transaction]?
A. Yes, sir.
Q. What is this, please?
A. A settlement statement.
Q. Which transaction, please?
A. Grand Legacy of Mississippi is buying from Gant & Shivers, financed by BancorpSouth.
Q. This is dated April 15th, 2005?
A. April, yes, sir.
Q. This is the transaction that -- where Gant & Shivers was selling the Bernard Bayou property to Grand Legacy of Mississippi; do you agree?
A. Yes, sir.
Q. And that's the transaction where Gant & Shivers profited by the four-point-four million dollars that we just talked about right?
A. Yes, sir.

[R. at 2030].

Q. Did Gant & Shivers take out four-point-four million dollars?
A. Take out?
Q. Of this transaction?
A. Yes, sir, sure did.

[R. at 2030].

Q. Regardless of the source of the payment, whether it's in escrow account or otherwise, does this HUD-1 show that the seller is supposed to pay into the

transaction two hundred one thousand, sixty-four dollars, and sixty-three cents?

A. Yes, sir.
Q. Line 504, let me know when you find that.
A. Yes, sir.
Q. It says, Payoff of First Mortgage Loan. Do you see that?
A. Yes, sir.

* * *

Q. My question is -- was meant to be fairly clean, and that is, are you aware of any first mortgage loan that was paid off?
A. No, sir.

[R. at 2031].

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.*
Q. Why is that?
A. For what?
Q. Pardon?
A. Why would I want to participate if I wasn't going to make any money on the sale of the property?
Q. Well, *you had the 30 percent interest.*
A. That was unknown.
Q. *That would not be attractive to you?*
A. *No, sir. Not by itself, no, sir.*

[R. at 2037 (emphasis added)].

Further, Gant and Shivers had the intention of running the exact same scam on Sanders a second time, as evidenced in Shivers' deposition:

Q. Did you agree and were you in favor of GSW Holdings, LLC, entering into this purchase and sale agreement where you all agreed to purchase Mr. Blackledge's 1,000 acres for nine thousand dollars an acre?
A. I knew about that, yes, sir.
Q. Okay. Did you object to that?
A. No, sir.
Q. Did you voice that you were -- that you had approve it?
A. Yes, sir.
Q. Okay. Similarly, sir, did you approve entering into a contract and two weeks later to sell the same property to Grand Legacy, LLC, [sic] for fourteen thousand dollars an acre?
A. I don't remember the figures, but I do recall there was definitely some profit in it. That's what we're in the business for.

[R. at 2037].

As discussed above, in regard to the Blackledge deal, real estate agent Howard Rizio testified that he was present when Gant told Sanders that he "wasn't making any money on this deal at all, and that it was no different from the deal on the 100 acres on the Back Bay." [R. at 2449-50]. In addition, Sander's pilot, Chris Quillen, testified that he heard Gant tell Sanders on two occasions that Gant would not make any profit on the front end of the deal. [R. at 2452]. Gant's statements obviously directly contradict Shivers' admission that he and Gant intended to profit off of the Blackledge deal, which is further evidence of Gant and Shivers plan to defraud the Appellants a second time.

The foregoing proves that at all times Shivers was keenly aware of the details of the transaction, he intended to make a profit of over $4.4 million off of the Appellants, he participated with full knowledge in the scheme to defraud the Appellants, and he affirmatively concealed material information in furtherance of that fraud. Shivers admitted that he would not have even participated in the deal if they were not going to make the profit and the scam worked so well the first time that he and Gant intended to do it again with the Blackledge Property. Shivers' claim that he did not "make any statements" to Sanders is not a viable defense to his blatant participation in the $4.4 million fraud, $2.1 million of which was deposited into Shivers' personal bank account. [R. at 2358, 2360; R.E. at 150].

B. Alternatively, because this case involves fraud, the Court could pierce the corporate veil and hold Shivers personally liable.

Shivers claims that any action he might have taken was in his capacity as a member of Gant & Shivers, LLC, therefore he has no personal liability. [R. at 351]. Several courts have held that when fraud or misrepresentation are involved, the corporate veil of the limited liability company can be pierced in order to hold individual members personally liable. *See e.g.,*

Westmeyer v. Flynn, 889 N.E.2d 671 (Ill. App. Ct. 2008) (the Illinois Limited Liability Company Act does not bar fraud as a basis for piercing the corporate veil of an LLC to hold individual LLC members personally liable to third parties); *Young v. Hamilton*, 92 Fed. App'x 389 (9th Cir. 2003) (under the Utah Revised Limited Liability Company Act, an LLC member could be subjected to personal tort liability for fraudulent acts he committed in furtherance of the LLC's business, even if he was acting on behalf of the LLC rather than in his personal capacity).

In Delaware, although an LLC is a separate legal entity distinct from the members who own an interest in it, **a court is permitted to pierce the corporate veil of an LLC where there is fraud to hold individual LLC members personally liable to third parties**, under DEL. CODE ANN. title 6, §§ 18-201(b), 18-701. *Business Ins. Co., Ltd. v. World Trade Center Properties, LLC*, 375 F. Supp. 2d 238 (S.D.N.Y. 2005) (applying Delaware law) (emphasis added). Based on the same Delaware provision, the court in *Pepsi-Cola Bottling Co. of Salisbury, Maryland. v. Handy* found that a corporation could recover directly against LLC members for fraudulent representation because the LLC members were not being sued solely by reason of being members of the LLC, since the claim was based upon fraudulent acts committed by the LLC members before the LLC was formed and before the LLC took title to certain property. 2000 WL 364199 (Del. Ch. 2000).

In *Vertrue Inc. v. Meshkin*, an action was brought against the owner of an LLC alleging that the owner fraudulently induced the plaintiff to enter into an agreement and advance money to the LLC. 429 F. Supp. 2d 479 (D. Conn. 2006) (applying Delaware law). The owner filed a motion to dismiss and the court denied the motion stating that when "an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal or corporation, he is liable to third persons injured thereby." *Id.* at 504. The court further stated that to impose personal liability on the LLC owner, it was not necessary for the plaintiff to show that

the LLC owner personally benefited from the alleged torts, only that he **participated in the commission of them,** even if that participation was for the corporation's benefit. *Id.* (emphasis added). In the case at hand, Shivers was a managing member of Gant & Shivers, LLC, whose signature was required on many of the closing documents including the false closing statements. Shivers, therefore, not only participated in the commission of the fraud, but he clearly benefitted from it as well. Therefore, Shivers' conduct clearly exceeded the requirements of the *Meshkin* case and it was inappropriate for the trial court to grant his Motion for Summary Judgment when there is a question of fact as to Shivers' personal liability in this matter.

In Texas, the corporate veil of an LLC may be pierced to hold individual members personally liable to third parties when the corporate fiction is used as a means of perpetrating fraud. TEX. BUS. CORP. ACT ANN. art. 2.21. Actually, no showing of actual fraud is necessary to pierce the veil of an LLC, rather, a showing that an action was so grossly unfair as to constitute constructive fraud will suffice to hold an individual LLC member liable. *Taurus IP, LLC v. DaimlerChrysler Corp.*, 534 F. Supp. 2d 849 (W.D. Wis. 2008) (applying Texas law). In *McCarthy v. Wani Venture, A.S.*, evidence supported a jury finding that the one-third owner of a wallboard distributor, an LLC, caused the LLC to be used to perpetrate an actual fraud and did perpetrate an actual fraud upon a wallboard manufacturer, thus warranting piercing of the LLC veil to permit the manufacturer to recover damages from the LLC owner individually. 251 S.W.3d 573 (Tex. App. 2007).

Shivers' argument that he is protected by the limited liability company shield because he did not make any representations to the Appellants does not stand. In a member-managed LLC, all members are agents that can bind the LLC. The Mississippi Limited Liability Company Act provides:

> ...**every member is an agent of the limited liability company for the purpose of conducting its business and affairs**, and the act of any member, including, but not limited to, the execution in the name of the limited liability company of any instrument for apparently carrying on in the usual way the business or affairs of the limited liability company of which he is a member, binds the limited liability company...unless the member so acting has, in fact, no authority to act for the limited liability company in the particular matter and the person with whom he is dealing has knowledge of the fact that the member has no such authority.

MISS. CODE ANN. § 79-29-303(1) (1972) (emphasis added). All of the representations that Gant made to the Appellants were on behalf of Gant & Shivers, LLC. Gant clearly had the authority to make said representations and, as shown above, Shivers was fully informed at all times about the arrangements concerning the deal with Appellants. Therefore, Shivers cannot argue that he is not bound by Gant's actions on behalf of Gant & Shivers, LLC. There is at least a question of fact as to Shivers personal liability for fraud, in addition to his liability based on his personal failure to disclose material information and because he willingly signed the false Settlement Statement – an affirmative false representation. Because there is a viable legal basis for Shivers to be personally liable for his personal actions and omissions in furtherance of the fraud, the trial court erred in granting his motion for summary judgment just because of his membership status in the limited liability company.

An individual member of a limited liability company *can* be held individually liable for his own acts or conduct. He will not be protected by the limited liability shield in all cases just by virtue of his membership in the LLC. 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, in furtherance of the fraud, but also because of his status of managing member acting with knowledge of the fraud. Further, because fraud is involved, the corporate veil should be pierced and Shivers should be personally liable even if he was acting only in his capacity as a

member of the LLC. In sum, Stephen L. Shivers, Sr.'s Separate Motion for Summary Judgment should have been denied based on credible questions of fact entitling Appellants to a jury trial.

CONCLUSION

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

Respectfully submitted, this the 29th day of July, 2010.

GRAND LEGACY, LLP, Individually and as Managing General Partner of GRAND LEGACY OF MISSISSIPPI, LP, and GRAND LEGACY OF MISSISSIPPI, L.P.

By Their Attorneys
DunbarMonroe, P.A.

David C. Dunbar by G.T.S

David C. Dunbar
G. Clark Monroe

OF COUNSEL:
David C. Dunbar (MSB [redacted]
dcdunbar@dunbarmonroe.com
G. Clark Monroe II (MSB [redacted]
gcmonroe@dunbarmonroe.com
DUNBARMONROE, P.A.
270 Trace Colony Park, Suite A
Ridgeland, MS 39157
Office: (601) 898-2073
Facsimile: (601) 898-2074
Website: www.dunbarmonroe.com

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
1720 23rd Avenue/Boyce Holleman Blvd
Gulfport, Ms 39501

Donald C. Dornan, Esq.
Spyridon, Palermo & Dornan, LLC
P.O. Box 154
Biloxi, MS 39502-4206

THIS the 29th day of July, 2010.

David C. Dunbar by G.T.S.

David C. Dunbar
G. Clark Monroe

ADDENDUM

MISS. CODE ANN. § 79-13-202. Formation of partnership

(a) Except as otherwise provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

(b) An association formed under a statute other than this act, a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this chapter.

(c) In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

(3) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:

(i) Of a debt by installments or otherwise;

(ii) For services as an independent contractor or of wages or other compensation to an employee;

(iii) Of rent;

(iv) Of an annuity or other retirement or health benefit to a beneficiary, representative, or designee of a deceased or retired partner;

(v) Of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or

(vi) For the sale of the goodwill of a business or other property by installments or otherwise.

MISS. CODE ANN. § 79-13-404. General standards of partner's conduct

(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:

(1) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(2) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(3) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(c) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

(f) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.

(g) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

MISS. CODE ANN. § 79-14-201. Certificate of limited partnership

(a) In order to form a limited partnership, a certificate of limited partnership must be signed and delivered to the office of the Secretary of State for filing. The certificate must set forth:

(1) The name of the limited partnership;

(2) The street and mailing address of the office and the name and the street and mailing address of the registered agent for service of process, required to be maintained by Section 79-14-104;

(3) The name and the street and mailing address of each general partner;

(4) The latest date upon which the limited partnership is to dissolve; and

(5) Any other matters the general partners determine to include therein.

(b) A limited partnership is formed at the date and time of the filing of the certificate of limited partnership in the office of the Secretary of State, as evidenced by such means as the Secretary of State may use for the purpose of recording the date and time of filing, or at any later time specified in the certificate of limited partnership if, in either case, there has been substantial compliance with the requirements of this section.

(c) For all purposes, a copy of the certificate of limited partnership duly certified by the Secretary of State is conclusive evidence of the formation of a limited partnership and prima facie evidence of its existence.

MISS. CODE ANN. § 79-14-1107. Cases not covered

In any case not provided for in this chapter, the provisions of the Mississippi Uniform Partnership Act govern.

MISS. CODE ANN. § 79-29-303. Agency power of members and managers

(1) Except as provided in subsection (2) of this section, every member is an agent of the limited liability company for the purpose of conducting its business and affairs, and the act of any member, including, but not limited to, the execution in the name of the limited liability company of any instrument for apparently carrying on in the usual way the business or affairs of the limited liability company of which he is a member, binds the limited liability company, unless the member so acting has, in fact, no authority to act for the limited liability company in the particular matter and the person with whom he is dealing has knowledge of the fact that the member has no such authority.

(2) If the certificate of formation provides that management of the limited liability company is vested in a manager or managers:

(a) No member, acting solely in the capacity as a member, is an agent of the limited liability company; and

(b) Every manager is an agent of the limited liability company for the purpose of its business and affairs, and the act of any manager, including, but not limited to, the execution in the name of the limited liability company of any instrument for apparently carrying on in the usual way the business or affairs of the limited liability company of which he is the manager, binds the limited liability company, unless the manager so acting has, in fact, no authority to act for the limited liability company in the particular matter and the person with whom he is dealing has knowledge of the fact that the manager has no such authority.

(3) An act of a manager or a member which is not apparently for the carrying on in the usual way the business of the limited liability company does not bind the limited liability company unless authorized in accordance with the limited liability company agreement.

(4) No act of a manager or member in contravention of a restriction on authority shall bind the limited liability company to persons having knowledge of the restriction.

Repealed by 2010 Miss. Laws Ch. 532 (H.B. 683).

MISS. CODE ANN. § 79-29-305. Liability to third parties

(1) A person who is a member of a limited liability company is not liable, by reason of being a member, under a judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the limited liability company, whether arising in contract, tort or otherwise or for the acts or omissions of any other member, manager, agent or employee of the limited liability company.

(2) A member of a limited liability company is not a proper party to a proceeding by or against a limited liability company, by reason of being a member of the limited liability company, except:

(a) Where the object of the proceeding is to enforce a member's right against or liability to the limited liability company; or

(b) In a derivative action brought pursuant to Article 11 of this chapter.

(3) Notwithstanding the provisions of subsections (1) and (2) of this section, under a limited liability company agreement or under another agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of the limited liability company.

Repealed by 2010 Miss. Laws Ch. 532 (H.B. 683).