IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
No. 2009-CA-01173

Consolidated with
2010-CA-00810

BEAUMONT HOMES, LLC — **APPELLANT**

vs.

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

APPEAL FROM THE CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

OF COUNSEL:
Samuel L. Anderson (MSB N[redacted]
Clyde X. Copeland, III (MSB N[redacted]
Matthew W. Vanderloo (MSB N[redacted]
HARRIS JERNIGAN & GENO, PLLC
587 Highland Colony Parkway (39157)
Post Office Box 3380
Ridgeland, Mississippi 39158
Phone: (601) 427-0048
Fax: (601) 427-0050
ATTORNEYS FOR APPELLEES

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CERTIFICATE OF INTERESTED PARTIES

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 Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

PARTIES: Appellant:

Beaumont Homes, LLC

Appellees

Colonial/Jordan Properties, LLC

SMCDC, Inc.

Mark S. Jordan

Dee C. Denton

ATTORNEYS:

For Appellant:

Ken R. Adcock, Esq.
Adcock & Morrison, PLLC
P.O. Box 3308
Ridgeland, Mississippi 39158
Attorney for Beaumont Homes, LLC

For Appellee

Samuel L. Anderson
Clyde X. Copeland, III
Matthew W. Vanderloo
Harris Jernigan & Geno, PLLC
587 Highland Colony Parkway
Post Office Box 3380
Ridgeland, Mississippi 39158-3380
Attorney for Colonial/Jordan Properties, LLC, SMCDC, Inc., Mark S. Jordan and Dee C. Denton

Trial Court Judge:

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

This the 27th day of January, 2011

Respectfully submitted,

By: _____
Samuel L. Anderson

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STATEMENT OF CASE

This case involves the interpretation and enforcement of a real estate contract wherein Beaumont Homes, LLC purchased property "as is" with the condition that neither party would rely on any representations not contained within the provisions of the written contract. On October 2, 2006, Beaumont Homes filed a complaint against Colonial/Jordan, SMCDC, Inc., Mark S. Jordan, and Dee C. Denton, alleging breach of contract, negligence, misrepresentation/negligent misrepresentation, fraudulent concealment, and breach of fiduciary duties and the duty of good faith and fair dealing, for failing to disclose the alleged existence of flooding on the property and a temporary moratorium on building permits prior to the sale. (C.P. 1-7)[1] On December 7, 2006, Colonial/Jordan, SMCDC, Inc., Mark S. Jordan, and Dee C. Denton filed their Answer and Affirmative Defenses. (C.P. 22-37)

On October 3, 2007, Beaumont Homes amended its complaint, joining Madison County, Mississippi as a defendant over its issuance of the moratorium and as the owner of the property containing the subject drainage system. (C.P. 179) On November 9, 2007, Madison County filed its Answer to First Amended Complaint. (C.P. 223) On January 15, 2007, Madison County, Mississippi filed a Motion to Dismiss. (C.P. 247) On October 14, 2008, an Agreed Order of Dismissal was entered, dismissing Madison County from this cause of action. (C.P. 456)

Following a period of discovery that extended to the Madison County Board of Supervisors and its individual members, Defendants Colonial/Jordan, SMCDC, Inc., Mark S. Jordan, and Dee C. Denton each filed a Motion to Dismiss, or in the alternative Motion for Summary Judgment. (C.P. 1184, 1287, 1393) On June 22, 2009, the court entered its Order Granting Summary Judgment to Colonial/Jordan, SMCDC, Inc., Mark S. Jordan, and Dee C. Denton. (C.P. 2060)

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[1] The Clerk's Papers are cited as "C.P. ___". Exhibits are cited as Ex. __".

On June 29, 2009, following entry of summary judgment, Colonial/Jordan filed a Motion for Attorneys' Fees based on the real estate contract which granted the prevailing party attorneys' fees. (C.P. 2065-2090) (C.P. Supp. Vol. 1 at 6) On July 16, 2009, Beaumont Homes filed a Notice of Appeal to the Mississippi Supreme Court. (C.P. 2091)

On January 4, 2010, a hearing was held wherein the court concluded that since the entire lawsuit centered around enforcement of the real estate contract, Colonial/Jordan as the prevailing party was entitled to its attorneys' fees. (C.P. Supp. Vol. 1 at 66-70) On March 1, 2010, the court entered its Order Granting Defendant Colonial/Jordan Properties, LLC's Motion for Attorney's Fees. (C.P. Supp. Vol. 1 at 50) On May 6, 2010, the court assessed attorneys' fees in the amount of $5,000.00 against Beaumont Homes. (C.P. Supp. Vol. 1 at 97) On May 17, 2010, Beaumont Homes filed its second Notice of Appeal. (C.P. Supp. Vol. 1 at 101) Although this second notice of appeal is the reason the style of this case references a consolidation, this case represents a single dispute over Beaumont Homes' purchase of Lot 127 in the Deerfield Subdivision.

STATEMENT OF RELEVANT FACTS

On August 22, 2005, the Madison County Board of Supervisors ("the Board") privately imposed a temporary moratorium on the issuance of building permits in Deerfield Subdivision Phase IIIC (the "moratorium") due to drainage problems on several lots in the area during periods of heavy rain. (C.P. 1202-03) As confirmed by the Board minutes and the Madison County Chancery Clerk, the Board moratorium was issued without notice to the public. (C.P. 1281-86) Although a few lots experienced drainage problems, the Board imposed the moratorium on the entire phase to avoid potential exacerbation of the problem and its own liability for damages until it could enlarge a drainage culvert. (Ex. 1, Brunini at 27-29) The problematic drainage culvert was owned by and located on property that had been dedicated to and titled in Madison County, Mississippi.

On September 16, 2005, Beaumont Homes, LLC ("Beaumont Homes") and Colonial/Jordan Properties, LLC ("Colonial/Jordan") entered into a contract (the "Contract") for the sale and purchase of Lot 127 in Deerfield Subdivision Phase IIIC (the "Property"). (C.P. 1236-37)[2] At all times relevant to this civil action, Colonial/Jordan was a Mississippi limited liability company. SMCDC, Inc., a Mississippi corporation, was the managing member of Colonial/Jordan. Mark Jordan was a director and the sole officer of SMCDC, Inc. (C.P. 1236-37, 1489) Dee C. Denton ("Denton"), a real estate broker, was the agent for Colonial/Jordan that made the sale.[3] (C.P. 1237)

On November 14, 2005, Colonial/Jordan conveyed the Property to Beaumont Homes. (C.P. 1239-40) Although Lot 127 was within the area included by the moratorium, the lot itself had no flooding problems. (Ex. 1, Oakes at 36-37) As part of the Contract, Colonial/Jordan provided Beaumont Homes with a Title Report and Certificate of Title. (C.P. 1242-46) The extent of the title companies' search, and whether it included a search or certification as to unrecorded action against the property, was set forth therein. (C.P. 1242-46)

On December 31, 2005, Michael Oakes, the sole member of Beaumont Homes, was informed of the Board's moratorium by a representative of Madison County, after he began clearing the property prior to applying for a construction permit. (Ex. 1, Oakes at 32-33) Despite extensive discovery in this cause, the Board members confirmed under oath that no one remembered ever notifying Mr. Jordan of the moratorium or threatening Mr. Jordan with a moratorium to get financial assistance with the County's drainage problems. (Ex. 1, Caughman at 76-79)(Ex. 1, Jones at 153)(Ex. 1, Banks at 33-35)(Ex. 1, Brunini at 46-47, 62-63) Mr. Jordan confirmed under oath that

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[2] Beaumont Homes also purchased Lot 130 in Deerfield and an additional lot in the Harvey's Crossing subdivision for development at the same time. (Ex. 1, Oakes at 23) However, Lot 127 in Deerfield is the only one at issue in this lawsuit.

[3] The Contract provides the following: "AGENCY DISCLOSURE: All parties agree and understand that Dee C. Denton, Broker represents the Seller."

he had no knowledge of the moratorium until several months after Beaumont Homes' purchase of Lot 127. (C.P. 1274-75) Despite his lawsuit, Mr. Oakes was also unaware of whether any Defendant had knowledge of the moratorium before the sale. (Ex. 1, Oakes at 32-33) Although the moratorium was lifted in early 2007 following repair of the Madison County, Mississippi drainage system, Beaumont Homes never sought to build on the property which was ultimately foreclosed. (Ex. 1, Oakes at 40-42)

SUMMARY OF THE ARGUMENT

A contract must be enforced as written if unambiguous and there is no violation of statute or public policy. When a contract clause is clear and unambiguous, construction is a matter of law and summary judgment is the appropriate means for resolving disputes over its application. Here, the Contract expressly provided that the Property was being sold "as is" without any representations about its condition, and that neither party could rely on or would be bound by any representations not contained therein. The Mississippi Supreme Court has held that similar contract provisions preclude causes of action for breach of contract or fraudulent misrepresentation under similar circumstances as a matter of law.

The legal duties of the parties necessary to establish causes of action for negligence and negligent misrepresentation were governed and subsumed by the terms of the Contract. Pursuant to the Contract, Colonial/Jordan had a duty to provide a Title Report and Certificate of Title which were provided prior to closing. As to disclosing anything further about the physical condition of the property, there were no obligations under the express terms of the Contract. Case law relied upon by Beaumont Homes concerned express misrepresentations by a seller about the specific condition of property with no contractual provisions precluding reliance thereon, unlike here where there were no discussions about the condition of the property prior to its purchase and there existed a contract precluding reliance on anything outside the terms of the Contract. Because the legal duties of the

parties were defined by Contract, and there was no breach, there was no independent claim for negligence or negligent misrepresentation as a matter of law.

Pursuant to the Contract, Colonial/Jordan was the seller and Beaumont Homes the buyer of Lot 127. Because SMCDC., Mark S. Jordan, and Dee C. Denton were not parties to the Contract, there is no cause of action against them for breach of contract, negligence and negligent misrepresentation. To the extent they may have been involved in the transaction, they were acting as agents of Colonial/Jordan, a disclosed principal, as specifically set forth in the Contract.

In an effort to reach beyond the legal duties set forth in the Contract and/or hold liable parties that were not privy to the Contract, Beaumont Homes asserted fraud. However, Beaumont Homes failed to establish legally sufficient proof of fraud necessary to avoid summary judgment. Despite general allegations of flooding throughout this cause of action, there was no property flooding on Lot 127. The moratorium was temporarily imposed on all properties until the flooding on other properties could be resolved. As to the existence of the temporary moratorium, Beaumont Homes never had any discussions with the seller, and there was no proof establishing that anyone involved in the transaction had ever been made aware of the moratorium. Beaumont Homes bought multiple properties at the same time for development without speaking or meeting with Colonial/Jordan. The moratorium was entered by the Madison County Board of Supervisors without notice to anyone, an no Board member could say that they ever spoke to Mr. Jordan about the moratorium. Without proof of a knowingly false representation by any Defendant in this cause of action, there can be no claim for fraud as a matter of law. For this same reason, there was no breach of any alleged duty of reasonable care to support the claims for negligence and negligent misrepresentation, assuming there were any such duties beyond those contained in the Contract. Without knowledge of the moratorium, there was no bad faith to establish a breach of the covenant of good faith and fair dealing either.

The case at hand involved an arms-length transaction between two sophisticated developers. There was no evidence that the transaction between the parties went beyond operating on their own behalf, that the parties had a common interest and profit from the activities of the other or that one party had dominion or control over the other required to establish a fiduciary relationship. The existence of a fiduciary duty must arise before any breach of that duty may result.

Beaumont Homes did not introduce evidence of damages despite the issue being raised on summary judgment. Although Beaumont Homes sought rescission and refund of the purchase price, the facts demonstrate that the moratorium was lifted in early 2007, Beaumont Homes never built anything, and the property was sold through foreclosure proceedings in 2008. As to any alleged loss of the benefit of the bargain, Beaumont Homes offered no such proof in response to the summary judgment motions. Without proof of damages, this lawsuit should be dismissed.

Following entry of summary judgment, the chancery court maintained the jurisdiction and discretion to enter its award of a portion of Colonial/Jordan's attorneys' fees since the request was made within ten (10) days and the express terms of the Contract provided for such an award.

Accordingly, the judgment of the Chancery Court of Madison County, Mississippi should be AFFIRMED.

ARGUMENT

Standard of Review on Appeal

Questions of law are reviewed *de novo* by the Mississippi Supreme Court. *Powe v. Byrd*, 892 So.2d 223, 227 (Miss. 2004); *Arceo v. Tolliver*, 19 So. 3d 67, 70 (Miss. 2009); *Sheppard v. Miss. State Highway Patrol*, 693 So.2d 1326, 1328 (Miss. 1997).

Standard for Summary Judgment in Court Below

A motion for summary judgment should be granted if the plaintiff is unable to prove any set of facts in support of their claim. *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 1274, 1275 (Miss. 2006). Rule 56 of the Mississippi Rules of Civil Procedure states in relevant part that:

> summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Miss. R. Civ. P. 56(c). The movant has the initial burden of demonstrating that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Commercial Bank v. Hearn*, 923 So. 2d 202, 204 (Miss. 2006). Once the movant makes this demonstration, the non-movant, in order to avoid summary judgment, must then produce "probative evidence legally sufficient" to show that a genuine issue of material fact does exist. *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985). While summary judgment cannot take the place of a trial of disputed facts, a trial should not be substituted for summary judgment when there is no genuine issue as to a material fact which determines the outcome of the case. *Wolf v. Stanley Works*, 757 So. 2d 316, 319 (Miss. Ct. App. 2000); *see also Monsanto Co. v. Scruggs*, 342 F. Supp. 2d 568, 572 (N.D. Miss. 2004) (judge must determine whether there is sufficient probative evidence favoring non-moving party for the fact finder to ever return verdict for non-moving party).

I. There was no breach of contract because the Contract expressly provided that the Property was sold as is without any reliance by either party on items outside the terms of the Contract or certification as to the condition of the property.

The primary purpose of contract construction is to determine the intent of the contracting parties, and intent is always governed by the objective language of the contract. *Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, 908 So.2d 107, 110 (Miss.2005); *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748, 752 (Miss.2003)); *One South, Inc. v. Hollowell*, 963 So. 2d 1156, 1162 (Miss. 2007). Courts ascertain the meaning of the language actually used, and not

some possible but unexpressed understanding of the parties. *Heartsouth, PLLC v. Boyd*, 865 So. 2d 1095, 1105 (Miss. 2003)(quoting *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So.2d 96, 105 (Miss.1998) and *Cherry v. Anthony, Gibbs, Sage,* 501 So.2d 416, 416 (Miss.1987)). The parties disagreement over the meaning of the contract does not alone render an instrument ambiguous. *IP Timberlands Operating Co.*, 726 So.2d at 105 (citing *Whittington v. Whittington,* 608 So.2d 1274, 1278 (Miss.1992)). Under Mississippi law, where a clause in a contract does not violate statute, public policy and is unambiguous as to its provisions, it must be enforced just as written. *Leonard v. Nationwide Mutual Insurance Co.*, 499 F.3d 419, 429 (5th Cir. 2007). Contracts are solemn obligations and must be interpreted and enforced by the courts as written. *Heartsouth*, 865 So. 2d at 1105. When a contract is clear and unambiguous on its face, construction becomes a matter of law, and not fact, making summary judgment the appropriate means for resolving the dispute. *Griffin v. Tall Timbers Dev., Inc.* 681 So.2d 546, 551 (Miss.1996)

Here, the sales transaction between Colonial/Jordan and Beaumont Homes for the purchase of the Property was governed by a written contract ("the Contract"). The Contract expressly provided the following as to representations considered part of the transaction:

> AGREEMENT OF PARTIES: This Contract incorporates the entire and final agreement of the parties. Neither party has relied upon any statement or representation made by any representative bringing the parties together. Neither party shall be bound by any terms, conditions, oral statements, warranties, or representations not contained herein. The provisions of this Contract shall apply to and bind the heirs, executors, administrators, successors in title and assigns of the respective parties hereto. Where herein used, the singular includes the plural and the masculine includes the feminine as the context may require.

In *Natchez Pecan Marketing Ass'n v. Bramlett*, 143 So. 429, 430 (Miss. 1932), the Court held that a similar contract clause prohibiting reliance on oral representations not contained in the contract was enforceable and precluded any claims for breach of contract or fraudulent misrepresentation relating to outside discussions by the parties. *Natchez Pecan* held that the contract clause also shielded the seller from any liability from extraneous communications made by its agents to which

the seller may not have been privy. *Id.* Here, despite the fact that Mr. Oakes from Beaumont Homes never even spoke to Mr. Jordan prior to its simultaneous purchase of several lots for development, there was a contract clause limiting the transaction to the terms of the written contract. Accordingly, the chancery court properly concluded there could be no breach of contract for alleged communications not addressed within the written contract itself.

The Contract at issue now goes even further in its refusal to certify the condition of the property through the following language:

> (c) Buyer understands and agrees that the Master Development plan is a proposed scheme of development and is dependent upon general market conditions, climate stability, governmental regulations, financing feasibility, alternative access, and other factors which may inhibit or prohibit development. Buyer further understands in order for the Seller-Developer to maintain the integrity of its Master Plan, that certain neighborhoods could require rezoning and purchaser waives any rights to object to said rezonings. Hence, Seller-Developer makes no representation as to time, layout means or mode of development except that the Developer proposes to develop said property as the above-mentioned factors permit. However, Buyer understands that, as stated in said Declaration, Section 2.03, that Developer is under no obligation to develop further than Phase I.
>
> (d) Buyer accepts said lot "as and where is" and in its present condition with respect to suitability for Buyer's purposes, location, and physical conditions, including, without limitation, damages which hereafter may be suffered by Buyer or their heirs, successors, and assigns as a result of movement of soil, the natural flow of storm water, the overflow of established drainage ways, or the failure to maintain said drainage ways by the person or agencies responsible therefor.

Although Beaumont Homes cites to a string of cases concerning seller misrepresentations, none of those cases involved contracts that expressly placed the parties on notice that no one may rely on any terms or representations beyond the contract itself, and more importantly, they concerned situations where the seller had expressly represented specific conditions about the property. In *Alexander v. Beresford*, 27 Miss. 747 (Miss. Err. & App. 1854), the seller expressly and falsely represented during the sale that the subject property only flooded at the rear near a bayou and that it was highly valuable for agricultural purposes. Similarly, in *Estell v. Myers*, 54 Miss. 174, (1876), the seller expressly claimed that the property was not prone to flooding despite having experienced

routine flooding in previous years. 1876 WL 5142 at *6. In *Reed v. Charping*, 41 So. 2d 11, 14 (Miss. 1949), the seller expressly claimed that the property consisted of at least 5000 cultivatable acres when in fact it was proven to only contain approximately 3500. In *Holman v. Howard Wilson Chrysler Jeep, Inc.*, 972 So. 2d 564 (Miss. 2008), the court found a factual dispute as to whether there had been proper notice that an automobile had been in an previous accident because the contract vaguely represented that the automobile "*may* have suffered damages and may have had repairs performed on it." *Id.* at 569 (emphasis added)(also concluding that there were statutory disclosures required for sales of dealer automobiles). All of these cases cited by Beaumont Homes are distinguishable since Colonial/Jordan did not make any representations about the property, and more importantly, it had a Contract which expressly confirmed that it was not making any representations about the condition of the property so as to prevent any alleged misunderstanding about this fact. *See also Laird v. ERA Bayshore Realty*, 841 So. 2d 178, 180 (Miss. App. 2003)(finding that "as is" clause eliminated any further covenants as to condition of property).

The Contract is consistent with Mississippi real estate statutes which do not require minimum disclosures for the sale of unimproved land. Miss. Code Ann. § 89-1-501 et seq. governs the disclosures required for sale of real estate, but it expressly exempts "transfers of real property on which no dwelling is located." *See Miss. Code Ann.* § 89-1-501(2)(h). In *Cole v. Lovett*, 672 F. Supp. 947 (S.D. Miss. 1987), cited by Beaumont Homes, the Court found liability for non-disclosures about the existence of a security interest imposed by a company installing vinyl siding on a home, primarily because it was a violation of statute -- the Truth in Lending Act. Here, there were no statutory disclosures required beyond anything set forth in the Contract.

Despite its attempts to stigmatize Colonial/Jordan for successful business operations, Beaumont Homes was likewise a sophisticated party in the business of purchasing lots, building homes, and offering to buyers for a profit during the real estate boom. Had it made a simple phone

call regarding building permits before its purchase of lots in the area, it may have discovered the temporary moratorium. With no intention of building anything itself, Colonial Jordan had no incentive to make such a call. Such is the reason its contracts, with the "as is" clause, unambiguously placed the burden of due diligence on the buyer, Beaumont Homes.

In *Jackson v. Sam Finley, Inc.*, 366 F.2d 148 (5th Cir. 1966), a party to an asphalt paving contract argued that a similar clause that prohibited reliance on any alleged representations outside the sales contract should not be interpreted literally because the parties had a "general understanding" concerning the amount of paving that would be required, even though the contract only addressed the rate of compensation per yard of paving work performed. The Court held that despite one of the parties' alleged misunderstanding of the scope of the work that would be required under the contract, "contract law requires that where contractual language is unambiguous, the contract read literally must be enforced" and "the fact that this may not correspond to the actual understanding of the parties will not justify the admission of parol evidence to modify the language." *Id.* at 155. Not only did the court affirm dismissal of the claims for breach of contract based on the contract clause prohibiting reliance on representations outside the terms of the contract, but also affirmed dismissal of the causes for fraud, misrepresentation, mistake, indefiniteness, lack of mutuality and/or violation of public policy. *Id.* at 153.

With Beaumont Homes' detailed plea of facts concerning the dealings of the Madison County Board of Supervisors, the Board's alleged interaction with Mark Jordan, the supposed circumstances establishing constructive notice of a moratorium and the alleged general misunderstandings regarding the condition of the property, Beaumont Homes is similarly attempting to go outside the terms of the Contract with parol evidence to alter the transaction. The recitation of these facts is merely an attempt to give the appearance of some factual dispute where none exits as to the transaction in question. Only where the dispute concerns facts that are material is there any need for

further review by a trier of fact. *See Phillips Oil Company v. OKC Corporation*, 812 F.2d 265, 272 (5th Cir. 1987)(mere existence of disputed factual issues does not foreclose summary judgment since some facts do not affect outcome of lawsuit under governing substantive law). Here, Beaumont Homes executed a binding Contract and in so doing agreed both: (1) that it did not enter into the Contract in reliance on any representations, and (2) that it would not bind Colonial/Jordan to any representation not included in the Contract. Furthermore, the Contract expressly placed Beaumont Homes on notice that there were no representations being made about the condition of the property. Any alleged factual discrepancies outside the contract terms are inadmissible parol evidence, irrelevant and ineffective in altering the terms of the deal. Pursuant to the express provisions of the Contract, there was no breach of contract as a matter of law in this case. Accordingly, summary judgment was appropriately entered by the chancery court as to the claim for breach of contract.

II. The legal duties of the parties necessary to establish causes of action for negligence or negligent misrepresentation were governed and subsumed by the Contract.

In the absence of a contractual or statutory violation, Beaumont Homes asserts that Colonial/Jordan was negligent in its failure to disclose the existence of flooding on Lot 127 or the existence of a moratorium. *See Donald v. Amoco Prod. Co.*, 735 So. 2d 161, 175 (Miss. 1999) (reciting standard of care for negligence). However, to succeed on a claim for negligence against Colonial/Jordan, Beaumont Homes must first show that Colonial/Jordan *breached a legal duty. Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So. 2d 413, 417 (Miss. 1988)(summary judgment affirmed where plaintiff failed to present proof of each element of negligence)(emphasis added). Whether a legal duty is owed is a question of law to be determined by the court and reviewed *de novo* on appeal. *Wagner v. Mattiace Co.*, 938 So. 2d 879, 883 (Miss. 2006); *Belmont Homes, Inc. v. Stewart*, 792 So.2d 229, 232 (Miss.2001); *Doe v. Wight Security Services, Inc.* , 950 So. 2d 1076, 1079 (Miss. 2007). Negligent misrepresentation likewise requires a breach of some

legal duty to make a disclosure outside the provisions of the contract or statute.[4] Mississippi law holds that concealment, omission, or suppression is actionable only if there is a legal duty to make a certain disclosure. *Smith v. Union National Life Ins. Co.*, 286 F. Supp.2d 782, 787 (S.D. Miss. 2003)(holding duty does not exist absent special relationship).

The allegations of negligence and negligent misrepresentation are misleading in the context of this particular dispute because the parties' relationship and duties were governed by the Contract. In *Wagner v. Mattiace Co.*, 938 So. 2d 879, 883 (Miss. 2006), a store patron brought a claim of negligence against a property manager for an alleged breach of the duty to maintain a reasonably safe premises. In finding no legal duty of the property manager to maintain the property, the Court looked solely to the provisions of the lease between the property manager and the operator of the business where the accident occurred. *Id.* at 881, 883-84. Because the lease contract did not impose a duty on the property manager to make any repairs while the lease was in effect, it concluded that no legal duty could be established as a matter of law. *Id.*

The point here is that since there was a contract defining the legal relationship and duties of the parties, it governs and subsumes the various legal duties owed by the parties in subsequent claims of negligence. *See also Smith*, 286 F. Supp.2d at 787 (holding that since purchase of insurance is arm's length transaction, purchaser can not recover for failure to disclose information beyond the terms of the contract); *Ross v. Citifinancial, Inc.*, 2002 WL 461567 ¶ 11 at *6-7 (S.D. Miss. 2002)(finding no duty by lender to disclose additional information to borrower outside terms of contract); *see also Horace Mann Life Ins. Co. v. Nunaley*, 960 So. 2d 455, 461 (Miss. 2007).

> [T]he dividing line between breaches of contract and torts is often dim and uncertain. There is no definition of either class of defaults which is universally accurate or

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[4] Negligent misrepresentation requires the following: 1) a misrepresentation or omission of a fact; 2) that is material or significant; 3) resulting from a breach of the duty to exercise reasonable care; 4) that is reasonably relied upon; and 5) damages are a direct result of such reasonable reliance. *Powell v. Cohen Realty, Inc.*, 803 So.2d 1186, 1191 (Miss. App. 1999)(emphasis added).

> acceptable. In a general way, a tort is distinguished from a breach of contract in that the latter arises under an agreement of the parties . . .

Hazel Mach Co. v. Shahan, 161 So. 2d 618, 623 (Miss. 1964)..

Based on the duties set forth in the Contract, Beaumont Homes cannot establish any legal duty of disclosure beyond what was provided to Beaumont Homes to support claims of negligence or negligent misrepresentation. The Contract imposed a duty on Colonial/Jordan to provide a Title Report in connection with the sale, and it is undisputed that it did so. (C.P. 1242-46) There was no dispute as to Colonial/Jordan's legal ownership of the property before the sale or the validity of the transfer of title to Beaumont Homes. Whether the Title Report or Certificate of Title failed to appropriately reflect the moratorium or properly disclaim any applicable search would be a matter between Beaumont Homes and the title company, not any of the defendants herein. There was no duty on Colonial/Jordan to provide anything further than what was provided to Beaumont Homes or to conduct any additional research for potential unrecorded land use restrictions discussed by federal, state and local governmental organizations. There was no duty beyond delivering the Property as is without any further representations beyond the Contract as to the condition of the property.

In *Lane v. Oustalet*, 873 So. 2d 92, 94 (Miss. 2004), cited by Beaumont Homes, the Court found liability against a seller and his agent for non-disclosures regarding termite damage, only because the seller failed to provide the termite report specifically required by the real estate contract. Although that case primarily involved a dispute between the agent, seller and closing attorney as to whom should have ultimately disclosed the report, the fact remained that disclosure was required by the terms of the sales instrument. *Id.* at 94. *Lane* does not support the factual claims here since there was no alleged failure by Colonial/Jordan to produce any materials otherwise required by the express provisions of the Contract.

Here, the legal duties that would allegedly support a claim for negligence or negligent misrepresentation were subsumed and governed by the terms of the Contract. Since Colonial/Jordan violated no legal duties set forth in the Contract, the Chancery Court properly entered summary judgment as to the claims for negligence and negligent misrepresentation.[5]

III. SMCDC., Mark S. Jordan, and Dee C. Denton were not parties to the Contract.

While the above grounds for summary judgment would be equally applicable to all parties involved, Mark Jordan, SMCDC, Inc., and Dee C. Denton are entitled to summary judgment on the claims for breach of contract, negligence and negligent misrepresentation for the additional reason they were not parties to the Contract. Colonial/Jordan, LLC was the Property seller, as expressly provided in the Contract and Settlement Statement. The respective corporate relationships of the remaining parties were clearly set forth in both documents as well. SMCDC, Inc. was identified as Colonial/Jordan's managing member, and Mr. Jordan the President of SMCDC. Both documents reflect that Mr. Jordan executed the Contract and the Settlement Statement in his capacity as President of SMCDC, Inc., the managing member of Colonial/Jordan. (C.P. 1236-40)

The cardinal rule of corporate law is that a corporation possesses a legal existence separate and apart from that of its officers and shareholders and applies whether shareholders are individuals or corporations. *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 957 So. 2d 969 (Miss. 2007). In order to pierce the corporate veil of Colonial/Jordan, Beaumont Homes would have had to establish legally sufficient facts to support an "alter ego" theory. To succeed under an alter ego theory, a plaintiff must present evidence of some frustration of contractual expectations regarding the party

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[5] Although the analysis does not need to go any further in the absence of a legal duty of any further disclosures under the Contract, no one has shown that Colonial/Jordan was ever informed of the moratorium. Therefore, assuming for purposes of argument only that there was a duty of disclosure beyond the duties established by the Contract, there could not have been any breach in the absence of knowledge of the moratorium. This fact is addressed fully below in Section IV of this Brief since knowledge and/or intent to deceive is a prerequisite to any claim for fraud.

to whom he looked for performance, flagrant disregard of corporate formalities by the defendant corporation and its principals, and a demonstration of fraud or equivalent misfeasance. *Buchanan*, 957 So. 2d at 977; *see Rosson v. McFarland*, 962 So. 2d 1279, 1285 (Miss. 2007) (fact finder may only consider piercing corporate veil where plaintiff presents credible evidence on each of these three elements). Beaumont Homes offered no facts to prove any such theories. *See Rosson*, 962 So. 2d at 1285-86 (plaintiff cannot prove the first element required to pierce the corporate veil where plaintiff entered into a contract with a corporate entity, but plaintiff did not require natural person to guarantee performance of corporate entity); *Buchanan*, 957 So. 2d at 980 (summary judgment affirmed where plaintiff failed to offer legally sufficient proof of flagrant disregard of corporate formalities by corporation and its principals).

When asked under oath why Mr. Jordan was sued, Michael Oakes ("Oakes"), the sole member and owner of Beaumont Homes, testified that Mr. Jordan sold him the Property. As already discussed above, it is established as a matter of law that Colonial/Jordan sold the property. Mr. Jordan was merely an agent for a disclosed principal. Under Mississippi law, an agent for a disclosed principal incurs no personal liability, absent fraud or other equivalent conduct. *Gray v. Edgewater Landing, Inc.*, 541 So. 2d 1044, 1047 (Miss. 1989). In this same respect, Dee C. Denton, the real estate broker, was acting solely as an agent for a disclosed principal. The Contract states the following in this regard:

> AGENCY DISCLOSURE: All parties agree and understand that Dee C. Denton, Broker represents the Seller.

Because Mr. Jordan, SMCDC, Inc. and Denton were neither parties to the Contract and/or otherwise acting as agents for a disclosed principal, they were entitled to summary judgment under any circumstance.

IV. Beaumont Homes failed to establish legally sufficient proof of fraud necessary to avoid summary judgment as to all Defendants.

In an effort to reach beyond the legal duties set forth in the Contract and/or hold liable parties that were not privy to the Contract, Beaumont Homes made allegations of fraud in its Complaint. However, to prove fraud in Mississippi, a plaintiff must produce legally sufficient evidence of the following elements: (1) a false representation; (2) its materiality; (3) the speaker's knowledge of its falsity or ignorance of its truth; (4) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (5) the hearer's ignorance of its falsity; (6) his reliance on the truth; (7) his right to rely thereon: and (8) his consequent and proximate injury. *Levens v. Campbell*, 733 So.2d 753, 761-62 (Miss. 1999); *Nichols v. Tri-State Brick & Tile Co.*, 608 So. 2d 324, 330 (Miss. 1992)(quoting *Whittington v. Whittington,* 535 So. 2d 573,585 (Miss. 1988). Fraud must be proved by clear and convincing evidence. *Martin v. Winfield;* 455 So. 2d 762, 764 (Miss. 1984). When the plaintiff fails to present substantial evidence fairly tending to establish every element of the plaintiffs causes of action, judgment as a matter of law should be granted to the defendant. *United States v. Jefferson Electric Manufacturing Co.*, 291 U.S. 386, 407 (1934); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

(A) There was no flooding on Lot 127.

Throughout its brief and the underlying cause, Beaumont Homes generally complained that Colonial/Jordan failed to disclose the existence of flooding. However, there was no flooding on Lot 127. Several lots across the street would experience water backing up into the street during periods of heavy rain as the result of a drainage culvert that was too small to carry the water away. (Ex. 1, Oakes at 36-37) Lot 127 did not flood. The Board imposed the temporary moratorium on the entire phase including Lot 127 only to avoid any potential exacerbation of the problem and its own liability for damage to the affected lots until Madison County could enlarge its drainage culvert. (Ex. 1, Brunini at 27-29) The problematic drainage culvert was not owned by any Defendant named herein.

Without any factual basis for its general claim of failure to disclose "flooding" on Lot 127, there was no false representation on this particular subject as a matter of law. Despite the sweeping arguments as to flooding in its brief, pleadings and in the transcript of summary judgment motions, the issue of disclosure as to the unpublished moratorium is the only subject relevant to the claims of fraudulent or negligent non-disclosure.[6]

(B) Beaumont Homes failed to offer legally sufficient proof that could clearly and convincingly establish misrepresentations about the condition of the property or that anyone involved in this lawsuit had knowledge of the moratorium.

In order to establish legally sufficient proof of fraud, Beaumont Homes must demonstrate by clear and convincing evidence that there was a misrepresentation made to Beaumont Homes that was known to be false. *See Johnson v. Bay City South Mortgage Co.*, 928 So. 2d 888, 891-82 (Miss. Ct. App. 2006). According to Mr. Oakes, the sole member of Beaumont Homes, the only person he spoke with prior to executing the Contract for purchase of the Property was Dee Denton. However, he remembers nothing about the substance of any conversations with Ms. Denton. (C.P. 22-25)

As to Mr. Jordan, the only other individual involved in the sale by his signature in the Contract for and on behalf of Colonial/Jordan, Mr. Oakes confirmed the following:

Q. Okay. Do you remember if Mr. Jordan was present at closing?

A. He definitely was not there.

Q. Have you ever met Mark Jordan?

A. Not personally.

Q. Did Mark Jordan – did you and Mark Jordan have any conversations about the purchase of this lot prior to closing?

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[6] For the same reason, there was no negligent misrepresentation as to the alleged existence of flooding on the subject property as a matter of law. There was no need for further analysis above in the context of the causes of action for breach of contract, negligence and negligent misrepresentation since the property was sold "as is" with no duty to disclose anything further than what was stated in the Contract.

A. No.

Q. At any time between your finding out about the moratorium and the time that it was lifted, did you ever have any conversations with Mark Jordan about the lot?

A. No, never - - I've never talked to Mark Jordan personally.

* * *

Q. How do you know that Mark Jordan, through his agents - - well, Mark Jordan instructed his agents to lie and conceal material facts from you?

A. I don't know that.

Q. You don't know that?

A. No.

(C.P. 1252-58) Accordingly, there is no proof whatsoever that there were any representations of any kind made by anyone about the condition of the Property.[7]

If there had been discussions between Mr. Jordan, Mr. Oakes and Ms. Denton about the condition of Lot 127 at the time of the sale, and there weren't any, Mr. Jordan nevertheless testified as follows concerning alleged knowledge of the moratorium:

Q. Are you testifying here, under oath, today that the Madison County Board of Supervisors did not place a moratorium on building on Lots Number 127 and 130 of Deerfield IIIc Subdivision on August 22nd, 2005?

A. No, sir, I did not say that.

Q. Do you disagree with that statement that I just made?

A. I didn't say it.

Q. You're not answering my question. I'm asking if you agree or disagree - -

A. They placed a moratorium on certain lots in Deerfield. Yes, they did.

Q. Okay. All right. Which just by - - happened, by chance, your - - a company which you owned, Colonial/Jordan Properties, LLC, owned two of those lots.

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[7] Beaumont Homes also purchased Lot 130 in Deerfield and an additional lot in the Harvey's Crossing subdivision for development at the same time. (Ex. 1, Oakes at 23)

A. I never got noticed of it, sir. So they did not place it on me that I was aware of.

Q. Well, they placed it on the two lots that your company owned. Would you agree with that?

A. I was never noticed of such.

(C.P. 1274-75)

Mr. Oakes then confirmed under oath in the following testimony that Beaumont Homes had no facts to support its allegations that Mr. Jordan or Ms. Denton ever had actual knowledge of the temporary moratorium at the time Beaumont Homes purchased the Property:

Q. You say you're alleging that he [Jordan] knew about the moratorium. Do you know that - - do you know that to be true?

A. Yes.

Q. What do you base that knowledge on?

A. Documents obtained from my attorney, Mr. Adcock.

Q. What documents are those?

A. This here where the moratorium was issued on August 22, 2005.

Q. Do you have any knowledge that Mr. Jordan actually knew that that was issued?

A. No. I don't have any hard evidence, no.

* * *

Q. Do you claim that Ms. Denton had any knowledge that this moratorium had been placed on this lot prior to its sale to you?

A. No.

(C.P. 1255-56)

Mr. Oakes testified that the only evidence of any such knowledge is through the existence of the Board minutes. Reliance on the minutes alone notice was not sufficient to establish

knowledge in this case because those minutes do not reflect notice to anyone. (C.P. 1202-03) According to the agenda for that meeting, there was no public hearing scheduled for said meeting related to Deerfield Subdivision, including as to the subject moratorium. There is no record from the August 22, 2005 Meeting of the Madison County Board of Supervisors of any notice of public hearing or proof of publication related to Deerfield Subdivision for any reason or any evidence of specific notice to any Defendant in this civil action. Proofs of Publication or notice to landowners may be found for almost every other issue discussed by the Board except this one. (C.P. 1220-35) As confirmed by the Madison County Chancery Clerk, the Board moratorium was issued without notice. (C.P. 1281-86)

In a final effort to establish notice of the moratorium, Beaumont Homes deposed all the Board members and their attorney, each of whom confirmed that they do not remember ever discussing the existence of a moratorium with Mr. Jordan. Donnie Caughman testified as follows:

Q. As you sit here today, do you have a present recollection of having given Mark Jordan notice of a moratorium -- notice of the moratorium before August 22nd, 2005, which is the date the moratorium was imposed?

A. When you say if I have recollection of giving it to him, I don't.

Q. Okay.

A. And I -- and I would imagine that came from our board attorney at the time, if anything was given to him.

Q. And that -- you imagine that as a guess, whether he got notice or not. You didn't give him any; is that correct?

A. I don't recall giving it to him, no, sir.

Q. Did you give Mr. Jordan notice of the moratorium after August 22nd, 2005?

A. I don't recall giving him notice.

Q. Okay. Do you recall giving notice to Dee Denton prior to August 22nd, 2005?

A. No.

Q. Do you recall giving notice to Dee Denton after August the 22nd, 2005?

A. No.

Q. Do you recall giving notice to any representative of SMCDC, Incorporated, before August 22, 2005?

A. No.

Q. Do you recall giving notice to any representative of SMCDC, Incorporated, after August 22nd, 2005?

A. No.

Q. Do you recall giving notice to any representative of Colonial/Jordan Properties before August 22nd, 2005?

A. No.

Q. Do you recall giving any notice of the moratorium to any representative of Colonial/Jordan Properties after August 22nd, 2005?

A. No.

* * *

Q. Okay. And as you sit here today, do you have a present recollection of the moratorium being discussed with Mr. Jordan at the meeting referred to in Exhibit 17?

A. No.

Q. Okay. As you sit here today, do you know if Mr. Jordan ever received notice from anybody about the moratorium?

A. I don't know that he did.

Q. Okay. And that includes both before the moratorium was imposed and after?

A. That's correct.

Q. And does that -- your answer apply to Dee Denton?

A. Yeah. I don't know Dee Denton, and -- but I -- yes, because I don't know Mr. Denton, and I don't know that any notice was given to him.

Q. Okay. And does it apply to any -- does it apply to SMCDC, Incorporated?

A. Yes.

Q. And does it apply to Colonial/Jordan Properties, LLC?

A. Yes.

(Ex. 1, Caughman at 76-79)

Doug Jones confirmed the same in the following testimony:

Q. Okay. And as you sit here today, do you have a present recollection of ever having told Mr. Jordan that you were going to impose a moratorium on the issuance of building permits?

A. No, sir.

Q. Okay. Do you have a present recollection of having ever told Mr. Jordan that a moratorium on the issuance of building permits had been imposed after August 22nd, 2005?

A. No, sir.

Q. Okay. And again, does that answer apply to SMCDC, Incorporated?

A. Yes.

Q. Colonial/Jordan Properties, LLC?

A. Yes, sir.

Q. And Dee Denton?

A. Yes, sir.

(Ex. 1, Jones at 153)

Karl Banks was unaware of notice to Mr. Jordan about the moratorium:

A. I don't recall any conversation with Mark Jordan on the moratorium or anything dealing with Deerfield. It wasn't in my district.

* * *

Q. All right. As you sit here today, do you know whether -- do you have present knowledge of whether notice was given, prior to August 22nd, 2005, that a moratorium might be imposed in Deerfield Subdivision?

A. I don't have any knowledge of any notice one way or the other, no.

Q. Okay. And so as I understand it, you have no present knowledge, as you sit here today, of notice having been given to Mr. Jordan about the possibility of a moratorium having been imposed?

A. I have no information on whether or not he was notified.

Q. Okay. And am I correct, did I understand your testimony to be that you have no knowledge, as you sit here today, of whether Mr. Jordan was provided notice of the moratorium after it was imposed?

A. I have no knowledge of that he was notified, but I'm - - you know, I have no knowledge of whether he was notified. I don't have any information on it.

Q. Yes, sir. And does your answer imply that representatives of SMCDC, Incorporated, whether they had knowledge, do you have present -- let me ask you this. Do you have present knowledge, as you sit here today, whether any representatives of SMCDC, Incorporated, were provided with notice of the possibility of a moratorium being imposed prior to August 22nd, 2005?

A. I don't have knowledge of anybody being notified.

(Ex. 1, Banks at 24, 33-35)

Finally, the Board's attorney, Edmund L. Brunini, summed up the position of the Board concerning Beaumont Homes' claim of notice and extensive discovery of the Madison County Board of Supervisors over the last several years:

Q. And isn't it reasonable to assume that the moratorium would be something that you naturally would have discussed in trying to get Mr. Jordan to financially contribute to the repair of the drainage flooding problem?

Object to the form.

A. That's a fair question. But I don't think that's -- that's a fair question. But I frankly would not reach that conclusion in my own mind, that because there was an underlying predicate there that the moratorium was affecting Mark, that we necessarily discussed it.

As I -- as I've said earlier, I believe -- you know, there are different ways to practice law, and my -- my personal preference is to try to get people to come to some accommodation without throwing brick bats around the room. And it was perfectly reasonable for me to say to you, I didn't stand up on Mark's back and start talking about we're not going to do this for the moratorium or you're going to be stuck with this moratorium, or anything like that. I don't recall saying those kinds of things to Mark.

So if I -- if I did, I'd tell you, Ken. If I -- if I thought we had a big discussion about, you know, you do this, and we'll lift the moratorium; and if you don't do this, we ain't going to lift the moratorium, if those kind of conversations had been had, and I remembered them, I would tell you that. I just don't recall having that kind of a conversation. I think we spent –

Q. Well, did you –

A. -- more time talking about the hydrology and talking about Granberry's mechanisms to try to cure the problem and what might be involved in the cost of it than we did in trying to start pressuring. And I don't recall Mark kicking back on anything like that, either.

* * *

A. I would -- I would say that it is very reasonable that the moratorium issue would have been involved in those discussions. I do not recall a specific statement that we're going to lift this moratorium or that this -- "As you know, Mark, there's a moratorium, and if you'll get -- help us resolve this, we'll get the moratorium off." I just don't recall that happening.

Q. But what was –

A. It would probably have solved this lawsuit and had saved the County a hell of a lot of money a long time ago if I would have been able to say to you -- or anybody been able to say to you that they're absolutely certain that that occurred. Unfortunately, Ken, I -- and the County -- this is a -- way out of proportion to the County's involvement. The cost of this to the County has been very high over this last several years of having to continue to fool with this issue. And if I could say to you that this occurred, it would be a happy day. And I wish I could, I wish I could say that. But I don't just recall specifically being -- that happening, and I can't -- I can't, in, you know, honesty, testify that I know that Mark knew at the time of that meeting that the moratorium was in place. To me, it is unlikely that he would not have known, but I cannot tell you that he knew. I cannot, of my own knowledge, tell you that he knew, and I cannot tell you that during the course of that meeting, he would have known that.

Q. You think -- you think -- you think Jordan knew, because he keeps up with what's going and he's attune --

A. You know, I don't remember, at the time, coming to a conclusion -- or even thereafter, when this thing started, I don't recall coming to the conclusion that I thought Mark knew. You know, looking at all the circumstances and all the facts associated with this, it seems unlikely to me that he wouldn't have known. But I can't -- but that's just not evidentiary. You know, I can't.

(Ex. 1, Brunini at 46-47, 62-63) John Granberry, the engineer chosen by Madison County to subsequently correct the drainage problems in the Deerfield Subdivision, confirmed under oath that he had never visited with Mr. Jordan about drainage issues, moratoriums or building permits. (Ex. 2) As explained by Mr. Brunini, Colonial/Jordan was not the only one that owned empty lots in the affected area, and the issue would not have been necessarily be unique to Mr. Jordan. (Ex. 1, Brunini at 48-49). The drainage problems existed on other properties, and the problematic culvert had been owned by Madison, Mississippi for over a decade.[8]

Understanding that proof of actual notice is absent from this case, Beaumont Homes resorts to a theory of constructive notice as its substitute. *See Higginbothom v. Hill Brothers Construction Co.*, 962 So. 2d 46 (Miss. 2006). Beaumont Homes failed to raise this argument in the court below in response to summary judgment. (C.P. 1671-89) Case law is established that a party may not pursue arguments in the Mississippi Supreme Court for the first time on appeal. *See Fidelity & Deposit Co. of Maryland v. Ralph McKnight & Son Const., Inc.*, 28 So. 3d 1382, (Miss 2010)(Supreme Court does not consider matters not decided by trial court); *Corporate Management, Inc. v. Greene County*, 23 So. 3d 454 (Miss. 2009)(issue must first be presented to trial court before being raised to appellate court); *Mathis v. ERA Franchise Systems, Inc.*, 25 So. 3d 298 (Miss. 2009)(absent extraordinary circumstances, Supreme Court will not consider issues raised for first time on appeal); *Pittman v. Dykes Timber Co., Inc.*, 18 So. 3d 923 (Miss. App. 2009)(appellate courts will not put trial courts in error for issues not first presented to trial court for resolution); *Estate of Johnson v. Adkins* 513 So. 2d 922 (Miss.1987)(party must pursue appeal on same legal theory advanced in trial court); *Estate of Myers v. Myers*, 498 So. 2d 376, 378 (Miss.1986)("One of

[8] Assuming for purposes of argument only that there was some duty under the Contract to make every potential disclosure about the condition of land before its sale, there could be no breach of that duty as a matter of law to support a claim for negligence if the seller was not aware of the condition. Accordingly, this evidence is also sufficient to defeat claims of negligence and negligent misrepresentation if there were any such cause of action outside the terms of the Contract.

the most fundamental and long established rules of law in Mississippi is that the Mississippi Supreme Court will not review matters on appeal that were not raised at the trial court level").

Despite the procedural inadequacy, a theory of constructive notice should fundamentally fail where there was no proof that the minutes were ever made public. Furthermore, the *Higginbothom* Court ultimately refused to apply the theory of constructive notice to a construction contractor in a cause of action against it for negligence because the Court had previously held that the contractor was not liable for the existence of the dangerous condition in the first place. *Higginbothom*, 962 So. 2d at 59. Similarly here, there is no liability for non-disclosure since Contract expressly excluded reliance on representations or conditions of the property outside the terms of the Contract. Colonial/Jordan was not required to make any such disclosures under the Contract, it was not the entity that established the moratorium, and the problematic property and drainage system was not owned by it. Regardless, it would be improper to utilize a theory of constructive notice for the purpose of supplying the "intent to deceive" that is necessary to establish an intentional tort such as fraud. The issue of constructive notice in *Higginbothom* was only discussed in the context of a negligence cause of action. As set forth above, the allegations of negligence are not supportable where the parties adhered to their respective legal duties set forth in their mutual Contract.

Assuming that the theory of constructive notice could be applied solely through the appearance of the moratorium on the Board minutes without notice to the public to establish intentional fraud, and it cannot under Mississippi law, then such notice would equally apply to Beaumont Homes who contracted to purchase the property in question and has its own burden of diligence before making its purchase. To the extent that Beaumont Homes maintains that the minutes themselves serve as constructive notice to Mr. Jordan, then Beaumont Homes also had constructive notice of the moratorium prior to its purchase of the Property, and Beaumont Homes went forward with the transaction subject to notice and waiver. Accordingly, the allegations of

constructive notice are insufficient to change the outcome of this case as it concerns the claims for fraud.

For extra-contractual claims such as fraud, there must be clear and convincing proof, not assumption and speculation. Beaumont Homes never offered anything to the chancery court in which it could conclude there was legally sufficient proof upon which a trier of fact could ever make a clear and convincing finding of fraud. In response to a summary judgment motion, the opposing party has the burden to come forth with affidavits and concrete evidentiary material, like that offered by Appellees in this case, to show there is legally sufficient proof of their claims to proceed. *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985)(non-movant, in order to avoid summary judgment, must produce "probative evidence legally sufficient" to show genuine issue of material fact). Beaumont Homes simply did not do anything but speculate during the entire discovery process as to anyone's knowledge of the moratorium. Knowledge was specifically denied, and no one involved including those who issued the moratorium could ever say Mr. Jordan was actually informed. Speculation is legally insufficient to defeat summary judgment, especially in the face of an elevated burden of proof in the case of proving fraud. *See Herrington v. Leaf River Forest Products*, 733 So. 2d 774, 777 (Miss. 1999)(circumstantial evidence may be sufficient only if it places particular issue beyond conjecture). Considering that this same chancellor would be the ultimate trier of fact, the chancellor was doubly correct in her determination that there was not enough evidence to move the allegations beyond speculation so as to ever support a finding of fraud. Beaumont Homes offered no basis in the record to conclude that the decision by this chancellor would be any different should the case be remanded to her again to sit as the trier of fact hearing the same evidence once again. Because Beaumont Homes failed to meet its burden to provide legally sufficient proof of a representation made by anyone prior to the sale that was known to be false with an intent to deceive,

the extra-contractual claims of fraud failed as a matter of law and summary judgment should be affirmed.

V. There was no breach of the covenant of good faith and fair dealing in the absence of any knowledge of the moratorium.

The Mississippi Supreme Court has recognized that every contract contains an implied covenant of good faith and fair dealing in the parties' performance and enforcement. *Morris v. Macione,* 546 So.2d 969, 971 (Miss.1989). Bad faith requires a showing of conscious wrongdoing and requires more than bad judgment or negligence. *Univ. of Southern Mississippi v. Williams*, 891 So. 2d 160, 170-71 (Miss. 2004).

> "Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness, or reasonableness." *Cenac v. Murry,* 609 So.2d 1257, 1272 (Miss.1992). Bad faith, in turn, requires a showing of more than bad judgment or negligence; rather, "bad faith" implies some conscious wrongdoing "because of dishonest purpose or moral obliquity. *Bailey v. Bailey,* 724 So.2d 335, 338 (Miss.1998).

Univ. of Southern Mississippi, 891 So. 2d at 170-71.

Colonial/Jordan was the only party to the Contract in question, and thus, the only party with such a duty. Despite the Contract language precluding reliance on matters outside the contract, Beaumont Homes failed to provide evidence that Colonial/Jordan, or anyone on its behalf, committed conscious wrongdoing or bad faith, for the same reasons discussed in the preceding sections of this Brief. The allegation that Colonial/Jordan had knowledge of the moratorium is mere speculation, and Beaumont Homes never bothered to speak to anyone, including the seller, about the condition of the property before its agreement to purchase the property. Although the circumstances of this case may have been unfortunate for Beaumont Homes, it does not necessarily mean that someone other than Beaumont Homes should be blamed. Beaumont Homes was a sophisticated developer in the business of purchasing, building and flipping real estate until the real estate crash. Conducting its own due diligence, such as checking on a building permit prior to purchase, would

have prevented this entire situation. As to imposition of the moratorium itself, that was beyond the control of any party to this lawsuit. Based on the record in the court below, the claims for breach of the duty of good faith and fair dealing must fail as a matter of law.

VI. No fiduciary relationship existed in this arms-length transaction.

The existence of a fiduciary duty must arise before a breach of that duty may result. *Merchants & Planters Bank of Raymond v. Williamson*, 691 So.2d 398 (Miss. 1997). Where a complaint alleges a breach of fiduciary duty, it is necessary to state with particularity the facts which purportedly created the duty that was breached, so that the court could determine as a matter of law whether there was such a duty. *Wilbourn v. Stennett, Wilkinson & Ward,* 687 So.2d 1205, 1216 (Miss. 1996). A fiduciary relationship may exist only under the following circumstances:

> (1) the activities of the parties went beyond operating on their own behalf, and the activities were for the benefit of both; (2) where the parties had a common interest and profit from the activities of the other; (3) where the parties repose trust in one another; and (4) where one party has dominion or control over the other.

University Nursing Associates, PLLC v. Phillips, 842 So.2d 1270 (Miss. 2003). There were no such allegations or evidence in the record here so as to give rise to a fiduciary duty under Mississippi law. In response to summary judgment, Beaumont Homes alleged only that it was relying on Colonial/Jordan and its agents for "guidance." (C.P. 1687) As established by the Contract, Ms. Denton was the agent of the seller Colonial/Jordan. There are no facts establishing any common interest, joint venture, or control by Mr. Jordan over the purchase decision. This case involved nothing more than an arms-length transaction between two sophisticated business entities. There is no fiduciary relationship in an arms-length transaction. *See Burley v. Homeowners Warranty Co., et al*, 773 F. Supp. 844, 859 (S.D. Miss. 1990) (citing *Davidson v. State Farm Fire & Cas. Co.*, 641 F. Supp. 503, 514 n.8 (N.D. Miss. 1986). Accordingly, the claim for breach of fiduciary duty is without merit and was appropriately dismissed on summary judgment.

VII. Plaintiff failed to establish proof of damages as a matter of law.

According to its Complaint, Beaumont Homes sought rescission of the Contract, return of the purchase price, consequential damages and attorney's fees. However, rescission was not possible because Beaumont Homes no longer owned the Property - it was foreclosed and sold at auction. Although the moratorium was lifted in early 2007, Beaumont Homes never built anything and ultimately allowed the property to foreclose in 2008. With rescission unavailable, the only remaining measure of damages available in this civil action is loss of the benefit of the bargain. *Theobald v. Nosser*, 752 So. 2d 1036, 1042 (Miss. 1999) (injured party's damages are measured by his expectation interest and are intended to give him the benefit of the bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in absent the injury).

In response to the summary judgment motions, Beaumont Homes offered no competent witness or proof of any differential values to establish loss of the benefit of the bargain. With the moratorium having been temporary and the property sold with no home ever constructed, Mr. Oakes' opinion alone as to what he might have made on resale of a constructed home is mere speculation and would be reversible as a matter of law. *See Frierson v. Delta Outdoor, Inc.*, 794 So. 2d 220, 226 (Miss. 2001)(trial court award of damages reversed as too speculative where only evidence of measure of damages was the non-breaching company's speculative testimony). Without proof of damages, no cause of action asserted herein may prevail.

VIII. The Chancellor maintained the jurisdiction and discretion to enter its award of a portion of Colonial/Jordan's attorneys' fees under the terms of the Contract.

On June 22, 2009, the court entered its Order Granting Summary Judgment to Defendants. (C.P. 2060) On June 29, 2009, Colonial/Jordan filed a Motion for Attorneys' Fees based on the following language in the Contract:

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

(C.P. 2065-2090) (C.P. Supp. Vol. 1 at 6) Colonial/Jordan's attorneys' fees and expenses totaled $43,854.20. (C.P. Supp. Vol. 1 at 44-46)

On July 16, 2009, Beaumont Homes filed a Notice of Appeal. (C.P. 2091) On January 4, 2010, a hearing was held wherein the court ruled that the entire lawsuit centered around performance of the Contract, and therefore, Colonial/Jordan as the prevailing party was entitled to its attorneys' fees. (C.P. Supp. Vol. 1 at 66-70) On March 1, 2010, the court entered its Order Granting Defendant Colonial/Jordan Properties, LLC's Motion for Attorney's Fees. (C.P. Supp. Vol. 1 at 50) Colonial/Jordan was instructed to submit an additional itemized bill to which Beaumont Homes was allowed the opportunity to object. *Id.* The Affidavit of Matthew Vanderloo had been previously submitted as an exhibit to the original motion, establishing fees and expenses totaling $43,854.20. (C.P. Supp. Vol. 1 at 44-46) On May 6, 2010, the court allowed Colonial/Jordan attorneys' fees in the amount of $5,000.00. (C.P. Supp. Vol. 1 at 97) On May 17, 2010, Beaumont Homes filed a second Notice of Appeal. (C.P. Supp. Vol. 1 at 101)

By its original Notice of Appeal, Beaumont Homes did not divest the chancery court of jurisdiction to determine the issue of attorneys' fees. Mississippi Rule of Appellate Procedure 4(d) speaks for itself concerning the procedural handling of post-judgment motions such as the one for attorneys' fees:

> (d) **Post-trial Motions in Civil Cases**. If any party files a timely motion of a type specified immediately below the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Mississippi Rules of Civil Procedure (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of facts, whether or not granting the motion would alter the judgment; (3) under rule 59 to alter or amend the judgment; (4) under rule 59 for new trial; or (5) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the

> judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

A motion that seeks to amend the judgment of the court in any manner filed within ten (10) days of the entry of the court's entry of judgment is timely, and the filing of a notice of appeal by the opposing party before its disposition does not divest the court of jurisdiction to make a determination as to that motion. *See Capital One Services, Inc. v. J.C. Rawls*, 904 So. 2d 1010 (Miss. 2004); *see also Wright v. White*, 693 So. 2d 898 (Miss. 1997)(court divested of jurisdiction only when post-judgment motion is untimely).

The court has the discretion to award attorneys' fees if allowed by statute or contract. *Warren v. Derivaux*, 996 So. 2d 729 (Miss. 2008). A court should apply reasonable interpretation to any contract provision over which there is disagreement as to applicability or an ambiguity under the particular circumstances of a case. *Lehamn Roberts v. State Hwy Comm'n*, 673 So. 2d 742, 744 (Miss. 1996). Here, the contract permitted the award of attorneys' fees if either party initiated litigation and it concerned performance of the contract. (C.P. Supp. Vol. 1 at 6) Whether or not the ruling against Beaumont constitutes "fault" as contemplated in the Contract or whether or not there could ever be a ruling of "fault" in a breach of contract action, Colonial/Jordan was nevertheless required to file its own motion for summary judgment to ensure performance of the contract, and it was the prevailing party. Under these circumstances, the chancellor's decision to award only a small portion of the requested fees was a reasonable interpretation, even in the event of an ambiguity under the circumstances of this case. Accordingly, the award of a portion of attorneys' fees to Colonial/Jordan should be affirmed.

CONCLUSION

The transaction in this case was governed solely by a contract between two sophisticated real estate developers. The parties agreed they were not relying on any matters outside the terms of the

Contract or any guarantees about the condition of the property. The subject property was not shown to have flooding problems, there were no discussions about the condition of the property, and no one was ever made aware of a temporary moratorium imposed by the Madison County Board of Supervisors on building permits. Pursuant to the terms of the contract and the facts of this case, the chancery court properly entered summary judgment.

WHEREFORE, the judgment of the Chancery Court of Madison County, Mississippi should be AFFIRMED.

THIS the 27th day of January, 2011.

COLONIAL/JORDAN PROPERTIES, LLC,
SMCDC, INC., MARK S. JORDAN, AND
DEE C. DENTON

By: _____
Samuel L. Anderson

OF COUNSEL:
Samuel L. Anderson (MSB No. [redacted]
Clyde X. Copeland, III (MSB No. [redacted]
Matthew W. Vanderloo (MSB No. [redacted]
HARRIS JERNIGAN & GENO, PLLC
587 Highland Colony Parkway
Post Office Box 3380
Ridgeland, Mississippi 39157
(601) 427-0048
(601) 427-0050

CERTIFICATE OF SERVICE

I hereby certify that I have this day delivered via U.S. Mail a true and correct copy of the attached and foregoing document to the following person:

Ken R. Adcock, Esq.
Adcock & Morrison, PLLC
P.O. Box 3308
Ridgeland, MS 39158

Honorable Cynthia L. Brewer
Madison Chancery Court
Post Office Box 404
Canton, Mississippi

THIS the 27th day of January, 2011.

Samuel L. Anderson