IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

2011-CA-01049

XIAOYAN LI "SHANNON" MONTGOMERY **APPELLANT**

VERSUS

LINDA A. STRIBLING **APPELLEE**

BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF HANCOCK COUNTY

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies pursuant to Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure that the following persons have an interest in the outcome of the case. These representations are made in of that the Justices of this Court may evaluate possible disqualification or recusal.

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Honorable John C. Gargiulo
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SO CERTIFIED this the 22nd day of November, 2011.

James L. Gray, attorney for Appellant

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STATEMENT OF THE CASE

On May 20, 2011, a Judgment was entered by the Circuit Court of Hancock County, Mississippi denying the Appellant, Shannon Montgomery, the relief requested in her Complaint against the remaining defendant and the Appellee herein, Linda A. Stribling, doing business as Elite Modular Structures. Previously, a summary judgment had been granted to Montgomery on her claims against defendant Russell Edward Benet doing business as Lagniappe Construction & Real Estate Consulting, LLC. The other co-defendant, Elite Modular Structures, LLC was voluntarily dismissed upon the motion of Montgomery at the commencement of the trial. Linda A. Stribling was the only remaining defendant.

In the May 20, 2011 Judgment written by Judge Gargiulo, he denied Montgomery her claims against Stribling upon the Judge's finding that co-defendant, Russell Edward Benet, was not the agent of Linda A. Stribling. Judge Garguilo found that "Stribling should not be responsible for representations and acts of Benet." Judge Gargiulo could not have made this findings had he deemed as conclusively established the matters stated in the Requests for Admissions propounded by Montgomery to Stribling.

On November 10, 2009, Montgomery propounded to Stribling certain Requests for Admissions pursuant to Rule 36 of the Mississippi Rules of Civil Procedure. Stribling did not respond to these until June 9, 2010, the day of the hearing on Montgomery's Motion for Summary Judgment and some seven months after she received the requests. At no time before the trial of this case on February 8, 2011, did Stribling file a motion to withdraw her admissions as required by Rule 36(b). When counsel for Montgomery moved at the commencement of the trial for the Court to establish these matters as uncontested facts, Judge Gargiulo denied her Motion. This decision by Judge Gargiulo is obviously contrary to the Mississippi Rules of Civil

Procedure, and the effect of his failure to have these Requests for Admissions deemed admitted and conclusively established facts made his finding of no agency relationship between Stribling and Benet erroneous; thus necessitating a reversal of his Judgment. Further, this Court should render judgment in favor of the Appellant, Shannon Montgomery.

Specifically, Requests for Admission No. 10 propounded by Montgomery to Stribling, states that "Russell Edward Benet appeared to have authority to act on behalf of "Elite Modular Structures or Linda A. Stribling concerning the construction of the property of Shannon Montgomery on Highway 603 in Bay St. Louis." This should have been a conclusively established fact, and it is contrary to Judge Gargiulo's finding that Russell Edward Benet was not the agent of Linda A. Stribling.

With the other Requests for Admissions deemed to be admitted as conclusively established facts, together with the undisputed evidence offered at the trail of this matter, Montgomery is entitled to a Judgment in her favor on her breach of contract claim. Also, she proved damages both through the admissions and through evidence presented at the trial of this matter in the amount of $107,077.64. This Court should reverse the decision of the trial judge and render a judgment in favor of Montgomery against Linda A. Stribling in the amount of $107,077.64 plus interest to be determined by this Court. Further, Montgomery proved all the elements of fraud through a preponderance of the evidence at trial. This Court should render a Judgment in her favor on her fraud claim as well, and in addition to her economic damages, award to Montgomery reasonable compensation for her emotional distress which she proved at the trial of this matter.

SUMMARY OF THE ARGUMENT

This case is a breach of contract and a fraud case filed by the Appellant, Shannon Montgomery, against three defendants, Russell Edward Benet, Elite Modular Structures, LLC and the Appellee, Linda A. Stribling. Montgomery obtained a Summary Judgment against defendant Benet, and voluntarily had Elite Modular Structures, LLC dismissed because the LLC was not formed until after the events that form the basis of Montgomery's claim. Stribling admitted that she used Elite Modular Structures as a trade name under which she had a contracting business prior to her forming the LLC.

Montgomery propounded pursuant to Rule 36 M.R.C.P. certain Requests for Admissions to Stribling. Stribling did not respond to the Requests for Admissions until more than seven months after they were propounded to her and only a day before the hearing of the Motion for Summary Judgment filed by Montgomery seeking summary judgment against Stribling. These Requests for Admissions are deemed to be admitted 30 days after they are propounded if no response is filed. Stribling never filed a motion with the trial court seeking to withdraw her admissions for her failure to timely file her answers or responses to such Requests for Admissions as allowed by Rule 36(b) M.R.C.P. Therefore, the trial judge committed reversible error by denying Montgomery's motion at the commencement of the trial to have these admissions conclusively established as facts for the purposes of the trial.

In the written Judgment signed by Judge Gargiulo on May 19, 2011, entered by the Clerk on May 20, 2011, he found as fact that "Benet had no actual or apparent authority to act on behalf of Stribling." However, in the Request for Admissions No. 10 propounded to Stribling that should be deemed as a conclusively established fact, it states that " Russell Edward Benet appeared to have authority to act on behalf of Elite Modular Structures or Linda A. Stribling

concerning the cnstruction on the property of Shannon Montgomery on Highway 603 in Bay St. Louis." Further, the Requests for Admission No. 16 established as fact that 'Elite Modular Structures' is a trade name used by Linda A. Stribling in her construction business for which she was the sole proprietor, and was used by her until the formation of the limited liability company in December of 2008. Request for Admission No. 6 established the fact that "Linda A Stribling had sole control and authority over the acts and contract made by Elite Modular Structures, LLC from May 2008 through October 2008." Finally, Request for Admission No. 2 established the fact that "Elite Modular Structures, LLC" agreed to act as general contractor for the benefit of the Plaintiff for the construction of an office and apartments at 10296 Highway 603 in Bay St. Louis, Mississippi."

Another established fact is that "A contract existed (whether written, oral or implied) between Elite Modular Structures and Shannon Montgomery for the construction of an office and apartmetns on her property at 10296 Highway 603 in Bay St. Louis, Mississippi." (RFA #12) Finally, it is an established fact that Shannon Montgomery paid to Linda A. Stribling, her son, Lee Stribling, Elite Modular Structures or Russell Benet a total of $84,929.00. (RFA #13) At the trial, there was no contradictory evidence to the fact that nothing was constructed on Montgomery's property except the erection of a few poles that were "out of line" and the pouring of a slab that was of such poor workmanship that it would have to be torn up, the poles re-set and the slab poured again. Mongomery's calculations of damages totaling $107,077.64 went unchallenged at the trial, and these damages were amply supported by the testimony and documentary evidence admitted at the trial.

The trial court's refusal to deem as conclusively established facts the 16 Requests for Admissions propounded to Stribling which were not timely answered and for which she never

made a motion to withdraw her admissions is reversible error. If those facts are established, then all the elements of Montgomery's claims are established and she is entitled to a Judgment against Stribling for $107,077.64 as a matter of law. This Court should reverse the Judgment of the trial court and enter a Judgment in favor of Xiaoyan Li "Shannon" Montgomery against Linda A. Stribling in the amount of $107,077.64, plus legal interest thereon, together with reasonable compensation for her emotional distress as part of her fraud claim.

ARGUMENT

Procedural Background

On April 29, 2009 the Appellant, Xiaoyan Li "Shannon" Motngomery filed her Complaint for Damages against three defendants, Russell Edward Benet, Elite Modular Structures, LLC and the Appellee, Linda A. Stribling. (R.E. 10-27) Russell Edward Benet filed a pro se answer on July 13, 2003 and failed to deny the averments in the Complaint.(C.P. 21-26) Linda A. Stribling and Elite Modular Structures served an Answer and Affirmative Defenses, pro se, upon the attorney for Montgomery on July 20, 2009, but these Answers and Affirmative Defenses were not filed with the Clerk of the Circuit Court until March 30, 2010. (C.P. 80-103)

On November 13, 2009, Montgomery filed a Notice of Service of Discovery upon defendant Linda A. Stribling and defendant Elite Modular Structures, LLC certifying that she had served Interrogatories, Requests for Production of Documents and Requests for Admissions upon the defendants on November 10, 2009. (R.E. 28-29)

On March 30, 2010, Montgomery filed a separate Motion for Summary Judgment against all three defendants. (C.P. 104-219) She filed a Memorandum of Law in Support of her Motions for Summary Judgment on the same date and served both the Motions and the Memorandum upon the defendants at the addresses given on their Answers. (C.P. 222-232) Montgomery noticed a hearing on the three summary judgment motions for June 10, 2010 and filed a copy of the Notice of Hearing on March 30, 2010. (C.P. R.E. 41-42)

On June 10, 2010, a hearing was held before Circuit Judge Gargiulo on the three summary judgment motions filed by Montgomery. Judge Gargiulo granted summary judgment against defendant Russell Edward Benet who failed to appear at the hearing or file any response to the Motion for Summary Judgment. Said Summary Judgment was signed by Judge Gargiulo

on July 16, 2010 and was filed with the Clerk of July 19, 2010. (C.P. 249-250) Judge Gargiulo denied summary judgment against defendants Elite Modular Structures, LLC and Linda A. Stribling, and his Order Denying Summary Judgment was signed on July 16, 2010 and filed with the Clerk on July 19, 2010. (C.P. 251-252)

The trial of this matter was set for the week of February 7, 2011 before Judge Gargiulo. Preparing for a jury trial, counsel for Montgomery filed a Motion for Peremptory Instruction on February 7, 2011 and served the motion to Linda A. Stribling on the same day. (R.E. 46-48) On February 7, by agreement of the parties, the matter was set for the next day, February 8, 2011 for trial without a jury. At the commencement of the trial, by verbal motion of counsel for Montgomery, defendant Elite Modular Structures, LLC was dismissed as a defendant because said LLC was not formed until December of 2008, some two months after the events that form the factual basis of the plaintiff's lawsuit. (Transcript - pp. 10-13)

Further, at the commencement of the trial, counsel for Montgomery moved to convert his Motion for Peremptory Instruction to a motion to have the matters set forth in Montgomery's Motion conclusively established as facts based upon certain admissions in her pleadings and her failure to timely respond to the Requests for Admissions Propounded to her in November of 2009, and her failure to file or otherwise make any motion to withdraw such admissions. (R.E. 62-65) The verbal motion by counsel for Montgomery was denied by Judge Gargiulo without explanation. (R.E. 65-66)

A Judgment was signed by Judge Gargiulo on May 19, 2011 and filed with the Clerk of the Circuit Court on May 20, 2011. (R.E. 3-8) Judge Gargiulo made certain findings of fact and conclusions of law in the Judgment. In short, he found in favor of defendant Linda A. Stribling, on all the claims asserted against by the plaintiff, Shannon Montgomery.

On May 31, 2011, Shannon Montgomery filed her Motion to Reconsider and Alter Judgment seeking to correct the Court's error in not deeming the Requests for Admissions as conclusively established facts, and thus finding an agency relationship existed between Russell Benet and Linda A. Stribling. (R.E. 55-59) A Memorandum of Law in Support of Plaintiff's Motion to Reconsider and Alter Judgment was also filed on May 31, 2011. (C.P. 316-341) Linda A Stribling filed her Response to the Motion to Reconsider and Alter Judgment on June 16, 2011. (C.P. 343-344) In her response, Stribling erroneously makes the statement that "It is perfectly in the discretion of the court to allow Defendants to answer late."

On June 23, 2011, Judge Gargiulo denied Montgomery's Motion to Reconsider and Alter Judgment without any explanation. (R.E. 9) This Order was filed with the Clerk of the Circuit Court on June 24, 2011. On July 18, 2011, Shannon Montgomery filed her Notice of Appeal, appealing the Judgment of the Court on May 20, 2011 and the Order Denying the Plaintiff's Motion to Reconsider and Alter Judgment entered on June 24, 2011. (R.E. 60-61)

Summary of the Law

Standard of Review

A review of the Court's interpretation and application of the law is de novo. *Boyd v. Boyd*, 2011 Miss.App. LEXIS 619 (citing *Reed v. Fair*, 56 So.3d 577, 580 (Miss.App. 2010)) A trial court's denials of a Rule 36(b) motion is within the sound discretion of the trial court, and will not be overturned absent an abuse of discretion. Upon review, the Court is likely to affirm the trial court's enforcement of Rule 36 according to its terms if no justifiable excuse or explanation was offered for the default. *Langley, v. Miles*, 956 So.2d 970, 973 (Miss.App. 2006) However, stated conversely, the refusal to enforce Rule 36 is not in the trial court's discretion, and one must only show misinterpretation and application of the rule.

Rule 36 M.R.C.P.

Rule 36 of the Mississippi Rules of Civil Procedure allows a party to propound certain Requests for Admissions of fact. The rule clearly provides that "The matter is admitted, unless, within 30 days or within such shorter or longer time as the court may allow, the party to whom the request is directed served upon the party requesting the admission a written answer or objection. . . ." Subsection (b) of Rule 36 provides a procedure whereby a party may withdraw any such admission. It reads "Any matter admitted under this rule is conclusively established unless the court **on motion** permits withdrawal or amendment of the admission." (emphasis added)

The case of *Boyd v. Boyd*, 2011 LEXIS 619, is exactly on point with the issue in this case. In the *Boyd* decision, the Court of Appeals was faced with a case in which one of the parties was propounded certain requests of admission on April 16, 2008, and failed to answer within the 30 days. It was not until the second day of the trial of the matter that the party to whom such requests for admissions were propounded moved for an extension of time to answer the requests. The trial court properly denied this party's motion citing the fact that the party had failed to file a motion to withdraw or amend the request of admissions. The Court of Appeals upheld the trial court's decision. The Court of Appeals wrote that "Lisa filed her responses to Matthew's requests for admissions one year after they were due. She failed to request a withdrawal or amendment of the admissions prior to trial, nor did she provide the chancery court with any excuse to justify the dilatory response." (*Id.*) The Court of Appeals went on to write "that any difficulty with the case could easily have been eliminated if a motion to withdraw or amend the answers had been filed pursuant to Rule 36(b) and if there were justifiable excuse." (*Id.*)

The Mississippi Supreme Court has routinely upheld the application of Rule 36 in having

such admissions deemed conclusively establishing issues that are subject to requests for admissions. To avoid having a fact deem admitted, the requests for admissions must be answered in 30 days. *Scoggins v. Baptist Memorial Hospital-DeSoto*, 967 So.2d 646, 648 (Miss. 2007) The mechanism for having untimely responses not to be deemed established facts for trial are in the rule and must be followed. *(Scoggins*, p. 649) Any matter admitted under this rule [36] is conclusively established unless the court **on motion** permits withdrawal or amendment of the admission. (emphasis added) *DeBlanc v. Stancil*, 814 So.2d 796, 799 (Miss. 2002) If the party fails to communicate to the Court their reason for the delay in responding to the requests for admissions, then no compelling circumstances exist in which the court should allow the untimely reply to the admission. *Earwood v. Reeves*, 798 So.2d 508, 517 (Miss. 2001)

In the case of *Triangle Construction Co., Inc. v. Foshee Construction Co.*, 976 So.2d 978, 981 (Miss.App. 2008), the Court of Appeals upheld the trial court's use of discretion in denying Triangles request to withdraw the deemed admitted requests for admission because such motion was filed after Foshee had moved for summary judgment. (*Id.* - p. 981) The Court of Appeals went on to write that "When a party is in default under Rule 36(a), the trial court and the requesting party should not have to wait indefinitely for the defaulter to serve the responses, to file a motion for an extension of time pursuant to Rule 6(b)(2), to file a Rule 36(b) motion to withdraw, or to take other action to attempt to rectify the default." *(Id.* p. 982)

Principal and Agent

Under the general law of agency, knowledge acquired by an agent when transacting his principal's business will be imputed to his principal although not communicated to him, in the absence of a limitation on the agent's authority to the contrary, known to the person with whom the agent deals. *Lane v. Oustalet*, 850 So.2d 1143, 1148 (Miss.App. 2002)

The power of an agent to bind his principal is not limited to the authority actually conferred upon the agent, but the principal is bound if the conduct of the principal is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe the agent to have the power he assumes to have. *Johnson v. Rao*, 952 So.2d 151, 154-155 (Miss. 2007) There are three essential elements to apparent authority: (1) acts and conduct of the principal; (2) reliance thereon by a third person, and (3) a change in position by a third person to his detriment. (*Id.*- p. 155)

Where the relationship of the principal and agent exists, if the principal places his agent in a position where he appears, with reasonable certainty, to be acting for the principal, and his acts are within the apparent scope of his authority, such acts bind the principal. (*Bailey v. Worton*, 752 So.2d 470, 476 (Miss.App. 1999)

Breach of Contract

A valid contract must include the following essential elements: (1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation. *Hunt v. Coker*, 741 So.2d 1011, 1015 (Miss.App. 1999) citing *Lanier v. State*, 635 So.2d 813, 826 (Miss. 1994)

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possession by members of that profession or trade in good standing in similar communities. *Gilmore Company v. Garrett*, 582 So.2d 387, 391-392 (Miss. 1991)

As a general rule, a party to a contract may break it, by renouncing his liabilities under it; by rendering performance of his promise impossible; or by totally partially failing to perform his

agreement or undertaking. When either party to a contract fails to perform any of his terms, the contract has been broken. *Matheney v. McClain*, 161 So.2d 516, 519-520 (Miss. 1964) Termination of a contract is permitted only for a material breach. A breach is material when there is a failure to perform a substantial part of the contract or one of more of its essential terms or conditions, or if there is such a breach as substantially defeats its purpose. *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.*, 525 So.2d 746, 756 (Miss. 1987)

Damages for Breach of Contract

Parties that agree to contracts have both rights and obligations under that contract. The non-defaulting party is entitled to be put in the position he or she would have occupied had there been no breach. *Rogers v. Rogers*, 662 So.2d 1111, 1114 (Miss. 1995) citing *Eastland v. Gregory*, 530 So.2d 172, 174 (Miss. 1988)

Fraudulent Misrepresentation

To establish fraudulent misrepresentation, the plaintiff must prove (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity, or ignorance of the truth; (4) the speaker's intent that it should be acted on by the hearer and in a manner reasonably contemplated; (5) the hearer's ignorance of its falsity; (6) the hearer's reliance on its truth and his right to rely thereon; and (7) the hearer's consequent and proximate injury. *Williams v. Great American Life Ins. Co.*, 282 F.Supp.2d 496, 499 (N.D.Miss. 2003) When a fraudulent misrepresentation is made by an agent, the principal is bound thereby. (*Johnson v. Rao*, p. 154)

Analysis of the Issues

Facts Established Pursuant to Rule 36 M.R.C.P.

On November 10, 2009, the Appellant, Shannon Montgomery, propounded certain discovery to the Appellee, Linda A. Stribling, among which were certain Requests for Admission

propounded pursuant to Rule 36 of the Mississippi Rules of Civil Procedure. (R.E. 37-40) A Notice of Service of Discovery was filed with the Clerk on November 13, 2009. (R.E. 28-29) Stribling did not respond to these Requests for Admissions until June 9, 2010, the day before the hearing set for Montgomery's Motion for Summary Judgement (R.E. 43-45) After 30 days, said Requests for Admission are deemed admitted and are deemed conclusively established facts. At no time did Stribling file with the Court any motion to withdraw her admissions for her failure to answer or otherwise respond to them within the 30 days allowed under Rule 36. Stribling never offered the Court any reason or cause for not timely responding.

On February 7, 2011, the day before the trial, Montgomery filed a Motion for Peremptory Instruction to have the facts deemed conclusively established because of Stribling's failure to timely respond to the Requests for Admissions or to file a motion to withdraw her admissions as provided under Rule 36(b). (R.E. 46-48) At the commencement of the trial, because the parties had agreed to try the case without a jury, counsel for Montgomery moved to convert his Motion for Peremptory Instruction to a motion to find as conclusively established the facts established by Stribling's failure to timely answer the Requests for Admission. (R.E. 62-65) Montgomery's counsel further moved this Court to not allow any evidence or testimony contrary to the facts deemed admitted and conclusively established. (R.E. 62-65) When asked to respond to Montgomery's motion, Stribling only responded that "at the time I received those documents I was not represented, did not know the rules, and did the best I could later on when I could not obtain counsel." (R.E. 64) The fact that a person is pro se and unfamiliar with the Mississippi Rules of Civil procedure is not good cause to not hold such a person to the same rules as those imposed on persons who are represented. Judge Gargiulo denied the motions made by counsel for Montgomery and stated on the record that "Based upon the evidence before the court at this

time and construing the rules to achieve fairness and to avoid expense or delay, I am going to deny the motion, and the court would prefer to hear the anticipated evidence pursuant to the rules of evidence and through testimony." (R.E. 65)

The trial court's decision to deny Montgomery's motion to have the facts deemed conclusively established by Stribling's untimely responses to Requests for Admissions is reversible error. Rule 36, as interpreted by this Court and the Mississippi Supreme Court cited in the Summary of the Law given above, leaves no discretion with the trial to not have these Requests for Admissions conclusively established as facts. The Court's discretion is to allow the withdrawal of such admissions **upon motion** of the party to whom these Requests for Admissions were propounded. Further, since no motion to withdraw admissions was filed, counsel for Montgomery prepared for trial believing he did not need any evidence to prove these conclusively established facts. The denial of her motion prejudiced the case of Montgomery.

The most critical of these conclusively established facts is Request for Admission No. 7. (R.E. 38) The fact that "Russell Edward Benet appeared to have authority to act on behalf of Elite Modular Structures or you concerning the construction on the property of Shannon Montgomery on Highway 603 in Bay St. Louis", if accepted as a conclusively established fact by the court, would have made the court's rationale for its decision impossible. In the court's Judgment in this case, Judge Garguilo found that "there is no indication Benet had actual or apparent authority to act on behalf of Stribling. (R.E. 7) Judge Gargiulo went on to write that "Stribling should not be responsible for the representations and acts of Benet." (R.E. 8) Therefore, the entire rationale for the court's decision to deny Montgomery a judgment against Stribling rests on the court's finding that no agency relationship existed between Benet and Stribling. This is clearly erroneous if Rule 36 is enforced. Therefore, the judgment of the court

should be reversed and rendered in favor of Montgomery based upon this error alone.

Breach of Contract claim

Montgomery's Request for Admission No. 9 established conclusively as fact that a contract existed between Elite Modular Structures, LLC and Shannon Montgomery for the construction of an office and apartment on her property at 10295 Highway 503 in Bay St. Louis, Mississippi. (R.E. 38) Even though the LLC was dismissed as a defendant, Stribling admitted to the court at the commencement of the trial that even though the LLC was not formed until December of 2008, she used the name of 'Elite Modular Structures' as a trade name for her sole proprietorship business at the time she obtained a permit for the construction on the property of Montgomery. (R.E. 68-69) Stribling stated to the court that "It was in the process of being set up when I became involved in Ms. Montgomery's project, and we issued her contract in that name and proceeded under that manner." (R.E. 69) Therefore, no proof of the existence of the contract between Stribling and Montgomery was needed. Further, at the trial Montgomery testified that she understood that Stribling was the contractor and that Benet worked for her. (R.E. 71)

The fact that the building was never completed, and that the only work done on Montgomery's property was the erecting of some poles and the pouring of a slab was not contradicted at the trial. It was also not contradicted at the trial that the work done was of such poor workmanship that it would have to be completely redone. Further, this fact was conclusively established by Request for Admission No. 12. (R.E. 39) It was also uncontradicted at the trial that the economic damages suffered by Montgomery, and the costs of putting her in the same position had not breach of contract occurred came to $107,077.64. (Trial Exh. 16 / R.E. 75) The trial court did not assess any damages for emotional distress. Therefore, Montgomery is entitled to a judgment in her favor against Stribling in the amount of $107,077.64.

Fraudulent Misrepresentation claim

All the elements of fraudulent misrepresentation were established at the trial of this matter by the testimony of Montgomery. Stribling offered no evidence to contradict the fact that Benet made material misrepresentations to Montgomery in order to obtain some $78,100.00 with no intent on performing the contract. The trial court did not address this issue because all the misrepresentations were made by Benet, and the court found that he was not the agent of Stribling. However, because the fact that he was her agent was conclusively established by Request for Admission No. 7 which by Rule 36 is deemed admitted, Stribling is liable for the fraudulent statements made by Benet to Montgomery, and Montgomery is entitled to compensation for not only the $107,077.64 in economic damages, but also reasonable compensation for her emotional distress. Therefore, this Court should reverse the decision of the trial court and find for Montgomery on her claim of fraudulent misrepresentation and assess against Stribling reasonable damages for Montgomery's emotional distress which was established at the trial by the testimony of Montgomery. (R.E. 72-74)

CONCLUSION

The trial court in this matter erroneously denied Montgomery's motion to have the matters set forth in her Requests for Admissions propounded to Stribling conclusively established as facts for the purposes of the trial. This is reversible error. Stribling did not answer or otherwise respond to the Requests for Admissions until almost 7 months after these Requests were propounded to her and only one day before the hearing on the Motion for Summary Judgment filed by Montgomery against her. Rule 36 of the Mississippi Rules of Civil Procedure clearly states that such matters are deemed conclusively established if the responses are not served within 30 days after they are propounded to a party. Stribling never availed herself of the possible relief afforded to her by Rule 36(b) by filing any motion to withdraw such admissions. Mississippi jurisprudence as outlined hereinabove, clearly states that these matters should be conclusively established as fact by the trial court, and the trial judge has no discretion to ignore the untimely responses to the Requests for Admisssions. The trial court's discretion can only be exercised upon a motion to withdraw such admissions, and upon a showing of that the merits of the action will be subserved and that the party who obtained the admissions will not be prejudiced by alowing the withdrawal of the admissions. Clearly, Montgomery was prejudiced by the trial court's denial of her motion to have these matters conclusively established as fact because her trial counsel did not prepare to prove these facts relying upon the application of Rule 36, and there being no motion filed to allow the withdrawal of such admissions.

In view of the above, the rationale written by the trial court for its Judgment stating that Benet was not the agent for Stribling is in direct opposition to the fact that such agency was established by Request for Admission No. 7. Therefore, the Judgment of the trial court and the trial court's denial of Montgomery's Motion to Reconsider and Alter Judgment should be

reversed, and this Court should render a judgment in favor of Montgomery in the amount of $107,077.64 for her economic damages and an additional amount to compensate her for her emotional distress.

The existence of the contract between Montgomery and Stribling is also conclusively established by Request for Admission No. 9, and the uncontroverted evidence at the trial of this matter showed the contract was breached by Stribling's failure to perform in a workmanlike manner. Further, the economic damages were established by Montgomery at the trial by a preponderance of the evidence to be $107,077.64 which amount would be necessary to place her in the same position had no breach of contract occurred.

Montgomery proved by a preponderance of the evidence all the essential elements of fraudulent misrepresentation by Benet, who was acting in his capacity as agent for Stribling as a conclusively established fact. Therefore, in addition to the economic damages of $107,077.64 suffered by Montgomery, she is also entitled to reasonable compensation for her emotional distress caused by the fraudulent statements of Benet.

FOR THE FOREGOING REASONS, this Court should reverse the Judgment of the trial court entered on May 20, 2011, and the decision of the trial court in denial Montgomery's Motion to Reconsider and Alter Judgment by Order entered on June 24, 2011, and render a judgment in favor of the Appellant, Xiaoyan Li "Shannon" Montgomery against the Appellee, Linda A. Stribling, for the sum of $107,077.64 in economic damages plus compensation for her emotional distress.

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have served a true and correct copy of the foregoing Appellant's Brief upon the following persons by United States Mail, postage prepaid, and addressed as follows:

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Honorable John C. Gargiulo
Circuit Judge of 2nd Circuit Court District
P. O. Box 1461
Gulfport, MS 39502

Ms. Kathy Gillis
Clerk of Supreme Court and Court of Appeals
450 High Street
Jackson, MS 39201

SO CERTIFIED, this the 22nd day of November, 2011.

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