

IN THE SUPREME COURT OF MISSISSIPPI  
No. 2011-CA-01922

**COAE3**

**CLEMENT B. SAUCIER, JR.**  
**Appellant**

**vs.**

**THE PEOPLES BANK, BILOXI, MISSISSIPPI; THE WALLACE STEVE SEKUL  
FAMILY TRUST; ELIZABETH SEKUL, INDIVIDUALLY, AND THOMAS J.  
SLIMAN, INDIVIDUALLY**

**Appellees**

**On Appeal from the Circuit Court of Jackson County, Mississippi  
Honorable Kathy Jackson, Judge in Cause No. 2009-00161(2)**

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**BRIEF OF APPELLEES THE PEOPLES BANK, BILOXI, MISSISSIPPI,  
AND THOMAS J. SLIMAN**

**ORAL ARGUMENT REQUESTED**

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THOMAS J. SLIMAN, INDIVIDUALLY**

### CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Defendants-Appellees The Peoples Bank, Biloxi, Mississippi, and Thomas J. Sliman, individually, 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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Clement B. Saucier – Appellant
2. William Alex Brady, II and Brady Law Firm, PLLC, attorneys for Appellant
3. The Peoples Bank, Biloxi, MS – Appellee
4. Thomas J. Sliman – Appellee
5. Elizabeth Sekul – Appellee
6. The Wallace Steve Sekul Family Trust – Appellee
7. John S. Marvar, Jr., Trustee, the Wallace Steve Sekul Family Trust
8. Robert C. Galloway and Shannon F. Favre, Butler, Snow, O'Mara, Stevens & Cannada, PLLC, attorneys for Appellees The Peoples Bank, Biloxi, Mississippi and Thomas J. Sliman, individually
9. David A. Wheeler, Wheeler & Wheeler, PLLC, attorneys for Appellees Elizabeth Sekul and the Wallace Steve Sekul Family Trust
10. Jimmy H. Colmer, and Darryl Dryden, Heidelberg, Steinberger, Colmer, & Burrow, PA, former counsel for Clement B. Saucier, Jr.

So certified this the 7th day of June, 2013.

  
\_\_\_\_\_  
Robert C. Galloway  
ATTORNEY FOR APPELLEES, THE  
PEOPLES BANK, BILOXI, MISSISSIPPI, and  
THOMAS J. SLIMAN, INDIVIDUALLY

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### **STATEMENT OF THE ISSUES**

- I. Whether Appellant's failure to establish a genuine issue of material fact as to whether a fiduciary relationship existed between Appellant and Appellees, The Peoples Bank and Thomas J. Sliman, requires that summary judgment in Appellees' favor be affirmed.
- II. Whether Appellant's failure to establish a genuine issue of material fact on his claim of omission of material fact and his negligent misrepresentation claim requires that summary judgment in favor of The Peoples Bank and Thomas J. Sliman be affirmed.
- III. Whether Appellant's failure to establish any material disputed fact or to present clear and convincing evidence that Appellees, The Peoples Bank and Thomas J. Sliman, committed fraud requires that summary judgment in Appellees' favor be affirmed.
- IV. Even if The Peoples Bank or Thomas J. Sliman breached some duty to Appellant, whether Appellant suffered any legally cognizable damages from failure to disclose a potential easement on the property he bought, in view of the eminent domain action that was filed before Appellant filed this suit.



## STATEMENT OF THE CASE

### **A. Nature of the Case, Course of Proceedings, and the Trial Court's Disposition of the Case.**

#### **1. Nature of the Case.**

This lawsuit arises from the 2006 purchase by Clement B. Saucier, Jr. ("Saucier") of approximately 80 acres of unimproved real property in Vancleave, Jackson County, Mississippi from co-defendants Elizabeth Sekul ("Sekul") and the Wallace Steve Sekul Family Trust ("the Trust"). Saucier was advised of the availability of this property for purchase by Thomas J. Sliman ("Sliman"), Senior Vice President of The Peoples Bank, Biloxi, Mississippi ("The Bank"). (Sliman and The Bank are sometimes collectively referred to as "The Bank Defendants.") Saucier alleges that Sliman and The Bank breached a claimed fiduciary duty to him and/or acted negligently or fraudulently in failing to disclose to him a potential future easement acquisition by South Mississippi Electric Power Association ("SMEPA") over a portion of the property Saucier purchased. As no material facts were in dispute, summary judgment was granted to Sliman and The Bank because Saucier failed to prove by clear and convincing evidence that there was any fiduciary relationship between these parties with regard to the transaction at issue; because Defendants owed no duty to disclose the potential future easement by SMEPA; because the potential future easement of SMEPA did not constitute an omission of fact resulting in negligent representation; because Saucier's damages were speculative at best as he had no proof that SMEPA's potential future interest in the property caused him any damages; and, as Saucier will be fully compensated in SMEPA's eminent domain action for the easement that SMEPA obtained, he cannot establish damages here.<sup>1</sup>

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<sup>1</sup> While the trial court ruled on Saucier's alleged breach of contract claim against The Bank and Sliman, Saucier acknowledges that his claim for breach of contract was against Defendants Sekul and the Trust only. Saucier Brief at 2.

## **2. Course of Proceedings.**

On October 31, 2008, Saucier filed his Complaint for rescission and damages against The Bank, the Trust, Sekul and Sliman. R. 17.<sup>2</sup> The primary impetus for Saucier's claims against The Bank and Sliman is the failure of Sliman to disclose to Saucier information about the possibility of SMEPA condemning an easement on the property. R.E. 87 at p. 136; R. 711. Sliman was named a defendant in this action individually and in his capacity as a loan officer for The Bank. R. 18. The Bank was identified as a defendant due to the conduct of its agent, Sliman. R. 18. Elizabeth Sekul was the seller of property to Saucier, and the Trust was the part owner of property at issue. R. 18-19. The Bank and Sliman answered the Complaint on December 5, 2008, denying all liability. R. 51. Sekul and the Trust answered the Complaint on December 10, 2008 also denying all liability. R. 69. The case was transferred from the Chancery Court to the Circuit Court of Jackson, County, Mississippi on June 3, 2009 because of the nature of the claims. R.E. 10; R. 130.

On August 31, 2011, The Bank and Sliman moved to dismiss all of Saucier's claims against them. R. 469. On the same date, Sekul and the Trust filed their summary judgment motion, likewise contending that all of Saucier's claims against them should be dismissed. R. 844. Saucier filed a summary judgment motion as well, asserting that the material facts were undisputed as to his claims for breach of fiduciary duty and negligent misrepresentation and seeking judgment as to liability on those claims. R. 280-81. The Bank and Sliman also filed a Motion to Exclude the Expert Testimony of Appraiser, David Craft on August 31, 2011. R. 850. Defendants responded to Saucier's motion for summary judgment on September 22, 2011. R. 1007; 1355. Saucier responded to Defendants' summary judgment motions on September 23, 2011. R. 1324.

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<sup>2</sup> Although Linda L. Saucier was originally identified as a party in this action, on or about September 19, 2011, a stipulation of dismissal was entered dismissing her as a party to the litigation. R. 1002.

Defendants' motions for summary judgment were heard on October 5, 2011, and on October 25, 2011, the trial court granted summary judgment in favor of all Defendants, issuing two separate opinions, one as to claims brought against The Bank and Sliman and one as to claims brought against Sekul and the Trust. R.E. 11; R.E. 15; R. 1431. The court declined to rule on The Bank Defendants' motion to exclude the expert testimony of appraiser David Craft, as the issue was moot. R.E. 14; R. 1433. Saucier filed a Motion for Reconsideration on November 3, 2011, which was denied on December 16, 2011. R. 1435; R.E. 20; 1496. This appeal followed.

### **3. The Trial Court's Summary Judgment in Defendants' Favor**

In the opinion granting summary judgment to The Bank Defendants, Jackson County Circuit Court Judge Kathy Jackson determined that Saucier failed to establish that his previous personal and professional relationship with Sliman and The Bank established a fiduciary relationship that would raise on The Bank Defendants a fiduciary duty as to the transaction in this case. R.E. 12-14; R. 1431-33. Specifically, the court found that Saucier failed to prove by clear and convincing evidence that Sliman's actions as a liaison between Saucier and Sekul created a fiduciary relationship. R.E. 12-13; R. 1431-32. Sliman, therefore, had no duty to disclose SMEPA's potential future acquisition of an easement on the property at issue. R.E. 13; R. 1432. Likewise, The Bank, as mortgage lender, did not have a fiduciary relationship with Saucier. R. 1432-33. As to the claim of negligent misrepresentation, the trial court specifically determined that "an abstract speculative interest" that SMEPA might seek was not a fact that The Bank Defendants had an obligation to disclose. R.E. 13; R. 1432. So, too, Saucier did not show that this speculative future easement caused him damages at the time he purchased the property. R.E. 13; R. 1432. The court noted that, as Saucier would be fully compensated in any eminent domain proceeding filed by SMEPA to obtain the easement, he could not establish damages

against these Defendants for that easement. R.E. 14; R. 1433 Based upon these legal standards and because the facts as to the relationship of the parties were not materially in dispute, as fully evidenced by Saucier's own motion for summary judgment, the trial court granted The Bank Defendants' Motion for Summary Judgment.

**B. Statement of Facts Relevant to the Issues on Review.**

Saucier has been a customer of The Bank for years, and Sliman has handled personal and/or business loan transactions for him during Sliman's twenty-three years with The Bank. R.E. 44 at pp. 10-11; R. 331. While The Bank's trust department gives advice on investments generally, there is no evidence that it ever gave any advice to Saucier in connection with his purchase of the property from the Sekul Defendants or in connection with the loan he obtained from The Bank to purchase the property. . R.E. 128-29 at pp. 27-31; R. 415-416. Sekul has been a customer of The Bank for over fifty years. R.E. 31 at p. 7; R. 318. The testimony is uncontroverted that although he was her friend, Sliman was not Sekul's banker. R.E. 31 at p. 8; R.E. 44 at p. 10; R. 318; 331.

Saucier is a principal in Saucier Brothers Roofing Company. Supp. R.E. at 1; R. 1014. While Saucier and Saucier Brothers Roofing Company are long-time customers of The Bank, in their loan and deposit transactions with The Bank they have been treated no differently from any other customers of similar size. Supp. R.E. at 1; R. 1014. The Bank's loans to them and Mr. Sliman's dealings with them on loan transactions have been arms-length transactions. Supp. R.E. at 1; R. 1014. Prior to the transaction at issue, The Bank sold Saucier Brothers Roofing Company a warehouse property in 2004, and Saucier bought a small piece of property from The Bank in April, 2006. Supp. R.E. at 2; R. 1015. Sliman had never acted as a liaison between Saucier or Saucier Brothers Roofing and any sellers in any prior real estate transactions. Supp. R.E. at 2; R. 1015. Sliman has never personally sold any real estate to Saucier, has never

purchased any real estate from Saucier, and has never been his business partner. Supp. R.E. at 2; R. 1015. Sliman advised Saucier that The Bank needed additional collateral to secure the loan for the Sekul property because The Bank could not lend 100% of the value on unimproved land. Supp. R.E. at 3; R. 1016. Sliman did not tell Saucier what additional collateral he should put up. Supp. R.E. at 3; R. 1016. Saucier alone decided to pledge the trust account he had with The Bank as additional collateral. Supp. R.E. at 3-4; R. 1016-1017.

In early 2006, Saucier was looking for a piece of real estate in Mississippi to purchase and sell quickly for a profit. R.E. 56 at p. 9; R.E. 98 at p. 31; R. 343; 385. He was particularly interested in Jackson County property because he believed it to be the "hottest place for real estate." R.E. 56 at p. 9; R. 343. By happenstance, around that same time, Sekul told Sliman that she had a large piece of land that she wanted to sell in Vancleave, in Jackson County ("Sekul property"), and she asked Sliman to keep her in mind if he heard of any potential buyers. R.E. 45 at p. 13; R.E. 47 at p. 22; R. 332; 334.

In early spring of 2006 while at The Bank, Saucier asked Sliman if he knew of any properties coming up for sale, and Sliman told him about the Sekul property. R.E. 56 at p. 10; R.E. 59-60 at pp. 23-25; R.E. 94 at p. 15; R. 343; 346-47; 381. During this first conversation about the property, Sliman told Saucier that the Sekul property was approximately 80 acres in Vancleave, Mississippi with an asking price of \$10,000 per acre. R.E. 56-57 at pp. 12-13; R.E. 94 at p. 10; R. 343-44; 381. Sliman made no other representations to Saucier about the property, including its condition or value, instead relaying only information about the sale price and approximate acreage. R.E. 58 at p. 19; R.E. 65 at p. 45; R. 345; 352.

After the initial conversation with Sliman about the Sekul property, Saucier drove up to the property in early to mid-March, 2006 to take a look at it. R.E. 56 at p. 11; R.E. 95 at p. 17-18; R. 343; 382. Saucier and his wife stood in the road and looked at the property. R.E. 56 at p.

11; R. 343. After that visit to the Sekul property, Saucier made an offer of \$8,000 per acre; however, that offer was rejected by Sekul. R.E. 56 at 12-13; R. 343-344. Saucier then decided to purchase the Sekul property for the full asking price of \$10,000 per acre, and he advised Sliman of his intent to purchase. R.E. 57 at p. 13; R.E. 109 at p. 75; R. 344; 396.

In or around April, 2006, Sekul told Sliman of SMEPA's interest in performing a survey for a possible easement on property she owned. R.E. 46 at p. 18-19; R. 333. She had received correspondence from SMEPA that it wanted "to do a preliminary survey across your property." R.E. 28; R. 96-97. While the record reflects that SMEPA sent two letters to Sekul, she only recalls receiving one, but she cannot remember which one. R.E. 33 at p. 16; R. 320. One of the letters was addressed to Sekul's home in Biloxi that had been destroyed during Hurricane Katrina. R.E. 33 at p. 15; R. 320. At the time Sliman met with Sekul at her apartment, the only known intention of SMEPA was to conduct a survey on Sekul's property, as the letter SMEPA sent to her states: "We are in the process of doing a preliminary survey to route a 115 KV transmission line in Jackson County to help improve the electric service in the area. In order to complete the survey we're asking your permission to do a preliminary survey across your property located in Section 5, Township 6 South, Range 7 West Jackson County, Mississippi." R.E. 29; R. 97 (emphasis added). Sekul asked Sliman to sit in on a meeting with SMEPA with her and asked that the meeting take place at The Bank. R.E. 46 at p. 17 and p. 20; R. 333. At that meeting, Sekul told SMEPA that she was not willing to allow them onto her property to conduct a survey. R.E. 34 at p. 18; R. 321. She does not recall discussing any easement and was not even sure which property they were inquiring about. R.E. 34 at p. 18; R. 321. Sliman did not tell Saucier about SMEPA's interest in performing a survey for a possible easement simply because it did not come to mind. R.E. 47 at p. 23; R. 334.

Saucier signed the contract to purchase the Sekul property ("Contract") on May 22, 2006. R.E. 60 at p. 28; R. 347. He did not read the Contract before he signed it, although he was given the opportunity to do so. R.E. 59 at p. 24; R. 346. Sliman arranged for the lawyer to draft the contract and that was acceptable to Saucier and Sekul. R.E. 59 at p. 24; R. 346. Sliman specifically told Saucier that the Page-Mannino firm would be preparing the contract. R.E. 57 at p. 13-14; R. 344. Saucier had no objection to that law firm (*id.*); in fact, it was also the law firm for Saucier Brothers Roofing. R.E. 62 at p. 36; R. 349. Under the terms of the Contract, Saucier's purchase obligation was not contingent upon his obtaining an appraisal satisfactory to him; nor was the purchase obligation contingent upon Saucier obtaining a loan. R.E. 23; R. 24.

After Saucier signed the Contract but before closing, he and his wife made a second visit to the property during which they saw stakes in the ground. R.E. 57 at p. 15; R.E. 95 at 20; R. 344; 382. Saucier asked Sliman if he knew anything about the stakes, but Sliman had no knowledge of the stakes, their purpose or who placed them on the property. R.E. 63 at p. 37; R.E. 96 at p. 21-22; R. 350; 383. Prior to closing, Saucier contacted a surveyor about the stakes and was told that the stakes were for the alternate route for Highway 57 Bypass that was not going to be used. R.E. 58 at p. 17-19; R.E. 96 at 21-21; R. 345; 383. This explanation was sufficient for Saucier. R.E. 82; R. 369. There is no evidence in the record that these stakes were in any way related to the easement sought by SMEPA two years later.

Saucier never considered having a survey done of the property, and he did not ask for or receive a survey, appraisal or environmental report. R.E. 59 at p. 22-23; R.E. 60 at p. 27; R.E. 99 at p. 33; R. 346-47; 386. Saucier did not rely on the appraisal of Julie Ford Martin, which was obtained by The Bank, before entering into the Contract or closing on the property. R.E. 59 at p. 22-23; R.E. 60 at p. 27; R. 346-47; 386. Other than his conversations with Sliman, the surveyor questioned about the stakes, his two personal inspections and one aerial photograph, Saucier had

no other information about the property and made no further investigation about it before the closing. R.E. 62 at p. 33-34; R.E. 66 at p. 50; R.E. 99 at p. 34; R. 349; 353; 386.

The closing on the property took place on or about July 10, 2006, at which time Saucier paid a purchase price of \$805,500 for the Sekul property. R.E. 66 at p. 49-50; R. 353. Prior to closing, SMEPA did not contact Sekul again or seek to obtain an easement on the Sekul property, voluntarily or by filing an eminent domain action. R.E. 81 at p. 112; R. 368. In fact, SMEPA did not decide to acquire an easement on this property until almost two years after Saucier purchased the property. R.E. 82 at p. 113; R. 369. In March or April of 2008, Saucier was first contacted by SMEPA regarding the easement in question when a SMEPA representative, Randy Watkins, came to Saucier's residence in Biloxi to request permission to enter the property. R.E. 81 at p. 109-110; R.E. 82 at p. 113; R.E. 101 at p. 41; R. 368; 369; 388. Mr. Watkins told Saucier that SMEPA wanted to obtain an easement for large power lines. R.E. 100 at p. 39-40; R. 387. Mr. Watkins also advised Saucier that he had discussed the possible easement with Sekul, and Mr. Watkins then forwarded to Saucier the two letters from April, 2006 that had been sent to Sekul about SMEPA's desire to do a preliminary survey. R.E. 101 at 43; R. 388.

In May of 2008, SMEPA sent Saucier a written offer of \$12,865 per acre for 4.5 acres for the easement; Saucier, however, declined the offer because he wanted more money per acre. R.E. 114 at p. 93; R.E. 118 at p. 109; R. 401; 405. Saucier declined SMEPA's offer despite the fact that, almost immediately after the closing in 2006, Saucier had listed the property for \$12,500 per acre, but received no acceptable offers. R.E. 67 at p. 53-54; R. 354.

Due to non-acceptance by Saucier of its offer, SMEPA filed its eminent domain action against Clement B. Saucier, Jr. on July 9, 2008 in the County Court of Jackson County, Mississippi, Special Court of Eminent Domain, styled *South Mississippi Electric Power*



*Association v. Clement B. Saucier, Jr., et al.*, Case No. CO2008-20876 (the “Eminent Domain Action”); that action is still pending. R.E. 171-177; R. 649. Saucier obtained an Order staying the Eminent Domain Action pending the outcome of the instant lawsuit. R. 495.

### **SUMMARY OF ARGUMENT**

While Saucier asserts in his Brief to this Court that genuine issues of fact preclude summary judgment, Saucier admitted the vast majority of facts itemized by The Bank Defendants in support of their summary judgment motion. As found by the trial court, there are no genuine issues of material fact, and summary judgment in favor of The Bank Defendants should be affirmed.

Saucier must show that a fiduciary duty exists “before a breach of any such duty can occur.” *Lowery v. Guaranty Bank & Trust Co.*, 592 So. 2d 79, 83 (Miss. 1991) (citations omitted). This Court has consistently held that ordinarily a bank does not owe a fiduciary duty to its debtors and obligors. *E.g., Peoples Bank and Trust Co. v. Cermack*, 658 So. 2d 1352, 1359 (Miss. 1995). This Court has also been careful not to create a fiduciary relationship in situations where a customer deals with a trusted banker in an arms-length manner. *AmSouth Bank v. Gupta*, 838 So. 2d 205, 210 (Miss. 2002). Saucier failed to prove by clear and convincing evidence any of the three elements required to make his relationship with the Bank Defendants a fiduciary one. *Peoples Bank and Trust Co. v. Cermack*, 658 So. 2d 1352 (Miss. 1995). First, Saucier and The Bank Defendants did not have shared goals with regard to Saucier’s purchase of the Sekul property. Second, Saucier cannot establish that he justifiably placed his trust in The Bank Defendants concerning the transaction. Finally, there is a wholesale lack of proof that The Bank and Sliman had effective control over Saucier during this transaction. Saucier cannot establish any fiduciary relationship between him and The Bank Defendants. Moreover, for the

same reasons that Saucier cannot establish a breach of fiduciary duty, he cannot establish a breach of the duty of fairness.

Saucier has also failed to establish any negligent misrepresentation by The Bank Defendants. Saucier did not prove the essential element of a duty by The Bank Defendants to disclose a potential future easement. *Hazlehurst Lumber Co., Inc. v. Miss. Forestry Comm'n*, 983 So. 2d 309 (Miss. 2008). Even if a duty to speak existed, as a matter of law Saucier cannot establish the first element of a negligent misrepresentation claim: a representation or omission that concerns a past or present fact, as contrasted with a promise of future conduct. A request to conduct a preliminary survey does not necessarily mean that an easement will follow; nor does it affect the value or use of the land. Further, there is no evidence in the record that Saucier reasonably relied on any alleged negligent misrepresentation/omission by The Bank Defendants. The trial court appropriately ruled that Saucier's misrepresentation claim failed as a matter of law.

Just as the facts of this case do not support a negligent misrepresentation claim, Saucier cannot establish fraud by The Bank Defendants. As with negligent misrepresentation, a "successful claim for fraudulent misrepresentation must relate to past or present existing facts." *Moran v. Fairley*, 919 So. 2d 969, 976 (Miss. Ct. App. 2005). Fraud also requires proof of an intentional concealment of a fact that the concealer knows to be material and important to the other party, reliance and damages. Each element of a fraud claim must be proved by clear and convincing evidence. There is no evidence, much less any evidence that could meet the clear and convincing standard, on any of these elements of required proof.

Even if this Court finds that Saucier established any of his claims, Saucier cannot show that he has or will suffer any damages legally recoverable from The Bank Defendants. Saucier will recover full compensation for the taking of the easement from SMEPA, including

diminution in value of the residue of his land. *Mississippi State Highway Commission v. Hillman*, 198 So. 565 (Miss. 1940). To allow Saucier to recover from the Bank Defendants in this action and to recover from SMEPA would be a double recovery for the same loss, which is prohibited under Mississippi law.

The trial court correctly dismissed all of Saucier's claims against The Bank Defendants. That judgment should be affirmed.

### **LAW AND ARGUMENT**

#### **A. Issues Before the Court and Standard of Review.**

Saucier's Notice of Appeal was filed Dec. 22, 2011. He appeals from the "two Orders Granting Defendants' Motions for Summary Judgment entered in this case on October 25, 2011 and from the Order Denying Motion to Reconsider entered on December 16, 2011." R. 1501. While Saucier briefed issues related to the Orders granting summary judgment, he has not addressed at all whether his motion for reconsideration was properly denied. It is "settled precedent that issues on which a party fails to expend any discussion or citation of authority are not reviewed" in the appellate court. *AmSouth Bank v. Gupta*, 838 So. 2d 205, 210 (Miss. 2002), quoting *Smith v. Dorsey*, 599 So. 2d 529, 532 (Miss. 1992). Therefore, any appeal concerning the propriety of the trial court's denial of Saucier's Motion for Reconsideration is not before this Court.

This Court applies "the *de novo* standard in reviewing a trial court's grant of summary judgment." *Brown ex. Rel. Ford v. J. J. Ferguson Sand and Gravel Co.*, 858 So. 2d 129, 130 (Miss. 2003) citing *O'Neal Steel, Inc. v. Millette*, 797 So. 2d 869, 872 (Miss. 2001). In conducting a *de novo* review, this Court looks "at all evidentiary matters before [it], including admissions and pleadings, answers to interrogatories, depositions and affidavits." *Brown*, 858 So. 2d at 130 (citations omitted); *Newell v. Hinton*, 556 So. 2d 1037, 1041 (Miss. 1990).

While Saucier asserts in his Brief to this Court that genuine issues of fact preclude summary judgment, Saucier admitted the vast majority of facts itemized by The Bank Defendants in support of their summary judgment motion. R. 1384-1388. While Saucier denies The Bank Defendants' assertion that Sliman failed to disclose the SMEPA letter to Saucier solely because it did not come to his mind, he offers no proof in the record to sustain his denial. R. 1385. Saucier also denies The Bank Defendants' itemized fact that Saucier has no proof that Sliman intentionally withheld information from him – which is taken directly from Saucier's own deposition testimony – asserting that an inference to the contrary can be drawn. R. 983; 1387. Saucier offers no record proof to sustain this denial or inference. R. 1387. The only other itemized facts denied by Saucier concern the basis for his suit (Sliman's failure to disclose information versus failure to disclose documents) (R. 984; 1387); the fact that he will be compensated in the eminent domain proceeding (R. 984; 1398); and that he made no tender of the property for purposes of rescission. R. 985; 1387. Further, Saucier filed his own motion for summary judgment, asserting the same essential facts as undisputed. R. 281-288. There simply are no genuine issues of fact for trial.

In its *de novo* review, this Court must assess the evidence presented to determine whether Saucier may proceed with his lawsuit. Specifically, the Court must determine whether Saucier, in responding to The Bank Defendants' summary judgment motion, furnished "significant probative evidence showing that there are indeed genuine issues for trial." *Borne v. Dunlop Tire Company*, 12 So. 3d 565, 570 (Miss. Ct. App. 2009) (citing *Price v. Purdue Pharma. Co.*, 920 So. 2d 479, 485 (Miss. 2006)). To meet this burden of significant probative evidence, Saucier must have produced evidence upon which "a fair minded jury could return a favorable verdict." *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1214 (Miss. 1996). Summary

judgment under Rule 56 is appropriate when the non-moving party fails to make a showing sufficient to establish the existence of an element essential to his case and on which he bears the burden of proof at trial. *Grisham v. John Q. Long V.F.W. Post, No 4057*, 519 So. 2d 413, 416 (Miss.1988); *see also, Evan Johnson & Sons Constr., Inc. v. State*, 877 So. 2d 360, 365 (Miss. 2004); *Borne*, 12 So. 3d at 570.

To establish his claims for breach of fiduciary duty, Saucier has the burden of proving by clear and convincing evidence that a fiduciary relationship existed, which requires proof that the “trusted party exercises effective control over the other party.” *AmSouth Bank v. Gupta*, 838 So. 2d 205, 216 (Miss. 2002). Saucier must also establish that the parties have shared goals in each other’s commercial activities and that Saucier placed justifiable confidence or trust in the fidelity of Sliman and The Bank. *Id.* The trial court correctly found that Saucier failed to meet his burden in establishing a fiduciary relationship between him and the Bank and its loan officer.

In order to recover on his claims of negligent misrepresentation and intentional fraud, Saucier has to prove that Sliman and The Bank were obligated to disclose a material fact and failed to do so. *Hazlehurst Lumber Co., Inc. v. Mississippi Forestry Comm.* 983 So. 2d 309, 313 (Miss. 2008). Finally, Saucier’s claim for fraud requires proof of a non-disclosed, material fact by clear and convincing evidence. *Mabus v. St. James Episcopal Church* 884 So. 2d 747, 763 (Miss. 2004). The trial court correctly found that there was no material, present fact that Sliman or The Bank had a duty to disclose because SMEPA’s potential, future desire for an easement on this property was merely speculative. Therefore, Saucier failed to meet his burden in opposing The Bank Defendants’ summary judgment motion, and the motion was properly granted.

Finally, the trial court appropriately ruled that Saucier suffered no cognizable damages due to SMEPA’s taking the easement that Saucier would not recover as a matter of law in the Eminent Domain Action.

**B. Defendants Did Not Owe a Fiduciary Duty to Saucier; Nor Did They Breach Any Duty of Fairness.**

**1. The business relationship between Saucier, Sliman and The Bank does not rise to the level of a fiduciary relationship.**

While Saucier argues to this Court that a genuine issue of material fact exists as to whether a fiduciary relationship existed, Saucier Brief at 35, the facts upon which the trial court relied in reaching a contrary conclusion were largely set forth in Saucier's own statement of undisputed facts to support his Motion for Summary Judgment. R. 280-288. If those facts were undisputed for purposes of his own motion, he can hardly argue that they are disputed now. Simply, Saucier disagrees with the trial court's conclusions of law based upon those undisputed facts. The facts of the transaction and the parties' business history are not in dispute. This case was appropriately decided by the trial court as a matter of law.

It is axiomatic that Saucier must show that a fiduciary duty exists "before a breach of any such duty can occur." *Lowery v. Guaranty Bank & Trust Co.*, 592 So. 2d 79, 83 (Miss. 1991) (citations omitted). The undisputed facts do not support the existence of such a duty here. "A fiduciary relationship may arise in a legal, moral, domestic, or personal context where there appears 'on the one side an overmastering influence or, on the other, weakness, dependence, or trust, justifiably reposed.'" *Baker, Donelson, Bearman, Caldwell & Berkowitz, PC v. Seay*, 42 So. 3d 474, 485 (Miss. 2010) (quoting *Miner v. Bertasi*, 530 So. 2d 168, 170 (Miss. 1988)).

In a commercial transaction, a fiduciary relationship may arise "when the circumstances establish that (1) the parties have "shared goals" in the other's commercial activities, (2) one party justifiably places trust or confidence in the integrity and fidelity of the other; and (3) the trusted party has effective control over the other party." *Peoples Bank and Trust Co. v. Cermack*, 658 So. 2d 1352, 1359 (Miss. 1995) (emphasis supplied). See *Hopewell Enterprises, Inc. v. Trustmark Nat. Bank*, 680 So. 2d 812, 816-17 (Miss. 1996) (quoting *Carter Equip. Co. v.*

*John Deere Industrial and Equip. Co.*, 681 F.2d 386 (5<sup>th</sup> Cir. 1982)); *Strong v. First Family Financial Services, Inc.*, 202 F. Supp. 2d 536 (S.D. Miss. 2002). “Because of the severity of the burdens and penalties that are integral to a fiduciary relationship, the party seeking to prove the existing relationship must do so by clear and convincing evidence.” *Cermack*, 658 So. 2d at 1358.

Saucier was no neophyte in the lending or real estate arena. He was a successful, experienced businessman, owning half of Saucier Bros. Roofing Company. R.E. 55 at p. 7; R. 342. He admitted that he obtained eight to ten loans through The Bank over the years. Saucier Brief at 5; R.E. 44; R. 331. He also purchased properties from The Bank on at least two occasions. Saucier Brief at 4; R.E. 58; R. 345. Given Saucier’s experience in the business world, including experience with business and personal loans and real estate purchases, The Bank and Sliman can hardly be said to have an “overmastering influence” over Saucier, and Saucier cannot establish his “weakness, dependence, or trust, justifiably reposed.” To the contrary, the relationship between The Bank Defendants and Saucier was no different from the relationships maintained by The Bank Defendants with similar customers. R. 1014. All transactions between The Bank Defendants and Saucier were arms-length transactions. R. 1014.

This Court held that ordinarily a bank does not owe a fiduciary duty to its debtors and obligors. *Peoples Bank and Trust Co. v. Cermack*, 658 So. 2d 1352, 1359 (Miss. 1995) (citing *West Point Corp. v. New North Miss. Fed. Sav.*, 506 So. 2d 241, 244 (Miss. 1986)). The mere existence of a banking relationship between Saucier and The Bank Defendants, even a lengthy one, does not meet the requisite standard.

This Court has been careful not to create a fiduciary relationship in situations where a customer deals with a trusted banker in an arms-length manner. In *Gupta*, this Court underscored that the banking relationship does not create a fiduciary duty because finding a

fiduciary duty based upon a banking relationship – even one that included previous dealings with the same bank – “would effectively extend the mantle of the fiduciary relationship over every loan-application transaction.” 838 So. 2d at 216. Further, the fact that a bank may earn a profit on a loan does not mean the lender and borrower have shared goals in the lending transaction because “that is a feature common to every free-market transaction.” *Id.* Finally, a borrower’s trust in his bank because of their relationship does not make them fiduciaries: “While one normally does not enter into a contract with another unless he trusts and has confidence in him, contract and debt amount to a business and not to a fiduciary relationship.” *Id.* citing *Cermack*, 658 So. 2d at 1358. (other citations omitted.) This is especially true considering the “severity of the burdens and penalties that are integral to a fiduciary relationship.” *Id.*

The undisputed proof highlights Saucier’s failure to prove by clear and convincing evidence any of the three elements required to make his relationship with the Bank Defendants a fiduciary one. Saucier and The Bank Defendants did not have shared goals with regard to Saucier’s purchase of the Sekul property. The role of Sliman in the transaction was minimal—introducing two bank customers with a mutual interest and facilitating their negotiations and purchase and sale. Even if The Bank ultimately earned interest on the loan made to Saucier to purchase the Sekul property, interest on the loan does not create a shared interest. *Gupta* at 216. Instead, it is simply an arms-length business transaction. Significantly, Saucier was under no obligation to borrow money from The Bank to complete the transaction. The fact that the loan was made – long after Sliman’s alleged breach of duty by failing to disclose the potential easement – cannot be used to reach back and alter the parties’ relationship at the time of the alleged omission. *In Re Will of Boylen*, 990 So. 2d 230, 235-37 (Miss. Ct. App. 2008) (conduct of parties after alleged breach of fiduciary relationship irrelevant to whether relationship was one of confidence).



In addition, Sliman had nothing personally to gain from Saucier's purchase of the Sekul property or from any loan to Saucier, as he received no bonus or credit in his performance evaluation for loans closed. R.E. 139-140 at pp. 73-74; R. 426-427. Instead, Sliman's role in the discussions prior to Saucier's purchase of the Sekul property was merely to convey information between the parties; he gave no advice to, and was asked for no advice by, Saucier as to the condition, title, value or suitability (either generally or for any particular purpose) of the subject property. Saucier did not take Sliman into his confidence in any way. R.E. 56 at p. 9-11; R.E. 94 at p. 15; R.E. 113 at p. 89-90; R. 343; 381; 400.

Second, Saucier cannot establish that he justifiably placed his trust in The Bank Defendants concerning the transaction because he admits that The Bank and Sliman provided him with no information about the value or condition of the property—only the sales price and approximate size. R.E. 58 at p. 19; R.E. 65 at p. 45. R. 345; 352. Saucier made his own decision to pay the full asking price of \$10,000 per acre for the Sekul property with limited investigation of the property's condition and worth, and without obtaining a survey, an appraisal or an environmental report. R.E. 59 at p. 22-23; R.E. 60 at p. 27; R.E. 62 at p. 33-34; R.E. 66 at p. 50; R.E. 99 at p. 34. R. 346-47; 349; 353; 386. Saucier did not even read the Contract regarding the purchase, although he admits he had the opportunity to do so. R.E. 59 at p. 24; R. 346. While he may have placed trust in The Bank and Sliman, it can hardly be considered justifiable trust necessary to establish a fiduciary relationship.

Finally, there is an utter lack of proof that The Bank and Sliman had effective control over Saucier during this transaction. Saucier does not suggest that The Bank Defendants made any attempt to persuade Saucier or otherwise control his actions related to the Sekul property purchase. Sliman acted only as an uncompensated intermediary between the buyer and seller.

Saucier attempts to bolster his fiduciary duty argument by relying upon his own recollection of conversations with Chevis Swetman, president of The Bank, that occurred when SMEPA contacted Saucier about an easement, two years after the transaction at issue. Saucier Brief at 39; 44-45. Mr. Swetman's attempt to assist The Bank's customer does not establish the existence of a fiduciary relationship between Saucier and The Bank or Sliman two years earlier. Miss. R. Evid. 401, 402; *In Re Will of Boylen*, 990 So. 2d 230, 235-237 (Miss. Ct. App. 2008) (evidence of events occurring after time of alleged breach of confidential/fiduciary relationship irrelevant).

While Saucier and the business he partly owns, Saucier Brothers Roofing Co., were long time depositors in and borrowers from The Bank and may have previously purchased real estate from The Bank, these were all normal, arms-length business transactions. Supp. R.E. at 1-4; R. 1014-1017. There is no evidence that there was any special relationship involved in these transactions that would create a fiduciary duty. Further, the fact that Sliman may have been involved in those transactions as a loan officer of The Bank does not transform his relationship with Saucier into a fiduciary one. There is no case law to support a finding that a customer and a lender become fiduciaries simply because of the volume of normal banking and lending transactions. *See Williams v. Federal Land Bank of Jackson*, 954 F.2d 774, 777 (D.C. Cir. 1992) (applying Mississippi law) ("[T]he costs of lending would rise sharply if lenders were obliged to give their borrowers' interest the sort of priority inherent in a fiduciary duty."); *West Point Corp. v. New N. Miss. Sav. & Loan Assn'n.*, 506 So. 2d 241, 244 (Miss. 1986).

Indeed, Saucier's argument that a fiduciary relationship existed here because of the trust he placed in Sliman, "I had my full trust in Mr. Sliman," Saucier Brief at 37, was rejected by the court in *Strong v. First Family Financial Services, Inc.*, 202 F. Supp. 2d 536 (S.D. Miss. 2002). The *Strong* court also rejected this argument in the face of the lender's omission of facts. There,

plaintiffs claimed they were damaged because the defendants failed to obtain the best available financing terms on insurance in connection with consumer loans and failed to tell plaintiffs that First Family made money on insurance it obtained. The *Strong* court precluded such claims, noting that “silence, in the absence of a duty to speak, is not actionable.” *Id.* at 540.

In *Strong*, as here, the duty to disclose the omitted facts required a showing of a fiduciary duty. *Id.* Explaining why the *Strong* plaintiffs could not prevail on their fiduciary duty claim, the court stated:

In the case at bar, plaintiffs allege that a fiduciary relationship arose because defendants purported to obtain insurance on plaintiffs’ behalf in connection with plaintiffs’ respective loans and plaintiffs thus “placed special trust and confidence in their lender” to obtain adequate insurance at a fair price. But this is nothing more than an assertion that plaintiffs trusted their lender (and by inference, its employees) because it was their lender, which is plainly insufficient under the cited authorities to support finding that a fiduciary relationship existed. . . . Hence, there is no reasonable possibility of plaintiffs’ recovering on a theory that a fiduciary (or quasi-fiduciary) duty was breached.

*Id.* at 542, citing *Deramus v. Jackson Nat. Life Ins. Co.*, 92 F.3d 274, 278 (5<sup>th</sup> Cir.1996) (to establish fiduciary relationship, “justifiable reliance must have necessarily caused the first party to be lulled into a false sense of security so that the first party did not protect his own interest as he might have ordinarily”). The same result applies here: Saucier said he trusted Sliman and The Bank, but he cannot possibly prove any of the elements necessary to show that they owed him any fiduciary duty. *See also Taylor v. Southern Farm Bureau Casualty Co.*, 954 So. 2d 1045, 1048 (Miss. Ct. App. 2007) (“In Mississippi, the duty to disclose material facts only arises when there is a fiduciary relationship between the parties.”) (citations omitted.)

In *Hopewell Enterprises, Inc. v. Trustmark Nat’l Bank*, 680 So. 2d 812, 816-17 (Miss. 1996), this Court stated: “This court has never held that the relationship between a mortgagor and mortgagee is a fiduciary one.” Trustmark sued the Hammons on a delinquent promissory note. The Hammons counterclaimed, contending that Trustmark breached its fiduciary duty by

telling a potential buyer of the property in default that they were delinquent on their loan, thus sabotaging their sale of the property. The Chancellor ruled that there was no fiduciary relationship between Trustmark and the Hammons, and thus the bank did not breach any duty by making the disclosure. The Mississippi Supreme Court agreed:

The record below establishes that the relationship between the Hammons and Trustmark was simply an arms' length business transaction involving a normal debtor-creditor relationship. Moreover, Trustmark had nothing to gain from the success or failure of Hopewell, as the loan agreement fixes the contractual terms, nor did the Hammons repose any trust in the Trustmark officers. Lastly, the record does not indicate that Trustmark exercised dominion and control over the Hammons. Simply put, the Hammons failed to satisfy the requisite elements of a fiduciary relationship. Therefore, we hold that the Chancellor was not erroneous in finding that a fiduciary relationship did not exist.

*Id.* at 817. The same rationale applies here. Sliman and The Bank had a business relationship with Saucier. They had nothing to gain by success or failure of Saucier's transaction, and there is no evidence to establish that Saucier and The Bank exercised dominion or control over Saucier. The trial court properly dismissed Saucier's claim for breach of fiduciary duty.

**2. Saucier failed to establish any breach of the duty of fairness by The Bank Defendants.**

Recognizing the lack of proof to support a fiduciary duty, Saucier argues that these Defendants breached a duty of fairness to him. Saucier Brief at 42, citing *AmSouth Bank v. Gupta*, 838 So. 2d 205 (Miss. 2002). *Gupta* does not support Saucier's legal argument that a duty of fairness was breached here.

In *Gupta*, this Court noted that a duty to disclose "facts peculiarly within one party's knowledge" may arise "when failure to disclose may result in harm to the other party." *Id.* at 218. Such a duty to disclose does not arise simply because of a banking relationship, however, and a breach of the duty of fairness requires some showing of bad conduct. *First Am. Nat'l Bank of Iuka v. Mitchell*, 359 So. 2d 1376, 1380 (Miss. 1978). In *Mitchell*, the bank threatened foreclosure to try to get the sellers to accept a low price on their property, which benefitted the

purchaser, a personal friend of the bank officer. The court held that such strong-arm tactics in *Mitchell* violated the bank's duty of fairness and would cause the seller harm because he was being forced to accept a lower price for his property because of the strong arm tactics. In order to establish a breach of this duty of fairness, however, this Court in *Gupta* required that conduct "which sank to the level of conduct in *Mitchell*" be shown. Such bad tactics were not present in *Gupta* and are not present here.

Here, for the same reasons that Saucier cannot establish a breach of fiduciary duty, he cannot establish a breach of the duty of fairness. Saucier cannot establish that SMEPA's potential interest was "peculiarly within the knowledge" of only the Bank Defendants. He cannot show any harm that he suffered as a result of the claimed failure to disclose a speculative, potential interest that SMEPA might seek in the future. Unlike the situation in *Mitchell*, he has not established any bad conduct by the Bank Defendants in failing to disclose the potential SMEPA interest because the Bank Defendants had nothing to gain by this transaction. The Bank Defendants did nothing that could be construed as sinking to the level of the defendants in *Mitchell*. Absent such conduct, no duty of fairness was violated here.

**C. Saucier Did Not Establish Any Negligent Misrepresentation by The Bank Defendants.**

Saucier again claims that disputed facts exist as to his negligent misrepresentation claim against The Bank Defendants. Saucier Brief at 35. Saucier sought his own summary judgment on this issue, citing virtually the same material facts set forth herein as undisputed. R. 280-288. Once again, Saucier disagrees only with the trial court's legal interpretation as he can cite to no material fact dispute that would preclude judgment as a matter of law. He simply believes that the judgment as a matter of law was rendered to the wrong party. That is not a genuine fact dispute.

Saucier urges that The Bank Defendants' failure to disclose SMEPA's contact with Sekul constituted a negligent misrepresentation. Saucier Brief at 46. "In order to establish negligent misrepresentation, the following elements must be proven: '(1) a misrepresentation or omission of fact; (2) that the representation or omission is material or significant; (3) that the person/entity charged with the negligence failed to exercise that degree of diligence and expertise the public is entitled to expect of such persons/entities; (4) that the plaintiff reasonably relied upon the misrepresentation or omission; and (5) that the plaintiff suffered damages as a direct and proximate cause of such reasonable reliance.'" *Hazlehurst Lumber Co., Inc. v. Miss. Forestry Comm'n*, 983 So. 2d 309, 313 (Miss. 2008) (quoting *Horace Mann Life Ins. Co. v. Nunaley*, 960 So. 2d 455, 461 (Miss. 2007)). These elements must be proven by a preponderance of the evidence. *Holland v. Peoples Bank & Trust Co.*, 3 So. 3d 94, 100 (Miss. 2008).

In his argument on negligent misrepresentation, Saucier skips any discussion of the essential element of duty. Saucier Brief at 46-47. This is because he must show a fiduciary duty existed in order for Sliman's silence to be actionable. *See, supra*, at 20. Absent a duty to speak, Saucier's negligent misrepresentation claim fails. *Strong v. First Family Financial Services, Inc.*, 202 F. Supp. 2d 536 (S.D. Miss. 2002). As shown above, because there was no fiduciary relationship between Saucier and Sliman or The Bank, The Bank Defendants had no fiduciary duty to Saucier.

Furthermore, as a matter of law Saucier cannot establish the first element of a negligent misrepresentation claim, which is precisely what the trial court found. The first element requires a representation or omission that concerns a past or present fact, as contrasted with a promise of future conduct. *Spragins v. Sunburst Bank*, 605 So. 2d 777, 780 (Miss. 1992). The representation/omission about which Saucier complains is a representation/omission regarding possible future conduct, i.e. the potential taking of an easement by SMEPA on the property, an

“abstract speculative interest,” as noted by the trial court. R.E. 13; R. 1432. Mississippi law is clear that such a promise or omission concerning future conduct is not actionable, and a claim for negligent misrepresentation based thereon cannot be sustained. *Moran v. Fairley*, 919 So. 2d 969 (Miss. Ct. App. 2005).

Saucier asserts that because Sliman knew that SMEPA contacted Sekul seeking permission to survey her property, his failure to tell Saucier about it constituted a misrepresentation of fact. He states that the SMEPA contacts facts were “relevant, material and significant facts pertaining to the use and value of the Property.” Saucier Brief at 47. While we now know that in 2008, two years after Saucier purchased the Sekul Property, SMEPA formally sought and obtained an easement on the subject property, such knowledge cannot be imputed to Sliman and The Bank as of 2006. A request to conduct a preliminary survey does not *ipso facto* mean that an easement will follow; nor does it affect the value or use of the land. That is all that had occurred at the time Saucier purchased the property.

In an attempt to show that the SMEPA contact with Sekul is material, Saucier asserts that “all appraisers have indicated that the knowledge of SMEPA’s intent to survey and to locate transmission lines on the Property was relevant and material.” Saucier Brief at 46. This stretches the cited testimony beyond reason. Julie Ford Martin testified in her deposition that “I would like to know as much information as I could. I’m not saying that it would play a role in the value.” R.E. 166; R. 466. Further, the cited testimony of Allen Purvis overlooks his additional testimony that “if it’s possible or speculative, I would not place credibility on that as of the date of my valuation,” and “if it’s speculative, it doesn’t necessarily have to be in the appraisal.” R.E. 161; R. 448. Purvis succinctly stated why speculative information is not pertinent to an appraiser:

Whatever was known to be a fact should have been provided to the appraiser, and the appraiser should consider it. Whatever might be

speculation or not yet a fact may have absolutely no impact on that appraiser's conclusion as of the date that they appraise it because that's the date the value is good for.

R.E. 161; R. 448. The full testimony of these witnesses refutes Saucier's statement that a potential, future easement was relevant and material.

Even if the alleged omission by Sliman and The Bank is deemed by this Court to be a misrepresentation or omission of past or present fact, there is no evidence in the record that Saucier reasonably relied on any alleged negligent misrepresentation/omission by them. *See Waters v. Allegue*, 980 So. 2d 314, 319 (Miss. Ct. App. 2008). Saucier conducted little due diligence related to the purchase of the subject property. Of particular note, prior to closing, Saucier did not have a survey, appraisal or environmental report done on the property. R.E. 59 at p. 22-23; R. 346; 347; 386. He cannot forsake his own obligations to protect his interests and say after having buyer's remorse that he was relying solely on others.

As noted, Saucier can establish no genuine issue of fact for trial on his misrepresentation claim. The trial court appropriately ruled that, as a matter of law, the misrepresentation claim should be dismissed.

**D. Saucier Did Not Establish Any Material, Disputed Fact to Support a Fraud Claim Against The Bank Defendants.**

Saucier relies on the same set of undisputed facts for his fraud claim as for his negligent misrepresentation claim: The Bank Defendants' silence. Saucier Brief at 35. If the Bank Defendants' failure to mention the SMEPA inquiry to Sekul does not amount to a negligent misrepresentation, it certainly cannot meet Saucier's higher burden to prove fraud.

To prove fraud, Saucier must establish by clear and convincing evidence (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8)



his right to rely thereon, and (9) his consequent and proximate injury. *O.W.O. Inv., Inc. v. Stone Inv. Co.*, 32 So. 3d 439, 446 (Miss. 2010) (citing *Mabus v. St. James Episcopal Church*, 884 So. 2d 747, 762 (Miss. 2004)). As with a negligent misrepresentation, a fraudulent representation must relate to a past or present fact and cannot be based on a future promise. *Moran v. Fairley*, 919 So. 2d 969, 976 (Miss. Ct. App. 2005).

Saucier's fraud claim is based on omission of the same speculative future set of events as are all of his claims, *i.e.*, a potential future easement acquisition by SMEPA. Saucier Brief at 48. This future event is not a past or present fact that Sliman had a duty to disclose. As with negligent misrepresentation, a "successful claim for fraudulent misrepresentation must relate to past or present existing facts." *Moran*, 919 So. 2d at 976. The omission alleged by Saucier relates to a possible future event and does not give rise to liability for fraud/fraudulent misrepresentation. *Id.*

Moreover, this omission is only material if it affected the value of the property at the time Saucier purchased it. As noted, *supra* at 24-25, a speculative, future occurrence would not affect the value of the property. R.E. 161; R. 448. This, standing alone, is sufficient to defeat Saucier's fraud claim as a matter of law.

Fraud also requires proof of an intentional concealment of a fact that the concealer knows to be material and important to the other party, reliance and damages. Each element of a fraud claim must be proved by clear and convincing evidence. There is no evidence, much less any evidence that could meet the clear and convincing standard, on any of these elements of required proof. The evidence conclusively shows that there was no fiduciary duty on the part of Sliman. Saucier does not offer any proof to challenge Sliman's testimony that he merely forgot about the SMEPA contact with Sekul after it occurred. In fact, Saucier acknowledges that he cannot say that Sliman intentionally failed to disclose this information.

Q. As you sit here today, you're not aware of any evidence that he [Sliman] intentionally withheld that information [SMEPA contact with Sekul] from you, are you?

A. No.

Q. Are you aware of any motive that Mr. Sliman might have had for intentionally withholding that information from you?

A. No. Like I say, Mr. Sliman is my banker. I still trust him with my wallet in his pocket.

R.E. 78 at p. 98; R. 365. Absent such intent on Sliman's part, Saucier cannot establish fraud. In addition, there is no competent evidence that the preliminary contact by SMEPA was an "important and material fact" relating to Saucier's potential development of the property, or that Sliman should have recognized that contact as important and material. Finally, Sliman did not receive any bonus or special compensation resulting from this transaction. R.E. 52 at p. 47; R.E. 139-140 at p. 73-74; R. 339; 426. That is to say, he had no incentive to ensure that the sale of the Sekul property to Saucier was finalized. Saucier cannot establish a material, disputed fact on each element of his fraud count, and the trial court properly dismissed that claim.

#### **E. Saucier Suffered No Legally Cognizable Damages.**

Even if this Court finds that all other elements of any of Saucier's claims are met, Saucier cannot show that he has or will suffer any damages legally recoverable from The Bank Defendants.<sup>3</sup> Prior to Saucier filing this lawsuit, SMEPA exercised its power of eminent domain to take an easement on the property purchased by Saucier. When an owner's land is taken for public use, the owner is entitled to just payment for it. *North Biloxi Development Corp. v. Mississippi Transp. Comm'n*, 912 So. 2d 1118, 1128 (Miss. Ct. App. 2005) (citations omitted);

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<sup>3</sup> While Saucier made a claim for punitive damages in this case (on which the Bank Defendants sought summary judgment), Saucier's entitlement to any such damages was not directly adjudicated by the trial court because the trial court dismissed each substantive count of Saucier's Complaint. Given the narrow grounds on which punitive damages may be awarded, and given the requirement of clear and convincing evidence of fraud, oppression or wanton disregard for the rights of others, Saucier would not be able to establish a claim for punitive damages under the facts of this case. Miss. Code Ann. § 11-1-65; *Fowler Butane Gas Co. v. Varner*, 141 So. 2d 226, 233 (Miss. 1962).

*St. Andrew's Episcopal Day School v. Mississippi Transp. Comm'n*, 806 So. 2d 1105, 1109 (Miss. 2002) (citations omitted).

*Mississippi State Highway Commission v. Hillman*, 198 So. 565, 569-70 (Miss. 1940), sets forth the formula for just compensation as “the difference between the fair market value of the whole tract immediately before the taking, and the fair market value of that remaining immediately after the taking. . . .” Such compensation includes damages which “the residue of the property suffers, including diminution in value.” *Mississippi State Highway Comm'n v. Franklin County Timber Co.*, 488 So. 2d 782, 785 (Miss. 1986). As a matter of law, such an award is deemed to be “just, due, full and adequate compensation” to Saucier for the taking of the easement by SMEPA. *See Sarphi v. Mississippi State Highway Commission*, 275 So. 2d 381, 384 (Miss. 1973). Saucier, therefore, lacks any legally recoverable damages in this case.

Saucier claims that any payment from SMEPA for the easement should be excluded from consideration here under the collateral source rule. Saucier Brief at 26. What Saucier really seeks is a double recovery for his loss of property value by SMEPA's taking of the easement. SMEPA is obligated to fully compensate Saucier for the easement condemned and any devaluation of the residue of his property. In an effort to avoid the bar of a double recovery, Saucier obtained a stay of the damages hearing in the Eminent Domain Action, despite the fact that SMEPA has already deposited its calculation of Saucier's compensation with the court. R. 495. Such compensation is not a collateral source, but rather is what should be Saucier's only source of damages for the easement taken.

Saucier's assertion that any recovery in the Eminent Domain Action is from a collateral source is not well taken because any such recovery by Saucier would be for the same loss — the difference in value of the subject property before the SMEPA easement was taken and after that easement was taken, and would result from the action of the party who caused the loss (i.e.,

SMEPA), not from a source, such as insurance, that can be considered a "collateral" source. To allow Saucier to recover from the Bank Defendants in this action and to recover from SMEPA would be a double recovery for the same loss, which is prohibited under Mississippi law.

In *City of Jackson v. Estate of Stewart*, 908 So. 2d 703 (Miss. 2005), the Mississippi Supreme Court addressed the issue of whether the deceased's estate could sue the City of Jackson under a breach of contract theory and sue University Medical Center under a tort theory, both claims being for the same loss — i.e., injury to the deceased resulting from a fall. In explaining that plaintiff could pursue different theories against different parties, but could only recover once for the same loss, the Supreme Court said:

The Estate's breach of contract action and its tort action both arise from the same set of operative facts, and they allege the same damage.. . . [T]his Court has never held that a plaintiff may pursue two causes of action or theories and, having established liability under both, collect the same damages under both.

This Court recently held "that 'there can be but one satisfaction of the amount due the plaintiff for his damages'... Thus, double recovery for the same harm is not permissible." *Medlin v. Hazlehurst Emergency Physicians*, 889 So. 2d 496, 500-01 (Miss. 2004).

The trial court correctly held that the maximum recovery against the City for Mrs. Stewart's tort claim was \$250,000. Her maximum recovery under her claim for breach of implied contract is also the same \$250,000. However, these are the same damages awarded under two separate theories of recovery. As such, Mrs. Stewart's estate is entitled to only one recovery. Thus, she may recover no more than \$250,000, whether for negligence, breach of contract, or both.

908 So. 2d at 711-12. *Accord, Robushaux v. Nationwide Mut. Ins. Co.*, 81 So. 3d 1030, 1038 (Miss. 2011); *PGP Investments, LLC v. Regions Bank*, 2011 U.S. District Lexis 10037 (N.D. Miss. 2011).


Here, the result must be the same. Saucier seeks recoveries under different theories (statutory damages under the eminent domain statutes and tort damages) against different parties (SMEPA and the Bank Defendants), but for the same loss (the difference in the "before" and "after" value of his property), so he can only recover those damages once.

Although the Eminent Domain Action and this case do not squarely fit the "priority-of-jurisdiction" rule because they are not between the same parties, *see, e.g., Huffman v. Griffin*, 337 So. 2d 715 (Miss. 1976), as a matter of public policy, this Court should not allow Saucier to make an end run around the jurisdiction of the Special Court of Eminent Domain of Jackson County to determine Saucier's damages from acquisition of the SMEPA easement. Not only was the Eminent Domain Action filed several months before this action, SMEPA has acquired the easement through the quick-take provisions of the eminent domain statute and has deposited into the court's registry the appraised value of the easement and diminution in value to the remainder. If Saucier thought he was entitled to more than SMEPA paid for the taking of the easement, he had (and still has) a statutory remedy in the Eminent Domain Action – one that takes priority over all other non-priority actions. Miss. Code Ann. § 11-27-5. Instead of taking advantage of his statutory right to have a jury decide his damages from the easement acquisition in the Eminent Domain Action (which he could have long ago done, and thus long ago collected his full legal damages), Saucier has inappropriately filed this lawsuit and obtained an Order in the Eminent Domain Action staying that case pending resolution of this case. R. 495. As a matter of public policy, Saucier should not be allowed to avoid the jurisdiction of the Special Court of Eminent Domain (established in a prior-in-time action) and seek an alternate remedy here when he can recover his full damages in a proceeding established by the Mississippi Legislature for that very purpose.

## CONCLUSION

For the reasons set forth above, Appellees The Peoples Bank, Biloxi, Mississippi, and Thomas J. Sliman respectfully request that the Judgment of the trial court be affirmed, and request such other and further relief to which this Court deems them entitled.

Respectfully submitted this 7th day of June, 2013.

  
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**CERTIFICATE OF SERVICE**

I, Robert C. Galloway, one of the attorneys for Appellees, The Peoples Bank, Biloxi, Mississippi and Thomas J. Sliman, Individually, hereby certify that I have this day caused to be served by U.S. Mail, postage prepaid, a true and correct copy of the Brief of The Peoples Bank of Biloxi, Mississippi and Thomas J. Sliman to the following:

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This the 7th day of June, 2013.

  
\_\_\_\_\_  
ROBERT C. GALLOWAY

### **CERTIFICATE OF FILING**

I Robert C. Galloway, certify that I have had hand-delivered the original and five (5) copies of the Brief of The Peoples Bank of Biloxi, Mississippi and Thomas J. Sliman and of the Supplemental Record Excerpts and an electronic compact diskette containing same on June 7, 2013 addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, MS 39201.

  
ROBERT C. GALLOWAY