

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-01075 COA**

THE GLEN CONDOMINIUMS, INC.

APPELLANT

v.

**SHELTER MUTUAL AND/OR GENERAL
INSURANCE CO.**

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	09/01/95
TRIAL JUDGE:	HON. L. BRELAND HILBURN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	PAUL ROGERS JOHNATHAN FAIRBANK
ATTORNEY FOR APPELLEE:	RICHARD EDMONSON
NATURE OF THE CASE:	CIVIL - TORTS (OTHER THAN PERSONAL INJURY AND PROPERTY DAMAGE)
TRIAL COURT DISPOSITION: DISPOSITION:	SUMMARY JUDGMENT FOR APPELLEE AFFIRMED - 11/4/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	11/25/97

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

KING, J., FOR THE COURT:

The Glen Condominiums, Inc. appeals from a summary judgment dismissing claims of negligent misrepresentation and breach of fiduciary duty against Shelter Mutual and/or General Insurance Company.⁽¹⁾ Finding no error, we affirm.

FACTS

On April 19, 1991, The Glen Condominiums suffered hail damage to its roofs. Shelter Mutual Insurance Company provided coverage for the condominiums for natural events of this type. Thus, George Robinson, then president of The Glen Condominiums Board of Directors, spoke to Shelter representatives and appraisers regarding repair of the hail damage to the roofs. Robinson inquired

about a suitable contractor for the repair job, and Curtis Watts, an agent for Shelter, stated to him that All South Construction had "done many kinds of jobs in the past and all had been satisfactory". John Lange, a Shelter claims supervisor, also mentioned to Robinson that All South had performed work for Shelter in the past. After these communications, Robinson met with Lance Banks, owner of All South. The record indicates that during meetings with Banks, Robinson had an opportunity to inquire about the quality of All South's work. Robinson discussed at length damage to the roofs' sheeting and the cost of repairs. He subsequently entered into a contract allowing All South to complete the roof repair. However, All South failed to repair the roof properly which caused leaking. The Glen Condominiums hired another contractor and incurred costs of \$18,000 to correct the leaking.

The Glen Condominiums filed a complaint against Shelter Insurance alleging that, but for the recommendation of Shelter Insurance Company acting through John Lange, it would not have hired All South to perform the repair work necessitated as a result of the hail storm. Shelter Insurance filed a motion for summary judgment, and Circuit Court Judge Breland Hilburn granted the motion on September 1, 1995. The Glen Condominiums appeals from the grant of this motion.

ANALYSIS OF THE ISSUES AND THE LAW

I. WHETHER THE TRIAL COURT ERRED BY GRANTING SHELTER'S MOTION FOR SUMMARY JUDGMENT BASED ON THE GLEN CONDOMINIUMS, INC.'S CLAIM OF NEGLIGENT MISREPRESENTATION.

This Court employs a de novo standard when reviewing a lower court's grant of a summary judgment motion. *Short v. Columbus Rubber & Gasket Company, Inc.*, 535 So.2d 61, 63 (1988). We must review all evidentiary matters before us in the record: affidavits, depositions, admissions, interrogatories, etc. The evidence must be viewed in the light most favorable to the non-moving party, and the non-moving party is to be given the benefit of every reasonable doubt. *Smith v. Sanders*, 485 So.2d 1051, 1054 (Miss.1986); *Dennis v. Searle*, 457 So.2d 941, 944 (Miss.1984) The burden of demonstrating that no genuine issue of fact exists falls on the party requesting summary judgment. *Short v. Columbus Rubber and Gasket Co.*, 535 So.2d 61, 63-64 (Miss.1988). However, this burden on the moving party is one of production and persuasion, not of proof. *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 198 (Miss.1988). Ultimately, the motion for summary judgment lies only where there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Mississippi Rules Civil Procedure 56(c).

The Glen Condominiums, Inc. contends that Shelter Insurance Company negligently misrepresented that All South was qualified to perform roofing repairs by failing to investigate All South's qualifications and then recommending that All South was qualified. Viewing the evidence in the light most favorable to The Glen Condominiums we determine that no genuine issues of fact exist, we therefore affirm.

Our Supreme Court has stated that the elements of a negligent misrepresentation claim are: 1) a misrepresentation or omission of fact, 2) materiality, 3) the failure to exercise ordinary care, 4) reasonable reliance and 5) injury. *Berkline Corp. v. Bank of Mississippi*, 453 So.2d 699, 702 (Miss.1984). To recover on a negligent misrepresentation theory, The Glen Condominiums must

prove these elements by a preponderance of evidence. *R.C. Construction Co., Inc. v Nat'l Office Systems, Inc.*, 622 So.2d 1253, 1256 (Miss.1993).

The parties in the instant case have delineated facts which they contend establish or fail to establish the elements of negligent misrepresentation. Two undisputed factual assertions in the record are adversely dispositive of element one, the misrepresentation or omission of fact.

(1) Robinson agreed in his deposition that Mr. Watts made a statement regarding All South's satisfactory work in the past. Robinson did not make statements or present evidence to dispute past work of All South. In fact, Robinson stated that "he couldn't say about other jobs" All South had completed. He merely disputed the quality of work done on The Glen Condominiums.

(2) Lange stated that the general nature of the conversation with Robinson "would be that we used Lance Banks in the past and really have no knowledge of any problems and as far as I was concerned he did good work."

The parties do not dispute the truth of the matters asserted regarding past work of All South. The trial court correctly held that neither Watts nor Lange misrepresented or omitted any facts within their knowledge regarding All South. Having determined that no misrepresentation or omission of fact existed, the trial court found no material issue of fact existed. We find the summary judgment motion was properly granted.

II. WHETHER THE TRIAL COURT ERRED BY GRANTING SHELTER'S MOTION FOR SUMMARY JUDGMENT BASED ON THE GLEN CONDOMINIUMS, INC.'S CLAIM OF BREACH OF FIDUCIARY DUTY.

In the trial court, The Glen Condominiums failed to affirmatively assert the claim of breach of fiduciary duty in the pleadings or in response to the summary judgment motion on behalf of Shelter Insurance Company. Specifically, paragraphs ten through twelve of the complaint allege negligent misrepresentation only; further, the response to Shelter Insurance Company's Motion for Summary judgment merely states that there are genuine issues of material fact which preclude entry of summary judgment as a matter of law. "Under Mississippi law, an appellant is not entitled to raise a new issue on appeal, since to do so prevents the trial court from having an opportunity to address the alleged error." *Crowe v. Smith*, 603 So.2d 301, 305 (Miss.1992); *Cooper v. Lawson*, 264 So.2d 890, 891 (Miss.1972). We find the claim of breach of fiduciary duty is procedurally barred, and this court will not address it on appeal.

**THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS AFFIRMED.
COSTS ARE ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING,
HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**

1. The Glen Condominiums also sued All South Construction, the company that performed the actual repair on the roof. However, the parties settled and the claims against All South were dismissed with prejudice on August 9, 1994.