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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001427-MR

BRANCH BANKING AND TRUST
COMPANY (successor in interest to
BANK OF LOUISVILLE) APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JAMES M. SHAKE, CHIEF JUDGE
ACTION NO. 06-CI-010885

LARRY E. THOMPSON; LINDA
S. THOMPSON; NORWEST FINANCIAL
ACCEPTANCE, INC.; GREATER LOUISVILLE
FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION; J.B. GROUP, INC.; HIGHLANDS
ANESTHESIA ASSOCIATES; CIRCUS AUTO
SALES, INC.; COMMONWEALTH OF KENTUCKY
REVENUE CABINET, DIVISION OF COLLECTIONS
DEPARTMENT OF TAX COMPLIANCE; NBD
BANK, N.A.; AIRTRON, INC.; BARGAIN
SUPPLY CO., INC.; RANGASWAMY &
ASSOCIATES, INC.; AMERICAN TAX FUNDING,
LLC; SECURITY NATIONAL BANK, TRUSTEE;
MOORING TAX ASSET GROUP, LLC; AND
LOUISVILLE-JEFFERSON COUNTY METRO
GOVERNMENT APPELLEES

BRANCH BANKING AND TRUST
COMPANY (successor in interest to
BANK OF LOUISVILLE) CROSS-APPELLEE

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, CHIEF JUDGE
ACTION NO. 06-CI-010885

LARRY E. THOMPSON; and
LINDA S. THOMPSON CROSS-APPELLANTS

OPINION
REVERSING AS TO CASE NO. 2009-CA-001427;
AFFIRMING AS TO CASE NO. 2009-CA-001436

** ** ** ** **

BEFORE: KELLER, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: The subject of this litigation is a $3,449,232 business loan between Branch Banking and Trust (BB&T) and Linda and Larry Thompson. BB&T declared the Thompsons in default of their obligations under this loan and initially filed this matter as an action in foreclosure. Conversely, the Thompsons asserted two claims of fraudulent inducement against BB&T; first, the Thompsons alleged that they were fraudulently induced to enter into this loan; second, the Thompsons alleged that BB&T had fraudulently induced them to sign a subsequent

forbearance agreement, which contained a release of all claims arising prior to March 31, 2006, relating to the aforementioned loan.

In March, 2009, despite several motions for summary judgment and directed verdicts filed by BB&T, both of the Thompsons' claims of fraud in the inducement proceeded to trial. A jury found BB&T liable based upon each theory. Because the jury found that BB&T's alleged misrepresentations and omissions had fraudulently induced the Thompsons to execute the forbearance agreement, the trial court held that the fraud relating to the forbearance agreement vitiated the forbearance agreement and its release provision.

Consequently, the trial court permitted the jury to award the Thompsons $1,600,000 in damages against BB&T, based upon the Thompsons' first claim of fraud which arose from circumstances occurring prior to the March 31, 2006 date specified in the forbearance agreement's release provision. The jury also awarded the Thompsons $67,582 relating to the Thompsons' second claim of fraud, which alleged that BB&T had induced the Thompsons to sign the forbearance agreement by misrepresenting that the forbearance agreement would obligate BB&T to pay the Thompsons' overdue tax obligations and re-amortize their loan. Finally, the jury awarded the Thompsons $9,000,000 in punitive damages.

However, on May 6, 2009, the trial court awarded BB&T the principal, interest, and late fees the Thompsons were obligated to pay under the terms of the loan agreement. As such, the Thompsons' damages were offset by

$1,207,077.65 in principal remaining on the loan, $368,083.34 in interest, and $6,824.85 in late fees. And, in a July 21, 2009 order, the trial court also granted BB&T's post-verdict motion for $359,016 in attorneys' fees. The trial court based its decision to do so upon an attorneys' fee provision contained in the loan agreement and Kentucky Revised Statute(s) (KRS) 411.195, which provides that "Any provisions in a writing which create a debt, or create a lien on real property, requiring the debtor, obligor, lienor or mortgagor to pay reasonable attorney fees incurred by the creditor, obligee or lienholder in the event of default, shall be enforceable . . . ."

BB&T moved for judgment notwithstanding the verdict on both of the Thompsons' claims of fraudulent inducement, asserting, as it did in its motions for summary judgment and directed verdict, that: 1) the Thompsons' claims were barred by the statute of frauds; 2) the release contained in the above-referenced forbearance agreement barred the Thompsons' first claim of fraud; and 3) the Thompsons were not fraudulently induced to enter the forbearance agreement because the Thompsons had failed to prove an essential element of fraud, *i.e.*, that they reasonably relied upon any alleged representation made by BB&T as an inducement to execute it.

In support of its third contention, BB&T cited, among other things, (1) the Thompsons' admitted failure to read any of the documents at issue in this matter, including the forbearance agreement, prior to executing them; and (2) Larry Thompson's testimony that at the time he signed that forbearance agreement, he

did not trust BB&T because he believed that BB&T had already breached several contracts with him, lied to him, stolen from him, defrauded him, and destroyed his business and personal life.

The trial court denied BB&T's motion for judgment notwithstanding the verdict (JNOV), and that order is the subject of BB&T's appeal.

The Thompsons also cross-appeal the decision of the trial court to grant BB&T's post-verdict motion for attorneys' fees, contending that part of the amount awarded was unwarranted because it represented fees BB&T expended in unsuccessfully defending itself from the Thompsons' fraud claims. However, the Thompsons do not appeal or contest the trial court's finding that they were liable to BB&T for defaulting under the terms of the loan agreement.

After a careful review of the record and the applicable law, we find that it was error for the trial court to deny BB&T's motion for judgment notwithstanding the verdict on both of the Thompsons' claims of fraud. We reach this conclusion because 1) no evidence of record supports that the Thompsons could have reasonably or justifiably relied upon any of BB&T's alleged misrepresentations as an inducement to executing the forbearance agreement; and 2) because fraud in the inducement was the only ground asserted by the Thompsons to invalidate the forbearance agreement, the forbearance agreement precluded the Thompsons from asserting their other claim of fraud, which was based upon several alleged misrepresentations by BB&T occurring prior to March 31, 2006.

Finally, because BB&T should have prevailed below as a matter of law, the Thompsons' cross-appeal is moot. We affirm the trial court's decision to award BB&T the full amount of its attorneys' fees.

STATEMENT OF FACTS

As noted above, BB&T appeals the trial court's denial of its motion for judgment notwithstanding the verdict (JNOV). Under the JNOV standard, the facts of this case must be taken in the light most favorable to the Thompsons as the prevailing party. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). In this regard, we borrow mostly from Larry Thompson's testimony in order to establish those facts.

Larry Thompson operated as the sole proprietor of a real estate business that involved buying, selling, operating, and conducting "1031 exchanges"[1] with commercial properties. Originally, Larry had mortgaged each of his properties separately and through separate lenders. BB&T's successor-in-interest, Bank of Louisville, offered this loan to the Thompsons in December, 2001, for the purpose of consolidating those mortgages into a single loan. Gordon Dabney, a loan officer, was Bank of Louisville's representative in this transaction; Dabney later became BB&T's agent with respect to this loan.

[1] Section 1031, Title 25, of the U.S. Code permits the exchange of investment property. "The concept behind a 1031 exchange is that, when a property owner sells a property and reinvests its proceeds into another property, any economic gain has not been realized in a way that generates funds to pay any tax. Accordingly, the Internal Revenue Code defers the taxation of any gain from the sale of the property in this situation." *Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 124 Ohio St.3d 27, 918 N.E.2d 972, 975 (2009) (internal citations omitted).

Larry claims that he explained to Dabney that his property business involved constantly buying and selling property, performing 1031 exchanges, and executing contracts for deeds. In response, the Thompsons claim Dabney said, "Well, I'll be able to do all of that, and I can do it at a better rate." Thompson testified to the specifics of Dabney's representations, which he claims to have relied upon when he subsequently executed the agreement relating to this loan:

> Larry Thompson: And I said, but how does it work? He said, well, it's a blanket loan; do you know how that works.
>
> I said, well, I kind of have an idea, I said, but explain it to me. He said, well, it's like all your properties are out here and our mortgage covers over all of that.
>
> I said, well, what if I want to sell off something? I don't keep my properties forever. He said, well, we'll do a partial release, which lets that property go, and then through the allocation of the properties that, you know, that you're selling we—we release that on the allocated amount.
>
> Q: Did he—did you have discussions with him about how the allocation would be determined?
>
> Larry Thompson: Well, it would be determined from—from the mortgage amounts that we're putting in—into the blanket mortgage.
>
> Q: Okay. Now, you also have on this timeline the word "re-amortization." Did you have a discussion with him about re-amortization of the note?
>
> Larry Thompson: Yes, I did.
>
> Q: What was that discussion?
>
> Larry Thompson: Well, he told me that on the—on the blanket mortgage, this is how it works, you know, on the

partial releases. And once that principal is paid down on that particular property, they re-amortize the note on the balance that's remaining. And re-amortizing meaning they're going to set a new payment.

Q: Were all of those items important to you that Mr. Dabney was telling you?

Larry Thompson: Absolutely, they were important.

Q: Were these representations that Mr. Dabney made to you?

Larry Thompson: Absolutely.

Q: Did you believe—

Larry Thompson: More importantly was that I would have the flexibility to continue to do those things.

Q: Did you believe what Mr. Dabney was telling you?

Larry Thompson: Yes, I did.

Q: Did you rely on what Mr. Dabney was telling you?

Larry Thompson: I relied completely on what he told me.

Q: Prior—when you talked about you had flexibility before on all of those properties—for example, Mooreman, Baymeadow, or Stony, or any of those properties—if you wanted to sell it, what would you do?

Larry Thompson: I would sell it. I already had that flexibility in place. I didn't want to replace it—replace all of my flexibility with something that was going to tie my hands and I not be able to do it, not be able to sell property or buy property or exchange without having that —that freedom.

(Trial Transcript 980-982).

Q: When you talked with Mr. Dabney about going with BB&T, did you discuss the term of the loan?

Larry Thompson: Yes, sir, we did.

Q: What was that discussion?

Larry Thompson: The term would be 20-year amortization.

Q: And how did you feel about that?

Larry Thompson: Well, I thought it was okay. I didn't—you know, 30 was what I had, but, you know, in—in the different mortgages that I had, most of them were all 30-year mortgage, but 20 was acceptable.

Q: Okay. Now, what was your understanding when you entered into this agreement with the bank whether you needed their permission, the bank's permission, to sell property?

Larry Thompson: I didn't think I needed the bank's permission to sell my own property.

Q: Okay. What was your understanding about whether you needed the bank's permission to buy property?

Larry Thompson: No, I didn't think I needed their permission to buy either.

Q: Okay. Well, how did the allocation work if you sold a piece of property, based on your understanding?

Larry Thompson: Well, my understanding of the bank—of the allocation of the loan, how it breaks down to each particular property, is I would sell off, you know, any given particular property, that the balance remaining of the entire note would be re-amortized and a new payment would be set on the remaining balance.

(Trial Transcript 1003-1004).

On January 17, 2002, Larry and Linda Thompson, as co-obligors, executed the loan agreement. In his testimony, Thompson described the circumstances surrounding the January 17, 2002 closing of this loan agreement, which occurred at the office of Murray Greenwald, BB&T's attorney:

> Larry Thompson: Well, as I said, Mr. Greenwald was signing the documents, passing—passing the documents to me, saying check, make sure your name, address is spelled correctly on the first page, turn it over to the signature page and sign it.
>
> And as we did that, we passed it on down to Mr. Dabney, and he took it and began to stack the different documents.
>
> Q: Okay.
>
> Larry Thompson: And so that—that was the—the course of business. That's the way it was all handled at the closing.
>
> Q: Were you given any time to read the entire documents?
>
> Larry Thompson: No, we didn't have time. Wasn't asked to read anything. Just make sure your name is spelled right, turn over to the signature page, sign it, pass it on down to your wife, give it to Mr. Dabney.
>
> . . .
>
> Q: When you entered into that business loan agreement, these other documents, did you believe that all the representations Mr. Dabney made to you were true?
>
> Larry Thompson: Absolutely.
>
> Q: Did you enter into this loan agreement and the other agreements based on his representations?
>
> Larry Thompson: Solely on those representations.

Q: So you relied on them?

Larry Thompson: Yes I did. I relied on them 100 percent.

Q: Did Mr. Dabney tell you anything different at the closing?

Larry Thompson: Never told me anything different.

(Trial Transcript 993-995).

In short, Larry testified he believed that the document executed at the January 17, 2002 closing memorialized Dabney's alleged representations, stated above. But, he admits that he did not read those documents.

At trial, Larry also pointed to a spreadsheet listing the properties and mortgages covered under this agreement, and the amount of the total loan allocated to each of those properties. Larry claimed BB&T had created this spreadsheet. He testified that Dabney had represented that BB&T would allow him to elect to sell any parcel listed on that spreadsheet at any time he desired and that BB&T would release its mortgage lien on that property for a certain amount allocated on that spreadsheet.

However, the document executed at the January 17, 2002 closing, titled "Business Loan Agreement," contains none of Dabney's alleged representations, contains no reference to the spreadsheet, and affirmatively disclaims any other agreements between BB&T and the Thompsons "unless given

in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment."[2]

The Thompsons allege that they first discovered BB&T's alleged fraud on June 23, 2004. The Thompsons had contracted to sell a parcel of their commercial property, located on Valla Road in Jefferson County, Kentucky; the closing was held on that date.

> Larry Thompson: Well, when I delivered the contract to [Dabney] from the purchaser of the Valla property, I told him, I said, now, here's—this is the contract of Mr. Popham, who is buying the Valla property, he's coming out of a 1031 exchange, and I'm going to be doing a 1031 exchange on my—on my side.
>
> Q: What property were you going to buy on your side?
>
> Larry Thompson: Well, at the time, I hadn't actually picked out a property yet, because I was just delivering the purchase agreement on my property, but I told him that, you know, my intentions were to—to do a 1031 coming out of my side of the property.
>
> Q: Why did you want to do a 1031 exchange with the proceeds you were getting from Valla?
>
> Larry Thompson: Well, because I didn't want to pay taxes on my gain.
>
> Q: Okay. And approximately how much gain were you expecting to receive?

[2] We reemphasize that the Thompsons alleged two claims of fraud, not a claim for breach of contract, and that the Thompsons do not appeal the trial court's finding that they, not BB&T, breached the terms of the loan agreement. The trial court admitted this spreadsheet, as well as Dabney's representations, as evidence of fraudulent inducement, not as parol evidence of additional contractual terms that BB&T may have breached.

Larry Thompson: Well, I was thinking, you know, it's a million-dollar property, and I get 500,000, I'm going to pay, you know, taxes on 500,000 if I don't.

Q: Okay. And when you had this discussion with Mr. Dabney, what did he tell you?

Larry Thompson: He said okay. He said bring—bring in what you—you know, what you're looking at.

Q: Did you think this was going to go the same way as the 110 Second Street?[3]

Larry Thompson: I thought it would go exactly that way.

Q: Did he ever tell you that he was going to change his mind?

Larry Thompson: Never told me he was going to change the terms or the way that we were going to do it. He set a precedence when we—when we went into the Second Street property, and when he set that precedence, he told me—his actions showed me, this is how you're going to get a release, this is how we're going to release, and this allocation sheet is what we're going to work from. And that's what I relied on from the time that we did the—the closing on Second Street.

Q: Did you think that allocation of partial releases was part of your deal with the bank?

Larry Thompson: Absolutely.

Q: Okay. Would you have entered into that deal if you knew they weren't going to live up to that?

Larry Thompson: Never would have.

Q: Okay. You actually go through with the sale on Valla, don't you.

[3] Prior to this, Larry Thompson testified that BB&T, through Dabney, had allowed him to sell another parcel of his commercial property consistent with the representations outlined above. This property was located at 110 Second Street in Jefferson County, Kentucky.

Larry Thompson: I do.

Q: And a $931,000 check is what the net return was, wasn't it?

Larry Thompson: Yes.

Q: Okay. Who took that $931,000 of money?

Larry Thompson: BB&T.

Q: How much did you get?

Larry Thompson: Zero.

Q: Tell the jury how in the world that happened?

Larry Thompson: That's what I'm asking myself, how did it happen. They just—they just took it. I had no choice. It was—we're not going to give you any money, we're taking all the proceeds.

. . .

Larry Thompson: They stole my money at the closing. That money belonged to me. It didn't belong to BB&T.

Q: Well, how much of the 931,000 net proceeds belonged to you as opposed to the bank?

Larry Thompson: 500,000 belonged to me.

Q: Okay. Did you complain to the bank?

Larry Thompson: Yes, I did.

Q: What did they say to you?

Larry Thompson: They said we want all the proceeds.

Q: Who told you that?

Larry Thompson: Mr. Zemanski[4] and Mr. Dabney.

Q: What did you tell them?

Larry Thompson: I told them, I said that you guys are killing me, I'm going to get killed on taxes. They said, well, we—we run the numbers and we want all the proceeds. And I said for what. They said it's a loser. I said it's not a loser. They said, did you run the numbers. Yes, I ran the numbers, and it works for me. Well, we ran the numbers, and it—it don't work for us.

Q: You're now talking about what—you were going to use the proceeds to buy the Keesee property aren't you?

Larry Thompson: Yes.

Q: Okay. How much—how much did you only need in order to buy the Keesee property using proceeds from the Valla Sale?

Larry Thompson: For the Keesee property—property, I only needed 105.

Q: Did the bank let you keep at least 105,000?

Larry Thompson: No, they didn't.

Q And then why didn't they let you keep at least 105?

Larry Thompson: It didn't work for them and they took it all.

Q: When you say it didn't work for them, what did they tell you?

Larry Thompson: That's what they told me.

Q: That's their words?

Larry Thompson: Yeah. It doesn't work for us, we want all the proceeds.

[4] Kevin Zemanski is a Senior Vice President of BB&T and another of BB&T's agents.

. . .

Q: If you see, this is the contract you signed, the Keesee Company, with you, and it's various pieces of property, and you will see you wrote on here, it says, "This purchase is being acquired as part of an exchange pursuant to Section 1031 of the Internal Revenue Code." Is that right?

Larry Thompson: That's right.

Q: And in fact, it says, "It's also a said exchange property at 4700, 4740 Valla." You had to couple those two properties together?

Larry Thompson: Yes.

Q: Okay. Now, was it important for you to do this 1031 exchange?

Larry Thompson: It was very important.

Q: Why was it very important?

Larry Thompson: Well, the tax consequences from this was going to kill me, it was going to put me in a—in a financial bind to have to pay the taxes on this, on the gain that I was going to receive from this.

Q: And what about the loss that you—you were selling Valla, and were you making income from the rents at Valla?

Larry Thompson: I was when I owned it.

Q: Approximately how much were you making?

Larry Thompson: Well, the potential income of that property was approximately 20,000

Q: The Valla property?

Larry Thompson: The Valla property, 20,000 a month.

Q: So you lost that?

Larry Thompson: So I lost that.

Q: Now, you were going to buy the Keesee property. Would that have made up some additional?

Larry Thompson: That would have made up the—what I lost at Valla, what I was buying from Keesees would have replaced that loss of income.

Q: But now, when you were—so you lost the income at Valla, you received no proceeds, and the bank stopped you from buying the Keesee property, all at the same time?

Larry Thompson: Yes, all at the same time.

Q: What did that do to your business?

Larry Thompson: It destroyed it. From that point on, when they stole my money, these guys over here, this BB&T bank, when they stole my money at the closing, it destroyed my business.

Q: Mr. Thompson, what about—

Larry Thompson: They took everything I had. It was like a runaway train going down hill. From that point on, what they did to me touched every aspect of my business, my life. And they didn't care a dime about it.

All they could say was, well, we'll put 105 in an escrow account. Well, what's that going to do? You took 500,000. And then they come back and said, well, the 105 we put in escrow, we're going to keep it. Bull. They stole my money, and they know they stole it.

They ruined my business. Everything I worked for, for 30 years. How would you like to work for 30 years and come home and find out the bank cleaned you out? That's what they did to me.

Q: Now, Mr. Thompson, what happened to your business after the sale of Valla, them taking your money, you not being able to buy the Keesee property? What did you have to do?

Larry Thompson: I had to begin selling my properties just to make ends meet, just to pay taxes.

Q: What happens to a real estate—to your real estate business when you can only sell property and not buy and not exchange?

Larry Thompson: You end up with nothing.

Q: Did you know when entering this deal with the bank that they were going to liquidate all your assets?

Larry Thompson: I had no idea. If I had known when they came—when Gordon Dabney came in and sat down beside by desk that day, if he said, now, give us your loan and let me liquidate you, let me put you out of business, I would have said, no.

But that's not what I agreed to, and that's not what he represented that he was going to do for me when he came into my office that day soliciting my business.

(Trial Transcript 1018-1030).

Q: Okay. Now, when you learned—let's go back to the beginning here. When you learned that the bank was stopping you, what now did you learn—stopping you and taking all the proceeds from Valla, what did you now think in regard to the representations Mr. Dabney gave to you, that you could operate your business as usual?

Larry Thompson: All of those representations were false, total lies. They completely lied to me. Zemanski lied to me, the guy sitting here for BB&T lied to me.

Q: Okay. Let's—

Larry Thompson: Gordon Dabney lied to me. The terms that they promised me when they sat down at my desk

> and made the—made the agreement, when we got to this point, was total lies.
>
> Q: Okay. Well, why did you stay with this bank, Larry, knowing that they lied to you?
>
> Larry Thompson: At this point, I—I didn't feel—I didn't —I didn't know where to turn. There's no way out. It was—I mean, they had a stranglehold on me, the death grip. It was like a—from this point on, it was like a runaway train downhill. There was no stopping.

(Trial Transcript 1039-1040).

On August 16, 2004, following the Valla sale, the Thompsons entered into a loan modification agreement with BB&T. Regarding this second agreement, Larry Thompson testified:

> Q: So it's August '04 that the bank increased your interest rate; is that right?
>
> Larry Thompson: That's right.
>
> Q: They reduced your amortization period, and they give you a three-year balloon?
>
> Larry Thompson: Right.
>
> Q: What did that do to your business?
>
> Larry Thompson: Destroyed it.

(Trial Transcript 1040).

However, on cross-examination, Larry Thompson testified that, in spite of his feelings toward BB&T and Dabney, he had again signed an agreement with BB&T, through Dabney, without first reading it or claiming to understand it.

Q: Now, you—you testified yesterday to Mr. Zielke that when you signed this document—and you did sign this document, right, this loan modification document?

Larry Thompson: Yes.

Q: Okay. But you didn't read it first, right?

Larry Thompson: Right.

Q: Okay. Or get counsel to review it?

Larry Thompson: No.

Q: Okay. Even though you had already told the bank that they had stole money from you?

Larry Thompson: Yes.

Q: Okay. And even though you had told the bank that they had lied?

Larry Thompson: Yes.

Q: And even though you had believed that the bank had failed to live up to its—what you thought was their agreement to do partial releases, correct?

Larry Thompson: Yes.

Q: So all of those things had already happened, and you signed this document without reading it?

Larry Thompson: Yes.

Q: Okay. And you told the jury yesterday, I believe, that you didn't know that this was a three-year balloon until Mr. Zielke told you that it was?

Larry Thompson: That's correct.

Q: Okay. So I guess that—it says here, it talks about the payments, and it says, "With one final payment of all remaining principal and accrued interest due on 8/17/07."

Now, is it your testimony that the bank hid that from you?

Larry Thompson: Well, my testimony was they didn't explain this document to me. And the only thing that was presented to me was that when I sat down with Mr. Dabney, he explained to me what the payment was, what the rate was going to be, and what the balance of the loan that was being amortized, the principal balance. That's all he explained to me.

Q: Okay. And so, you feel it was his—

Larry Thompson: I'm sorry?

Q: So you feel that it was his obligation to explain that to you, but it was not your obligation to read the document before you signed it? Is that your testimony?

Larry Thompson: My testimony is that he's a bank representative and this is his document, he should explain it to me. I'm his customer.

He originally called on me. I didn't call on him. This is a document he wants me to sign. I asked him if he would re-amortize my loan—re-amortize my loan, set a new payment based on the money they had stolen from me from the Valla sale, which would pay down the principal.

(Trial Transcript 1144-1146).

Larry then described what happened to his business following the August, 2004 loan modification agreement:

Q: Now, sir, we now move to the April, October 2005 period. Why are you selling your property that you worked so hard to acquire?

Larry Thompson: I'm selling property to try to pay taxes, try to stay afloat.

Q: Okay. And you sold St. Anthony; is that right?

Larry Thompson: That's right.

Q: Who took all the money from the sales proceeds of that?

Larry Thompson: BB&T.

Q: You sold—

Larry Thompson: And I was even intending to do a 1031 exchange on that property and they stopped it.

Q: Did you let the bank know you were intending to do a 1031 exchange?

Larry Thompson: Yes, I did.

Q: Who did you call?

Larry Thompson: I called Gordon Dabney.

Q: You know, Mr. Dabney testified that you were hard to get a hold of and you had no communication. Was that true?

Larry Thompson: No. That's absolutely false. We were in total communication all the way through, all the way through the term of this note.

Q: When you sold the Mooreman property—and I think I misspelled it; I apologize—who took all the proceeds from that?

Larry Thompson: BB&T took it all.

Q: The same question with Harold Avenue and Bluegrass, who took all the proceeds?

Larry Thompson: Harold Avenue, BB&T takes all.

Q: What happened to the—

Larry Thompson: Bluegrass, they take all.

Q: What happened to the promise they were going to use the allocation shown on [the spreadsheet, referenced above]?

Larry Thompson: Promises were gone.

Q: Those promises that they made to you about the allocation, was that true or false?

Larry Thompson: It was false.

(Trial Transcript 1040-1042).

Q: So in 2005, how is your business doing after they stopped Valla and stopped your purchase of Keesee?

Larry Thompson: It's—it's starting to fall, starting to crumble.

Q: Okay. The bank has mortgages on all—all this property, correct?

Larry Thompson: Correct.

Q: They're taking all the proceeds; is that right?

Larry Thompson: That's correct.

Q: How are you getting by?

Larry Thompson: It was tough.

. . .

Larry Thompson: After—after BB&T has completely cleaned me out, stopped all my sales, what little money I had in the bank, a week before Christmas, the IRS cleans

> out my bank accounts. I can't even go to the store to buy any groceries.
>
> So my wife and I unwrap Christmas presents and take them back to the store to exchange them for cash, so we would have money to live on, because of the position they put us in. We had absolutely nothing.

(Trial Transcript 1043-1045).

The Thompsons failed to make their requisite payment on the loan when it came due on November 17, 2005. Also, they failed to make the December 17, 2005 payment. On December 28, 2005, Larry met with Zemanski, BB&T's agent, in order to discuss auctioning several more of his properties to meet his loan obligations. Larry testified:

> Larry Thompson: And so we went into my office and discussed—he said I'm—I'm here today because I want to talk to you about the property you've been selling off, and what else do you have that you're going to sell. And I said, well, I've got the property on Strawberry Lane listed that I have a contract on, and I have the property on New Cut Road.
>
> And he said, well, you're taking too long selling those. I said, well, what do you mean. He said, you're not getting it done fast enough. We want them sold faster. I said, well, you know, I've got them listed and I'm showing them. I have a contract on one, you know, we're working on it. I don't know what else I can do.
>
> He said, well, you need to do an auction. I said, an auction. He said, yeah.
>
> Q: Have you ever done—did you ever do an auction before in your life?
>
> Larry Thompson: No. Never done an auction. And I told him, I've never done—I said, well, I have never done an auction, I don't—I don't know anything about auctions. But what I do know, I don't think they're very good.

. . .

Q: Did he tell you what he would do if you didn't agree to that?

Larry Thompson: Well, he said if you don't do it, I'm going to foreclose on you.

Q: Okay.

Larry Thompson: He said, in fact, if we hadn't met today, I was—I was going to start foreclosure tomorrow and invoke the default rate. But since we've met today, I'm not going to invoke the default rate.

Q: What did he tell you about having money available if you did the auction to pay the IRS?

Larry Thompson: He told me if I would do the auction, if I would go forward with the auction, they would apply the proceeds from the sale of the auction of the properties to the principal of the loan and also pay off my taxes to the IRS.

Q: Was that important to you, to get these IRS taxes paid?

Larry Thompson: Very important. That's why I was listing those properties and trying to sell them, was to get rid of the IRS and get them off my back.

. . .

Q: Did Mr. Zemanski tell you what would happen if there was not enough sales money to satisfy BB&T's loan?

Larry Thompson: He said—I asked him, I said, well, if we do this auction and we get down to the end of it and the sales of the property that are in the auction, they don't bring enough to pay off the note—because I felt like and told him—I said, I feel like if I sell these two properties, there's enough out of these two sales to completely pay your note off and let me get away from you guys.

> And I said, if that doesn't happen, we don't raise enough money from the sale, what will we do with the balance that's left over? If there's 100,000 or 200,000, what happens with that? He said, well, we don't know what that amount is going to be. But when we get to that point, we'll re-amortize your note and set you a new payment.

(Trial Transcript 1047-1052).

Thereafter, the Thompsons failed to make any of the requisite loan payments due on January 17, February 17, and March 17, 2006. On March 31, 2006, Zemanski e-mailed Larry Thompson a proposed forbearance agreement. The text of the e-mail itself states:

> Larry,
>
> Attached is the proposed forbearance agreement. Please review it. Assuming you have no issues, please have Linda and yourself execute the agreement and return the original to me for the bank's signature. I expect this can be completed by next Friday, April 7th.

The forbearance agreement referenced in Zemanski's e-mail is written in twelve-point font, boldfaced and in all capital letters in some places, and spanning a total of eleven pages, including one page listing only signature lines. And, similar to each of the prior agreements between the Thompsons and BB&T, the forbearance agreement provides:

> 22. Entire Agreement; Merger. This Agreement and the Loan Documents constitute the entire and exclusive statement of the agreement of the parties with respect to the subject matter hereof and thereof, and supersede all prior understandings with respect to the subject matter hereof and thereof. No change, modification, addition or amendment of this Agreement and the other Loan

> Documents shall be enforceable unless in writing and signed by the party against whom enforcement is sought.

The forbearance agreement recites, as the undisputed evidence in this case bears out, that the Thompsons (the "Borrowers") were in default of their "Obligations" to BB&T (the "Lender") specified in the "Loan Documents."[5] In relevant part, the terms of the forbearance outlined in the agreement are as follow:

> 2. Forbearance.
>
> (a) Forbearance Period. Subject to the terms of this Agreement, Lender shall forbear from exercising its remedies with respect to the Note and the Loan Documents and the indebtedness and obligations evidenced thereby (collectively, the Indebtedness") until the earliest of (1) July 19, 2006, (2) the occurrence of a Termination Event as defined in this Agreement, or (3) repayment in full of all Obligations and Indebtedness owed by Borrowers to lender for any amounts now existing or arising after the date of this Agreement, including all applicable interest, late charges, premiums, penalties, and attorneys' fees. This period of forbearance is hereinafter referred to as the "Forbearance Period."
>
> . . .
>
> 4. Modifications to the Note and Security Documents.
>
> (a) Interest Payments During Forbearance Period. Borrowers shall make interest payments of $5,000 per month during the term of this Agreement, beginning April 10, 2006, and continuing on the 10th day of each month thereafter through and including July 10, 2006. Lender's acceptance of these payments shall be solely in consideration for Lender's forbearance, and shall be applied to accrued but unpaid interest, and in no way constitutes a waiver of the defaults described herein.

[5] Section 1(e) of the forbearance agreement defines "Obligations" as the "Borrowers' obligations under the Loan Documents." Section C defines "Loan Documents" as "The Note, the Jefferson County Mortgage, the Jefferson County Assignment of Rents, the Indiana Mortgage, the Indiana Assignment of Rents, this Agreement and all other related loan agreements, notes, mortgages, security agreements, guaranties and other instruments and documents."

Importantly, however, the forbearance agreement actually *disclaims* any promise to either apply proceeds realized from an auction of the Thompsons' properties to any of the Thompsons' tax obligations or re-amortize the Thompsons' loan. With regard to the former, the forbearance agreement states:

> 6. Application of Auction Proceeds. Borrowers shall cause the entirety of the proceeds of the Auction, after deduction of any fees owed to the Auctioneer (the "Auction Proceeds"), to be paid to Lender. Lender shall apply the Auction Proceeds first to reimbursement of the Marketing Expenses, with the balance of the Auction Proceeds to be applied against the Obligations.
>
> 7. Tax Obligations. Borrowers are required, and by executing this Agreement hereby agree, to satisfy any and all tax obligations with the Internal Revenue Service and/or the Commonwealth of Kentucky prior to the expiration of the Forbearance period.

With regard to the latter, the forbearance agreement states:

> 2. Forbearance.
>
> . . .
>
> (c) Rights Upon Termination of the Forbearance Period. Upon termination of the Forbearance Period, *Lender shall be under no obligation to grant, continue, or extend forbearance in any respect* and Lender shall have the right to exercise all remedies available upon default to the same extent as Lender would be entitled if the foregoing forbearance had never been a part of this Agreement (without notice or cure period of any kind, which are hereby expressly waived). . . .

(Emphasis added.) Three pages later, the forbearance agreement reemphasizes this point in boldfaced print:

> 9. **No Obligation to Extend Future Forbearance; No Waiver. Borrowers agree that Lender is not obligated to and does not agree to grant any other forbearance except as expressly set forth in this Agreement. For example (by way of illustration and not by way of limitation), Borrowers agree that no course of dealing that might have existed between them and Lender (whether or not one actually existed) would obligate Lender to grant any extension of the maturity of any Obligation, or any forbearance. Except as expressly provided herein, Lender reserves all of its rights and remedies with respect to Borrowers' Obligations. Borrowers agree that at the termination of the Forbearance Period, for whatever reason, Lender may exercise any and all of its rights and remedies under the Loan Documents, or under this Agreement, or in connection with the Indebtedness evidenced by the Loan Documents and/or the liens granted pursuant thereto, or otherwise as Lender may deem appropriate in the exercise of its sole and absolute discretion.**

Of equal importance, the next page also contains a provision releasing BB&T from any claims the Thompsons could have asserted against it, whether in tort or contract, which arose prior to March 31, 2006:

> 13. **RELEASE OF LENDER. AS A MATERIAL INDUCEMENT TO LENDER TO ENTER INTO THIS AGREEMENT, WHICH BORROWERS HAVE DETERMINED TO BE IN THEIR DIRECT ADVANTAGE AND BENEFIT, BORROWERS HEREBY RELEASE AND DISCHARGE LENDER, ITS PAST AND PRESENT EMPLOYEES, AGENTS, ATTORNEYS, OFFICERS AND DIRECTORS AND ALL AFFILIATES THEREFROM (COLLECTIVELY, THE "LENDER RELEASEES") FROM ANY AND ALL CLAIMS, LIABILITIES,**

DEMANDS, ACTIONS, AND CAUSES OF ACTIONS OF ANY KIND WHATSOEVER, WHETHER KNOWN OR UNKNOWN, CONTINGENT OR NON-CONTINGENT, LIQUIDATED OR UNLIQUIDATED, WHICH IN ANY WAY RELATE TO ANY EVENT, CIRCUMSTANCE, ACTION, OR FAILURE TO ACT AT ANY TIME PRIOR TO THE EFFECTIVE DATE OF THIS AGREEMENT RELATED TO THE LOAN DOCUMENTS, THIS AGREEMENT, ANY COURSE OF DEALING OR OTHER BUSINESS RELATIONSHIP (WHETHER OR NOT RELATED TO THE LOAN DOCUMENTS) AND/OR ANY OTHER CREDIT OR OTHER BUSINESS RELATIONSHIP AMONG THE PARTIES (OR ANY ONE OR MORE OF THEM) TO THIS AGREEMENT. BORROWERS HEREBY ACKNOWLEDGE AND AGREE THAT THE LENDER RELEASEES AT ALL TIMES HAVE ACTED IN GOOD FAITH AND IN COMPLIANCE WITH ALL OBLIGATIONS THAT MIGHT HAVE BEEN IMPOSED UNDER ANY AGREEMENTS BETWEEN OR AMONG, OR OTHER BUSINESS RELATIONSHIP BETWEEN OR AMONG, THE LENDER RELEASEES AND THE BORROWERS. BORROWERS FURTHER ACKNOWLEDGE AND AGREE THAT THE LENDER RELEASEES HAVE TAKEN NO ACTION, AND HAVE NOT FAILED TO TAKE ANY ACTION, WHICH WOULD IMPAIR ANY COLLATERAL SECURING ANY OBLIGATIONS OF BORROWERS TO THE LENDER RELEASEES OR ANY RIGHTS OR ACTIONS THAT THE LENDER RELEASEES MIGHT HAVE AGAINST THE BORROWERS. THIS RELEASE IS NON-CONTINGENT AND ABLSOLUTE [sic]**. THIS RELEASE SHALL SURVIVE, AND SHALL REMAIN IN FULL FORCE AND EFFECT AFTER THE TERMINATON OF THE FORBEARANCE PERIOD.**

Finally, the forbearance agreement provides, also in boldface:

> 25. **Acknowledgment of Borrowers. Borrowers acknowledge that they have received a copy of this Agreement as fully executed by the parties hereto. Each Borrower represents and warrants that he/she (a) has read THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS AND HAS HAD THE OPPORTUNITY TO CAUSE SUCH DOCUMENTS TO BE EXAMINED BY ITS ATTORNEY REPRESENTATIVE OR ADVISORS; (b) is thoroughly familiar with the transactions contemplated in this Agreement; and (c) together with its representatives or advisors, if any, has had the opportunity to ask questions of representatives of Lender, and receive answers thereto, concerning the terms and conditions of the transactions contemplated in this Agreement as each deems necessary in connection with the decision to enter into this Agreement.**

In sum, the forbearance agreement required the Thompsons, among other things, to 1) remit all of the proceeds of the auction of their properties, contemplated above, to BB&T; 2) apply the balance of those proceeds against the obligations they owed BB&T under those loan documents; 3) pay the taxes resulting from these sales; 4) pay BB&T $5,000 per month, for three months, in order to keep the 90-day forbearance period in effect; 5) acknowledge that after the expiration of the 90-day period, BB&T has no obligation, and does not agree, to re-negotiate their loan, *i.e.*, "grant any other forbearance in any respect"; 6) waive all claims in tort and contract they may have had against BB&T and its agents, arising in any way from the loan documents at issue in this case; and 7) acknowledge that if they chose to sign this forbearance agreement, they understood it and had an opportunity to review it themselves and with an attorney beforehand.

Larry responded to Zemanski's e-mail on April 7, 2006, at 6:34 p.m., stating

> Kevin,
>
> We returned today from spring break vacation. I will put a signed copy of the forbearance agreement and check in the mail to you tomorrow, you should have it by Monday the 10th.

Larry also wrote Zemanski a letter, dated April 7, 2006, which stated "Enclosed please find the signature page of the forbearance agreement and my check 23975 in the amount of $5,000 as per our agreement."

However, Larry testified that he chose not to read this document from BB&T, either. Instead, Larry testified that after he returned home and, prior to sending the e-mail and letter, he called Zemanski asking for an explanation of the forbearance agreement.

> Q: You didn't look through the—
>
> Larry Thompson: It's not anything I'm familiar with. I thought it very unprofessional of a bank to be sending me a document of something like this. I mean, what—what's this for? Tell me what it is. That's what I asked Kevin.
>
> Q: Well, is it your testimony that you flipped through the pages and looked through the captions?
>
> Larry Thompson: Well, I scanned down the page.
>
> Q: How many pages? Which pages?
>
> Larry Thompson: Well, I scanned down all the way through the document.

Q: All the way through the document?

Larry Thompson: Yeah. I just took the mouse and pulled the document all the way down, and then back up to the top.

Q: Excuse me, just a minute, sir. So it's your testimony that you—you scanned down through the pages?

Larry Thompson: I took the mouse, put it on the cursor, scanned all the way through the pages to see how many pages were there, back up to the top; you know, a five-second exercise.

Q: Okay. Well, did you see any of the bold print?

Larry Thompson: I didn't read any bold print.

Q: Okay.

Larry Thompson: I called—

Q: So you didn't even—you didn't look at the captions or anything like that, correct?

Larry Thompson: No. As I said, I looked at the top, forbearance agreement, didn't understand it, put the mouse on the cursor, scrolled all the way to the bottom of the page, scrolled back up to the screen, a five-second exercise there with the mouse, called Kevin, to ask him if he could explain the forbearance agreement for me. I didn't understand it.

Q: I mean, did that catch your eye, this bold print here that said, "No obligation to extend future forbearance"?

Larry Thompson: I didn't read any of it.

Q: Okay. So you didn't—you didn't happen to notice that there was a full two-thirds of a page with bold and capitalized letters on it that said "Release"?

Larry Thompson: No sir. I didn't read any of the document.

Q: Well, you scanned it; is that your testimony?

Larry Thompson: No, I didn't scan it. I put the mouse on the cursor—

Q: Just went whoop, whoop?

Larry Thompson: Went down to the bottom of the page and back up.
Q: Was—I mean, what was that for? Why did you do that?

Larry Thompson: I wanted to see how many pages it was.

Q: Okay. You wanted to see how long it was. Do you remember that—I mean, was it—was it just going to take too much time for you to look at or...

Larry Thompson: Sir, I said I didn't understand it.

Q: But you're a—you're a college graduate, aren't you, sir?

Larry Thompson: I am.

Q: Okay. And you have done, you know, 50 or 100 loans; is that correct? Been in business for 25—I mean, 35 years?

Larry Thompson: Yes, sir. I'm a college graduate. My degree is physical education.

Q: Certified—

Larry Thompson: I don't have a business degree.

Q: Certified property manager?

Larry Thompson: I'm a certified property manager.

Q: Do—have done complex 1031 exchanges?

Larry Thompson: I have done complex 1031 exchanges.

Q: You have drafted legal documents, the Kumar contract for deed, right?

Larry Thompson: I tried to do a legal document.

Q: Well, you did—in fact, you did it, right? You said you used that on many occasions, that contract for deed, right? You said that was yours.

Larry Thompson: Oh, contract for deed, I have done that, yeah. That's a form document, and I have used it.

Q: But you couldn't understand the—you decided you couldn't understand it, so you just weren't going to read it; is that what you're telling the jury?

Larry Thompson: Well, I called the maker of the—of the e-mail, and asked him to explain it to me.

Q: Do you think that excuses your responsibility to review the documents, sir? Do you think at that point you're just—

Larry Thompson: Well, he authored it. I wanted an explanation of it.

Q: And you didn't get a lawyer, right?

Larry Thompson: Right.

Q: And you—and the person that you asked to explain it to you, you had accused of lying and stealing?

Larry Thompson: Yes.

Q: And breaching agreements?

Larry Thompson: Breaching agreement, absolutely.

Q: And so you called him to explain the document to you?

Larry Thompson: He fraudulently sent me this document, telling me all it is, is an agreement so that we can move forward with the auction, because we had already discussed the auction.

All this is, is so that we can move forward with the auction. And we're going to pay your taxes from the auction, we're going to put you in a position where—where you can be back in good standing with the bank, we're going to re-amortize your loan for you.

They made promises to me with this thing. Sign this, and this is what's going to happen, we're going to help you sell your properties at auction, we're going to help you pay your taxes.

And then when all of that is done, we're going to re-amortize your loan, we're going to set you a new payment. Didn't do any of that. The only thing they did was the auction, sell my properties at pennies on the dollar, half price.

Q: So it's your testimony that you talked to Mr. Zemanski, even though the correspondence doesn't indicate that, right?

Larry Thompson: (Nodding head affirmatively.)

Q: And that you didn't read the forbearance agreement, because you relied on what he told you was in there?

Larry Thompson: I relied on what he explained to me what this document was.

Q: And you felt like—

Larry Thompson: He sent it to me in the e-mail, he authored it. He sent it to me. I thought it was a little strange that a bank is going to send me something through an e-mail. But nevertheless, that's why I called him, explain this to me. I have never seen a forbearance agreement. I don't know what that is.

Q: I guess you never will, if you don't read it.

Larry Thompson: Probably not.

(Trial Transcript 1187-1192).

Finally, Larry Thompson testified to the specifics of when and how he discovered BB&T had allegedly defrauded him again, this time with respect to Zemanski's representations regarding the auction, the re-amortization of the loan, and the payment of his outstanding state and federal tax debts:

> Q: Now, we know that the—that an auction actually occurred approximately June 29th [2006]; is that right?
>
> Larry Thompson: That's right.
>
> Q: And you were there; is that right?
>
> Larry Thompson: Yes, I was, yes.
>
> Q: And you saw what kind of prices the auction was bringing?
>
> Larry Thompson: Yes.
>
> Q: And you couldn't stop it, though, could you?
>
> Larry Thompson: No, I couldn't.
>
> Q: And those prices were about half of what your properties were worth?
>
> Larry Thompson: Yes, sir.
>
> Q: Who took all the proceeds of that sale?
>
> Larry Thompson: BB&T.

Q: How much did the bank give you for taxes?

Larry Thompson: Zero.

(Trial Transcript 1057).

Q: So there was never another—in other words, there was never any taxes paid like he promises, right?

Larry Thompson: Never paid.

Q: Never a re-amortization like he promised?

Larry Thompson: Never re-amortized.

(Trial Transcript 1060).

Prior to the auction, the outstanding balance of the Thompsons' loan was $1,891,488.84. On July 5, 2006, BB&T applied the total auction proceeds, minus marketing expenses, to this balance; afterward, the total outstanding amount of the Thompsons' loan was $1,207,077.65. On July 11, 2006, the Thompsons made the final $5,000 payment required to keep the 90-day forbearance period in effect. But, the Thompsons made no payments to BB&T during the months following the auction in order to cure their default under the loan documents, and they proposed no repayment plan.

On December 5, 2006, BB&T filed its complaint. The relevant procedural history of this case following BB&T's complaint, including the Thompsons' two counterclaims of fraud in the inducement, has been discussed earlier in this opinion.

STANDARD OF REVIEW

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. App. 1985).

A reviewing court may not disturb a trial court's decision on a motion for a judgment notwithstanding the verdict unless that decision is clearly erroneous. *Bierman*, 967 S.W.2d at 18. The denial of a motion for a judgment notwithstanding the verdict should only be reversed on appeal when it is shown that the verdict was palpably or flagrantly against the evidence such that it indicates the jury reached the verdict as a result of passion or prejudice. *Id*. at 18-19.

ANALYSIS

"[A] release without duress, fraud, or bad faith, is effective to waive a plaintiff's right to bring a claim, whether statutory or otherwise." *Humana, Inc. v. Blose*, 247 S.W.3d 892, 896 (Ky. 2008). The trial court only invalidated the April 7, 2006 forbearance agreement and release on the basis of fraud, and this fraud was based, in turn, upon BB&T's alleged promises to re-amortize the Thompsons' loan after the property auction and apply a portion of the proceeds from that auction to

satisfy the Thompsons' state and federal tax liabilities. As such, we address the Thompsons' claim of fraud relating to the forbearance agreement first because it is dispositive of all matters asserted in this case. If the Thompsons were not defrauded into entering the forbearance agreement, both of their claims of fraud against BB&T (*i.e.*, their claim of fraud relating to the forbearance agreement itself, as well as their other claim regarding transactions occurring prior to the March 31, 2006 release date contained in the forbearance agreement) must fail as a matter of law.

BB&T argues that the trial court erred in denying its motion for JNOV because reliance is an essential element of fraud, and the Thompsons failed to present any evidence demonstrating that they could have relied upon either of the alleged misrepresentations relating to the forbearance agreement as bases for fraud. In support of this contention, BB&T points to the several instances throughout the trial, not limited to those quoted above, where Larry 1) testified that he distrusted BB&T when BB&T allegedly made these representations and prior to signing the forbearance agreement; and 2) admitted that he failed to read the forbearance agreement prior to signing it.

We agree with BB&T's argument.[6]

[6] BB&T offers several other arguments as to why the Thompsons' claims of fraud should have been barred as a matter of law. These arguments relate to the statute of frauds and also to the proposition that these alleged misrepresentations are nonactionable "future promises." We do not address these arguments because the Thompsons failed to present any evidence of reasonable reliance, an element essential to their claim of fraud respecting the forbearance agreement. Their failure is dispositive to the resolution of this case.

A party claiming fraud must establish six elements by clear and convincing evidence: (1) material representation; (2) which is false; (3) known to be false or made recklessly; (4) made with inducement to be acted upon; (5) acted in reliance thereon and, (6) which causes injury. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999); *Wahba v. Don Corlett Motors, Inc.*, 573 S.W.2d 357, 359 (Ky. App.1978). Where the proven facts or circumstances merely show inferences, conjecture, or suspicion, or such as to leave reasonably prudent minds in doubt, it must be regarded as a failure of proof to establish fraud. *Goerter v. Shapiro*, 254 Ky. 701, 72 S.W.2d 444 (1934).

Our analysis of the Thompsons' claim of fraud focuses upon the fifth element, *i.e.*, reliance. Within the context of fraud, a plaintiff's reliance must be "reasonable." *Flegles, Inc. v. Truserv Corp.*, 289 S.W.3d 544, 549 (Ky. 2009). As such, when the recipient of a business representation has an opportunity to ascertain for himself the falsity of that business representation through ordinary vigilance or inquiry, the falsity of that business representation is not actionable as fraud, even when made with the intention to deceive. *Id*. Stated differently, the recipient of a business representation has a duty to exercise ordinary care, or "common sense." *Id*. The question this case presents, then, is whether the Thompsons' failure to read their forbearance agreement with BB&T, prior to signing it, breached their duty of ordinary care and, as a matter of law, precluded them from reasonably relying upon any extrinsic statements regarding the alleged promises, stated above.

A forbearance agreement, like a settlement agreement, is a contract. *Spot-A-Pot, Inc. v. State Resources Corp.*, 278 S.W.3d 158 (Ky. App. 2009); *see also Huff Contracting v. Sark*, 12 S.W.3d 704, 707 (Ky. App. 2000); *Humana, Inc. v. Blose*, 247 S.W.3d 892, 895 (Ky. 2008). And, the general rule is that the "negligence of one party, such as signing a contract without reading it, bars a suit for fraud against another." *Cline v. Allis-Chalmers Corp.*, 690 S.W.2d 764, 767 (Ky. App. 1985).

The rationale behind barring a claim of fraud in this context is twofold:

> First, that it invites perjury and subornation of perjury, if parties are allowed to set aside their contracts on parol evidence of having been misled into signing them. Second, it encourages negligence when relief is given against that which ordinary prudence would have protected against at the outset. Therefore, when one complains that he has been defrauded into signing a contract without reading it, and on the representation respecting its contents of the party whose interests were antagonistic to his own, the court is likely to say to him that what he complains of is his own folly, and against this the law cannot protect him.

Kreate v. Miller, 226 Ky. 444, 11 S.W.2d 99, 101 (1928) (quoting Cooley on Torts (3d Ed.) p. 933)).

To this effect, the rule

> rests on the idea that one cannot be defrauded by an assertion of what he knows to be false, and that courts will presume that an ordinary person does know those things which are obvious to ordinary observation. Hence courts will deny relief to him who shuts his eyes to that

> which is clearly apparent, if, knowing it, he could not have been deceived by defendant's misrepresentation.

Id. at 101-2 (quoting *Kaiser v. Nummerdor*, 120 Wis. 234, 97 N.W. 932, 934 (1904)).

In certain instances, however, it is proper for a jury, rather than the Court, to decide whether a party's failure to read a contract prior to signing it is a breach of the duty to exercise ordinary care. As stated by the former Court of Appeals,

> One *sui juris* and in possession of his faculties, contracting at arm's length, and who is able to read and write, is not permitted by the law to rely exclusively upon the statements of the other contracting party as to the contents of a writing which the former signs. *There must be something said or done by the party charged with the fraud which would be reasonably calculated to disarm or deceive one of ordinary prudence and to prevent him from using such diligence as an ordinarily prudent man would use in the execution of a contract under the same or similar circumstances.* When, therefore, the law speaks of misrepresentations by the party charged with the fraud, it means that the representations must have been not only untrue, but also made under such circumstances as would be reasonably calculated to deceive one while exercising ordinary care for his own protection.

Id. at 102 *(*quoting *United Talking Mach. Co. v. Metcalf*, 174 Ky. 132, 191 S.W. 881, 883 (1917) (emphasis added)).

In sum: where a party signs a contract he chooses not to read, and thereafter asserts a claim of fraud based upon a misrepresentation of the other contracting party as to the contents of that contract, the jury should decide whether

the party claiming fraud exercised ordinary care in relying upon that misrepresentation *only* where that misrepresentation was accompanied by "circumstances . . . reasonably calculated to deceive one while exercising ordinary care for his own protection." *Id*. That said, several cases are instructive of what circumstances would be reasonably calculated, in this context, to deceive one while exercising ordinary care for his own protection.

For example, in *Kreate*, 11 S.W.2d 99, the former Court of Appeals held that "[w]hether a person fails to exercise ordinary care in failing to read a contract he is called upon to sign may depend on the extent of the confidence which he is entitled to place in the person procuring his signature." *Id*. at 102. The plaintiffs in *Kreate* entered into a contract to purchase real property; the defendant was a real estate agent advertising that property and had also been hired by the plaintiffs to advertise their own property. The offer and contract the defendant drafted, regarding the transaction between the plaintiffs and sellers, clearly obligated the plaintiffs to pay, in cash, the entire $15,750 purchase price at the closing. *Id*. at 100. Further, the plaintiffs were literate. *Id*. They made no claim that the defendant misread the contract to them and did not argue that they had insufficient time to review the contract, prior to signing it. *Id*. at 102.

However, the plaintiffs asserted the defendant had defrauded them because, as they claimed, the defendant had explained that they would only be responsible for paying $8,000 at the closing of the transaction and that they would be given "time for the rest." *Id*. at 100. They claimed that they signed the contract

without reading it, relying upon this alleged representation, and that they were damaged when they were unable to comply with that provision of the contract, as drafted, when the sellers sought to enforce it at the closing. *Id*.

The *Kreate* Court found that it was a question for the jury to determine whether the representations were made, and, if so, whether the plaintiffs exercised ordinary care under the circumstances in signing the contract without reading it. It arrived at this conclusion because the record contained some evidence that

> [the plaintiffs] were absolutely unable to go through with a cash transaction unless the realty which they owned was first disposed of; that [the defendant] knew this, and [the plaintiffs] knew that he did know this; that [the plaintiffs] had listed their property with [the defendant] for sale, and that he had not disposed of it for them, nor had it been reduced to cash, as all knew, when the [contract] was signed; that at that time it was known that the [sellers] had agreed to take $15,750 for their farm so that the execution of the [contract] would be a practical consummation of the deal; that under such circumstances [plaintiffs] would most probably inquire about whether the transaction which would necessarily have to be completed shortly after they signed the [contract] was to be on terms, for otherwise it would be impossible, as all knew, for them to complete it; that, having listed their property with [the defendant] for sale, and knowing that he fully knew their financial standing, they thought they could rely on what he told them about the contract, and that they testify he did make the representations they said he did.

Id. at 102.

This Court relied upon *Kreate* in *Cline v. Allis-Chalmers Corp.*, 690 S.W.2d 764 (Ky. App. 1985), where we held that the extent of the confidence

which a person is entitled to place in the other procuring his signature may depend upon the amount of faith developed in their relationship through several prior dealings. *Id*. at 767. Similarly, the former Court of Appeals relied upon *Kreate* in *Lemaster v. Caudill*, 328 S.W.2d 276, 281 (Ky. 1959), where it held "that in the absence of any showing that [one sibling] had ever done anything which would cause his brothers and sisters to lose faith in him, the relationship was fiducial and they had the right to rely upon him."

The Supreme Court of Kentucky also relied upon *Kreate* in *Hanson v. American Nat. Bank & Trust Co.*, 865 S.W.2d 302 (Ky. 1993), *overruled on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 495 (Ky. 2002), holding that it was properly left for the jury to determine whether Hanson, the plaintiff, exercised ordinary care in relying upon a bank's alleged misrepresentations, or whether Hanson's failure to read a contract, which contradicted those misrepresentations, was so imprudent as to bar recovery for deceit. The Supreme Court arrived at this conclusion because

> Hanson presented evidence that he did not have an opportunity to read the contract, that he was discouraged from doing so, that the Bank had the documents several days before the closing and had not made these available to him for review, that he was discouraged from obtaining separate counsel to examine the documents and of the manner in which the Bank presented itself to obtain his confidence, all coupled with the assurances that the documents were prepared as he and the Bank had agreed.

Id. at 308-9.

Here, the Thompsons failed to read the 2006 forbearance agreement and the terms of that forbearance agreement clearly contradict Zemanski's alleged representations to either re-amortize the Thompsons' loan following the auction, or apply any portion of the proceeds realized from the auction to the Thompsons' state and federal tax obligations.

The facts of the case at bar, however, are not analogous to, and fall far short of, the circumstances in *Kreate*, *Cline*, *Lemaster*, and *Hanson*.

To begin, the trial court made no finding that BB&T owed the Thompsons anything akin to a fiduciary duty, as in *Lemaster*.[7] And, unlike the plaintiffs in *Kreate*, *Cline*, *Lemaster*, and *Hanson*, the evidence of this matter is not capable of demonstrating that the Thompsons had any reasonable basis for claiming that a relationship of trust and confidence existed between themselves and BB&T at the time they entered the April 2006 forbearance agreement with BB&T. Over the course of roughly two hundred pages of his trial testimony, not limited to the above, Larry emphasized, reemphasized, and testified at length that after the Valla sale in 2004 and continuing to the date he and Linda failed to read, yet signed, the forbearance agreement in 2006, the Thompsons believed and had constantly accused BB&T of defrauding them, stealing their money, and ruining their business; on at least two occasions at trial, Larry even went so far as to say that BB&T's conduct, prior to the execution of the forbearance agreement, amounted to "raping" him.

[7] Indeed, banks typically owe no fiduciary duty to their customers. *Flegles, Inc.*, 289 S.W.3d at 552.

Furthermore, unlike *Hanson*, there is no evidence that the Thompsons did not have an opportunity to read the forbearance agreement, that they were discouraged from doing so, that BB&T had not made the forbearance agreement available for the Thompsons for review, or that the Thompsons were discouraged from obtaining separate counsel to examine the forbearance agreement.

To the contrary, the forbearance agreement was available for the Thompsons to review, but it languished in Larry's e-mail account for a full week before Larry returned from his spring break vacation and checked his e-mail account. There is no testimony to the effect that Zemanski knew that Larry was on spring break when he sent the e-mail, or that Zemanski should have known that Larry would not bother to check his e-mail account for a week thereafter. Moreover, Larry testified that he *chose* not to read the agreement because he did not understand it and thought that it was unprofessional of the bank to have sent it to him via e-mail.

Unlike *Hanson*, Larry did not testify that he asked for, and was refused, more time to read the forbearance agreement prior to signing it. Nor, for that matter, does the record demonstrate that Larry felt pressured to put the signed forbearance agreement in BB&T's hands on April 7, 2006, as BB&T requested. Rather, in his response e-mail, Larry told BB&T that it should receive the signed agreement by April 10th.

And, unlike *Hanson*, Zemanski's e-mail asked the Thompsons to review the forbearance agreement. The forbearance agreement itself repeats this

request and also asked the Thompsons to certify that they had reviewed the forbearance agreement to their satisfaction, with or without counsel, prior to signing it.

But, perhaps the most fundamental difference between *Kreate*, *Cline*, *Lemaster*, and *Hanson*, on the one hand, and this case on the other, is the simple fact that those cases involved a plaintiff's failure to read only *one* contract, while the Thompsons failed to read *three*. And *after* claiming, as of 2004, that BB&T had fraudulently misrepresented the contents of the loan documents they signed (without reading them) in 2002, the Thompsons proceeded to sign two more agreements with BB&T, a modification agreement and forbearance agreement, without reading those, either.

In short, reasonable reliance is a material element of a claim of fraud in the inducement, and this case does not support, and is flagrantly against, the proposition that the Thompsons reasonably relied upon BB&T's alleged misrepresentations respecting the forbearance agreement. Consequently, BB&T was entitled to judgment notwithstanding the verdict, and the trial court erred in denying its motion.

CONCLUSION

The Thompsons' claim of fraud relating to the 2006 forbearance agreement fails as a matter of law. We do not address the merits of the Thompsons' other fraud claim, which arose from circumstances occurring prior to

the forbearance agreement, because the Thompsons' failure to read the forbearance agreement with BB&T, prior to executing it, was fatal to both of the Thompsons' claims of fraud against BB&T. Accordingly, we reverse the trial court's decision to deny BB&T's motion for JNOV. And, consequently, we affirm the trial court's decision to grant BB&T the full amount of its attorney's fees.

STUMBO, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

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