

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

THOMAS C. GRIFFITH

APPELLANT

VERSUS

CASE NO. 2002-0161-T

HARRY GRIFFITH

APPELLEE

**ON APPEAL FROM
THE CHANCERY COURT OF MARION COUNTY, MISSISSIPPI**

REPLY BRIEF OF APPELLANT

ATTORNEY FOR APPELLANT:

**RENEE McBRIDE PORTER
PORTER LAW FIRM
915 Main Street
Post Office Box 982
Columbia, Mississippi 39429
601-731-1886/1887
Ms. Bar No [REDACTED]**

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

THOMAS C. GRIFFITH

APPELLANT

VERSUS

CASE NO. 2002-0161-T

HARRY GRIFFITH

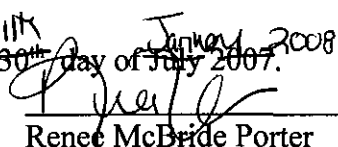
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible conflicts, disqualifications or recusal:

1. Thomas C. Griffith Appellant
2. Harry Griffith Appellee
3. Renee McBride Porter
Porter Law Firm, P.A.
P.O. Box 982
915 Main Street
Columbia, Mississippi 39429 Attorney for
Appellant
4. T. Jackson Lyons
120 North Congress Street
Suite 420
Jackson, Mississippi 39201 Attorney for
Appellee
5. Honorable Judge James H. C. Thomas, Jr.
Chancellor, 12th District
P.O. Box 807
Hattiesburg, Mississippi 39403 Lower Court Judge

Respectfully submitted, on this the 30th day of July 2007.



Renee McBride Porter
MSB: 8388

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

THOMAS C. GRIFFITH

APPELLANT

VERSUS

CASE NO. 2002-0161-T

HARRY GRIFFITH

APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS.....iii

TABLE OF CASES AND
AUTHORITIES.....v

REPLY TO ANSWER TO APPEAL

Reply to the Facts.....6

The Chancellor found that Harry had not acted appropriately and in the best
interest of the corporation and had used the business to pay his personal expenses
which had not been reimbursed.....8

Costs of Materials Analysis.....9

CERTAIN EXPENSES

Health Insurance.....11

Gasoline Purchases.....12

Payroll Expenses13

Other Expenses13

Recap of Monies and arguments made by Harry.....14

ANSWER TO CROSS APPEAL.....

The Chancellor was correct in allowing the amended complaint.....17

A Corporate Opportunity can be rejected by the shareholders, and the shareholders
have the option to reject or take advantage of the opportunity but they still have to
agree upon the same. Harry's taking advantage of the corporate opportunity in
another corporation is not lawful and in violation of good faith.....18

Statute of Limitations.....	22
Punitive Damages.....	23
SUMMARY OF THE ARGUMENT.....	25
CONCLUSION.....	27
CERTIFICATES OF SERVICE.....	29

TABLE OF CASES AND AUTHORITIES

CASES

<u>American Empire Live Ins. Co. v. McAdory</u> , 319 So.2d 237 (Miss. 1975).....	20
<u>Cooper v. Mississippi Land Co.</u> , 220 So.2d 302 (Miss. 1969).....	20
<u>Byrd v. Bowie</u> , 933 So.2d 899, 904(¶ 14) (Miss. 2006).....	8
<u>Ellzey v. Fyr-Pruf, Inc.</u> , 376 So. 2d 1328 (Miss. 1979).....	19
<u>Fought v. Morris</u> , 543 So. 2d 167 (Miss. 1989).....	8, 20
<u>Gibson v. Manuel</u> , 534 So.2d 199 (Miss. 1988).....	20
<u>Johnston v. Palmer</u> , 963 So.2d 586 (Miss.App. 2007).....	20
<u>Knox Glass Bottle Co. v. Underwood</u> , 228 Miss. 699, 89 So.2d 799 (1956).....	20
<u>McCarty</u> , 667 So.2d at 1284-85.....	18
<u>Moeller v. Am. Guarantee and Liab. Ins. Co.</u> , 812 So.2d 953, 962 (¶28) (Miss. 2002).....	18

STATUTES AND RULES

Mississippi Rules of Civil Procedure Rule 15(a).....	18
Mississippi Code Annotated Section 79-4-8.42.....	20
Mississippi Code Annotated § 79-4-16.01.....	21
Mississippi Code Annotated § 79-4-16.01.....	21
Mississippi Code Annotated § 79-4-8.21.....	12, 21, 22
Mississippi Code Annotated Section 11-1-65.....	23

REPLY TO ANSWER TO APPEAL

Reply to the Facts

Tom Griffith is in agreement with the Facts as found by the Honorable Chancellor in his (Findings of Facts, Conclusions of Law, and Final Judgement, Record page 143). Harry agrees that he ran the business and states that he and Tom met and discussed everything. After examination of the entire record this court will surmise that Tom never admitted that he and Harry met and discussed everything. In fact, Tom stated "I was buying that line of answer for quite a while, even though I continued to doubt it, but I was having to buy it. But one day at Northgate Coffee Shop in January of 2001, my brother and I drank coffee up there just about every morning. And I was sitting there and I said, Harry let's go to the shop and see how much dividends we might be looking at this year, because I knew we had sold 23,000 pickers and the year before we had sold 21,000 pecan gathers, and we hadn't got much dividend the year before so I figured there ought to be a pretty good dividend..." (Record page 246, lines 3-15). When Harry stated that the expenses had eat up the profit, Tom realized there was something wrong. Tom admits he did trust his brother, but after questioning him 2001 this lawsuit began. Tom then wrote Exhibit 27 (See Trial Exhibit 27. A letter by Tom to John Harvey (his trustee) dated October 31, 2001.) and this lawsuit began.

Harry makes argument that Tom admitted the books were detailed. Tom did admit the books were real detailed (Record page 249, line 10), however Tom did not agree the books were correct as he stated there may be a deposit for \$12,000.00., and you didn't know where it came from. (Record page 249, line 14). Tom submits that the detailing of the records

were one way in which Harry was able to orchestrate this embezzlement. The fact that the records were detailed does not mean that they were correct or accurate. Tom admitted that he went through all of the quick books at the Ray Griffith Company and determined the questionable transactions. (Record page 250, line 19).

When this lawsuit begun it was determined that certain safeguards that had been put into place by the minutes to guard against this type of activity had not happened. The minutes required Harry and Steve Gray to sign on all checks. (See minutes of April 2, 1990 which required both signatures. See Trial Exhibit No. 31). Thus, it was evident from the beginning the procedure was not followed.

The court did appoint Art Kersch. (See Scheduling Order, Record, page 117). Mr. Kersch testified as an expert and was admitted as an expert in accounting. (Record page 15, line 25). Mr. Kersch was supplied with bank statements and check stubs. Since as it was admitted Harry ran all of his businesses through The Ray Griffith Company, it would have been very difficult to go through an examination of those records and determine whether or not the expenses paid by Harry were legitimate. Mr. Kersch testified that the parties agreed upon the number of pickers sold, and if the parties agreed upon the number of pecan gatherers sold then to determine whether or not expenses were legitimate one can look at the costs related to the sale of those pickers/gatherers.

Mr. Kersch asked and it was ordered for both parties to submit information to him to assist him in making his report. Mr. Kersch stated that "Most of the information I tried to apply from the spreadsheets that I got from Mr. Harry Griffith did not seem to work in his favor." (Record page 65, line 19-20). Mr. Kersch submitted his report to the Court, and the report was

introduced and accepted as Exhibit 2.

Harry's counsel wants this court to go through the testimony and exhibits and retry this matter as pointed out in his brief. Tom would submit to this Court that the lower court had a three day trial and accepted Mr. Kersch's opinion and submission. The recent case of Johnston v. Palmer, 963 So.2d 586 (Miss.App. 2007) found " We are bound to respect a lower court's findings of fact when they are supported by reasonable evidence in the record and are not manifestly wrong. Byrd v. Bowie, 933 So.2d 899, 904(¶ 14) (Miss. 2006). The lower court findings are supported by Mr. Kersch's report and witnesses and are not wrong and should be supported.

The Chancellor found that Harry had not acted appropriately and in the best interest of the corporation and had used the business to pay his personal expenses which had not been reimbursed.

Harry argues that the Court did not find misappropriation. Tom would submit that the Chancellor did indeed find misappropriation even if the Chancellor did not use that word. (See Findings of Facts, Conclusions of Law, and Final Judgement Record page 143) where the Court specifically found "Here it seems that Harry is guilty of more than merely bad bookkeeping. Evidence presented at trial showed that Harry did not even keep a checking account in his own name, and that he often ran his personal expenditures through the account set up in the name of the Ray Griffith Company. It was further established that Harry had a practice of paying for many of the obligations of his other business with Ray Griffith funds. Although Harry has attempted to argue that all of the money he 'borrowed' has been reimbursed to the Ray

Griffith Company, the fact still remains that there are unaccounted for 'missing' funds. The unorthodox accounting methods utilized by Harry Griffith do not seem to fall into the category of what would be 'in the best interest of the corporation ' as required by the statute. (Findings of Facts, Conclusions of Law, and Final Judgement, Record, page 146). The court found that Harry "ran all of his personal and other (unrelated) business expenses through an account set up in the name of The Ray Griffith Company." (Findings of Facts, Conclusions of Law, and Final Judgment, Record, page 148). The Court further found that Harry had not convinced the court that he had reimbursed the company. (Findings of Facts, Conclusions of Law, and Final Judgement, Record, page 148.) Thus, the Court found that Harry had committed wrongdoing. The Court found that Harry had paid his expenses through the business and had not reimbursed the business. Thus this Court has found that Harry did not properly handle the funds.

Costs of Materials Analysis

Harry submits that we should disregard Mr. Kersch's report due to the fact that the cost of materials are not correct. Mr. Kersch had no way of knowing whether or not the Ray Griffith Company checks coded to pecan gather material cost submitted to the accountant, Steve Gray, by Harry for the annual tax return were truly pecan gather cost or not. Therefore, Mr. Kersch reconstructed the pecan gather cost. Both parties agree on the total nine years of sales figures as per the tax returns. Mr. Kersch sought to construct a costs of materials. Mr. Kersch asked for help and assistance from both parties.

Mr. Kersch was not appointed as an expert in pecan gatherer manufacturing, but an expert in accounting. There was no objection to his expertise.

Mr. Kersch's job was to examine the records and determine if under Harry

Griffith's operation and authority the expenses made were ultra vires . (See Order Appointing Special Master, Record, page 100.)

Tom admits that in his examination of the books, he had not found evidence of Harry buying or paying for supplies or materials for his toy manufacturing company. For example, Harry Griffith did not pay for a load of lumber with which to make toys with a Ray Griffith Company check nor buy saw blades for his toy company with Ray Griffith checks; he was however, misappropriating funds i.e. Harry was paying labor for Woodstock Toys with Ray Griffith Company checks. (Record Page 76, line 14)) and he was paying his personal expenses down to surgeries and reading material with Ray Griffith Company checks. (See trial exhibit 24 where Ray Griffith Company checks were written for the following: Eye surgery for Harry, Back Door Café, Rogers Oil, Shannons (a hair cutting salon), Capital One, Books a Million, Quality Lube, and Betsy Griffith and Others.)

Appellee makes argument with Tom's figures on the material cost shown. First of all, Mr. Kersch requested input from both parties and received none from Harry. For Harry to now complain about the report when he could have provided input with invoices is not well taken. Secondly, Tom had full knowledge of this business and as he had run the same from the early 1980's to 1990 and was running the business at the time of trial.

Harry admits from his brief that the tax returns from his calculations did not match Mr. Kersch's figures, and there were \$167,471.00 more in material costs than that submitted by Mr. Kersch. This is the reason the Court appointed Mr. Kersch to determine if there was money missing and now much. Harry has thus admitted and stated from the material costs alone there was \$167.471.00 difference in costs reported and actual costs, estimated in Mr.

Kersch's report.

Calculating the martial costs for one pecan gatherer was not a difficult task. The calculation of material costs were made by Tom as per Trial Exhibit No. 3. Tom testified that he used records from the Ray Griffith Company to calculate the costs of this material including looking at material purchase invoices to determine for example that the wooden handle cost 36 cents each. The steel sides and other sheet metal parts had listed on their purchase orders the number of parts per pound each different type metal made, and therefore it was simple knowing the cost per pound of the metal to calculate and divide by the number of parts per pound and determine the costs of each type metal part used in the pecan gatherer. Most of the other parts consisted of rivits, bolts and nuts with the exception of the six center section wires for which the material invoice list the cost per wire. The only other materials used in the pecan gatherer were primarily the card board boxes and paint to paint and ship the pickers in. Therefore, the material costs were easily determined, knowing the total number of pecan gathers sold. Harry has in his brief claimed that the material costs he alleged were incurred were \$489,471.00., as shown on the tax returns. From Tom's calculations the material needed would have cost \$322,000.00. Therefore, there is a difference of \$167,471.00., in material costs alone.

Even though we are looking at a nine year period the costs were fairly stable during that period of time for these materials. The calculation of the material costs for the pecan gatherer used by Mr. Kersch was the best estimate for that cost over this period. It would have been difficult and impracticable due to the record keeping to go back year to year.

CERTAIN EXPENSES

Health Insurance

Harry argues that he should have been paid his health insurance. First of all, as Harry admitted the company was paying his health insurance and that of his wife and son. The Board of Directors had authorized the payment of health insurance for Kathleen Griffith (See Minutes Trial Exhibit No. 31 of April 2, 1990) The Board of Directors, when it hired Harry, did not authorize the payment of his or his families health insurance. (See Minutes Trial Exhibit No. 31 of April 2, 1990) A corporation only acts through it's minutes Harry had no authority to pay his health insurance that of his wife and child. (See Mississippi Code Annotated § 79-4-8.21).

Gasoline Purchases

Harry makes argument that the gasoline should have been paid for by the business. First of all, this business was a corporation which spoke through it's minutes. (Mississippi Code Annotated Section 79-4-8.21). Harry was employed at the rate of \$1,000.00., per month as a general manager. (See Exhibit No. 31) No mention was made of his gasoline expense. Please see Trial Exhibit 12 with reference to the gasoline, which is coded as Freight and Delivery. Harry provided statements such as this to Tom which would have his gasoline expenses coded Freight and Delivery. Please see Trial Exhibit 1., as to gasoline purchased. The gasoline purchased by Harry and his wife, Betsy Griffith , during one month, specially the money of May of 2000, is evidenced by Trial Exhibit 1. May is not a month in which pecan gathers are sold. Pecans fall from the trees in September, October, and November. Please see the exhibit where Harry and his wife purchased \$294.00., of gas which can be calculated as per the invoices \$1.48 per gallon. Thus, as per Exhibit 1 Harry and his wife purchased during May, 2000, 198.60 gallons of gasoline. Also, Trial Exhibit 12 shows actual purchases over a six year period of \$12,339.46 by Harry and Betsy Griffith. This purchase was extraplulated to \$16,372.00.

Harry argues that he should have been reimbursed for his travel to and from the business to his home and for trips. This pecan gatherer business did not require Harry to make many trips to the Ray Griffith Company. The Ray Griffith Company had it's own manager and workers. Harry's primary function was to over see and handle unusual problems for the Ray Griffith Company. Therefore, it was not necessary for Harry to make dozens of trips per week to the Ray Griffith Company more like one trip per day during the pecan season and occasionally during the off season. Also, there were very few trips out of town which Harry needed to make to run the business, and if he was required to make a trip there would have been no problem with paying for the gas on that specific trip.

Payroll Expenses

Ashley Sappington testified that yes she was working for Harry in the toy company and was being paid with a Ray Griffith Company check. (Record page 76, line 17). Ashley stated in her testimony that the Ray Griffith Company had very few employees. From Ashley's testimony alone the Court can determine that you can not look at Harry Griffith's records and justify his expenses.

Other Expenses

In his brief Harry would have one believe that he reimbursed the Ray Griffith Company for every expense he wrongfully took. This is improbable and unbelievable. Examine the trial exhibits:

Exhibit 1., shows gasoline expenses for which no authority existed.

Exhibit 5., shows auto repairs being made to Harry's vehicles.

Exhibit 6., shows a capital one bill paid for by the Ray Griffith Company with

charges to the Back Door Café, Chesterfields of Hattiesburg, Winn Dixie, Walmart, etc.

Exhibit 24., shows checks written on the First National Bank account which was a Ray Griffith Company account over a period of more than one year. These checks are for:

Eye surgery for Harry

Back Door Cafe

Rogers Oil

Shannons (a hair cutting salon)

Capital One

Books a Million

Quality Lube

Betsy Griffith

and others.

Exhibit 25 shows a print out of monies paid to Jessica Sappington in the amount of \$5,148.74. Jessica testified that she would be paid by a Ray Griffith Company check when she worked for Woodstock Toys.

When you review the monies and expenses paid by Harry as proved by the Exhibits entered into evidence one can only believe that Harry was paying his personal expenses out of the business and not reimbursing for the same.

Recap of Monies and arguments made by Harry

Harry argues that he has paid all of the monies that he borrowed back to the Ray Griffith Company and points to his Exhibit No 15., as being at or near zero. Please see Trial Exhibit 13 which is the list of withdrawals from Harry and Betsy Griffith made from the

Questionable Transaction List. In comparing the two exhibits, the following checks are listed on both the questionable transaction list Exhibit No. 13., and Exhibit 15 which is Harry Griffith's zero balance exhibit.

187

719

1038

1309

1326

1331

1381

952

1655

1217

1233

1280

1313

1322

1437

1460

1480

1504

1621

2233

2234

2607

2825

2356

1170

___ Custom powder coating

However, Harry's zeroed account list leaves out the following list of checks from Exhibit 13 (the questionable transaction list). The following checks are not on the zero balance list made by Harry. So, where have the following checks been reimbursed to?

1236 which totals \$2,919.50

1237 which totals \$1,838.35

1348 which totals \$2,000.00

1399 which totals \$1,000.00

1408 which totals \$1,000.00

1410 which totals \$2,000.00

1582 which totals \$2525.00

2363 which totals \$11,938.12

2828 which totals \$1200.00

646 which totals \$9,964.22

1993 which totals \$1441.71

2253 which totals \$2500.00

2382 which totals \$1500.00

Grand total: \$41826.90

The exhibits themselves tell the story as Harry says his accounts balance, but he leaves out the entries above set forth and by those entries Harry has withdrawn \$41,826.90., that has not been repaid.

Also on Exhibit 7 under Harry Griffith Draws the following checks were also shown as dividends/draws on his Exhibit 18: 2594 and 2640.

Almost all of the other checks on the Questionable Transactions List on Exhibit 13 are either large petty cash or numerous checks to his wife Marsha (Betsy) Griffith) coded as payroll for which the Ray Griffith Company has never received or been able to find any petty cash sales tickets or time cards.

Also, on the Harry Griffith's zeroed account sheets, Exhibit 15, there are records of draws with check numbers, however, there is no documentation or deposit slips as to the return of the money and no proof that the money went into the account. The only record is that of Harry Griffith saying his accounts balance, when upon examination they do not balance as one can see from the above.

Lastly, in his own Exhibit No. 15., Harry's first entry is wrong in that there is a \$5,000.00., error in the same.

From examination of Harry's own records it is obvious that there was much money spent that was not even supposedly reimbursed. Therefore, for Harry to argue that all money had been reimbursed was properly not well taken by the Chancellor.

ANSWER TO CROSS APPEAL

The Chancellor was correct in allowing the amended complaint.

The Complaint in this action was filed on June 17, 2002. An Amended Complaint was filed on March 5, 2003. On March 20, 2004, Harry filed his Answer. Harry files his Amended Answer answering the Amended Complaint. The Amended Complaint dealt specifically with the issue of Harry beginning another business in competition with the Ray Griffith Company while he was an officer, director and shareholder of the same. This action of Harry was first pled on August 14, 2002, when the Plaintiff filed a motion alleging this activity of Harry. This matter was tried on April 5 and April 7, 2004, some years and months after the allegations were pled.

The Mississippi Supreme Court has found that prejudice to the opposing party is the key factor in governing the court's discretion in allowing a party leave to amend. McCarty, 667 So.2d at 1284-85 (quoting 61 Am. Jur.2d Pleadings § 315 (1981)).

In this case the Amended Complaint had been filed for over one year and the issue specifically in question for well over one year. The Amended Complaint had been answered. The facts were known, depositions were taken and there was no prejudice to the other party.

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires;" this mandate is to be heeded . . . if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.. — the leave sought should, as the rules require, be "freely given." Moeller v. Am. Guarantee and Liab. Ins. Co., 812 So.2d 953, 962 (¶ 28) (Miss. 2002).

In this case the amendment was allowed and properly so by the Court.

A Corporate Opportunity can be rejected by the shareholders, and the shareholders have the option to reject or take advantage of the opportunity but they still have to agree upon the same. Harry's taking advantage of the corporate opportunity in another corporation is not lawful and in violation of good faith.

Harry became aware of a corporate opportunity and took advantage of the same to the detriment of The Ray Griffith Company. The Supreme Court of Mississippi in its ruling on Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328 (Miss. 1979) found that the following must be found to prove usurpation of corporate opportunity:

First, it must be shown by a preponderance of the evidence that under all the facts and circumstances the business opportunity is logically related to the corporation's existing or prospective activities.

Second, the complainant must prove that the corporation was either (a) not insolvent in the balance sheet sense at the relevant times, or (b) financially disabled as a result of nonpayment of a debt or breach of a fiduciary duty by one or more of the defendants *id.* at 1335. According to the Ellzey court, once these two elements have been found by the trial judge, then burden of proof shifts to the fiduciary to absolve himself of liability by clearly showing that his "duty of fidelity and diligence, as well as the duty of continuing disclosure of material facts, has been fully disclosed *id.* at 1335."

The Defendant did indeed usurp his corporate opportunity as a fiduciary of The Ray Griffith Company, Inc., and that he wholly failed to uphold his "duty of fidelity and diligence" to The Ray Griffith Company, Inc.

The Court correctly found "Harry began importing pecan gatherers under the

guise of a new company while still acting as a director/officer of The Ray Griffith Company.”

(Findings of Facts Conclusions of Law and Final Judgement, Page 152.)

Mississippi Code Annotated Section 79-4-8.42 provides that officers of the corporation shall act:” In a manner the officer reasonably believes to be in the best interest of the corporation.” In both the payment of personal expenses and in the taking advantage of the pickers made in China and starting a new business Harry has not acted in the best interest of the Ray Griffith Company.

The Mississippi Supreme court noted in Fought v. Morris, 543 So. 2d 167 (Miss. 1989), that in a closely held corporation “[e]ach shareholder has an inside view of the company's operations and maintains an element of trust and confidence in each other which is commonly lacking in a large or publicly-held corporation.” *Id.* at 171. As such, the court went on to state that a “[p]ersons involved in a close corporation should act, therefore, at all times in good faith toward each other and to the corporation in order to maintain this confidence.” *Id.*

The Fought court went on to note that “stockholders in close corporations must bear toward each other the same relationship of trust and confidence which prevails in partnerships....” *Id.* Further the court noted that “directors and officers of a corporation stand in a fiduciary relationship to the corporation and its stockholders. These duties include exercising the utmost good faith and loyalty in discharge of the corporate office.” *Id.*; see also Gibson v. Manuel, 534 So.2d 199 (Miss. 1988); Ellzey v. Fyr-Pruf, Inc., et al., 376 So.2d 1328, 1332 (Miss. 1979); American Empire Live Ins. Co. v. McAdory, 319 So.2d 237 (Miss. 1975); Cooper v. Mississippi Land Co., 220 So.2d 302 (Miss. 1969); and Knox Glass Bottle Co. v. Underwood, 228 Miss. 699, 89 So.2d 799 (1956).

In the case at hand the business purpose was manufacturing and selling pecan pickers. Without the consent of the company, Harry began purchasing pecan pickers manufactured overseas, then using the customer base which the Ray Griffith Company had established over 50 years of business, marketing and selling those pecan pickers to the Ray Griffith Company's customers in direct competition to Ray Griffith Company and in direct opposition to the best interest of the company and the shareholders. Harry also used the resources of the Ray Griffith Company to market the pecan pickers to the Ray Griffith Company customers, by sending brochures and information regarding this new company to the customers via the Ray Griffith Company fax machine.

Additionally, in direct violation of the statute, Harry Griffith never received the permission of the corporation to conduct any of the activities in which he was involved. The record shows that after July 9, 1993 no corporate minutes were produced and that none of the prior minutes make any mention of the opportunity to purchase pecan pickers from overseas and re-sell to the existing customers and there is no indication that Harry's expenditures of the corporate assets for personal expenses was ever approved. Miss. Code Ann. § 79-4-16.01 states in pertinent part:

(a) A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation.

(b) A corporation shall maintain appropriate accounting records.

Miss. Code Ann. § 79-4-16.01.

Additionally, Miss. Code Ann. § 79-4-8.21 states:

(a) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by §§ 79-4-1.01 et seq. to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more written consents describing the action taken, signed by each director, and included in the minutes or filed with the corporate records reflecting the action taken.

(b) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date.

(c) A consent signed under this section has the effect of a meeting vote and may be described in as such in any document.

Miss. Code Ann. § 79-4-8.21

However, Harry Griffith never complied with the requirements of the code. Instead he conducted business, paid personal expenses and failed to relay corporate opportunities to the board, in any form, with or without meetings. As such he is liable to the corporation and the shareholders for his actions which were a direct violation of the statute and his fiduciary duties.

Harry has not acted in the best interest of the corporation and his actions should be penalized.

Harry's payment to himself were not authorized and not proper.

Harry's payments to himself were not authorized and not proper. There were no minutes to support the same. The only person arguing they were proper is Harry himself and that

argument should be rejected.

Statute of Limitations

The Court found that Tom did not know of the misconduct of Harry until 2001, and that he file suit property and timely. This is a finding of the Court which should be upheld.

Punitive Damages

The Court in it's award of punitive damages found that " In reviewing the pleadings and the proof adduced at trial and the post trial pleadings, the Court now finds the actions of Defendant, as fiduciary and one in charge of the operation of the business, are so wanton and aggravated as to warrant punitive damages to compensate Plaintiff above the damages awarded which barely compensate him for the losses incurred based on the difficulty in ascertaining where the unaccounted funds were spent." (Amended Judgement, Record page 157.). The Chancellor had tried this matter on a multi day trial and found from the trial and from his review of the record and post trial pleadings that the award of damages was incorrect. The Chancellor was the fact finding and his findings are supported by the record. The Chancellor found that the damages previously awarded were not adequate and thus he awarded punitive damages. The Chancellor obviously considered "the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages." Mississippi Code Annotated Section 11-1-65. In this case the award of

punitive damages were meant to compensate the Plaintiff also. The trier of fact had heard the testimony and considered the pleadings and found that the damages awarded were not proper to compensate Plaintiff. Thus this award was based upon a trial and based upon the record and should be affirmed.

In this case Court found that there was \$313,451.00., unaccounted for funds and questionable transactions to be resolved by this Court. (Findings of Facts, Conclusions of Law, and Final Judgement, Record page 143.) These monies happened while the company was being operated by Harry Griffith. For the court to award \$50,000.00., as punitive damages when \$313,451.00., is unaccounted for is certainly feasible and equitable and in no way an abuse of discretion.

SUMMARY OF THE ARGUMENT

The Court was correct in it's Findings of Facts and Conclusions of Law and Final Judgement in finding that "Evidence presented showed that Harry paid not only his own personal expenditures, but also those of *his other businesses* using The Ray Griffith Company Funds." (Emphasis added) (Findings of Facts, Conclusions of Law and Final Judgement) The Court was also correct when it found that "a fiduciary may not compete with a corporation with whom he owes a duty of loyalty. Harry began importing pecan gatherers under the guise of a new company" having previously been an officer and director of The Ray Griffith Company taking advantage of a corporate opportunity and using inside information in a closely held small corporation. (Findings of Facts, Conclusion of Law and Final Judgement).

The Court has found that Harry has paid his personal and other expenses of his separate personal businesses out of the Ray Griffith Company business and with Ray Griffith Company funds and taken advantage of a corporate opportunity. The Court has also found that Harry's actions are wanton and wilful. The Court is correct in it's findings. The Court's finding are supported by the Court's expert, Art Kersch, the exhibits entered in this case, and the testimony in this case.

The Court is incorrect in that it did not award damages appropriately. The Court found that \$313,451.00., was at issue in this case. The Court should have awarded one-half of \$313,451.00., as a Judgement to Thomas C. Griffith together with interest on the same. The

Court found that Harry took advantage of a corporate opportunity which hurt the corporation.

The Court should have awarded damages for the loss of that opportunity. The Court should have awarded attorney's fees in full for this action which was made necessary due to the actions of Harry.

CONCLUSION

The lower court has found that Harry Griffith acted in a wilful and wanton disregard of the rights of his brother, Tom. The lower Court has found that while Harry was managing The Ray Griffith Company the sum of \$313,451.00., was missing or unaccounted for or was spent by Harry on items such as his personal expenses. The lower Court has found that Harry took advantage of a corporate opportunity. The lower Court, however, did not fully compensate Tom for Harry's actions. Tom asks this Court to affirm the lower's Court findings but to reverse and render the Judgement awarded and award:

1. A Judgement of \$156,725.50 (one-half of the unaccounted for funds) for the monies owed by Harry to Tom as a result of Harry wrongfully expending funds for his personal and non Ray Griffith Company business expenditures.

2. A Judgement against Harry for profits lost by Tom as a result of Harry taking advantage of getting the pecan pickers from China and starting a new business. Ray Griffith sales dropped in 2003 from its nine-year average of \$157,671.00 to \$18,962.00. There should be an award of damages to Tom for this drop in sales.

3. A Judgement for \$16,181.83, for the difference in the draws, plus interest.

4. Affirming the punitive damages award against Harry for \$50,000.00.

5. Interest both prejudgement and post judgement on the money awarded Tom.


6. Attorney's fees as per Exhibit 30.

7. A restraining order against Harry to cease his competition with his own

company, The Ray Griffith Company, as the Court has found that competition is improper and for this Court to allow this competition to continue simply increases daily the damages of Tom.

Obviously, Tom is pleased with Judge Thomas's findings in this case. The reason Tom was forced to appeal this case is that the money awarded does not agree with Judge Thomas's ruling. Art Kersch, Certified Public Accountant, Court Appointed Special Master, (independent of both parties) realized the game Harry was playing. That is why Art Kersch took an Internal Revenue Service approach using a spreadsheet (Exhibit 2) analyzing the total Ray Griffith Company sales against the logical expenses you would incur in making the sales and running the Ray Griffith Company. Tom believes that Mr. Kersch's final figure of \$313,451.00., which he arrived at giving Harry every opportunity to refute the same, is the best estimate Mr. Kersch could have made of money taken over nine years by Harry. Harry, since he undoubtedly, from a review of the testimony and exhibits, and Judge's Thomas's comments in his Amended Judgment and Punitive Damages Award, was taking advantage of his brother and the situation and to be blunt was stealing large sums of money from his brother and the Ray Griffith Company in a very cold, calculating, systematic way. It would seem reasonable, at the very least, that Tom should be awarded one-half of \$313,451.00., plus interest on \$156,725.50, for ten years.

Tom respectfully submits this brief and argument to the Court.



RENEE McBRIDE PORTER
MSBN [REDACTED]
PORTER LAW FIRM, P.A.
POST OFFICE BOX 982
COLUMBIA, MISSISSIPPI 39429
(601) 731-1886
ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

THOMAS C. GRIFFITH

APPELLANT

VERSUS

CASE NO. 2002-0161-T

HARRY GRIFFITH


APPELLEE

CERTIFICATE OF SERVICE

This is to certify that I, Renee McBride Porter, on the 30th day of July, 2007
furnished a true and correct copy of the above and foregoing

REPLY BRIEF OF APPELLANT

to the Honorable Judge James H. C. Thomas, Jr., Chancellor, 12th District, by placing
same in the United States Mail, postage prepaid, and mailing it to his usual office address
of Post Office Box 807, Hattiesburg, Mississippi 39403 and to Honorable T. Jackson Lyons
120 North Congress Street, Suite 420, Jackson, Mississippi 39201.



RENEE McBRIDE PORTER
MSBN [REDACTED]
PORTER LAW FIRM, P.A.
POST OFFICE BOX 982
COLUMBIA, MISSISSIPPI 39429
(601) 731-1886

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

THOMAS C. GRIFFITH

APPELLANT

VERSUS

CASE NO. 2002-0161-T

HARRY GRIFFITH


APPELLEE

AMENDED CERTIFICATE OF SERVICE

This is to certify that I, Renee McBride Porter, on the 11th day of January, 2008, furnished a true and correct copy of the above and foregoing

REPLY BRIEF OF APPELLANT

to the Honorable Judge James H. C. Thomas, Jr., Chancellor, 12th District, by placing same in the United States Mail, postage prepaid, and mailing it to his usual office address of Post Office Box 807, Hattiesburg, Mississippi 39403 and to Honorable T. Jackson Lyons 120 North Congress Street, Suite 420, Jackson, Mississippi 39201.



RENEE McBRIDE PORTER
MSBN [REDACTED]
PORTER LAW FIRM, P.A.
POST OFFICE BOX 982
COLUMBIA, MISSISSIPPI 39429
(601) 731-1886