IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS

LAMBERT COMMUNITY HOUSING GROUP, L.P. **APPELLANT**

VS. **CAUSE NO. 2006-TS-02127**

WENZEL & ASSOCIATES, P.A., ET AL **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF QUITMAN COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

REPLY BRIEF FOR APPELLANTS

SUBMITTED BY:

Mark D. Herbert (Bar No[redacted]
Adam Stone (Bar No[redacted]
WATKINS LUDLAM WINTER & STENNIS, P.A.
633 North State Street (39202)
Post Office Box 427
Jackson, MS 39205
(601) 949-4900

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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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Lambert Community Housing Group, L.P., Appellant;
2. David Shafer, Principal/Officer of Lambert Community Group, L.P.;
3. William Wenzel, Appellee;
4. Wenzel & Associates, P.A., Appellee
5. Mark D. Herbert, Attorney for Appellant;
6. Adam Stone, Attorney for Appellant;
7. Robert M. Tyner, Attorney for the Appellee;
8. W.O. Luckett, Attorney for the Appellee;
9. Honorable Albert B. Smith, III, Trial Court Judge.

So certified this, the 12th day of September, 2007.

By: _____
Adam Stone

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SUMMARY OF THE ARGUMENT

This case is very simple. A professional architect, William Wenzel, was directly negligent in the services he rendered to Lambert. A jury has found this to be the case and no defendant to the proceedings below has appealed this finding by the jury. Rather than accept responsibility for his actions, as he repeatedly stated to the jury he would, William Wenzel convinced the court below that judgment should not be entered against him.

In its initial brief, Lambert demonstrated to this Court that the jury's verdict, in light of the uncontested facts and unrefuted evidenced presented for its consideration, clearly indicated an intent to hold William Wenzel personally liable for his negligence. Lambert further demonstrated that, pursuant to Mississippi law, the lower court's dismissal of the claims against William Wenzel in this case simply cannot be affirmed. Wenzel made no attempt to address the binding authority cited by Lambert in its initial brief and has posed no legitimate argument in defense of the clearly erroneous judgment entered by the trial court.

Further, Lambert has demonstrated that, due to the admissions of William Wenzel in this case, there was simply no fact for the jury to find regarding his individual liability. Under the Mississippi Professional Corporation Act, William Wenzel was liable for any negligent professional services rendered by Wenzel and Associates, P.A. in which he personally participated. In both the pleadings and Mr. Wenzel's testimony at trial, there was absolutely no dispute that William Wenzel personally participated and, in fact, was solely responsible for certification of the payment applications at issue in this case. Once the jury found that the payment applications were negligently certified, Mr. Wenzel was individually liable as a matter of law. No further factual findings were required of the

jury. As such, the trial court committed reversible error in entering a judgment dismissing Lamberts' claims against William Wenzel, individually.

II. ARGUMENT

The controversy at issue in the present case arises out of the jury's verdict finding that "Wenzel" negligently certified payment applications for faulty workmanship on the James E. Taper project and awarding Lambert damages in the amount of $1,949,932.85. (Rec. 186) In a separate general verdict form, the jury apportioned 33.3% of those damages to Wenzel & Associates, P.A. (Rec. Ex. Tab 5 at 187) Despite these findings and the fact that William H. Wenzel was a named defendant who admitted that he was solely responsible for certifying the payment applications at issue, the trial court dismissed all claims against him with prejudice instead of entering judgment against him.

As in the post-trial hearings, William Wenzel argues in the Appellees' Brief that the absence of his specific name on the apportionment of damages form necessarily releases him from any obligation to pay the verdict returned by the jury in favor of Lambert. Additionally, Wenzel argues that the jury had to be instructed with regard to Miss. Code Ann. § 70-10-67 in order for that statute to apply with regard to the individual liability of William Wenzel. Finally, William Wenzel apparently argues that Lambert is not entitled to judgment as a matter of law, again, because William H. Wenzel was not specifically named on the apportionment form. For the reasons set forth below and in its initial brief, incorporated herein by reference, Wenzel's arguments should be rejected by this Court.

A. THE JURY CLEARLY FOUND WILLIAM WENZEL NEGLIGENT.

In his argument, William Wenzel incorrectly frames the issue before this Court as a determination as to "whether the jury was instructed to assess liability to [William Wenzel], individually, in order that a verdict be entered against him." *See, Brief of*

Appellee at p. 7. However, the ***actual*** issue on appeal (as noted by Wenzel elsewhere in his brief) is whether the trial court erred in refusing to enter judgment against William H. Wenzel, individually and in its dismissal of all claims against him with prejudice. *See, Brief of Appellee at p. 1.* Notwithstanding his protestations to the contrary, the jury's specific finding, in light of the evidence upon which it was based, makes clear that the jury found that William H. Wenzel negligently certified payment applications and that this negligence directly resulted in injury to Lambert.

> The jury specifically found[1] pursuant to interrogatory Instruction P-100 that:
>
> Wenzel ***negligently certified applications for payment*** by representing that the project had achieved certain designated levels of completion in accordance with the contract documents which, in fact, it had not, or that the project was being completed in a professional, workmanlike and orderly manner which, in fact, it had not then the form of your verdict shall be:
>
> "We, the jury, find for the Lambert Community Housing Group, L.P. in the amount of $1,949,932.85 in compensatory damages.

(Rec. Ex. Tab 5 at 186)(emphasis added) It is clear from this finding that the jury found William Wenzel, a named defendant in this action, and the individual who ***admittedly*** made these negligent certifications, liable for compensatory damages in the amount of $1,949,932.85.

Wenzel argues that use of the word "its" instead of "his" in the jury instruction is dispositive as to whether the jury found Wenzel and Associates, P.A., not William H.

---

[1] Wenzel's argument that the doctrine of *ejusdem generis* does not apply to jury instructions warrants little discussion. As noted in Lambert's initial brief, this doctrine was discussed in the proceedings below upon the trial court's express instruction that the parties look to and brief contract law principals to assist in resolving the issue regarding the individual liability of William Wenzel. Notwithstanding, and contrary to Wenzel's argument, the principal of the doctrine is embodied in Miss. R. Civ. P. 49(c) which provides that where there is an inconsistency between a jury's response to an interrogatory, like that posed and responded to in Instruction P-100, and the general verdict, the jury may be required to resume deliberations to resolve the conflict or "judgment may be entered consistent with the answers, notwithstanding the general verdict . . ." Miss. R. Civ. P. 49(c).

Wenzel negligent and liable for damages. Wenzel further insinuates that because some other employees of Wenzel and Associates P.A. "had some involvement in the case" the jury may have found these employees' negligence caused Lambert's rather than the negligence of William H. Wenzel. *See, Brief of Appellee at p. 9.* Not only are this arguments unsupported by citation to any authority, they absolutely ignore the admissions and evidence introduced at trial.

As noted in Lambert's initial brief, there has ***never been any dispute*** in the proceedings below with regard to the fact that William H. Wenzel was the chief architect associated with Wenzel & Associates, P.A. and directly participated in rendering the architectural services at issue in this case. In paragraph 14 of the original complaint filed in this case, Lambert alleged that William Wenzel, a registered professional architect, "was assigned by Wenzel & Associates to render professional services to the Project. . . ." that "[i]t was principally the Defendant William Wenzel who performed the 'comprehensive professional services' for the Project on behalf of Wenzel & Associates." (Rec. 14) In the Answer, William Wenzel ***admitted*** this allegation. (Rec. 35)

Further, the evidence at trial upon which the jury based its findings established that William H. Wenzel was solely and directly responsible for the negligent certifications. As noted in Lambert's initial brief, Mr. Wenzel testified that ***he*** was the "***sole judge***" as to whether or not payment applications would be certified for payment. (TR 146, 194) Additionally, the negligent certifications were all individually signed by William Wenzel. (Rec. 255, 258, 266, 269) Indeed, William Wenzel took ***full responsibility at trial for the certification on the payment applications.*** The following exchange occurred:

Q: Okay. But my question was, you can't say that the system complied with the codes that you required in your plans and specifications, can you?

A: Well, by virtue of ***me being the architect***, when ***I*** approve something, ***I am certifying*** that they do all comply with that. I mean, that's what I was trying to say. I – whether they do or not, that's another point. But as the arch[2] so to speak, like we talked about, ***I am the person, uh, who makes that judgment to sign for an application for payment***. . . .

. . .

A: What I meant was, by that, I mean, it may not meet – ***some things may not meet code***. I'm not saying that they all meet code. But they may not meet code. But ***I'm responsible*** for the fact that they do or they don't.

Q: You're responsible for the fact that they don't?

A: If they don't and I sign for it, I am. ***I'm not shrugging my duties***. . . .

(TR 236-237)(emphasis added). Clearly, the evidence upon which the jury reached its verdict established that William Wenzel committed the negligence found by the jury and acknowledged his individual responsibility therefore. Any insinuation that the jury might have found some other employee of Wenzel and Associates, P.A. responsible is disingenuous and unsupported by the record.

B. IF UNCLEAR, THE TRIAL COURT HAD A DUTY TO REQUIRE THE JURY TO RETURN A CLEAR VERDICT.

Wenzel cites Uniform Circuit and County Court Rule 3.10 for the proposition that, because the Defendant William H. Wenzel's individual name was not set forth on the apportionment instruction, then the jury necessarily intended to hold him harmless for his negligence. *See Brief of Appellee at p. 9.* Neither Rule 3.10 nor Mississippi case authorities support this argument.

[2] In earlier testimony, William Wenzel explained the role of the architect, his role, as follows : ". . . I'm the architect. And the architect – the arc, arch stands for on top. I'm the top of the food chain in the design practice. . . ." (TR 146)

1. Rule 3.10 puts responsibility on trial court to require clear verdict

Rule 3.10 provides the following in pertinent part:

> If a verdict is so defective that the court cannot determine from it the intent of the jury, the court ***shall***, with proper instructions, direct the jurors to reconsider the verdict. No verdict shall be accepted until it clearly reflects the intent of the jury. . . .

U.C.C.C.R. 3.10 (emphasis added). Wenzel appears to argue that because the trial court accepted the jury's verdict, it necessarily follows that the trial court found the jury's intent to be clear. This is simply not the case. In post-trial hearings the trial court acknowledged that William Wenzel ***could have*** been held personally liable and ***may have been held personally liable by the jury***. (TR 315) Notwithstanding, the trial court entered Judgment dismissing all claims against William Wenzel with prejudice.

2. Case authorities put responsibility on trial court to require clear verdict

Wenzel alternatively argues that if the verdict was ambiguous then "the jury should have been sent back to the jury room to reword their verdict." *See Brief of Appellee at p. 9.* Lambert agrees that this is the law. Indeed, cases cited by both parties stand for the proposition that it is the responsibility of the trial court to make certain that the jury's verdict is clear. *See, Hobbs Automotive, Inc. v. Dorsey*, 914 So. 2d 148, 152 (Miss. 2005)(affirming trial court's reformation of verdict to reflect jury's intent in light of evidence presented for consideration); *Adams v. Green*, 474 So. 2d 577, 581 (Miss. 1985); *Baham v. Sullivan*, 924 So. 2d 580, 583 (Miss. Ct App. 2005)("The trial court was under the duty to see that loss of time and the expense of the trial should not be nullified by the failure of the jury to put their verdict in proper form.")(citing *Universal C.I.T. Credit Corp. v. Turner*, 56 So. 2d 800, 803 (Miss. 1952). However,

Wenzel's argument that it is too late to correct this error once the jury is discharged is simply not supported by applicable law.

Wenzel acknowledges that the trial court should have required the jury to further deliberate if the verdict was ambiguous regarding the individual liability of William Wenzel. *See Brief of Appellee at p. 9.* Further, Wenzel acknowledges that the trial court found the verdict to be ambiguous as to the individual liability of William Wenzel. *See Brief of Appellee at p. 9.* Wenzel appears to argue (with no citation to authority) that any corrective action after the fact would somehow deprive William Wenzel of his right to a jury. This argument is contrary to the law and to the undisputed facts in this case. As such, it should be rejected by this Court.

3. Wenzel failed to address *Adams v. Green.*

In its initial brief, Lambert called the Court's attention to *Adams v. Green*, 474 So. 2d 577 (Miss. 1985). Wenzel made no attempt to address this case in his brief. This is not surprising as this Court's decision in *Adams* absolutely requires reversal of the lower court's judgment releasing William H. Wenzel of all liability.

In *Adams*, three defendants were tried in a civil action involving an automobile accident. *Adams*, 474 So. 2d at 579. The jury returned a verdict in favor of two of the defendants but failed to make any finding as to the third defendant, Doris Edwards. *Id.* On appeal, this Court noted that the ***plaintiffs never sought an jury instruction for a verdict against Doris Edwards***. *Id.* at 580. This Court noted that no parties to the action raised any objection to the form of the verdict at the time the verdict was returned. *Id.* Notwithstanding, this Court reversed entry of judgment in favor of Doris Edwards relying upon Miss Code Ann. § 11-7-161 which states: "[i]f the verdict is not responsive to the

issue submitted to the jury, the court shall call their attention thereto and send them back for further deliberation." *Id.* Specifically, the Court held:

> [A]s to the defendant Doris G. Edwards, the court ***committed reversible error when it failed to return the jury to the jury room to reform the verdict as to the question of the liability of Doris G. Edwards,*** and the failure to do so resulted in a mistrial as to this defendant. ***This is true despite the appellants' failure to request an instruction against Doris G. Edwards, individually.***

Id. at 581 (emphasis added).

In light of *Adams*, Wenzel's argument that judgment should not be entered against him because the name "William H. Wenzel" was not specifically apportioned any percentage of damages on the apportionment verdict form is clearly without merit. Accordingly, even if this Court finds that the jury did not clearly find William Wenzel individually liable pursuant to its findings relevant to P-100, the trial court's decision to dismiss all claims against William Wenzel still warrants reversal.

C. LAMBERT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

1. Lambert's Motion for JNOV Should Have Been Sustained

Wenzel argues that Lambert failed to include its motion for judgment as a matter of law in the record on appeal before this court and further questions whether such motion was properly preserved. Wenzel is incorrect.

As this Court has already correctly noted, the original judgment entered by the trial court on June 14, 2006 was interlocutory as it did not resolve Lambert's claim against William Wenzel, individually. (Rec. 207-208) On November 16, 2006, Lambert filed its Motion for Final Judgment wherein it specifically sought entry of Judgment Notwithstanding the Verdict on the basis of William Wenzel's liability as a matter of law pursuant to Miss. Code Ann. § 79-10-67. (Rec. 204) Final judgment was not entered by

the trial court until December 7, 2006. (Rec Ex. Tab 2) As such, Lambert's motion for judgment as a matter of law (JNOV) was filed no later than ten days after entry of final judgment in compliance with the requirements of Miss. R. Civ. P. 50. *Swift v. State Farm Mut. Auto. Ins. Co.*, 796 F.2d 120, 122 (5th Cir. 1986)(interpreting "no later than" language included in Fed. R. Civ. P. 50 to allow for filing of Motion for JNOV prior to entry of final judgment).[3] *See also*, *Mallery v. Taylor*, 792 So.2d 226, 228 (Miss. 2001)(holding notice of appeal filed prior to entry of final judgment timely).

Notwithstanding Wenzel's unfounded argument regarding the status of the record, Wenzel goes on to re-argue his central position that the jury instructions were lacking a specific instruction as to individual liability for William Wenzel and the Professional Association Statute and, therefore, denial of the motion was appropriate. This argument ignores applicable law and the unrefuted evidence presented at trial.

The standard for determining whether a motion for JNOV should be granted is as follows: "If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, [then the Court is] required to reverse . . ." *Trustmark Nat. Bank v. Jeff Anderson Regional Medical Center*, 792 So. 2d 267, 273 (Miss. Ct. App. 2000). In the present case there was absolutely no dispute that the Defendant William Wenzel was responsible for the negligent payment certifications which the jury found caused damage to Lambert.

At trial, William Wenzel acknowledged and it was uncontested that he had, in fact, signed and certified each of the payment applications which the jury ultimately

[3] Lambert has been unable to identify any Mississippi case interpreting the "no later than" language utilized in Miss. R. Civ. P. 50. However, this Court has routinely held it appropriate to look to federal court interpretation of the corresponding Federal Rules of Civil Procedure for guidance in such an instance. *Hood ex rel. State Tobacco Litigation*, 958 So. 2d 790, 806 (Miss. 2007).

found to have been negligently certified. (TR 212-220, 236-237, 241, Tr Ex P-8, Rec Ex Tab 5 at 186, Rec. 255, 258, 266, 269) Indeed, William Wenzel clearly accepted responsibility for any mistakes he made in certifying the work for payment. (TR 228-229, 230-232) The following exchange occurred at trial during the cross-examination of William Wenzel:

> Q: Well, I'm asking you what you did. Did you go out there and make sure that it complied? Because you gave certification to the owner?
>
> A: Hey, I inspect everything. I'm in – in charge of this project in terms of –
>
> Q: You're in charge of inspection?
>
> A: I sign – I have no problem signing it. That's my job. I sign for it. ***I take responsibility for what I sign for. I don't know what else I need to say. You don't need to go [sic] every one of these. I take responsibility for what I did.***

(TR 232)(emphasis added)

There was ***no evidence*** that any one other than William Wenzel was responsible for (or even involved) in the negligently certified payment applications. Indeed, William Wenzel's ***only*** argument at trial was that his mistakes did not amount to $1.9 million in repairs. (TR 256) The jury clearly disagreed. (Rec. 186)

The overwhelming weight of the evidence supported entry of judgment against William Wenzel individually, notwithstanding any perceived ambiguity in the jury's verdict. The trial court's failure to enter judgment against him was, therefore, reversible error.

2. There was no "fact" for the jury to find.

Wenzel further argues that William Wenzel cannot be held liable because the jury was not instructed with regard to the law applicable to professional associations. *See*

Brief of Appellee at p. 10, 13. Lambert is at a loss as to what "fact" any jury would need to find in this regard.

Generally speaking, it is the role of the jury to decide "facts in dispute . . ." *New Orleans & G.N.R. Co. v. Walden*, 133 So. 241, 245 (Miss. 1931). *See also, Conley v. State*, 790 So. 2d 773, 807 (Miss. 2001)("the jury is the ultimate finder of fact . . ." Conversely, it is the court's responsibility to decide matters of law. *See, Claiborne v. Greer*, 354 So. 2d 1109, 1110 (Miss. 1978)("the jury resolves conflicts of fact the court resolves issues of law arising from nonconflicting facts.")

As noted in Lambert's initial brief, Wenzel & Associates, P.A. is a professional association, this fact was uncontested at trial. (TR 109-110) Professional Associations in Mississippi are governed by the Mississippi Professional Corporation Act ("MPCA") found at Miss. Code Ann. §§ 79-10-1 *et seq.* The MPCA makes "[e]ach individual who renders professional services" liable for negligent acts committed as an employee of the Professional Association "for a negligent or wrongful act or omission in which he personally participates to the same extent as if he rendered the services as a sole practitioner." Miss. Code Ann. § 79-10-67. Additionally, the statute imposes liability on the individual members of a professional association for the negligence of employees under his direct supervision or control.

As noted above, the jury clearly found that the payment applications were negligently certified by "Wenzel." (Rec. Ex. Tab 5 at 186) Additionally, the jury found that Lambert was injured as a result of this negligence. (Rec. Ex. Tab 5 at 186) There has never been ***any*** factual dispute as to which Wenzel architect was responsible for certifying these payment applications. William Wenzel signed those applications and was

directly responsible for the professional services rendered to Lambert by the professional association, ***this fact was not contested in the pleadings***. (Rec. 14, 35, 69, 83) In paragraph 14 of the original complaint filed in this case, Lambert alleged:

> Defendant Wenzel is a registered professional architect who was assigned by Wenzel & Associates to render professional services to the Project. It was principally the Defendant William Wenzel who performed the "comprehensive professional services" for the Project on behalf of Wenzel & Associates.

(Rec. 14) In the Answer, William Wenzel admitted this allegation. (Rec. 35) Likewise, William Wenzel admitted in his answer to the Lambert's amended complaint he was the architect who performed "comprehensive professional services." (Rec. 69, 82-83)

There can be no question that the jury has already clearly determined that these professional services were rendered in a negligent manner which caused actual injury to Lambert. As such, there was simply no issue of fact for the jury to find with regard to William Wenzel's individual liability. Pursuant to Miss Code Ann. § 79-10-67 and his admitted "personal participation" William Wenzel is liable ***as a matter of law***. Once the jury found negligence in the performance of professional services rendered by Wenzel and Associates, P.A., there was simply no need for any additional finding against William Wenzel as there were no further facts in dispute. It was ***admitted*** in the pleadings that William Wenzel was, in fact, the professional directly responsible for rendering the professional services which the jury determined to have negligently caused damage to Lambert. Additionally, as already demonstrated above, this fact was further admitted in testimony at trial and is clear from the documents entered into evidence. As such, the trial court's refusal to enter judgment against William Wenzel individually and its entry of judgment dismissing all claims against him with prejudice was reversible error.

III. CONCLUSION

This is not a difficult case. It is very clear that the jury found the actions of William Wenzel to be negligent. It is equally clear that the jury found Lambert to be entitled to damages in the amount of $1,949,932.85. Under the uncontested facts of this case and established William Wenzel has personal liability for that negligence. The trial court should not have allowed Mr. Wenzel to escape liability for his negligence. Lambert respectfully requests that this Court reverse and remand with instructions to enter judgment against Wenzel in accordance with the jury's verdict and all applicable law.

This the 12th day of September, 2007.

Respectfully Submitted:

LAMBERT COMMUNITY HOUSING GROUP, L.P.

By: _____

Mark D. Herbert MSB# [redacted]

Adam Stone MSB# [redacted]

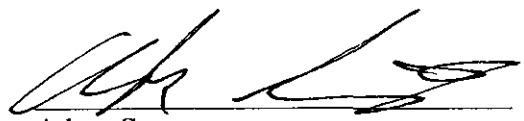
CERTIFICATE OF SERVICE

I, Adam Stone, do hereby certify that I have this day served via U.S. Mail, a true and correct copy of the foregoing pleading upon the following counsel of record:

Robert M. Tyner, Jr. Esq.
W.O. Luckett, Esq.
Luckett Tyner Law Firm, P.A.
Post Office Box Drawer 1000
Clarksdale, MS 38614-1000

Honorable Albert B. Smith, III
Post Office Drawer 478
Cleveland, MS 38732

THIS the 12th day of September, 2007.



Adam Stone