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

BRIEF FOR APPELLANT

SUBMITTED BY:

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CERTIFICATE OF INTEREST 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 26th day of June, 2007.

By: Adam Stone
Adam Stone

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WHETHER THE TRIAL COURT ERRED IN ITS REFUSAL TO ENTER JUDGMENT AGAINST DEFENDANT WILLIAM H. WENZEL, INDIVIDUALLY.

STATEMENT OF THE CASE

Appellant, Lambert Community Housing Group (hereinafter "Lambert") initiated the present action on August 29, 1997 in the Circuit Court of Quitman County, Mississippi (hereinafter "Complaint") (Rec. 12-23)[1] In the Complaint, Lambert sought recovery for damages arising from the negligent performance of architectural services performed specifically by William Wenzel in his professional capacity as an architect for Wenzel & Associates, P.A. and misrepresentations made by William Wenzel in the course of performing said services. (Rec. 14-17) From the initial answer filed and throughout the defense of this case, William H. Wenzel and Wenzel & Associates, P.A. were referenced by their counsel collectively as "Wenzel." (Rec. 34, 82-83)

On March 23, 2006, nearly nine years after the initial filing of this action, this matter was tried before a jury in Quitman County, Mississippi which found in favor of Lambert and awarded judgment in the amount of $1,949,932.85. (Rec. Ex. Tab 5 at 184, 186-187) Specifically, in response to interrogatories posed in Instruction P-100, the jury found that "Wenzel negligently certified application for payment by representing that the project had achieved certain [sic] designated level 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 . . ." (Rec. Ex. Tab 5 at 186)

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[1] For the purposes of this brief, citations to the record on appeal are abbreviated as follows: "Rec." indicates a citation to the clerk's papers by page number; "Rec. Ex. Tab" indicates a citation to the Mandatory and Appellant's Record Excerpts by tab and, where applicable, page number; "TR" indicates a citation to that portion of the transcript of the trial commencing on March 20, 2006 and hearing commencing on May 23, 2006 designated for inclusion in the record on appeal for this matter and "TR Exh" indicates a citation to an exhibit offered at the trial commencing on March 20, 2006 by exhibit number and, where applicable, by page number.

Although William Wenzel and Wenzel & Associates, P.A. were both named defendants, the general verdict form only provided a space for the allocation of a portion of damages to Defendant, Wenzel & Associates, P.A. (Rec. Ex. Tab 5 at 187) The jury apportioned 33.3% fault to Wenzel & Associates, P.A., 33.4% liability to Defendant, Quality Construction, Inc.[2] and 33.3% liability to Mid-South Development, Inc. (Rec. 187) In that the jury clearly found William Wenzel liable and Miss. Code Ann. § 79-10-67 imposes joint and several liability on William Wenzel in light of the uncontested facts presented to the jury, Lambert presented an order of final judgment to the trial court seeking entry of judgment against both "Wenzel" defendants. However, after a hearing on the same, the trial court only entered judgment against Wenzel & Associates, P.A. (hereinafter "First Order of Judgment") (Rec. 188-190)

Thereafter, Wenzel & Associates, P.A. filed for Bankruptcy protection in the Northern District of Mississippi. (Rec. 199) Upon receipt and verification that the automatic stay had been lifted, Lambert filed a Notice of Appeal seeking review of the First Order of Judgment on September 18, 2006. (Rec. Ex. Tab 1) On November 8, 2006, this Court dismissed the appeal finding that the First Order of Judgment did not resolve ***all*** claims raised in the action, particularly Lambert's claims against the Defendant William Wenzel. (Rec. 207)

Upon remand to the trial court for further proceedings, Lambert filed its Motion For Final Judgment wherein it called to the trial court's attention: (1) the jury's finding that Wenzel had been negligent in performing architectural services; (2) that all of the evidence presented for the jury's consideration regarding said negligence related to the

[2] Lambert had already obtained a default judgment against this defendant prior to trial. (Rec. Ex. Tab 1)

individual action of William Wenzel and (3) that Miss. Code Ann § 79-10-67 clearly provided for the William Wenzel's liability to be joint and several with that of Wenzel & Associates, P.A. (Rec. 204-205)

On December 7, 2006, the trial Court entered Final Judgment against Wenzel and Associates, P.A. only and dismissed all claims against William Wenzel with prejudice. (Rec. Ex. Tab 2) Lambert filed its timely Notice of Appeal on December 14, 2006, 2007. (Rec. 297) This matter is now ripe for appeal.

STATEMENT OF FACTS

The facts underlying the present case began in 1994 when Lambert was formed in order to develop and build a multi-unit housing development for low-income individuals in Lambert, Mississippi.[3] (TR 10-11) The development was to be called the James E. Taper Estates (TR 14)

William Wenzel of Wenzel & Associates, P.A. was retained to be the architect for the project. (TR 14) Mr. Wenzel was responsible for designing the project and for construction management and oversight of the project. (TR 14) In particular, Mr. Wenzel was responsible for and did authorize all payment applications for the disbursal of contract funds to the general contractor. (TR 211-214)(TR Ex 8) Mr. Wenzel provided the form for the construction contract between Lambert and the general contractor for the construction of James E. Taper Estates. (TR 13-24) The contract provided for construction costs for completion on that project in the amount of $1,736,00.00. (TR 24)(TR Ex. P-8) Mr. Wenzel also drafted the specifications for the project and had the absolute authority to withhold payment under the contract if work was not properly performed, not tested in accordance with the terms of the contract and/or covered prior to inspection by Mr. Wenzel. (TR 206-209, 254-255)

At trial, it was undisputed that Mr. Wenzel was the ***only*** individual associated with Wenzel & Associates, P.A. to handle responsibility for design, oversight and authorization of progress payments. (TR 194)(TR Ex. P-8) Indeed, Mr. Wenzel testified that he handled this job personally and was responsible for his actions pursuant thereto.

[3] Initially, Lambert was owned by two partners, Mid-South Development, Inc. and WNC & Associates, Inc., WNC being the partner which provided the capital for the project and Mid-South being responsible for the development. Mid-South Development, Inc. ceased to operate as a partner before completion of the James E. Taper Estates Project. Thereafter, WNC became sole partner of Lambert and took charge of completion of the project.

(TR 194, 195-196, 213-214, 232, 237) This was, in fact, not a contested issue at trial due to William Wenzel's admissions in the pleadings to this fact. (Rec. 14, 34, 69, 82-83) It was, likewise, undisputed at trial that Mr. Wenzel authorized the disbursement of $1,681,067.00 for work which he personally certified as being complete and done in accordance with specifications. (TR Ex P-8)

Unfortunately, the work which was certified by Mr. Wenzel was far from complete and significantly out of compliance with specifications. The testimony at trial regarding these problems was significant: toilets flushing from one apartment into another (as opposed to into the sewage system), sewage lines encased in the concrete slab that could not be connected, electrical wiring left unconnected and dangling, insufficient studs included in the framing, hallways in some buildings barely wide enough for one adult to walk through. Indeed, Mr. Wenzel acknowledged and attempted to trivialize many of these failures in his testimony. (TR 220-223)(certified foundation without required compaction testing); (TR 228)(certified plumbing rough-in despite fact that end-pipe was encased in concrete); (TR 232-237)(certified that electrical was one hundred percent complete despite the fact that he could not confirm that this was the case and admitting that he was responsible if electrical not up to code); (TR 249)(admitting that failure to redesign in light of decreased slab size caused problems with the plumbing but that "life is full of problems"); (TR 252)(acknowledged that he certified contract funds and did not require immediate correction of narrow hallways out of compliance with ADA, did not perceive this to be a major problem); (TR 253)(admitted that framing was out of compliance with specifications by framer paid at one hundred percent per his certifications, did not perceive this to be a major problem).

As noted above, hallways in some of the buildings were unacceptably narrow due to a reduction in the size of the foundation slabs rendering these buildings non-compliant with the Americans with Disabilities Act ("ADA"). (TR 252) Mr. Wenzel testified that he failed to re-design the buildings to account for the decreased slab size and just left it to the contractor to make adjustments on his own. (TR 248-249) Likewise, Mr. Wenzel testified that he did not re-design the plumbing layout to account for the decreased slab size. (TR 248-249) Mr. Wenzel acknowledged that testing was required as part of the specifications to verify the proper level of compaction underlying the foundation and that this testing was not done. (TR 216-17) Notwithstanding, Mr. Wenzel certified the foundation based upon his poking the ground with a stick. (TR 216-17)

At the time Mr. Wenzel ceased working on the project, he had authorized payment in the total amount of $1,681,067.00, approximately ninety seven percent of the total contract amount. (TR Exh. P-8) Due to the numerous (and in some cases, bizarre) errors in construction, Lambert had to spend an additional approximately $2 million to correct the construction errors in order to make the James E. Taper Estates fit for occupancy. (Rec. 20)

At trial the jury found that "Wenzel negligently certified application for payment by representing that the project had achieved certain [sic] designated level 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 . . ." (Rec. Ex. Tab 5 at 186) Based upon that finding, the jury awarded Lambert damages in the amount of $1,949,932.85.

Thereafter, William Wenzel sought to avoid any individual liability for the judgment solely on the basis of the fact that he was not specifically apportioned any percentage of damages on the general verdict form. (Rec. 217-219, 228-230 (TR 309) The trial court's dismissal of all claims against Mr. Wenzel despite the jury's verdict, the evidence upon which that verdict was based and despite Mr. Wenzel's clear liability as a matter of law gives rise to the present appeal.

At trial, the jury clearly found in favor of Lambert. (Rec. 184) Likewise, the jury clearly found that "Wenzel" negligently certified payment applications resulting in Lambert's payment for sub-standard work. (Rec. 186) The ***only*** evidence before the jury regarding certification of these pay applications established that the Defendant ***William Wenzel*** personally made those certifications in his capacity as a professional architect and that ***he was responsible for and stood by those certifications.*** (TR 17, 26-28, 194, 195-196, 213-214, 232, 237)(Tr Ex. P-8)

In light of the jury's findings and the clear and uncontradicted evidence at trial, the trial court's dismissal of all claims against William Wenzel and refusal to enter judgment against him must be reversed and remanded with instructions to enter said judgment.

SUMMARY OF THE ARGUMENT

The issue presented for this Court's consideration in the present case is very simple – should judgment be entered against William Wenzel, individually, a named defendant in the action. In the proceedings below, the trial court dismissed all claims against William Wenzel based solely upon the absence of his name, individually, on a general apportionment form submitted to the jury. This decision warrants reversal for two primary reasons.

First, the jury specifically found that the payment certifications were negligently certified by Wenzel and that this negligence gave rise to an award of $1,949,932.85. As noted above, the individual ***solely responsible*** for those certifications was William H. Wenzel. Clearly, the jury's verdict is not reflected in the order of judgment being appealed herein.

Second, the jury's apportionment of damages against Wenzel & Associates, P.A. gives rise to an equivalent liability against William Wenzel as a matter of law. It was admitted in the pleadings and uncontested at trial, that the William Wenzel was the individual architect in charge of the James E. Taper Estates project. As such, he is liable as a matter of law pursuant to the clear language of Miss. Code Ann. § 79-10-67 which makes him personally liable to the same extent as he would be if he were a sole practitioner. Indeed, William Wenzel's negligence was the ***sole*** basis for a finding of negligence against Wenzel & Associates, P.A.

William Wenzel was a named defendant in this action against whom significant evidence was introduced at trial. Throughout this proceeding, William Wenzel and Wenzel & Associates, P.A. were regarded collectively as "Wenzel" by their attorneys.

Only now, when he perceives an opportunity to avoid the judgment arising out of his own negligence, does Mr. Wenzel seek to separate himself from the P.A. Such an outcome is contrary to the jury's verdict and the law and, as such, should be reversed.

STANDARD OF REVIEW

This present appeal involves the applications and interpretation of legal issues by the trial court. As such, the appropriate standard of review is *de novo*. *Edwards v. Stevens*, No. 2007-ED-00710-SCT at ¶ 5 (Miss., May 31, 2007) (citing *Ladner v. Necaise*, 771 So. 2d 353, 355 (Miss. 2000)). Additionally, this appeal involves the denial of a motion for directed verdict. The appropriate standard of review is set forth below:

> Judgments as a matter of law, which include directed verdicts, peremptory instructions-a procedural equivalent to a directed verdict-and judgments notwithstanding the verdict, all exist to challenge via motion the substance of a party's factual presentation *vis-a-vis* the law of the case. In essence, when requested by way of a motion to grant one of these judgments as a matter of law, trial courts are provided an opportunity to assess the viability of the cases pending before them. By their very nature, these motions present purely legal questions, and therefore, once these motions are utilized by the parties and ruled on by a trial court, these issues are preserved for review and directly appealable upon final judgment.

White v. Stewman, 932 So. 2d 27, 31 -32 (Miss. 2006).

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) In post-trial hearings, counsel for William Wenzel argued that the absence of this Defendant's name on the apportionment of damages form necessarily released him from any obligation to pay the verdict returned by the jury in favor of Lambert. The trial court erroneously accepted this argument and entered judgment against Wenzel & Associates P.A. ***only*** and dismissed William Wenzel with prejudice. This decision is contrary to the law and to the jury's verdict and, as such, must be reversed.

I. THE JURY FOUND WILLIAM WENZEL NEGLIGENT.

A. The Jury Clearly Found that William Wenzel Acted Negligently.

The jury specifically found 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, the named defendant and individual who admittedly made these negligent certifications, liable for compensatory damages in the amount of $1,949,932.85.

The evidence at trial upon which the jury made this finding was based solely on the direct actions of William Wenzel. At trial, 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 are all individually signed by William Wenzel and all but one make no mention whatsoever of Wenzel & Associates, P.A. (Rec. 255, 258, 266, 269) Finally, 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[4] 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.

[4] 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)

In considering whether or not the jury's verdict supported entry of judgment against William Wenzel individually, the trial court indicated that the law regarding whether or not William Wenzel was acting in his individual or representative capacity when he negligently signed the payment applications would govern whether or not he could be subject to the jury's award of damages. Courts have long held in the contract context that "where the instrument itself contains nothing to indicate that it was signed in a representative capacity, parol evidence cannot be introduced to show that such was, in fact, the intent of the signer." *Turner v. Terry*, 799 So. 2d 25, 34 (Miss. 2001)(citing 12 Am.Jur.2d Bills and Notes, § 503 (1997) and Personal Liability of Corporate Officer On Promissory Note, 8 Am.Jur. Proof of Facts 2d 193, § 6 (1976)). That is, if there is nothing in the document to indicate that an individual is acting in a representative capacity, the person is individually liable. *Id.* Other jurisdictions have held that absent some indication of principal/agent relationship, the agent will be personally liable. *Federal Deposit Ins. Corp. v. Woodside Constr. Inc.*, 979 F.2d 172, 175-76 (9th Cir. 1992).

The wording of P-100 comes directly from the Architect's certification which reads:

> In accordance with the Contract Documents, based on on-site observations and the data comprising the above application, ***the Architect*** certifies to the Owner that to the best of ***the Architect's*** knowledge, information, and belief, the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the Amount Certified.

(Rec 213) (emphasis added)

This court has affirmed a trial court's judgment on a jury's verdict which simply stated that Plaintiffs were entitled to $100,000.00 "for fraud" with no mention as to the defendant against whom this judgment was to be entered and at variance with the specific

instructions of the court. *Hobbs Automotive, Inc. v. Dorsey*, 914 So. 2d 148, 152 (Miss. 2005). While this Court acknowledged that the proper procedure would have been for the trial court to require the jury to correct its verdict prior to discharge, reformation was appropriate under the circumstances. *Id.* Specifically, this Court acknowledged that the jury's intent was clear and was supported by the evidence presented at trial and, as such, the trial court was correct to conform the verdict accordingly. *Id.*

In the case at bar, the jury's intent is similarly clear. The relevant language included in jury instruction P-100 made no reference to any corporate capacity of Wenzel. (Rec. 186) Thus, when examined in context of the evidence presented, it is absolutely clear that the jury was holding William Wenzel personally liable for his actions. This outcome is not only consistent with the wording of the jury instruction and the jury's verdict in favor of Lambert, but also it is consistent with the exhibits and testimony presented for the jury's consideration. Indeed, it is consistent with William Wenzel's answer to the complaint wherein he admitted that he was the architect who performed "comprehensive professional services" for the James E. Taper Estates project. (Rec. 14, 34)

The finding of the jury in P-100 was that Wenzel was negligent in approving payment applications. There was no evidence that anyone other than William Wenzel signed those applications, indeed, ***this was not even contested in the pleadings***. (Rec. 14, 35, 69, 83) The payment applications were, in fact, signed by Mr. Wenzel personally and Mr. Wenzel testified that ***he*** (not Wenzel & Associates, P.A.) was responsible for them. (TR 194, 195-196, 213-214, 232, 237) (TR Exh. P-8) Further, Mr. Wenzel's signature on

the payment applications does not indicate that he was signing in any corporate capacity.[5] Again, Mr. Wenzel's testimony at trial admitted that ***he was solely responsible***, the "top of the arch" to use his analogy, for any certifications negligently made. It is clear that the jury found him to be negligent ***and*** liable for that negligence. It is egregious that he would now try to avoid this liability on the basis of an technical omission in the apportionment section of the general verdict form.[6]

The trial court should have entered judgment against William Wenzel individually in accordance with the jury's clear intent in the verdict it returned and consistent with the evidence presented at trial.

B. The Trial Court Should Have Resolved Any Ambiguity In The Verdict.

Mississippi Code Ann. § 11-7-161 provides that "[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." In *Adams v. Green*, 474 So. 2d 577, 580 -581 (Miss. 1985), this Court held the trial court in error for failing to require the jury to render a verdict against a named defendant where evidence was submitted at trial to support her culpability in the case. *Id.* The Court so held "despite the appellants' failure to request an instruction against Doris G. Edwards, individually." *Id.* at 581. In reaching this decision, this Court reflected upon a previous decision:

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[5] Indeed, any such indication would be of no value as Wenzel & Associates, P.A. is a professional association, not a corporation. Thus Wenzel's signature, even in a representative capacity, would still give rise to personal liability pursuant to Miss. Code Ann. § 79-10-67 due to his personal participation in that act. *See, infra,*

[6] Even so, Miss. R. Civ. P. 49(c) 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).

> [W]here the form of the verdict is ambiguous, confusing and improper, the attorney for the appellant should request that the jury be returned to the jury room to reword their verdict and to bring in a verdict in the proper form. However, in the absence of the request from the appellants that this be done, ***the Supreme Court has placed the responsibility and duty squarely on the shoulders of the trial judge to, on its own motion, order the jury to return to the jury room to reform and reword their verdict and to bring in a verdict in proper form.***

Id. (citing *Saucier v. Walker,* 203 So. 2d 299 (Miss. 1967))(emphasis added).

As noted above, Mr. Wenzel's sole argument in the proceedings below was 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. This argument seems to imply that the omission of the name "William H. Wenzel" on the apportionment form is tantamount to a release of liability. This is clearly not the case in light of the significant evidence presented at trial establishing the individual liability of the named defendant, William H. Wenzel, individually. *See, supra.*

As noted above, it is Lambert's position that the jury intended to enter judgment against William Wenzel, individually. Notwithstanding, the trial court found that the jury's verdict was ambiguous. (TR 309-310) Indeed, 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) As such, under the authorities cited above, the trial court erred in approving the instructions in a form which allowed for an ambiguous and confusing verdict. The trial court should have directed the jury to clarify.

Alternatively, the trial court should have applied the doctrine of *ejusdem generis*[7] to resolve the perceived conflict in the jury's verdict. As instructed by the trial court in

[7] This doctrine is embodied in Miss. R. Civ. P. 49(c) and, therefore, clearly applicable to ambiguous jury verdicts.

the proceedings below, Lambert reviewed contract cases regarding contract construction to assist the trial court in determining how to interpret the jury's verdict. Although Lambert took the position, as set forth above, that the jury clearly intended to enter a verdict against William Wenzel on individual liability, Lambert pointed out that, should the trial court find ambiguity in the verdict, the doctrine of *ejusdem generis* would apply. That is, specific provisions control over general provisions. *Yazoo Properties v. Katz & Besthoff Number 284, Inc.*, 644 So. 2d 429, 432 (Miss. 1994).

In the present case, the jury's specific findings and verdict pursuant to the interrogatory posed by P-100 is clearly the more specific provision. This instruction set forth various detailed findings which the jury could accept or reject and, pursuant thereto, the verdict rendered by the jury found that Wenzel "negligently certified applications for payment." (Rec. 186) This is a detailed finding of fault and the ***only evidence*** presented to the jury in this regard was that ***William Wenzel was the sole individual responsible for these certifications.*** (TR 17, 26-28, 194, 195-196, 213-214, 232, 237) (TR Exh. P-8). Conversely, the apportionment instruction simply provided a space for the jury to apportion percentages of responsibility for any damages awarded. There is nothing specific about it. In fact, that form was to be used in conjunction with any of the jury instructions. Under the doctrine of *ejusdem generis* and the provisions of Miss. R. Civ. P. 49(c), the jury's verdict pursuant to Instruction P-100 should control and resolve any ambiguity as to whether or not Mr. Wenzel is personally liable for the judgment verdict rendered by the jury.

To the extent any ambiguity in the jury's verdict existed, the court could have and should have resolved that ambiguity by either applying the doctrine of *ejusdem generis* or

by requiring the jury to return an unambiguous verdict as to the liability of the named defendant, William H. Wenzel. Dismissal of Lambert's claim was clearly not appropriate.

II. LAMBERT WAS ENTITLED TO DIRECTED VERDICT AGAINST WILLIAM WENZEL

As set forth above, Lambert took the position at trial that the jury clearly found William Wenzel individually liable due to his negligent certification of the payment applications and that Lambert suffered damages in the amount of $1,949,932.85 as a result of that negligence. (Rec. 186) However, in the alternative, Lambert sought a directed verdict against Lambert based upon the jury's finding of liability against Wenzel & Associates, P.A. and the uncontested facts of the case. (Rec. 204) This Motion should have been granted.

A. Lambert Was Entitled to Judgment Against William Wenzel As A Matter of Law

The standard for determining whether or not the trial court should have granted a Motion for Directed Verdict is as follows:

> This Court will consider the evidence in the light most favorable to the appellee, giving the appellee the benefit of all favorable inferences that may be reasonably ***drawn from the evidence.***" *General Motors Acceptance Corp. v. Baymon,* 732 So.2d 262, 268 (Miss.1999) (citing *Steele,* 697 So.2d at 376). ***If the facts are so overwhelmingly in favor of the appellant that a reasonable juror could not have arrived at a contrary verdict, this Court must reverse*** and render.

Harrah's Vicksburg Corp. v. Pennebaker, 812 So. 2d 163, 170 (Miss. 2001).

As noted above, the defendant Wenzel & Associates, P.A. is a professional association under the laws of the State of Mississippi. (TR 109-10) Accordingly, Wenzel & Associates, P.A. is governed by the Mississippi Professional Corporation Act ("MPCA") found at Miss. Code Ann. §§ 79-10-1 *et seq.* Pertinent to the present case is

the particular section of the MPCA addressing liability of individual professionals within the professional association and liability for the association itself. The relevant provision provides:

> (1) ***Each individual who renders professional services*** as an employee of a domestic or foreign professional corporation ***is liable 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.*** An employee or shareholder of a domestic or foreign professional corporation is not liable, however, for the conduct of other employees or shareholders of the corporation, except a person under his direct supervision and control, while rendering professional services on behalf of the professional corporation to the person for whom such professional services were being rendered.
>
> (2) A domestic or foreign professional corporation whose employees perform professional services within the scope of their employment or of their apparent authority to act for the corporation is ***liable to the same extent as its employees.***

Miss. Code Ann. § 79-10-67 (emphasis added). The two concepts embodied in this statute make the controversy before this Court easy to resolve as a matter of law.

First, subsection one of the statute provides that there is no corporate shield for any individual who renders professional services as an employee of a professional association. Rather, all such individuals are ***fully*** responsible for any negligent acts or omissions in which that individual participated. Second, the statute makes clear that any liability to the professional association is simply that imputed to it pursuant to the negligent acts of the individual professional. In short, a professional association simply cannot be held liable unless there is a showing of an individually negligent professional. Id. *See also, Carl J. Battalia, M.D., P.A. v. Alexander*, 177 S.W. 3d 893, 903 (Tex. 2005)("the jury should have been asked ***only*** whether the physicians were negligent; the consequences to the professional associations follow as a matter of law."). Where the negligence of the professional association is derived from the negligence of a single

professional, negligence of the individual equates to the liability of both. Indeed, as noted by the court in *Battalia*, listing both the professional and the professional association on the verdict form could lead to a double recovery for the same negligent act.

These are important concepts in light of the evidence presented to the jury and the uncontested finding of liability against Wenzel & Associates, P.A. and admissions by Wenzel in the pleadings.

B. Wenzel & Associates, P.A.'s Liability Was Based Entirely On The Negligence of William Wenzel

As noted above, William Wenzel relied solely on the apportionment instruction in seeking to avoid personal liability in the proceedings below. His position being that because his individual name was not separately included on the general apportionment form, he cannot be held liable for the judgment rendered against Wenzel & Associates, P.A. as a direct result of ***his professional negligence***. This position is incredible in light of the fact that there has ***never been any dispute*** in the proceedings below as to which professional architect associated with Wenzel & Associates, P.A. participated in rendering the architectural services at issue in this case. Indeed, William Wenzel and Wenzel & Associations, P.A. were referenced as a single entity by defense counsel from the very inception of this case. (Rec. 34)

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 and Wenzel & Associates, P.A. admit this allegation. (Rec. 35) Indeed, the answer to this complaint references both William Wenzel ***and*** Wenzel & Associates, P.A. collectively as "Wenzel" (Rec. 34) This practice was continued in Wenzel's answer to the Lambert's amended complaint wherein it was again admitted that William Wenzel was the architect who performed "comprehensive professional services" (Rec. 69, 82-83) and throughout the proceedings below. For this reason alone, Lambert was entitled to judgment as a matter of law against William Wenzel once the jury clearly returned a verdict against Wenzel & Associates, P.A.

Only when William Wenzel perceived an opportunity to escape liability for the jury's clear decision regarding his negligence, did he seek to separate himself from the professional association. He did this despite the fact that Lambert clearly put on a case against Mr. Wenzel individually and in that case, Mr. Wenzel admitted that he the performed the inspections and certified the payment applications that the jury clearly held to be negligent. In that neither Wenzel & Associates, P.A. nor William Wenzel, individually have filed a cross notice of appeal challenging the jury's verdict in this regard, and the verdict is supported by the substantial weight of the evidence, this finding by the jury is established as fact. *Canadian Natl. Ill. Cent. R.Co. v. Hall*, 953 So. 2d 1084, 1083 (Miss. 2007)

There was absolutely no attempt at trial to establish that any one other than William Wenzel was responsible for inspections and certification of payment applications which the jury found to be negligent. (Rec. 186) On the contrary, 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)

His ***only*** argument was that these mistakes did not amount to $1.9 million in repairs. (TR 256) The jury clearly disagreed. (Rec. 186)

In his testimony he admitted his responsibility. However, not that the jury has found liability for his negligence, William Wenzel suddenly seeks to rely on a technicality to escape responsibility for that negligence.

Section 79-10-67 ***makes*** Mr. Wenzel "personally liable for negligent or wrongful acts or omissions in which he personally participates to the same extent as if he rendered the services as a sole practitioner." *Id.* The evidence needed to bring Mr. Wenzel within the purview of § 79-10-67 was clear and undisputed. There were literally hours of testimony from Mr. Wenzel himself regarding his personally having made the inspections and certifications. Further, it was uncontested that Mr. Wenzel personally certified all payment applications. The documents in evidence, likewise, demonstrated that Mr. Wenzel, and ***only*** Mr. Wenzel, was responsible for the negligent certification which the jury found to be negligent and which gave rise to its award of in excess of $1.9 million.

While it is understandable that Mr. Wenzel desires to avoid personal liability, Mississippi law simply does not allow it. Regardless of whether or not a specific amount was apportioned to him individually in the apportionment instruction, Mr. Wenzel is "liable 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." Mr. Wenzel was a party to this lawsuit and testified to personally participating in the project. Furthermore, P-100 establishes Mr. Wenzel's personal liability. That interpretation of P-100 is consistent with Mississippi law, is consistent with the facts, and simply makes sense. Mr. Wenzel's interpretation ignores § 79-10-67, bears no relation to the facts of the case, and would release Mr. Wenzel from liability based upon a technicality.

Clearly, the trial court erred in its refusal to direct verdict against William Wenzel to the extent Wenzel and Associate, P.A. is liable.

III. CONCLUSION

In this 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 as a result of that negligence. Under the uncontested facts of this case, the law is very clear that William Wenzel's liability for the verdict is equal to Wenzel & Associates, P.A. liability. The trial court should not have allowed Mr. Wenzel to escape liability for his negligence. Lambert respectfully requests that Court reverse and remand with instructions to enter judgment against Wenzel in accordance with the jury's verdict and all applicable law.

This the 26th day of June, 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:

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THIS the 26th day of June, 2007

Adam Stone
by LAR