IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
No. 2007-CA-000639

WILLIAM S. HARRIS — **APPELLANT**

VERSUS — **CASE NO. 2007-CA-000639**

TOM GRIFFITH WATER WELL & CONDUCTOR SERVICE, INC — **APPELLEE**

APPEAL FORM THE CHANCERY COURT OF MARION COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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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 the Judges of the Court of Appeals may evaluate possible conflicts, disqualifications or recusal:

1. William S. Harris — Appellant
2. Tom Griffith Water Well & Conductor Service, Inc. — Appellee
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5. Chancellor James H. C. Thomas, Jr.
   Post Office Box 807,
   Hattiesburg, Mississippi 39404 — Presiding Judge

Respectfully submitted, on this the 27th day of February, 2008.

Renee McBride Porter, MSB: [redacted]

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STATEMENT OF THE ISSUES

I.

I.. Whether the Chancellor's findings are manifestly wrong, clearly erroneous, not supported by substantial evidence and against the overwhelming weight of the evidence?

A. Whether the Chancellor's findings that Plaintiff was an employee with an employment at will contract, and not an independent contractor under the 10% gross sales agreement is manifestly wrong and clearly erroneous, not supported by substantial record evidence and against the weight of the evidence?

B. Whether the Chancellor's findings that Defendant changed the basis of payment is clearly erroneous, manifestly wrong, not supported by the substantial evidence and against the overwhelming weight of the evidence?

II. Whether the Chancellor's Findings are manifestly wrong and clearly erroneous when he applied the statue of limitations and laches as a basis of the Judgement?

A. Whether the Defendant waived the Affirmative Defenses of Statute of Limitations and Laches when they were not asserted in the Defendant's answer or any amended answer?

B. Whether the Defendant waived previously non-pled affirmative defenses of statute

of limitations and laches when the Defendant failed to timely assert them?

1. Does excessive delay in asserting affirmative defenses or statute of limitations and lances constitute a waiver by the Defendant to assert them?

2. Whether the Defendant waived affirmative defenses of statute of limitations and laches raised for the first time in a summary judgement motion when, the motion was filed over four and one-half years after litigation had commenced and less than ten (10) days prior to hearing and the trial?

C. Whether the Chancellor's former adjudication overruling the Defendant's motion for summary judgement established the law of the case that the statute of limitations and laches defense did not apply to bar Plaintiff's claim?

III. Whether the Chancellor's Finding in the Judgement that there was not an enforceable contract between Plaintiff and Defendant is clearly erroneous, manifestly wrong, not supported by the substantial evidence and against the overwhelming weight of the evidence.

STATEMENT OF THE CASE

Harris filed suit against Griffith on July 11, 2002, alleging a breach in an oral contract. On September 4, 2002, Tom filed a motion to dismiss and motion to transfer the case to the Circuit Court. That no answer or responsive pleading was had on said motion until June 23, 2003. That discovery was propounded January 9, 2004. That during discovery the attorney for the Plaintiff died and ultimately depositions were completed in this matter on January 22, 2007. That after the depositions were completed Tom fled a Motion for Summary Judgement and Motion to Amend his earlier Answer. This case was then tried at which time the Court found that a genuine issue of material fact did exist. The Court, after a trial and examination of exhibits, dismissed the Complaint finding "Without a written agreement the issue before the Court must turn on the intent of the parties as reflected by their conduct in determining the nature of the contract between the parties." (See Judgement, page 3). The Court found that "the conduct of the parties indicated an employer/employee relationship rather than that of an independent contractor when Griffith began paying a set sum as salary. Harris did not make demand or otherwise take action that would indicate his status was other than an at will employee with the regular weekly salary checks and the termination at the behest of Griffith." (See Judgement, page 3). The Court ultimately found "the arrangement was an unwritten monthly at will employment by Harris, whose claim to be an independent contractor is not borne out by the conduct of the parties, either in the method or amount of payments made by Griffith following his change from paying commissions to a fixed salary." (See Judgement page 4).

That Harris appealed the Court's decision.

STATEMENT OF THE FACTS

Since 1978, Tom Griffith has operated a water well drilling service, known as Tom Griffith Water Well & Conductor Service, Inc., which originally did industrial and residential drilling. The company office has been in Columbia, Mississippi since opening. Tom Griffith Water Well & Conductor Service, Inc., has been a successful business employing an average of twelve people. Tom has been the chief officer and President of the business since it's beginning.

Tom Griffith graduated from college with a Mechanical Engineering degree. Tom has served his community in several capacities as President of different organizations. Tom served his country during the Vietnam War as an officer in the United States Army. He is also an Eagle Scout. As mentioned above, Tom has engaged in business in Columbia, Mississippi, for over twenty-nine years, employing local persons, thereby helping local families and the local economy. This suit is a serious, upsetting attack on the character of Tom Griffith and his family. What started out as a working agreement between three friends for the betterment of all three, and which lasted for nine years, has been turned into something completely different.

The business of Tom Griffith Water Well & Conductor, Inc., had two divisions. One being the traditional water well business; the other being environmental drilling. In 1993 the two businesses had total gross sales of $1,096,574.00.

In 1992, Andy Rushing became employed by Tom Griffith Environmental Drilling, Inc., as a sales person. Andy's salary was to be ten percent (10%) of his gross sales. At the beginning of Andy's tenure with Tom Griffith Water Well & Conductor Services, Inc., he was paid by the company far in excess of ten percent of his sales.

During 1993 Bill Harris was working at Kmart in Columbia on a part-time basis.

He became employed with Tom Griffith Water Well & Conductor Service, Inc., as an office employee on a part-time basis. Harris proposed to Tom that he would like to be on the same plan as Andy Rushing, and proposed to participate as a sales person receiving ten percent (10%) of his sales. Tom agreed verbally with Harris and said "We will try this and see how it works." There was no written agreement.

For approximately three years Harris and Andy received ten percent (10%) of their gross sales as a commission. Harris, just as Andy, was paid a certain amount of money each week by Tom. In the beginning, the company was ahead of Harris, as Harris was drawing more than his ten percent. However, at some point in time, the sales increased and Tom owed Harris some money, as per Harris's records. Tom would pay as the company's cash flow status would allow and eventually caught up.

Tom's intention was to have three divisions. The house (Tom) would have the existing accounts as the House and Andy already had $1,096,574.00 in sales at the time Harris started selling. Andy would have environmental sales. Harris would have sales in the traditional water well

business.

At some point in time, Tom met with both Andy and Harris and said there was going have to be a change. There were problems in determining whose sales were "house" and whose were Bill's. There were problems with the arrangement with other employees both inside and outside the office. Tom told both Bill and Andy "I do not want to wake up one day and owe you all a great some of money." Harris and Andy then went on a fixed salary each week. Harris wanted his money paid in two checks. There were some back 10% commissions owed, and Tom

caught those up over time.

Since that time (which appears to be January, 1997, from Harris's ledgers, introduced as Trial Exhibit 7), the parties operated under a weekly fixed payment method. Tom paid both Harris and Andy each week.

During this time, Harris continued to submit invoices to Tom, as he had before when Tom paid 10% commissions. Tom testified in Court that he told Harris do not submit these invoices to me. Harris told Tom he just wanted to keep a record for his own knowledge. (Record, page 139). The testimony was clear that there was no writing between these parties. Harris admitted that he sent no memorandum, no letters, nothing. Harris was paid each week. Harris cashed his checks. Then, after September of 2001, the economy forced Tom to curtail expenses. In May of 2002, Tom terminated Harris. Then, suddenly Harris wanted to enforce the nine year old original agreement. Harris filed suit.

At the trial Harris could not produce any written evidence signed by Tom. He could only produce his invoices. He also produced his records, which were introduced as Trial Exhibits 6 and 7. These exhibits uphold and confirm Tom's testimony. When these exhibits at studied, Harris shows differing amounts being paid to him for the years 1995 to 1996 in multiples of $500.00 per week. Beginning in 1997, per Trial Exhibit 7, $750.00 was paid per week. On page 2 of Trial Exhibit

7, Harris was paid $750.00 each week, for weeks on end. There are a couple of times when his pay would range from $1500.00 to $2250.00, but those times would be for two or three weeks. Also, as Tom testified, the weekly fixed amounts had to continue to be adjusted over the years as the business and economy changed.

The only people who testified other than the parties were the expert witness called by Harris and Beth Lee. (Note Beth was subpoenaed by Harris to testify.) Beth testified she had worked prior to Tom hiring Harris. She testified that when Harris first came to work his pay would vary. Later, she testified his pay would be a certain amount each week. She also testified that she did not personally receive the invoices from Harris to Tom. Beth testified Harris was not on the accounts payable. She, as the payroll clerk, understood after a period of time Harris was paid a fixed amount per week.

The Chancellor properly dismissed the Complaint finding that there was not proof of a contract between Harris and Tom and that the testimony evidenced that the contract was for an employee at will. Harris appealed.

SUMMARY OF THE ARGUMENT

The decision of the Chancellor should be upheld because there is substantial evidence in the record both from a review of the testimony and exhibits to support the same. Harris filed suit on an oral contract. Tom admitted that at one time the parties operated under the agreement that he would pay Harris 10% of his sales. But, as times changed the agreement had to be changed. Harris, Tom and Andy (another employee) met as per Tom's testimony and the record, and Tom advised the persons working for him that they were now on a set salary. Harris continued to submit Tom invoices and when Tom objected Harris said he just wanted to keep up with what he sold. However, Harris took no other action to collect the supposed money owed him. Harris sent no letters, notes, or other memorandum. Further, Harris received his check each week and cased the same. After Harris was terminated due to a downturn after September 11, 2001, he filed suit. The Chancellor properly found that the Complaint should be dismissed. The Chancellor's decision to dismiss the case is supported by substantial evidence in the record and must be affirmed. Further there is additional law to support the Chancellor's decision i.e., there was no written contract; the course of dealing between the parties; the amount of time Harris allowed to lapse prior to taking any action; Harris did not meet his burden of proof; and ultimately did not prove any damages. The Chancellor's decision must be affirmed as it is wholly supported by both the law and evidence.

ARGUMENT

I. The Chancellor was correct in dismissing the Complaint and the Court's decision is supported by the evidence and should be upheld.

In reviewing the decisions of a Chancellor, this court has taken a limited standard of review. See Reddell v. Reddell, 696 So.2d 287 (Miss. 1997). In order to disturb the findings of a chancellor this court must find that the chancellor has abused his discretion, was manifestly wrong or has made a finding which was clearly erroneous. See Bank of Miss. V. Hollingsworth, 609 So.2d 422 (Miss. 1992).

The Chancellor heard the testimony and examined the evidence and his decision should not be overturned unless he abused his discretion.

Furthermore, the chancellor's determination regarding the weight and credibility of witnesses are given deference when there is conflicting testimony. See. Scott Addison Constr., Inc. v. Lauderdale County Sch. Sys., 789 So.2d 771 (Miss. 2001); Murphy v. Murphy, 631 So.2d 812 (Miss. 1994); Culbreath v. Johnson, 427 So.2d. 705 (Miss. 1983).

In the case at bar, there is no evidence that the Chancellor erred in making his decision. The case involved a suit on an oral contract. The party with the burden of proving the existence of a contract testified that there was a contact. However, this testimony was not corroborated in any way or manner. In fact the other testimony of witnesses called by the Defendant corroborates the fact that a contract did not exist as it shows the Plaintiff being paid in installments a certain sum of money each week.

"This Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard" See Johnson v. Johnson, 650

So. 2d 357 (Miss. 1994). See also McEwen v. McEwem, 631 So. 2d 821, 823 (Miss. 1994). The only way an appellate court can reverse a chancellor's ruling of fact is when there is not "substantial, credible evidence" to justify his findings. The Court referenced Parsons v. Parsons, 678 So. 2d 701,703 (Miss. 1996), saying the award on appeal will not be disturbed unless it is found to be against the overwhelming weight of the evidence or manifestly in error.

The court in Carr v. Carr, 480 So. 2d 1120 (Miss. 1985) stated that " Findings of fact made by a chancellor may not be set aside or disturbed on appeal unless manifestly wrong; this is not whether the finding relates to evidentiary fact questions, or to ultimate fact questions" Tucker v. Tucker, 453 So. 2d 1294 (Miss. 1984). The Court went on to conclude that if there is evidence in the record that support the chancellor's finding of fact, then the finding should not be disturbed. "The Court is bound by the findings unless it can be said with a reasonable certainty that those findings were manifestly wrong and against the overwhelming weight of the evidence." Torrence v. Moore, 455 So. 2d 778 (Miss. 1984).

In Devereaux v. Devereaux, 493 So. 2d. 1310 (Miss. 1986), the Court stated again that they would not reverse the chancellor's finding of facts on contradictory testimony unless it is manifestly wrong Voss v. Stewart, 420 So. 2d 761, 765 (Miss. 1982). The Court *will* reverse a chancellor's findings when, on the record, it is manifestly wrong. If there is nothing on the record to justify the findings of the chancellor, then the Court will reverse.

This court has held that "[w]here the factual findings of the chancellor are supported by substantial credible evidence, they are insulated from disturbance on appellate review." Norton v. Norton, 742 So.2d 126 (Miss. 1997) citing Jones v. Jones, 532 So.2d 574, 581 (Miss. 1988).

In the case at bar there is evidence to support the Chancellor's findings and the Judgement should be upheld.

The Court found as follows, to wit: "The Court finds there was essentially a contract of employment at will between the parties, initially based on Harris receiving a commission as reflected by Griffith's payment method, (Trial Exhibit 6) and then changed to a weekly salary, as based on Griffith's payment method between 1999 and 2002. While Harris continued to submit invoices, the Court finds the intent of the parties, at least as to the mutuality of the arrangement, changed with the monthly changed to a set salary." (See Judgement, page 3.) There was evidence in the record to support this claim when you view exhibits and testimony which both support the fact that Tom paid Harris a set amount each week. This was supported by Beth Lee, Tom Griffith and by Trial Exhibit 2. Therefore the findings of the Court were supported by evidence and must be upheld.

II.

Appellee's reply to the issues raised by Appellant.

I. Whether the Chancellor's findings are manifestly wrong, clearly erroneous, not supported by substantial evidence and against the overwhelming weight of the evidence?

As aforesaid the Chancellor's findings are clearly correct and supported by the evidence and should be affirmed and upheld.

A. Whether the Chancellor's findings that Plaintiff was an employee with an employment at will contract, and not an independent contractor under the 10% gross sales agreement is manifestly wrong and clearly erroneous, not supported by substantial record evidence and against the weight of the evidence?

The finding that Harris was an employee at will and not an independent contractor, as he had been referred to by Tom and himself, is not significant as to the ultimate finding of this Court. The Court dismissed Harris' complaint finding first of all that there was not a contract. The Court found "A binding contract must consist of parties with a valid or legal object entering into a mutually agreeable understanding with each party receiving something of value." (See Judgement, page 3). The Court dismissed the Complaint after looking at the intent of the parties finding that there was no enforceable contact. Whether or not Harris was classified as an independent contractor or employee did not effect the fact that there was no written agreement. The case of Owens v. Thomae, 759 So.2d 1117 (Miss. 1999) provides " In determining whether a employer-employee or independent contractor relationship existed, especially where third parties are affected, courts are not confined to the terms of the contract, but may look as well to the conduct of the parties. Richardson v. APAC-Mississippi, Inc., 631 So.2d 143, 151 (Miss. 1994); Mississippi Employment Sec. Comm'n v. Logan, 248 Miss. 595, 600, 159 So.2d 802, 804 (1964). . . .Branning, 1999 WL 444606 at * 7-8.

The Court looked to the conduct of the parties and found that an employment at will contract existed and this finding should be affirmed.

B. Whether the Chancellor's findings that Defendant changed the basis of payment is clearly erroneous, manifestly wrong, not supported by the substantial evidence and against the overwhelming weight of the evidence?

The Chancellor's findings are supported by the Record and by other evidence. Harris argues that payments to him fluctuated. However, when you review Trial Exhibit 2., you find the following:

June 19, 1998 to April 12, 1999: each week Harris was paid: $750.00

April 16, 1999 to November 29, 1999: each week Harris was paid $500.00.

March 10, 2000, to January 24,2001 each week Harris was paid $850.00.

January 29, 2001 to October 10, 2001 each week Harris was paid $875.00

(Please note on the January 29, 2001, check was made payable for $850.00., and then an additional check for $25.00., was written on February 9, 2001., indicating a desire to increase the pay to $875.00).

The only time periods not covered above are the time period from December 3, 1999, to February 25, 2000, at which time Harris was paid $800.00., for nine of those weeks and then two weeks for $700.00 and an additional $400.00., showing an intent to pay $800.00 per week.

After October 10, 2001, which is almost a month after September 11, 2001, the payments dropped to $200.00., a week.

See Trial Exhibit 2.

This analysis supports the finding that Harris was an employee at will and drawing a salary.

The record testimony of Beth Lee supports the finding of the Court. Beth was asked if when she first began work Harris's checks would differ each week and she replied "Yes." (See Record, page 170, line 13). She was then asked if she recalled a time period when their payments became to be a certain amount. Her reply was again "Yes." (See Record, page 170, line 20.).

Harris admitted that at one time he was paid $750.00., per week for weeks. (See Record, page 45). Harris was questioned : "But you agree with me that starting June of 1998

and going through 1998, 1999, 2000, 2001, and up to 2002, every week you got a certain amount, and there were no payments– there were no big payments made? His answer was "There were no big payments." He admitted "Well it was fairly level" He further admitted that the only thing we had since, we had no verbal contract between he and Tom, was their course of dealing. (Record, page 50, line 16) When asked "And it would seem that the way you dealt each other is that every week you would get paid a check." His reply" "Actually, I got two checks, yes." (Record, page 50, lines 17-20.)

Further, the testimony by Harris that he never sent a statement or letter requesting any type of payment from Griffith. (Record, page 52). When asked "Do you have anything, any memorandum or note, anything signed by Mr. Griffith saying that he owed you this 10 percent." His reply was "No, I do not." (Record, page 53, line 14.)

Therefore, the findings by the Court were supported by the evidence both testimony and exhibits.

II. Whether the Chancellor's Findings are manifestly wrong and clearly erroneous when he applied the statue of limitations and laches as a basis of the Judgement?

A. Whether the Defendant waived the Affirmative Defenses of Statute of Limitations and Laches when they were not asserted in the Defendant's answer or any amended answer?

The Defendant did not waive the Affirmative Defenses of Statute of Limitations and Laches as they were asserted in his Motion for Summary Judgement and his motion to amend his answer. Mississippi Rule of Civil Procedure No. 12 provides that "leave to amend shall be granted when justice so requires" In this case the Defendant (Tom) moved to amend his pleadings days after the

depositions and justice would require that he be allowed to so amend his pleadings. Further these issues were tried by the Court after an examination of the record. Mississippi Rule of Civil Procedure No. 15, provides also "When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings... the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the maintaining of the action or defense upon the merits." In this case the issues of statute of limitations and laches were tried by this Court with no objection made by Harris.

The Court is justified in it's ruling on the statute of limitations and laches.

B. Whether the Defendant waived previously non-pled affirmative defenses of statute of limitations and laches when the Defendant failed to timely assert them?

1. Does excessive delay in asserting affirmative defenses or statute of limitations and lances constitute a waiver by the Defendant to assert them?

This lawsuit was filed on July 11, 2002, by Harris and summons was issued and served in this cause. On September 4, 2002, Tom filed a motion to dismiss. That no answer or responsive pleading was had on said motion until June 23, 2003. That as per Uniform Chancery Court Rules 1.10 discovery was to be completed within ninety days of service of an Answer. That an Answer/ Response was served on September 4, 2002. That no action was had for nine months. That discovery was not propounded until January 9, 2004. That the discovery was not timely filed as per Mississippi Rule of Civil Procedure No. 1.10. That this action could have been dismissed as per Mississippi Rule of Civil Procedure No. 41, by this Court. That depositions were completed in

this matter on January 22, 2007. That at that time Tom became aware of certain defenses and filed the appropriate pleadings. That Tom did not have the transcripts of the depositions in hand until February 12, 2007. That prior to receiving the transcripts and based upon written notes and memory from the depositions Tom filed his motions herein. That Tom filed these motions after discovery was completed. That discovery was not timely followed by either party. That Harris filed for additional discovery after the time deadlines and schedules. Tom did request to amend his pleadings. For Harris to now argue this request is not timely when he let nine months go by after the filing of the suit without taking any action should not be well taken.

2. Whether the Defendant waived affirmative defenses of statute of limitations and laches raised for the first time in a summary judgement motion when, the motion was filed over four and one-half years after litigation had commenced and less than ten (10) days prior to hearing and the trial?

The Court's Judgement does not find that a contract existed. The fact that the case was not timely filed by Harris and that laches had attached is only surplus argument for the dismissal. However, Tom filed his motions and amended answer with days of the deposition so that he acted timely and properly.

The case of Rankin v. Clements Cadillac, Inc., 905 So.2d 710 (Miss.App. 2004) is on point in that in that case Clements Cadillac, Inc., filed an Answer but did not set forth a Release in the Answer. Mr. Rankin tried to bar consideration of an affirmative defense that was not pled but which was injected into the case before trial. The Court quoted Rule 15 B "issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." M.R.C.P. 15(b). There is no prohibition in

Rule 15(b) of applying the trial-by-consent principle to affirmative defenses. In the case at hand the issues were tried by the Court with the issues involving the extensive questioning of Harris as to how he got a check each week and took no action even though Tom supposedly owed him money. So this issue was tried by the Court.

The Rankin case also allowed the trial of the affirmative defenses even though they were raised orally just prior to trial. The Rankin case found that a "defendant's pretrial motion that seeks a ruling on an affirmative defense which has not been included in the pleadings, should be evaluated under the same rule as would apply if that defense was raised at trial. Under Rule 15(b), the evidence and the defense should be accepted unless the objecting party can "satisfy the court that the admission of such evidence [in support of the affirmative defense] would prejudice the maintaining of the action or defense."

There was no argument here that the affirmative defenses would prejudice Harris and thus they should be accepted as a bar to this suit.

C. Whether the Chancellor's former adjudication overruling the Defendant's motion for summary judgement established the law of the case that the statute of limitations and laches defense did not apply to bar Plaintiff's claim?

The Court simply found that summary judgement was not proper in that a material and genuine issue of fact did exist . The court made no ruling on any other law or the facts. Simpson v State Farm Fire & Casualty Co. 564 So. 2d., 1374, 1376 (Miss., 1990), is not on point herein as the Court ruled ("It's my finding now to overrule the summary judgement based on the fact I think there is a genuine issue of fact that we need to hear in the case today." (See Record, page 9, lines 5-9). The Simpson case discussed the doctrine of law in a case, but the Simpson case

is a case that was tried and appealed and then retried. The case at hand had not been tried when the Chancellor found that there was a genuine issue of fact. There were no findings on the law made by the Court. Therefore this issue is without merit.

III. Whether the Chancellor's Finding in the Judgement that there was not an enforceable contract between Plaintiff and Defendant is clearly erroneous, manifestly wrong, not supported by the substantial evidence and against the overwhelming weight of the evidence.

As afore said the Chancellor's findings are not clearly erroneous and are supported by the evidence. In reply to the arguments made by Harris:

Harris argues: Harris testimony the contract existed and continued to exist until May 2002 when Griffith breached the contract and first told Harris payment would not be made	**Tom's reply: Griffith's testimony that the contract did exist but that he had a meeting with both Andy and Harris and told them he could no longer pay the 10%; Beth Lee testifying that at one time Harris was paid each week a differing amount and later was paid a certain amount each week; Harris being paid each week for weeks on end the same amount of money**

Harris argues: Harris; sixty-nine (69) invoices undisputedly submitted to Griffith covering time period that the ten (10%) percent gross sales commission agreement was negotiated in 1994 until Griffith advised, via its President, that it was not going to pay what was owed under the agreement.	**Tom's reply: First of all there is no proof that 69 invoices were submitted to Tom only Harris' testimony that he would present invoices at times. Secondly, Tom's testimony "I do remember on at least one occasion almost the exact words that were said, and I said, Bill, don't give me those invoices anymore; we're not on this. I believe we were sitting up at the Northgate Coffee Shop. It was Andy and I and Bill. And Bill said, Well I just want to keep score. I want to keep up with it. I said, Okay, but we're not on it. " Record page 139, lines 1-8) Tom testified that Harris never told him he owed him money. Harris got his check each week and never sent Tom a letter or statement or any documentation.**
Harris argues: Lefoldt's testimony that financial documents and deposition testimony reviewed supported existence of the contact and that Harris is due money under terms of the contract.	**Tom's reply: Mr. Lefoldt was a paid witness for Harris. (See Record page 93, line 5). Mr. Lefoldt admitted that Harris was paid certain amounts each week. (Resembling salary) He further admitted that no where in Tom's books did he see a reference as to any amounts owed Harris. (See Record , page 111).**
Harris argues: Griffith's unchanging payment method i.e., Griffith consistently made almost weekly payments toward account in fluctuating amounts from the time the oral contractual agreement was undisputedly negotiated in 1994, until Griffith's breach	**Tom's reply: See Trial Exhibit 2 which shows that** June 19, 1998 to April 12, 1999:Harris was paid: $750.00, per week April 16, 1999 to November 29, 1999: Harris was paid $500.00., per week March 10, 2000, to January 24,2001 Harris was paid $850.00., per week January 29, 2001 to October 10, 2001 Harris was paid $875.00, per week This shows a consistent payment record each week of payment evidencing for weeks on end the same amount paid each week. **(Note most salaries do change as is evidenced by the pay record for Harris and as was confirmed by the testimony)**

Harris argues: Griffith's own bookkeeper, Bethany Lee's testimony that separate checks were paid to Harris since 1994, the time the contractual agreement was negotiated until Harris left in 2002, one for sale expense and the other for payroll.	**Tom's reply: Tom admits that Harris was paid in two checks one for office work and one for sales work however he was paid a salary or set sum for each. Bethany Lee was subpoenaed to court by Harris but called by Tom to testify and she testified that she remembered when Harris's pay changed.**
Harris argues: Griffith's own Find Reports and Transaction By Detail By Account statements, i.e. Exhibits "1" and "2," reflect the independent contractor status of Harris with no taxes, etc... withheld from payments made to Harris that were coded to "sales expense" by Griffith from the time period Griffith's financial records were produced until breach in 2002.	**Tom's reply: Whether or not Harris is an independent contractor or employee has nothing to do with his claim that he should receive 10% of the gross sales. Harris was employed to do a job at a flat rate as a sales person. Griffith's Find Report only substantiated his claim in that they should payments to Harris each week of set amounts and show no monies owed Harris**
Harris argues: Harris, and Lefoldt's testimony that no taxes were withheld from sales expense checks paid to Harris as an independent contractor from time agreement was entered until 2002, unlike payroll checks where Harris was paid for office work and taxes were withheld.	**Tom's reply: Whether or not taxes were withheld or not does not lend any credence to the claim of Harris. Many employees are paid on a weekly salary and pay taxes themselves.**
Harris argues: Harris' regular conducted business activity generated Payment Received ledger, i.e. Trial Exhibit "7," demonstrating payments received and applied toward account under the ten (10%) percent gross sales commission agreement from time of agreement was made until 1999 when Harris testified he began using computer generated reports of Griffith (e.g. Exhibit "1" or "2") to keep up with same until Griffith's 2002 breach.	**Tom's reply: This is Harris's ledger which is not corroborated by anyone. Harris admitted he never sent a summary or letter to Tom. Tom admitted that the did receive the invoices but advised Harris to stop sending them. Harris would have one believe that Tom owed him all of this money and he never took any action to collet the same and allowed his pay to decrease when Tom owed him increasing sums of money. This argument is not plausible.**

Harris argues: Harris' regular conducted business activity generated Accounts Receivable ledger, i.e. Trial Exhibit "6," demonstrating payments due for commissions earned as independent contractor under the ten (10%) percent gross sales agreement from time of agreement until Griffith's breach in 2002.	**Tom's reply: Again, this is Harris's ledger which is not corroborated by anyone and Harris has the burden of proof.**
Lefoldt's testimony and reports, i.e. Exhibit "9" and "10," reflecting his accounting and calculations that demonstrated Griffith owed Harris for Harris' billings for the years 2000 and after under the terms of the contract, and that Harris' billings and Griffith's payment continued after the contract was allegedly changed as testified to by Griffith, in the same manner as it did when payments were undisputedly being made under the contractual agreement.	**Tom's reply" Lefoldt as aforesaid was hired by Harris and only based his testimony on what Harris advised. Lefoldt has no personal knowledge of any contract and can not confirm or deny a contract existed which is the crux of this case. Lefoldt also admitted on cross examination that Harris was paid a consistent amount each week.**

The record is full of evidence with support the Chancellors' decision. The first of which is the fact that there is no written evidence between the parties, signed or acknowledged by both parties. Harris has the burden of proving the purported 10% agreement still existed. Tom testified that he advised his employees that the agreement was not continuing. (See Record page 139, lines 1-8). Therefore there is evidence in the record to support the Chancellor's decision. Harris continued to work for Tom and receive his checks each week. The court's decision is supported by the record.

III.

The Chancellor's Decision should be upheld according to the law.

A. BURDEN OF PROOF

The Plaintiff has the burden of proof in any case. In this specific case involving a

contract Warwick v. Matheney, 603 So.2d 330 (Miss. 1992) the Court found:

> "In any suit for a breach of contract, the plaintiff has the burden of proving by a preponderance of the evidence:
>
> 1. the existence of a valid and binding contract; and
>
> 2. that the defendant has broken, or breached it; and
>
> 3. that he has been thereby damaged momentarily."

17A C.J.S. Contracts, § 590(d), at 1148; Crawford v. Ellzey, 57 So.2d 502 (Miss. 1952); G. Salvaggio & Co., Inc. v. Delta Heights, Inc., 277 So.2d 754 (La. App. 1973); Beefy Trail, Inc. v. Beefy King Int'l, Inc., 267 So.2d 853 (Fla.App. 1972); Brown v. Five Points Parking Center, 121 Ga. App. 819, 175 S.E.2d 901 (Ga. App. 1970); Western Tank & Steel Corp. v. Gandy, 385 S.W.2d 406 (Tex.Civ.App. 1964); *Wyatt v. O'Neal*, 236 Ark. 798, 370 S.W.2d 129 (1963).

In the case of Atlas Roll-lite Door Corp. V. Ener, 741 So.2d 343 (Miss.App. 1999), Preponderance of the evidence means

> "Evidence which is of a greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not."

Harris had the burden of proving that a contract existed. He testified. We have only his testimony to prove the contract existed. (Note Harris subpoenaed several people to testify in this action, including Beth Lee, Andy Rushing and Harry Griffith, yet he called only himself and his expert witness to testify.) Harris said there was an agreement. Tom said this verbal agreement was changed in 1997, or thereabout, to a weekly fixed salary amount. Harris continued to work after the agreement was altered. There was not an agreement/contract. Harris

has the burden of proof. This case should be dismissed as Harris did not meet his burden of proof.

B. STATUTE OF FRAUDS

Mississippi Code of 1972 Section 15-3-1 provides that certain contracts are to be in writing. Specifically the code section provides:

"An action shall not be brought whereby to charge a defendant or other party:

(a) upon any special promise to answer for the debt or default or miscarriage of another person;

(b) upon any agreement made upon consideration of marriage, mutual promises to marry excepted;

(c) upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year;

(d) upon any agreement which is not to be performed within the space of fifteen months from the making thereof; or

(e) upon any special promise by an executor or administrator to answer any debt or damage out of his own estate;

unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof,

shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her hereunto lawfully authorized in writing."

This case involves a verbal contract, not a written contract, which could not be performed within fifteen months. The law is clear when it says "No suit." This is a suit to enforce a contract barred by the statute of frauds. The suit should be dismissed on the grounds that it violates the statute of frauds.

The reason for the statute of frauds is to avoid cases just like this where parties have been operating under an agreement for some time, both parties appear satisfied, and then, suddenly, something happens and one party is not satisfied and files suit. The law is clear that this suit is not permissible.

C. COURSE OF DEALING

Mississippi Code Section § 75-2-202.provides as follows:

"Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) by course of dealing or usage of trade (Section 1-205) [§ 75-1-205] or by course of performance (Section 2-208) [§ 75-2-208]; and

(b) by evidence of consistent additional terms unless the

court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."

Our courts have recognized that you can look at the course of dealing between parties to explain or supplement their oral agreement.

The case of *Stevenson-Wisehunt Corp. v. Holeman*, 341 So.2d 657 (Miss. 1977), is similar to the case at hand because Stevenson-Whisenhunt Corporation appeals from a decree of the Chancery Court of Leflore County which dismissed its bill of complaint seeking an accounting from Ray Holeman and Staple Cotton Cooperative Association for cotton grown on land owned by Stevenson and leased to Holeman for the crop year 1973. The Supreme Court upheld the dismissal.

The facts were as follows, to wit: "From 1969 through 1973, Ray Holeman leased from Stevenson-Whisenhunt Corporation a portion of certain farm lands known as Cypress Lake Plantation on which cotton and other products were produced. A written contract was executed each year which contained almost identical provisions, including the following: "As a rental therefore second party agrees to pay the first party one-fourth (1/4) of cotton."

In each of the years 1969 through 1973, Holeman as lessee of appellant's land executed a marketing agreement with Staple Cotton Cooperative Association whereby he agreed to market all cotton produced by him on Stevenson's land through Staple. In each contract for the years 1971, 1972 and 1973, Staple was specifically instructed to remit the proceeds as follows:

"Twenty-five percent (25%) proceeds to Stevenson-Whisenhunt Corporation pay direct for credit account and FNB Blytheville, Arkansas." The remaining 75 percent of the

proceeds were paid to producer Holeman.

Each year Holeman would forward contract the cotton. In the year 1973 Holeman again confirmed that he wanted the forward contracting and was advised by Whisenhunt to do so. However, the price of cotton rose dramatically in 1973. In 1973 after Mr. Holeman had sold the cotton by forward contract he was advised that due to the price escalation that there was an objection to the contract.

The cotton was delivered as per the contract however Stevenson-Whisenhunt did not negotiate the check as it had done in the previous years, but filed an action in the Chancery Court of Leflore County claiming a landlord's lien on all the cotton grown and produced by Holeman.

The court after hearing the testimony found "... As to this question it is my opinion that there has been such a course of dealing as to estop the complainant landlord from objecting to the forward contract. The course of dealing was such as to supplement the rental contract and authorize the execution of the forward contract by the tenant. The evidence is clear that the landlord was aware of the tenant's forward contracting in 1971 and in 1972, and that the landlord did not make any protest or give any word of warning to either the tenant or to Staple Cotton with reference to those two years. There is in fact positive evidence that the landlord was advised in advance of the first contracting and agreed to it, and I believe that evidence is uncontradicted. The landlord accepted the advantages of the 1971 and 1972 forward contracts without any protest and without any questioning of the authority of the tenant or of Staple Cotton to effect those contracts. When the new rental contract for 1973 was executed the landlord was aware that the tenant might well follow his last two years practice and forward

contract the crop.

"...Stevenson-Whisenhunt expressly authorized Holeman to market and forward contract the cotton. Moreover, appellant corporation approved this procedure by acquiescence in negotiating the proceeds check for a two-year period prior to 1973 on almost identical contracts. The record clearly shows an acceptable prior course of dealing between the parties..."

In the Stevenson case the Court found that " we have a course of dealing relative to the forward contracting of the cotton, but we also have the authorization by Whisenhunt for Holeman to go ahead and do as he had been doing for the past two years."

The case of *Federal Land Bank of New Orleans v. Southern Credit Corporation*, 188 Miss. 192, 192 So. 827 (1940), held that a landlord's lien on agricultural products may be waived by a course of dealings between a landlord and tenant, if it shows consent by the landlord to the disposition and sale of the crop." See also, *Martin v. Leflore Bank & Trust Co.*, 220 Miss. 106, 70 So.2d 66 (1954).

The case of *Judd v. Delta Grocery & Cotton Co.*, 133 Miss. 866, 98 So. 243 (1923), held that where the testimony established that the landlord allowed his tenant to sell the cotton for several years and remit the rent established a course of dealing which constituted the tenant as his agent to dispose of the cotton.

As to this question there has been a course of dealing between Tom and Harris for six and one-half years. Harris would pay Tom each week; normally the same sum of money. Harris would cash his checks. There has been such a course of dealing as to estop Harris from now objecting to the oral contract. The evidence is clear that Harris was paid each week. The evidence is clear that he cashed his checks. The evidence is clear that he never wrote Tom any

documentation objecting to his salary. Harris is now estoped from objecting to the course of dealing.

D. MISSISSIPPI DOES NOT RECOGNIZE ORAL EMPLOYMENT CONTRACT

Mississippi does not recognize the existence of implied contracts of employment, and parol evidence may not be used to prove the existence of an employment contract when, in the absence of an express contract, employment would be considered at-well. Heart-South PLLC v. Boyd, 865 So.2D 1095, 1103 (¶19) (Miss. 2003). Likewise, Mississippi does not recognize that a course of dealing may create an employment contact. Id. The sole remedy for the alleged breach of an unwritten employment contract is a suit sounding in tort and governed by a one year statute of limitations, found in Mississippi Code Annotated Section 15-1-29.

E. PROOF OF DAMAGES

Should the Court not uphold the Chancellor's decision then the Court must find that Harris has not adequately proved his damages. Harris has been over paid for the work he performed for Tom Griffith.

Harris has filed this claim alleging three years of unpaid commissions. It is not clear how he arrives at the figures he claims as he is claiming monies that were supposedly accrued long before three years prior to filing. The "first in, first out" method as testified by his expert witness has no basis in law. One must file suit within three years of a debt.

If you look at Trial Exhibit 13 which shows that when Harris was hired Tom had $795,747.00 in sales from the water well business. From the years 1987 to 1993 the sales averaged $628,026.60. The sales for the years 1994-2001 for the water well business averaged $804,951.38. In these calculations the years of 1993 and 2002 are left out because Harris did not

work full years those years. There is an average increase in sales of $176,924.78 per year. Ten percent of $176,924.78 is $17,692.48. Harris was paid far in excess of $17,692.48 each year. Now, Harris sues for over $205,000.00 in addition to the monies he was already paid. Where is the equity in this argument?

CONCLUSION

The Chancellor's decision is supported by the law and evidence and should be upheld and this appeal dismissed with costs being assessed to Harris. Tom hired Harris to do sales work for him. Harris was paid for his work. Every week, for weeks on end, Harris cashed his checks. Now, Harris says "Tom you owe me more money." There is simply something grossly unfair in this argument. We have all hired persons to perform certain works for us, i.e., as simple as mowing the yard to working as secretaries. What if one of those hired persons all of a sudden after nine years said "You owe me back money." This case should be dismissed immediately.

The Chancellor's decision to dismiss the case is supported by substantial evidence in the record and must be affirmed.

The Chancellor's decision to dismiss the case is also supported by the following:

1. This case involves a contract not in writing which could not be performed within fifteen months. The law is clear when it says "No suit." This is a suit to enforce a contract barred by the statute of frauds. The appeal should be dismissed on the grounds that it violates the statute of frauds.

2. There was no writing or memorandum in any manner in this case to confirm the supposed agreement. This case was filed, and Tom immediately filed a motion to dismiss. Tom later filed an answer. Deposition were conducted in this case on January 22, 2007. After depositions, the Tom moved this Court to allow him to amend his answer to include the defense of the statute of frauds and statute of limitations.

3. Further this case should be dismissed as there is no proof of the contract.

Harris has the burden of proof by preponderance of evidence. Harris testified there was an agreement. Tom admitted the parties had an agreement but stated that the agreement changed. After the Agreement changed Harris continued to work for Tom. Each week Harris was paid by Tom. The case should be dismissed because it fails to meet the burden of proof.

4. The case should be dismissed because the course of dealing between the parties would estop Harris from now asserting he does not agree to the arrangement he and Tom had. Harris took advantage of this Agreement for years and for him now to say "Oh, I do not agree it should have been something else," should not be allowed.

If the Court does not find substantial evidence to support the Chancellor's ruling and the Court does not find that the case should be dismissed because of the statute of frauds, statute of limitations, burden of proof argument or course of dealing argument then the damages alleged by Harris have not been proven. As per trial exhibits, Harris only increased Tom's sales each year less than $200,000.00 a year. Harris was paid salaries up to $52,000.00 per year. Now, Harris sues for in excess of $200,000.00, in addition to the salaries he was paid for six and one- half years. The math does not add up.

Harris chose an equitable forum. Among the most important maxims of equity is that one which states "Equity regards substance rather than form". Harris's claims arise out of form alone. For six and one-half long years, Harris would have the Court believe he tolerated the insufferable diminishment of his rightful pay, but on the fateful date of July 11, 2002, he could not longer stand being denied his ten per cent and sued Griffith. But, there is no agreement or contract between the parties; there was no express agreement governing Harris's employment. Harris was free to work for Griffith, or to leave Griffith. But, he is not free to claim what is not

his, was not his, and cannot be his.

The appeal should be dismissed with all costs including an assessment of attorney's fees being assessed against Harris.

RESPECTFULLY SUBMITTED, this the 27th day of February, 2008.

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2007-CA-000639

WILLIAM S. HARRIS **APPELLANT**

VERSUS **CASE NO. 2007-CA-000639**

TOM GRIFFITH WATER WELL & CONDUCTOR SERVICE, INC

APPELLEE

CERTIFICATE OF SERVICE

This is to certify that I, Renee McBride Porter, on the 27th day of February, 2008, furnished a true and correct copy of the above and foregoing

BRIEF OF APPELLEE

to the Supreme Court Clerk, Post Office Box 249, Jackson, MS 39201 via hand delivery; to Honorable Judge James H.C. Thomas, Jr., Post Office Box 807, Hattiesburg, MS 39404 via mail; L. Grant Bennett, and L. Clark Hicks, Jr., Gunn & Hicks, PLLC., Post Office Box 1588, Hattiesburg, Mississippi , via mail, and to Tom Griffith, via hand delivery.

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