IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-00639-COA

WILLIAM S. HARRIS — **APPELLANT**

VERSUS

TOM GRIFFITH WATER WELL & CONDUCTOR SERVICE, INC. — **APPELLEES**

APPEAL FROM THE CHANCERY COURT OF MARION COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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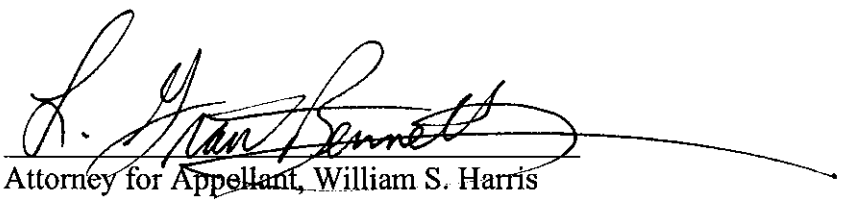
CERTIFICATE OF INTERESTED PARTIES

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 Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

William S. Harris	APPELLANT
Tom Griffith Water Well & Conductor Service, Inc.	APPELLEE
L. Grant Bennett, Esq. L. Clark Hicks, Jr., Esq. and the law firm of Gunn & Hicks, PLLC	ATTORNEYS FOR APPELLANT
Renee McBride Porter, Esq.	ATTORNEY FOR APPELLEE
Judge James H. C. Thomas, Jr.	Chancellor in Trial Court Proceedings



Attorney for Appellant, William S. Harris

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STATEMENT REGARDING ORAL ARGUMENT

Tom Griffith Water Well and Conductor Service, Inc., via its President, Tom Griffith, negotiated and entered into a verbal contract with William S. Harris that called for the water well company to pay Harris commissions of ten percent (10%) of gross sales that Harris made for the company. Harris was an independent contractor who invoiced the company for his services until the company President informed Harris that the company would not pay Harris what was owed. The amount owed, with prejudgment interest added, amounts to $190,093.00.

Suit was tried on February 15, 2007, and the substantial and overwhelming weight of the evidence in the record supports (1) the existence of a binding contract, (2) the water well company breached the contract, and (3) Harris suffered monetary damages as a result of the breach. The Chancellor entered a Judgment and findings for the water well company. The findings as contained in the Judgment are clearly erroneous, manifestly wrong and do not reflect the substantial and overwhelming weight of the evidence in the record.

Harris seeks oral argument to prevent the unjust consequences of allowing the water well company to breach its agreement with Harris and avoid paying its obligations. The Judgment contains findings that are inconsistent with established law in Mississippi. The Chancellor unilaterally inserted affirmative defenses in his Judgment, which had never been raised properly by the Appellee. The Judgment also contains erroneous and inconsistent findings of fact when compared to the substantial and overwhelming weight of the record evidence.

STANDARD OF REVIEW

The briefs of Harris and Griffith agree on the correct standard of review to be used by the appellate court on appeal. *Appellant Brief, p.17-18; Appellee Brief, p.14-15.* Both briefs recognize and cite authorities supporting the standard of review being as follows:

- Mississippi appellate courts will not disturb the findings of a Chancellor where supported by substantial evidence unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous, or if he applied an incorrect legal standard. *Church of God Pentecostal, Inc. v. Free Will Pentecostal Church of God, Inc.*, 716 So. 2d 200, 204 (¶15) (Miss. 1998); *Johnson v. Johnson*, 650 So. 2d 1281, 1285 (Miss. 1994);

- An Appellate Court can reverse the Chancellor's ruling of fact when there is not substantial, credible evidence to justify his findings;

- A Chancellor's award may be reversed on appeal if the findings of fact are found to be against the overwhelming weight of the evidence or manifestly wrong. *City of Jackson v. Delta Construction Company*, 228 So. 2d 606, 607 (Miss. 1969); *Devereaux v. Devereaux*, 493 So. 2d 1310, 1312 (Miss. 1986); and,

- For questions of law the standard of review for decision of a Chancellor is de novo and appellate courts will reverse for erroneous interpretations or applications of the law. *Pannell v. Guess*, 671 So. 2d 1310, 1313 (Miss. 1996).

When these standards of review are applied to the factual evidence and the record and the Chancellor's Judgment, it is clear the Chancellor's factual determinations were not supported by substantial evidence, and were against the overwhelming weight of the evidence. Also, such review will demonstrate the Chancellor's Judgment to be manifestly wrong and clearly erroneous since he applied an unavailable, and hence erroneous application of law.

ARGUMENT

I. THE FINDINGS IN THE JUDGMENT ENTERED BY THE CHANCELLOR ARE MANIFESTLY WRONG AND CLEARLY ERRONEOUS SINCE THEY ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

A. THE CHANCELLOR'S FINDING THAT HARRIS WAS AN EMPLOYEE WITH AN EMPLOYMENT AT WILL CONTRACT, AND NOT AN INDEPENDENT CONTRACTOR UNDER THE 10% GROSS SALES AGREEMENT, IS NOT SUPPORTED BY SUBSTANTIAL RECORD EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND THUS, MANIFESTLY WRONG AND CLEARLY ERRONEOUS.

Griffith failed to rebut the substantial record evidence set forth in Appellant's original Brief demonstrating the trial court was manifestly wrong and clearly erroneous when it found there existed an employer/employee type relationship between Harris and Griffith, instead of finding that Harris was working as an independent contractor on sales that he made for Griffith. Griffith's failure to cite anything, or anywhere in the Record to show that the weight of the evidence supported the Chancellor in finding an employer/employee type relationship speaks volumes. Harris' original Appellant Brief, discusses in specific detail and gives citations to the Record demonstrating the substantial and great weight of the evidence establishes Harris' existence under the agreement as an independent contractor. The Record shows this fact was admitted by Griffith in discovery and at trial. *R. Vol. I., pp. 141-142 Griffith's Responses to Interrogatory No. 2 and No. 6; R. Vol. I, p. 146 and Vol. II, p. 152, lines 14-22; T., p.163, lines 1-8.* Griffith's admission is supported by *Trial Exhibits "1" and "2"* reflecting no payroll taxes, social security, medicare or other withholdings were withheld from payments made to Harris under the ten percent (10%) gross sales agreement. Harris and Ken Lefoldt's testimony also evidence the independent contractor status of Harris. *T., p.14, lines 18-24; p. 57-58, p. 86, lines*

12-28. Griffith cited no record evidence to the contrary because none exists. Since Griffith asserts no rebuttal citation to any facts in the record contrary to those clearly and substantively addressing the issue set forth by Harris, but instead, Griffith only makes a cursory argument with no meaningful support, such that the Appellate Court may consider Griffith's failure to do so a waiver of this issue. *Doss v. State*, 956 So. 2d 1100, 1102 (¶7) (Miss. App. 2007).

Griffith's argument that it is of no importance whether or not there was found to exist an employer/employee relationship between Griffith and Harris, or whether or not Harris was deemed to be an independent contractor for sales he made is disingenuous and is an attempt to sway this Court away from the importance of this being an erroneous determination of the Chancellor that is not supported by the weight of the evidence. Griffith admitted on more than one occasion the fact that Harris worked as an independent contractor for sales he made for Griffith. Contrary to Griffith's argument that it does not matter whether or not the relationship that Harris had with Griffith was as an employee or an independent contractor, is the fact that this very relationship had to be determined in order for the court to reach a conclusion whether or not the contract existed since differences exist as to whether verbal agreements are enforceable under an employer/employee relationship versus an independent contractor status. Following this argument by Griffith, he turns around later in Appellee's Brief and attempts to argue that when Harris made sales for Griffith it was under an employer/employee type relationship. *Appellee's Brief, §D, p.33.* Stated differently, while Griffith argues that an employee status existed as to Harris and asserts arguments and defenses such as *Miss. Code Ann. §15-1-29 on p.33* of his Brief, Griffith argues on page 17 of his Brief that whether Harris was deemed an employee or an independent contractor is of no importance. This argument is circuitous and reflects Griffith's

attempt to confuse the issue in hopes the Appellate Court will ignore the substantial and overwhelming weight of the evidence in favor of Harris on this issue and the erroneous determination of the Chancellor finding that Harris was an employee. The Record evidence is clear the independent contractor status of Harris given the numerous Record citations previously cited by Harris, which are left unrebutted by Griffith. Accordingly, by Griffith's own admission and the other substantial record evidence and weight of the evidence, Harris was an independent contractor under the ten percent (10%) gross sales agreement. The Chancellor finding differently in the Judgment he entered was manifestly wrong and clearly erroneous. *R. Vol. IV, pp. 459-462 and/or Appellant Record Excerpt "2," pp.2-4.*

B. THE CHANCELLOR'S FINDING THAT GRIFFITH CHANGED THE BASIS OF PAYMENT TO HARRIS IS CLEARLY ERRONEOUS, MANIFESTLY WRONG, NOT SUPPORTED BY THE SUBSTANTIAL EVIDENCE AND AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Again, Griffith's argument is disingenuous in the face of what the Record evidence demonstrates. Griffith argues Harris was being paid as an "employee at will and drawing a salary" and referenced certain amounts of payment were made during certain periods between 1999 and 2001. *Appellee's Brief, p.18.* Interestingly, Appellee resorts to trying to persuade this Court that an employee at will relationship existed when, just prior, in its argument in the section before, Griffith argued it was of no importance whether Harris' status was as an employee or independent contractor. Griffith continues to double-speak and the Appellate Court should take notice.

The substantial and overwhelming weight of the evidence shows the basis of payment was not changed, and reflects the Chancellor's decision was clearly erroneous and manifestly wrong when he found that Griffith changed the basis of payment to Harris. *R. Vol. IV, pp. 460-462*

and/or Appellant Record Excerpt "2," pp.2-4. A review of *Trial Exhibits "2" and "7"* reflect, as previously discussed in detail in Appellant's original Brief, that numerous fluctuations in payment existed from Griffith to Harris from 1995 through 2002. These fluctuations do not support set salary as Griffith argues. Rather, the substantial and overwhelming weight of the evidence of record by way of these exhibits, along with the testimony of Harris, Lefoldt, Griffith and Lee, clearly demonstrate payment of two (2) checks: one for administrative work Harris performed for Griffith that had taxes withheld since he was working as an employee in a clerk capacity; and another check for which Harris was given W-2s and no tax withholdings were withheld for which Harris was working as an independent contractor as admitted by Griffith under the ten percent (10%) gross sales commission agreement.

The Chancellor's finding that "plaintiff is seeking commissions only from the 1999 to 2001 period long after [emphasis added] Griffith had changed the arrangement and basis of payment for plaintiff's services" is clearly erroneous and manifestly wrong on its face when compared to the Chancellor's prior finding that the commission arrangement under the agreement "as reflected by Griffith's payment method, [...] changed to a weekly salary, as based on Griffith's payment method between 1999 and 2002." *R., Vol. IV, pp. 461-462 and/or Appellant Record Excerpt "2," pp. 3-4.* The Court contradicts itself by finding the agreement changed before 1999, but later finding the agreement changed sometime between 1999 and 2002. Moreover, the Chancellor's finding that sometime prior to 1999 Griffith changed Harris' employment status and begin paying him $1,000.00 each week" is not supported by the substantial evidence of record, nor for that matter, any of the evidence in the record. *R., Vol. IV, pp. 460 and/or Appellant Record Excerpt "2" p. 2; Trial Exhibit "2" and "7."* [Payments fluctuate no less than 29 times

and does not support a set salary.] A detailed analysis of the clearly erroneous findings of the Chancellor and the existence of the weight of the evidence being in favor of Harris is set forth in details in Harris' original Appellant Brief on this issue.

II. THE CHANCELLOR'S FINDINGS ARE MANIFESTLY WRONG AND CLEARLY ERRONEOUS WHEN HE WRONGLY APPLIED STATUTE OF LIMITATIONS AND LACHES AS A BASIS OF THE JUDGMENT.

A. GRIFFITH WAIVED AFFIRMATIVE DEFENSES OF STATUTE OF LIMITATIONS AND LACHES WHEN HE FAILED TO ASSERT THEM IN HIS ANSWER.

M.R.C.P. 12 does not provide that "leave to amend shall be granted when justice so requires" as argued by Griffith. *Appellee's Brief, p.19.* Instead, *M.R.C.P. 12(b)* limits when leave to amend should be granted pursuant to *M.R.C.P. 15(a). See, M.R.C.P. 12 and 15(a).* Griffith's argument on pages 19 and 20 of his Brief is without merit because Griffith did not properly seek leave to amend under *M.R.C.P. 15(a).* A review of the Record demonstrates Griffith never moved to amend the pleadings specifically requesting that Statute of Limitations or Laches defenses be allowed contrary to Griffith's claim in his Brief that such was done. *R. Vol. I, List of Clerks Papers (pages unnumbered); R. Vol. I., pp. 1-5.* Griffith cannot demonstrate that he properly requested leave of court to specifically include affirmative defenses of Statute of Limitation or Laches in an Amended Answer, nor did Griffith obtain written consent of Harris to do so. Accordingly Griffith failed to satisfy requirements of *M.R.C.P. 15(a)* to allow for an amendment to include specific defenses of Laches and Statutes of Limitation.

Moreover, the issue of Statutes of Limitation and Laches was not tried by expressed or implied consent of Harris as attempted to be argued by Griffith on page 20 of its Brief. The record fully discloses Harris adamantly opposed any defense of Statutes of Limitation or Laches

being argued by Griffith. While Griffith did assert for the first time Statutes of Limitations and Laches in his Motion for Summary Judgment filed just days before trial and outside of the time provisions required by *M.R.C.P. 56(c)*, without first seeking leave to amend to allow for these defenses, nor having ever received any order from the court allowing amendment therefor, Harris always objected and sought to have excluded Griffiths' improper, and untimely argument of application of Statute of Limitations and Laches defenses. Harris filed multiple pleadings prior to trial preserving for the Record his opposition to Laches or Statute of Limitations being argued by Griffith. *R., Vol. I, p. 94-97; 98-99; 100-120; 121-Vol. II at p. 229; Vol. II, p. 230-240.* Griffith's argument that the issues of Statutes of Limitations and Laches were tried by the Court with no objection made by Harris is simply incorrect in light of the numerous objections cited above.

It should also be noted that *M.R.C.P. 8(c)* required that Griffith set forth affirmatively Laches and Statutes of Limitations, as well as any other matter constituting an avoidance or affirmative defense when filing its answer. Barr, Whitefoot, Johns-Manville, and *M.R.C.P. 8(c)* all support the fact that affirmative defenses of Statutes of Limitations and Laches must be raised in an Answer or they will be deemed waived. *Davis v. Barr*, 157 So. 2d 505, 510 (Miss. 1963); *Whitefoot v. BancorpSouth*, 856 So. 2d 639, 645 (¶33) (Miss. App. 2003); *Johns-Manville v. Mitchell Enterprises, Inc.*, 417 F. 2d 129, 131 (5th Cir. 1969) [applying Mississippi law]; *M.R.C.P. 8(c)*.

Likewise, several recent decisions of the Mississippi Appellate Courts have buttressed the fact that affirmative defenses are waived if not pursued timely after participation in the litigation process by the Defendant; the exact situation that existed with Griffith in the instant action. Here, Griffith participated, though reluctantly at times, and after numerous Motions to Compel had to be

filed against it, in the litigation process from the time suit was filed until the trial of this matter. Griffith never asserted affirmative defenses until, for the first time inserting in an untimely filed Motion for Summary Judgment, Statutes of Limitations and Laches defenses for which no leave to amend had ever been received prior to their assertion, nor any leave to amend having ever been granted thereafter. As stated, recent cases have strengthened prior precedent that affirmative defenses are waived when there has been participation in the discovery and pre-trial litigation process for a time period similar to the instant case, and provide additional authority for the fact that Griffith waived any right to assert affirmative defenses of Statute of Limitation or Laches. *See, Burleson v. Lathem*, 968 So. 2d 930, 933 (¶10) (Miss. 2007); *Young v. Huron Smith Oil Company, Inc.*, 564 So. 2d 36, 38-39 (Miss. 1990); *Mississippi Credit Center, Inc. v. Horton*, 926 So. 2d 167, 180-181 (¶44) (Miss. 2006); *East Mississippi State Hospital v. Adams*, 947 So. 2d 887, 891 (¶10-12) (Miss. 2007). For the Chancellor to rely upon such affirmative defenses as a basis of the judgment is clearly erroneous and manifestly wrong. *R. Vol. IV, p. 461 and/or Appellant Record Excerpt "2," p. 3.*

Griffith failed to assert affirmative defenses of Statute of Limitations or Laches as required under established Mississippi case law and related Mississippi Rules of Civil Procedure. Griffith's failure to do so, effectively waived these affirmative defenses. The Chancellor's decision to rely upon Statute of Limitations and Laches in his judgment finding for Griffith is clearly erroneous and manifestly wrong given the waiver of these affirmative defenses by Griffith. Moreover, given Griffith's waiver, the Chancellor applied incorrect legal standards of the affirmative defenses of Statutes of Limitations and Laches to support his judgment. *R. Vol. IV, pp. 461-462 and/or Appellant Record Excerpt, "2," pp. 3-4.* This Court should reverse the

Chancellor's clearly erroneous decision to use Statute of Limitations and Laches as a basis of the findings in the Judgment. For the Appellate Court not to do so would result in parties proceeding to litigation believing that certain defenses had been waived by the opposing party given the current precedent of Mississippi law and Mississippi Rules of Civil Procedure, only to be surprised and have these waived defenses used against them by the trial court. This result would be a harsh and expensive one, and does not accord with equity, common sense, or the law.

B. GRIFFITH WAIVED PREVIOUSLY NON-PLED AFFIRMATIVE DEFENSES OF STATUTE OF LIMITATIONS AND LACHES WHEN HE FAILED TO TIMELY ASSERT THEM.

1. EXCESSIVE DELAY CONSTITUTES WAIVER.

2. GRIFFITH'S SUMMARY JUDGMENT MOTION FILED AND NOTICED FOR HEARING OUT OF TIME CONSTITUTES WAVIER OF AFFIRMATIVE DEFENSES RAISED THEREIN.

All Griffith can do is cite *Rankin v. Clements Cadillac, Inc.*, 905 So. 2d 710 (Miss. App. 2004) in response to these issues. It should be noted that the *Rankin* case cited by Griffith has been overruled. However, the more recent decision of *Ashburn* clearly demonstrates precedent that is on point to the circumstances that exist in this case. *Ashburn v. Ashburn*, 970 So. 2d 204 (Miss. App. 2007). Though the subject of litigation was different, in *Ashburn*, the Court of Appeals reviewed a situation closely resembling the one that existed in the instant case. While engaged in a divorce proceeding, Mrs. Ashburn, just prior to trial and without giving the required notice of such motion, asserted the affirmative defense of condonation. The Chancellor originally overruled the Motion to Dismiss, but held it under advisement. Following a trial, the Chancellor dismissed Mrs. Ashburn's Complaint for divorce then relying upon the untimely condonation affirmative defense that she had previously asserted just before trial. *Ashburn* at p.210-211.

Similarly, here Griffith filed an untimely Motion for Summary Judgment just before trial and attempted to notice it for hearing whereupon Harris filed a Motion to Strike Defendants' Notice of Motion for Summary Judgment. *R. Vol. I, p.94-97.* Contained within Griffith's Motion for Summary Judgment was for the first time, assertions of Statutes of Limitation and Laches affirmative defenses. No leave to amend had previously properly been sought, pursuant to *M.R.C.P. 15*, nor was any leave to amend ever granted by the Court for these affirmative defenses to be included in any type of amended pleading. After trial was held, the Court relied upon affirmative defenses of Statutes of Limitation and Laches as part of his holding finding for Griffith. *R. Vol. IV, pp. 461-462 and/or Appellant Record Excerpts "2," pp. 3-4.*

In *Ashburn*, the Court of Appeals specifically addressed the question of whether or not the Chancellor erred in dismissing Mr. Ashburn's complaint for divorce based on the affirmative defense of condemnation when Ms. Ashburn did not timely plead that defense. *Ashburn* at 212. The Court of Appeals cited *M.R.C.P. 8(c)* that requires when affirmative defenses must be asserted, and also cited Mississippi Supreme Court precedent that "affirmative defenses that are neither pled nor tried by consent are deemed waived." *Ashburn at 212(¶23)* citing *Goode v. Village of Woodgreen Homeowners Assn.*, 662 So.2d 1064, 1077 (Miss. 1995). The Court of Appeals also discussed *Mississippi Rule of Civil Procedure 15(a)* and its language instructing courts to be liberal in allowing amendments to the pleadings. *Ashburn* at ¶ 25. Commenting on this provision, the Court of Appeals indicated that in a situation that existed in *Ashburn*, like here, where the party asserting the affirmative defense was aware prior to the trial of facts giving rise to the alleged affirmative defense but did not follow through with seeking to timely amend the answer, then the right to rely upon the affirmative defense was waived even in light of such liberal

amendment policy. *Id.* The Court of Appeals also addressed the argument that has been raised by Griffith in his brief that the affirmative defenses of statutes of limitation and laches were tried by implied consent of the parties. *Ashburn* at ¶ 26 and ¶28. The Court went on to find in the *Ashburn* decision that Mr. Ashburn would have been somewhat prejudiced by the Chancellor entertaining the condemnation affirmative defense that had been raised just before trial had commenced. *Id.* at ¶27 and ¶28. The same is true in the instant case. Griffith never received any ruling on any type of motion of Record to amend his pleadings to include statute of limitations and laches defenses. *See, Entire Record and Trial Transcript.* Harris had every reason to believe that the statute of limitations and laches defenses had been waived given that no leave to amend had ever been granted to Griffith to allow consideration of these affirmative defenses and the fact that Harris had specifically objected to inclusion of these non-pled affirmative defenses. As found by the Court of Appeals in *Ashburn*, the Chancellor erred when he denied Mr. Ashburn's complaint for divorce based on the affirmative defense of condemnation when such defense was not timely or properly plead by Mrs. Ashburn. *Id.* at ¶23 and fn.11 at p.214. The same ruling applies in the instant case due to the Chancellor's clearly erroneous and manifestly wrong decision to rely on statutes of limitation and laches in his decision finding in favor of Griffith.

C. FORMER ADJUDICATION OVERRULING MOTION FOR SUMMARY JUDGMENT ESTABLISHED LAW OF THE CASE THAT STATUTE OF LIMITATIONS AND LACHES DID NOT APPLY.

Griffith's argument that *Simpson* does not apply is without merit. See, *Simpson v. State Farm Fire and Casualty Co.*, 564 So.2d 1374, 1376 (Miss. 1990). [abrogated on other grounds]. Griffith argues the doctrine of the law of the case does not apply unless the case has been tried, appealed and then re-tried, as was the case in *Simpson. Appellee's Brief, pp. 22-23.* Such

procedural posture is not a requirement for the law of the case doctrine to apply. As stated in *Simpson*, "the law of the case doctrine as recognized by this Court, is as follows:

> The doctrine of the law of the case is similar to that of former adjudication, relates entirely to questions of law, and is confined in its operation to subsequent proceedings in the case. Whatever is once established as the controlling legal rule of decision, between the same parties and the same case, continues to be the law of the case, so long as there is similarity of fact. This principal expresses the practices of courts generally to refuse to reopen what has previously been decided. It is founded on public policy and the interest of orderly and consistent judicial procedure. *Id.* at 1376.

In this case, the Chancellor overruled Griffith's motion for summary judgment when it had before it all information necessary to make a decision on whether laches or statutes of limitations would apply. *T., p.9, lines 5-10.* In doing so, the Court overruled the plaintiff's motion for summary judgment which had asserted previously non-pled claims of statutes of limitation and laches. Either the Court, by overruling the summary judgment motion, found that the statutes of limitations and laches defenses did not apply, or the Court determined the defenses were not properly before the Court for consideration since no amended pleading including them had been allowed. With either finding, the law of the case was established. By overruling Griffith's motion for summary judgment, the Chancellor established the law of the case that statute of limitations and laches would not apply. Given the definition that the Mississippi Supreme Court set forth in *Simpson* regarding the law of the case doctrine, public policy and the interest of orderly and consistent judicial procedure dictate that the Chancellor should not be allowed to revive statute of limitations and laches defenses and assert same as a basis in his judgment finding in favor of Griffith when he had previously overruled the motion for summary judgment and established the law of the case these <u>legal</u>, not factual, defenses did not apply.

III. THE CHANCELLOR'S FINDING IN THE JUDGMENT THAT THERE WAS NOT AN ENFORCEABLE CONTRACT BETWEEN GRIFFITH AND HARRIS IS CLEARLY ERRONEOUS, MANIFESTLY WRONG, NOT SUPPORTED BY THE SUBSTANTIAL EVIDENCE AND IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

It is apparent by Griffith's response to this section as contained on Pages 23 through 26 of Griffith's brief that the substantial evidence and overwhelming weight of the evidence is supportive of there existing an enforceable contract and that Harris is entitled to judgment in his favor in this matter. Let's compare the charts set forth in both Harris' and Griffith's Briefs. A review of the chart as set forth in Harris' brief on Pages 30 through 32, clearly demonstrates:

(1) **Harris testified** as to the existence of the contract;

(2) **Sixty-nine invoices from Harris to Griffith** confirm the existence of the 10% gross sales commission agreement for the time period of 1994 through near the time that Harris was told by Griffith that Griffith was not going to pay him what was owed in 2002;

(3) The **expert testimony of CPA, Ken Lefoldt**, demonstrated his review of the financial documents and deposition testimony of Griffith and Harris supported the existence of the 10% gross sales commission contract and that Harris was due money under the terms of that contract;

(4) **Griffith paid Harris fluctuating amounts** from the time the verbal contractual agreement was made until Griffith's breach, all as supported by **Trial Exhibits "1," "2," and "7;"**

(5) Griffith's own **bookkeeper, Bethany Lee, testified that separate checks** were paid to Harris since 1994 until the time that Harris left in 2002;

(6) **Griffith's own financial documents** as demonstrated by **Exhibit "1" and "2"** that reflect independent contractor status of Harris showing **no taxes were withheld** from payments made to Harris under the 10% gross sales agreement, but instead were coded to "sales expense;"

(7) **Harris and Lefoldt, the expert CPA's testimony that no taxes were withheld from sales expense checks** paid to Harris as an independent contractor, unlike payroll checks that were paid to Harris for the minimal office work that he did as

an employee;

(8) **Harris' payments received ledger, Trial Exhibit "7"** demonstrating payments received and applied toward account under the 10% gross sales commission agreement from the time the agreement was made until Harris began using **Griffith's own computer-generated reports** to keep track of same;

(9) **Harris' accounts receivable ledger, i.e, Trial Exhibit "6,"** demonstrating payments that were due from Griffith for commissions earned as an independent contractor under the 10% gross sales agreement from the time of the agreement until the agreement was breached in 2002; and

(10) **The expert testimony of CPA Ken Lefoldt and his review of Trial Exhibits "9," "10," "2," and "7"** reflecting his accounting and calculations that demonstrated Griffith owed Harris for Harris' billings for the years 2000 and after under the terms of the 10% gross sales contract and the fact that **Griffith's payment to Harris continued in the same fashion by being paid in varying amounts following the time period when Griffith testified that the contract was allegedly changed.**

All of the above evidence not only demonstrates that the substantial evidence and overwhelming weight of the evidence weighs heavily in favor of Harris, it also demonstrates that the evidence supporting that the contract existed and that amounts were due and owing to Harris are corroborated not by testimony of Harris himself, but by: (1) testimony of Griffith's bookkeeper, Bethany Lee, (2) the independent CPA, Ken Lefoldt, that was hired to review the relevant financial documents, pleadings and depositions between the parties, (3) the voluminous financial reports that reflect that payments were made consistent with testimony as provided by Harris, Lefoldt and Lee.

Contrast the substantial and overwhelming weight of the evidence, with the chart Griffith sets forth on its behalf at pages 23-26 of Appellee's Brief. When you compare the charts at pages 30-32 of Harris' Appellant Brief to that of pages 23-26 of Appellee's Brief, you can easily see that Griffith relies solely on his own testimony, which is not corroborated by any other evidence. The

substantial evidence, the diversity of the evidence and corroborative nature of the different types of evidence weigh overwhelmingly in favor of Harris, not Griffith. Accordingly, this Court should reverse and render the Chancellor's decision and award Harris damages of $190,093.00, plus post-judgment interest, due to the Chancellor's clearly erroneous and manifestly wrong decision in light of the substantial and overwhelming weight of the evidence in favor of Harris.

HARRIS' RESPONSE TO GRIFFITH'S NEW ASSERTIONS ON APPEAL

IV. THE CHANCELLOR'S DECISION SHOULD BE REVERSED ACCORDING TO THE LAW.

A. BURDEN OF PROOF

It is undisputed by Harris that he has the burden of proof of proving breach of contract in order for him to recover any damages. Harris proved the existence of a valid and binding contract. *T., p.5, lines 17-20; p.13, lines 5-29; p. 14, lines 1-24; p.99, lines 21-26; p.117; R. Vol. I., p.146; R. Vol. II, p.155, lines 19-25, p.156, lines 1-18.* The exhibits that were introduced at trial support the fact of a continuous valid and binding contract given the forever fluctuating payments made by Griffith to Harris, the accounts receivable and payments received ledgers of Harris, continuous invoices submitted to Griffith by Harris, Griffith's own financial records and Lefoldt's review of the financial records and opinion. *See Trial Exhibits "1," "2," "3," "5," "6," "7," "9," and "10;" T., p.15, lines 4-29; p.16, lines 1-16; p. 51, lines 22-29; p.52, lines 14-28; p.56, lines 1-4; p.138, lines 23-29; p. 146, lines 21-25; R. Vol. II, p.157, lines 1-11.* Harris also proved that Griffith breached the agreement. *Trial Exhibit s "1," "2," "5," "6," "9," and "10." T., p.29-30; p.128, lines 5-16; p.129, lines 3-12; p. 150, lines 9-27 and p.158, lines 8-13.* Harris proved that he had been damaged as a result of Griffith's breach of the ten percent (10%) gross sales commission contact. *Lefoldt testimony, pp. 73-83, pp.89-92; p.100, lines 5-11;* Griffith's own

testimony, *T., p. 148-150; Trial Exhibit "9," and "10."* Harris clearly pointed out in his original Appellant Brief, as well as this Reply Brief, that the substantial evidence and overwhelming weight of the evidence, as well as the corroborative nature and the diversity of evidence all weighs in favor of Harris. The only evidence rebutting the fact that a contract existed, that the contract was breached, and that damages were caused, is the lone testimony of Griffith. Importantly, the testimony that the Chancellor relied upon from Griffith that the agreement changed at some point in time, was testimony by Griffith that he admitted he did not even know when he may have indicated such. *T., p.122, lines 2-16.* Also, Griffith's testimony conflicts on other important issues and clearly were not credible. *See, Griffith's testimony at T., p.129, lines 3-12, when contrasted to p.151, lines 3-25, p.153, lines 5-21.* This contradicting and lone testimony of Griffith does not demonstrate what the substantial evidence of record and overwhelming weight of the evidence demonstrates as discussed above in favor of Harris, especially in light of the fact that Harris testified he was never informed by Griffith that the ten percent (10%) gross sales commission contract would be terminated until May 2002. *T., p.29, lines 26-29; p.30, lines 1-5; p.42, lines 19-26.*

B. STATUTE OF FRAUDS DOES NOT APPLY.

Griffith raised Statute of Frauds in its Appellee Brief in an attempt to have this Court affirm the Chancellor's decision. *Appellee's Brief, p. 28.* For the same reasons that Harris has set forth as it relates to Griffith failing to timely and properly plead affirmative defenses of Statute of Limitations and Laches affirmative defenses discussed hereinabove and in Appellant's original Brief in detail, the same arguments apply to Griffith's Statute of Frauds defense. Griffith did not plead Statute of Frauds as required by *M.R.C.P. 8(c).* Statute of Frauds is an affirmative defense

and was not timely pled, nor was any permission received from the Court to allow amendment of pleadings to assert the Statute of Frauds defense. The recent trend in case law which has been cited *supra* in *§ II and its subparts* as well as in Appellant's original Brief, supports the fact that Griffith cannot raise Statute of Frauds as an affirmative defense just before trial without prejudicing Harris. Also, the recent trend in case law previously cited from the Mississippi Appellate Courts in *§ II and its subparts in Appellant's Briefs*, is that affirmative defenses that are not timely pursued when a party participates in the pre-litigations process such as Griffith, are deemed to be waived.

Finally, it should be noted that although the Statute of Frauds affirmative defense is not an applicable defense that can be used for decision on the merits of this case due to Plaintiff's failure in asserting it and given the fact that Harris never consented to Statute of Frauds being tried, the Statute of Frauds defense would fail anyway. In the instant case, Harris sought to recover only those amount of damages to which he was entitled within a three (3) year Statute of Limitations prior to when suit was filed. *Trial Exhibit "9," and "10;" T., p.36, lines 19-29, p.37, lines 1-16, pp. 73-105.* The record evidence clearly disclosed that at least 69 invoices were submitted by Harris to Griffith throughout the period that he was entitled to ten percent (10%) gross commissions on sales. *See Trial Exhibit "5."* These invoices were submitted more often than every 15 months and payment was made toward the submitted invoices by Griffith in varying amounts. Griffith's endorsed checks clearly were enough to satisfy the Statute of Frauds in combination with the submitted invoices for the time period for which damages were sought. Proof of partial payments from Griffith to Harris on account toward the total amount of invoices submitted, exist on Griffith's own records. *Trial Exhibit "1" and "2."* For the aforementioned

reasons, the untimely and non-pled claim affirmative defense of Statute of Frauds fails.

C. COURSE OF DEALING DOES NOT APPLY.

Griffith asserts on appeal, that course of dealing should be allowed as a basis for affirming the Chancellor's judgment in favor of Griffith. Again, Harris incorporates herein, and relies upon the previous arguments that have been asserted in his original Appellant's Brief and the arguments heretofore in his Reply Brief. *See, §II., Appellant's Brief and Reply Brief and their subparts.* For the same reasons that Harris has set forth as it relates to Griffith failing to timely and properly plead affirmative defenses of Statute of Limitations and Laches affirmative defenses, the same argument applies to Griffith's Course of Dealing argument. *Id.* Griffith did not plead Course of Dealing as required by *M.R.C.P. 8(c).*

Additionally, the cases cited by Griffith are inapplicable and therefore distinguishable from the present case. Contrary to Griffith's discussion on pages 30-32 of his Brief, the *Holeman*, *Southern Credit Corp.*, *Martin*, and *Judd* cases cited by Griffith do not support his erroneous contention that Mississippi courts have recognized course of dealing can be looked at to explain or supplement verbal contractual agreements. *Holeman*, involved a written lease contract, written forward contract, and written marketing agreement. The dispute arose regarding the 1973 forward contract and the main issue involved was whether "the course of dealing was such to supplement the written rental contract and authorize the execution of the forward contract by the tenant." *Stevenson-Wisehunt Corp. v. Holeman*, 341 So. 2d 657, 659 (Miss. 1977). The Court found course of dealing to apply with regard to the written contracts, not the issue involved in the present case and thus, *Holeman* is inapplicable to support a course of dealing argument offered by Griffith.

Southern Credit Corp., involved whether course of dealing and acquiescence applied to the terms of a written lease contract between a landlord and tenant, and also involved a written waiver of lien between the bank and a finance company financing the tenant to be able to plant crops. There, the Court found that course of dealing applied in reference to the written lease contract terms and that the tenant was recognized as an agent seller of cotton for the bank which was inconsistent with the written terms of the lease. *Federal Land Bank of New Orleans v. Southern Credit Corp.*, 192 So. 827, 828-829 (Miss. 1940). This case too, is inapplicable to the instant verbal contractual agreement case. The *Judd* and *Martin* cases also involve written contracts to which the course of dealing analysis was applied and are therefore, likewise distinguishable from the present case. *Martin v. LeFleur Bank and Trust Company*, 70 So. 2d 66 (1954), and *Judd v. Delta Grocery and Cotton Company*, 98 So. 243 (1923).

Regardless of the inapplicability of course of dealing as asserted by Griffith, the course of dealing of the parties in this case establish an ongoing independent contractor relationship whereby Harris made numerous sales on behalf of Griffith's business through 2002. When Griffith decided that it either did not want to pay Harris, or could not afford to pay Harris, or both, Griffith terminated the agreement in 2002 and wrongfully withheld substantial payments due and owing to Harris.

D. GRIFFITH'S ARGUMENT THAT MISSISSIPPI DOES NOT RECOGNIZE ORAL EMPLOYMENT CONTRACT IS A MOOT ISSUE.

In light of the facts and argument that have been presented in Harris' original Appellant's Brief and heretofore in this Reply Brief that Griffith admitted that Harris was working under the ten percent (10%) gross sales commission as an independent contractor, as well as all of the

citations to the Record that have been presented to the Court heretofore by Harris, Griffith's argument that Mississippi does not recognize oral employment contracts is moot, or alternatively, has appropriately already been addressed. As previously discussed, the Chancellor found that Harris was acting as an employee, not an independent contractor in its judgment in favor of Griffith. The substantial record evidence and overwhelming weight of the evidence, including Griffith's own admission, was that Harris acted as an independent contractor under the ten percent (10%) gross sales commission agreement. While the Court found Harris to be operating as an employee, tantamount is the fact that the record supports an admission by Griffith of the independent contractor nature of the work Harris was performing pursuant to the ten percent (10%) gross sales agreement.

For arguments sake, even if Harris could be deemed to have been an employee, which is not demonstrated given the substantial evidence of the record and admission of Griffith, Griffith is precluded from raising this defense as it has been waived for the same reasons as previously discussed for Griffith's untimely and improperly raised affirmative defenses of Statutes of Limitations, Laches, Statute of Frauds and Course of Dealing, as discussed. *See, Supra at §II and its subparts.*

Finally, this case has nothing to do with an employment contract. Griffith agreed, both in prior pleadings filed by it in this matter, as well as in its discovery responses during the course of this lawsuit, that this was a verbal contract between Griffith and Harris as an independent contractor for a ten percent (10%) commission on gross sales. Moreover, at trial, Griffith and Harris both testified that Harris was an independent contractor under the ten percent (10%) commission on gross sales agreement and that no employment taxes were withheld for sales

checks paid to Harris. Beth Lee testified that Harris was issued a separate employee payroll check for services that he rendered in connection with doing office work, as well as a separate sales check that did not have employee taxes withheld for independent contractor sales work. Ken Lefoldt, an expert qualified in finance and accounting, testified his review of the Griffith records and of the other documentary evidence reflected the existence of an independent contractor status for Harris under the ten percent (10%) commission on gross sales agreement. Griffith's own records entered at trial also reflect that sales checks, with no tax withholdings, were paid to Harris. *Trial Exhibits "1" and "2."* For the Court to find, and for Griffith to argue now, that this is an issue of whether an employment contract existed or not, is not supported by the substantial evidence or the overwhelming weight of the evidence in the record, all the while flying in the face of Griffith's own testimony and documents entered at trial.

E. HARRIS PROVED DAMAGES.

Griffith argues at page 33 of its Brief that it is unclear how Harris arrives at the figures he claims he is owed. Harris should not penalized for Griffith and its counsel's inability to comprehend generally accepted accounting principles and finance procedures that utilize a "first in, first out" accounting method that was testified to by Harris' expert, Kenneth Lefoldt. The concept is simple and was adequately explained by Mr. Lefoldt as set forth in his reports and testimony. *T., p. 69-105 and Trial Exhibits "9" and "10."*

Griffith makes an erroneous summary calculation on pages 33 and 34 of his Brief to try and persuade the Appellate Court that damages were not proved. There was no testimony presented by any expert of behalf of Griffith to corroborate the erroneous calculation that is just now being asserted on appeal by Griffith or any testimony to reflect such calculation is rooted in

any business accounting, or finance principle. Moreover, if you look at the calculation on pages 33 and 34 of Griffith's Brief, it makes no allowance for old "house accounts" that no longer continued to do business with Griffith, nor for the new business that was generated in its place by Mr. Harris. In other words, the erroneous summary calculation by Griffith asserted in its Brief, only looks at aggregate sales figures without taking into account any loss of existing business that would have occurred that was replaced by new business that Harris generated for Griffith. Moreover, the calculation as provided by Lefoldt is based upon accurate data as it utilized not only the ledgers as maintained by Harris, but also Griffith's own financial records. *T., p.69-105, and Trial Exhibits "1," "2," "3," "4," "5," "6," "7," "9," "10."*

CONCLUSION

The Record's substantial and overwhelming weight of the evidence demonstrates that a ten percent (10%) gross sales commission agreement was in effect from the time that it was entered into as admitted by Griffith and confirmed by Harris, as well as trial exhibits of record, until Griffith breached it in May 2002. Damages have been calculated and provided in the record by Ken Lefoldt, an expert in accounting and finance. The value of monetary damages inclusive of statutory prejudgment interest allowed for at 8%, totals $190,093.00. Griffith has failed to demonstrate otherwise to allow for an affirmance of the Chancellor's decision in his favor. Instead, Griffith relies solely upon his lone conflicting testimony as argument that the Chancellor's decision is without error. When reviewing the substantial evidence and the overwhelming weight of the evidence, including Harris' testimony, Beth Lee's testimony, Ken Lefoldt's testimony and the numerous trial exhibits consisting of Harris' business records that were maintained, including payments received ledger and accounts receivable ledger, in addition

to Griffith's own financial records, it is clear that the substantial evidence, overwhelming weight of the evidence, diversity of the evidence and corroborative nature of the evidence that it supports the fact that the Chancellor was manifestly wrong and clearly erroneous in his ruling in favor of Griffith when applying applicable law then available to the Court.

Griffith also relied upon affirmative defenses that were waived by its failure to timely assert them, and which were not tried on consent of the parties given the objections that exist of record on behalf of Harris. A review of the Record clearly discloses that Griffith was not compliant in the discovery process such that several Motions to Compel were necessary to force Griffith to provide documents requested by Harris in discovery. This is indicative of Griffith's behavior throughout the litigation process and presumably, because Griffith was afraid that it would eventually have to pay Harris what it knew it owed. The Court of Appeals has the opportunity to right a severe wrong according to the substantial and overwhelming weight of the evidence in the Record and to correct a clear error of law in this case by reversing and rendering the Chancellor's decision and awarding Harris $190,093.00, plus post-judgment interest.

This the 16th day of April, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

I, the undersigned, do hereby certify that I have this date mailed by United States Mail, postage prepaid, or served by facsimile or electronic mail, a true and correct copy of the above and foregoing Reply Brief of Appellant to:

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THIS 16th day of April, 2008.

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