

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-00639

WILLIAM S. HARRIS

APPELLANT

VERSUS

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

APPELLEES

APPEAL FROM THE CHANCERY COURT OF MARION COUNTY, MISSISSIPPI

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

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L. Clark Hicks, Jr., Esq.
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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. 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 he 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 and manifestly wrong.

Harris seeks oral argument to prevent the unjust consequences of allowing the water well company to 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 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.

STATEMENT OF THE ISSUES

- 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 FINDING 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 FINDING THAT DEFENDANT CHANGED THE BASIS OF PAYMENT TO PLAINTIFF 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 STATUTE OF LIMITATIONS AND LACHES AS A BASIS OF THE JUDGMENT?
 - 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 OF STATUTE OF LIMITATIONS AND LACHES 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 JUDGMENT 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 JUDGMENT ESTABLISHED

THE LAW OF THE CASE THAT THE STATUTE OF LIMITATIONS AND
LACHES DEFENSES DID NOT APPLY TO BAR PLAINTIFF'S CLAIM?

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

STATEMENT OF THE CASE

1. Nature of the Case.

William S. Harris sold water well jobs as an independent contractor for Tom Griffith Water Well and Conductor Service, Inc.¹ Harris and Griffith's President, Tom Griffith, had a verbal agreement that Harris would get paid ten percent (10%) of all gross sales. This arrangement lasted for several years until May 2002 when Griffith suddenly announced that he was terminating Harris' services. Shockingly, Griffith said he would not pay Harris for past sales even though those obligations were due and owing.

With no other choice to enforce the contractual agreement, Harris filed suit two months later on July 11, 2002. *T.*, pp. 29-31; *R. Vol. I.*, pp. 6-7; pp. 21-23. As part of the relief requested, the Complaint requested payment in an amount sufficient to satisfy the amount owed under the terms of the verbal contractual agreement Griffith breached. *R. Vol. I.*, p. 7.

2. Course of Proceedings and Disposition in the Court Below.

After filing suit on July 11, 2002, Griffith filed a Motion on September 4, 2002 objecting to jurisdiction and requesting transfer of the suit to Circuit Court. *R. Vol. I.*, p. 8. Harris filed an Answer to Griffith's Motion and on September 12, 2003, an Agreed Order was entered whereby

¹Tom Griffith Water Well and Conductor Service, Inc.'s President is Tom Griffith. As President for Tom Griffith Water Well and Conductor Service, Inc., Tom Griffith was the one who communicated with Harris for purposes of this litigation. Therefore, throughout this brief and for ease of understanding and reference, "Griffith" is used to refer to the company and Tom Griffith, its President, collectively.

counsel for Harris and Griffith agreed to the jurisdiction of the Chancery Court to hear the case, rendering the prior objection to jurisdiction by Griffith a moot issue. *R. Vol. I., pp. 18-19.* Prior representing counsel for Harris propounded discovery and had to file two Motions to Compel against Griffith. *R. Vol. I., p. 2.* In early 2005, the prior attorney representing Harris, W.J. “Pete” Gamble, III, died unexpectedly. Harris timely obtained new counsel after having to wait some time before his litigation file was returned to him from Mr. Gamble’s office, and an entry of appearance was made by Harris’ new representing counsel on August 18, 2005. *Id.* Harris filed an Amended Complaint and after moving for default judgment, Griffith eventually filed an Answer. *Id.* After additional Motions to Compel by Harris were filed as made necessary by Griffith’s failure to respond to outstanding discovery and the Court ordering responses be made to same, as well as depositions being taken in the matter, trial was scheduled for February 15, 2007. *R. Vol. I., pp. 2-4.* Less than ten (10) days prior to trial, Griffith filed a Motion for Summary Judgment and related pleadings to which Harris filed Motions to Strike, a Response and other responsive pleadings. *Id.* The Court overruled Griffith’s Motion for Summary Judgment on the day of trial, February 15, 2007. *T., p. 9, lines 2-10.* Trial occurred on February 15, 2007. *T. pp. 1-172 and Trial Exhibits.* The Chancellor issued a written Judgment that included findings of fact and conclusions of law on April 11, 2007. *R. Vol. IV., and/or Brief Exhibit “1,” pp. 459-462.* Harris timely filed his Notice of Appeal, Designation of the Record and Certificate of Compliance with Rule 11(B)(1) on April 13, 2007. *R. Vol. IV., pp. 463-468.*

3. Statement of the Facts

Harris began working at Griffith in December of 1992 on a part-time basis originally performing administrative office work. *T., p. 11, lines 14-24.* Except for his time in the military, Harris’ work history had been in sales. *T., p. 10, lines 24-29; p. 11, lines 1-13.* In either December of 1993 or January of 1994, Harris approached Griffith via its President, Tom Griffith, and met with

him on a Sunday afternoon. Griffith and Harris entered into a verbal contractual agreement whereby Griffith would pay Harris commissions of ten (10%) percent of gross sales made for Griffith. *T.*, p. 5, lines 16-20; *T.*, p. 13, lines 5-29; p. 99, lines 21-26; p. 117. The reason for this meeting was that Harris had another job opportunity, but he was willing to work under the agreement if he knew Griffith was willing to pay Harris \$100,000 a year if he performed the sales, to which Griffith agreed. *T.*, p. 14, lines 1-17; p. 117. Harris and Griffith's President shook hands on the verbal contractual agreement. *T.*, p. 14 lines 1-17. It was Griffith's desire that Harris be an independent contractor under the ten (10%) gross sales agreement and he was treated accordingly. *T.*, p. 14, lines 18-24; pp. 57-58; p. 86, lines 12-28; p. 163, lines 1-8; *Trial Exhibits "1" and "2."* The agreement was never reduced to writing or signed by either party due to the fact that Harris felt he knew Griffith's President and thought he could trust him. *T.*, p. 14, lines 27-29; p. 15, lines 1-3.

Harris began submitting invoices to Griffith for the commissions due for sales he made under the ten (10%) percent gross sales agreement. *T.*, p. 15, lines 4-29; p. 16, lines 1-16; p. 51, lines 22-29; p. 52, lines 14-23; p. 56, lines 1-5; p. 138, lines 23-29; p. 141, lines 1-6; p. 146, lines 21-25; *R. Vol. II*; p. 157, lines 1-11; *Trial Exhibit "5."* Harris testified at no time was he ever told to quit submitting invoices to Griffith for the commissions he was due. *T.*, p. 15, lines 17-22. In all, Harris submitted sixty-nine (69) invoices to Griffith for commissions due Harris on sales he made for Griffith from 1994 until shortly before Griffith notified it was breaching the agreement in 2002. *T.*, pp. 16-19; *Trial Exhibit "5."* Harris invoiced Griffith for ten (10%) percent of gross sales, excluding tax, and only for customers where Harris had generated the sale. *T.*, pp. 19-21. Harris maintained an accounts receivable ledger that kept up with the amount Griffith owed him for commissionable sales. *T.*, pp. 21-24 and *Trial Exhibit "6."* Harris' submitted invoices and the accounts receivable ledger were compared at trial and demonstrated that each were consistent with the other since the accounts receivable entries were being pulled from actual Griffith customer

invoices, and the invoices as submitted by Harris to Griffith were generated from Harris' accounts receivable ledger. *T.*, pp.24-26. Harris initially also maintained a payments received ledger that Harris would enter payments made to him by Griffith under the ten (10%) percent gross sales agreement so that he could maintain a balance owed from Griffith when compared to Harris' accounts receivable ledger. *T.*, pp. 32-34 and *Trial Exhibit "7."* Eventually, Harris realized he could use computer printouts from Griffith's own financial records reflecting sales expenses that would show payments made to Harris for commissionable sales and compare these printouts to his personally maintained accounts receivable ledger. *T.*, p. 32.

Harris testified at trial that he was paid in two separate checks on a weekly basis - one for office work that he still performed as an employee of Griffith just like he had been receiving when he first began working with Griffith in 1992, and the other was a check that began to be paid under the ten (10%) percent gross sales agreement with Harris working as an independent contractor. *T.*, pp. 26-27; pp. 43-44; pp. 57-58; pp. 66-67; *Trial Exhibits "1" and "2"* [i.e., sales expense checks under 10% gross sales agreement] and *"3."* [i.e., payroll checks]. Testimony of the bookkeeper for Griffith, Bethany Lee, at trial also reflected payment of two separate checks to Harris - one for payroll and one coded to sales expense that was for the commissions owed on gross sales Harris made. *T.*, pp. 168-169. Taxes, FICA, etc... were withheld from the employment check Harris received from Griffith, but the check he received as an independent contractor under the ten (10%) percent gross sales agreement had no taxes or social security withheld. *Id.* and *T.*, pp.63-65; pp. 86-88; *Trial Exhibits "1," "2," and "3."* Harris also never received any W-2s from Griffith on the payments Griffith made to Harris for commissionable sales under the ten (10%) percent gross sales agreement for which Harris was working as an independent contractor, rather, he only received W-2s for the payroll checks he received for doing office work as an employee. *T.*, p. 34. Harris and Griffith never had an agreement to be paid a specific monetary amount each week, but Griffith paid

toward the account of accumulated commissionable sales weekly what cash flow for the company would allow at the time. *T.*, pp. 34-35 and *Trial Exhibits "1" and "2."* Payments from Griffith to Harris under the ten (10%) percent gross sales agreement were coded by Griffith to sales expense and fluctuated over time. *T.*, pp. 34-36; pp. 44-47; pp. 94-95; pp. 98-99; pp. 156-157; p. 160, lines 23-29; p. 161, lines 3-6 and *Trial Exhibits "1," "2," and "7."* Griffith was always behind from the beginning under the ten (10%) percent gross sales agreement, but Griffith paid Harris toward the account of accumulating commissions. *T.*, p. 27. Harris testified to the "feast or famine" nature of the water well business and that cash flow for Griffith was erratic which helped explain why payment was being made by Griffith on account toward Harris' earned commissions. *T.*, pp. 27-28. While Harris was selling for Griffith as an independent contractor, he helped better Griffith's water well business by selling fewer private jobs, and selling more industrial/commercial type jobs because the jobs were more profitable, and payment was often tendered quicker by the commercial client after being invoiced. *T.*, pp. 28-29.

Griffith's President informed Harris in May 2002, that the verbal contract was terminated and that Griffith would not pay him because business was slow. *T.*, pp. 29-30. Griffith's President also told Harris during this same time in 2002 that Griffith did not have the money to pay him. *T.*, p. 128, lines 5-16. Griffith's President testified that Harris "may" have told him that Griffith owed him money after Harris was informed Griffith was not going to pay Harris. *T.*, p. 129, lines 3-12. Griffith's President admitted Griffith was behind on paying commissions to Harris and owed thousands of dollars. *T.*, pp. 129-130; p. 136, lines 22-27. When Harris inquired about the money that Griffith still owed Harris under the ten (10%) percent gross sales agreement, Griffith's President informed Harris that "I'm not gonna pay you." *T.*, p. 30. Before May of 2002, Harris testified he had never been informed by Griffith that it wanted the ten (10%) percent gross sales contract terminated. *T.*, p. 42, lines 19-26. However, Griffith testified at trial that unlike Griffith's

recollection of the time period of making the ten percent (10%) gross sales agreement with Harris, that Griffith in some unknown year told Harris that the ten percent (10%) gross sales agreement was getting out of whack. *T.*, p. 117; p. 122. Yet, Griffith's President also testified that he may not have communicated to Harris "good enough" Griffith's belief of changing to a flat fee arrangement between Griffith and Harris and could not remember "hardly anything about" conversations where the flat fee issue was allegedly discussed. *T.*, p. 131, lines 16-26; p. 137, lines 4-9. Griffith's President testified the ten (10%) percent gross sales agreement was an agreement that continued to be an oral agreement and that Griffith never sent any type of writing or memorandum to Harris indicating the ten (10%) percent gross sales agreement was no longer in place. *T.*, p. 158, lines 8-13. After Griffith breached the ten (10%) gross sales agreement in May 2002, Harris filed suit within two (2) months to recover sums due under the verbal contractual agreement; those sums due as calculated and verified by certified public accountant, Kenneth Lefoldt, Jr. using records maintained by Harris and Griffith. *Id.* and *T.*, pp. 36-37.

Kenneth Lefoldt, Jr., (hereinafter, "Lefoldt"), a certified public accountant was called by Harris at trial, was tendered and accepted as an expert in the area of finance and accounting. *T.*, pp. 69-72 and *Trial Exhibit "8."* Lefoldt testified that after making calculations using a "first in/first out methodology," that he was able to determine the amount owed under the ten (10%) percent gross sales agreement between Harris and Griffith. *T.*, pp. 80-83; pp. 104-105 and *Exhibit "9."* Lefoldt's expert opinion, was that Griffith owed Harris \$144,638.07 inclusive of a few invoices not submitted to Griffith by Harris, and an adjusted balance due after deducting unsubmitted invoices, of \$133,496 - all of which represented billings by Harris to Griffith for only the years 2000 and 2001 when deducting Griffith's prior payments on account for the preceding years. *T.*, pp. 73-83; p. 105, lines 6-26 and *Trial Exhibit "9."* Lefoldt testified his opinion was based not only on the ledgers and interviews of Harris and depositions of the parties, but also available records from Griffith were

reviewed as well so that an unbiased opinion of the outstanding balance could be determined. *T.*, p. 72, lines 10-29; p. 73, lines 1-8; pp. 77-78. Lefoldt also testified that Griffith's QuickBooks records were consistent with Harris' testimony that he was paid as an employee for administrative office work for which Harris received W-2s that Lefoldt had also reviewed, and that Harris was also being paid as an independent contractor under the ten (10%) percent gross sales agreement. *T.*, pp. 85-88 and *Trial Exhibits "1" and "3."* Lefoldt's testimony reflected that the variance between payments Griffith made to Harris for sales expense as reflected on Trial Exhibit "2," Griffith's own financial records, was indicative of payment on account, rather than any type of fixed compensation. *T.*, p. 108; *Exhibit "2," and "7."*

Lefoldt also rendered an opinion as to the value of prejudgment interest using the allowable statutory eight (8%) interest rate. *T.*, pp. 89-92. He testified that prejudgment interest on the \$144,638.07 amount that included unsubmitted invoices by Harris amounted to \$61,318 and that prejudgment interest on the \$133,496 amount that gave a credit to Griffith for Harris' unsubmitted invoices totaled \$56,597. *T.*, pp. 90-92 and *Trial Exhibit "10."* Lefoldt's opinion was that the total amount Harris is due from Griffith allowing for unsubmitted invoices from Harris when adding prejudgment interest totaled \$205,956 or, alternatively, \$190,093 when giving credit to Griffith for Harris' latest unsubmitted invoices before Griffith's breach. *T.*, pp. 91-92 and *Trial Exhibit "10."*

All of Lefoldt's calculations and opinion as to amount owed Harris from Griffith, were based upon Harris' and Griffiths' records and prior testimony. *T.*, p. 72, lines 10-29; p. 73, lines 1-8; pp. 77-78. Lefoldt's calculations and opinions were left un rebutted by Griffith, except to the extent that Griffith broadly testified without any supporting record evidence, that he had paid Harris what was owed. Interestingly enough, Griffith provided this testimony even when Griffith indicated he did not keep up with what he owed Harris, but relied upon Harris to do that. *T.*, pp. 148-150; p. 76, lines 19-29; p. 100, lines 5-11.

SUMMARY OF THE ARGUMENT

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

It has been undisputed throughout the course of this litigation as well as at trial that Harris was not an employee or operating under an employment at will contract, but instead was working as an independent contractor under an agreement with Griffith whereby Griffith was to pay Harris commissions on ten percent (10%) of gross sales Harris made for the water well company. At trial, Griffith admitted Harris was an independent contractor under this agreement. *T.*, p. 163, lines 1-8. Testimony of Harris and Lefoldt confirmed the fact that Harris worked as an independent contractor under the agreement as well as Trial Exhibits "1" and "2" clearly demonstrated that no taxes or other type of withholdings were withheld from the sales expense checks Griffith paid to Harris under this agreement. *T.*, p. 14, lines 18-24, pp. 57-58; p. 86, lines 12-28; Trial Exhibits "1" and "2." Griffith also had provided sworn testimony by way of deposition and interrogatory responses that Harris was working as an independent contractor under the agreement. *R. Vol. I.*, pp. 141-142; p. 146; *Vol. II.*, p. 152. The Chancellor finding that Harris was a salaried employee and not an independent contractor under the ten percent (10%) gross sales agreement, is manifestly wrong and clearly erroneous. See Brief Exhibit "1"; *R. Vol. IV.*, pp. 459-462

The Chancellor erred again by finding in the Judgment that Griffith changed the basis of payment to Harris. First the findings in the Judgment are inconsistent. The Chancellor found in one paragraph of the Judgment that Griffith changed the arrangement and basis of payment for plaintiff's services before the period of 1999 to 2001. *Id.* Later in the Judgment, he found that the commission arrangement under the agreement changed to a weekly salary between the years 1999 and 2002. *Id.* Trial Exhibits "5" and "6" are Harris' invoices submitted to Griffith under the agreement and Harris'

regularly maintained accounts receivable ledger which do not support the inconsistent findings of the Chancellor. Trial Exhibit "7" demonstrates that fluctuating payments were made by Griffith from the time the agreement was entered in 1994 until breach of the agreement by Griffith in May 2002, while also not supporting any change in basis of payment to a set salary of \$1,000.00 each week as erroneously found by the Chancellor.

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

The Chancellor erroneously applied statute of limitations and laches as part of his findings in the Judgment. *Id.* These affirmative defenses were not available to the Chancellor for application since they were waived by Griffith when not asserted in Griffith's answer to Harris' complaint as required by *Miss. Rules of Civil Proc. 8(c)* and established case law. *See, Davis v. Barr*, 157 So.2d 505, 510 (Miss. 1963); *Whitefoot v. Bancorp South*, 856 So.2d 639, 645 (¶33) (Miss. App. 2003); *Burleson v. Lathem*, 2006-CA-02025-SCT (¶ 13-18) (Miss. 2007). Griffith also waived the affirmative defenses by waiting over four and one-half (4 ½) years after litigation had commenced to first raise them in an untimely motion for summary judgment. *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 180-181 (¶¶ 44-45) (Miss. 2006). The Chancellor also had formerly adjudicated the issue of whether or not statute of limitations and laches applied when it overruled Griffith's motion for summary judgment. In doing so, the court established the law of the case that laches and statute of limitations were not available affirmative defenses to defendant as no facts had changed and litigation was pending between the same parties at trial as it was at the summary judgment stage.

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

The parties agree that in 1994 a verbal contractual agreement was entered into between Griffith and Harris for Harris to work as an independent contractor and be paid commissions on ten percent (10%) of gross sales he made for the water well company. The substantial evidence and great weight of the evidence clearly establishes not only that an enforceable contract existed in 1994 but continued to exist until breached by Griffith in May 2002. The substantial and great weight of the evidence reflects a contract existed and remained in effect until breached in 2002 based upon Harris', Lefoldt's and Bethany Lee's testimony at trial and Trial Exhibits "1," "2," "5," "6" and "7." As a result of Griffith's breach, a certified public accountant who was qualified, tendered and admitted as an expert in finance accounting at trial, testified that monetary damages sustained by Harris under the agreement including prejudgment interest totaled \$190,093.00. The lone evidence rebutting is the sole testimony of Griffith. Contrary to the Chancellor's erroneous finding, the substantial great weight of the evidence supported the fact that an enforceable contract existed, was breached by Griffith and Harris sustained damages as a result of the breach.

STANDARD OF REVIEW

In Mississippi, the appellate courts' standard of review for factual determinations made by a trial judge sitting without a jury is the substantial evidence standard. Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc., 716 So.2d 200, 204 (¶15) (Miss.1998). Mississippi's appellate courts will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or if he applied an incorrect legal standard. Id. Additionally, when the chancellor is the trier of facts, unless it was evident that the chancellor is manifestly wrong, or that the findings of

facts by the chancellor were against the overwhelming weight of the evidence, the appellate court will not disturb the findings of facts. City of Jackson v. Delta Const. Co., 228 So.2d 606, 607 (Miss.1969). For questions of law, however, the standard of review for decisions of a chancellor is *de novo*. Pannell v. Guess, 671 So.2d 1310, 1313 (Miss. 1996). The appellate courts will reverse for erroneous interpretations or applications of the law. Id.

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 admitted at trial that Harris was an independent contractor under the ten (10%) percent gross sales commission agreement; a fact that has never been disputed between Harris and Griffith. *T.*, p. 163, lines 1-8. This admission by Griffith was confirmed by testimony of Harris and Lefoldt as well as Trial Exhibits "1" and "2" reflecting that no withholdings were made from sales expense Griffith paid Harris for commissions due under the agreement. *T.*, p. 14, lines 18-24; pp. 57-58; p. 86, lines 12-28; Trial Exhibits "1" and "2." Griffith's admission at trial as confirmed by Harris, Lefoldt and Trial Exhibits "1" and "2," was consistent with other evidence of record that Harris was an independent contractor under the agreement. Griffith, in his response to interrogatories #2 and #6, as provided in Griffith's Answers to First Set of Interrogatories, admitted Harris was an independent contractor under the agreement. *R. Vol. I.*, pp. 141-142. Likewise, Griffith testified in his deposition on January 22, 2007, that Harris was working as an independent

contractor and did not have a prescribed schedule. *R. Vol. I, p. 146 and Vol. II, p. 152.* Griffith's Answers to First Set of Interrogatories and deposition testimony were submitted as exhibits to Plaintiff's Response to Defendant's Motion for Summary Judgment which the chancellor announced on the day of trial he had reviewed. *See, T., p. 9, lines 2-10; R. Vol. I, pp. 121-150; Vol. II, pp. 151-229.* Griffith's own financial records reflect payments made to Harris under the ten percent (10%) gross sales agreement were being charged to "sales expense" and not to employee payroll, demonstrating the veracity of the independent contractor status of Harris under the agreement. *Trial Exhibits "1" and "2."* No payroll taxes, social security, medicare or other withholdings were withheld from payments made to Harris under the ten (10%) gross sales agreement. Griffith's bookkeeper, Bethany Lee, admitted Harris received a separate check for commissions than the payroll check. The undisputed substantial and overwhelming weight of the evidence is that Harris was an independent contractor with a valid verbal contract with Griffith under the ten (10%) percent gross sales commission agreement; not an employee with an employment at will contract. These findings are manifestly wrong and clearly erroneous which should be reversed. Richardson v. APAC-Mississippi, Inc. 631 So.2d 143 (Miss. 1994).

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.

The Chancellor also found that the "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." *R., Vol. IV., and/or Brief Exhibit "1," at p.462.* Yet, the Chancellor previously found and set forth in the Judgment, 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." *Id.* These findings read, on one hand, the

agreement changed well before 1999, but then, on the other hand, the agreement changed according to the Chancellor, based on Griffith's payment method sometime between 1999 and 2002. The Chancellor's findings are inconsistent on their face, and thus, clearly erroneous and manifestly wrong. The Chancellor also found that "sometime prior to 1999 Griffith changed Harris' employment status and began paying him \$1,000.00 each week." *Id.*

The above findings are not supported by substantial evidence and are against the overwhelming weight of the evidence. Trial Exhibits "5" and "6," Harris' invoices to Griffith and Harris' accounts receivable ledger, reflect when invoices began being submitted for jobs sold by Harris beginning in 1994 after the agreement was made.² A review of Trial Exhibit "7," the payments received ledger of Harris, demonstrates that from the time payments began being made to Harris under the agreement, the payments consistently fluctuated. *See, Trial Exhibit "7."*³ [Note, fluctuating payments varied in amounts in 1995 and 1996 between \$500, \$750, \$1,000, \$1,500, and \$2,000]. Similarly, though the Chancellor found that Griffith's and Harris' commissions on ten percent (10%) of gross sales "arrangement changed with the monthly change to a set salary" [....] "based on Griffith's payment method between 1999 and 2002," the substantial and overwhelming weight of the evidence demonstrates otherwise. *R. Vol. IV., and/or Brief Exhibit "1" at p. 461.* A review of Exhibit "7" and Exhibit "2," Harris' payments received ledger and Griffith's sales expenses paid to Harris, demonstrate that payments fluctuated, not only in 1995 and 1996, but also in all of the following years of 1997 thru 2002. *Trial Exhibits "7" and "2."* In fact, if each fluctuation in payment is counted on Exhibit "2," it is evident that payments fluctuated no less than

²As testified by Harris, the first invoice was not submitted to Griffith until jobs he sold had accumulated to a point where he would invoice them. *T., p. 15, lines 8-18.*

³Lefoldt testified Griffith only produced financial records from and after 1997, thus for the period prior to 1997, Harris' payments received ledger, i.e. Trial Exhibit "7" must be utilized to view payments made by Griffith. *T., p. 77, lines 10-16.*

twenty-nine (29) times between 1997 and 2002, with multiple payment fluctuations occurring in each year between 1997 and 2002. [Note, fluctuating payments varied in amounts between 1997 and 2002 between \$1,000, \$750, \$2,250, \$1,500, \$2,100, \$600, \$700, \$400, \$950, \$350, \$50, \$650, \$200, \$25 and \$675]. These fluctuations are consistent, not with a change to a set [emphasis added] salary as the chancellor found, but instead, are exactly the same type of fluctuations and varied payments that were being made toward account by Griffith just as had been done before when it is undisputed that the ten percent (10%) gross sales agreement existed. *See, R. Vol. IV., and Brief Exhibit "1" at p. 461; T., pp. 116-117, p. 122.*

The substantial and best evidence of record also reflects the Chancellor's clearly erroneous finding that Harris began to be paid \$1,000.00 each week sometime prior to 1999. *See, R. Vol. I, and/or Brief Exhibit "1" at p. 460.* A review of Exhibit "7" and "2" reflects, as discussed above, that instead of \$1,000.00 payments being made each week sometime prior to 1999 and continuing thereafter, instead, payments fluctuated between \$500, \$1,000, \$2,000, \$1,500, \$750, \$2,250, \$2,100, \$600, \$700, \$650, \$50, \$950, \$400, \$350, \$700, \$200, \$675, and \$25. Even if one were to add payroll payments as found on Exhibit "3" to the sales expense payments as reflected on Exhibit "7" and "2," it is clear that the Chancellor's decision is manifestly wrong since the total of payments do not equate to \$1,000.00 each week, rather, the payments still fluctuate in various multiples of hundreds of dollars from \$1,000.00 each week. Using the Chancellor's own words, the only "set salary" [emphasis added] was the salary Harris received for the office work he performed which is reflected on Exhibit "3." *See, Brief Exhibit "1" at p. 461.* The substantial and overwhelming weight of the evidence of record by way of testimony of Harris, Lefoldt, Griffith and Bethany Lee, as well as trial exhibits -all of which have been discussed above - clearly demonstrate the payment of two checks, one for administrative work Harris performed as an employee of Griffith that had taxes withheld and for which Harris was given W-2s; the other a sales expense check Griffith paid

to Harris under the terms of the ten (10%) percent gross sales commission agreement in Harris' capacity as an independent contractor. Griffith's agreement to pay ten (10%) percent gross sales commissions to Harris is reflected and supported by the substantial and overwhelming weight of the evidence of record as he continued to pay toward account in fluctuating payments from the time the agreement was entered, thru 2002 until Griffith informed Harris for the first time that the money owed under the agreement would not be paid. Accordingly, the Chancellor's finding that Harris' "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" is not supported by the substantial or overwhelming weight of the evidence. *See, T., p. 462 and/or Brief Exhibit "1" at p.462.* Moreover, the Chancellor's finding that the ten (10%) percent gross sales agreement was changed, depending on which part of the Judgment is read, i.e. between 1999 and 2002 or some time prior to 1999, simply is not supported by the substantial and overwhelming weight of the evidence as set forth above, is clearly erroneous and manifestly wrong which requires a reversal by this Court as to these findings. *Id.*

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.

The Judgment entered in this cause following trial sets forth the Chancellor's decision to apply statute of limitations and laches as bases to deny finding in favor of Harris. *R. Vol. IV, and/or Brief Exhibit "1," at pp. 461-462.* However, neither of these affirmative defenses were pled by Griffith in his Motion to Dismiss or in his Answer. *R. Vol. I, pp. 8-10; pp. 37-41.*

As provided in *Miss. R. Civ. Proc. 8(c)*, a party, i.e. Griffith, that is pleading an answer in response to Harris Complaint, "shall [emphasis added] set forth affirmatively ... laches ..., statute of

limitations and any other matter constituting an avoidance or affirmative defense.” *Miss. R. Civ. Proc. 8(c)*. It is long established in Mississippi that it is fundamental and mandatory that affirmative defenses of statute of limitations and laches be raised in the answer of the defendant or they are deemed waived. Davis v. Barr, 157 So.2d 505, 510 (Miss.1963); Whitefoot v. Bancorp South, 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]; *Miss. R. Civ. Proc. 8(c)*. To not require same, would allow the defendant more than one bite at the apple, since he could then arguably not plead at all, or plead a broad defense or an unrelated defense altogether in the initial answer, with only the intent of asserting the specific affirmative defense at a later time. This reasoning rejects the interpretation of the rules in Mississippi case law and fails to explain the existence of specific enumerated affirmative defenses found in *Miss. R. Civ. Proc. 8(c)* and the mandatory language requiring assertion of these defenses in the answer. This concept holds true with other rules containing affirmative defenses that work the same way, such as the requirement of assertion of certain *Miss. R. Civ. Proc. 12(b)* affirmative defenses in an answer, which if not asserted, are also deemed waived. Burleson v. Lathem, 2006-CA-02025-SCT (¶¶13-18) (Miss.2007). As set forth above in Barr, Whitefoot, Johns-Manville and Burleson, failure of a party to assert affirmative defenses in an answer to a complaint constitutes a waiver by that party and does not preserve to that party any right to object by asserting the affirmative defenses at a later date. *See, Burleson v. Lathem*, 2006-CA-02025-SCT (¶¶13-18) (Miss.2007) [holding likewise that failure to assert Rule 4(h) or 12(b)(4) or (5) affirmative defenses in answer constitutes waiver]. Supporting the concept and nature of waiver, a judgment cannot thereafter be entered based upon a previously waived, and thus, inapplicable affirmative defense or it will be reversed. *Id.* [reversing trial court’s decision that allowed previously waived defenses by defendant as basis for dismissal of plaintiff’s claims.] To allow otherwise, would castrate the legal importance and recognition of waiver as well as waiver’s implications which

the Mississippi appellate courts have long recognized.

Griffith failed to assert affirmative defenses of statute of limitations or laches as required under established Mississippi law and related rule of civil procedure. Griffith's failure to do so, 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, the Chancellor applied incorrect legal standards, i.e. defenses, of statute of limitations and laches to support his judgment in light of the fact they had been waived and were not available to the Chancellor for rendering his judgment. *R. Vol. IV, and/or Brief Exhibit "1," pp. 461-462.* This Court should reverse the Chancellor's decision to use statute of limitations and laches as a basis of the findings in the Judgment.

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

Though he failed to do so, even if Griffith had properly pled affirmative defenses of statute of limitations and laches in his Answer as required to be considered for any relief that may be afforded by same as discussed above, the Chancellor's decision to use these affirmative defenses as bases for the Judgment he entered in this cause was clearly erroneous and manifestly wrong on additional grounds.

1. EXCESSIVE DELAY CONSTITUTES WAIVER.

By waiting in this case until more than 4½ years after filing of the original Complaint, and so late in the litigation process to assert by way of a motion for summary judgment previously non-pled, and thus, prohibited affirmative defenses of statute of limitation, laches and other defenses such as course of dealing, statute of frauds, etc..., Griffith's delay constitutes additional grounds that Griffith waived the non pled affirmative defenses as a matter of law. *See, MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 180-181 (¶¶44-45) (Miss.2006) and East Mississippi State Hospital v.

Adams, 947 So.2d 887, 890-891 (§§10-12) (Miss.2007). In Horton, the Mississippi Supreme Court held that a defendant's failure to timely and reasonably raise and pursue the enforcement of an affirmative defense for a period of eight months which would serve to terminate the litigation, coupled with active participation in the litigation process, ordinarily would serve as a waiver. Horton, 926 So.2d (§44) at 180. Adams, recently upheld this rationale as set forth in Horton, finding that the defendant's subsequent participation in the litigation, together with their failure to pursue affirmative defenses for two years after the case began, waived the affirmative defenses. Adams, 947 So.2d (§§10-12) at 891. In the instant case, just as held in Horton and Adams, Griffith's failure to timely and reasonably raise and pursue the enforcement of affirmative defenses of statute of limitations, laches and others, combined with Griffith's active participation in the litigation process over a course of over 4½ years serves as a waiver of these affirmative defenses. Given the precedent set forth in Horton and Adams, Griffith's delay also effectively constituted a waiver of these previously non-pled affirmative defenses, making the Chancellor's decision to rely on statutes of limitation and laches or any other previously non-pled affirmative defense as part of his findings in the Judgment clearly erroneous and manifestly wrong. Moreover, the Chancellor applied the wrong legal standard using these affirmative defenses after they had been waived by Griffith.

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

For the first time, just over four (4) years and seven (7) months after litigation had commenced when Harris filed his Complaint on July 11, 2002, Griffith raised statute of limitations, laches and other defenses such as course of dealing in a motion for summary judgment he filed on February 7, 2007. *R. Vol. I, pp. 82-83*. Griffith raised these arguments despite having waived the affirmative defenses by not including them in his Answer as required, or timely pursuing them. The record discloses Griffith was never granted any Order allowing him to amend his Answer to include any

affirmative defenses following his Answer. Griffith's motion for summary judgment was filed a mere eight (8) days [six (6) weekdays] prior to the date of trial. As a result, the summary judgment motion was not timely filed, served or noticed for hearing under *Miss. R. Civ. Proc. 56(c)* or the Court's previously entered Scheduling Order. *R. Vol. I, pp. 80-81*. *Miss. R. Civ. Proc. 56(c)* requires a minimum of ten (10) days advance service before the fixed hearing date. Palmer v. Biloxi Regional Medical Center, Inc., 649 So.2d 179, 182-183 (Miss.1994). The deadline for dispositive motions to be filed under the Court's Scheduling Order was January 26, 2007, twelve (12) days prior to when Griffith's motion for summary judgment was filed. *Id. R. Vol. I, pp. 80-81*.

Harris filed motions to strike seeking to prohibit the summary judgment motion that, for the first time contained the statute of limitations, laches and other waived affirmative defense arguments such as course of dealing. Harris filed the motions to strike on grounds the summary judgment motion was untimely filed, served and noticed for hearing. *R. Vol. I, pp. 94-97; 100-120; 121-229*. Alternatively, despite the limited period of time before trial, Harris responded to Griffith's motion for summary judgment and also filed an itemization of material facts. *R. Vol. I & II, 122-229; 230-240; 241-243*. Given the objections to, and motions to strike Griffith's untimely motion for summary judgment, as well as the fact these affirmative defenses were not raised in the answer of Griffith, the Chancellor's decision to use statute of limitations and laches to support his findings in the Judgment was clearly erroneous and manifestly wrong. *Miss. R. Civ. Proc. 56(c)* and the Court's own prior Scheduling Order prohibited the filing of the summary judgment motion. Griffith waiting to file the summary judgment motion outside the time requirements imposed by *Miss. R. Civ. Proc. 56(c)* and the governing scheduling order's time limitations, demonstrates a waiver by Griffith to file the summary judgment motion. The statute of limitations, laches and other affirmative defense arguments such as course of dealing first asserted in Griffith's summary judgment motion should not have been considered since the record contains no Order from the Court allowing Griffith's summary

judgment motion to be heard out of time. Even if any such Order did exist, it would be void anyway under the mandatory notice requirements provided by *Miss. R. Civ. Proc. 56(c)* and Palmer 649 So.2d at 182-183.

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

Despite Griffith's waiver due to his failing to raise affirmative defenses in his answer, delay and untimely filing of the motion for summary judgment, the Chancellor, on February 15, 2007, the day of trial, overruled Griffith's motion for summary judgment. *T. p. 9, lines 2-10*. Such was done without a record hearing on the motion, and the Court found genuine issues to exist, though none of the purported genuine issues of fact were ever placed into the record by the Court. *Id.* However, the relevant dates and facts that related specifically to allow a determination by the Court of whether application of statutes of limitation, laches and course of dealing applied were set forth in Griffith's motion for summary judgment, Harris' response, their itemization of material facts and supporting memorandum briefs. *R. Vol. I & II, pp. 82-89; 122-229; 230-240; 241-243*. As the Chancellor stated, he had reviewed the materials regarding the summary judgment. *T. p. 9, lines 6-7*. The Chancellor was informed of the relevant facts and dates and overruled Griffith's summary judgment motion that had asserted statute of limitations, laches and course of dealing defenses. In doing so, the Chancellor established the law of the case that the legal defenses of statute of limitation, laches and course of dealing did not apply. *See, Simpson v. State Farm Fire & Casualty Co.*, 564 So.2d 1374, 1376 (Miss.1990).⁴ [Abrogated on other grounds]. The facts did not change between the same

⁴The doctrine of the law of the case, is similar to that of former adjudication, and relates entirely to questions of law, and is combined in its operation to subsequent proceedings in the case. Whatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, so long as there is similarity of facts. This principal expresses the practice 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.

parties and the information as set forth in the motion for summary judgment, the response, and the trial. As the doctrine of the law of the case is founded on public policy and the interest of orderly and consistent judicial procedure, the Chancellor's decision to include in the Judgment findings relying on statute of limitations and laches defenses was clearly erroneous and manifestly wrong.

As a final note on the Chancellor's use of laches, the Chancellor cited Hall for the concept that laches applied. Hall v. Dillard, 739 So.2d 383 (Miss.App.1999). See, *R. Vol. IV., and/or Brief Exhibit "1" at p. 461*. However, the court had already established the law of the case that laches was not a valid defense given his overruling of Griffith's summary judgment motion. Moreover, Hall, was a case that dealt with laches when the plaintiff there sought to enforce payment of retirement account funds after a period of over eight years had elapsed. Hall is of no force or effect on the instant case, where here, Harris filed suit within two (2) months following Griffith breaching the agreement and advising Harris that payment would not be made. Suit was filed well within the statute of limitations as provided under *Miss. Code Ann. § 15-1-29*, following breach.

Accordingly, in light of (1) established Mississippi law requiring affirmative defenses be raised in the answer of a defendant or they are deemed to be waived, (2) the mandate of *Miss. R. Civ. Proc. 8(c)* requiring assertion of specific enumerated affirmative defenses that include statute of limitations, laches and other affirmative defenses, (3) the extreme lapse of time and late stage of the litigation process before Griffith even first attempted, just before trial, to assert the previously non pled affirmative defenses, (4) the law of the case already established by the Chancellor's prior overruling of Griffith's summary judgment based in part on statute of limitations and laches defenses, and (5) the inapplicability of the Hall decision on issue of laches for which the Chancellor cited the decision, the findings of the Chancellor in the Judgment regarding applicability of statute of limitations and laches are clearly erroneous and manifestly wrong. The Chancellor also applied the incorrect legal standards of statute of limitations and laches in the Judgment. *R. Vol. IV., and/or Brief*

Exhibit "1."

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.

Harris' suit against Griffith is governed by a three year statute of limitations because it involves the breach of an unwritten contract entered into by Griffith, via its President, and Harris, an independent contractor. *Miss. Code Ann. §15-1-29*⁵. Harris filed suit less than two months following the breach by Griffith. As plaintiff, Harris has the burden of proof to demonstrate an enforceable contract existed. An oral contract, just like a written contract, is enforceable. R.C. Construction Co., Inc. V. National Office Systems, Inc., 622 So.2d 1253, 1255 (Miss.1993); Putt v. City of Corinth, 579 So.2d 534, 538 (Miss.1991). Additionally, whether or not a verbal contract exists is itself a factual issue that must be determined. *Id.*, *See also*, Leary v. Stockman, 937 So.2d 964, 971 (¶35) (Miss.App.2006). Basic contract law provides that in order to recover for breach of contract, here, Harris has the burden to prove by a preponderance of the evidence: (1) the existence of a binding contract, (2) that the defendant breached the contract, and (3) that the plaintiff suffered monetary damages as a result. Sudeen v. Castleberry, 794 So.2d 237, 245 (¶20) (Miss.App.2001).

The parties agree, a verbal, unwritten contract was made between Griffith and Harris in 1994 and that Harris would receive commissions in the amount of ten (10%) percent of gross sales he made as an independent contractor selling water well jobs for Griffith. This is not in dispute until Griffith testified the arrangement changed in some unknown year thereafter. However, the substantial and overwhelming weight of the evidence of record demonstrates the oral contractual agreement never

⁵Though denied by Harris, even if a one year statute of limitation applied under *Miss. Code Ann. §15-1-29* as Griffith may try to argue, suit was timely filed less than two months after the breach occurred and the time the breach of contract claim accrued in May 2002.

changed. The following chart sets forth the substantial and overwhelming weight of the evidence supporting the continued existence of the ten (10%) gross sales commission contract versus the record evidence the contract was terminated sometime prior to the breach in 2002:

<u>Record Evidence Contract Existed And Remained In Effect Until Breached in 2002</u>	<u>Record Evidence Contract Existed, But Ceased to Exist prior to May 2002</u>
<ul style="list-style-type: none"> 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. <i>T.</i>, p. 13; 29-30; p. 68. 	<ul style="list-style-type: none"> Griffith's lone and unsupported testimony that he told Harris he could not afford to pay him per the agreement in some admittedly uncertain year in the 1990s.
<ul style="list-style-type: none"> 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. <i>See, Exhibit "5"; T. pp. 16-19; p. 72, lines 7-27; p. 76, lines 13-29; p. 141, lines 1-6; p. 146, lines 21-25; R. Vol. II., p. 157, lines 1-11.</i> 	
<ul style="list-style-type: none"> Lefoldt's testimony that financial documents and deposition testimony reviewed supported existence of the contract and that Harris is due money under terms of the contract. <i>T.</i>, p. 76; pp. 84-86. 	
<ul style="list-style-type: none"> Griffith's unchanging payment method, i.e., Griffith consistently made almost weekly payments toward account in <u>fluctuating</u> amounts from the time the oral contractual agreement was undisputedly negotiated in 1994, until Griffith's breach. <i>See, Exhibits "1," "2," and "7."</i> 	

<ul style="list-style-type: none"> • 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 sales expense and the other for payroll. <i>T.</i>, pp. 168-170. 	
<ul style="list-style-type: none"> • Griffith's own Find Reports and Transaction By Detail By Account statements, i.e. <i>Exhibits "1" and "2,"</i> 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. 	
<ul style="list-style-type: none"> • 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. <i>T.</i>, pp. 26-27; p.34; p.58, lines 1-6; pp. 63-65; pp. 86-88. 	
<ul style="list-style-type: none"> • Harris' regular conducted business activity generated Payment Received ledger, i.e. <i>Trial Exhibit "7,"</i> 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. <i>Trial Exhibit "7."</i> 	

<ul style="list-style-type: none"> • Harris' regular conducted business activity generated Accounts Receivable ledger, i.e. <i>Trial Exhibit "6,"</i> 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. <i>Trial Exhibit "6."</i> 	
<ul style="list-style-type: none"> • Lefoldt's testimony and reports, i.e. <i>Exhibit "9" and "10,"</i> 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. <i>T., p. 81, lines 11-19; p. 100; Trial Exhibits "9," "10," "2" and "7."</i> 	

The evidence shows the contract was breached in May 2002 when Griffith told Harris he was not going to pay what Harris had earned and was owed. Both Harris and Lefoldt testified as to the amount of monetary damages that were due under the contractual agreement based on Harris' owed commissions of ten (10%) percent of gross sales. *Exhibits "9" and "10"* specifically place in the record the amount of damages Harris was entitled to following Griffith's breach of the contractual agreement, in terms of what was owed under the agreement for years 2000 and after, as well as for calculated prejudgment interest. Even the Chancellor recognized the total sum, after deducting for Harris' unsubmitted invoices, amounted to \$133,496.00 plus prejudgment interest of \$56,597.00 for a total amount of monetary damages of \$190,093.00. *See, R. Vol. IV., and/or Brief Exhibit "1," at p. 460.* The substantial and overwhelming weight of the evidence does not support the Chancellor's finding that no enforceable contract existed between Harris and Griffith, rather it supports the contract

existed, was breached by Griffith in May 2002 and caused Harris damages in the amount of \$190,093.00. This Court should reverse and render and award Harris damages of \$190,093.00 plus post-judgment interest.

CONCLUSION

The record's substantial and overwhelming weight of the evidence demonstrates the ten (10%) percent gross sales commission agreement lasted from 1994 until Griffith breached it and notified Harris it was not going to pay what was remaining owed under the agreement in May of 2002. Harris, as any prudent businessman would do, sought to enforce payment pursuant to the contractual agreement and timely filed suit within two (2) months following Griffith's breach. The substantial evidence in this case demonstrates the existence of a valid and enforceable contract and its subsequent breach by Griffith. Harris and the expert witness who was qualified in finance and accounting, certified public accountant, Lefoldt, testified to the amount owed by Griffith under the breached contractual agreement. Prejudgment interest was requested in Harris' Amended Complaint. *R. Vol. I., pp. 21-23*. The Chancellor recognized that the value of monetary damages inclusive of statutory prejudgment interest allowed for at eight (8%) percent totaled \$190,093.00. In light of the clearly erroneous and manifestly wrong findings of the chancellor that is not supported by the substantial or overwhelming weight of the evidence, the Judgment with findings by the Chancellor as entered should be reversed. *See*, Brief Exhibit "1," pp. 459-462. Given a trial has already taken place with the record disclosing that the substantial and overwhelming weight of the evidence supports the existence of an oral contractual agreement existing from 1994 until its breach by Griffith in May 2002 and resulting damages of \$190,093.00, this Court should not only reverse the Chancellor's decision, but render a judgment for Harris in the amount of \$190,093.00 and also award post-judgment interest as was requested for in Harris' Amended Complaint. *R. Vol. I., pp. 21-23*.

This the 21st day of November, 2007.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "L. Grant Bennett", is written over a horizontal line.

L. Grant Bennett, MS Bar [REDACTED]

L. Clark Hicks, Jr., MS Bar [REDACTED]

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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 Appellant's Brief and Record Excerpts to:

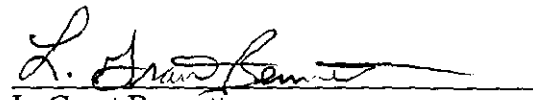
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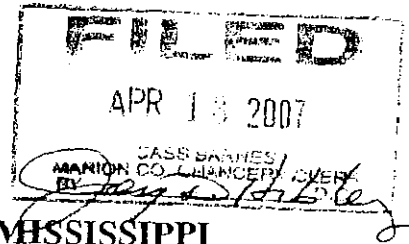
Renee McBride Porter, Esq.
Post Office Box 982
Columbia, MS 39429

Judge James H. C. Thomas, Jr.
Post Office Box 807
Hattiesburg, MS 39403-0807

THIS 21st day of November, 2007.


L. Grant Bennett

Appendix I



IN THE CHANCERY COURT OF MARION COUNTY, MISSISSIPPI

WILLIAM S. HARRIS

PLAINTIFF

VERSUS

CAUSE NUMBER 2002-0177-GN-TH

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

DEFENDANT

JUDGMENT

THIS CAUSE was tried on Plaintiff's Complaint seeking contractual damages from his employment with Defendant, who has responded in general denial of the claim. Defendant is a resident of Marion County, Mississippi where the employment was entered execution was primarily centered. Each party was represented by counsel at trial. The Court finds it has jurisdiction of the parties and subject matter.

FACTS

Tom Griffith Water Well & Conductor Service, Inc. is a business owned and primarily operated by Tom Griffith since 1978, described as functioning in two operations. One, a well drilling operation and the other in environmental services. In 1993 Plaintiff, William S. Harris began working for Griffith in the well drilling operation for an commission of ten percent (10 %) of the sales he generated. He described himself as an independent contractor. There was no written contract, memorandum or other writing signed by both parties memorializing the agreement between the parties. Additionally, Harris did office work for Griffith for which he was initially paid a separate check. Upon receipt of the initial invoices Griffith paid varying amounts

toward the sums earned by Harris, although the exact amount invoiced was never paid. From 1995 to 2001 Harris prepared invoices periodically which reflected his sales and expected commission which he handed to Griffith (Exhibit 5).

Sometime prior to 1999 Griffith changed Harris' employment status and began paying him \$1,000.00 each week (Exhibit 2 page 12), with Griffith testifying the change was necessary as a result of a downturn in gross income and sales for the company, and that he thought \$1,000.00 weekly was a good income for Harris. Harris opines he never had a direct conversation with Griffith of the change from commission to salary and he continued to submit invoices to Griffith of his sales although he accepted the salary checks without an accounting ever being made of unpaid amounts claimed to be due him over the entire period involved. He continued to work for Griffith, both in sales and office work, and he never made demand of Griffith of a commission balance due before suit was filed. He accepted the checks weekly for his services which included the office work. In May of 2002 Griffith terminated Harris citing a continued slowdown in work. On at least one occasion, Griffith borrowed money from Harris which was repaid.

Harry Kenneth Lefolt, Jr., a Certified Public Accountant, qualified as an expert witness, and furnished a report (Exhibit 9) which calculated at the commission rate Harris claimed the sum of \$144,638.00, less \$11,132.00, totaling \$133,496.00 for commissions was due from 1999 to 2002. Further, he calculated prejudgment interest of \$56,597.00 from July 11, 2002 when suit was filed.

ISSUE

Whether there existed an enforceable contract between the parties for Griffith to pay a commission to Harris until his termination.

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. 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. 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, 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 change to a set salary. The Court finds further 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.

Griffith argues the statute of limitations and laches as defenses to Harris' action which the Court finds applicable, with laches attaching to Harris's failure to make demand or otherwise memorialize amounts due him from much earlier commission invoices. Noting the language in *Hall v. Dillard*, 739 So.2d 383 (Miss.App. 1999), which cites *Twin States Realty Co. V. Kilpatrick*, 26 So.2d 356, (Miss. 1946), this Court finds laches is involved over a period of time when there is "...actual or passive acquiescence in the performance of the act complained of, then equity and good conscience to enforce such rights when a defendant has been led to suppose by the word [or silence, or conduct] of the plaintiff that there was no objections to his operations."

Here, plaintiff is seeking commissions only from the 1999 to 2001 period long after Griffith had changed the arrangement and basis of payment for plaintiff's services. Without a written agreement to give a definite period of time to Harris' entitlement to commissions, or a specific timely demand by Harris of prior amounts due him to counter the change in employment status, the Court finds 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.

The Complaint of Plaintiff is dismissed.

ORDERED AND ADJUDGED, this 11th day of April, A.D., 2007.



CHANCELLOR