

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

NO. 2007-CA-00639 SCT

*supp brief appellant*

WILLIAM S. HARRIS

APPELLANT/RESPONDENT

VERSUS

TOM GRIFFITH WATER WELL &  
CONDUCTOR SERVICE, INC.

APPELLEE/PETITIONER

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**SUPPLEMENTAL BRIEF OF APPELLANT/RESPONDENT,  
WILLIAM S. HARRIS**

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This Honorable Court is about to begin the process of reviewing the entire record, reading the trial court's decision and analyzing the Court of Appeals opinion. We are uncertain why a fact-driven case was granted certiorari, but the Petitioner's hyperbole and melodramatic comments may provide a clue.

We disagree with these types of statements littered throughout the Petition for Certiorari:

1. The Court of Appeals decision "... would drastically and unjustly do away with the ability of a party to terminate or modify a contract, even when the duration of the contract is not specified."
2. The Court of Appeals decision "... materially alters the law of contracts in Mississippi"; and
3. The Court of Appeals decision is in clear "conflict with well established contract law in Mississippi."

By now, this Court is well familiar with a petitioner's use of strong, shocking language suggesting that if a Court of Appeals decision is allowed to stand, business as we know it will come to an end. Rarely are these prophecies even remotely true.

We suggest to the Court that the Court of Appeals correctly determined that the trial court's decision was against the overwhelming weight of the evidence, nothing more. Bill Harris and Tom Griffith agree they had a commission sales agreement during the early part of their working relationship. The disagreement is whether Griffith decided to stop paying Harris commissions. The trial court accepted the testimony of Tom Griffith, despite overwhelming and substantial evidence that the commission sales agreement never ended.

The Court of Appeals, in its written opinion, never held that an oral promise of a business owner to pay commissions could never be modified by the owner. To the contrary, the Court of Appeals considered Griffith's testimony that there was a novation of the initial sales commission agreement. *Harris v. Tom Griffith Water Well*, 2007-CA-00639-COA ¶¶25-28 (*Miss.Ct.App.* 2009). The Court of Appeals correctly went on to find that there was no other evidence of a novation, other than Griffith's testimony. Moreover, the Court of Appeals noted that Griffith's credibility on this point was severely undermined by the documentary evidence and his own sworn testimony.

The Court of Appeals held that Griffith could not state with any specificity when the novation occurred; he could not produce any documentation to corroborate his testimony; the documentation produced was in conflict with his testimony; and he had given sworn interrogatory answers inconsistent with his testimony.

This was and is a fact-driven case, and the Court of Appeals decision is not monumental in its conclusions.

Harris and Griffith, all can agree, testified in diametrical conflict with one another. Harris said the sales agreement continued, while Griffith said that it ended at some unknown time. If this had been all the evidence presented, the chancellor, as the finder of fact, had the discretion to accept the testimony of Griffith. This was far from all of the evidence, however.

When this Court reviews the record, it will find extensive corporate records from Griffith's own office and other testimony providing the commission agreement continued.

1. Griffith's office continued to make separate sales commission check entries through 2002, until Harris left the business.
2. There were never any withholdings from the sales commission check paid through 2002, despite Griffith's argument that he changed the agreement making Harris a salaried employee at \$1,000.00 a week.
3. Griffith's statement that he changed the agreement to \$1,000.00 a week is inconsistent with the records, as Harris received periodic payments of different amounts during their relationship.
4. Harris continued to invoice the amount due for the sales agreements, with credits for payments being made during their relationship, and these invoices were routinely given to Griffith. Griffith never denied this fact.
5. The entire stack of corporate records, according to Harris's expert, revealed Griffith continued to pay commission checks through 2002 until Harris left the business.
6. Harris's expert, Ken Lelfodt, testified that there was no legal and other sound basis for Griffith's business to write checks to Harris without tax withholdings if indeed Harris was an employee. On the other hand, the expert testified that the method of payment without withholdings was consistent with the commission sales agreement.

7. Griffith never produced any documentation supporting his statement that all of the commissions had been paid in full.

8. At one point in his deposition, Griffith admitted he may not have paid Harris all the commissions owed.

9. Lee's own bookkeeper admitted Griffith's company continued to pay commission checks to Harris through 2002, when Harris left the company.

Thus, contrary to the inadequate assertions of Griffith, the Court of Appeals decision was based on the evidence. The facts of this case overwhelmingly prove Harris and Griffith had a commission sales agreement through 2002. Griffith's own bookkeeper, Bethany Lee, had to admit this fact, as pointed out by the Court of Appeals.

What the Court of Appeals found was that the only evidence in support of Griffith's position was his own testimony. His own testimony was inconsistent, vague and unexplained at times. Moreover, his testimony was directly contradicted by his own corporate records, his bookkeeper, expert evidence and other evidence; not just Harris's testimony.

There is only one sentence in the twenty plus page opinion of the Court of Appeals which, when read out of context, might be relied on by Griffith in support of his Petition for Certiorari. On page 20, in the first sentence under the Conclusion section, the Court of Appeals found that there was no substantial evidence to support the Chancellor's findings "... that there was a mutually agreed upon novation of the oral contract that Harris and Griffith had entered into, which required Griffith to pay Harris a 10% commission on all sales procured by Harris." The Court of Appeals, even when reading this sentence independent of the opinion, did not hold that novation of an oral contract without duration must be "mutually agreed upon." The Court of Appeals found that the Chancellor's opinion of a mutually agreed upon novation was not

supported by the evidence. The Court of Appeals decision supports Griffith's statement of the law, which is that an oral contract for services, without duration, may be terminated at will. The specific facts of this case, however, overwhelmingly prove that Griffith never terminated the sales commission agreement. This was the finding of the Court of Appeals.

The Court of Appeals used the correct standard of review and correctly found that a chancellor's finding of fact will not be disturbed unless the findings are manifestly wrong or clearly erroneous. *Vaughn v. Vaughn*, 798 So. 2d 431, 433 (¶9) (Miss. 2001). If the findings of the chancellor are not supported by substantial credible evidence and are manifestly wrong, the chancellor's decision must be set aside on appeal. *Id.* At 433-34 (¶9) (citing *Pearson v. Pearson*, 761 So.2d. 157, 162 (¶14) (Miss. 2000).

We ask this Court to pay close attention to pages 13, 14 and 15 of our Reply Brief and Pages 30, 31 and 32 of the Appellant Brief before the Court of Appeals. These pages provide extensive detail and record citations to the volumes of evidence supporting our contention that the sales agreement was never terminated.

Griffith's Petition for Certiorari contains the following inaccurate statement on page 6: "The Court of Appeals has ruled that an employer or a party to a contract without any agreed duration is bound by the original terms of the contract unless the other party agrees to a novation." The Court of Appeals decision makes no such ruling. All of the law cited by Griffith in his Petition for Certiorari is correct. Contracts for an indefinite period are terminable at will by either party. The Court of Appeals has not changed this law. Griffith had the right to arbitrarily decide that he would no longer pay Harris a commission but pay him \$1,000.00 a week, as he testified. The evidence presented at trial, however, did not support Griffith's

contention that he changed the commission sales agreement. This is what the Court of Appeals found throughout its exhaustive and extensive opinion and review of the evidence.

Petitioner's counsel, while writing a respectable brief, did not handle the case below and did not appear at the trial. The undersigned did and heard all the evidence. The evidence in the record, read by this Court, played at the trial no differently than it reads. After a full day of evidence Griffith had only his unsubstantiated and discredited assertion that the sales agreement had been terminated. He had no adequate response for why his own bookkeeper contradicted him. He had no explanation why his own corporate records were in conflict with his position. He had nothing to support his testimony. This is why the Court of Appeals correctly reversed the Chancellor's decision, and the Court of Appeals ruling will have no effect on existing contract law.

Business owners still have the right to terminate, change or modify contracts without duration. In our case, a business owner, attempted to retroactively change the sales agreement after the lawsuit was filed. Witnesses and records from his own company proved he was unjustifiably trying to renege on his promise.

We ask that this Court accept that the Court of Appeals decision is not momentous law-changing material or earth shattering, legal analysis but correctly determines that the overwhelming weight of the evidence was in Harris's favor. The overwhelming/substantial evidence and manifest error standard exists for cases such as this one. Here, the appellate court has the ability to, and should, rectify the decision of the trial court when it's decision clearly was not supported by the overwhelming and substantial evidence of record.

Respectfully submitted this the 13<sup>th</sup> day of November, 2009.

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**CERTIFICATE OF SERVICE**

I, the undersigned do hereby certify that I have this date served via Federal Express and/or U.S. Mail, prepaid first class, a copy of the above **Supplemental Brief of Appellant/Respondent, William S. Harris** to the following counsel of record:

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Dated, this the 13<sup>th</sup> day of November, 2009

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