2007-CA-01378 E/CT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. John Holaday, Holaday, Moorehead & Eaton, Attorneys At Law, PLLC, Counsel for Appellee
2. Jay Gore, III, and Adam Kirk, Counsel for Appellant
3. Ham Management & Development Co., LLC, Appellee
4. David Hill, Esq., Member of HAM Management & Development Co., LLC
5. David Minyard, Esq., Member of HAM Management & Development Co., LLC
6. Jim Earl Aron, Appellant
7. Honorable Kenneth M. Burns, Special Lafayette County Chancery Court Judge

John Holaday

JOHN HOLADAY

STATEMENT REGARDING ORAL ARGUMENT

Ham Management & Development Co., LLC, Appellee and Cross Appellant herein, respectively requests that oral argument be granted. Appellee respectively suggests that oral argument will be of benefit to the Court in making a just and appropriate disposition of this case.

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2007-CA-01378

JIM EARL ARON **APPELLANT**

V.

HAM MANAGEMENT & DEVELOPMENT CO., LLC **APPELLEE**

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Course of the Proceedings

Plaintiff does not generally dispute the procedural facts as set forth in Defendant's Brief in the section entitled, "A. Nature of Case, Course of Proceeding and Disposition in the Court Below." However, to have a complete statement of those procedural facts, it is important to note that after the trial court's Judgment of May 29, 2007, HAM paid the $471,958.00 awarded to Aron by the trial court. After Aron, through his counsel, accepted the Judgment amount from HAM, Aron filed this appeal. At that time, HAM was unable to seek relief from the trial court, as it had lost jurisdiction of this matter as a result of this appeal.

Statement of Facts Relevant to the Issues Presented for Review

David Minyard and David Hill are attorneys whose main law office is located in Oxford, Mississippi. (Tr. at 122)[1] They typically do not handle real estate or contractual legal matters. (Tr. at 122, 312)

In December of 1993, Hill and Minyard bought an interest in ten (10) acres of property in south Oxford along with a local pharmacist, Kenneth Coleman. (Ex. D3, Ex. D4) Coleman had

[1]Throughout this document, Defendant will refer to all trial exhibits as Ex. P1, D1, etc.

previously bought the ten (10) acres from the Wilson estate. (Tr. at 315-16) In the fall of 1995, Hill and Minyard bought equal interests along with Coleman in the remainder of the Wilson estate, approximately sixty-two (62) acres, more or less. (Tr. at 315-16, Ex. D3, Ex. D4) The purchase price of the initial ten (10) acres in 1993 was two hundred seventy-five thousand ($275,000.00) dollars. (Ex. D3, Ex. D4) The purchase price of the sixty-two (62) acres in 1995 was five hundred thousand ($500,000.00) dollars. (Tr. 2 at 102, Ex. D3, Ex. D4) In 1995, Coleman, Hill and Minyard formed an LLC named CHM Management & Development Co., LLC, the primary purpose of which was to manage and develop the real property mentioned above. Hill, Minyard, and CHM purchased and managed the property with personal financial contributions and one or more loans from local banks.

In 1998, Hill and Minyard on the one hand and Coleman on the other hand decided to amicably part ways. The members of CHM agreed to equitably divide both the property and the debt of the LLC and allow Coleman to leave the LLC. (Tr. at 127-28) Specifically, Coleman took an undivided interest in forty-nine (49) acres, more or less, and assumed approximately three hundred fifty thousand ($350,000.00) dollars of the debt of the LLC. Hill and Minyard jointly took an undivided interest in 25.54 acres and assumed approximately five hundred thousand ($500,000.00) dollars of the debt of the LLC. Hill and Minyard were able to negotiate 15.54 of their 25 acres free and clear of all debt. (Tr. at 129-31) Upon Coleman's departure from the LLC, Hill and Minyard changed its name to H&M Management and Development Co., LLC. (Tr. at 131) The real property which Hill and Minyard retained is the real property which is the subject of the dispute between the current parties to this suit. This real property will hereinafter be referred to as "the subject property."

At all pertinent times, the intent of CHM, and later Hill and Minyard, was to develop the

subject real property as a commercial subdivision. (Tr. at 135-36) Prior to Coleman leaving the LLC, the LLC had employed an engineering firm, Southern States Engineering, to draw the plans of the subdivision and to assist in the approval of those plans by the City of Oxford. (Tr. at 133-34) When Coleman left, Hill and Minyard chose to utilize the services of a different engineering firm, Precision Engineering of Oxford, to complete the plans begun by Southern States. (Tr. at 135, Ex. D7) Precision finalized the plans, and the LLC obtained the approval of the City of Oxford to develop the property as a commercial subdivision, namely, Magnolia Place Development, on or about December 14, 1998. (Tr. at 136, Ex. D7)

In 1994, Hill, Minyard and Coleman individually hired contractors to begin work on the subject property including but not limited to Claude Neal of the business known at that time as Lafayette Dozier. (Tr. at 133) Over the course of the next several years, Mr. Neal and other individuals performed a significant amount of work on the subject property including but not limited to: leveling the subject property; clearing trees and debris off of the subject property; draining and filling in a large pond on the subject property; and performing other tasks designed to prepare the property for commercial development. (Tr. at 133) This work was done by Hill, Minyard and Coleman individually first, then by CHM after its formation. Hill and Minyard spent no less than $167,375.00 on this pre-development construction work primarily through Claude Neal. (Tr. at 133-35, Ex. D8)

In 1998, Jim Earl Aron was a client of the Hill & Minyard law firm on matters unrelated to the subject property. (Tr. at 316) Mr. Aron approached Hill and Minyard and requested that they allow him to become a member of the LLC in exchange for completion of the construction work necessary for the commercial development of the property. (Tr. at 317-20) Mr. Aron persisted in

his attempts to persuade Hill and Minyard to let him into the LLC. (Tr. at 138-40, 317-20) He represented specifically that he had the equipment, experience and financial resources to complete the construction. (Tr. at 317-20) Through several conversations, Hill and Minyard told Mr. Aron that the purpose of the LLC was to develop the subject property as a commercial subdivision. (Tr. at 317-20) Hill and Minyard informed Aron that the City of Oxford was insistent on compliance with all applicable ordinances and the details of the previously approved plans and specifications. (Tr. at 317-20, Ex. D7) Hill and Minyard discussed with Mr. Aron the fact that all construction on the property had to be in conformity with the plans and specifications and that all work had to be approved by John Lewis, the primary Precision engineer over the project. (Tr. at 317-20, Ex. D7, Ex. D12) Obviously, Hill and Minyard were busy practicing law and knew that they had to have someone to complete the necessary development of the subject property. (Tr. at 317-20) Ultimately, Mr. Aron persuaded Hill and Minyard to allow him to participate in the LLC upon his explicit representations that he could either do the development work himself or pay a qualified person to complete the project. However, it was made clear to Aron that Hill and Minyard's real interest in letting him into the LLC was primarily to have him finish the development of the subject property. (Tr. at 140-43, 174, 321-23) The parties changed the name of the LLC to HAM in recognition of the addition of Mr. Aron into the LLC. (Tr. 2 at 80) The parties entered into a written agreement which was later amended to clarify certain provisions of the agreement. (Tr. at 320-24, Ex. P2) The agreement called for Hill and Minyard to convey a 1/3 interest in the subject property to Mr. Aron and then for Mr. Aron to convey the 1/3 interest back to the LLC. (Tr. at 350-53, Ex. P2) The parties executed the appropriate deeds for the conveyance of the property, and ultimately, HAM owned the subject property. (Tr. at 353, Ex. P7, Ex. P8) The agreement called for the members' respective

interests in the subject LLC to be determined after the subject property was developed and lots began to be sold, and would be paid after the members' respective bases were deducted from the value of the subject property. (Tr. at 322-24, Ex. P2)

In exchange for the conveyance of the 1/3 interest, Mr. Aron had three (3) main obligations. (Tr. at 321-26, Ex. P2) First, he was to pay David Hill and David Minyard sixty-two thousand five hundred ($62,500.00) dollars each. (Tr. at 312, 324-25) Second, Mr. Aron agreed to pay 1/3 of the mortgage note payments and taxes. (Tr. at 321, 326, Ex. P2) Third, and most importantly, Mr. Aron had to complete the necessary development on the property to make the commercial subdivision lots ready to be sold. (Tr. at 321-23 , Ex. P2) Specifically, it was made clear to Mr. Aron that the work included: the construction of a road through the property; the clearing and leveling of the property; the subdivision of the property into commercial lots; the construction of adequate sewage and drainage on the property; and any other work necessary to sell the commercial subdivision lots. (Tr. at 321-23) The exact language of the agreement stated that:

> 7. DGH, DLM and JEA agree that JEA will be primarily responsible for seeing to the clearing of the property, moving dirt onto and around the property, the building of a road through the property, and all other acts required for preparing the property for sale and to be built upon. The parties agree that any and all funds which JEA spends in this manner will be added to his basis in the property.

(Ex. P2)(emphasis added).

Not only did Hill and Minyard make these issues clear to Mr. Aron, but more importantly, John Lewis specifically instructed Mr. Aron that each of these tasks had to be performed in conformity with the City approved plans and specifications. (Tr. at 141-43, 317-20, Ex. D7, Ex. D12) At no time prior to his admission into the LLC did Mr. Aron suggest to Hill, Minyard or John Lewis that he did not have the experience, equipment and/or financial resources to finish the job or

live up to his agreement. (Tr. at 139-40, 150-51, 319)

John Lewis provided details to Mr. Aron on what work needed to be performed. (Tr. at 137, 143, 146, 281-83, 292-93, Ex. D12) In fact, Mr. Lewis provided Mr. Aron with a breakdown of the different areas of construction which needed to be completed with a separate cost estimate for each area. (Tr. at 308, Ex. D6) The total construction estimate was in the amount of $692, 090.00. (Tr. at 284, Ex. D6) The total estimate was broken down into seven areas, as follows: dirt work for $305,281.00 (approximately 46% of the total project)[2] ; storm drainage system for $22, 256.00 (3.4 % of the total project); french drain system for $10,200.00 (1.5 % of the total project); sanitary sewer system for $63,520.00 (9.6%of the total project); water distribution system for $80,700.00 (12.2 % of the total project); street work for $161, 177.00 (24.5% of the total project); and $16,000.00 of engineering work[3]. (Tr. at 285-88, Ex. D6)

Mr. Aron began work on the subject property in the latter part of 1998. Although Mr. Aron suggests that he substantially completed the work he agreed to perform, both John Lewis and the documentary evidence in the case suggests that he performed: 45 % of the dirt work; 95 % of the storm drainage system; 0 % of the french drain system; 0% of the sanitary sewer system; 0% of the water distribution system; and 0% of the street work. (Tr. at 291-92) Thus, Mr. Aron actually performed only 24 % of the total work which needed to be performed in order to sell commercial lots

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[2]Defendant has simply divided the cost estimate for each sub-area by the total cost estimate to determine an approximate percentage of the total project represented by each sub-area. For this purpose, Defendant has conservatively utilized the total figure on Exhibit D12 prior to the addition of a 5% contingency, i.e., $659,133.00. This method benefits Plaintiff.

[3]Obviously, the engineering work was performed by Precision Engineering and was not the responsibility of Hill, Minyard or Aron.

for the subject property.[4] (Tr. at 291-92) In fact, most of the work performed on Mr. Aron's watch was not actually performed by Mr. Aron but rather by individuals and/or entities he hired such as Tidwell Construction Company. (Tr. at 288-92) Ultimately, Mr. Aron did not pay all of his sub-contractors such as Tidwell. (Tr. at 331) As a result, in January 1999, the Tidwells placed a construction lien on the subject property, and Hill and Minyard had to pay a significant sum of money to the Tidwells to have it removed. (Tr. at 331, Ex. P6)

Despite repeated attempts by Hill and Minyard to encourage Mr. Aron to finish the job he had agreed to do, he did not. (Tr. at 150-51, 331-32) On numerous occasions, Hill and Minyard verbally requested that Mr. Aron complete the construction. (Tr. at 150-51, 331-32) Mr. Aron gave no legitimate explanation for his failure to finish the job. (Tr. at 150-51, 331-32) No further development has taken place on the subject property, since Mr. Aron's abandonment of the project in January of 1999. Mr. Aron's failure to perform the requested work has resulted in the inability of the LLC to sell any commercial subdivision lots. The facts show that Mr. Aron never intended to complete the work he agreed to do under the agreement with Hill & Minyard. The facts support the conclusion that Aron fraudulently induced his way into the subject property. Defendant that Aron never met his agreed upon obligations to earn a third (1/3) interest in the subject property.

In addition to the foregoing problems with Mr. Aron's failure to meet his obligation to

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[4]Defendant simply multiplied the percentage of work completed in each sub-area by the percentage which that area represented of the total project to determine the number of total project percentage points accomplished by Mr. Aron for each sub-area. Thus, Mr. Aron completed 21% of the total project when he finished 45% of the dirt work which represented 46% of the total project, i.e., 45% multiplied by 46% equals approximately 21%. He likewise completed approximately 3% of the total project when he finished 95% of the storm drainage system which comprised 3.4% of the total project, i.e., 3.4% multiplied by 95% equals approximately 3%. Since Mr. Aron did not complete any work on any of the other sub-areas, Defendant then added the percentages of these two sub-areas together to determine the total percentage of the project completed by Mr. Aron and his sub-contractors, i.e., approximately 24% of the total project.

complete the development of the subject property, Mr. Aron was routinely late on paying his portion of the note payments and did not make all of his tax payments. (Tr. at 144-45, Ex. P1, P2) Also, Mr. Aron twice wrote checks to Hill and Minyard for his one hundred twenty-five thousand ($125,000.00) dollars of good faith money which were non-negotiable. Mr. Aron testified that he knew that the checks were bad when we wrote them. Mr. Aron kept telling Hill and Minyard to not cash the checks. Ultimately, Mr. Aron satisfied that aspect of the Agreement by transferring a piece of property to Hill and Minyard which they agreed to accept as payment for the one hundred twenty-five thousand ($125,000.00) dollars. (Ex. P3) Hill and Minyard had no other agreement with Aron when accepting the land in return for the non-negotiable checks except that the land would be accepted in lieu of the one hundred twenty-five thousand ($125,000.00) dollars owed to Hill and Minyard as part of the agreement. (Ex. P3) Mr. Aron likewise filed for personal bankruptcy on or about May 19, 2003. (Tr. at 30, Ex. D2) Mr. Aron never told Hill and Minyard that he was filing for personal bankruptcy or that he had filed for personal bankruptcy. (Tr. at 151) Defendant maintains that at the time of Mr. Aron's filing his personal bankruptcy in May of 2003, he was already being represented by Mr. Jay Gore, his counsel in this case. (Tr. at 31) Mr. Gore had already put Hill and Minyard on notice in February of 2003 that he represented Mr. Aron with respect to Aron's interest in the LLC. (Tr. at 31, 333-35, Ex. D2) It is completely unreasonable to conclude that Mr. Aron would at any time thereafter have been in Hill and Minyard's office to discuss his personal bankruptcy or any other legal matter. Hill and Minyard found out about Mr. Aron's personal bankruptcy by their prior counsel in this matter, Stewart Guernsey, only after this litigation began. (Tr. at 151) In his personal filing, Mr. Aron did not initially list his interest in the LLC as an asset (Tr. at 80-81, Ex. D2 at Schedule A. Real Property), but only later amended his

schedules to list his 1/3 interest in the LLC with a value of $850,000.00. (Ex. D2 at page two of Schedule A. Real Property - Amended). Aron never had the permission of Hill and Minyard to file his individual bankruptcy in 2003 and, as a matter of law, was dissociated from the LLC at the time he filed bankruptcy.

Since Mr. Aron's abandonment of the subject job, Hill and Minyard have maintained the status quo on the subject property and mitigated their damages as much as possible under the circumstances. Hill and Minyard borrowed money against this property on one occasion after Mr. Aron's abandonment of the project. (Tr. at 172, 222) Hill and Minyard made a specific visit to notify Mr. Aron of their intent to utilize the subject property as collateral for a small loan of twenty-five thousand ($25,000.00) dollars in February, 2002. (Tr. at 173, 339) He voiced no objection. (Tr. at 173, 339) Hill and Minyard timely paid back the loan in December, 2002, and it no longer encumbers the subject property. (Tr. at 222)

Although Hill and Minyard have received informal inquiries from potential buyers of the property, they have not received any hard offers. The only qualified expert testimony concerning the value of the subject property comes from the expert appraiser for Mr. Aron, J. Filo Coats, who has opined in his report that he felt the current value was $3,760,000.00 and the value of the subject property at the time of Mr. Aron's bankruptcy was $2,760,000.00. (Ex. D11) Thus, when Mr. Aron filed bankruptcy in May of 2003, the value of the subject property was $2,760,000.00 according to his own expert appraiser, J. Filo Coats. (Ex. D11).

Hill and Minyard's expert witness accountant, Robert Church, has opined that Hill and Minyard's respective bases in the subject property are valued at $ 1,320,244.00, collectively, or $660,122.00 each. (Tr. at 244, Ex D8, Ex. D10) Mr. Aron's accountant, Chris Jones, opined by

deposition that Mr. Aron has invested approximately $264,496.40 in the subject property. (Ex. P1) However, Mr. Aron did not offer any testimony or evidence of the value of his "basis" in the property pursuant to the subject agreement. (Ex. P1, Ex. P2)

Although Mr. Aron initially filed in this case, Hill and Minyard counterclaimed on behalf of HAM Management and Development Co., LLC. (R. at 1-10 and 159-71) Hill and Minyard requested that the trial court find that Mr. Aron was dissociated from the LLC when he filed personal bankruptcy on or about May 19, 2003. (Ex. D2) Hill and Minyard further requested that the trial court find that Mr. Aron was only entitled to receive the exact amount of money he put into the LLC. In the alternative, Hill and Minyard requested that the trial court find that Mr. Aron receive his legitimate basis put into the subject property plus no more than 24% of his one-third of the value of the subject property at the time of his bankruptcy after the deduction of all the parties' respective bases. Defendant provided the trial court with a detailed analysis of this calculation.

In response to the request of Defendant, the trial court ruled that Aron was entitled to $471,958.00 from HAM. (R. at 485-92) The trial court broke down this amount as follows: $371,958.45 for the amount invested in the project by Aron; and $100,000.00 for Aron's interest in the LLC. (R. at 485-92) The trial court ruled that HAM pay the entire Judgment amount no later than August 1, 2007. (R. at 485-92) After the trial court's denial of Aron's post-trial motion, HAM undisputedly paid the total amount to Aron prior to August 1, 2007. Despite the acceptance of such payment, Aron appealed the trial court's Judgment.

SUMMARY OF THE ARGUMENT

All of Aron's issues on appeal revolve around allegations that the trial court did not properly calculate Aron's interest in the LLC. Aron had every opportunity to provide the trial court with any

and all reasonable methods of calculation available to him. The trial court heard testimony from Aron himself, HAM's expert accountant, Robert Church, and even a proffer from Aron's accounting expert, Chris Jones. Despite all of the testimony and evidence, the trial court chose to calculate the basis of each member of HAM and formulate its Judgment based on such a calculation. HAM contends that the trial court utilized reasonable and rational methods of calculation in determining the basis or each member. Aron simply believes that the trial court should have used a different method. Such an argument does not overcome the abuse of discretion standard applied to Chancellors in this State. In fact, as set forth below in the cross-appeal of HAM, it is the contention of HAM that the trial court should have determined that Aron forfeited his entire interest in HAM based upon his fraud in representing to the other members of HAM that he could complete the construction and in his failure to complete the construction with no justification.

Finally, HAM asserts in its cross-appeal that Aron should not be allowed by this Court to prosecute an appeal after accepting the full Judgment amount. Aron did not raise this issue with the trial court and did not give HAM an opportunity before appealing this case to this Court. By accepting the Judgment amount, HAM is estopped and/or waived its right to prosecute this appeal.

ARGUMENT

On or about July 30, 2004, Plaintiff filed the Complaint for Accounting and for Injunctive and for Other Relief against Defendant HAM. (R. at 1) In that Complaint, Plaintiff requested the following relief from this Court:

> Wherefore Plaintiff brings his Complaint before this Court, and prays that upon a hearing on the merits of this cause for this Court's injunction to the Defendant requiring a full and complete accounting of all revenues, expenses, and disbursements of the Defendant for the period of time, beginning July 15, 1998 to the present, and for a determination of the value of his interest and of the value of the

> respective interests of the other members of the LLC, and further, for judgment upon a hearing of the merits hereof in the amount of $261,634.39 or such other amount as the Court may determine to be due him, and additionally for an Order of this Court requiring the sale of the property of the defendant in order to accomplish the stated purpose of the agreement of the members upon which the Plaintiff's participation in membership of HAM Management and Development Co. LLC was based, together with the award of a reasonable attorney's fee and all costs hereof.

(R. at 4) Plaintiff asked for four distinct grants of relief: 1) a full accounting; 2) a determination of the value of the respective interests of the members of HAM; 3) and Order requiring the sale of the property; and 4) the award of a reasonable attorney's fee and all costs hereof. (R. at 4) At issue in this appeal is only item 2) of Plaintiff's request for relief. Specifically, Plaintiff requested that the Court determine the respective interests of the members of HAM. Plaintiff raises this issue on appeal in three primary sub-headings.

I. The Trial Court Correctly Interpreted the Agreement's Intended Definition of 'Basis'[5]

In essence, this matter involves the interest of the parties in the only asset of HAM which is the subject real property. Defendant agrees that such relief is within the jurisdiction of the Chancery Court. *Lawrence County School Dist. v. Brister*, 849 So.2d 851, 852 (Miss. 2002); *Gulf Park Water Co., Inc. v. First Ocean Springs Development Co.*, 530 So.2d 1325, 1335 (Miss. 1988)(citing Miss. Const. 1890 § 160). As discussed above, the parties' agreement relating to the subject real property was governed by an Agreement and Addendum to that Agreement.

In that Agreement and Addendum, the parties agreed that the members' respective interests in the subject LLC were to be determined after the subject property was developed and lots began

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[5]For the convenience of the Court, Appellee has utilized in his Brief the same issue number system set out in Appellant's Brief. However, Appellee has changed the titling of these issues to reflect Appellee's position as to each issue.

to be sold, and would be paid after the members' respective bases were deducted from the value of the subject property. (Tr. at 322-24, Ex. P2) The Addendum to the Agreement clearly indicates that the parties' respective bases would be determined pro rata. (Ex. P2)

In this assignment of error, Plaintiff appears to contend that the trial court improperly calculated his basis in the property. Specifically, Plaintiff criticizes the trial court by using a different formula for determining his basis as opposed to the respective bases of the other members, Hill and Minyard. On the contrary, the trial court did not utilize a different formula or method in determining the respective members' basis. The trial court simply took into consideration that Hill and Minyard owned the subject property prior to Aron acquiring his interest. As discussed above, Hill and Minyard incurred debt to acquire the real property. Further, they spent a great deal of money on developing the property prior to Aron's involvement. It is absolutely logical and reasonable that the trial court would give Hill and Minyard credit for owning the land and spending money on the land prior to Aron acquiring his interest in the LLC, i.e., the land. Hill and Minyard's ownership in the property and their prior investments in developing the property was each of their basis in the property. Likewise, Aron was to receive what he put into the land and the LLC in addition to his interest in the property. The trial court properly ruled that Aron be reimbursed his investment. His investment was his basis in the property.

Although it is candidly difficult to follow Aron's argument in this regard, he appears to suggest that Hill and Minyard should have been given no credit for their acquisition or development costs of the subject property prior to Aron's involvement. That position is not supported by the evidence or the law. Plaintiff's citation to basic contract case law which calls for ambiguities to be resolved against the drafter offers him no support. It is simply unreasonable for Mr. Aron to have

assumed that Hill and Minyard would let him in this project and not take into consideration their acquisition and development interests.

The Court of Appeals has ruled,

> This Court will not disturb the findings of a chancellor unless we find an abuse of discretion, an erroneous application of law, or manifest error. Andrews v. Williams, 723 So.2d 1175, 1177(¶ 7) (Miss.Ct.App.1998). Thus, if we find substantial evidence in the record to support the chancellor's findings, we will not reverse. Wilbourne v. Wilbourne, 748 So.2d 184, 186(¶ 3) (Miss.Ct.App.1999).

Webb v. Webb, 974 So.2d 274, 276 (Miss. App. 2008). The trial court properly determined the parties' respective bases in the subject property and did not abuse its discretion.

II. The Trial Court Did Not Commit Prejudicial Error in Determining the 'Basis' of Hill and Minyard by Including Debt as Equity

A. The 'basis' awarded properly included debt which was assumed by Aron.

1. The 'basis' awarded properly included an arbitrary assignment of value for 15.54 acres of the 25.54 acres.

Defendant respectfully maintains that Plaintiff's second assignment of error is just a different way of stating his first assignment of error. Here, Plaintiff criticizes the trial court for including in the estimation of the respective bases of Hill and Minyard an amount to consider the prior acquisition costs of the real property for Hill and Minyard. When they acquired the subject real property, they split with Coleman. Coleman took an undivided interest in forty-nine (49) acres, more or less, and assumed approximately three hundred fifty thousand ($350,000.00) dollars of the debt of the LLC. (Tr. 1 at 296) Hill and Minyard jointly took an undivided interest in 25.54 acres and assumed approximately five hundred thousand ($500,000.00) dollars of the debt of the LLC. Hill and Minyard were able to negotiate 15.54 of their 25 acres free and clear of all debt. (Tr. at 129-31)

Aron contends, in essence, that Hill and Minyard should not have been given credit at all for the prior ownership of the 15.54 acres, because their negotiation with Coleman left this land free and clear of debt. HAM offered the expert testimony of Robert Church who offered a reasonable explanation and accounting method for a determination of Hill and Minyards' basis in this property. The trial court accepted Mr. Church's method. Mr. Church underwent a Daubert voir dire examination by Plaintiff's counsel. (Tr. at 234-37) Mr. Church explained that there was not a separate purchase price for the 15 acres, so he used a reasonable method to determine Hill and Minyard's basis in the property. (Tr. at 234-37) Mr. Church testified on direct examination that his method was not only reasonable but was in conformity with generally accepted accounting principles. (Tr. at 237-38) In addition, Mr. Church underwent extensive cross-examination concerning this issue. (Tr. at 249-56) Mr. Church's methods were sound in determining the basis of Hill and Minyard in the subject 15 acres, and the trial court did not err in relying thereon.

2. The purchase of the all the property was properly included in the debt assumed by Aron, but was credited to the 'basis' of Hill and Minyard to the exclusion of Aron.

This assignment of error appears to be virtually identical to the argument made in the preceding section. The only difference appears to be that Aron maintains that the trial court allowed the arbitrary evaluation of the basis of Hill and Minyard in the subject 15.54 acres but then held Aron to a strict standard in accounting for his expenditures in the property. Again, Aron misses the mark. The trial court held Aron to this standard, because his expenditures could be proven with certainty. On the contrary, since the 15.54 acres were not purchased in a separate transaction, Hill and Minyard could not give a distinct purchase price for that acreage but had to rely on their expert accountant to utilize a rational accounting method for evaluating their basis in that property. No different

treatment was given to Hill and Minyard by the trial court than was given to Aron.

In addition, in this assignment, Aron indicates that the grant of the property to him was not subject to any conditions other than the assumption of the Mechanics Bank debt. According to Aron, his one-third interest in the real property was definitive and not subject to any further deductions. On the contrary, a review of the subject Agreement and Addendum between the parties reveals that Hill and Minyard deeded him an interest in the subject property contingent upon his performance of various conditions including but not limited to the assumption of debt, the payment of cash and the development of the property. (Tr. at 321-26, Ex. P2) Why else would these owners of real property simply convey a one-third interest in a party having no prior interest or involvement with the property? This assignment of error is simply without merit.

Also, as to this assignment of errot, it is apparent that Plaintiff confuses the parties' respective one-third interests in the real property from the parties respective bases in said property. While the Agreement and Addendum did provide that all parties would have a one-third interest in the LLC, and thus the property, it provided that the interests would be calculated after deducting the parties respective bases. (Ex. P2) Thus, the first calculation that had to be made by the trial court was the amount of the parties' respective bases. Only then could the trial court move on to consider the parties remaining interests in the property. Plaintiff states in his Brief that "[t]he result of this position is that Aron never had the equal 1/3 interest for which he bargained." (Appellant's Br. at 19) Respectfully, Aron is missing the point. The calculation of his one-third interest was subject to a prior payment to the members of the LLC, including himself, of each of their respective basis in the property. The trial court relied upon a reasonable method in determining the bases of the parties.

B. The 'basis' awarded to Hill and Minyard properly included amounts for expenditure made after Aron's date of dissociation.

Aron contends in this assignment that the trial court erred by including in the calculation of the basis of Hill and Minyard amounts paid after Aron's effective date of dissolution of May 19, 2003. The trial court ruled that Aron was statutorily dissociated from the LLC by his filing of a personal bankruptcy on May 19, 2003. (R. at 490) Aron is critical of the trial court for including in the calculation of Hill and Minyards' respective bases amounts paid on taxes and debt after Aron's dissociation. However, as conceded by Aron in his Brief, the trial court consistently calculated Aron's basis in the LLC in the exact same manner. That is, the trial court gave Aron credit for payments he had made after May 19, 2003, to the LLC debt and ordered that Aron was entitled to receive such amounts back from HAM as part of his basis. (R. at 490, Appellant's Brief at 24)

The trial court's methods which took into consideration payments made on LLC debts after Aron's effective dissociation from the LLC were fair, reasonable and consistent with all parties. The Chancellor did not abuse his discretion in this regard.

III. The Trial Court Did Not Commit Prejudicial Error in Assessing Aron's Interest in H.A.M., LLC With a Monetary Penalty Without Testimony or Proof on Damages

A. Proof of damages was offered at trial

Aron suggests that Hill and Minyard did not provide proof of damages at trial, and thus, the trial court's ruling giving Aron $100,000.00 for his interest in the LLC was without evidentiary support. First, Aron is mistaken in his assertion that Hill and Minyard suffered no damages as a result of his misconduct. For example, in January 1999, the Tidwells placed a construction lien on the subject property due to Aron's failure to pay them, and Hill and Minyard had to pay a significant

sum of money to the Tidwells to have it removed. (Tr. at 331, Ex. P6) This payment is an example of the damages suffered by Hill and Minyard as a result of Aron's breach of contract, negligence, fraud, etc.

However, whether Hill and Minyard produced evidence of damage is not the point, as the trial court did not rule based on Hill and Minyard's counterclaim. The trial court ruled on Aron's request contained in his Complaint "for a determination of the value of his [Aron's] interest and of the value of the respective interests of the other members of the LLC." (R. at 4) Aron asked the trial court for equitable relief. The trial court heard all of the evidence presented at trial and considered all of the documents offered at trial by all parties. For example, the trial court considered the evidence John Lewis, the project engineer, that Aron had not come near to completing the work which he had agreed to perform on the subject property. (Tr. at 291-92) The trial court considered the factual reality that the subject property would have been completed years ago and would have been ready for lease as a commercial subdivision but for the failure of Aron to finish the work he had promised to perform and then by tying up the real property in litigation for the duration of this lawsuit. After taking all evidence into consideration and after weighing the respective equities of the parties, the trial court determined that Aron was only entitled to his investment in the property and an additional $100,000.00. Aron asked the court to rule on the LLC's respective interests, and it did. The fact that the trial court did not rule in Aron's favor is not a ground for appeal. The Chancellor did not abuse his discretion and should not be overturned as requested by Aron.

B. Damage Claim is not the personal action of Hill and Minyard and is not barred by Miss. Code Ann. Section 15-1-49

First, as set forth in the previous assignment of error, the basis for the trial court's Judgment

was not the Counterclaim filed by HAM but the equitable determination of the interests of the members of the LLC requested by Aron in his Complaint. (R. at 4) Thus, the issue of what individual or entity owned the breach of contract action alleged in the Counterclaim filed in this action is irrelevant to this appeal.

Next, David Hill and David Minyard were named as Defendants in the Answer, Affirmative Defenses and Counterclaim filed in this action alleging various causes of action. That Counterclaim was properly served upon counsel for Aron, and thus, preserved any claims stated therein.

Finally, any civil causes of action asserted by HAM or its members against Aron were not barred by Miss. Code Ann. §15-1-49 as suggested by Aron. This Court has previously held that when a party files a suit against another party, the defendant party can assert causes of action in the way of a setoff in their counterclaim even if such causes of action would have been barred otherwise. *Singing River Mall Co. v. Mark Fields, Inc.*, 599 So.2d 938 (Miss. 1992).

Thus, this assignment of error is without merit.

IV. The Trial Court Erred in Awarding Aron Any Monetary Amount

Defendant filed an Answer to Plaintiff's Complaint as well as a Counterclaim. Defendant asserted various civil causes of action in its Counterclaim which will be covered in this section of this document. The trial court did not address the Counterclaim, and HAM maintains that is should have done so and awarded Plaintiff no monetary amount above the amount of his investment.

It is crystal clear from the evidence that Jim Earl Aron pursued David Hill and David Minyard to become a part of HAM. They did not approach him nor did they need him. He convinced them over numerous occasions that he had the expertise, equipment, experience, qualifications and money to complete the construction. They explained to him how demanding the

City of Oxford was regarding compliance with the approved plans and specifications. They explained to him how they wanted to develop the subject property into commercial subdivision lots. They directed him to John Lewis, the project engineer, who explained to Plaintiff in detail the complexity and degree of work which had to be performed. Defendant maintains that Plaintiff knew from the beginning that he did not have the money to timely pay the notes and taxes on the property. Defendant maintains that Plaintiff knew from the beginning that he did not have the ability, expertise or money to finish the construction project. Simply put, he lied to get in the door.

The Mississippi Court of Appeals has recently discussed the cause of action of fraud and/or fraudulent inducement. The Court in *Lacy v. Morrison*, 906 So.2d 126, 129 (Miss. App. 2004), stated as follows:

> Fraud in the inducement arises when a party to a contract makes a fraudulent misrepresentation, i.e., by asserting information he knows to be untrue, for the purpose of inducing the innocent party to enter into a contract. Contracts entered under such circumstances are voidable by the innocent party; however, the innocent party must first establish the presence of the misrepresentation or fraud alleged, which requires proving, by clear and convincing evidence, the following elements:
>
> (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the matter reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance upon its truth; (8) his right to rely thereon; (9) his consequent and proximate injury.
>
> Great Southern Nat. Bank v. McCullough Environmental Services Inc., 595 So.2d 1282, 1289 (Miss.1992) (citing Johnson v. Brewer, 427 So.2d 118, 121 (Miss.1983)).

Lacy v. Morrison, 906 So.2d 126, 129 (Miss. App. 2004). All of these nine elements are present in the instant case.

The bottom line is that Plaintiff knew that he did not have the expertise or money to finish

the job, but he had to make a good show of it by doing at least some of the work. When he came to the end of his abilities and money, he just stopped work. By then, he knew that he had fooled Hill and Minyard and that they would owe him something.

Plaintiff knew that his representations regarding the construction and his financial ability to pay the associated costs of the subject property were false at the time he made them.

Defendant maintains that Plaintiff breached the written agreement between the parties. Although Defendant has asserted a breach of contract claim, it is permissible for this Court to consider the intent of the parties and the communications between them in making its determination in this case. While ordinarily, parol evidence is not allowed regarding breach of contract actions, the Mississippi Supreme Court has made an exception to this rule. In *Memphis Hardwood Flooring Co. v. Daniel*, 771 So.2d 924, 931 (Miss. 2000), the Mississippi Supreme Court found as follows:

> In Brown v. Ohman, 42 So.2d 209, 213 (Miss.1949), we found that there is an exception to the parol evidence rule in actions alleging fraud and deceit. We distinguished two situations in which fraud may arise in the procurement of a contract and held that parol evidence is admissible to prove either instance. Id. at 212. We stated:
>
> Actions for the recovery of damages for fraud and deceit are usually based upon misrepresentations which amount to fraud in inducing a party to enter into a contract as contrasted with fraud in procuring a signature to and thereby completing the execution of the contract, and the law is well-settled that parol evidence is admissible to prove fraud and misrepresentations in either instance.
>
> Id.

Memphis Hardwood Flooring Co. v. Daniel, 771 So.2d 924, 931 (Miss. 2000). Thus, the conversations and representations between the parties which have been discussed throughout this Brief can be considered by this Court even in relation to the contract claim.

At this point, it is important to note that Plaintiff was to receive his interest in the LLC and

the subject property contingent upon his fulfillment of his contractual obligations. (Ex. P2) Hill and Minyard already owned the property long before Plaintiff came along. As a result, it is logical that the intent of the parties was that Plaintiff meet certain obligations prior to him earning his interest in the property. As set forth above, Plaintiff had to fulfill three basic obligations in order to earn his interest in the property. Plaintiff either failed wholly or in part to perform all of his obligations as set forth above.

Plaintiff did not fulfill the necessary conditions precedent to the vesting of his interest in HAM and its property. As a result, he never earned any interest in HAM or its property. Defendant maintains that Plaintiff's breaches justify that he should have only gotten back what he specifically, legitimately invested into the subject property.

To the extent the trial did not address HAM's counterclaim, Defendant maintains that the trial court erred. The trial court further erred in awarding Aron $100,000.00 over and above the amount he invested in the LLC.

V. Aron is Barred from Prosecuting this Appeal Due to Its Acceptance of the Payment of the Judgment

It is undisputed that HAM paid the full Judgment amount timely and that Aron accepted the Judgment amount with no reservations or conditions. As a result, HAM maintains that Aron is barred from prosecuting this appeal, as it waived its right to do so by accepting the Judgment amount from Aron. This Court has found that a party will be deemed to have waived its right to appeal when: the appealing party has accepted payment of the Judgment; the party has appealed the Judgment as a whole; and the amount recovered is contested on appeal. *Taylor v. Morris*, 609 So. 2d 405, 407-08 (Miss. 1992)(citing *Adams v. Carter*, 47 So. 409, 409-12 (1908)). All of these

factors are present in this case. HAM appealed the entire Judgment and requests in its Brief that this Court "reverse the Judgment of the Chancery Court of Lafayette County, Mississippi, and render a Judgment consistent with law and the facts of the case, or remand the case for a new trial." (Appellant's Brief at 31) The amount of the award is contested both by the Appellant and the Appellee.

HAM maintains that Aron waived his right to appeal this case due to his acceptance of the Judgment amount from HAM. As a result, this appeal should be dismissed with all costs assessed against Aron.

Conclusion

Based on the foregoing, Appellee Ham Management & Development Co., LLC, requests that the Court affirm the verdict of and rulings made by the Lafayette County Chancery Court in this case. In the alternative, Appellee Ham Management & Development Co., LLC, requests that the Court reverse the verdict of the Lafayette County Chancery Court in that it contains an award of $100,000.00 over and above Appellant's investment in the LLC. Finally, Appellee Ham Management & Development Co., LLC, respectfully requests that the Court dismiss the appeal made by Appellant, as Appellant waived its right to appeal this case by accepting payment of the Judgment amount by Appellee.

This the 27th day of May, 2008.

John Holaday

JOHN HOLADAY

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CERTIFICATE OF SERVICE

I, John G. Holaday, attorney for the Defendant in the above styled matter, do hereby certify that I have this day served a true and correct copy of the ***Brief of Appellee and Cross Appellant Ham Management & Development Co., LLC*** via first class United States Mail, postage prepaid, to the following: Steven Farese, Esq., Farese & Farese, Post Office Box 98, Ashland, Mississippi 38603, Jay Gore, III, Esq. and Adam Kirk, Esq., GORE, KILPATRICK & DAMBRINO, PLLC, P.O. Box 901, Grenada, Mississippi 38902-0901, and the Honorable Kenneth M. Burns, Circuit Judge, P.O. Drawer 110, Okolona, Mississippi 38860.

DATED this 27th day of May, 2008.

John G. Holaday