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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

REPLY BRIEF OF APPELLEE

ARGUMENT

I. Plaintiff's Reply Brief contains unsupported legal and factual allegations.

Plaintiff Jim Earl Aron's Reply Brief is not persuasive for several reasons. First, the Brief is replete with arguments concerning alleged facts and rulings of the trial court with no citation to the record. How can Defendant HAM be expected to respond to vague, general criticisms of the trial court's rulings without any citation to the record of which portion of the trial court's opinion is being criticized? For example, Plaintiff argues on page 10 of his Brief, as follows:

However, the Chancellor found Hill and Minyard were entitled to more value for each of their interests by giving them additional value for Tract 2 which was unencumbered by debt at the time of the sale, thereby treating Tract 2 as a separate transaction for which Aron had not paid.

Pl.'s Br. at 10. Defendant disagrees with this general statement made by Plaintiff. However, even more important is the question: how can Defendant or this Court analyze this argument without any reference to where the trial court allegedly made this ruling? Such unsupported allegations about the trial court's rulings and even the factual circumstances between the parties run throughout Plaintiff's Brief. Plaintiff even goes so far to attempt to give expert testimony in his Reply Brief. For example, on pages 13 and 14, Plaintiff states, "[t]hat value is determined by deducting the amount of debt from

the asset value to arrive at a 'net' value." First, Defendant is not able to ascertain exactly what Plaintiff is asserting in this statement. Next, Plaintiff cites to no law, no portion of the trial court record nor any portion of the trial court's ruling. Plaintiff's Reply Brief should not be considered by this Court as it is based on the unsupported and uncited allegation of Plaintiff and his counsel.

II. Plaintiff's Reply Brief contains language highly disrespectful to the trial court and should be stricken.

Next, Plaintiff's Reply Brief contains language throughout that is highly disrespectful to the trial court. For example, Plaintiff constantly uses unnecessary expletives in an attempt to illustrate the alleged unreasonableness of the trial court's rulings, e.g., "egregious error" at p. 11 and "the Chancellor entered the twilight zone" at p. 15. More important is the Plaintiff's clear and unequivocal allegation that the trial court was biased in favor of Defendant HAM due to its members' status as attorneys. Specifically, Plaintiff, through counsel, states in his Brief, as follows: "[s]ummarily and arbitrarily charging Aron with causing damages of \$135,790, without any proof evidences a bias in favor of the attorney litigants by the trial court which warrants immediate reversal and restoration of his equity." Pl.'s Br. at 17. Plaintiff goes on to state that "[t]he Chancery Court of Lafayette County clearly was either confused or biased in its determination of Aron's equity." Pl.'s Br. at 21.

There is absolutely no excuse on the part of Plaintiff or his counsel to challenge the credibility and unblemished judicial record of the Honorable Chancery Court Judge Kenneth Burns. Judge Burns is a respected member of the Mississippi judiciary. Plaintiff's clear accusation is that Judge Burns ruled in favor of Defendant, because David Hill and David Minyard are members of the Bar. The unfounded accusation is insulting to Defendant and to the trial court and should be

insulting to this Court. Further, the accusation is made by Jay Gore, III, a member of the Bar who has been admitted to practice law in Mississippi for over thirty-two years and knows better. Defendant contends that, at the very least, Plaintiff's Reply Brief should be stricken from the record. See Rule 28(k) of the Mississippi Rules of Appellate Procedure. This Court has taken this action in cases where the attorneys for the litigants have accused the trial court of ruling in favor of one party over another due to some bias or agenda. See e.g. City of Jackson v. Estate of Stewart ex rel. Womack, 939 So.2d 758, 759-66 (Miss. 2005)(discussing Rule 40(c) of the Mississippi Rules of Appellate Procedure regarding disrespectful language in a Motion for Rehearing).

III. Plaintiff raises issues for the first time on appeal.

Finally, Plaintiff continues to insist on raising issues for the first time on appeal. For example, in his Reply Brief, Plaintiff makes the legal argument for the first time that in some manner the nature of a warranty deed contradicts the trial court's ruling. For example, Plaintiff argues on page 7 of his Brief that:

Co-tenants in property each have an **equal**, undivided interest and are fiduciaries to the other co-tenants. Bayless v. Alexander, 245 So.2d 17 (Miss. 1971); Quates v. Griffin, 239 So.2d 803 (Miss. 1970); Gray v. Caldwell, 904 So.2d 803 (Miss. 2005). In this instance, the Assumption Warranty Deed (Trial Exhibit P-7, Tab 50) drawn by the attorney/members, specifically recites 'do grant, bargain, sell, convey, and **warrant**, unto David G. Hill, David L. Minyard and Jim Earl Aron, as tenants in common . . .'. MCA 1972 ann. section 89-1-33 specifies that a deed which 'warrants' title embraces all five of the common law covenants: seizin, power to sell, freedom from incumbrance, quiet enjoyment and warranty of title. By virtue of the execution of the Assumption Warranty Deed, Jim Aron was warranted a full 1/3 share and the equal ownership right of 'every inch' of **all** the lands described, including the portion to which the Chancellor assigned Hill and Minyard additional equity.

Pl.'s Br. at 7. For reasons stated below, Defendant vehemently disagrees with the legal conclusions argued by Plaintiff. However, these arguments should not be considered by this Court, because they

were never raised by the Plaintiff at the trial court level. This Court has on many occasions explicitly stated that a party cannot raise an issue for the first time on appeal. *Albert v. Allied Glove Corp.*, 944 So.2d 1, 7(¶ 21) (Miss.2006) (citing *Purvis v. Barnes*, 791 So.2d 199, 202(¶ 7) (Miss.2001)).¹

Further, throughout the Reply Brief, Plaintiff repeatedly asserts what appears to be an argument relating to the standing of Defendant HAM to assert certain claims which he alleges rightfully belong to David Hill and David Minyard individually. First, Plaintiff cites no law in support of his argument that Defendant HAM lacked standing, and his argument should fail for that reason. *See Ferrell v. River City Roofing, Inc.*, 912 So.2d 448, 456 (Miss.2005); *Tate v. State*, 912 So.2d 919, 928 (Miss.2005). However, as with the argument above relating to the warranty deed between the parties, Plaintiff raises this issue for the first time on appeal. As a result, it should not be considered by this Court.

Finally, Plaintiff's argument regarding the statute of limitations should fail as it is necessarily dependent upon the standing argument mentioned above. However, any argument relating to the statute of limitations should also fail as it was first raised on appeal.

IV. Plaintiff incorrectly frames the ruling by the trial court and the nature of this case.

Throughout the entirety of Plaintiff's Brief and Reply Brief, Plaintiff attempts to mischaracterize the nature of this case and the rulings by the trial court. The fact is that this case involves the dissociation of Jim Earl Aron from HAM Management & Development Co., LLC. When a member is dissociated from a limited liability company, the respective interests of the members must be determined to ascertain what the member's buyout, if any, will be. In this

¹It is also worth noting that this argument was not raised in Plaintiff's initial Brief in this case.

particular case, the determination of what Jim Earl Aron was due, if anything, was based in part on the Agreement and Addendum signed by the parties. (Tr. at 320-24, Ex. P2) Further, the trial court was most certainly entitled to take into consideration any evidence concerning Plaintiff's improper conduct and/or failure to live up to the obligations he had agreed to fulfill in the Agreement.

In this case, the trial court heard extensive testimony and reviewed numerous exhibits introduced by both parties. Contrary to Plaintiff's argument in his Reply Brief, Defendant's members offered substantial evidence on the amount of their respective bases, the failure of Plaintiff to live up to his obligations under the Agreement and Addendum thereto and the damages and difficulties suffered as a result of Plaintiff's conduct. After weighing all of the evidence, the trial court entered its ruling setting forth the amount Plaintiff was entitled to receive. Thus, on appeal, Plaintiff now attempts to make this case about the deeding of real property, civil causes of action, etc. At the end of the day, this case is about if and when a member should be considered dissociated from a limited liability company, and what amount of money, if any, the dissociated member was entitled to receive. The trial court did what the parties asked it to do. Plaintiff is just aggrieved at the outcome. Plaintiff's assignments of error are without merit.

Defendant maintains that the Court should affirm the rulings of the trial court. In the alternative, for the reasons stated in this Reply Brief and in Defendant's original Brief, Defendant would respectfully request that the Court reverse that portion of the lower court's ruling which gave Plaintiff \$100,000.00 over and above his investment in the LLC.

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

As stated in Defendant's earlier Brief, Plaintiff waived his right to appeal the trial court's

ruling due to its acceptance of the monetary judgment amount from Defendant. 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. The *Taylor* case specifically stated as follows:

Both parties miss the point. We agree that the Rules of Civil Procedure *408 have, for most purposes, abrogated the distinction between judgments in law and judgments in equity. Contrary to Taylor's premise, however, Adams and Madison County do not draw the line between equitable and legal judgments per se; instead, they distinguish between judgments which are appealed from in part and judgments which are appealed from as an entirety. As Adams plainly explains, a recovery of a monetary judgment is inconsistent with an appeal only where the appeal relates to the entire judgment -including the part recovered. In Adams, the plaintiff obtained a judgment for \$8,228. He collected the judgment, but nevertheless appealed, claiming that he was owed more. In their pleadings, the defendant/appellees had denied all liability. In holding that the plaintiff had waived his right to appeal by recovering the judgment, this Court emphasized that "the appellant obtained an appeal, not from that part of the judgment disallowing the [amount demanded in excess of \$8,228] only, but from the judgment as a whole-the entire judgment." Adams, 47 So. at 409. In essence, the Court was saying that a party cannot keep the baby and simultaneously have the baby thrown out with the bath water. The only reason the Court drew a distinction between judgments at law and judgments in equity is because, according to Adams, a party could appeal either all or part of a judgment in equity while judgments at law could only be appealed in their entirety. Id. It is thus the nature of the appeal, and not the type of judgment, which determines whether a party may first collect a judgment which favors him in part. In any event, this Court recently repudiated Adams's assumption that judgments at law could not be appealed in part. See *Davis v. Noblitt & Capers Elec. Co., Inc.*, 594 So.2d 610, 613 (Miss.1992); see also *Yazoo & M.V.R. Co. v. Scott*, 108 Miss. 871, 892, 67 So. 491, 495 (1914).

Taylor, 609 So. 2d at 407-08. 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." Pl.'s Br.

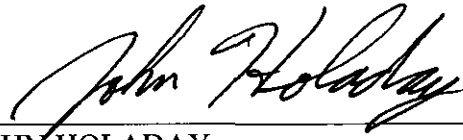
at 31 (original Brief filed by Plaintiff). Defendant filed a counter-appeal alleging that Plaintiff should not have been awarded the money he was awarded. As discussed above by the *Taylor* Court, the entirety of the trial court Judgment is at issue in this appeal. Plaintiff's appeal should be barred due to his acceptance of the judgment amount from Defendant.

Plaintiff blindly argues in his Reply Brief that somehow this argument does not apply, because Defendant did not post a supersedeas bond. First, this argument is nonsensical in that Defendant had no reason to post a supersedeas bond. Defendant did not appeal the trial court's ruling. Once Plaintiff filed his appeal, Defendant filed a counter-appeal. Second, the pertinent case law does not address the posting of a bond. The case law deals with the conduct of the party desiring to accept the judgment amount and appeal. Plaintiff's actions fall within the four corners of the *Taylor* case cited above. As such, Plaintiff lost the legal ability to file the instant appeal by accepting the judgment amount from Defendant.

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 7th day of October, 2008.


JOHN HOLADAY

Of Counsel:

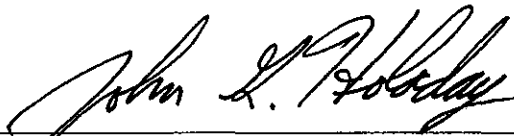
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CERTIFICATE OF SERVICE

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 *Reply 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 7th day of October, 2008.


John G. Holaday