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JIM EARL ARON	**APPELLANT**
VS.	**CASE NO. 2007-CA-01378**
HAM MANAGEMENT & DEVELOPMENT CO., LLC	**APPELLEE**

REPLY OF APPELLANT AND BRIEF OF CROSS APPELLEE

The Brief of the Appellant and the Brief of the Appellee/Cross Appellant sufficiently set forth the course of the proceedings below and there is no need for expansion of those topics here.

The Appellee/Cross Appellant has designated no additional topics to be addressed as assignments of error, accordingly the Brief of the Cross Appellee will be addressed to the Assignments of Error asserted its Brief of the Appellant.

SUMMARY OF THE ARGUMENT

David Hill and David Minyard, both attorneys at law, obtained title to 25.28 acres of land consisting of Tract 1 and Tract 2, in a division of land they owned as co-tenants with a third party. A portion of this property (Tract 1) was security for a deed of trust which they assumed in the exchange. After they obtained title to this property, they sold an undivided 1/3 interest to Jim Aron in exchange for $125,000 and assumption of and equal 1/3 share of the remaining debt secured by Tract 1). The trial Court assigned a value to Hill and Minyard's shares for Tract 2 but did not include the value of Tract 2 in Jim Aron's equity, although it was included in the deed to Aron and in the subsequent deed from the three of them to the HAM, LLC. The additional value was assigned to Hill and Minyard even though there was no evidence they paid anything

for the land other than what was included in the exchange with their former partner, Coleman.

The trial Court committed plain error in determining the value of the basis of the respective members of HAM management and development company was other than equal on the date of Aron's entry. The only asset of the company was a tract of land which was owned equally by Hill, Aron, and Minyard, when the deed transferred title to the LLC. There were no books, records, or minutes of the LLC, and Hill and Minyard sold an undivided 1/3 interest in the land to Aron for a value they determined and accepted. For the trial court to determine that the ownership of the company at that point in time was something other than equal among the members was clear error.

HAM Management and Development Company, LLC, had no liabilities, however, its members did on an individual basis. Jim Aron agreed to assume equal liability with Hill and Minyard on these notes, and made payments thereon, although he was not required to actually execute them. These liabilities were secured by the corporate asset, but HAM itself had no debt, only one asset, and this asset was contributed to the company by a deed indicating three owners with undivided 1/3 interest in each. Therefore the interests of the three members was equal on the day the land was contributed as capital to the company.

The clear intent of the Agreement and its Addendum was to provide for the development of the HAM property and contemplated unequal future contributions by the members which were to be returned to them as their 'basis' before dividing any excess profits. The fact that Aron ran out of money did not preclude Hill and Minyard from completing the project with their own funds but they chose not to do so. Neither did they attempt to remove Aron because of any breach of duties. Instead, they allowed the land to lie idle and continued to look to Aron for his

contribution to note payments and taxes.

HAM as a corporate entity is not a party to the Agreement or the Addendum which was referenced as an operating agreement in the absence of a formal document titled as such. The corporate entity has no standing to complain that Aron breached this private agreement between the members of the limited liability company, except possibly as a third party beneficiary. The corporate entity did assert a counterclaim against Aron, but wholly failed to provide any proof of any damages, the only testimony being that the property had greatly increased in value since the time Aron became a member, despite any inability of Aron to complete the development without additional funds.

For the Chancellor to determine that the members had anything other than an equal interest in the limited liability company when the only asset was property in which each of the grantors had an undivided 1/3 interest when it was contributed was clear error. This error was compounded when the Chancellor arbitrarily assessed Aron's membership value with a penalty for his alleged failure to complete his duties under his agreement with Hill and Minyard for development of the property. To be certain, the Chancellor could not penalize Aron's interest for damages when there is absolutely no evidence of any damages in the record, only testimony that the values have increased.

The Chancellor was also manifestly in error in assessing Aron's interest with damages for which there was no evidence, and in spite of testimony that the property had increased in value since Aron's separation from the LLC.

ARGUMENT

A. THE TRIAL COURT INCORRECTLY INTERPRETED THE AGREEMENTS' INTENDED DEFINITION OF 'BASIS'

Appellee/Cross Appellant takes the position that Aron was not entitled to rely on the plain wording of the Agreement and the Addendum (Exhibits 47 and 48) to understand that when he paid for his undivided 1/3 interest in the property he was actually getting an undivided 1/3 interest, co-equal with Hill and Minyard. Appellee/Cross Appellant (the corporate entity, HAM) asserts that Aron actually received something far less. This interpretation constitutes clear error based on the plain language of the Agreement and Addendum. The Agreement clearly states:

> Whereas, Jim Earl Aron (hereafter JEA) desires to buy a **1/3 undivided interest** in said property, and DGH and DLM desire to sell a **1/3 undivided interest** in said property,
>
> The parties hereby agree as follows:
>
> 1. DGH and DLM agree to sell to JEA an **undivided 1/3 interest** in the above noted Real property;
> 2. DGH and DLM agree to convey to JEA the above stated **undivided 1/3 interest** by assumption warranty deed upon the execution of this agreement;
> 3. Pursuant to said assumption warranty deed JEA becomes equally liable with DGH and DLM on the outstanding mortgage on said property to Mechanics Bank of Water Valley, Mississippi; as well as any and all other present and future debts against said property;
> 4. In consideration of DGH and DLM conveying an **undivided 1/3 interest** in said property to JEA, JEA agrees upon the execution of this agreement to pay unto DGH and DLM the total sum of $125,000, to be made in two (2) separate checks of $62,500, one payable to DGH and one payable to DLM.
> 5. DGH, DLM and JEA agree that JEA will become a member/owner of H&M Management & Development Company, LLC, and that the name of the company will be changed to HAM Management & Development Company, LLC.
> 6. DGH, DLM and JEA agree that the property which is the subject of this agreement will be conveyed to and held by the aforenamed LLC, and that the development and marketing of this property will be done under the name of the LLC.

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 spend in this manner will be **added to** his basis in the property.
8. The parties further agree that JEA will be entitled to recover his costs connected with the activities done and performed in paragraph seven (7) above if the costs are repaid to him by DGH and DLM, and on a one to one basis if the costs are further agree that JEA will recover this said costs when the property is developed and the property begins to be sold. The parties further agree that the bank debt on the property will be retired before any individual debt is retired, and that when individual debt is retired, it will be done on a pro ratio basis, i.e., the percentage a member received will be determined by the percentage of his basis in the property as compared to the total basis in the property.

Due to the obvious scrivenor's error in paragraph 8 of the Agreement the Addendum (Ex. 48) was executed providing in pertinent part as follows:

> "The parties agree that JAMES EARL ARON will be entitled to recover his costs connected with the activities done and performed in paragraph seven (7) above on a 2/3 basis if the costs are repaid to him by DAVID G. HILL and DAVID L. MINYARD, and on a one-to-one basis if the costs are repaid by HAM Management & Development, LLC. The parties further agree that JAMES EARL ARON will recover this said costs when the property is developed and the property begins to be sold. **The parties further agree that the bank debt on the property will be retired before any individual debt is retired, and that when individual debt is retired, it will be on a pro-rata basis, i.e., the percentage a member received will be determined by the percentage his basis in the property as compared to the total basis in the property."**

The Agreement and Addendum confirm the parties expected Aron to be reimbursed for the amount of his development costs in a manner that would keep every participant equal. These documents clarify that the bank debt 'on the property' will be retired before any individual debt is retired. There was no individual debt except that which was secured by the property. Neither Hill nor Minyard gave any testimony that they owed any additional money on their membership in HAM. Since Aron bought his interest in the real property before it was conveyed to HAM,

and since he was also bound to pay an equal 1/3 of the debt, each member had an equal investment in the company. There was never any disparity of equitable interests or 'basis' in HAM, LLC, after Aron bought his 1/3 undivided interest.

For this reason Aron was to be reimbursed on a 2/3 basis **if the costs are repaid to him by DAVID G. HILL and DAVID L. MINYARD** and on a one-to-one basis if the costs are repaid by HAM Management and Development Company, LLC. This language provides additional confirmation that all the development costs are to be shared equally, and reimbursed by a method which kept each party equally invested. The clear language of these documents acknowledges both; (1) the distinct nature of the corporate entity as separate from the individuals and (2) to be equitable, reimbursement by the individuals required a different rate than if Aron is repaid by the company of which he is an equal 1/3 member. (Reimbursement by the company which he partially owns would mean Aron would be repaying himself for 1/3 of any payment just as if he were an unrelated third party contractor.)

More importantly, these documents were drawn by attorneys who had a stake in the process, and Aron was entitled to rely upon them. These attorney/drafters utterly failed to mention any intention to claim a different amount of investment in the project than Aron. All the language is indicative of each individual maintaining an undivided 1/3 interest.

Had the attorney/drafters intended something other than the 1/3 interest for each individual there is absolutely no reason why they, as the only parties with knowledge of their prior expenditures, could not have tabulated those monies, and set forth their claim to a different 'basis' than the 'undivided 1/3 interest' they represented to Aron he was purchasing for $125,000. Failing to specify something other than what was indicated in plain English when they

had the power of the drafting pen and the position of trust and authority cannot be cured by claiming otherwise at trial. There is no ambiguity in this Agreement or the Addendum, and even if there were, it makes no difference to the value of the corporate entity and therefore no difference in Aron's interest in the sole asset of HAM.

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 to 'every inch' of **all** the lands described, including the portion to which the Chancellor assigned Hill and Minyard additional equity.

The Appellee contends the Chancellor was justified in giving Hill and Minyard a greater value because they had improved the property and incurred debt before selling to Aron. Certainly Hill and Minyard had purchased and improved the property prior to selling to Jim Aron. This is not a novel situation and is not grounds, as argued by the Appellee, for the Chancellor to determine that Aron was sold a lesser interest than they themselves warranted. Any value they placed upon the land and any improvements must have been included in the price they set for Aron's interest. The sale value was determined by Hill and Minyard in 1998 and a

solemn warranty deed executed, subject only to the Deed of Trust in favor of Mechanics Bank and nothing else.

In actuality, Hill and Minyard knew how much they had invested when they sold Aron an undivided 1/3 interest in the improved property in 1998. Aron bought his interest and paid the value requested to own an undivided 1/3 interest in the land which was partially improved before he bought his share. He paid full value for those improvements. The plain language of the Agreement and the Addendum is that the three individuals would each own an equal interest in the development and would market the property through the limited liability company. Hill and Minyard chose not to convey the property to the limited liability company and have Aron buy an interest in the company, but instead chose by deliberate design, to have Aron buy his undivided 1/3 interest **before** conveying any property to HAM. Upon execution and recordation of the warranty deed, Aron, Hill, and Minyard had a mutuality of interests, not disparate interests. Conner v Conner, 119 So.2d 240 (Miss. 1960); Lampley v U.S., 17 F Supp 2d 609 (N.D. Miss.1998). For the trial court to find Aron's interest in the property to have been worth a fraction of the value of his co-tenants **at the time the deed was executed** is clear error.

II. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN DETERMINING THE 'BASIS' OF HILL AND MINYARD BY INCLUDING DEBT AS EQUITY?

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

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

A. The values determined by the trial court as the initial 'basis' of the three individuals in the real estate were known and ascertainable on July 13, 1998 when the Assumption Warranty Deed was executed. The interests of the three co-tenants was established upon the execution and delivery of the Assumption Warranty Deed. Each interest was co-equal and mutual. Wilder, Anderson, Connor, Lampley , *op cit.* Had the three abandoned their intent to transfer title to HAM, any one of them could have sold their undivided interest to a third party without the consent of the others, for whatever price satisfied the selling party. Medford v Mathis, 168 So.2d 607 (Miss 1936).

The debt which provided the money for the improvements made **before** Aron's purchase remained as part of the debt which he assumed. Aron paid for the value of the improvements made prior to his purchase when he paid Hill and Minyard. The debt he assumed represented purchase price and improvements for which Hill and Minyard **had not paid.** If they had actually paid for the improvements in the property there would not have been a debt remaining to be assumed. To include the same debt which was assumed by Aron in the determination of the value of Hill and Minyard's portion and then not include the same debt in Aron's 'basis' is pure error. The trial court's ruling is especially egregious since it treats the debt **assumed equally by Aron** as the equity of Hill and Minyard. Accumulating additional error the trial court then *deducted* that same debt from the value of the land before determining the 'net value' to be shared by Aron. All three owed the same debt, but the trial court considered it differently for different members.

B. There is one Assumption Warranty Deed at issue conveying 25.28 acres described in two tracts. The Appellee argues that there is a difference in the title conveyed to Aron described in

Tract I of the Assumption Warranty Deed and in Tract II. The deed itself makes no reference to any different estate or valuation in the property being transferred. All the property described in the Assumption Warranty Deed was transferred at the same time for the stated consideration. The warranties of the deed pertain to both tracts of land, albeit only one tract served as security for the debt. 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.

By holding as he did, the Chancellor gave Hill and Minyard an additional value for Tract 2 because they could not establish any separate value they had paid for that tract when they obtained title in the land swap with Coleman. What they paid when they obtained the title they sold to Aron is immaterial because they sold Aron an undivided 1/3 interest in **all** the property described in the deed. This arbitrary addition of value to two of the three co-tenants clearly establishes the error of finding that one tract was included in the purchase price but the other was not. There was but one deed, a stated consideration, and one transaction conveying undivided interests in each and every tract identified in the deed to the named grantees in equal portions of 1/3 each.

The trial Court erroneously concluded that because there was no independent value expressly assigned to Tract 2 in their land swap with Coleman, Hill and Minyard were entitled have extra value assigned to their 'basis' in the whole 25.28 acres. As established in the Appellant's initial brief, Hill and Minyard split a relationship with Coleman which resulted in their accepting 25.28 acres of land with debt secured by a portion thereof, and Coleman receiving

other land and debt related to it. It makes absolutely no difference in the value of the property described in the Assumption Warranty Deed whether all the land, or only a portion, was encumbered by debt. When Aron bought an undivided 1/3 interest and assumed 1/3 of the debt, he owned exactly 1/3 of every square inch of both tracts of land altogether. For the Chancellor to treat the property otherwise is arbitrary, manifestly unjust, and clearly an error warranting reversal.

Any claim that the consideration paid by Aron for his undivided 1/3 interest in the property which was conveyed to HAM, was a claim held by Hill and Minyard individually. The Chancellor's grant of additional value to Hill and Minyard's interest in the LLC because of what they paid for the land before they sold to Aron is wholly unlawful. Any such claim on the part of Hill and Minyard would be a personal chose in action against Aron individually and the LLC had no standing to assert any such claim on their behalf. Additionally any such claim they may have had would amount to a claim of insufficient consideration for the deed, which they did not file and which would, in any event, be barred by the applicable statute of limitations. MCA 1972 ann. Section 15-1-49. For the Chancellor to go behind the sale to Aron of an undivided 1/3 interest in the land conveyed to HAM is egregious error warranting reversal.

From the standpoint of the equities in HAM, LLC, the members contributed one asset, the real property consisting of approximately 25 acres. This contribution was made in July of 1998, by a single deed executed by the three equal co-tenants. The defendant HAM, LLC, received only one asset contributed in equal shares by the three members. Without any Operating Agreement, and without any books, records, or accountings to indicate otherwise, the only contributions which would accrue to the individual accounts of the respective members was

whatever contributions each made subsequent to the transfer of the land to the LLC. Aron's interest in the LLC's only asset was the same as that of Hill and of Minyard individually. The LLC had no liabilities and did not owe Hill and Minyard anything.

Any evidence of debt or contract contemplated to take longer than 15 months to perform must be in writing. MCA 1972 ann. Section 15-3-1(d). The only documentation evidencing agreement of the members was the Agreement and the Addendum and the corporate entity is not a party to either document. (Trial Exhibit P-2, Tab 47 and 48). This document references an agreement that Aron's **additional** investment to be made in future furtherance of the development of the property would be added to his 'basis'. There is no indication in either document or any other writing that Hill and Minyard would be given a value in excess of any **additional** investment they made after the execution of the Agreement and Addendum. For the Chancellor to arbitrarily go behind the deeds and award two of the three members value for what they claim was their disproportionate share of equity in the land contributed to the LLC is undoubtedly reversible error.

The Appellee seems to make the incongruous argument that the Chancellor was entitled to make such a disproportionate allocation of value because Aron's investment was certain while that of Hill and Minyard was uncertain. While Hill and Minyard may not have made a separate allocation of value between the parcels of property they acquired in their split with Coleman, any such failure is made moot when they sold the acquired property to themselves and Aron in undivided 1/3 interests each. (Trial Exhibit P7, Tab 50)

Confronting the error head-on is the specific language of the deed drafted and executed by Hill and Minyard. The Assumption Warranty Deed specifically recites:

> ".....we, David G. Hill and David L. Minyard, Individually **and as H&M Management & Development Company, LLC**, do hereby grant bargain, sell, convey, and **warrant** unto David G. Hill, David L. Minyard, and Jim Earl Aron, **as tenants in common**, the following described real property ...."

Therefore, there can be absolutely no doubt that Aron bought a complete, undivided 1/3 interest as tenant in common from Hill and Minyard individually and as H&M Management and Development Company, LLC. There is no justification for finding that his interest in the only asset of H&M (which became HAM) was less than that of the other two members simply because they claim they could not figure out what they had invested before bringing Aron into the venture. Equity abhors a forfeiture, which is precisely what the Chancellor imposed upon Aron in arbitrarily reducing his proportion of the value of the corporate asset.

III THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY INCLUDING HILL AND MINYARD EXPENDITURES MADE AFTER ARON'S DISSOCIATION

As presented in Appellant's Brief, the trial Court awarded an increase in the basis given Hill and Minyard for payments they made for taxes and interest, and it was error to do so. The Appellee argues for inclusion because Aron was given credit for his payments on the debt after his dissociation. To arrive at the correct result, the impact of the payments is the determining factor.

It is easily understood that because Hill and Minyard remain as the only members of HAM, any payments they made after Aron's exit would increasing the value of their investment. That value is determined by deducting the amount of debt from the asset value to arrive at a 'net'

value. This value for Aron is determined at the date of his dissociation on May 19, 2003. (R.E. 52, Trial Exhibit D-2). Any payment he made toward reducing the debt or payment of taxes after that date inured not to his benefit, but to the benefit of Hill and Minyard through their ownership of the HAM, LLC. It is complete error for the Court to allow Hill and Minyard to be credited for what they paid to reduce their own personal debt after Aron's dissociation when the value to be determined was fixed on the date of his dissociation, May 19, 2003.

The amount of debt used to calculate the equity on Aron's date of separation is the proper measure to determine the net equity on that date. The market value appraisal also used May 19, 2003, as the date for the value of the asset. Since Aron's equity is fixed at the date of his dissociation, the remaining equity that date is also fixed. The Chancellor used the amounts paid by Hill and Minyard after Aron's dissociation, ($71,086.83 for bank and carrying charges, and $55,242.72 for taxes after May 19, 2003. (R.E. 55, Trial Exhibit D-8 attachment 'D' and 'E')) to increase the amount they were to be given in determining the "net available for distribution". The problem with the arithmetic is that the Chancellor used the appraised market value on May 19, 2003, as the starting point, but used the accumulated investment of Hill and Minyard through the date of trial. This reduced the 'net amount available for distribution' by at least $126,329.55.

Had the Chancellor been consistent, the 'net amount available for distribution' would have begun with the appraised value on May 19, 2003, less the amount of debt on that date. There is no question that on May 19, 2003, Hill and Minyard had not paid the $126,329.55 at issue in this error. When they did make the payments, they received the benefit of them directly. When Aron made his payments after the date of dissociation, Hill and Minyard got the benefit of those payments as well because it paid their debt. Accordingly, Aron is entitled to a return of the

payments he made after may 19, 2003. Hill and Minyard already have the benefit of their payments after that date because they retain the asset. The Chancellor's refusal to acknowledge this arithmetic is clearly manifest error.

IV THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ASSESSING ARON WITH UNPROVEN DAMAGES OF $135,790.

Appellee's offers no evidence to support the claim in its brief that Hill and Minyard suffered damages and therefore the Court was justified in its reduction of the amount due to Aron by the amount of $135,790 because Aron "did not comply with the terms of his agreement with HAM.". There was no such proof introduced or offered at trial. A mere claim of damages will not support an award of damages. A plaintiff is required to place into evidence his proof of damages with as much accuracy as is reasonably possible. *Merrit v Duett, 455 So. 2d 792 (Miss. 1984).* The best available evidence of each and every item of damages must be produced at trial. *Eastland v Gregory, 530 So.2d 172 (Miss. 1988).*

Damages must be proven by a preponderance of the credible evidence and may not be based on mere conjecture and speculation. *Kaiser Investments, Inc. v Linn Agrigprises, Inc. 538 So.2d 409, (Miss. 1989). Courtney v Glenn 782 So.2d 162 (Miss. App. 2000).* With no testimony and no documentation of damages, the Chancellor entered the twilight zone and chose another arbitrary number by which to reduce Aron's award.

The Cross Appellant, HAM Management and Development Co., LLC, is a Mississippi limited liability company, a distinct legal entity, separate and apart from its members. This is fundamental law which is the very purpose for which the limited liability corporation law was

created. The Brief of the Appellee/Cross Appellant is couched in terms of the members Hill and Minyard and becomes misleading when determining the issues at trial and on appeal. Neither Hill nor Minyard obtained leave to intervene in the lawsuit which was filed as an accounting against HAM Management and Development Co., LLC. Any interest of Hill or Minyard is purely derivative of their interests in the company and neither has any standing for personal redress either in the Chancery Court of Lafayette County, nor in the appeal process.

HAM Management and Development Co., LLC, as a separate legal entity, has no standing to object to the determination of the relative interests of its members, as the ownership distribution of the company has no relevance to the value of the company, or its corporate purposes. It matters not to the corporation itself whether one person owns half or a third or some other fractional interest and the Cross Appeal should be dismissed for lack of standing. The value of the sole asset of the company is not diminished by retiring the interests of a member. The value of the land simply was not affected by removing Aron from the list of members of the LLC. David Minyard testified that he felt there had been some bad inference put on the property, but he had no documentation of any adverse impact. (R.E 36, R. Vol.6, p.215, 216). The testimony of appraiser Filo Coats established the value of the property at the time of the bankruptcy filing was $2,760,000, and $3,760,000 on February 13, 2007. (R.E. 56, Coats Appraisal, Trial Exhibit D-11).

The Appellee, HAM Management and Development Company, LLC, introduced absolutely no evidence of any damages, nor could it. Its sole asset had increased in value during the time the company held title through the time of Aron's membership and continued to increase in value by $1,000,000 by the time of trial. No testimony was introduced to provide any basis of

determining any damages proximately related to any breach of conduct by Aron. There simply were no damages.

Even if there had been some testimony of actual (as opposed to merely perceived) damages, any such claim must be causally related to some breach of contract by Aron. Since the claimed breach of duty by Aron occurred when he stopped developing the property in January of 1999, any claim for breach was long barred by the three-year statute of limitations by the time suit was filed on July 30, 2004. MCA 1972 Ann. Section 15-1-49. Summarily 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.

By the same argument, it is error for the trial court to simply conclude *sua sponte* that Aron's interest in the LLC was his investment plus $100,000 as argued by the Appellee. Surely the Appellee, LLC, has no standing to assert that any one member's interest should be 'capped' at some value while the others' interests should be increased arbitrarily. The trial court committed manifest error in summarily reducing the value of Aron's investment by assessing him damages for breach of contract when such damages were not only unproven, but any claim for them was barred by Section 15-1-49, MCA 1972, ann.

V. SETOFF IS NOT AVAILABLE TO THE APPELLEE HAM MANAGEMENT AND DEVELOPMENT COMPANY, LLC.

For the reasons previously reviewed, the Appellee's reliance on Singing River Mall Co. v Mark Fields, Inc., 599 So.2d 938 (Miss. 1992) as a basis for awarding damages is completely misplaced. "A *setoff* is a counterclaim which the defendant has against the plaintiff, but which is

extrinsic to the plaintiff's claim." Id. at p.944 citing Black's Law Dictionary. Singing River found the claimed 'setoff' arose from a contract and was within the then six-year period of the general statute of limitations. This period is now three years and any action for breach of contract by Aron based on the written contract in this case identified as the Agreement and the Addendum is simply barred by the Section 15-1-49, MCA 1972..

Additionally, this action was commenced as an accounting, not a claim for damages as contemplated by Section 15-1-71 MCA 1972 ann. Aron filed suit for a simple accounting and determination of his interest against HAM Management and Development Company, LLC. He made no claim for damages, and as discussed above, the corporation had no claim for damages against Aron as it was not a contracting party with him. The Appellee's argument is spurious.

VI THERE IS NO CLAIM FOR FRAUD AGAINST ARON

The Appellee, again asserting a personal position of its members and not as a corporate entity, argues that Aron is not entitled to anything because of alleged fraud in the inducement to enter into a contract with Aron. This position fails in an initial assessment. To support a claim of fraud in the inducement, HAM, would first have to be a party to the contract, which it is not.

Secondly, as stated in Singing River, fraud may not be charged in general terms, but must be pleaded with particularity and may not be inferred or presumed, citing Brabham v Brabham, 483 So.2d 341 (Miss. 1986). Further, 'fraud cannot be predicated upon statements which are promissory in their nature when made and which relate to future actions or conduct', citing House v Holloway, 258 So.2d 251 (Miss. 1972); 37 C.J.S. Fraud § 11 (1968). Even if the LLC had been a party to the Agreement or the Addendum any action pledged by Aron was future in nature.

Lastly, on this issue, there is no proof Aron factually did not intend to develop the property. Certainly he expended over $200,000 in furtherance of that effort. There is no basis upon which the trial court could have concluded that Aron intended to defraud anyone, and especially HAM, LLC, the Appellee which was not a party, paid not a cent to Aron, and which received the benefit of whatever meager improvements he may have accomplished.

Furthermore, Hill and Minyard, the attorneys who drafted the Agreement and the Addendum, and structured the entire business arrangement do not have a viable claim for fraud. The terms of the Agreement and Addendum are not clear and must be construed against the drafting party. Where the language of an otherwise enforceable contract is subject to more than one fair reading, the reading applied will be the one most favorable to the non-drafting party. Leach v Tingle, 586 So.2d 799 (Miss. 1991). The language 'see to' the development of the property must be construed in favor of Aron, whatever it means. Aron 'saw to' the development until his money ran out, which is not fraud.

VII. ARON'S ACCEPTANCE OF THE PAYMENT OF JUDGMENT IS NOT A BAR TO HIS APPEAL OF THE RULING ADVERSE TO HIM

The Appellee, HAM, contends that payment to Aron of the amount adjudged to be due him constitutes a bar to any appeal of the judgment. This is simply not the case.

The Appellee, through counsel, tendered payment to Aron in time to avoid incurring interest on the judgment. The Appellee did not perfect any appeal until it did so in response to Aron's filing his Notice of Appeal. The Appellee did not seek any supersedeas to avoid paying the judgment while it appealed and apparently was satisfied with the ruling of the trial court until

Aron appealed.

Aron's appeal is in regard to the amount of the award adjudged to be his interest in the property. He agrees he is entitled to what he was adjudged to be due, but also contends he is entitled to more, especially the amount arbitrarily deducted without foundation or proof. Aron's contention is that this Court should remedy the errors of the trial Court and enter its judgment for an amount in excess of what he was awarded below. The precedent for this can be found in the case of Taylor v Morris 609 So.2d 405 (Miss. 1992). In Taylor, the Court acknowledged it is 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. Citing Investors Property v Watkins, Pitts, Hill & Assocs. 511 So.2d 1379, (Miss. 1987). Where an appellant accepts only that which the appellee concedes, or is bound to concede, to be due him under the judgment he is not estopped to prosecute an appeal which involves only his right to a further recovery

CONCLUSION

. Jim Aron purchased an undivided interest in 25.28 acres of land from two attorneys who executed the deed they drafted conveying and warranting title on behalf of themselves individually and doing business as H&M Management and Development Company, LLC. The clear intent of these three men was to develop the property and maintain equal interests in the investment, repaying debt and development expenses first, and dividing any profits last as the property was sold. Aron was tasked with overseeing the development effort and financing it. He ran out of money before the project was finished and several years later filed for bankruptcy which dissociated him from the LLC. After efforts to receive an accounting fell on deaf ears, he

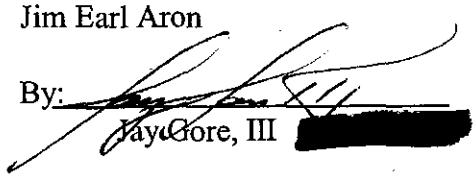
filed suit for an accounting from the LLC asking his interest be determined and he be paid in accordance with law and equity.

The Chancery Court of Lafayette County clearly was either confused or biased in its determination of Aron's equity. It totally overlooked the fact that he entered HAM Management and Development Company, LLC as an equal member having purchased an undivided interest in the company's sole asset and assuming an equal amount of debt with the existing two members. The Chancery Court also failed to acknowledge that the debt on the property which Aron assumed was not equity to the other members. Finally, the Chancery Court, totally without foundation reduced the amount of Aron's interest by a totally arbitrary assessment of $135,790.

The Supreme Court should reverse the judgment of the Chancery Court of Lafayette County because of the several items of manifest error and render judgment for Aron in the amount of $875,046 and give credit for the amount paid of $471,958.

Respectfully submitted this the 30th day of July, 2008.

Jim Earl Aron

By: 
Jay Gore, III [redacted]

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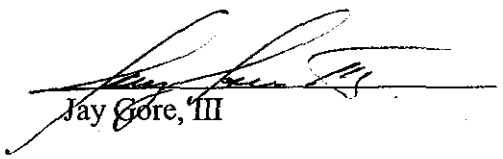
CERTIFICATE OF SERVICE

I, the undersigned Jay Gore, III, attorney Jim Earl Aron, do hereby certify that I have this day served a true and correct copy of the above and foregoing Reply Brief of Appellant and Brief of Cross-Appellee, by placing a true copy thereof, postage prepaid, in the United States mail, properly addressed, to counsel for the Defendant, John Holaday, Esq. Holaday, Yoder, Moorehead & Eaton, 681 Town Center Blvd., Suite A Ridgeland, MS 39157, Steven Farese, Sr., Esq., P. O. Box 98, Ashland, MS 38603, and to Honorable Kenneth Burns, P.O. Drawer 110, Okolona, MS 38860-0110.

This the 30th day of July, 2008.



Jay Gore, III