IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

1. Jim Earl Aron.....Appellant

2. Jay Gore, III, Esq.
   Gore, Kilpatrick & Dambrino, PLLC
   135 First Street
   Post Office Box 901
   Grenada, Mississippi 38902-0901.....Attorney for Appellant

3. HAM Management & Development Co.,LLC.....Appellee

4. David Hill, Member of HAM Management.....Appellee

5. David Minyard, Member of HAM Management.....Appellee

6. John Holaday, Esq.
   Holaday, Yoder, Moorehead & Eaton
   681Townes Center Blvd., Suite A
   Ridgeland, MS 39157.....Attorney for Appellee

7. Honorable Steven Farese
   P. O. Box 98
   Ashland, MS 38603.....Attorney for Appellee

8. Honorable Kenneth Burns..... Special Judge

Jay Gore, III MSB#4916

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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.**

II. **DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN ASSESSING ARON'S INTEREST IN H.A.M, LLC WITH A MONETARY PENALTY WITHOUT TESTIMONY OR PROOF OF DAMAGES?**

- **A. No proof of damages was offered at trial.**
- **B. Damage claim is the personal action of Hill and Minyard and barred by Miss. Code Ann. Section 15-1-49.**

STATEMENT OF THE CASE

A. Nature of the Case:

This case arises from the determination by the Chancery Court of Lafayette County, Mississippi, Honorable Kenneth Burns, Special Judge, of the respective interests of the three individual members of H.A.M Management and Development Co, LLC, a Mississippi limited liability company.

B. Course of the Proceedings:

There were significant and diverse pleadings, motions and orders in the convoluted progress of the case to the point of trial, however, the pertinent procedural matters are as follows:

Jim Aron filed suit on July 30, 2004, in the Chancery Court of Lafayette County, Mississippi, against Ham Management and Development Co., LLC, (HAM) seeking an accounting of his interest and injunctive relief arising from the defendant's alleged non-payment of sums owed for work performed by Aron. (R.E. 2, R. Vol.1, pp.1-11) HAM filed a Motion to Dismiss based on Aron's having filed a voluntary petition in bankruptcy on May 19, 2003. (R.E. 3, R. Vol.1, pp.13-15) Aron filed his Response to the Motion to Dismiss on October 4, 2004. (R.E. 4, R. Vol.1, pp.16-45)

Following the recusal of both Chancellors for Lafayette County, Honorable Kenneth Burns was appointed Special Judge to decide the case on November 11, 2004. (R.E. 5, R. Vol.1, p.49)

Chancellor Burns entered an Order on April 25, 2005, overruling HAM's Motion to Dismiss (R.E. 6, R. Vol. 2, p.158) and HAM together with Hill and Minyard filed their

Answer and Affirmative Defenses and Counterclaim on May 9, 2005. (R.E.7, R. Vol.2, pp.159-171) Aron filed his Answer to the Counterclaim on June 16, 2005. (R.E. 8, R. Vol.2, pp.186-191) HAM, Hill and Minyard filed an Amended Answer, Affirmative Defenses and Counterclaim on September 22, 2005 (R.E. 9, R. Vol.2, pp.216-229) Aron filed his Answer to the Amended Affirmative Defenses and Counterclaim on September 25, 2006. (R.E. 16, R. Vol.3, pp.320-325)

On September 23, 2005, HAM removed the case to the U.S. District Court for the Northern District of Mississippi requesting referral to U.S. Bankruptcy Court. (R.E. 10, R. Vol.2, p. 230) HAM also filed an adversary proceeding in the Bankruptcy Court (R.E. 11, R. Vol.2, p. 264) and on April 27, 2006, the Chancellor granted HAM's motion to stay the Chancery action pending a ruling by the Bankruptcy Court. (R.E. 13, R. Vol.2, p. 284) The District Court remanded the case to the Chancery Court of Lafayette County on May 1, 2006. (R.E. 12, R. Vol. 2, pp.273-276) On May 30, 2006, the Bankruptcy Court entered its Order of Abstention in favor of adjudication of the merits of the Complaint by the Chancery Court. (R.E. 14, R. Vol. 2, p.294) The stay of the Chancery was vacated on June 6, 2006. (R.E. 15, R. Vol.2, p.295)

The matter was tried on March 20 and 22, 2007 and on May 29, 2007, the Judgment of the Chancellor was entered determining the value of Aron's interest in HAM at the time of his bankruptcy filing as $471,958. (R.E. 17, R. Vol.4, pp.485-492) Aron filed a Motion to Amend the Judgment or for a New Trial on June 7, 2007, (R.E. 18, R. Vol. 4, pp.495-498) which was overruled by Order filed on July 2, 2007. (R.E. 19, R. Vol. 4, p. 510)

Aron has perfected his appeal to address the errors of the Chancery Court. (R.E. 20, R. Vol. 4, p.511)

C. Statement of Relevant Facts

HAM Management and Development Co., LLC is a Mississippi limited liability company, originally formed as CHM Management and Development Co., LLC, whose members at the time of formation consisted of Kenneth Coleman, David Hill, and David Minyard. (R.E. 23, R. Vol.5, p. 126) In December of 1993, Coleman, Hill, and Minyard, purchased ten (10) acres in Lafayette County, Mississippi, from Mary Alice Wilson for $275,000, who was paid a down payment at purchase of $20,000 and who financed the balance of the purchase price of $255,000. (R.E. 24, R. Vol. 5, p. 130; R. E. 44, R. Vol. 7, p.346). The purchase price of this property was $27,500 per acre.

In January of 1996, Coleman transferred title to approximately 62.59 acres of additional land adjoining the 10 acre parcel which he had also purchased from Mrs. Wilson. Title was conveyed to Coleman, Hill, and Minyard by assumption warranty deed which required the grantees to assume the purchase money lien of $500,000 owed to Mary Alice Wilson. (R.E. 53, Trial Exhibit, D-3) The price per acre for this property was $7,988. CHM borrowed and spent $167,375 from Mechanics Bank in furtherance of the development of the original 10 acre parcel of property owned by Coleman, Hill, and Minyard prior to Coleman's withdrawal in May of 1998. (R.E 55, Trial Exhibit D-8 and testimony of Hill, Minyard; R. E. 34, R. Vol.6, pp. 199,200; R. E. 45, R. Vol.7. p. 350). Prior to the separation of Coleman from Hill and Minyard, the three individuals had made payments totaling approximately $170,000 toward retirement of the $500,000 debt, of which amount Hill and Minyard paid $125,000 plus 2/3 of the initial down payment of $20,000 to Mrs. Wilson. (Hill testimony R.E.45, R. Vol. 7, pp 358-360).

At the separation of Coleman from CHM, LLC, in May, 1998, Coleman took 50 acres of

the property lying west of Burney Branch Creek which had received no improvements, together with the outstanding balance due on the purchase money deed of trust to Mary Alice Wilson. (R.E. 23, R. Vol 5, p. 127) Hill and Minyard received title to the improved ten acre parcel and 15.54 acres of the 62 acre (sometimes referred to as 64 acres) tract and the associated debt. The result being Coleman had 50 acres with debt owed to Mrs. Wilson, and Hill and Minyard had 25.54 acres with debt owed to Mechanics Bank. (R.E. 41, R. Vol.7, p.315; R. E. 42, R. Vol. 7, p. 327)

This transaction effectively divided all the property owned jointly by Coleman, Hill and Minyard. Hill and Minyard received all the property between Burney Branch Creek and Miss. Hwy. 7 consisting of approximately 25.54 acres, together with the debt owed to Mechanics Bank of $537,644. The associated debt was for the payoff of Ms. Wilson for the initial purchase of the 10 acres and $167,375 in improvement to that date together with an additional unexplained amount of $115,269. The origin and purpose of this unexplained amount is unknown. (Hill testimony R.E. 45, R. Vol.7, pp. 350 -358) Hill and Minyard also refunded $15,008 to Coleman for taxes he had recently paid on the property received by Hill and Minyard. (R.E. 32, R. Vol.6, p.186)

Hill and Minyard had done legal work for Aron and he approached them about purchasing an interest in the property. (R.E. 25, R. Vol.5, pp. 138-140) On July 13, 1998, Hill and Minyard, individually, entered into an Agreement (R.E. 47, Trial Exhibit P-2) to sell Jim Earl Aron an undivided 1/3 interest in the real estate, for $125,000 and his agreement to become equally liable on the outstanding debt to Mechanics Bank as well as all other present and future debts against the property and to 'see to' the development of the property. (R.E. 47, Trial Exhibit, P-2; R. E. 45, R.Vol. 7, pp. 350-355). This Agreement was subsequently amended to

clarify the payment of Mr. Aron's purchase price as reflected in the Addendum dated September 25, 1998. (R. E. 48, Trial Exhibit, P-2 "Addendum") The corporate entity is not a signatory to this Agreement and was to receive no money from Aron as the $125,000 purchase price was paid to Hill and Minyard individually.

Mr. Aron had difficulty paying Hill and Minyard, but ultimately satisfied his purchase price by conveying a parcel of 16 acres of land to Hill and Minyard which they acknowledge was accepted in lieu of the anticipated checks for the $125,000 consideration. (R. E. 49 Trial Exhibit, P-3; Minyard testimony R.E. 25, R.Vol. 5, p.140). [1]

The day of the Agreement, Hill and Minyard individually and as H &M Management and Development Co., LLC (formerly CHM) executed an Assumption Warranty Deed transferring title to the entire 25.28 acres to Hill, Minyard, and Aron as tenants in common, subject only to the deed of trust in favor of Mechanics Bank. (R.E. 51, Trial Exhibit P-8). The same day, Hill, Minyard and Aron transferred title to the 25.28 acres to HAM Management and Development Company, LLC by warranty deed. (R.E. 50, Trial Exhibit P-7). With the recording of the deed from the three individuals to the LLC, the title to the real property became vested in the LLC in which each owned an undivided 1/3 interest and was its only asset. The individuals agreed to develop the property through the LLC and to divide the proceeds from sale in accordance with the Agreement.[2] (R.E. 47, Trial Exhibit P-2)

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[1]Aron contends he had a verbal agreement requiring his participation in any profit on this parcel if it was sold within a year for more than $150,000. The land was sold within a year for $320,000 but Hill and Minyard deny any such agreement.

[2] It is not contested that Hill and Minyard individually received the contemplated $125,000 of consideration for Aron's 1/3 interest in HAM Management and Development Company, LLC. With the transfer of the real property to the LLC by the aforementioned deed, Hill, Aron, and Minyard each owned a 1/3 interest in the LLC, the sole asset of which was the 25.28 acres. The property was subject to a lien in favor of Mechanics Bank in the amount of $537,644 for the purchase price, the improvements to date

The sole asset owned at any time by HAM was the 25.28 acres transferred to it by Hill, Minyard, and Aron on July 13, 1998. There was no appraisal or valuation of the land at the time Aron bought in (R.E. 38, R. Vol.6, p.236) and no determination of the 'basis' of Hill or Minyard (R.E. 28, R. Vol.6, pp.158; R. E. 29, R. Vol. 6, p. 161). The LLC had no books or records of account, no minutes, and no checking or banking account. (R.E. 45 , R. Vol.7, p.356). As note payments and taxes became due, Hill and Minyard would notify Aron of his share each year. (R.E.27, R. Vol. 5, pp. 144,145). When the case went to trial the amount of debt on the property was approximately $300,000. (R.E. 37, R. Vol.6, p.226.).

Hill and Minyard's position was that the Agreement required Aron to advance all the costs of development and "see to" the development of the HAM property until it began to sell. (R.E. 26, R. Vol.5, p.142). As the property was sold, the bank was to be repaid first, Aron's development costs next, and the balance pro-rated among the members of the LLC in accordance with their 'basis'. Aron ran short of money and when Hill and Minyard refused to advance additional funds, Aron told the contractor on site, Joe Tidwell, to cease working and the project was effectively shut down in January, 1999. (R.E. 35, R. Vol.6, p.213) Joe Tidwell testified he was paid all he was owed by Aron, but had difficulty getting paid for some additional work he performed later for Hill and Minyard. [3] (R. E. 22, R. Vol. 5, pp. 106 - 111)

Hill and Minyard presented evidence they had invested $167,375 in the project through CHM prior to Aron's involvement. (R.E. 30, R. Vol. 6, p. 163; R. E. 34, R. Vol. 6, pp. 199,200;

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by CHM, and an additional amount the purpose and use of which is undefined but immaterial as each individual had agreed to be equally liable on the debt. The debt to Mechanics Bank was subsequently moved to Merchant's and Farmer's Bank.

[3]When work stopped, John Lewis testified Aron had completed 45% of the dirt work, 95% of the storm drainage system, but none of the rest of the work, and the project was approximately 24% completed. Jones documented Aron's expenditures for work on the project at $114,798.

R. E. 55, Trial Exhibit D8) However, all of this expenditure was financed with debt on the property which Aron was required to assume. (R.E. 34, R. Vol.6, pp.199, 200; R. E. 45, R. Vol 7, p.350) Prior to the separation of Coleman from Hill and Minyard, the three individuals had made payments totaling approximately $170,000 toward retirement of the $500,000 debt on the 62 acre parcel, of which amount Hill and Minyard paid $125,000. (Hill testimony R.E. 45, R.Vol.7, pp. 358-360).

Hill and Minyard offered the testimony of Robert Church, C.P.A for a determination of their 'basis' in the property. Over Aron's objection, Church testified their "basis" was $1,320,244 based on checks written through CHM for development prior to Aron, checks for debt and tax payments through 2007, and including a $427,350.00 value he 'assigned' to the 15.4 acres from the property received from Coleman at his departure from CHM. (R.E. 39, R. Vol.6, p.244). The trial Court deducted Aron's payment to Hill and Minyard of $125,000 to arrive at the 'basis' awarded to Hill and Minyard of $1,185.244.

Following Aron's involvement, John Lewis, a local engineer, was hired by HAM to revise the prior development plans and prepare an estimate of the cost of development. Lewis estimated the cost of developing the property to be $692,090. (R.E. 54, Trial Exhibit D-6) Aron's accountant, Chris Jones, C.P.A., documented note payments and development expenditures of $264,496.40 by Aron after he bought into HAM. [4] (R.E. 46, Trial Exhibit P-1 at p.26 and exhibits to Jones deposition).

Aron filed personal bankruptcy on May 19, 2003, which was ultimately dismissed.

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[4]Aron represented he paid Darrell Parker the amount of $125,000 attendant to work on the property but the trial court found insufficient evidence of this payment nor is it included in Jones's tabulation.

His assets listed in the bankruptcy include the HAM real estate. (R.E. 52, Trial Exhibit D-2). Although Aron was late making some payments on the HAM bank note he did make payments until November 7, 2005. (R.E. 46, Chris Jones deposition exhibits, Trial Exhibit P-1). The value of the land at the time of the 2003 bankruptcy filing was $2,760,000, and increased to $3,760,000 by February 13, 2007. (R.E. 56, Coats Appraisal, Trial Exhibit D-11). The bank's lien at the time of the bankruptcy filing was $485,427.00. (R.E. 55, Trial Exhibit D-8)

The Chancellor entered his Judgment relying on Miss. Code Ann. §79-29-307 (d) finding that Aron became dissociated from the LLC on May 19, 2003, upon the filing of his personal petition in bankruptcy. The trial court determined the basis of Hill and Minyard in the property to be $1,195,244, and Aron's basis in the property to be $371,958.45. (Paragraphs 20, 21 of the Judgment, R.E. 17, R.Vol. 4, pp.485-492) In doing so, the Chancellor gave full credit to Hill and Minyard for the money CHM had spent on the project even though the CHM expenditure was a part of the debt owed the bank. The trial court also allowed Hill and Minyard to receive benefit for payments they made on bank notes and taxes through 2007. The Chancellor then also deducted the 2003 debt from the appraised 2003 value to determine the amount of remaining equity to be split. (R.E. 17, Judgment paragraph 34, R. Vol 4, p 491). The Chancellor's Judgment determines Aron's share of the remaining equity to be $235,790 but reduced this amount to $100,000 "because he did not comply with the terms of his agreement with HAM." The total final award to Aron was $471,958.

SUMMARY OF THE ARGUMENT

All the property at issue was originally purchased from Mary Alice Wilson. Ten acres was initially purchased for $275,000 of which $20,000 was paid by Coleman, Hill, and Minyard, and the balance of $255,000 financed by Mrs. Wilson. A contiguous parcel of 64 acres was purchased for $500,000 from Mrs. Wilson which was totally financed by her for Coleman who transferred title to Coleman, Hill, and Minyard who assumed the purchase debt to Wilson. In 1998 Coleman took 50 acres and the debt owed to Wilson on the larger tract. Hill and Minyard took the 10 acres, plus 15.54 acres of the 64 acre parcel, for a total of 25.54 acres. In the exchange Hill and Minyard assumed all the debt for the 10 acre purchase including $167,375 in improvements to the ten acre parcel. They also refunded Coleman $15,008 in taxes on the 15.54 acres which he had paid before the split.

Within months of Coleman's exit Aron purchased an undivided 1/3 interest from Hill and Minyard who drafted an Agreement and Addendum executed by the parties. Aron received a deed for a 1/3 undivided interest in the land as tenants in common subject only to the lien of Mechanics Bank. The three then titled the property to HAM, LLC, and Aron was to "see to" the development of the real estate. The Addendum required the determination of the parties respective 'basis' in the development prior to distribution of funds.

To have a contract, there must be a 'meeting of the minds'. When Aron paid for his 1/3 undivided interest there was no appraisal of the property, or statement of 'basis'. HAM had no books or records of account and its only asset was the 25.54 acres. There is no Agreement or Addendum language indicating any intent contrary to each member initially having an equal 1/3 interest in the venture. In 1998 when they executed the Agreement and subsequent deeds, Hill and Minyard, who are attorneys, drafted the Agreement and the Addendum and deeds. Any

ambiguity in the Agreement and Addendum must be interpreted against the drafting party, avoiding any absurd, harsh, or unreasonable result.

The Chancellor's Judgment erroneously assigned a 'basis' of $427,350 for Hill and Minyard in the purchase of 15.54 acres as appraised by accountant Robert Church. With no evidence of any separate payment for the 15.54 acres, Church arbitrarily assigned the same per acre value ($25,000 per acre) in 2007 to this tract as the per acre price for the original 10 acres. The price per acre for the 15.4 acres when it was part of the 64 acre tract was $7,988 or $124,133. This arbitrary assignment of a valuation of 'basis' is $303,217 more than the documented price. The error is especially egregious in that it ignores the uncontested testimony that Coleman received no extra payment of money for the 15.54 acres when he split with Hill and Minyard. Coleman's consideration for his interest in the 15.54 acres was his release from debt on the property retained by Hill and Minyard and a refund of taxes he had recently paid on the 15.54 acres. This $303,217 was never paid by anybody, was not debt, and was simply a totally arbitrary 'assignment' of value in favor of Hill and Minyard.

This unreasonable determination of 'basis' could not have been contemplated when the Agreement was executed with Aron in 1998. Both Hill and Minyard testified they did not know their basis in 1998 and even Church testified he could not determine their basis as of 1998. Despite his arbitrary assignment of value, Church testified the meaning of 'basis' was what was actually paid plus improvement costs and carrying charges (R.E.40, R. Vol.6, p.253.) Church then admitted his determination was not based on what had been actually 'paid' by Hill and Minyard. (R.E. 40, R. Vol.6, pp.253-254). Hill and Minyard had not 'paid' for the property because the land received in the Coleman split was included in the debt assumed by them and ultimately by Aron. For the Chancellor to accept this arbitrary 'basis' in contravention of all the

other testimony and documents is an absurd interpretation of 'basis' and requires reversal as manifest error.

The Chancellor also was clearly in error when he included debt assumed equally by Aron for improvements within the 'basis' for Hill and Minyard. Hill and Minyard each testified they received title to 25.54 acres in their 1998 split with Coleman in exchange for assumption of the debt for the purchase and improvement of the initial 10 acres. The $537,644 debt they assumed included the debt remaining from the land purchase of $255,000 together with the cost of the improvements to that time of $167,375 and an additional, unexplained amount of $115,269. In making his award the Chancellor actually charged Aron with paying 1/3 of the bank debt for money the Court credited to Hill and Minyard as their 'basis'.

Additionally, the Court accepted Church's inclusion of payments by Hill and Minyard after the date of Aron's dissociation in 2003. It is manifest error and direct violation of *Miss Code Ann. Section 79-29-602* to determine Aron's basis and equity with property valued in 2003, while allowing the 'basis' of Hill and Minyard to increase for payments made through 2007. If Aron's equity is limited by the value of the property as of May 19, 2003, so also must be the determination Hill and Minyard's equity.

The trial Court also arbitrarily assessed Aron with $135,795 in penalties for failing to finish the development with no proof of any damages. Minyard testified he had no proof of any detrimental impact on the property caused by Aron and at the time of trial he would sell the property for $7.5 million. The actual appraised value of the land at the time of the 2003 bankruptcy filing was $2,760,000, increasing to $3,760,000 as of February 13, 2007, clearly exceeding the total amount of the purchase price for the entire 75 acres plus all improvements.

Damages must be proven to a reasonable degree of certainty and the testimony at trial is

totally void of any proof of damages. To 'round off' a determination of equities based on a total absence of proof is clearly reversible error. HAM Management and Development Company, LLC, the Defendant/Counterclaimant was not a party to the Agreement or Addendum and it has no corporate claim against Aron for any breach of contract for developing the property between him, Hill and Minyard. Hill and Minyard knew of the claimed breach in January of 1999 and chose not to pursue Aron for damages. They instead continued to request and accept payment of his share of the note payments and taxes until he filed suit for accounting in 2004. Miss. Code Ann. 15-1-49 limits such actions for breach of contract to three years which would bar any action against Aron after January, 2002, at the latest.

The judgment of the trial Court should be reversed and a new trial ordered. In the alternative, the Judgment should be amended to restore to Aron the $135,795 arbitrarily assessed against him, and to increase his award by 1/3 of the $167,375 debt counted in favor of Hill and Minyard. Aron is also entitled to an increase in his award by adjusting the 'basis' of Hill and Minyard to properly reflect their actual 'basis' in the property based on what they had actually paid to the point of Aron's dissociation in 2003. The only indication of any amount actually 'paid' by Hill and Minyard at the time of Aron's inclusion is $125,000 which Hill testified without documentation they had paid toward debt retirement. Since the debt assumed at the time of the Agreement reflected the balance of the purchase price for all the property and its improvements to that date, the only other payment actually made before Aron's entry was 2/3 of the $20,000 down payment to Wilson for the 10 acres, and the $15,008 in taxes refunded to Coleman when he left CHM. The Judgment should be amended accordingly.

Any award of damages for a breach of contract which was not brought until over six years later is barred by the statute of limitations whether belonging to individuals or the corporate LLC.

ARGUMENT

I. DID THE TRIAL COURT INCORRECTLY INTERPRET THE AGREEMENTS' INTENDED DEFINITION OF 'BASIS' ?

Contract formation requires a 'meeting of the minds' on the essential elements of the contract. *Hunt v Davis, 208 Miss. 710, 45 So.2d 350, 352 (1950). Mathis v Jackson County Board of Supervisors 916 So.2d 564 (C.A. Miss. 2005).* The Agreement and Addendum executed by Aron, Hill and Minyard, was drafted by Hill and Minyard, who are both practicing attorneys, and any ambiguity in terms must be construed in the light most favorable to Aron, the non-drafting party. *Mississippi Transportation Commission v Ronald Adams Contractor, Inc., 753 So.2d 1077, 1085 (Miss. 2000); Estate of Parker 673 So.2d at 1381-82 (citing Pursue Energy Corp. v. Perkins, 558 So.2d 349 (Miss. 1990))* .

"Ambiguous words and terms should be construed *against* the party who has drafted them; and we accept that, in a case where language of an otherwise enforceable contract is subject to more than one fair reading, we will give that language the reading most favorable to the non-drafting party." *Leach v Tingle, 586 So.2d 799, 801-802 (Miss. 1991).* "A construction leading to an absurd, harsh, or unreasonable result in a contract should be avoided unless the terms are express and free of doubt." *Theobald v Nosser, 752 So.2d 1036, 1041 (Miss. 1999).*

When interpreting a contract, the court's concern is not so much for what the parties may have intended, but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy. *Simmons v Bank of Miss., 593 So.2d 40, 42-43 (Miss. 1992).* Thus, the courts are not at liberty to infer intent contrary to that emanating from an objective reading of the words employed in the contract to the exclusion of parol or extrinsic evidence. *Cooper v Crabb, 587 So.2d 236, 239, 241 (Miss. 1991).*

In the present case Jim Aron understood from the plain language of the Agreement and the Addendum drafted by Hill and Minyard that he was purchasing an undivided 1/3 interest in 25.54 acres as tenants in common with Hill and Minyard subject to the debt on the property. For this he was paying $125,000 and assuming an equal share of the debt. (R.E. R.Vol.5 pp.11-13) The Agreement itself provides in paragraph 4:

> In consideration for 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 the other to DLM.

This contract language is not ambiguous in the least.

Aron ultimately satisfied his buy-in price by conveying a separate parcel of property to Hill and Minyard, and he received an Assumption Warranty Deed (R. E. 50,Trial Exhibit P-7) which conveyed to him the undivided 1/3 interest. At this point he owned an undivided 1/3 interest in the only asset of HAM subject only to the lien of Mechanic's Bank.

Aron also understood he was "primarily responsible for seeing to" the development of the dirt work on the property and preparing it for sale as the Addendum provides in paragraph 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.

Aron was to receive his additional expenditures returned to him as 'basis' in the property when it began to sell on a pro-rata basis with Hill and Minyard. He

could not have contemplated that the definition of 'basis' of Hill and Minyard would include an arbitrary retroactive assignment of value in 2007, of over $300,000 to 15.54 acres of the land on which he had assumed equal liability for payment. The Agreement, and Addendum refer to basis as actual money paid, not an arbitrary assignment of values made nine years later.

Aron's 'basis' in 1998 was equally understood by Aron and Hill to be Aron's $125,000 buy-in, plus what he actually spent on the property together with interest, taxes, and principal payments until it sold. (R.E. 43, Hill Testimony, R. Vol.7, p.343). The Agreement and Addendum are silent as to what constitutes basis and makes no mention of including any amount which is represented by debt being assumed equally by Aron. The only consistent interpretation of the Agreement and the Addendum, is that Hill, Aron, and Minyard, were equally invested once Aron delivered the required consideration of $125,000 and assumed an equal obligation to pay the debt on the property. Each person's expenditures going forward would be considered as increasing their basis when it came time to disburse money to the members.

The definition of 'basis' becomes significant when determining the equities of the parties for pro-rata distribution of profits on sale of the property. The Addendum drafted by Hill and Minyard attempts to clarify the distribution provisions of paragraph 8 of the Agreement 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 amount of debt Aron assumed included the bank debt incurred to pay Mrs. Wilson for the 10 acres. The amount Aron assumed also included the money spent to improve the property prior to Aron's entry. To conclude when the property was ultimately sold that Hill and Minyard would be entitled to claim part of that same debt as 'basis' is an absurd interpretation. Aron's basis was to be increased by what he actually spent. Any ambiguity in the contract language drafted by Hill and Minyard must be resolved in favor of Aron. *Leach v Tingle, 586 So.2d 799, 801-802 (Miss. 1991);* The Chancellor's decision clearly determines Aron's basis by a vastly different definition than used for Hill and Minyard, and for this reason must be reversed. A contract cannot be given one interpretation for one party and a different interpretation for another.

II. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN DETERMINING THE 'BASIS' OF HILL AND MINYARD ?

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

1. **The 'basis' awarded included an arbitrary assignment of value for 15.54 acres of the 25.54 acres.**
2. **The purchase of the all the property was included in the debt assumed by Aron, but was credited to the 'basis' of Hill and Minyard to the exclusion of Aron.**

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

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

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

Contracts such as the Agreement and Addendum are to be interpreted as a whole and, if possible, should be construed to avoid conflict in interpretation of all of its clauses. *Brown v Hartford Ins. Co. 606 So.2d 122, 126 (Miss. 1992).* In construing particular provisions of a contract, the instrument as a whole will be looked to, and its meaning determined from the entire agreement as written. If contract language is capable of two interpretations, the court should give effect to the interpretation which gives effect to all its provisions and is consistent with general intent. *Lambkin v Heard, 137 Miss. 523, 102 So.2d 565 (Miss. 1925); Benefit Trust Life Ins. Co. v Lee, 248 Miss. 715, 160 So.2d 909, 915 (1964).*

Based on the plain language of the Agreement and the Addendum, together with the Assumption Warranty Deed and testimony of Hill , the only reasonable and consistent interpretation of 'basis' is the amount of money actually each person actually paid into the project. At Aron's buy-in and the execution of the Assumption Warranty Deed to Hill, Aron, and Minyard each owned an undivided interest in the only asset of the LLC. There were no other books, minutes or records of the LLC. To this initial equal basis was to be added money actually spent thereafter by each member and reimbursement made pro-rata with the total money actually invested by each member. No other interpretation of the documents is consistent especially given the corroborating testimony of the parties

to the transaction.

Had an interpretation contrary to initial equal ownership interests been intended, such intent was required to be specified in the Agreement and Addendum. There were no books or records of the LLC at any time and no appraisal of the property or other determination of 'basis' when Aron bought into HAM. The only indication of investment is referenced in the documents. It is clear error for the trial Court to have adopted Church's arbitrary assignment in 2007 of a fictitious purchase expenditure which was never made to Hill and Minyard for 15.54 acres. The result of this position is that Aron never had the equal 1/3 interest for which he bargained.

It is equally clear error to include as 'basis' the $167,375 in improvements which was included in the debt assumed by Aron when he bought into the project. Hill and Minyard set the value of an undivided 1/3 interest in the property at $125,000 and executed a deed to Aron. While the testimony was that Aron was also liable for the development after that point, the interest in the property, which was the sole asset of the HAM LLC was 1/3 each.

When the Chancellor adopted Church's interpretation of 'basis' for Hill and Minyard he accepted Church's arbitrary assignment of a value to 15.54 acres as if Hill and Minyard had paid this amount. The amount assigned was the per acre price of the 10 acre tract. The effect of this arbitrary assignment of value was to overstate the value of the land by $303,217 over the price when it was purchased from Mrs. Wilson. Not only was this $303,217 not paid by Hill and Minyard, it was never paid by anybody. It is a fictitious, arbitrary assignment of

value which is outside the terms of the Agreement and Addendum. To simply award this value to Hill and Minyard is wholly without foundation and evidences a bias in favor of the attorney litigants and against Aron. Coleman's consideration for Hill and Minyard receiving this parcel with the 10 acres was his release from debt. Hill and Minyard paid him no other money other than a refund of taxes of $15,008. This award of a 'stepped up basis' is clear and manifest error and justifies reversal.

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

Aron's contract to develop the property further is distinct from his co-equal ownership of the land. The Assumption Warranty Deed to Aron is subject only to a lien in favor of Mechanic's Bank. Neither the deed to Aron, nor the subsequent deed to the HAM, LLC makes any reference to any additional consideration being due from Aron. Hill and Minyard acknowledge that they accepted land from Aron in the place of the cash initially contemplated. There is no limitation of Aron's 1/3 interest as a tenancy in common with Hill and Minyard beyond the debt to Mechanic's Bank. (R.E. 50, Trial Exhibit P-7)

Hill and Minyard each testified they could not determine their basis in the property when Aron paid them the $125,000 they established for his 1/3 undivided interest. (Although Hill did testify he and Minyard had paid about $120,000 to $125,000 toward payment of debt before Aron's entry. (R.E. 45, R. Vol.7, pp.351-355) Robert Church also testified he could not determine Hill and Minyard's basis as of 1998, and his calculation for trial in 2007 was based on not

having a specific value assigned to the purchase of the15.54 acres when Coleman split with Hill and Minyard.

Church and the Chancellor ignored the testimony of Hill and Minyard that Coleman received a release from his obligation to pay his portion of the $537,644 owed Mechanic's Bank for purchase of the 10 acres and its improvement. (R.E. 23, R. Vol. 5, pp. 126-128; R. E. 41, R. Vol.7, p. 315). In the exchange, Coleman received title to 50 acres and assumed the balance of the purchase note to Mrs. Wilson. In sum, Coleman received 50 acres and $500,000 in debt ($10,000/acre), and Hill and Minyard received 25.54 acres and $537,644 in debt ($21,040/acre) and each was released from the debt of the other. (R.E. 33, R. Vol.6, p.187). Coleman received no additional payment for the 15.54 acres beyond his release from the $537,644 debt on the improved 10 acre parcel.

The Chancellor was clearly in error in allowing a retroactive and arbitrary assignment of valuation without foundation for the 15.54 acre parcel and the inclusion of $167,375 in debt as 'basis' for Hill and Minyard when there is no proof they 'spent' or actually 'paid' these amounts or that they had paid for the purchase of the ten acres.. At the same time the Chancellor held Aron strictly to account for his actual expenditures definitively associated with the development. (R.E. 17, R. Vol.4, pp.485-492 Judgment paragraph 21)

Aron paid $125,000 and assumed an equal liability to pay the Mechanic's Bank lien of $537,644 which resulted from paying for the land received in the split from Coleman with its improvements of $167,375, and additional unexplained amount of $115,269. (R.E. 34, R. Vol. 6, pp. 199, 200; R. E. 45,

R. Vol.7, p. 352). He received an Assumption Warranty Deed for an undivided 1/3 interest as a tenancy in common with Hill and Minyard. The deed recites the grantors have received good and valuable consideration and there is no reference to any unpaid consideration due the grantors.

The trial court, in essence, determined to give Hill and Minyard a 'stepped up basis' for an arbitrarily assigned value by Church. This retroactive and arbitrary valuation is contradictory to the language of the Agreement and the Assumption Warranty Deed. Hill and Minyard presented no evidence they paid money for the property which is not reflected by the debt Aron assumed other than their portion of $20,000 down payment to Mrs. Wilson and a refund of $15,008 in tax payments to Coleman. All their testimony is clear that the split with Coleman left them with 25.54 acres and $537,644 in debt to Mechanics Bank. There is no evidence of any additional equity payment or debt related to the purchase or improvement of the HAM, LLC property. The only bank debt was to Mechanic's Bank and was assumed equally by Aron. (R.E. 31, R.Vol.6, p.184)

It is manifest error, in light of the facts, to simply grant an award of over $300,000 to the 'basis' of Hill and Minyard with no evidence of any payment to anybody for the amount credited. This finding of the Chancellor warrants reversal.

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

The trial court adopted Church's valuation of 'basis' for Hill and Minyard in the amount of $1,320,244 and deducted Aron's payment to them of $125,000 to

arrive at a net basis of $1,195,244. (R.E 17, R.Vol.4, p. 488, Judgment paragraph 20) The Chancellor then proceeded to determine the net value to HAM on May 19, 2003 for purposes of determining the amount to be due the respective parties. His computation is as follows:

Appraised value	$2,760,000
M&F Bank debt	485,427
Net value	$2,274,573
Aron's basis	371,958
Hill and Minyard's basis	1,195,244
Net available for distribution	$ 707,371

The Chancellor determined Aron was only entitled to computation of value on the date he filed for bankruptcy, May 19, 2003. However, he incorporated money paid the bank and for taxes after that date to the date of trial by Hill and Minyard. This error increased Hill and Minyard's 'basis' by at least the amount of $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'). Aron's date of dissociation determines the date for evaluation of his interest in the LLC. *Miss Code Ann. Section 79-29-602* mandates a dissociated member receive, "within a reasonable time after the dissociation, the fair value of his interest in the limited liability company as of the date of dissociation based upon his right to share in distributions from the limited liability company." The Chancellor's obviously clear error reduces the amount for distribution by a total of $126,329.55 paid after the date of dissociation, and is in violation of *Miss Code Ann. Section 79-29-602*, manifestly unfair and inequitable and mandates reversal of the judgment.

The Chancellor did include in Aron's basis the payments he made to the bank after May 19, 2003. However, these payments increased the current equity of Hill and Minyard and are proper to be refunded as payments made by Aron after the date of dissociation. To value the property by its appraised value on May 19, 2003, and recognize the bank debt as of that date, compels limiting the basis of Hill and Minyard to that date as well. As computed, the Chancellor unjustly charged the amount available for distribution with not less than $126,329.55 in payments made by Hill and Minyard after May 19, 2003.

This error by the Chancellor is clear and manifest, justifying reversal.

III. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN ASSESSING ARON'S INTEREST IN H.A.M, LLC WITH A MONETARY PENALTY WITHOUT TESTIMONY OR PROOF OF DAMAGES?

A. No proof of damages was offered at trial.
B. Damage claim is the personal action of Hill and Minyard and barred by Miss. Code Ann. Section 15-1-49.

A. No proof of damages was offered at trial.

The Chancellor found 1/3 of the net amount available for distribution to be $235,790 and proceeded to reduce Aron's 1/3 by the amount of $135,790 because "he did not comply with the terms of his agreement with HAM. (R.E. 17, R. Vol.4, at p. 492 Judgment paragraph 37.) This is obviously an assessment of damages for breach of contract. However, there is no proof of any damages to HAM as a result of any breach by Aron.

It is fundamental contract law that damages for breach of contract cannot be based on mere speculation but must be proved to a reasonable certainty. *Wall v Swilley, 562 So.2d 1252, 1256 (Miss. 1990) Adams v U.S. Homecrafters, Inc. 744 So.2d 736 (Miss. 1999).* If Aron breached the Agreement, the party claiming damage resulting from the breach has the burden of proving those damages with reasonable certainty. *Eastland v Gregory, 530 So.2d 172, 174 (Miss.1988).*

The rule that damages must not be speculative and must be related to the claimed breach is fundamental contract law. *Frierson v Delta Outdoor, Inc. 794 So.2d 220 (Miss. 2001)* citing *Turner v Crane, 115 Miss. 134, 75 So.495 (1917).* Damages may only be recovered when the evidence presented at trial removes their quantum from the realm of speculation and transports it through the twilight zone and into the daylight of reasonable certainty. *Frierson; Wall.*

There is no proof whatsoever that HAM has been damaged as a result of any action or inaction of Aron. When asked specifically if Aron's bankruptcy had caused any damages, Minyard testified 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) Both original parcels, together constituting 75 acres, were sold to Coleman, Hill and Minyard for a combined amount of $755,000. By 2003, when Aron filed for bankruptcy the property value had increased to over $2,000,000. Hill and Minyard received 25.54 acres in exchange for assuming $537,644 in debt in

1998. Minyard testified at trial he would sell the property for $7,500,000. There is no testimony of any monetary amount of damages resulting from Aron's bankruptcy, dissociation, or failure to develop the property as originally contemplated.

"When a plaintiff has available to him sources and means whereby damages may be calculated to a fair degree of certainty and he does not secure for trial such available proof, the circuit judge is perfectly correct in presuming if the plaintiff had any actual proof of damages he would have come forward with it and in directing verdict for the defendants." *David Thomas v Global Boat Builders & Repairmen, Inc. et.al.482 So.2d 112 (Miss. 1986).* 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.

A Chancellor's determination that the parties had offsetting damages was found to be reversible error as an abuse of discretion where he arbitrarily adjusted the rights of the parties. *Theobald v Nosser 752 So.2d 1036 (Miss. 1999).* In the

case at hand the trial court arbitrarily assessed an unexplained amount against Aron because the Chancellor found he did not live up to his contract with HAM. With absolutely no testimony or proof of any damages related to such a failure, any award of damages or reduction of award for breach of contract is reversible error.

B. Damage claim is the personal action of Hill and Minyard and barred by Miss. Code Ann. Section 15-1-49.

Any claim for damages for breach of contract must belong to a party to the contract, and in this case, only Hill, Minyard, and Aron signed any contract. H.A.M. Management and Development Co., Inc. is a separate legal entity, apart from its members. While Aron's bankruptcy filing may have been deemed to be a dissociation of his interest in the LLC, it did not have the effect of dissolution of the corporate entity which continued to hold title to the land. The LLC is the only party served with process in this matter. Hill and Minyard are named in the Answer and Counterclaim, but served no process on Aron for any personal cause of action for breach of the Agreement or Addendum. Not being party to the Agreement or the Addendum, the LLC has no claim for damages against Aron, Hill or Minyard.

In any event, Hill and Minyard, (and therefore, arguendo, the LLC) knew of Aron's shutting down the contractors in January of 1999. (R.E. 35, R. Vol.6, p.213). Instead of suing Aron for failing to finish the development they continued to request and accept the bank payments and taxes from Aron until he filed suit for accounting in 2004. Any breach of contract claim is barred by the

three -year statute of limitations for such actions. *Miss. Code Ann. Section 15-1-49.* The Counterclaim for damages was filed May 9, 2005 (R.E. 7, R. Vol.2, pp. 159-171) which is six years and four months after Aron terminated work. Any claim of the corporation or the individuals is time barred and any award of damages for breach of contract is improper and compels reversal.

CONCLUSION

The Chancellor made multiple findings which constitute manifest error and the Judgment must be either reversed and rendered or remanded for a new trial.

The trial court was manifestly in error in defining 'basis' by a different standard for Hill and Minyard than he used for Aron. The contract language is not ambiguous, but even if it is, any ambiguity must be construed in favor of Aron and against Hill and Minyard. The Chancellor, in every instance, interpreted the Agreement and Addendum in the light most favorable to Hill and Minyard in that he:

1. Counted the debt assumed by Aron as part of the 'basis' awarded to Hill and Minyard. The assumed debt of $537,644 included the purchase price of the property. It is totally improper and absurd to include debt assumed by Aron in the amounts credited to Hill and Minyard. Aron was given a price of $125,000 and assumption of this debt for a 1/3 undivided interest in the real estate. Hill and Minyard set their price and Aron paid it. The Chancellor was clearly and manifestly wrong in this award and the Judgment should be reversed on this ground.

2. Counted as 'basis' for Hill and Minyard the amount of $167,375 in improvements which were uncontradicted to be included in the $537,644 assumed equally by Aron. This is obviously a double assessment of the same money. In adopting Church's report, the Chancellor gave Hill and Minyard credit for the $167,375 both as a separate line item and again by crediting them with the debt

which included the $167,375. This is all the more egregious in that Aron assumed equal liability for these amounts. There is no justification for this 'double dip' in favor of Hill and Minyard and to do so constitutes clear and manifest error requiring reversal.

3. Counted an arbitrary, retroactive assignment of $303,217 which was not paid by anybody as 'basis' for Hill and Minyard. Robert Church received no such payment when he settled with Hill and Minyard. There was no separate transaction for 15.54 acres and the value of this parcel was included in the debt Hill and Minyard took in the settlement with Coleman. Two months after Coleman's split, Aron assumed an equal share of this same debt. The trial court was clearly and manifestly wrong when it granted equity to Hill and Minyard for money which was never paid to anyone and the Judgment must accordingly be reversed.

4. Counted as 'basis' for Hill and Minyard $126,329.55 paid on the property *after* Aron's date of separation in 2003 while holding the value of the property and the debt at May, 2003, values. It is totally an abuse of discretion to disregard *Miss Code Ann. Section 79-29-602* and continue to add to Hill and Minyard's account to the date of trial, while holding Aron's account and the valuation of the property to a date four years prior. If Aron's valuation date is May 19, 2003, the same date must also apply to the other two members of the LLC. This determination of the Chancellor is manifestly wrong and the Judgment must be reversed.

5. Assessed an arbitrary penalty to Aron of $135,790 because "he did not

comply with the terms of his agreement with HAM." even though there was no proof of damages at trial, and no claim for breach of contract was brought for over six years after the claimed breach.. This is obvious error requiring reversal of the Judgment.

The Chancellor, in effect, re-wrote the Agreement and the Addendum in favor of Hill and Minyard in every respect.

> "It is a fundamental principle that a court may not make a new contract for the parties or rewrite their contract under the guise of construction. In other words, the **interpretation** or construction of a **contract** does not include its modification or the creation of a new or **different** one. It must be construed and enforced according to the terms employed, and a court has no right to **interpret** the agreement as meaning something **different** from what the parties intended as expressed by the language they saw fit to employ. A court is not at liberty to revise, modify, or distort an agreement while professing to construe it, and has no right to make a different contract from that actually entered into by the parties." *17 Am.Jur.2d Contracts section 242.*

The only fair and just result is for this Supreme Court to 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.

Respectfully Submitted

Jim Earl Aron

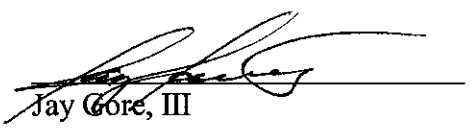
By: _____
Jay Gore, III [redacted]

Gore, Kilpatrick & Dambrino, PLLC
P. O. Box 901
Grenada, MS 38902-0901
662.226.1891

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 Brief and Record Excerpts of the Appellant, 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, 681Townes Center Blvd., Suite A Ridgeland, MS 39157.

This the 21st day of February, 2008.

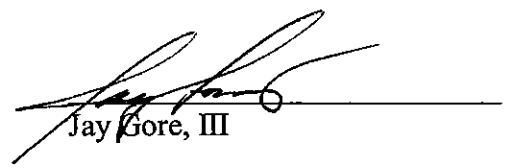


Jay Gore, III

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 Brief of the Appellant, by placing a true copy thereof, postage prepaid, in the United States mail, properly addressed, to Honorable Kenneth Burns, P.O. Drawer 110 Okolona, MS 38860-0110.

This the 25th day of February, 2008.



Jay Gore, III