

# IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NUMBER: **2007-CA-01590**

DENISE CUEVAS

PLAINTIFF / APPELLANT

VERSUS

MARGARET KELLUM

DEFENDANT / APPELLEE

ON APPEAL FROM THE  
CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI  
Civil Action No.: 2003-2166-JB

BRIEF OF DEFENDANT / APPELLEE

Oral Argument Requested

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CERTIFICATE OF INTERESTED PERSONS

"The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or refusal."

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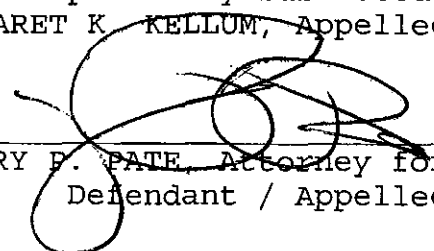
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#### CONSTITUTIONS

Mississippi

None

United States

None

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## STATEMENT OF ISSUES

Several questions of first impression are presented.

- A. What is a "formal account" under §79-12-43 Miss. Code 1972 (repealed eff. 1/1/2007)?

Defendant / Appellee suggests that

- (1) "Formal Account" under the above repealed statute did not mean "audit" and
- (2) the Master's report provided an appropriate "adjustment of the equities" of the parties

- B. Whether a Master / Chancellor must order a "formal account" (audit by accountant) in partnership dissolution matters?

Defendant / Appellee suggests that, absent proof of a deficiency in the Master's Report, the Plaintiff / Appellant received an appropriate "formal accounting."

- C. Whether failure to timely object to a Master's report waives that party's right to a "trial on the merits" of derivative matters?

Plaintiff / Appellant received an adjudication upon all issues properly before the learned Chancellor.

## CONCLUSION

This Honorable Court should affirm the Chancellor.

## STATEMENT OF THE CASE

### A. NATURE OF THE CASE

A case of application of Rule 53(g)(2) MRCP and the definition of "formal account" under Mississippi's former Uniform Partnership Act.

### B. COURSE OF PROCEEDINGS BELOW

#### Pleadings

On October 27, 2003, Cuevas filed a "Complaint for Injunctive Relief, Partition of Property and Damages" (CP.1-10) alleging breach of partnership in violation of the Mississippi Uniform Partnership Law (CP.4-5), breach of fiduciary duties (CP.5-6), injunctive relief (CP.6-7), and independent tort (CP.7-8).

On December 1, 2003, Kellum filed an "Answer to Complaint and Counterclaim" (CP.17-22) generally denying all of Cuevas' allegations (CP.17-18) and a counter-claim for injunctive relief and damages (CP.19-21). Kellum's answer included exhibits:

- A. September 8, 1999 "General Partnership Agreement Settler's Point Personal Care Home" as Exhibit "A" (CP.23-26),
- B. Kellum's October 23, 2003 notice of termination of

partnership to Cuevas as Exhibit "B" (CP.27),

C. Kellum's March 31, 2001 license to operate an Institution for the Aged or Infirmed as Exhibit "C" (CP.28),

Kellum's March 31, 2002 license to operate an Institution for the Aged or Infirmed as Exhibit "C" (CP.29),

Kellum's March 31, 2003 license to operate an Institution for the Aged or Infirmed as Exhibit "C" (CP.30),

Kellum's March 31, 2004 license to operate an Institution for the Aged or Infirmed as Exhibit "C" (CP.31),

On January 6, 2004, Cuevas filed an "Answer to Counterclaim" (CP.34-36).

#### Cuevas' Motion for Preliminary Injunction

On November 26, 2003, Cuevas filed a Motion for Preliminary Injunction (CP.11-16).

On January 15, 2004, Kellum filed an "Answer to Motion for Preliminary Injunction (CP.38-40).

#### First Referral to Special Master

On January 22, 2004, the Court entered its Order Appointing Special Master (CP.41-43), David Roberts, Esq.

#### Cuevas' Motion for Summary Judgment

On April 8, 2004, Cuevas filed a motion for partial summary judgment (CP.46-48) and supporting memorandum (CP.49-59) and exhibits: (A) September 8, 1999 "General Partnership Agreement Settler's Point Personal Care Home" as Exhibit "A" (CP.61-64); (B) September 9, 1999 Warranty Deed from Michael E. Jenner et ux

to Kellum and Cuevas as joint tenants with full rights of survivorship as Exhibit "B" (CP.65-66); (C) February 5, 1999, Warranty Deed from Robert M. Morgan and Cynthia A. Morgan to Kellum and Cuevas as tenants in common with full rights of survivorship as Exhibit "C" (CP.67-68); (D) September 20, 1995, Warranty Deed from Gulf Orleans, Inc. and Andrew J. Sanchez, Jr. to Kellum and Cuevas as tenants in common with full rights of survivorship as Exhibit "D" (CP.69-71); (E) Kellum's October 23, 2003 notice of termination of partnership to Cuevas as Exhibit "B" (CP.72); (F) Kellum's December 1, 2003, "Answer to Complaint and Counterclaim" (CP.73-78); (G) January 28, 2004 affidavit of Mark Youngblood (CP.79-84); (H) copies of supporting authorities (CP.85-193).

#### Second Referral to Special Master

On May 4, 2004, the Court entered its Agreed Order appointing Haidee Oppie Sheffield, Esq., as Special Master (CP.194-197) with directions to:

. . . report to the Court concerning her opinion as to the respective ownership interests of the various properties within the scope of the litigation claimed by each of the parties. Specifically, the Special Master shall determine (1) the capital contributions from each party to the business in question; (2) the personal-related withdraws [*sic*] from the business in question; (3) the ownership interest of each party in the business in question as of the date of filing of this litigation; and (4) the ownership interests of each party in the real property in question as of the date of filing of this litigation. The said report shall be forthcoming as soon as possible. The parties are directed to comply with all requests of the Special Master. \* \* \*

(CP.194) .

The Chancellor did not direct the Special Master to render a "formal account" (Applt.Brf.8). The Special Master did not require Kellum to produce a monthly accounting for the period that Kellum alone ran Settler's Point (T.26-27) .

#### Emergency Motion

On June 7, 2004, Cuevas filed an "Emergency Motion to Require Margaret Kellum to Sign a Joint License Application with Denise Cuevas, and to Turn Over Control of Settler's Point and All of Its Assets and Belongings to Plaintiff" (CP.198-202) with an April 5, 2004, letter from Mississippi Department of Health to Kellum and Cuevas re February 20, 2004 inspection of Settler's Point and violations of "Licensure Regulations" (CP.203) with "Licensure Violation Report" (CP.204-218) as Exhibit "A".

On June 24, 2004, Kellum filed an "Answer to Emergency Motion to Require Margaret Kellum to Sign a Joint License Application with Denise Cuevas, and to Turn Over Control of Settler's Point and All of Its Assets and Belongings to Plaintiff" (CP.219-221) .

#### Special Master's Draft Report

On September 26, 2004, the Special Master wrote a letter to each party's counsel (CP.273-274, T.24-25, 28-29) and the Special Master issued a draft Master's report to the parties (CP.224, 273, T.17, 24) .

Neither Cuevas nor Cuevas' counsel contacted the Special

Master thereafter (T.28, 30).

The Special Master did receive considerable information after the letter (T.30) from Kellum (T.32). The Special Master received the monthly spreadsheets for Settler's Point (books of account) (T.31, 66-67). Cuevas produced a physician's statement re Cuevas health to the Special Master.

#### Judgment of Recusal

On January 24, 2005, the Chancery Court entered a Judgment of Recusal whereby Chancellor Pat H. Watts, Jr. recused himself (CP.222).

On January 25, 2005, the Court entered an "Order of Recusal, Transfer of Case and Acceptance of Alternative Case" whereby Chancellor Pat H. Watts, Jr. and Chancellor Jaye A. Bradley swapped cases (CP.223).

#### Report of Master

On March 28, 2005, *Second* Special Master Haidee Oppie Sheffield filed her "Report of Special Master" (CP.224-235) with exhibits: (A) "Spreadsheet of Withdrawals" as Exhibit "A" (CP.236), (B) "Interest Calculations on MK Advances" as Exhibit "B" (CP.237), (C) Sheffield's detailed invoice of charges as Exhibit "C" (CP.238-239).

No objections to the Master's Report were filed (T.31).

#### Kellum's Emergency Motion

On April 13, 2005, Kellum filed an "Emergency Motion"

(CP.240-242) regarding a March 31, 2005 letter from Mississippi State Department of Health re Cuevas' application for licensure (CP.259) with exhibits: (A) March 28, 2005, Special Master Haidee Oppie Sheffield's "Report of Special Master" (CP.243-243-258) as Exhibit "A"; (B) March 31, 2005, letter from Mississippi State Department of Health re Cuevas' application for licensure (CP.259) as Exhibit "B"; (C) April 5, 2005, letter from Earl L. Denham (Defense counsel) to Robert G. Harenski (Plaintiff's counsel) as Exhibit "C" (CP.260-262); (D) April 7, 2005, letter from Robert G. Harenski (Plaintiff's counsel) to Earl L. Denham (Defense counsel) as Exhibit "D" (CP.263-264).

First (1<sup>st</sup>) Hearing

On April 14, 2005, a hearing was held in the Chancery Court of Jackson County, Mississippi (T.2-96) concerning Defendant Kellum's "Emergency Motion" (T.4).

Haidee Oppie Sheffield, Esq., Special Master herein, testified (T.16-33). The Partnership Agreement was admitted into evidence without objection (**Exhibit 1** (Partnership Agreement) **admitted without objection**, T.19).

Defendant Margaret Kellum testified (T.34-68). Plaintiff Denise Cuevas testified (T.68-91).

Defendant Cuevas proffered the Affidavit of Mark Youngblood (CP.79-84), an absent witness (then in China) (T.91). Plaintiff Kellum objected (T.91-92) and Defendant replied (T.92). The Chancellor sustained Kellum's objection and DENIED admission

(T.92) of the Affidavit of Mark Youngblood (CP.79-84).

The Court then recessed and conferred with counsel in chambers (T.92-93). When open Court resumed, Plaintiff Kellum announced the terms of a temporary agreement (T.93-94) to serve "until the matter is set for trial" (T.93). The Court announced that the temporary agreement "would be the order of the Court" (T.94) and directed defense counsel to prepare the Order (T.94) and Court recessed (T.95).

On May 4, 2005, the Court entered an "Agreed Order on Emergency Motion" directing the parties to apply for a joint license (CP.277-278).

#### Plaintiff Objects to Report of Special Master

On April 19, 2005, Cuevas filed a "Motion to Allow Out of Time Objections to Report of Special Master" (CP.265-266) with exhibits: (A) Cuevas' Objections to Report of Special Master (CP.267-272) as Exhibit "A"; and (B) Copy of September 26, 2004 letter from Special Master Haidee Oppie Sheffield to counsel for both Parties (CP.273-274) also as Exhibit "A".

On April 28, 2005, Kellum filed an "Answer to Motion to Allow Out of Time Objections to Report of Special Master" (CP.275-276).

#### Hurricane Katrina

On August 29, 2005, Hurricane Katrina struck the Jackson

County, Mississippi Courthouse, rendering it unusable.<sup>1</sup> As part of Jackson County's recovery effort, the Chancery Court's file herein was removed from the Jackson County Courthouse and sent to a document recovery contractor out of state (T.99).

Second (2<sup>nd</sup>) Hearing

On October 10, 2005, a hearing was held in the Chancery Court of Jackson County, Mississippi (T.97-135).

The Court noted that Cuevas' April 19, 2005 "Motion to Allow Out of Time Objections to Report of Special Master" (CP.265-266) was filed after the April 14, 2005 hearing, was not then adjudicated, and that Cuevas could argue the motion at the October 10, 2005 hearing (T.104). The Court took note of the Motion to Approve the Report of Special Master (T.105).

The Court agreed to hear Cuevas' objections (T.107) and Cuevas' "Motion to Allow Out of Time Objections to Report of Special Master" (CP.265-266; T.107-108). When the Court asked why Cuevas' objections were untimely filed, counsel replied

MR. HARENSKI:           And, Your Honor, as I stated in my motion, I had a lot of court appearances and I just did not get to it. I wish that I could state from memory exactly what the court appearances were. I know that one of them dealt with a federal cocaine conspiracy trial that was getting ready to go. And, you know, I don't know what the other ones were.

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<sup>1</sup> See: 9/6/2005 Mississippi Supreme Court "Emergency Administrative Order", 2005-AD-00001.

(T.108).

The Court DENIED Cuevas' "Motion to Allow Out of Time Objections to Report of Special Master" (T.109).

On October 25, 2005, the Court entered its "Order Denying Motion to Allow Out of Time Objections to Report of Special Master" (CP.317-318).

Report of Special Master

The Court then considered the Motion to Approve the Report of Special Master (T.110). The Special Master summarized her Report (T.110-121). The Court took the matter under advisement (T.124, 132) for 30 days (T.132), reserved ruling (T.127), directed the parties to confer (T.124), and ordered each party to bear half (½) of the Master's fees and charges (T.133).

On February 10, 2006, the Court entered its "Order Approving Report of Special Master" approving the Report of Special Master and assessing half (½) of the Special Master's fees against each party (CP.329-330).

Cuevas' Motion to Determine Perjury

On June 14, 2005, Cuevas filed a "Motion to Determine if Margaret Kellum Committed Perjury, for Contempt and Sanctions, and for a Pilfer Hearing to Determine if Margaret Kellum Has Used Settler's Point Funds to Pay Her Legal Expenses" (CP.279-283) with exhibits:

- A. Excerpts from April 14, 2005 hearing upon the Emergency Motion (CP.284-285) as Exhibit "A",

- B. Excerpts from April 14, 2005 hearing upon the Emergency Motion (CP.286-287) as Exhibit "B",
- C. Copy of Kellum's 2003 U.S. Income Tax return (CP.288-294) as Exhibit "C".

On June 27, 2005, Kellum filed an "Answer to Motion to Determine if Margaret Kellum Committed Perjury, for Contempt and Sanctions, and for a Pilfer Hearing to Determine if Margaret Kellum Has Used Settler's Point Funds to Pay Her Legal Expenses" (CP.304-306).

#### Cuevas' Motion for Accounting

On June 14, 2005, Cuevas filed a "Motion for an Accounting" (CP.295-299).

On June 27, 2005, Kellum filed an "Answer to Motion for an Accounting" (CP.310-312).

#### Cuevas' Motion for Independent Appraisal

On June 14, 2005, Cuevas filed a "Motion for an Independent Appraisal and Business Evaluation" (CP.300-303).

On June 27, 2005, Kellum filed an "Answer to Motion for an Independent Appraisal and Business Evaluation" (CP.307-309).

#### Designation of Expert Witness

On July 24, 2006, Cuevas filed a "Plaintiff's Designation of Expert Witness" (CP.331-333) with expert's curriculum vitae (CP.334-349).

On April 13, 2007, Kellum filed a "Defendant's Amended

Designation of Expert Witness" (CP.351-352) with first expert's curriculum vitae (CP.353) as Exhibit "A" and second expert's curriculum vitae (CP.354-355) as Exhibit "B".

Third (3<sup>rd</sup>) Hearing

On April 17, 2007, Cuevas filed a Motion to Compel (CP.356-368). On May 16, 2007, Kellum filed a Motion to Compel (T.369-409).

On May 25, 2007, a hearing was held in the Chancery Court of Jackson County, Mississippi (T.136-162) upon the Motions to Compel (T.138-144). The Court reminded the parties that the Court had denied the motion to file out of time objections to the master's report (T.139). The Court ordered Cuevas to provide copies of Cuevas' checks (T.142-143).

Petition for Direction

On June 8, 2007, Kellum filed a "Petition for Direction" (CP.410-411).

On June 11, 2007, Cuevas filed a "Response to Petition for Direction and Motion to Vacate Order Adopting Special Master's Report, or Alternatively Motion for Trial on the Merits" (CP.412-416).

Fourth (4<sup>th</sup>) Hearing

On June 12, 2007, a hearing was held in the Chancery Court of Jackson County, Mississippi (T.145-162) on Kellum's Petition for Directions (T.147) and related matters. The Chancellor ruled:

THE COURT:

Okay. Let me say this: Mr. Fitzgerald, what you're asking me to do is go back and redo this whole case. \* \* \*. You're saying that the Master never got documents, things, information. Of course, you weren't involved then, but, you know, that was their responsibility. And if she didn't, then they should have filed objections timely. That's what we have rules for. I am certainly not going to go back and retry this case after a Master has already done it.

I am going to enter - I'm going to enter a Final Judgment. Mr. Denham, you will prepare it for the Court, please.

(T.159).

#### Final Judgment

On July 12, 2007, the Court issued its "Final Judgment *Nunc Pro Tunc* to February 10, 2006" (CP.417-418), (1) finding "jurisdiction over the parties and the subject matter herein" (CP.417); (2) noting an October 10, 2006 hearing to approve the Special Master's Report (CP.417) and the Court's February 10, 2006 "finding that the Special Master's Report should be approved in its entirety" (CP.417-418), and (3) directing "implementation of the Master's Report within thirty (30) days of the date of this Final Judgment, *Nunc Pro Tunc* to February 10, 2006" (CP.418).

#### Post-judgment and Appeal

On August 16, 2007, Cuevas filed a Notice of Appeal (CP.419-420). On August 30, 2007, Cuevas filed a "Designation of Record On Appeal" (CP.421-423).

On October 1, 2007, the Clerk of the Supreme Court of

Mississippi issued a Notice of Deficiency (CP.424).

On October 2, 2007, Cuevas filed a "Motion for Stay of Judgment" (CP.425-427). On October 4, 2007, Cuevas filed a "Certificate of Compliance with Rule 11(b)(1) [MRAP]" (CP.428-430).

On July 15, 2008, the Chancery Clerk of Jackson County, Mississippi issued a "Statement of Fees" (CP.431) and "Clerk's Certificate As To Cost" (CP.432) and "Clerk's Certificate As To Authenticity" (CP.433).

C.  
STATEMENT OF FACTS

Since November 1, 1995, Kellum has operated an unlicensed (T.36) private care facility for the aged as a sole proprietorship (T.34, 52). Kellum is a certified assistant aide and has some junior college nursing training (no degree) (T.35).  
Partnership Agreement

On September 8, 1999, the parties signed a "General Partnership Agreement Settler's Point Care Home" (CP.23-26, T.18). Under paragraph 6 of the Agreement, "profits and losses shall be allocated to the Partners in equal amounts" (CP.24, T.53). Because Kellum's contribution (equity) to the partnership exceeded Cuevas' contribution, Kellum claimed to own the majority interest in the partnership (T.53). Inter alia, the Agreement

stated:

9. Withdrawal by Partners. (a) A Partner may, by notice to each of the other Partners at least seventy-five (75) days prior to the last day of any fiscal year, elect to withdraw from the Partnership. The withdrawing Partner's Capital Account shall be valued as of the last day of the fiscal year in which the notice of withdrawal is given.

10. Causes for Termination. The Partnership shall be terminated upon the earlier of:

10.1 The incompetency, insolvency or death of all the Partners; or

10.2 The decree of any court of competent jurisdiction directing the dissolution or termination of the Partnership; or

10.3 (a) Execution of a written declaration of intention to terminate the Partnership by all of the Partners; or (b) Thirty days following the delivery by one to the other Partners of a written declaration intention to terminate the Partnership; or

The incompetency, insolvency or death of any one or more of the Partners (but not all of the Partners) shall not terminate the Partnership.  
(CP.24).

#### State Licensure

Effective September 1, 1999, the State first licensed Settler's Point (T.36).

On March 31, 2001, Mississippi State Department of Health licensed Margaret Kellum

. . . to maintain and operate an Institution for the Aged or Infirm according to Section 43-11-9 of the Mississippi Code of 1972 on the premises described to wit: Settler's Point . . . .  
(CP.28).

The license was annually renewed in Kellum's name for 2002 (CP.29), 2003 (CP.30), and 2004 (CP.31).

#### Cohabitation

Kellum and Cuevas lived in the same house until 2003 (T.56).

#### Partnership

Settler's Point operated as a partnership (T.18). Kellum and Cuevas jointly own the Settler's Point building (T.40). Settler's Point pays the monthly note upon the premises (T.40). All installments have been paid (T.42, 71-72) and the note upon the parties residence is current (T.72).

Kellum brought ten (10) residents, supplies, furnishings, deposits, and transfers of utility accounts to the partnership (T.34).

Cuevas had no prior experience in this business (T.34). Cuevas cooked meals three (3) days per week, housekeeping, entertained the elderly, answered the telephone, and showed the house to clients, shopped at Sam's Club for groceries (T.35). Cuevas did not shop at local groceries, did not pay any bills, did not schedule employees, or provide medical assistance to residents (T.35). The partnership paid all of Cuevas' living expenses plus Fifty Dollars (\$50.00) per week (T.71-73).

#### Dissent in Partnership

Cuevas testified that, beginning in 2003, the Parties began having problems (T.74). Kellum does not then believe that Kellum and Cuevas could jointly operate Settler's Point (T.36). Eventually, the Parties could not be together at Settler's Point at the same time (T.38, 84). The parties can not be in the same room (T.41).

The Parties shared the same bookkeeper, Thomas Dolinsky, and Kellum left the Partnership's books of account open for Cuevas' inspection (T.38). Kellum testified that Cuevas was free to look at the books of account (T.42). Kellum has not denied Cuevas' access to the books (T.39).

#### Tax Returns

Dolinsky has prepared tax returns (T.44). By agreement of the parties, Dolinsky prepared tax returns showing that Kellum operated as a sole proprietorship in order to preserve Cuevas' Social Security (T.72) disability benefits (T.48, 50-51, 67, **Exhibit 4** (tax returns for 2001, 2002, 2003) **admitted without objection**, T.51).

Since 1988 (T.83), Cuevas has been disabled and receives disability benefits (T.70). Dolinsky helped Cuevas to gain reinstatement of benefits when Cuevas lost benefits due to employment (T.70). Cuevas testified that she agreed to permit Dolinsky and Kellum to handle tax matters (T.69, 71). Cuevas did not report income from payments on Partnership properties (T.69-70). Cuevas filed no income tax returns for 2000 - 2003 (T.70-71).

#### Termination of Partnership

On October 23, 2003, Kellum wrote a letter to Cuevas stating:

The purpose of my writing is to provide you notice that I intend to terminate our partnership pursuant to Section 10.3(b) of our General Partnership Agreement.

So noticed this the 23<sup>rd</sup> day of October, 2003.

/s/ Margaret K. Kellum

(CP.27, T.60).

Cuevas received the letter (T.77, **Exhibit 2** (8/23/2003 letter) **admitted without objection**, T.33).

Under the terms of the Agreement, the partnership terminated November 22, 2003 (T.20-21) or November 25, 2003 (T.80). Cuevas does not object to terminating the partnership (T.74-75).

In January, 2004, Kellum and Settler's Point employees chased Cuevas around Settler's Point (T.81-82).

#### Special Master's Report

Kellum reviewed the Special Master's Report (T.39). Kellum is satisfied with the Special Master's Report (T.39). Cuevas is not satisfied with the Special Master's Report (T.75-76).

Kellum was ready to divide partnership assets (T.39).

#### Emergency Motion

Kellum and Cuevas each applied to the State for a license to operate Settler's Point (T.39, 59-60, T.87-90). On January 17, 2004, Kellum applied for a license (T.60-61, 64-65, **Exhibit 5** (license application) **admitted for identification**, T.61, **Exhibit 7** (2004 license application) **admitted without objection**, T.66). By April 5, 2004, letter from Mississippi Department of Health letter (CP.214-218), the State rejected both applications (T.40, 64-65, **Exhibit 3** (Health Dept. letter) **admitted without objection**, T.41). Cuevas received a Health Department letter

(C.90).

Every year, Kellum received a notice from the State Department of Health regarding health code violations disclosed upon Department inspections (T.62). The violations were corrected and the Department reinspected Settler's Point (T.62, **Exhibit 6** (Health Department Notice) **admitted without objection**, T.62).

#### Attorney's Fees

On cross-examination, Kellum denied having paid any of her "attorney's fees out of Settler's Point accounts" (T.62).

### SUMMARY OF THE ARGUMENT

#### PROPOSITION 1

##### WHETHER THE CHANCELLOR PROPERLY REFERRED THIS PARTNERSHIP ACCOUNTING TO A MASTER?

Under common law, Chancellors assigned partnership matters to masters. Rule 53 MRCP continued the common law. The Chancellor appointed a Special Master. No one audited the books of account. Cuevas provided no information. Using Kellum's supplied accounts and documents the Special Master responded to each issue in the Order of reference. The Chancellor found that the Master's report disposed of the case. Cuevas produced no admissible evidence to show otherwise. The Chancellor should be affirmed.

#### PROPOSITION 2

WHETHER THE COURT ERRED IN ADOPTING THE MASTER'S REPORT?

Kellum twice acknowledged that Cuevas has a right to an accounting. On appeal, Kellum suggests that "formal accounting" is undefined in the statute and that the Chancellor should "adjust the equities" of the parties. Kellum suggests that the Special Master and Chancellor did so.

Cuevas complains that the Chancellor and the Special Master erred by not requiring an audit (apparently at partnership expense). Cuevas does not cite any case so requiring. Kellum found none. The Chancellor should be affirmed.

## ARGUMENT

### Standards of Review

#### Review of Questions of Fact

The Mississippi Supreme Court does not sit to redetermine questions of fact. Matter of City of Horn Lake, 630 So.2d 10, 19 (Miss. 1993).

#### Review of Questions of Law

The Supreme Court employs a de novo standard of review when passing on questions of law. G. B. "Boots" Smith Construction v. Cobb, 860 So.2d 774, 776-777 (Miss. 2003) (¶¶6-7). Legal conclusions are also reviewed de novo. Andrew Jackson Life Insurance Co. v. Williams, 566 So.2d 1172, 1183-1184 (Miss. 1990).

#### Review of Jurisdictional Questions

Jurisdictional questions are subject to de novo review. McCain Builders, Inc. v. Rescue Rooter, LLC, 797 So.2d 952, 954 (Miss. 2001).

### PROPOSITION 1

WHETHER THE CHANCELLOR PROPERLY REFERRED  
THIS PARTNERSHIP ACCOUNTING TO A MASTER?

The Chancellor assigned the matter to a qualified Special Master. Complaint is made that the Master did not require an

"formal account" (audit) of partnership accounts (Applt.Brf.12-16). Kellum acknowledged Cuevas right to an audit - at Cuevas' expense. Cuevas cites no law requiring Kellum to bear audit expense. There is no evidence that the partnership's books of account are in error. There is no evidence that Cuevas' retained accountant was denied access to the partnership's books. Cuevas made no showing that the Special Master must procure a "formal account" (audit). The Chancellor adopted the Master's report and entered judgment. The Chancellor should be affirmed.

#### Chancery Court Jurisdiction

Equity has original jurisdiction of the settlement of partnership estates and accounting between partners. Barry v. Mattocks, 156 Miss. 424, 432, 125 So.544, (Miss. 1930); Crowe v. Smith, 603 So.2d 301, 307-308 (Miss. 1992).

#### Common Law Masters

A Chancellor may refer a partnership accounting to a master or make his own calculations in the Chancellor's discretion. Ransom v. Harroun, 147 Miss. 579, 592, 113 So. 206 (1927). The Chancellor acted within Chancery jurisdiction / procedure and should be affirmed.

#### Limited Chancery Jurisdiction

Cuevas' complaint that the Chancellor erred in failing to address all of Cuevas' claims (Applt.Brf. 6-10) is without merit.

Cuevas (1) requires the Chancellor to exceed Chancery Court jurisdiction, (2) denies Kellum's right to trial by jury, (3) is

unsupported by admissible evidence in the Record on Appeal.

Cuevas confuses "questions of law" and actions at law. Contrary of Cuevas' argument (Applt.Brff. 7, 16), claims for money damages, here damages for breach of fiduciary duty, breach of partnership agreement (contract), and "independent tort", are claims at law subject to jury trial. A Chancellor ought not hear such claims. City of Ridgeland v. Fowler, 846 So.2d 210 (Miss. 2003) [chancery court has no subject matter jurisdiction of Mississippi Tort Claims Act monetary damage claim]; Southern Leisure Homes, Inc. v. Hardin, 742 So.2d 1088, 1090 (Miss. 1999) [breach of contract claims properly heard in circuit court]; Robertson v. Evans, 400 So.2d 1214, 1215 (Miss. 1981) [courts of equity should not assume jurisdiction of claims for personal injury]; McLean v. Green, 352 So.2d 1312, 1314 (Miss. 1977) [*abuse of discretion* for chancellor to assume jurisdiction of a common law action; should be tried in a court of law where the right to trial by jury remains inviolate]. The Chancellor should be affirmed.

#### Injunctive Relief Inapplicable

Where one has a "plain and adequate remedy at law," a court of equity is without jurisdiction. Thompson v. Anding, 370 So.2d 1335, 1338 (Miss. 1979). By definition, monetary damages are not "irreparable" harm. The Chancellor correctly dismissed Cuevas' claims for relief via extraordinary writ.

Where the primary harm claimed in the absence of an

injunction is monetary, or where the harm is equivalent in that both parties claim right to disputed funds, injunction is improper. DFW Metro Line Services v. S. W. Bell Telephone Co., 901 F.2d 1267, 1269 (5<sup>th</sup> Cir. 1990); Mississippi Women's Medical Clinic v. McMillon, 866 F.2d 798 (5<sup>th</sup> Cir. Miss. 1989); Speigel v. City of Houston, 636 F.2d 997, 1001 (5<sup>th</sup> Cir. 1975); Stock v. Tenneco, Inc., 641 F.Supp. 199, 202 (S.D. Miss. 1986).

It is insufficient to allege in general terms that there is no complete and adequate remedy at law, injury is substantial, and is irreparable. Material facts must be shown, so that the Chancellor may determine from the facts whether the elements are shown. Bridges & Shelson, Griffith Mississippi Chancery Practice (2000 Ed.) §446, pp.252-253 (Harrison Co. 2000). Nothing in the Record on Appeal so indicates.

The Chancellor should be affirmed.

## PROPOSITION 2

WHETHER THE COURT ERRED IN ADOPTING THE MASTER'S REPORT?

Since Cuevas asserted breach of partnership agreement (contract), then Cuevas bore the burden of proof. Warwick v. Matheny, 603 So.2d 330, 336 (Miss. 1992). Cuevas did not place admissible evidence in the Record on Appeal to support her

claim(s). Cuevas claims that the Court erred in not procuring evidence of the alleged breach, "Formal and Proper Accounting" (Applt.Brf. 10-16), citing §79-12-37 Miss. Code 1972. §79-13-403 Miss. Code 1972 confirms a partner's right to view a partnership's books of account. No cited authority requires that a Chancellor or the Special Master procure a "Formal and Proper Accounting" (audit).

Kellum acknowledged Cuevas' right to inspect the partnership's books of account (T.38-39, 42). On direct examination, Kellum testified:

Q. You're familiar, are you not, with a requirement that the books of the place be left open, that she [Cuevas] would be able to get an accounting of the assets?

A. Yes, I am. And, they are open for her to get a look at them any time she wanted to.

\* \* \*.

Q. Do you recall any requests that have been made by them to have access to the [\*39] records that was denied?

A. No, sir.  
(T.38-39).

and again

Q. If there is any request by these people for any documentation of any type or if they want to come look at the books, are they free to do that?

A. Yes, sir.  
(T.42).

Cuevas has not shown wherein Kellum's books of account err.  
Cuevas did not audit the books of account.

An "accounting" may, but does not mandate, an "audit." An "accounting" means an "adjusting of the equities" of the parties.

Barry v. Mattocks, 156 Miss. 424, 432-433, 125 So. 554, 556

(Miss. 1930) (McGowen, J.) noting:

\* \* \*. The [\*433] interest of a partner in partnership property, whether real or personal property, is his interest in the net balance after deducting from the whole the debts thereof, and after adjusting the equities between the partners. \* \* \*. [156 Miss. at 432-433, 125 So. at 556].

The Special Master (1) responded to each issue in the Court's referring Order and (2) proposed a remedy "adjusting the equities." The Chancellor correctly (1) assigned a Special Master and (2) adopted Master's report. The Chancellor should be affirmed.

#### Rule 53 MRCP

Rule 53 MRCP states in part:

(f) **Statements of Account.** The court may direct an account to be taken in any cause . . . , and when the master shall doubt as to the principles upon which the account shall be taken or as to the propriety of admitting any item or debit or credit claimed by either party, he may state in writing the points on which he shall doubt and submit the same for decision to the court \* \* \*.

(g) **Report.**

(1) *Contents and Filing.* \* \* \*.

(2) *Acceptance and Obligations.* The court shall accept the master's findings of fact unless manifestly wrong.

Within ten days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as provided by Rule 6(d). The court after hearing may adopt the report or modify it or may reject it in whole or in any part or may receive further evidence or may

recommit it with instructions.  
(emphasis original).

Cuevas made no timely objection. Cuevas proffered no admissible evidence warranting further litigation. The Chancellor should be affirmed.

#### Mississippi Common Law

Common law supplements the Uniform Partnership Act. Smith v. Redd, 593 So.2d 989, 993 (Miss.1991). At common law, a Master's report can not be vacated or set aside unless manifestly wrong as against the overwhelming weight of the evidence. Broadhead v. Stack, 244 So.2d 382, 384 (Miss. 1971) quoting Merchants Fertilizer & Phosphate Co. v. Standard Cotton Gin, 199 Miss. 201, 23 So.2d 906 (1945).

Cuevas made no timely objections to the Master's report. Cuevas proffered no admissible evidence contradicting the Master's report. Finding the Master's report dispositive, the Chancellor adopted it and entered judgment. The Chancellor should be affirmed.

#### Mississippi's Uniform Partnership Act

The primary purpose of the UPA was to codify the common law into one uniform act on partnerships. Allied Steel Corp. v. Diamond, 607 So.2d 113, 116 (Miss. 1992).

On October 27, 2003, Cuevas filed her Complaint (CP.1), relying upon §79-12-43 Miss. Code 1972 (right to accounting). Kellum acknowledged Cuevas' right to inspect the books (T.38,

42). Kellum produced the books of account and whatever the Master requested (T.17-18, 26-27, 30-32).

In 2004, Mississippi repealed §79-12-43 Miss. Code 1972 (Applt.Brff. 11) and adopted Uniform Partnership Act (1997) as §79-13-101 - §79-13-1206 Miss. Code 1972. §79-13-403 Miss. Code 1972 provides a partner's right to inspect the books. §79-13-1206 Miss. Code 1972 [savings clause] states that the Act "does not affect an action or proceeding commenced or right accrued before this chapter takes effect" (i.e. 1/1/2005). On July 17, 2007, the Court entered its Final Judgment (CP.417).

Normally, a Court does not enforce law which has been repealed because repeal's effect is as though the statute never existed. USPCI of Mississippi, Inc. v. McGowan, 688 So.2d 783, 787 (Miss. 1997); City of Starkville v. 4-County Electric Power Association, 909 So.2d 1094, 1108-1111 (¶¶ 41-49) (Miss. 2005).

A Master may require an audit. Cuevas cites no case mandating an audit. Kellum found none. The Master was able to "adjust the equities" of the parties without audit. Cuevas filed no timely objection and produced no evidence to warrant further litigation. The Chancellor approved the report and entered judgment. The Chancellor should be affirmed.

#### CONCLUSION

The learned Chancellor was correct and should be affirmed.

Respectfully submitted,

MARGARET K. KELLUM, Appellee

BY:

HENRY P. PATE, Attorney for  
Defendant / Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the undersigned has this day caused to be hand delivered or mailed, postage prepaid and firmly affixed thereto, a true and correct copy of the foregoing writing to the following:

HON. JAYE A. BRADLEY, Chancellor  
Jackson County Courthouse  
3104 Magnolia Street  
Post Office Box 998  
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Trial Judge

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(substituted by 11/17/2005 Order (CP-322))

Plaintiff's counsel

SO CERTIFIED, this the 17<sup>th</sup> day of DECEMBER, 2008 at Ocean Springs, Jackson County, Mississippi.

Respectfully submitted,  
MARGARET K. KELLUM, Appellee

BY:

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