IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00846

WOODKREST CUSTOM HOMES, INC.; NATIONWIDE CUSTOM CONSTRUCTION, LLC; and ROBERT KRESS, SR., Individually — APPELLANTS

v.

JAMES COOPER and SANDRA COOPER — APPELLEES

BRIEF OF APPELLEES, JAMES COOPER AND SANDRA COOPER

ORAL ARGUMENT IS NOT REQUESTED

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WOODKREST CUSTOM HOMES, INC.; NATIONWIDE CUSTOM CONSTRUCTION, LLC; and ROBERT KRESS, SR., Individually **APPELLANTS**

v.

JAMES COOPER and SANDRA COOPER **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

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

1. Honorable Paul S. Funderburk, Circuit Court Judge of Itawamba County, Mississippi;
2. Woodkrest Custom Homes, Inc., Appellant;
3. Nationwide Custom Construction, LLC, Appellant;
4. Robert Kress, Sr., Appellant;
5. Joe Morgan Wilson, Attorney for Appellants;
6. James Cooper, Appellee;
7. Sandra Cooper, Appellee;
8. Thomas A. Wicker, Attorney for Appellees;
9. Joshua S. Wise, Attorney for Appellees;
10. Holland, Ray, Upchurch & Hillen, P.A., Attorneys for Appellees.

RESPECTFULLY SUBMITTED, this the 13th day of February, 2009.

HOLLAND, RAY, UPCHURCH & HILLEN, P.A.

By: _____

THOMAS A. WICKER, [redacted]
JOSHUA S. WISE, MSB[redacted]
Attorneys for the Appellees,
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STATEMENT REGARDING ORAL ARGUMENT

The issues presented for appeal in this matter can be resolved on the basis of the record and briefs of the parties. Oral argument is not necessary.

STATEMENT OF THE ISSUE

The trial court properly denied the Defendants' Motion to Set Aside Default Judgment.

STATEMENT OF THE CASE

A. STATEMENT OF THE PROCEEDINGS

This is an appeal from an Order of the Circuit Court of Itawamba County, Mississippi, denying the Defendants' Motion to Set Aside Default Judgment.

B. STATEMENT OF THE FACTS

This is a case in which the Plaintiffs/Appellees, James Cooper and Sandra Cooper, sued the Defendants/Appellants, Woodkrest Custom Homes, Inc., Nationwide Custom Construction, LLC and Robert Kress, Sr., for breach of contract, negligent and fraudulent misrepresentation, misappropriation, and conversion of money entrusted to the Defendants. (Record Excerpts; Tab 1: 4-8). The Plaintiffs entered into a contract with the Defendant, Woodkrest, for materials to be used in connection with the construction of the Plaintiffs' residence in Itawamba County, Mississippi, and entered into an agreement with Nationwide as the contractor and builder for the project. (Record Excerpts; Tab 1: 4-8). The Defendant, Woodkrest, despite having been paid for materials, and despite repeated demands, failed to produce and deliver the building materials, including specifically, doors and windows for the project. (Record Excerpts; Tab 1: 4-8). Additionally, Plaintiffs paid one-half (1/2) the cost of an elevator for the residence based upon the representation that this payment was required by the manufacturer in order to guarantee the price on the elevator. (Record Excerpts; Tab 1:

4-8). The deposit for the elevator was never delivered to the manufacturer. (Clerk's Papers, p. 4-8).

The Defendant, Nationwide, represented that the Defendant, Robert Kress, Sr., would supervise the construction project and would make frequent site visits for the purpose of supervising the construction. (Record Excerpts; Tab 1: 4-8). The Defendants failed to adequately supervise the project, and the project was unreasonably delayed. (Record Excerpts; Tab 1: 4-8). The Defendants failed to provide services in connection with the identification and retention of subcontractors, forcing the Plaintiffs to identify and retain subcontractors on several aspects of the project, although this was a service for which the Defendants were paid. (Record Excerpts; Tab 1: 4-8). The Defendants failed to pay at least one material supplier and have failed to provide an accounting for the money advanced by the Plaintiffs or to give other assurances that all vendors, laborers and material suppliers had been paid. (Record Excerpts; Tab 1: 4-8). As a consequence of the Defendants' failures/breaches, the Plaintiffs contracted with a third party to complete the project. (Record Excerpts; Tab 1: 4-8).

The Plaintiffs, James Cooper and Sandra Cooper, filed their Complaint for damages on March 6, 2006. (Record Excerpts; Tab 1: 4-8). Summons was issued to the individual Defendant, Robert Kress, Sr., c/o Eric Clark, Mississippi Secretary of State, P.O. Box 136, Jackson, Mississippi 39205-0136, on March 7, 2006. (Record Excerpts; Tab 2: 10). Summons was issued to Nationwide Custom Construction, LLC, c/o Eric Clark, Mississippi Secretary of State, P.O. Box 136, Jackson, Mississippi 39205-0136, on March 7, 2006. (Record Excerpts; Tab 2: 11). Summons was issued to Woodkrest Custom Homes, Inc., c/o Eric Clark, Mississippi Secretary of State, P.O. Box 136, Jackson, Mississippi 39205-0136, on March 7, 2006. (Record Excerpts; Tab 2: 12). The pleadings clearly indicate that the

Defendants were served with process on March 10, 2006[1] (Robert Kress, Sr., Individually) and on March 20, 2006 (Nationwide Custom Construction, LLC and Woodkrest Custom Homes, Inc.). (Record Excerpts; Tab 5: 19-27).

On April 28, 2006, Plaintiffs filed their Application for Entry of Default and supporting affidavit. (Clerk's Papers, p. 29-31). On the same day, Plaintiffs also filed their Notice of Hearing for a determination of damages. (Clerk's Papers, p. 28). The Itawamba County Circuit Court by Order dated May 9, 2006, entered a Default Judgment in favor of James Cooper and Sandra Cooper against the Defendants.

The Itawamba County Circuit Court by Order dated May 9, 2006, entered a default judgment in favor of James Cooper and Sandra Cooper against the Defendants. (Record Excerpts; Tab 7: 41-42).

On May 4, 2006, the detailed affidavit of the Plaintiff, James Cooper, was presented at the damages hearing as evidentiary support of the damages suffered by the Plaintiffs. (Clerk's Papers, p. 28). Based upon this affidavit and the exhibits attached to it, the court awarded $119,387.14 in actual damages, $268,161.42 in punitive damages (based upon three times the liquidated damages of $89,387.14), and $5,000.00 in attorney's fees.

On November 29, 2006, over seven (7) months after the default judgment, the Defendants filed their Motion to Set Aside the Default Judgment. (Clerk's Papers, p. 43-49). Plaintiffs filed their Response to the Motion to Set Aside the Default Judgment on December 27, 2006. (Clerk's Papers, p. 50-51). On April 10, 2007, an Order was entered denying the Defendants' Motion to Set Aside Default Judgment. (Clerk's Papers, p. 54). The Plaintiffs

[1] The date of service of March 10, 2006 was improperly referenced in the intial Default Judgment as February 10, 2006. As reflected in the Clerk's Papers, at p. 21, there was a return receipt dated February 10, 2006, but this was the return receipt for the certified letter mailed to the Defendants prior to the complaint being filed. The correct date of service was March 10, 2006, which was referened correctly in the Court's final order appealed from. See, Clerk's papers at page 58. More importantly, the Defendants admit they were properly served and *never* raised the issue of process or the date of service until on appeal. Accordingly, any issue regarding process or service of process is waived and procedurally barred from review.

filed their Motion Requesting Re-Hearing and in the Alternative Motion Requesting Findings of Fact and Rulings of Law on April 18, 2007. (Clerk's Papers, p. 55-56). On April 3, 2008, the trial Court entered an Order on Motion of the Defendants' Requesting Re-Hearing or in the Alternative Findings of Fact and Rulings of Law. (Record Excerpts; Tab 8: 58-61). On May 1, 2008, Defendants filed their Appeal.

SUMMARY OF THE ARGUMENT

This is a case in which a default judgment was entered approximately two months after service of the summons and complaint. The Defendants admit that they were served with process in March, 2006, prior to the entry of the Default Judgment in May of that year. The Defendants further admit that, by June, 2006, they not only were aware of the summons and complaint, but were aware that a Default Judgment totaling almost $400,000.00 had been entered against them. Despite this admitted knowledge on behalf of the Defendants, they took no action to challenge the Default Judgment until November, 2006, more than six months after judgment was entered.

In moving to set aside the Default Judgment, the Defendant's failed to present any factual evidence by affidavit or otherwise which would have supported a colorable defense to the claims presented in the Complaint. The best that can be said is that they presented affidavit testimony of a conclusory nature to the effect that they did not believe they owed as much as was sued for and that they thought they were going to engage in "settlement discussions". No rationale is advanced for why – when they learned of the Default Judgment in June, 2006, the Defendants assumed that "settlement negotiations" were taking place, or why they then decided to wait several more months before entering an appearance in the case.

Now, for the first time on appeal, the Defendants' attack the default pleadings for containing an error with regard to the date of service on Robert Kress individually. As noted heretofore, that error was corrected by the trial court in its findings of fact and conclusions of law, is shown by the record to be a reference to the initial demand letter served on the Defendants, and the record further shows that the Defendants were served with process more

than thirty days prior to the entry of default against them (indeed, the Defendants admit as much in their affidavits in the court below).

Also for the first time on appeal, the Defendants attack the amount of the Judgment. Neither issue should be considered by the court inasmuch as it was not preserved below, but (as with the issue of service of the summons) the challenge to the damages award is without merit. The damages were supported at the hearing before the trial court with the affidavit testimony of one of the Plaintiffs, accompanied by exhibits supporting his testimony regarding liquidated damages. Punitive damages were supported by the narrative contained in that affidavit, and were reasonable considering the amount of liquidated damages, as was the award of attorney's fees.

In as much as the Defendants failed to present a case for setting aside the Default Judgment in the court below, and failed to preserve the issues they now advance on appeal, the appeal should be denied and the Default Judgment affirmed.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANTS' MOTION TO SET ASIDE THE DEFAULT JUDGMENT.

Standard of Review

Decisions regarding whether to set aside a default judgment are governed by the abuse-of-discretion standard. *McCain v. Dauzat*, 791 So. 2d 839, 842 (Miss. 2001). Under the abuse-of-discretion standard, this Court will affirm the trial Court's decision unless there is definite and firm conviction that Court below committed clear error of judgment in the conclusion it reached upon the weighing of relevant factors. *Pierce v. Heritage Properties, Inc.*, 688 So. 2d 1385, 1388 (Miss. 1997) (citing *Cooper v. State Farm Fire & Cas. Co.*, 568 So. 2d 687, 692 (Miss. 1990)). Accordingly, the trial Court's exercise of its discretion may be disturbed only where it has been abused. *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 388 (Miss. 1987).

The Default Judgment Should be Upheld in this Matter Because Defendants Failed to File Their Motion to Set Aside Default Judgment within the Required Mandatory Six (6) Month Time Limitation Under MISSISSIPPI RULE OF CIVIL PROCEDURE 60(b)

MISSISSIPPI RULE OF CIVIL PROCEDURE 60(b) clearly requires motions filed for relief from judgment for fraud, misrepresentation or other misconduct of an adverse party, accident or mistake, and/or newly discovered evidence, which by due diligence could not have been discovered in time, to be filed within not more than six (6) months after the judgment, order or proceeding was entered or taken. The comment to Rule 60 clearly states that such motions **must** be filed within six (6) months. Therefore, if the basis of a Motion to Set Aside Default Judgment is Rule 60(b)(1)-(3), the trial Court has no discretion to grant the Motion if it is made more than six (6) months after the Final Judgment. *Burkett v. Burkett*, 537 So. 2d 443, 445 (Miss. 1989). Relief from a default judgment may be granted pursuant to Rule 60(b)(6) in "exceptional and compelling circumstances...when relief is not warranted by the

preceding clauses, or when it is uncertain that one or more of the preceding clauses afford relief." *Bryant, Inc. v. Walters*, 493 So. 2d 933, 939 (Miss. 1986).

In this case, the default judgment was entered on May 19, 2006. The Defendants did not file their Motion to Set Aside Default Judgment until November 29, 2006, over six (6) months after the default judgment had been entered. The Defendants' Motion to Set Aside Default Judgment should be time barred. *R. N. Turnbow Oil Investments v. McIntosh*, 873 So. 2d 960, 965 (Miss. 2004). Accordingly, the procedural time bar of MISSISSIPPI RULE OF CIVIL PROCEDURE 60(b) was dispositive of all issues raised in the Defendants' Motion to Set Aside Default Judgment. *Id.* at 965.

If the Procedural Time Bar is Not Dispositive of All Issues, This Court Should Apply the Three-Part Test in Determining that the Default Judgment was Proper Under MISSISSIPPI RULE OF CIVIL PROCEDURE 60(b)

The Mississippi Supreme Court has held that the trial Court must consider the following three-pronged balancing test when considering a Rule 60(b) motion:

> "(1) [t]he nature and legitimacy of the defendant's reasons for his default, i.e., whether the defendant has good cause for default;
>
> (2) whether the defendant in fact has a colorable defense to the merits of the claim; and
>
> (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default is set aside."

Chassaniol v. Bank of Kilmichael, 626 So. 2d 127, 134 (Miss. 1993) (citations omitted).

A. Whether the Defendants have Good Cause for Default

The first element requires the Defendants to show "good cause". The Defendants' Motion to Set Aside Default Judgment requested the trial Court to set aside the default judgment because they were attempting to "settle" with Dr. and Mrs. Cooper. The Defendants admit proper service of process and that the failure to answer and/or respond was

because they "did not want to go to court." (Clerk's Papers, p. 46). There are no legal grounds establishing "good cause" in the Defendants' Motion to Set Aside Default Judgment because none exists. (Clerk's Papers, p. 43-49).

Defendants' failure to respond is far from excused for good cause since the Complaint in this matter had been properly served on March 10, 2006 (Robert Kress, Sr., Individually) and on March 20, 2006 (Nationwide Custom Construction, LLC and Woodkrest Custom Homes, Inc.). The Defendants failed to present any evidence or argument before the trial Court that they were not properly served with the Complaint and Summons. Where a party fails to raise an issue before the trial Court, this Court is procedurally barred from considering that issue. *Miss. Mun. Liab. Plan v. Jordan*, 863 So. 2d 934, 940 (Miss. 2003). Because the Defendants failed to present any evidence or argument that they were not properly served with process, the Defendants' arguments regarding service of process, the date of process was served, or whether the service date was properly recited in the initial default pleadings should not be considered by this Court and are barred from review. More importantly, the Defendant's own affidavits attached to their Motion to Set Aside Default Judgment, recite that they were served with process more than thirty days prior to the entry of the Default.

The Plaintiffs did not make their Entry of Default until April 28, 2006. (Clerk's Papers, p. 29-31). Moreover, the default judgment was not entered until May 19, 2006, creating a great expanse of time for the Defendants to attempt to set aside the default herein. (Record Excerpts; Tab 7: 41-42). The trial Court was correct in finding that the Defendants failed to show "good cause" in its Order on Motion of the Defendants Requesting Re-Hearing or in the Alternative Findings of Fact and Rulings of Law when it commented:

> "By the Defendants' own admission, they were aware of the May 9, 2006 judgment no later than July 18, 2006, when,

> according to the affidavit submitted by the Defendants, they were served with process in Tennessee. The Defendants have offered no justification whatsoever for failing to file any pleading challenging the May 9, 2006 judgment until November 29, 2006."

(Record Excerpts; Tab 8: 60).

Under the first prong, the Defendants must show it had good cause for the default. The Defendants were properly served with process and the delay was lengthy. Dr. and Mrs. Cooper respectfully submit that the Defendants have failed to put forth evidence of good cause. As such, the trial Court did not abuse its discretion as to prong one.

B. Whether the Defendants have a Colorable Defense to the Merits of the Claim

The second element to the analysis requires a determination of whether the Defendants have a colorable defense to the merits of this claim. This Court has stated that the second prong generally outweighs the other two prongs in importance. *Allstate Ins. Co. v. Green*, 794 So. 2d 170, 174 (Miss. 2001) (citing *Bailey v. Georgia Cotton Goods, Co.*, 543 So. 2d 180, 182 (Miss. 1989)). In order to show a colorable defense, a party "must show facts, not conclusions, and must do so by affidavit or other sworn form of evidence." *Rush v. N. Am. Van Lines, Inc.*, 608 So. 2d 1205, 1210 (Miss. 1992). The Defendants' Motion to Set Aside Default Judgment fails to set forth any factual basis supporting a colorable defense so as to satisfy this element as a matter of law.

In the Defendants' Motion to Set Aside Default Judgment, they not only fail to establish a colorable defense to the merits of the claim but outright admit liability. In the affidavit of Teresa Kress, which was submitted in support of the Defendants' Motion to Set Aside Default Judgment, Mrs. Kress states "we will happily pay anything that we properly and honorably owe the Coopers." (Clerk's Papers, p. 46-47). Further, Mr. Kress's affidavit states that we "do not owe Dr. and Mrs. Cooper but a few thousand dollars." (Clerk's

Papers, p. 48). The Defendants have failed to advance a "colorable defense" but only assert that they were attempting to "settle" this case. Prong two is weighed heavily in favor of Dr. and Mrs. Cooper. Accordingly, the trial Court did not abuse its discretion as to prong two.

C. The Nature and Extent of Prejudice Which May be Suffered by the Plaintiffs if the Default is Set Aside

The third element requires examination and consideration of any prejudice the Plaintiffs would suffer if the default judgment entered in this matter was set aside. Under the third prong, this Court considers whether Dr. and Mrs. Cooper would be prejudiced if the default judgment was set aside. Before the trial Court, the Defendants failed to present any evidence or argument that Dr. and Mrs. Cooper would not suffer prejudice if the default judgment was set aside. Because this Court reviews the evidence before the trial Court to determine an abuse of discretion, Defendants' arguments regarding prong three should not be considered by this Court. *Miss. Mun. Liab. Plan v. Jordan*, 863 So. 2d 934, 940 (Miss. 2003) ("[W]here a party fails to raise an issue before the trial Court, [this Court is] procedurally barred from considering that issue.").

For the sole purpose of argument, the Coopers would suffer prejudice if the default judgment was set aside. First, the diminishing memories of the available witnesses would prejudice Dr. and Mrs. Cooper because of their inability to recall details such as amounts, numbers, names, and other questions related in the discovery process. When a default judgment is set aside, memories of third party witnesses will no doubt have faded and the injured plaintiffs are without a resolution for an additional period of time. *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 388 (Miss. 1987). Additionally, The Coopers would be prejudiced due to the deterioration of much of the physical evidence in this matter. Specifically, Dr. and Mrs. Cooper have had to rehire other builders and suffer additional expense in building their home. The Mississippi Supreme Court has consistently held, in

both criminal and civil actions, that loss of evidence can prejudice parties in an action. *Arrington v. Masonite Corp.*, 58 So. 2d 10, 12 (Miss. 1952); *Sharp v. State*, 786 So. 2d 372, 381 (Miss. 2001).

In light of the fact that the record is devoid of any argument by the Defendants that Dr. and Mrs. Cooper would not prejudiced if the default judgment was set aside, the Defendants' arguments regarding the third prong should be procedurally barred from review. Further,the Coopers respectfully submit that the trial Court did not abuse its discretion as to prong three.

For these reasons, the trial Court did not abuse its discretion in not setting aside the default judgment. Thus, the trial Court properly denied Defendants' Motion to Set Aside Default Judgment.

II. THERE IS EVIDENTIARY SUPPORT FOR THE DAMAGES AWARDED TO THE PLAINTIFFS.

This is a case concerning primarily liquidated damages. As such, no hearing on damages is necessary. *Journey v. Long*, 585 So. 2d 1268, 1272 (Miss. 1991). Because Plaintiffs' claims were for liquidated damages, a hearing was not required. *Id.* (holding a judgment may be entered by default without a hearing if the amount claimed is a liquidated amount or an amount capable of mathematical calculation). However, on May 4, 2006, the trial Court held a hearing for the determination of damages. At the hearing, the Plaintiffs submitted the affidavit of James Cooper as the sole evidentiary support for the damages suffered by the Plaintiffs. The affidavit of Dr. Cooper was also attached to the Plaintiffs' Motion for Default Judgment. (Record Excerpts; Tab 6: 35-40). In this case, the damages awarded were supported by evidence presented to the trial Court.

The Plaintiffs asserted extensive claims in their Complaint arising out of the damages which were inflicted upon them by the Defendants. These damages included: reasonable

cost of labor and materials required to complete the building project and the contract price previously paid by the Plaintiffs, conversion of money entrusted to the Defendants, damages flowing from the misrepresentations and misappropriation of the Plaintiffs' monies, and damages for breach of contract.

Dr. and Mrs. Cooper contracted with the Defendants to build a house in Itawamba County, Mississippi, and the Defendants defaulted in the providing the labor, material and supervision necessary to complete the house. (Record Excerpts; Tab 6: 35-40). The Coopers paid $186,997.80 for a materials package, but did not receive the materials as valued and itemized in Exhibit 1 to Dr. Cooper's affidavit. (Record Excerpts; Tab 6: 35-40). Notwithstanding the fact that the Defendants repeatedly advised and assured Dr. and Mrs. Cooper that the windows and doors had been ordered, the doors and windows were never delivered. Moreover, there is no evidence that the doors and windows were ever even ordered. (Record Excerpts; Tab 6: 35-40). The Plaintiffs were properly awarded a refund for their payment for the materials package which was never received in the amount of $53,378.06. (Record Excerpts; Tab 6: 35-40). Additional liquidated damages awarded are supported by the affidavit of Dr. Cooper and Exhibit 1 attached to Dr. Cooper's affidavit. Accordingly, there is evidentiary support for these liquidated damages which were awarded to the Plaintiffs.

The Coopers also paid a deposit to the Defendants in the amount of $13,000.00, which the Defendants were to pay to Thyssen-Krupp to guarantee the price on an elevator for the home. The Defendants fraudulently misrepresented that the money had been paid to Thyseen-Krupp when in fact the Defendants kept the money and did not order or place a deposit on the elevator. (Record Excerpts; Tab 6: 35-40). Because of the Defendants' failure to put a deposit on the cost of the elevator, the cost of the elevator increased by $1,250.00.

(Record Excerpts; Tab 6: 35-40). As such, the Plaintiffs were awarded a refund of the $13,000.00 deposit together with $1,250.00 for the increase in cost, for a total of $14,250.00 in connection with the elevator. These damages awarded are supported by the affidavit of Dr. Cooper and Exhibit 1 attached to Dr. Cooper's affidavit. There is evidentiary support for these liquidated damages which were awarded to the Plaintiffs.

The Defendants contracted for a "turn key" job on this project for the amount of $50,387.84. The Defendants misled and lied to the Plaintiffs with regard to these monies paid for a timely completion of the job. As shown by Exhibit 2 in support of Dr. Cooper's affidavit, the estimated cost to complete the materials package items was $55,798.82, or an additional $5,410.98 beyond the contract amount. (Record Excerpts; Tab 6: 35-40). The Plaintiffs were properly awarded their breach of contract damages in the amount of $5,410.98. (Record Excerpts; Tab 6: 35-40).

The Defendants failed to pay for the materials purchased for the work on the project from Riley Building Supplies, Inc. in Fulton, Mississippi, forcing the Coopers to pay for said materials in order to avoid the imposition of a lien on the property, and they were properly awarded the amount of $16,348.10, which is the amount they paid to Riley Building Supplies, Inc. which was applied to the invoice as referenced as Exhibit 2 in support of Dr. Cooper's affidavit. These damages awarded are supported by the affidavit of Dr. Cooper and Exhibit 2 attached to his affidavit. There is evidentiary support for these liquidated damages which were awarded to the Plaintiffs. (Record Excerpts; Tab 6: 35-40). In summary, the purely economic damages sustained by the Coopers, for which the record provides uncontested support, is as follows:

- Damages for materials paid for but not received $ 53,378.06
- Damages for Elevator Deposit $ 13,000.00
- Damages for increased cost of elevator $ 1,250.00
- Damages for cost to complete construction $ 5,410.98

- Damages for local accounts payable on which the Defendants defaulted $ 16,348.10

Total Liquidated Damages $ 89,387.14

The trial Court properly awarded the conservative amount of $30,000.00 compensation for unliquidated breach of contract damages relating to special items that were contracted for such as an endless pool and other items in the house due to the illness of the Plaintiff, Sandra Cooper, based upon the pain and suffering caused by the delay resulting from the Defendants' breach. The Defendants were well aware that the items in the house were included in the contract for therapeutic reasons for Mrs. Cooper. Yet the Defendants, through their intentional misrepresentations and abandonment of the project, forced the Plaintiffs to re-hire other builders and undergo additional delay regarding the therapeutic items that were originally contracted for. Accordingly, the Coopers were properly awarded damages for the Defendants' breach of contract regarding pain and suffering from the delay in obtaining the use of therapeutic items of the house. There is evidentiary support for the damages awarded to the Plaintiffs arising out the Defendants' breach of contract. (Record Excerpts; Tab 6: 35-40).

In light of the liquidated damages awarded to the Plaintiffs, the amount of punitive damages awarded as a multiple of three times the liquidated damages (without including the $30,000.00 general damages in the formula) was not excessive. In this case, the uncontested evidence, never denied by the Defendants, is that the Defendants told the Plaintiffs that certain money paid by the Coopers had been paid to third parties when, in fact, this was not true. When challenged, the Defendants compounded the wrong-doing by continuing to misrepresent that the deposits had been paid to third party suppliers when they were not. Such blatant falsehoods are the very type of wrong-doing which punitive damages are designed to prevent. There was sufficient evidence before the trial Court to award punitive

damages to the Plaintiffs, and the awarded damages were reasonable and supported by the evidence.

The factors for determining the constitutionality of punitive damages include: the reprehensibility of the conduct of the Defendants, the disparity between the harm or potential harm caused and the amount of punitive damages, and the difference between the remedy provided and the civil penalties authorized or imposed in comparable cases. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (U.S. 1996). Perhaps the most important of these factors in determining reasonableness in this matter is the first, the degree of reprehensibility of the Defendants' conduct. *Id.* It has been said, "[t]he flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages." *Id.* at 576. In gauging the flagrancy of the misconduct, it is important to note that bad faith, fraud, trickery and deceit are important. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (U.S. 1993).

In this case, all of these factors are present and evidenced by the Defendants' conversion of the Plaintiffs' monies and their refusal to deliver the labor and materials for the building project which was contracted and paid for. The punitive damages awarded to the Plaintiffs were reasonable, proper and supported by the evidence. (Record Excerpts; Tab 6: 35-40).

Finally, where punitive damages are allowable, the court may award reasonable attorney's fees. In the instant case, the attorney's fees, when related to the amount of liquidated damages at issue, are less than ten per cent of the total. The Court has wide discretion to award attorney's fees based upon the Court's knowledge of the time involved, risk of litigation, possible appeals, etc. In the instant case, the award of $5,000.00, is not only reasonable, it is low.

CONCLUSION

This is a case in which the Defendants have continually, fraudulently, maliciously, willfully and criminally breached the contract between the Plaintiffs and the Defendants and misappropriated the Plaintiffs' monies. The Defendants consistently and continually disregarded the Plaintiffs' legal claim by carelessly handling the properly issued and served Summons and Complaint, failing to answer the same, and lastly, waiting beyond the procedural time limitations to call the default judgment into issue. As such, Defendants' Motion to Set Aside Default Judgment is time barred and should be dismissed. Further, the trial Court record is devoid of any argument by the Defendants that they were not properly served with the Complaint and Summons. Accordingly, any argument raised by the Defendants on this Appeal regarding service of process is procedurally barred.

Even if the Defendants' Motion to Set Aside Default Judgment was not time barred, their arguments still fail as a matter of law. The Defendants have failed to advance "good cause" and a "colorable defense" for their default, and their only argument to the trial Court was that they were attempting to "settle" this matter. Additionally, the Defendants failed to present any evidence or argument that Dr. and Mrs. Cooper would not suffer prejudice if the default judgment was set aside. In light of the three-part test promulgated in *Chassaniol v. Bank of Kilmichael*, 626 So. 2d 127, 134 (Miss. 1993), this Court should affirm the judgment of the Circuit Court of Itawamba County, Mississippi, denying the Defendants' Motion to Set Aside Default Judgment. Further, this Court should affirm the award of damages in the amount thereof and assess all costs of this Appeal against the Defendants accordingly.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs/Appellees respectfully request that this Honorable Court affirm the ruling of the Circuit Court of Itawamba County,

Mississippi, in this matter and assess all costs of this Appeal against the Defendants/Appellants.

RESPECTFULLY SUBMITTED, this the 13th day of February, 2009.

HOLLAND, RAY, UPCHURCH & HILLEN, P.A.

By: 

THOMAS A. WICKER, [redacted]
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Attorneys for Appellees,
James Cooper and Sandra Cooper

CERTIFICATE OF SERVICE

I, Thomas A. Wicker, one of the attorneys for the Appellees, James Cooper and Sandra Cooper, do hereby certify that I have this day mailed via United States mail, proper postage prepaid, a true and correct copy of the above and foregoing to the following:

Honorable Paul S. Funderburk
Circuit Court Judge
District One
P.O. Drawer 1100
Tupelo, MS 38802-1100

Joe Morgan Wilson
Attorney at Law
210 West Main Street
Senatobia, MS 38668

DATED, this the 13th day of February, 2009.

THOMAS A. WICKER, [redacted]

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JAMES COOPER and SANDRA COOPER **APPELLEES**

CERTIFICATE OF FILING

I, Thomas A. Wicker, one of the attorneys for the Defendants/Appellees, James Cooper and Sandra Cooper, do hereby certify that I have this day mailed the original and three (3) copies and an electronic disk of the Brief of Appellees, James Cooper and Sandra Cooper, by U.S. mail, postage prepaid, to Betty W. Sephton, Clerk, Supreme Court of Mississippi, P.O. Box 249, Jackson, Mississippi 39205-0249.

RESPECTFULLY SUBMITTED, this the 13th day of February, 2009.

HOLLAND, RAY, UPCHURCH & HILLEN, P.A.

By: _____
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