In the SUPREME COURT of MISSISSIPPI

No. 2009-CA-01851

JAMES ERIC HARRISON
Appellant-Cross Appellee
v.
MACK WALKER, STAN VARNER AND TYSON BREEDERS, INC.
Appellees-Cross Appellants

BRIEF OF APPELLEES-CROSS APPELLANTS MACK WALKER, STAN VARNER AND TYSON BREEDERS, INC.

ORAL ARGUMENT NOT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

At issue in Plaintiff's appeal are one evidentiary ruling and two jury instructions. Defendants' cross-appeal concerns the sufficiency of the evidence supporting the jury's damages award on Plaintiff's breach of contract claim. None of these issues is novel, and none warrants oral argument.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28 of the Mississippi Rules of Appellate Procedure, 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 recusal.

1. James Eric Harrison, *Appellant*;
2. Stan Varner, *Appellee/Cross-Appellant*;
3. Mack Walker, *Appellee/Cross-Appellant*;
4. Tyson Breeders, Inc., *Appellee/Cross-Appellant*;
5. Hon. Robert T. Evans, *Trial Judge*;
6. W. Wayne Drinkwater, Jr., Esq., *Counsel for Appellees/Cross-Appellants*;
7. Mary Clay W. Morgan, Esq., *Counsel for Appellees/Cross-Appellants*;
8. J. David Shoemake, Esq., *Counsel for Appellant;*
9. A. Regnal Blackledge, Esq., *Counsel for Appellant;*
10. Dudley Butler, Esq., *Counsel for Appellant;*
11. Will Bardwell, Esq., *Counsel for Appellant.*

Respectfully submitted, this the 18th day of October, 2010.

W. Wayne Drinkwater, Jr.
Mary Clay W. Morgan

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STATEMENT OF THE ISSUES

I. Whether the trial court erred in admitting evidence of Plaintiff's poor performance prior to his final, December 2001 contract, when evidence of Plaintiff's failure to reform his chronically poor performance was relevant to Tyson's defense to Plaintiff's claims of fraudulent inducement and bad faith, and was necessary to tell the complete story of the parties' business relationship.

II. Whether the trial court erred in submitting Jury Instructions D-12 and D-20, which presented Tyson's theory of compensable consequential damages arising from Tyson's claimed breach of contract by giving oral, not written, notice of termination.

III. Whether the trial court erred in denying Tyson's motion for judgment notwithstanding the verdict on Plaintiff's claim that Tyson breached the contract by giving oral notice of termination, when Plaintiff undisputedly received actual notice of termination and sustained no damages as a result of receiving notice of termination orally.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

Plaintiff Eric Harrison filed this action on January 17, 2002.[1] R. 18, 39.[2] Plaintiff sued Tyson Breeders, Inc. ("Tyson") for breach of contract, alleging that Tyson gave him oral notice of termination, rather than the written notice required by the parties' contract. R. 39. Plaintiff also brought claims of breach of the duty of good faith and fair dealing and fraudulent inducement against Tyson and its employees Mack Walker and Stan Varner. *Id.* On June 5, 2008, the trial court entered summary judgment against Tyson on Plaintiff's claim that Tyson breached the parties' December 2001 contract by failing to give Plaintiff written notice of termination. R. 726-28; D.R.E. 1-3.

On January 26, 2009, the parties brought to trial the following issues: (1) Plaintiff's claimed damages arising from Tyson's failure to give notice of termination in writing, rather than orally; (2) Plaintiff's claim that he was fraudulently induced to enter into the contract; and (3) Plaintiff's claim that Tyson breached the duty of good faith and fair dealing. At the close of the Plaintiff's case, the trial court granted the motion for directed verdict of the individual defendants Mack Walker and Stan Varner.[3] Tr. 678.

The jury returned separate verdict forms for each of Plaintiff's three claims. R. 949-951; D.R.E. 5-7. On the issue of damages for Tyson's failure to give Plaintiff written notice of

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[1] Plaintiff originally filed this case in the Chancery Court of Covington County, Mississippi. R. 18. On interlocutory appeal, this Court reversed the Chancery Court's grant of summary judgment to Plaintiff and that court's denial of the Defendants' motion to transfer venue to the Circuit Court of Covington County. *Tyson Breeders, Inc. v. Harrison*, 940 So. 2d 230, 233-34 (Miss. 2006).

[2] References to the Clerk's Index in the Record on Appeal are made in the following format: "R. ___". Citations to the transcript of the trial are made as follows: "Tr. ___". References to trial exhibits are made as: "_ Ex. _". Finally, "D.R.E." refers to the Defendant's Record Excerpts.

[3] Plaintiff's post-trial motions claimed the trial court erred in granting a directed verdict to Walker and Varner. R. 960. Because Plaintiff's brief does not address this issue on appeal, it has been abandoned. *See Shavers v. Shavers*, 982 So. 2d 397, 401 (Miss. 2008); *Pittman v. Dykes Timber Co., Inc.*, 18 So. 3d 923, 925 (Miss. App. 2009).

termination, the jury returned a verdict for Plaintiff of $22,328.00, a full year's lost income. R. 949. On Plaintiff's claims of fraudulent inducement and breach of the duty of good faith and fair dealing, the jury returned verdicts for Tyson. R. 950-51. Plaintiff and Tyson filed cross-motions for judgment notwithstanding the verdict ("JNOV), and Plaintiff filed a motion for new trial or additur. R. 960, 974. The trial court denied both parties' post-trial motions. R. 1071, 1072; D.R.E. 8. On November 9, 2009, Plaintiff filed a notice of appeal. R. 1073. Tyson cross-appealed the trial court's denial of its JNOV motion. R. 1080.

B. Statement of Facts

1. Plaintiff's First Contract With Tyson and Oaklawn Loan.

Plaintiff raised breeder hens for Tyson. Tr. 348-49. A breeder producer is responsible for caring for the breeder flock and producing quality fertile hatching eggs that, when hatched, produce healthy baby chicks to be grown into marketable poultry. Tr. 389-90. Generally, a breeder producer receives breeder hens and cockerels at approximately 20 weeks of age. Tr. 363. These chickens remain on the producer's farm until they are approximately 65 weeks of age, when their egg production generally declines. Tr. 387-88. The breeders are then removed from production and slaughtered for food. *Id.* At all times, the chickens remain the property of Tyson. Tr. 386.

On February 10, 1997, Plaintiff entered into a five-year Hatching Egg Production Contract ("1997 Contract") with Tyson.[4] Tr. 397-98; P. Ex. 1. Under the 1997 Contract, the Plaintiff's duties as a producer included the following:

> A. The Producer agrees to furnish all labor, utilities, bedding, supplies, and well-maintained housing and equipment as required by the Company specifications, as outlined in the Company's Breeder Egg Production Guide.

[4] From 1989 until 1997, Plaintiff had successive one-year contracts with Tyson's predecessor, McCarty Farms. Tr. 348.

> B. The Producer agrees to cooperate with the Company in adopting and/or installing recommended management practices and equipment as presented in the Company's Breeder Egg Production Guide.

P. Ex. 1 at ¶ 2A-B.[5] Plaintiff also agreed to use his "best efforts in maintaining the breeder hen flock in such a manner that maximum egg production and hatchability will result." *Id.* at ¶ 4.[6]

Also in February of 1997, Plaintiff refinanced the mortgage on his chicken houses through Oaklawn Financial Corporation ("Oaklawn"). Oaklawn, like Tyson Breeders, Inc., is a subsidiary of Tyson Foods, Inc. Tr. 349-50; D. Ex. 20. Oaklawn made loans to Tyson chicken growers on favorable terms, deducting loan payments from growers' checks.[7] The only security Oaklawn required for Plaintiff's loan was his two chicken houses and 10 acres of land. Tr. 350-51; D. Ex. 20.

In 1998 and 1999, Plaintiff's performance and management practices deteriorated. Jimmy Ballenger, the Tyson service technician who visited Plaintiff's farm on a weekly basis, observed dirty conditions, contamination of hatchery eggs, and poorly maintained equipment. Tr. 549-54. Ballenger documented these conditions in weekly Service Reports, and provided copies of each weekly Service Report to Plaintiff. Tr. 424, 549-54; D. Ex. 92.

Stan Varner, Tyson's breeder hatchery manager, and Mack Walker, Tyson's live production manager, also visited Plaintiff's farm and observed the poor conditions of Plaintiff's chicken houses and equipment. Tr. 685-86; D. Ex. 31, 34, 35. After observing the conditions on Plaintiff's farm, Varner stated:

> On 12/22/98 I went to Eric Harrison's farm at the request of Jimmy Ballenger, the service tech for this farm. Several weeks prior to this visit we had some severe

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[5] Plaintiff's later contract with Tyson contained identical provisions. *See* P. Ex. 2 at ¶ 2A-B.

[6] *See also* P. Ex. 2 at ¶ 4.

[7] Although Tyson growers were given the option of borrowing money through Oaklawn, they were not required to do so. Tr. 422. Many growers, including Plaintiff, chose Oaklawn as a lender because Oaklawn offered better terms than other lenders. Tr. 422.

> contamination problems at the hatchery from this farm. This came from the washing of hatching eggs[8] of which he was told to immediately stop. Upon arriving at the farm, I saw that the farm was a total mess.
>
> . . .
>
> Eric Harrison was present during this visit and was informed that if there was not immediate attention to these problems, Tyson would take over control of the farm. He was also informed that if the management did not meet Tyson specification for the duration of this flock we would no longer place birds on this farm.

D. Ex. 31 (footnote added). A week later, Varner found no improvements on Plaintiff's farm:

> On 12/29/98, Mack Walker and myself made a return visit to the Eric Harrison farm. Eric Harrison was not present during this visit. Problems found are listed below:
>
> 1. Hired employees were still washing hatching eggs;
> 2. Farm had been clean[ed] up some but was still filthy;
> 3. Egg room cooler house # 2 - 51°
> 4. Inside chicken house - 52°.
>
> We left the farm and I called Jimmy Ballenger to have Eric meet with us at 1:00 that afternoon. When we met, he had no excuses except his hired employees are not doing what he told them to do. He was told that we had serious problems in returning to his farm with birds. After 1 hour of talking, the meeting ended with Eric assuring us he would take care of the problems. I informed him that his ability to get the problems corrected are in serious question and [if] he wants to keep his farm it had better change.

D. Ex. 34.

As a result of the dirty conditions and damaged equipment at Plaintiff's farm, his hatchability rate was 30% lower than the average breeder producer. *Id.* Such a low hatchability rate is a critical failing for a breeder producer. It is essentially impossible for a breeder producer to maintain a profitable operation, either for Tyson or for himself, with such poor performance. Tr. 390.

In recognition of Plaintiff's unsatisfactory performance, on February 15, 1999, Plaintiff and Tyson signed a letter agreement modifying the 1997 Contract in which Plaintiff acknowledged his "serious management problems with the past flock." D. Ex. 42. Plaintiff

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[8] Washing hatching eggs promotes contamination by providing moisture that encourages bacteria growth. Accordingly, all producers know that hatching eggs must be cleaned with dry abrasives, not water. Tr. 391-93. Plaintiff acknowledged that he knew eggs should not be cleaned with water. *Id.*

promised to meet certain production and hatchability benchmarks and to make certain repairs to his chicken houses if Tyson agreed to give him another flock. *Id.* If Plaintiff failed to do so, he acknowledged and agreed that his contract would be terminated:

> Due to serious management problems with the past flock, we will replace hens only if you agree to the following:
>
> 1. With the next flock you will be expected to produce 158 eggs/hen housed and hatch 85% for the life of the flock. The result of not meeting this criteria will be termination of your contract.
>
> 2. Upgrade the farm during this out-time starting 3-25-99 and ending on 5-6-99 as follows:
>
> - Replace slat stands
> - Repair slat sticks
> - Replace curtains for cool cells
> - Repair nest
> - Replace cross over covers for egg belts
> - Purchase two new egg belts
> - Replace current drinkers with nipple drinkers
> - Repair or replace feeder grill
> - Replace bad feed troughs
> - Repair rooster feeder pans
> - Dirt pads in both houses need dirt added and leveled
> - Replace bad fan louvers
> - Control rats and other pests
> - Repair rat holes in coolers and egg rooms
> - Repair doors in egg rooms
> - Repair or replace cooler units
>
> Your failure to comply with the terms of this letter agreement on a continuing basis will result in immediate termination of your contract.

Id. Plaintiff admits that he voluntarily entered into the February 15, 1999 letter agreement. Tr. 431-35.

In reliance on Plaintiff's promises in the February 15, 1999 letter agreement, Tyson placed another flock of its chickens on Plaintiff's farm in 1999. Tr. 561. Plaintiff's performance and equipment maintenance issues did not improve. Tr. 561-67. Specifically, he did not repair his housing and equipment, he did not provide proper care for Tyson's breeder hen flock, and

egg production for the flock was very low. Tr. 561-67; D. Ex. 45. As a result, Tyson advised Harrison that he would not receive any additional flocks of Tyson chickens.[9] D. Ex. 47; Tr. 437.

In 2000, Tyson did not place any flocks on Plaintiff's farm for ten months. Tr. 351-52; D. Ex. 108. Plaintiff was unable to pay his Oaklawn loan, and the loan went into default. Tr. 352. Plaintiff testified that he assumed Oaklawn would foreclose on his chicken houses because of this default. Tr. 439-50. Had foreclosure occurred, Plaintiff would have earned *no* future income as a grower.

2. Plaintiff's Return to Tyson in 2000

In the summer of 2000, however, Plaintiff resumed his work as a grower for Tyson. A key disputed issue at trial was *why* Tyson decided to re-hire Plaintiff as a grower. Plaintiff claimed that Stan Varner and Mack Walker approached him and asked him to resume his contract as a grower for Tyson. Tr. 353-58. Plaintiff's theory at trial – unsupported by any evidence – was that Tyson did not want to absorb the loss of Plaintiff's defaulted Oaklawn loan. Therefore, Plaintiff argued, Tyson re-hired Plaintiff solely to force him to refinance the Oaklawn loan with another lender, and according to Plaintiff, planned to terminate him again as soon as his loan was refinanced, thereby placing the risk of loss on some other lender. Tr. 4-11.

In contrast, Varner and Walker testified that in the summer of 2000, Plaintiff came to them and begged for another chance to be a Tyson grower. Tr. 720-21; 815-17. Varner and Walker testified that Plaintiff broke down in tears in Tyson's offices, pleading and promising that he would reform his past poor farming practices if Tyson would give him one last chance. *Id.* Varner testified that he did not think Tyson should reinstate Plaintiff as a grower, because of

[9] Tyson notified Plaintiff of his first termination in 1999 by oral, not written notice. Plaintiff did not protest the form of termination notice he received in 1999, even though his 1997 contract required written notice of termination. Tr. 437. Thus, Plaintiff led Tyson to believe that so long as Plaintiff received actual notice of termination, he would not complain of the form of the notice.

his poor past performance. Tr. 721. However, Walker pitied Plaintiff, and decided to give him one last chance to improve.[10] Tr. 819-20.

Accordingly, Walker overruled Varner's objections and gave Plaintiff another opportunity. On October 7, 2000, Tyson placed a new flock of its chickens on Plaintiff's farm. Tr. 825; D. Ex. 108. On June 1, 2001, while Plaintiff was caring for this flock, he refinanced his Oaklawn loan through First Financial Bank. D. Ex. 73, 74, 75. Plaintiff's performance with respect to the October 7, 2000 flock, though mediocre, did show some improvement over his dismal 1999 performance. Tr. 358, 573-74, 723-24. In view of that improvement, on September 22, 2001, Tyson placed yet another new flock of chickens on Plaintiff's farm.[11] Tr. 363; D. Ex. 108.

By any standard, Plaintiff's performance on the September 22, 2001 flock was abysmal, returning to the poor performance he demonstrated prior to 2000. Tr. 577-94, 729. His chicken houses continued to suffer from disrepair, and his egg production and hatchability rates were extremely low. D. Ex. 92; Tr. 577-94. Plaintiff chronically neglected mechanical problems on his farm, and failed to perform basic upkeep to ensure the health and productivity of Tyson's chickens. For instance, the drinkers in Plaintiff's chicken houses were damaged, and chickens in parts of the houses did not have adequate access to water. Tr. 577, 581. Plaintiff also failed to make repairs to his feeders, forcing birds to fight for food in a limited number of feed pans. Tr. 589-60. Plaintiff consistently failed to remove dead chickens from the houses. Because

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[10] In returning a verdict for Tyson on Plaintiff's fraudulent inducement claim, the jury found for Tyson on this fact issue. Thus, the Court must accept the testimony of Tyson's witnesses on this point. *Spotlite Skating Rink, Inc. v. Barnes,* 988 So. 2d 364, 368 (Miss. 2008) (stating that in reviewing the trial court's denial of a JNOV, this Court must "consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence.") (quotation omitted).

[11] When Tyson placed the final, September 22, 2001 flock on Plaintiff's farm, Tyson was aware that Plaintiff had already refinanced his Oaklawn loan. Tr. 820. This fact undercuts Plaintiff's argument that Tyson only intended to keep Plaintiff as a chicken grower until he refinanced his Oaklawn loan.

chickens are carnivorous, leaving dead chickens in the houses allows the live chickens to feed on the carcasses. This can compromise the health of the chickens. Tr. 578. Despite several reminders, Plaintiff failed to hook up the houses' curtain drops, a device that safeguards the chickens from suffocation in the event of a power outage. Tr. 585. Plaintiff's neglect of his farm led to very poor egg production. He had an average of 600 cracked eggs per day, twelve times the expected rate of 50 eggs per day. Tr. 586. Over the life of the flock, he produced an average of 108.1 eggs per hen, far below the expected standard of 158 eggs per hen. Tr. 597. Ballenger stated that Plaintiff's production on this flock was "about as poor as you can get. And I don't know if I've ever seen one that poor." Tr. 597.

Finally, on October 29, 2001, Walker and Varner visited Plaintiff's farm and observed the continuing poor conditions in Plaintiff's chicken houses. D. Ex. 83. At this visit, Walker and Varner informed Plaintiff that if his performance did not improve, he would not receive another flock of chickens:

> Mack Walker and myself went to Eric Harrison's farm on 10/29/01. We went because we had some problems on the farm the previous (2) weeks. Some of the previous problems were still not taken care of such as:
>
> 1. The back half of the rooster feeder in #1 evidently had lost its charge and no feed was getting to the back half of the house.
> 2. Eggs were under the belt in several places.
> 3. There were a lot of inside cones off the male feeders.
> 4. There were a lot of eggs in the scratch area.
>
> The farm did not look good at all especially considering all the problems we've had in the previous 2 years. The grower was on the farm and we told him things had to improve greatly to get another flock of chickens.

Id. Plaintiff's performance did not improve, and Varner recommended to Walker that Plaintiff be terminated at the end of his current flock. D. Ex. 87 (stating "we have spent several years trying to work with this grower without any success. There is no indication that things will change and I believe the contract should be terminated at the end of this flock.").

In December 2001, all growers in Tyson's Magee complex received a pay increase.[12] As a result, all growers received a new contract that enabled each grower to receive the higher pay. Tr. 207. In order to receive this raise, Plaintiff signed a new Hatching Egg Production Contract ("2001 Contract") on December 19, 2001, as did all other growers in Tyson's Magee complex. P. Ex. 2; Tr. 260-61. The 2001 Contract was for a one-year term, and it contained no options for renewal. *Id.* Like the 1997 Contract, the 2001 Contract required Plaintiff to properly maintain his chicken houses and equipment:

> The Producer agrees to furnish all labor, utilities, bedding, supplies, and well-maintained housing and equipment as required by the Company specifications, outlined in the Company's Breeder Egg Production Guide.

Id. at ¶ 2A. The 2001 Contract, like the 1997 Contract, gave Tyson the right to terminate its agreement with Plaintiff if Plaintiff failed to properly care for Tyson's chickens or otherwise breached the terms of the contract:

> Events of Default. Any of the following events shall constitute a default by the Producer under this Contract:
>
> . . .
>
> E. Failure of the Producer to properly care for and protect any of the Company's property including, but not limited to, the care commonly defined as good animal husbandry practices.
>
> F. The occurrence of any event which in the opinion of the Company endangers or impairs the Company's property.
>
> G. Failure of the Producer to comply with any provision of this Contract.
>
> H. Failure of the Producer to consistently produce hatching eggs in an efficient competitive manner, as provided in Paragraph 12 herein.

Id. at ¶ 11. In the event of a default by the producer, Tyson had the right to terminate the contract by written notice and take immediate possession of its chickens:

> Remedies of Company on Default of Producer. Upon default or breach of any of the Producer's obligations under this Contract, the Company may immediately cancel this Contract by giving notice in writing, and the Company may, without

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[12] Under the 1997 Contract, Plaintiff was paid 33.25 cents per dozen eggs. P. Ex. 1. When Plaintiff resumed operations as a Tyson chicken farmer in the summer of 2000, he continued to be paid pursuant to the terms of the 1997 contract. Tr. 444-45. Under the 2001 Contract, Plaintiff received 35.50 cents per dozen eggs. P. Ex. 2.

> further notice, delay or legal process, take possession of poultry, feed or other property owned by the Company. The Company shall have the right to utilize the Producer's egg hatching production facilities until the flock is ready for slaughter. The Company may also pursue any other remedies at law or equity.

Id. at ¶ 13. The 2001 Contract did not require that the written notice contain any specific language or provisions, nor did the contract contain any notice period. Tyson had the right to terminate its contract and retake possession of its chickens contemporaneously with its delivery of the termination notice. *Id.*

In February 2002, Walker and Varner personally met with Plaintiff and informed him that because of his consistently poor performance, they intended to terminate his contract at the end of his current flock. Tr. 370-72; 740. Because this oral notice of termination was unequivocal, Tyson did not give Plaintiff any additional written notice of his termination. Tr. 372. Tyson also did not terminate the contract immediately. Instead, three months after giving Plaintiff oral notice of termination, Tyson removed its chickens from Plaintiff's houses on May 13, 2002, approximately eleven weeks early. Tr. 371-72.

SUMMARY OF THE ARGUMENT

In this appeal, Plaintiff seeks to overturn the jury's verdict in favor of Tyson on Plaintiff's claims of fraudulent inducement and breach of the duty of good faith and fair dealing. Plaintiff seeks to have the jury's verdict reversed based, first, on the trial court's admission of evidence of Plaintiff's performance as a grower over the course of his two contracts with Tyson, instead of restricting proof to the term of his final contract beginning in December 2001. First introduced by Plaintiff during his own case in chief, evidence of Plaintiff's pre-December 2001 performance was properly admitted. This evidence was directly relevant to Plaintiff's claims and Tyson's defenses, and necessary to tell the full story of the parties' business relationship.

Plaintiff's brief in this appeal leaves the reader with the impression that the primary dispute at trial was whether Plaintiff's performance under his final contract, signed December 19, 2001, was bad enough to support Tyson's decision to terminate Plaintiff's contract. Based on this inaccurate framing of the issues, Plaintiff claims that any evidence of his poor performance prior to December 19, 2001, is inadmissible "character" evidence under Miss. R. Evid. 404. This is not the case.

At the outset, evidence of Plaintiff's earlier performance was first presented to the jury by Plaintiff, in his own case. Plaintiff's presentation of this evidence in his own case makes clear that pre-December 2001 evidence was necessary to understand both Plaintiff's claims and Tyson's defenses. Plaintiff himself testified that in 1999, he had performance problems which led to his termination. He testified that he decided in 2000 to quit being a chicken farmer and allow Oaklawn to foreclose on his chicken houses. He claimed that Tyson fraudulently recruited him to return as a grower in the summer of 2000, telling Plaintiff that the parties were starting over with a "clean slate" and his past poor performance would be forgotten. Plaintiff claimed that Tyson did so intending that Plaintiff would refinance his Oaklawn loan, which had gone into

default. According to Plaintiff, Tyson was desperate to get this loan off its books. He argued that once a new lender had stepped in, Tyson planned to do its best to doom Plaintiff to failure as a chicken grower, then terminate him again. In short, under Plaintiff's theory of the case, evidence of the parties' interactions before December 2001 was pivotal and was extensively presented. Because Plaintiff first introduced evidence that predates the term of the December 2001 contract, he cannot now claim that the Court erred in allowing Tyson to present its own evidence of Plaintiff's poor performance prior to December 2001.

Further, Tyson introduced evidence of Plaintiff's historical poor performance for multiple valid reasons. First, Tyson's motive in terminating Plaintiff was a key issue. Tyson was entitled to prove that its decision to terminate Plaintiff in 2002 was not a rash one based on Plaintiff's poor performance for a single year, or was solely an excuse to rid itself of Plaintiff after he had refinanced his Oaklawn loan. Instead, Tyson terminated Plaintiff because he failed to improve his farming practices despite being given multiple chances to reform over a period of many years. Tyson also offered evidence of the extensive efforts it had made over the years to help Plaintiff cure his performance problems, and the multiple chances Tyson gave Plaintiff to improve over the years, to prove that it acted in good faith in its dealings with Plaintiff. Tyson did not introduce evidence of Plaintiff's pre-December 2001 performance problems to prove that, because Plaintiff was a poor farmer in the past, he must have been a poor farmer under his final 2001 Contract. Instead, Tyson presented evidence of Plaintiff's poor performance to prove that Plaintiff had, in fact, been a poor farmer in the past. Plaintiff's years of continued, uncorrected poor performance – and not Plaintiff's refinance of his Oaklawn loan – were the reason that Tyson terminated Plaintiff.

The other issue raised on appeal by Plaintiff, and the issue raised by Tyson's cross-appeal, concerns the jury's award of damages on Plaintiff's claim that Tyson breached the

parties' contract by giving notice of termination in an improper form. Prior to trial, the trial court granted Plaintiff summary judgment on this claim, holding that Tyson breached the parties' contract by giving oral, not written, notice of termination. Plaintiff claims the jury was improperly instructed on the measure of damages they could award as a result of Tyson's failure to give written notice of termination.

Because the Plaintiff received nearly three months *actual* notice of termination, the trial court erred as a matter of law in granting Plaintiff summary judgment on this issue. Further, the jury's award of a full year of lost income as damages for a technical defect in the manner it gave Plaintiff notice of termination is unsupported by the evidence and the law. The trial court's instructions to the jury properly stated Mississippi law: although Plaintiff is entitled to damages caused by any defective manner in which Tyson gave notice of termination, he is not entitled to damages that would put him in a *better* position than he would have occupied if he had received the required written notice of termination. There was no evidence that Plaintiff suffered *any* damages because he received oral, not written, notice of termination. Certainly, there was no evidence that Plaintiff lost a full year's income because he received oral notice of termination.

For these reasons, the Court should affirm the jury's verdict in favor of Tyson on Plaintiff's claims of fraudulent inducement and breach of the duty of good faith and fair dealing, and render judgment in Tyson's favor on Plaintiff's breach of contract claim.

STANDARD OF REVIEW

Plaintiff's appeal challenges the Court's admission of evidence of his performance as a chicken grower prior to December 19, 2001. The relevancy and admissibility of evidence are largely within the Court's discretion. Such decisions are reversible error only where that discretion has been abused, and where a party's substantial rights have been violated. *Hentz v. State,* 542 So. 2d 914, 917 (Miss. 1989); *Monk v. State,* 532 So. 2d 592, 599 (Miss. 1988). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Miss. R. Evid. 401.

Plaintiff also challenges the Court's decision to give two jury instructions. Trial courts are given considerable discretion regarding the instructions' form and substance. *Brown v. State,* 768 So. 2d 312, 315 (Miss. Ct. App. 1999). Both parties are entitled to have jury instructions given which lay out their theory of the case; however, the court may refuse instructions that incorrectly state the law, are fairly covered elsewhere in the instructions, or are not supported by the evidence. *Williams v. State,* 953 So. 2d 260, 263 (Miss. Ct. App. 2006). The appellate court evaluates "the evidence from the view of the party requesting the instruction." *Brown,* 768 So. 2d at 315. "[T]he various requested instructions are not considered in isolation[;] [r]ather, the instructions actually given must be read as a whole." *Sheffield v. State,* 844 So. 2d 519, 524 (Miss. Ct. App. 2003) (citing *Turner v. State,* 721 So. 2d 642, 648 (Miss. 1998)). "When [read together], if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." *Johnson v. State,* 908 So. 2d 758, 764 (Miss. 2005).

Tyson's cross-appeal of the trial court's denial of its motion for judgment notwithstanding the verdict ("JNOV") is subject to *de novo* review. Tyson's JNOV motion challenged the trial court's grant of summary judgment and the jury's damages award on

Plaintiff's claim that Tyson breached the 2001 Contract by giving oral, not written, notice of termination. This Court applies a *de novo* review to the denial of a JNOV motion, considering all of the evidence in the light most favorable to the verdict. *See United States Fid. and Guar. Co. of Miss. v. Martin*, 998 So. 2d 956, 964 (Miss. 2008).

ARGUMENT

I. EVIDENCE OF PLAINTIFF'S PRE-DECEMBER 19, 2001 PERFORMANCE ISSUES IS RELEVANT AND ADMISSIBLE.

A. Rule 404(b) Does Not Prevent Introduction of Pre-December 2001 Evidence Which Is Relevant to Tyson's Good Faith Motives in its Dealings with Plaintiff and Necessary to Tell the Complete Story of the Parties' Business Relationship.

Plaintiff claims that the trial court violated Rule 404 of the Mississippi Rules of Evidence in admitting proof of Plaintiff's history as a Tyson grower prior to his final, December 19, 2001 contract. Plaintiff argues that Tyson introduced evidence of his historical poor performance only to prove that, because he had been a poor farmer in the past, he must have also been a poor farmer after December 19, 2001. This argument ignores the fact that the issue at trial was not whether Tyson breached the parties' final contract by terminating him without adequate cause. Plaintiff's claim that Tyson breached the terms of the 2001 Contract was based solely on Tyson's failure to given written notice of termination, which was decided on summary judgment prior to trial. Plaintiff made no claim at trial that Tyson breached the 2001 Contract by terminating him without cause. Instead, Plaintiff focused on his claims that Tyson fraudulently induced him to sign the December 2001 contract in the first place, and terminated him for a bad faith reason – so that a lender other than Oaklawn would bear the loss associated with his loan default. In short, Plaintiff's claims against Tyson were based on the motives behind Tyson's actions, and not on whether Tyson had cause to terminate him. Thus, Tyson's defense at trial centered on proving its good motive in resuming its relationship with Plaintiff in the summer of 2000, its good faith

efforts to help Plaintiff improve his performance over the years, and its actual motive for terminating Plaintiff in 2002.

Under Rule 404(b),

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Miss. R. Evid. 404(b). The comment to Rule 404 makes clear that the Rule's list of permissible uses of evidence of prior acts is not exhaustive. Miss. R. Evid. 404(b) cmt. Evidence of prior bad acts is also admissible "where the offense in the instant case and the past offense are so inter-connected as to be considered part of the same transaction." *Id.* This exception allows evidence of prior bad acts to be admitted when necessary to present a clear, complete and coherent story to the jury. *See Neal v. State*, 451 So. 2d 743, 759 (Miss. 1984); *Pinzee v. State*, 983 So. 2d 322, 330 (Miss. Ct. App. 2007).

Here, evidence of Plaintiff's poor performance prior to December 2001 was not offered as "character" evidence to prove that Plaintiff was a poor farmer after December 2001. Plaintiff's poor performance under both contracts is not in contention, and was admitted by Plaintiff himself. *See* Appellant's Br. at 1-2. Evidence of Plaintiff's long history of poor performance was offered by Tyson to show its motive in re-hiring Plaintiff in 2000, its good faith in dealing with Plaintiff over the course of their relationship, its multiple attempts to help him reform his poor practices, and its motive for terminating Plaintiff in 2002. Under Rule 404(b), these are permissible reasons to introduce evidence of Plaintiff's historical performance problems. *See Morris Newspaper Corp. v. Allen*, 932 So. 2d 810, 821-22 (Miss. Ct. App. 2005) (in breach of employment contract case, evidence of past interactions between supervisor and employee were relevant to issue of employer's motive for termination, and thus not inadmissible under Rule 404).

Plaintiff claims that he objected at trial to the admission of any evidence of his performance predating the December 2001 contract, properly preserving the issue for appeal. Appellant Br. at 8-9. This is inaccurate. At trial, Plaintiff objected to any evidence of his poor performance prior to his first termination in January 2000, claiming that evidence was irrelevant. Tr. 245, 275-76. The trial court overruled Plaintiff's objection, correctly noting that Plaintiff had opened the door to the admission of evidence prior to 2000 by introducing the parties' 1997 contract. Tr. 251, 281. In his post-trial motions, Plaintiff took a different approach, arguing that Tyson was estopped from introducing evidence prior to the summer of 2000. Plaintiff argued that, because Plaintiff testified that Tyson's employees told him they were starting over with a "clean slate" when Tyson re-hired him in 2000, that Tyson was estopped from introducing evidence prior to that date.[13] Tr. 353; R. 960, 1004. It is only in this appeal that Plaintiff has adopted a third set of objections – this time, to any evidence of his performance prior to *December 2001*, as opposed to the summer of 2000. Thus, Plaintiff did not properly preserve for appeal his objection to pre-December 2001 evidence. *See Boyd v. State,* 977 So. 2d 329, 337 (Miss. 2008) (Counsel must object contemporaneously to inadmissible evidence in order to preserve the error for appeal.").

In any event, evidence of the parties' course of dealings prior to December 2001 was central to both parties' theories at trial. During his case in chief, Plaintiff himself introduced extensive evidence of pre-December 2001 dealings between the parties. Beginning with his Complaint, Plaintiff alleges facts supporting his claims as early as 1997, when he refinanced his debt through Oaklawn. R. 18. Plaintiff's opening statement describes Plaintiff's poor performance beginning in 1999, and makes clear that the events of the summer of 2000 are the key to Plaintiff's fraudulent inducement claims. Tr. 4-11. Plaintiff's first exhibit at trial was the

[13] Tyson's witnesses denied that they ever told Plaintiff he was starting over with a "clean slate." Tr. 818-20.

parties' initial, 1997 contract. P. Ex. 1. Plaintiff also solicited testimony from Jimmy Ballenger regarding Plaintiff's 1998-99 performance issues. Tr. 515-18. Plaintiff himself testified on direct examination about his pre-2001 experiences with Tyson, including his 1997 financing through Oaklawn, his decision to stop being a chicken grower in early 2000, and his decision to resume operations as a chicken grower in late 2000. Tr. 348-56. Plaintiff also testified on direct examination regarding the performance of his September 2000 flock. Tr. 358. Having introduced substantial evidence of the parties' relations prior to December 19, 2001, Plaintiff cannot prevent Tyson from introducing its own evidence concerning those relations.[14] As Plaintiff's own use of evidence of his performance prior to December 19, 2001 proves, that evidence was important to Tyson's motives in dealing with Plaintiff, and necessary to tell the jury a complete, coherent story.

Evidence of Plaintiff's performance prior to December 2001 is probative of the key disputed issue of Tyson's motive in reinstating Plaintiff's contract in the summer of 2000, and its motive in ultimately terminating him in 2002. Plaintiff claimed that Tyson terminated him in 2002 because he had refinanced his Oaklawn loan, in accordance with Tyson's fraudulent scheme. Tyson's defense to this claim was that it terminated Plaintiff because he had consistently failed to use proper farming practices, despite his repeated promises to improve if Tyson would give him another chance. In determining whether Tyson's actions were based on Plaintiff's performance and not his financing, it was relevant for the jury to consider the parties' history.

Tyson proved that it knew Plaintiff had an Oaklawn loan when it first terminated him in early 2000, but that Plaintiff's loan was not a factor in that decision. Tr. 718-19. Tyson's

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[14] *See Martin v. State,* 970 So. 2d 723, 725 (Miss. 2007) (holding that a party that opens the door on otherwise inadmissible evidence runs the risk that the other party may introduce collateral, irrelevant or otherwise damaging evidence as a result).

motivation in terminating Plaintiff in 2000 – which included his poor performance prior to that termination – is relevant and admissible as to its motive in 2002. Obviously, Tyson could well be more willing to terminate a grower for longstanding failures which had not been righted after numerous efforts. Proof that Plaintiff's 2001-2002 performance was a resumption of prior bad performance was important in assessing Tyson's credibility. Had Plaintiff's performance been exemplary for years prior to 2002, a jury might conclude that Tyson's 2002 decision to terminate Plaintiff for a single bad flock was pretextual. To the contrary, Plaintiff's history was a powerful reason why Tyson acted as it did in 2002, and was directly relevant in assessing the good faith of Tyson's actions, a principal issue in the case.

Plaintiff also claimed that, after he refinanced his loan, Tyson almost immediately began issuing negative service reports and targeted him for termination. Tr. 617-18. In its defense of this claim, Tyson presented evidence that it closely monitored Plaintiff's farm in 2001, not because he had refinanced his loan, but because Plaintiff had a long history as a problem grower. Thus, evidence of Plaintiff's poor performance prior to 2000 is also relevant to Tyson's good faith reasons for its decision to closely monitor Plaintiff's farm in 2001 and 2002.

Finally, evidence of Plaintiff's pre-2001 performance is also relevant to Plaintiff's claim that Tyson overloaded his houses during his final flock in 2001-2002. Plaintiff testified that he performed poorly in 2001-2002 solely because Tyson placed more than 11,000 pullets in each of his chicken houses. Tr. 364-66; 493-95. The evidence showed that, in 1998-2000, Tyson placed fewer than 10,500 chickens in each of Plaintiff's houses. D. Ex. 92. Yet, Plaintiff's performance in those years also was unacceptable. *Id.* Proof of Plaintiff's historical performance demonstrates that Plaintiff's problems during his tenure as a grower were not related to the number of chickens Tyson placed in his houses, but arose from poor management. Evidence of Plaintiff's historical performance is admissible for this independent permissible purpose.

The trial court did not abuse its discretion in admitting proof of Plaintiff's performance as a chicken grower prior to the December 2001 Contract. This evidence is highly probative of the key issue of Tyson's motives in reinstating Plaintiff's contract in the summer of 2000, closely monitoring Plaintiff's performance after his reinstatement, and in terminating Plaintiff in 2002.

B. The Trial Court Properly Admitted Photographs of Plaintiff's Farm Based on the Testimony of Stan Varner that the Photographs Accurately Depicted Conditions He Observed on Plaintiff's Farm.

Plaintiff claims the trial court erred in admitting photographs (D. Ex. 108) that Tyson employees took of Plaintiff's farm. He argues that the testimony of Stan Varner, who took the photographs, did not establish that the photographs accurately depicted conditions at Plaintiff's farm during a relevant time period. This issue is without merit. Varner testified that the photographs accurately documented the conditions he observed at Harrison's farm in 1999 and in 2001. For the reasons described above, evidence of Plaintiff's performance during 1999 and 2001 is relevant and admissible.

Photographs are admissible if an authenticating witness establishes that the photographs accurately depict the subject matter at issue. *See Ford v. State*, 975 So. 2d 859, 867-68 (Miss. 2008) (photographs are properly authenticated when witness testifies they are an accurate depiction of scene). It is irrelevant *when* the photographs were taken, as long as they fairly and accurately depict the subject matter. *See Lowery v. Illinois Cent. Gulf R.R.*, 356 So. 2d 584, 585 (Miss. 1978) (photographs taken after time of collision when grass was higher admissible if witness testifies they fairly and accurately represent conditions at the scene and explain any differences); *see also Nelson v. Phoenix of Hartford Ins. Co.*, 318 So. 2d 839, 843 (Miss. 1975).

Here, Stan Varner properly authenticated the photographs he took of Harrison's farm. Varner testified that he took photographs of Harrison's farm on at least two occasions, once in 1999 and once in 2001, based on the dates of memoranda in his file. Varner testified that the

pictures admitted into evidence fairly and accurately depicted the conditions he observed at Harrison's farm *both* in 1999 and in 2001:

> Q. [I]f you could review the pictures in front of you, tell me, do those pictures accurately depict the conditions you observed on Mr. Harrison's farm in 1999 and in 2001. I would like to know if those pictures reflect the problems you've detailed to us.
>
> . . .
>
> A. Yes.

T. 741. This testimony sufficiently authenticated the photographs, and the Court did not abuse its discretion in admitting them into evidence.

II. JURY INSTRUCTIONS D-12 AND D-20 ARE ACCURATE STATEMENTS OF THE LAW.

Plaintiff claims that Instructions D-12 and D-20 improperly limited the damages that the jury could award for Tyson's breach of the contract by giving oral, not written, notice of termination. The instructions properly stated the measure of damages for the defect in the form of termination notice that Tyson gave to Plaintiff. First, the trial court granted Plaintiff's own requested instruction on the proper measure of damages for Tyson's breach:

> If you find for the Plaintiff, Eric Harrison, you should award damages in an amount that will put him in as good of a position as he would have been had Tyson Breeders, Inc. not given written notice of termination as required in the 2001 Contract.
>
> You can consider the losses incurred and the gains not realized due to Tyson Breeders, Inc.'s failure if it knew or had reason to forsee at the time the contract was made that failure to fulfill the contract will probably cause such losses and/or damages to the Plaintiff, Eric Harrison.
>
> Any expenses, if any, which Tyson Breeders, Inc. failure to perform saved Eric Harrison should be deducted from the amount awarded.
>
> Additionally, any losses and/or damages that Eric Harrison could have foreseen and avoided through reasonable efforts should be deducted from the amount awarded.
>
> This instruction applies to the 2001 Contract only.

R. 921 (Jury Instruction P-17).

The trial court also gave instructions giving Tyson's theory of the proper measure of damages. Under Tyson's theory of the case, Plaintiff suffered no damages as a result of the form

of termination notice he received. Tyson was entitled to present jury instructions that accurately state Mississippi law in support of its theory of the case.[15]

Instruction D-12 states the appropriate measure of damages when a party to a contract is given improper notice of termination:

> [W]here a contract requires a party to give written notice of termination of the contract, and where the contract does not require that notice be given at any particular time, then if a party fails to provide written notice of termination, the other party is entitled to a reasonable notice of termination. In such a case, it is your duty as jurors to decide the amount of time that would constitute reasonable notice. A party who is not given notice of termination as required by the contract is entitled to damages for the income, if any, he would have earned during the period constituting reasonable notice.

R. 928. Instruction D-12 accurately states Mississippi law. Damages recoverable for a breach of contract are those that are reasonably foreseeable consequences of the breach. *See Wright v. Stevens*, 445 So. 2d 791 (Miss. 1984). A party injured by a breach of contract has no right to be placed in a better position than he would have occupied had the contract been performed. *Wilson v. General Motors Acceptance Corp.*, 883 So. 2d 56, 66-67 (Miss. 2004); *see also University of Southern Miss. v. Williams*, 891 So. 2d 160 (Miss. 2004) (monetary remedy for breach of contract must not charge the breaching party beyond the trouble that the breach caused).

Here, the breach at issue was the improper *form* of the termination notice that Tyson gave to Plaintiff. Under Mississippi law, if a party to a contract is given inadequate notice of termination, the appropriate measure of damages is the party's lost income for an appropriate notice period. *See King v. Exxon Company, USA*, 618 F.2d 1111, 1118-19 (5th Cir. 1980) (proper measure of damages upon a party's failure to provide written notice of termination of an employment contract of indefinite duration is the plaintiff's net income for a reasonable time period, as determined by the jury); *see also Fuselier, Ott & McKee, P.A. v. Moeller*, 507 So. 2d

[15] As discussed below, Instructions P-17, D-12 and D-20 need not have been given, because there was no evidence to support any damages award flowing from the form of termination notice that Tyson gave Plaintiff.

63, 67-68 (Miss. 1987) (attorney not given the 60-days notice of termination required under his employment contract was entitled to damages in the amount of his expected income for the 60-day notice period); *Louisiana Oil Corp. v. Bryan*, 165 Miss. 157, 147 So. 324 (1933) (employer's termination of employment contract without required 10 days' notice constituted breach of contract, and proper measure of damages was 10 days' salary). Here, the 2001 Contract contained no notice period; it allowed Tyson to immediately terminate the contract upon delivery of written notice. P. Ex. 2 at ¶ 13. Instruction D-12 is an accurate statement of Mississippi law under Tyson's theory of the case.

Instruction D-20 also accurately states Mississippi law on contract damages:

> You are instructed that damages for breach of contract are intended to give an injured party the benefit of his bargain by awarding him a sum of money that will put him in the same position he would have had if the contract had been performed. A party injured by a breach of contract does not have the right to be placed in a better position than he would have occupied had the contract been performed.
>
> You are further instructed that the December 2001 Contract between James Eric Harrison and Tyson Breeders was for a term of one year. Even if you decide to award damages to Mr. Harrison for breach of that contract, you are instructed that any such damages are limited by the one-year term of the contract.

R. 936. In a breach of contract case, compensatory damages may be awarded to give the plaintiff the "benefit of the bargain," or those damages that place the injured party in the position he would have occupied if the contract had not been breached. *See, e.g., Lovett v. E.L. Garner, Inc.*, 511 So. 2d 1346, 1353 (Miss. 1987); *Wright v. Stevens*, 445 So. 2d 791 (Miss. 1984). A party may not recover damages that are speculative or remote. *See Polk v. Sexton*, 613 So. 2d 841, 844 (Miss. 1993).

At the time of his termination in May 2002, Plaintiff was growing chickens for Tyson under a one-year contract which expired on December 19, 2002. P. Ex. 2. That contract had no right of renewal. P. Ex. 2. Plaintiff admitted he incurred no damages by improving his farm in reliance on the 2001 Contract. Tr. 473-74. Thus, Plaintiff's only possible recovery for breach of

the form of notice provision of the contract is the income he would have received for the duration of the one-year contract. Any damages beyond the term of that contract would be speculative and remote. Instruction D-20 is an accurate statement of Mississippi law.

In any event, any error in Instructions D-12 and D-20 is harmless, because the jury chose not to follow them. The jury awarded Plaintiff $22,328.00 for Tyson's breach of the December 2001 contract by giving oral, not written, notice of termination. The only evidence supporting this damages figure had nothing to do with Tyson's failure to give written notice of termination. Dr. Charles Dennis, Plaintiff's damages expert, testified that $22,328.00 equals one year of Plaintiff's average net income from his chicken farm during the 1999 to 2000 period. Tr. 654-59; D. Ex. 131. The jury did not award Plaintiff damages for a reasonable notice period, as set forth in Instruction D-12. Likewise, the jury did not limit its award of damages to the income Plaintiff would have received under the remaining 7 months of the 2001 Contract. Instead, the jury awarded a full year's lost income as damages for Plaintiff's receipt of oral, not written, notice of termination. Because the jury did not follow Instructions D-12 or D-20, any error is harmless.

The jury instructions Plaintiff contests are accurate statements of Mississippi law, and the instructions as a whole fairly state the law that applies to the case. The Court committed no error in giving Instructions D-12 and D-20.

III. THE COURT ERRED IN DENYING TYSON'S MOTION FOR JNOV, AND NO EVIDENCE SUPPORTS THE JURY'S DAMAGES AWARD FOR TYSON'S BREACH OF CONTRACT BY FAILING TO GIVE WRITTEN NOTICE.

Prior to trial, the trial court entered summary judgment against Tyson, holding that Tyson breached its contract with Plaintiff by giving oral, not written, notice of termination. At trial, the jury awarded to Plaintiff damages of $22,328, a full year of lost income, as a result of Tyson's failure to give written notice of termination. For several independent reasons, this verdict against

Tyson must be reversed. *First*, the uncontradicted proof was that Tyson gave Plaintiff actual notice that the contract would be terminated. Such notice was the legal equivalent of written notice, and Plaintiff has no legal complaint arising from the fact that the notice was oral, and not written. *Second*, there is no evidence that Plaintiff suffered damages in any amount arising from Tyson's failure to provide written notice of termination. *Third*, Plaintiff's damages for any such breach could not exceed his lost net income for a reasonable notice period; here, Tyson gave Plaintiff three months actual notice of termination. There was no evidence that such notice was unreasonable, and Plaintiff's proof was that *60* days constituted a reasonable notice period. Finally, Tyson removed Plaintiff's final flock of chickens 11 weeks early, and no recovery in excess of lost net income for that time period could be allowed. No evidence supports a verdict for a full year's lost net income.

A. Plaintiff Received Legally Sufficient Oral Notice of Termination.

The uncontradicted evidence in this case was as follows: (1) Tyson and Plaintiff entered into a one-year contract on December 2001; (2) in February 2002, Tyson gave Plaintiff unequivocal oral notice that it intended to terminate his contract at the end of his current flock which, if carried to full term, would have been picked up in August 2002; (3) Tyson picked up Plaintiff's flock of chickens on May 13, 2002, eleven weeks early; (4) Tyson's contract with Plaintiff did not require Tyson to give Plaintiff advance notice of termination. Plaintiff presented no evidence that Tyson's termination of his contract by oral notice in February 2002 caused him to suffer damages in any amount.

Plaintiff, Mack Walker and Stan Varner all testified that Tyson orally informed Plaintiff in February 2002 that his contract would be terminated at the end of his flock. Tr. 371-72. Plaintiff testified that he understood in February 2002 that his contract would be terminated. Tr. 414-15. Thus, the uncontradicted evidence was that Plaintiff received unequivocal oral notice of

termination in February 2002. A contract's requirement that termination be in writing is a matter of form, not substance. Particularly when, as here, a plaintiff has received unequivocal actual notice of termination that is substantially equivalent to a written notice, he has no legal complaint. *See B. Finder Associates v. Coldform, Inc.*, 2005 Conn. Super. LEXIS 1283 at *4-5 (Conn. Super. Ct. 2005) (*citing Oregon Portland Cement Co. v. E.I. DuPont De Nemours & Co.*, 118 F. Supp. 603, 607 (D. Or. 1953)) ("A contract requirement that the notice of termination be in writing will not be strictly construed . . . when the evidence unequivocally establishes that the plaintiff received oral notice of termination."); *see also Daniel E. Terreri & Sons v. Bd. of Mahoning County Comm'rs*, 786 N.E.2d 921, 932 (Ohio Ct. App. 2003) (holding that the failure to follow the written notice provisions of a contract can be harmless when there is evidence of constructive or actual notice). Thus, the Court erred in granting Plaintiff's motion for summary judgment, directing the jury to return a verdict for Plaintiff on this claim, and denying Tyson's JNOV motion.

B. Plaintiff Suffered No Damages By Receiving Oral Notice of Termination.

Plaintiff failed to present evidence that he suffered any damages as a result of Tyson's technical breach of the contract by giving Plaintiff oral, not written, notice of termination. Even if Tyson's failure constituted a breach of contract, a verdict for breach requires proof of damages. Plaintiff bore the burden of proving that he suffered actual damages as a result of Tyson's breach. *See Garner v. Hickman*, 733 So. 2d 191, 195 (Miss. 1999). No such proof was presented here. The contract contained no notice period. Tyson could have terminated the contract by handing Plaintiff a document stating that the contract was terminated and picking up the chickens immediately. P. Ex. 2; Tr. 412-414. Instead, Tyson gave Plaintiff three months' oral notice of termination. Tr. 414. Plaintiff presented no evidence that he suffered damages as a result of the form of notice he received.

The only evidence on point was Plaintiff's testimony that, had he received written notice of termination, he could have taken that notice to an attorney and somehow taken action to prevent Tyson from terminating his contract. Tr. 496-97. Plaintiff testified that a written notice of termination "would have given him a definite timeframe to try to work out something somewhere – some way to save everything [he] had." Tr. 372. Plaintiff's apparent belief that written notice of termination was a prerequisite for his lawsuit against Tyson is incorrect. Plaintiff had *actual* notice of termination, yet he did not seek an attorney to try to prevent Tyson from terminating his contract. Indeed, this action was filed by Plaintiff in the absence of any written notice of termination by Tyson. This testimony is purely speculative and does not support an award of damages in any amount.

Tyson had the right to pick up its chickens at any time. Instead, Plaintiff received three months oral notice of termination, giving him more time to make arrangements for his future plans than he was entitled under the contract. Plaintiff suffered no damages as a result of the form of his termination notice. Without such proof, his breach of contract claim fails for this independent reason.

C. Plaintiff's Damages are Limited to a Reasonable Notice Period, and He Received Reasonable Notice of Termination.

At most, Plaintiff's damages are limited to income for a period of time that the jury found to have been a reasonable notice period. *King v. Exxon Company, USA*, 618 F.2d 1111, 1118-19 (5th Cir. 1980) (applying Miss. law); *Fuselier, Ott & McKee, P.A. v. Moeller*, 502 So. 2d 63, 67-68 (Miss. 1987); *Hazell Machine Co. v. Shahan*, 161 So. 2d 618, 624 (Miss. 1964).

The only evidence concerning the time that would have been a reasonable notice of termination was Plaintiff's suggestion that 60 days would have been reasonable, since the contract required Plaintiff to give Tyson 60 days notice of termination. Tr. 210-11; 496. Again, the uncontradicted proof showed that Plaintiff received three months actual notice of

termination, a month *more* than he testified would have been reasonable. Therefore, the proof does not support a damage award for lost income during a reasonable notice period in any amount, and certainly not a full year's lost income.

D. No Evidence Supports a Full Year of Lost Profits as Damages for Termination of the Contract 11 Weeks Early.

Finally, there was no evidence to support the jury's award of $22,328, a *full year* of lost profits damages. Tyson terminated Plaintiff's contract eleven weeks early, on May 13, 2002. Tyson's contract with Plaintiff did not require Tyson to deliver another flock of chickens to Plaintiff, nor did the contract contain an option for renewal. Therefore, the only lost profits damages Plaintiff could have suffered would be the eleven weeks of profits he would have earned if Tyson had not picked up his flock early. Plaintiff presented no proof as to what eleven weeks of profits would have been. The $22,328.00 awarded by the jury is clearly unsupported by the evidence.

CONCLUSION

For the reasons stated above, the jury's verdict in Tyson's favor on Plaintiff's claims of bad faith breach of contract and fraudulent inducement should be affirmed. However, the jury's verdict of $22,328.00 in breach of contract damages should be reversed and rendered.

RESPECTFULLY SUBMITTED, this the 1st day of October, 2010.

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CERTIFICATE OF SERVICE

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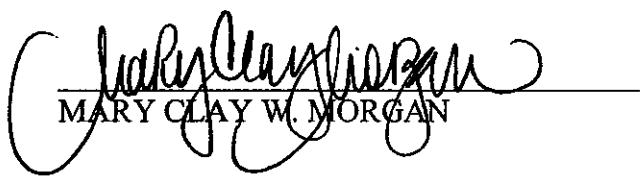

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