IN THE SUPREME COURT OF MISSISSIPPI

JAMES ERIC HARRISON **APPELLANT**

V. **CAUSE NO. 2009-CA-01851**

MACK WALKER, STAN VARNER, AND TYSON BREEDERS, INC. **APPELLEES**

CERTIFICATE OF INTERESTED PARTIES

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 the Mississippi Supreme Court may evaluate possible disqualification or recusal.

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

RESPECTFULLY SUBMITTED this THIRTIETH day of June 2010,

Will Bardwell

Will Bardwell, Mississippi Bar No. [redacted]
Will Bardwell Law Firm, PLLC
P.O. Box 13305
Jackson, MS 39236
Phone: (601) 604-4150
E-mail: will.bardwell@gmail.com

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STATEMENT OF THE CASE

Eric Harrison worked as a chicken grower. He built and operated large chicken houses near his home on his property in Covington County. Beginning in 1989, Harrison contracted with large corporations to receive young chickens and to raise them into and through adulthood, during which time he collected eggs and cared for the birds until the corporation would return to retrieve the birds and, later, to bring Harrison a new flock. Some years later, when Tyson Foods acquired Harrison's employer company, Harrison began working under the same arrangement for Tyson Breeders, Inc., a subsidiary company.

Harrison operated his farm under financing through Oaklawn, a wholly owned subsidiary of Tyson that specialized in loans to chicken farmers. Harrison collateralized the loan with 10 acres of his property. But in 1999, while under contract with Tyson, Harrison's performance as a chicken grower began to suffer. Due to a serious injury suffered by his wife, Harrison began to neglect his chickens, and the flocks produced inferior birds and substandard quantities of eggs. Eventually, in October 1999, after a series of inspections demonstrated what Tyson concluded was a consistent pattern of unacceptabe farming practices, Tyson terminated Harrison's contract. And with Harrison out of work, he was unable to make payments on his loan with Oaklawn, which began charging Harrison's missed payments back against Tyson's complex in Magee,

where Harrison had been based.[1]

In early 2000, Harrison met with Tyson employees Stan Varner and Mack Walker regarding the possibility of beginning anew, and the parties agreed to recommence their relationship. Harrison refinanced through a new bank to pay off his Oaklawn loan and began raising chickens again for Tyson later in 2000. The new bank required Harrison to offer his entire 40 acres, and the structures thereupon, as collateral.

Initially, Harrison excelled at his second lease on life as a chicken farmer. But as time went by, Harrison's performance began to slip again, and Tyson began to discover new problems. In May 2002, Harrison's debts thereto having been paid, Tyson terminated its relationship with Harrison once and for all.

Soon thereafter, with no income stream, Harrison defaulted on his loan and lost his collateral: his two chicken houses, his home, and his 40 acres of land.

In December 2002, Harrison brought suit against Varner, Walker, Tyson Breeders, Inc., and others, for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraudulent inducement. Harrison alleged that Tyson had renewed its relationship with him only for the purpose of requiring him to pay off his Oaklawn loan – which had been charging Tyson's Magee complex for Harrison's missed payments until he was reinstated and had obtained new financing for his farm.

At trial, Tyson's theory of the case addressed the longstanding nature of Harrison's farming problems – including those that existed before Harrison and Tyson signed the contract on which the complaint was based. As defense counsel summed up for the trial judge, "our theory of the case . . . is a course of conduct that went on for a long time and finally resulted in

[1] As one Tyson employee testified, "[the payments] had to be absorbed, yes, so it was a cost that we incurred." Record Excerpts at 4: page 195.

[Tyson's] decision to terminate him." R.E. at 5:246. Specifically, Tyson adduced evidence not only of Harrison's farming habits during the period of time in which he worked under his new relationship, but also of conduct that occurred prior to Harrison's first termination. Defense counsel told jurors during closing arguments that the evidence presented on Tyson's behalf revealed "an overwhelming amount of evidence about Harrison's performance as a grower," and "not just in '98, '99, but in 2001 and 2002." R.E. at 6:870. This evidence included photographs taken by Tyson employees depicting Harrison's farm, although no defense witness could testify as to whether the photographs were taken before or after Harrison's first termination.

The jury returned a verdict on Harrison's behalf on the claim of breach of contract and awarded him $22,328. The jury ruled for Tyson on the remaining counts.

SUMMARY OF ARGUMENT

Harrison presents two assignments of error, either of which standing alone requires reversal of the circuit court's judgment and remand for a new trial.

First, the trial court violated Rule 404 of the Mississippi Rules of Evidence by permitting Tyson to introduce evidence of prior bad acts – specifically, Harrison's prior substandard farming practices. By defense counsel's own admission, evidence regarding Harrison's farming habits prior to his first termination served only to support the proposition that Harrison acted in conformity with those habits prior to his second termination. Such evidence is inadmissible under Rule 404, and the trial court's failure to reject the evidence requires reversal.

Second, the trial judge erred by admitting two jury instructions. Specifically, Instructions No. D-12 and D-20 improperly ordered the jury to limit its consideration of Harrison's damage to the period of time addressed by the terminated contract. These instructions necessarily forbade the jury to consider consequential damages, which, in the case at bar, included the losses of

Harrison's home, two chicken houses, and 40 acres of land. The failure to permit the jury to consider losses occurring after the date on which the contract would have ended naturally but nevertheless stemming from the breach amounts to reversible error.

STANDARD OF REVIEW

Harrison's first assignment of error regards the admissibility of evidence under the Mississippi Rules of Evidence. This Court reviews such questions for an abuse of discretion. ***Mississippi Transportation Comm'n v. McLemore***, 863 So. 2d 31, 34 (Miss. 2003).

Harrison's second assignment of error concerns the validity of two jury instructions. The matter presents a question of law, and the appropriate standard of review thereof is *de novo*. ***Snapp v. Harrison***, 699 So. 2d 567, 569 (Miss. 1997).

ARGUMENT

I. THE TRIAL JUDGE ERRED BY ADMITTING EVIDENCE OF ERIC HARRISON'S PAST FARMING HABITS.

Harrison brought suit against the defendants for breach of a contract that addressed a specific period of time, and any evidence of sloppy farming habits that occurred prior to that period of time should not have been admitted by the trial court.

Under the Mississippi Rules of Evidence, "[e]vidence of a person's character[2] or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . ." Miss. R. Evid. 404(a). In other words, when there is "no purpose for the . . . testimony other than to show that [a party] has a propensity to" act in conformity

[2] The description of such evidence as "character" evidence is somewhat misleading. As this Court has observed, for purposes of the Rules of Evidence, "character" evidence more fairly describes any evidence of habit. "For better or worse, the Rules include under the umbrella label 'character' behavioral patterns or propensities. . . . As an original proposition, a term other than 'character' may have been more appropriate." ***Heidel v. State***, 587 So. 2d 835, 845 n.9 (Miss. 1991). Ultimately, regardless of the descriptor, evidence of past actions may not be used to demonstrate a likelihood that a party acted similarly at a time relevant to court proceedings.

therewith, such evidence must not be introduced. ***Delahoussaye v. Mary Mahoney's Inc.***, 783 So. 2d 666, 673 (Miss. 2001) (Waller, J.). This rule exists because such evidence carries the unavoidable tendency to expand the scope of trial toward matters not contained within the complaint that, ultimately, offer a court nothing more than a tangentially related distraction.

> When a party attempts to prove that a person has a certain character trait and that he acted in accordance with it, the court will exclude the testimony. To do otherwise is to prejudice the person, to render him in the eyes of the jurors liable, not because of what he did or did not do in the instant case, but because of what he has done or failed to do in the past.

Miss. R. Evid. 404(a), cmt.

Put another way, as this Court wrote in 1989, Rule 404 exists in criminal cases to enforce "the notion that a defendant is on trial for a specific crime and not for generally being a bad person." ***Mitchell v. State***, 539 So. 2d 1366, 1372 (Miss. 1989) (cited favorably by ***Lambert v. State***, 724 So. 2d 392, 394 (Miss. 1998) (Waller, J.)). Similarly, in this civil[3] matter now before the Court, Rule 404 should have limited Tyson to attempting to show that Harrison did not live up to the terms of the contract in issue and not that he was generally a bad farmer.

But in the case at bar, the defense went to great lengths to demonstrate just that: that prior to Tyson's first termination of its contractual relationship with Eric Harrison, the plaintiff had performed poorly as a chicken farmer. Indeed, defense counsel questioned both of its witnesses about Mr. Harrison's track record prior to his first termination. For example, Varner told jurors that, prior to his first termination, Harrison had been "[w]ashing eggs" and had caused "a lot of management problems that wasn't [*sic*] getting taken care of." R.E. at 7:684. *See also* R.E. at

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[3] Even long before the adoption of the Mississippi Rules of Evidence, "this Court held that it is the general rule in an ordinary civil case that parties may not support their position by offering testimony as to their . . . character or reputation . . . ." ***Millers Mut. Fire Ins. Co. v. King***, 98 So. 2d 662 (Miss. 1957) (citing ***Graves v. Johnston***, 179 Miss. 465, 176 So. 256 (1937)).

7:687-89. Varner also testified that Mr. Harrison's first two flocks with Tyson, both of which he raised prior to the agreement at issue in the complaint, performed "pretty bad." R.E. at 8:712.

Furthermore, Varner detailed for the jury specific problems from which Harrison's farm suffered prior to the first termination, including "[t]wo to three hundred chickens underneath the slats, large cake areas in the scratch area, large feed spills[,]" R.E. at 8:715, "[d]ecayed chickens in several areas, . . . [and] large piles of trash at the end of the house that he was asked to discard during the previous flock." R.E. at 8:716. Later, Mack Walker reported to the jury that he had made the same observations and that he shared Varner's view of Harrison's farming acumen. R.E. at 9:807-08.

Ultimately, during closing arguments, defense counsel characterized this wealth of testimony regarding Harrison's pre-termination behavior as "an overwhelming amount of evidence about Harrison's performance as a grower." R.E. at 6:870. These shortcomings, defense counsel told jurors, ailed Harrison's farm "not just in '98, '99," which was prior to Harrison's reinstatement with Tyson, "but 2001 and 2002." ***Id.***

Indeed, this evidence was not the merely incidental sort that lends itself to harmless-error analysis but, as defense counsel told the trial judge at one point, was "extremely relevant to our theory of the case, which is a course of conduct that went on for a long time and finally resulted in [Tyson's] decision to terminate him." R.E. at 5:246.

By the defense's own admission, evidence of prior actions was adduced to demonstrate conformity therewith during the relevant contractual period. That introduction amounts to a plain violation of Rule 404.

Of course, certain well known exceptions exist to Rule 404(a). Most notably, "[e]vidence of other . . . acts . . . may . . . be admissible for . . . purposes such as proof of motive, opportunity,

intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Miss. R. Evid. 404(b). And although the list of exceptions delineated by Rule 404(b) is not exhaustive, *see* ***Id.*** at cmt., none comes close to providing a fair label for the evidence regarding Harrison's earlier farming performance.

In ***Delahoussaye v. Mary Mahoney's Incorporated***, 783 So. 2d 666 (Miss. 2001) (Waller, J.), this Court addressed a case in which, like the case at bar, a litigant impermissibly sought to introduce evidence of behavior similar to that alleged in that party's theory of the case. The plaintiff in ***Delahoussaye*** was injured in a car crash by a minor to whom the Mary Mahoney's restaurant had sold alcohol illegally. At trial, the circuit court refused to admit testimony that Mary Mahoney's had engaged in a pattern of alcohol sales to underage patrons, and on appeal, Delahoussaye argued that this evidence "of Mary Mahoney's opportunity, intent, knowledge, identity, or absence of mistake or accident" should have been admitted under Mississippi Rule of Evidence 404(b). ***Id.*** at 672.

The Supreme Court disagreed[4] and affirmed the trial judge's rejection of the proffered testimony. "Evidence of other . . . acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. We can conceive of no purpose for the proffered testimony other than to show that Mary Mahoney's has a propensity to sell alcohol to minors." ***Id.*** at 672-73.

Although the plaintiff's shoe in ***Delahoussaye*** is presented on the other foot by the case at bar, the point of law remains the same: when testimony of past actions is admitted for no other purpose than to show a tendency to conform to such behavior, Rule 404 is violated. Because

[4] Although ***Delahoussaye*** was decided by only a 5-4 vote, both Justice McRae's special concurrence and Justice Smith's dissent declined to rebut and, therefore, apparently did not disagree with the majority's analysis of Rule 404.

evidence of Harrison's earlier and poorly performing flocks was introduced over objection in order to demonstrate that he again produced an unacceptable crop, the trial court's judgment must be reversed.

However, this Court can reverse only if Harrison preserved the issue with an objection at trial. He did so. R.E. at 5:245. During the direct examination[5] of Richard Evans, the third of seven witnesses called during the plaintiff's case in chief, Harrison's counsel objected to Tyson's introduction of a letter documenting pre-termination deficiencies on the farm because, in the view of Harrison's attorney, "it's totally irrelevant to what happened after they put [Harrison] back into business." R.E. at 5:246. Although this objection was not lodged at the earliest possible juncture,[6] it preceded the vast majority of references to Harrison's prior acts as a chicken farmer. *See* ***Towles v. Towles***, 243 Miss. 59, 66, 137 So. 2d 182 (1962) (single objection preserves challenge to similar evidence that continues to be introduced after the objection's voicing). Furthermore, despite the fact that Harrison's objection lacked the magic words "Rule 404," the protestation did address the evidence's irrelevance,[7] which provides the common law root of the modern Rule 404's substance.

> The reason and injustice of the rule is apparent, and its observance is necessary to prevent injustice and oppression in criminal prosecutions. Such evidence tends to divert the minds of the jury from the true issue, and to prejudice and mislead them, and, while the accused may be able to meet a simple charge, he cannot be prepared to defend against all other charges that may be brought against him. "To

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[5] Because Harrison called Richard Evans as an adverse witness, plaintiff's counsel opened Evans' testimony with cross examination, and defense counsel followed with Evans' direct examination.

[6] Harrison objected to the first attempt to introduce a document related to his past performance and what appears to be the fifth reference overall to his past performance. *See* R.E. at 14:217, 220, 233; R.E. at 5:242. In contrast, in its case in chief, defense counsel explored Harrison's prior acts with no fewer than 36 questions posed to Stan Varner and 10 to Mack Walker. *See* R.E. at 15:684, 685, 686, 687, 690, 691, 692, 693, 694, 696, 697, 698, 699, 700, 702, 711, 712, 713, 714, 715, 719, 732, 744; R.E. at 16:804, 806, 807, 808, 809, 811, 814, 817.

[7] Notably, Article IV of the Mississippi Rules of Evidence is entitled "Relevancy and Its Limits."

> permit such evidence," says Bishop, "would be to put a man's whole life in issue on a charge of a single wrongful act, *and crush him by irrelevant matter*, which he could not be prepared to meet." 1 Bish. Crim. Proc. § 1124.

Floyd v. State, 166 Miss. 15, 148 So. 226, 230 (1933) (emphasis added) (cited by ***Eubanks v. State***, 419 So. 2d 1330, 1331 (Miss. 1982)).

Similarly, the trial court's admission of the defendants' photographs of Harrison's farm violated Rule 404. Harrison objected to their admission on the basis of the witness' inability to identify the point in time at which they were taken. R.E. at 8:704. As the trial judge rightly stated, "[t]he issue is do the photos reasonably and accurately depict and portray the scene as it appeared *during the time in question.*" R.E. at 8:707-08. But the trial court erred when it admitted the photos without determining that they portrayed the farm during Harrison's second stint with Tyson.

Ultimately, Varner could not testify whether the photos depicted Harrison's farm at a period in time relevant to the complaint.

> Q Now, Mr. Varner, I'm going to hand you a document that's already been marked for identification as Exhibit D-109. Mr. Varner, did on some occasions when you investigated, did you take photographs?
> A I did.
> Q Do you remember what those occasions were, when you took the photographs?
> A Anytime that I took a photograph, it would have been in correspondence to any of those letters that I had in my file. It would have been on one of those visits.
> Q Okay. And if 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.
> . . .
> THE WITNESS: Yes.

R.E. at 10:741. Certainly, under normal circumstances, a party is entitled to introduce photographic evidence when the image is a "fair and accurate representation of the scene at the

time" in question. ***Lowery v. Illinois Cent. Gulf R.R.***, 356 So. 2d 584, 585 (Miss. 1978). But as with any other brand of evidence, a photograph may not be introduced to demonstrate "prior offenses or actions to show that the party acted in conformity with past behavior . . . ." Miss. R. Evid. 404(b), cmt. Because Tyson did not introduce this photograph with any assurance that it depicted Harrison's farm at a moment relevant to the complaint, the trial court should have declined to admit it.

Even if the photograph had been proven definitively to have been taken prior to Harrison's first termination, Tyson potentially still could have introduced it without violating Rule 404. As this Court has held, "the mere fact that . . . photographs were taken at a time when conditions were somewhat changed does not render such photographs inadmissible so long as the changes are carefully pointed out to the jury." ***Nelson v. Phoenix of Hartford Ins. Co.***, 318 So. 2d 839, 843 (Miss. 1975). If Tyson had delineated distinctions between the Harrison farm as photographed and the Harrison farm as it existed during the period of time relevant to the complaint, then it would not have represented evidence of prior bad acts and would have passed muster under Rule 404. But that did not happen. Therefore, because the photographs were admitted with the recognition that they depicted prior bad conditions on Harrison's farm, their submission to the jury violated Rule 404.

Ultimately, with regard to both witness testimony and photographs, the trial court's admission of evidence regarding Harrison's past farming performances violated Mississippi Rule of Evidence 404 because it amounts to evidence of "a certain character trait that he acted in accordance with" at the time relevant to the cause of action. Miss. R. Evid. 404(a), cmt. Furthermore, Harrison preserved the point of error by proper objections, and the objections themselves adequately addressed the evidence's infirmities. Therefore, this Court should reverse

the circuit court's judgment and remand this case for a new trial.

II. THE TRIAL COURT ERRED BY SUBMITTING INSTRUCTIONS D-12 AND D-20 TO THE JURY.

The rules governing this Court's review of jury instructions are familiar ones. *See* ***Franklin Corp. v. Tedford***, 18 So. 3d 215, 238-40 (Miss. 2009). It is beyond dispute that a mistake of law contained within a jury instruction does not necessarily warrant reversal, because "[t]he law requires all instructions to be read together." ***Id.*** at 240. Even so, "this Court will not hesitate to reverse if the instructions, when analyzed in the aggregate, do not fairly and adequately instruct the jury." ***Id.*** at 239 (quoting ***Beverly Enter., Inc. v. Reed***, 961 So. 2d 40, 43 (Miss. 2007)). And although, in general, reversal will not be employed even in the presence of erroneous instructions "if other instructions clear up the confusing points," ***Payne v. Rain Forest Nurseries, Inc.***, 540 So. 2d 35, 40 (Miss. 1989), this Court also has held that "[faulty] instructions [are] not cured by the instructions which correctly announced the law" when the flawed instructions "are fundamentally in violation of the" law. ***Williams v. Moses***, 234 Miss. 453, 460, 106 So. 2d 45 (1958) (quoting ***Hill v. Columbus Ice Cream & Creamery Co.***, 93 So. 2d 634, 644 (Miss. 1957)). In sum, "where [the Court] find[s] two or more instructions in hopeless and substantive conflict with each other, [the Court] often reverse[s]." ***Payne***, 540 So. 2d at 41.

In the case at bar, two instructions contained incorrect statements of law, and each requires reversal.

Instruction D-12 related to Harrison's allegation that he suffered damages by virtue of Tyson's failure to provide reasonable notice of his contract termination. The instruction read, in relevant part: "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.E. at 11.

This is an incorrect statement of law. It is axiomatic that a party who suffers a contract breach is entitled to recovery for all injuries resulting from the breach – period. Those damages are not necessarily limited to the time period covered by the contract, as the trial court's instruction indicated. "The court's purpose in establishing a measure of damages for breach of contract is to put the injured party in the position where she would have been but for the breach." ***Leard v. Breland***, 514 So. 2d 778, 782 (Miss. 1987). "Contract damages . . . are intended to give [a breach sufferer] the benefit of the bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." ***J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co.***, 683 So. 2d 396, 405 (Miss. 1996).

Specifically, Instruction D-12 foreclosed to the jury consideration of consequential damages,[8] which "allow a plaintiff to recover lost profits if the [breaching party] has reason to know at the time of contracting that if he breached the contract, the plaintiff would be deprived of those profits." ***Massey-Ferguson, Inc. v. Evans***, 406 So. 2d 15, 19 (Miss. 1981). Indeed, much of the debate at trial regarding damages addressed the loss of Harrison's home. Although

[8] Consequential damages are special damages, which, under Rule 9(g) of the Mississippi Rules of Civil Procedure, must be pled specifically. In his Second Amended Complaint, Harrison's claim for damages read, in relevant part: "As a direct result of the wrongful actions of the Defendants, the Plaintiff has suffered substantial money damages. The Plaintiff has suffered other economic and non-economic losses as a result of the illegal and wrongful activities engaged in by the Defendants." R.E. at 13. Although Harrison's pleading omits the magic words "special damages," he satisfied Rule 9(g) by differentiating his "substantial money damages" from "other economic and non-economic losses . . . ." ***Id.*** In doing so, he exceeded the vagueness identified by this Court as an inadequate pleading of special damages in ***Puckett Machinery Company v. Edwards***, 641 So. 2d 29 (Miss. 1994). In that case, the plaintiff pled in his complaint that "he ha[d] suffered substantial and great damages," but went on to identify only money damages related to the purchase of unnecessary machinery. ***Id.*** at 38. The matter at bar is distinct from the 1994 case because Harrison's complaint specifically complained of "*other* economic and non-economic damages . . ." (emphasis added).

those damages flowed directly from Tyson's breach, the loss did not occur until after the period relevant to the contract. This loss amounts to a classic example of consequential damages, and the instruction precluding consideration thereof prevented the jury from addressing the totality – and, indeed, perhaps the most important portion – of Harrison's losses.

Likewise, Instruction D-20 prevented jurors from considering whether Harrison suffered damages that extended beyond the term of his prematurely terminated contract. Instruction D-20 charged the jury that the relevant "[c]ontract 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.E. at 12. Such an instruction necessarily precluded consideration by the jury of whether Tyson's breach resulted in damages that rippled beyond the time span addressed by the agreement.

Because Instruction D-12 and D-20 specifically deprived the jury of the ability to consider a significant portion of Harrison's legally recoverable damages, and because the whole of the remaining jury instructions did not cure the misstatement, the court's decision to grant the instructions represents reversible error. This Court should so recognize the decision and remand the case for a new trial.

CONCLUSION

This Court should reverse the judgment of the circuit court for two reasons. First, the trial court committed reversible error by allowing the defense to proceed with a theory of the case that, by its very nature and by the nature of the evidence offered in support thereof, fundamentally and repeatedly violated Rule 404 of the Mississippi Rules of Evidence. Second, by instructing the jury to limit its consideration of Harrison's damages to those suffered during

the period of time relevant to his one-year contract with Tyson, the trial court precluded the jurors from addressing consequential damages, including but not limited to the loss of Harrison's home.

Identification of either error requires reversal of the circuit court's judgment and remand thereto for a new trial.

RESPECTFULLY SUBMITTED this THIRTIETH day of June 2010,

Will Bardwell
Attorney for Eric Harrison

David Shoemake
Mississippi Bar No. [redacted]
A. Regnal Blackledge
Mississippi Bar No. [redacted]
Shoemake & Blackledge, PLLC
405 Main Street
P.O. Box 1678
Collins, MS 39428
Phone: (601) 765-8284
Fax: (601) 765-8282

Will Bardwell
Mississippi Bar No. [redacted]
Will Bardwell Law Firm, PLLC
416 E. Amite Street
Jackson, MS 39201
P.O. Box 13305
Jackson, MS 39236
Phone: (601) 604-4150
E-mail: will.bardwell@gmail.com

CERTIFICATE OF SERVICE

I, Will Bardwell, hereby certify that I have, on this day, served true and correct copies of the foregoing *Brief of Appellant* on the following interested parties via United States Postal Service mail, postage prepaid:

Wayne Drinkwater, Esq.
Mary Clay Morgan, Esq.
Bradley Arant Boult Cummings LLP
P.O. Box 1789
Jackson, MS 39215-1789

Hon. Robert T. Evans
Covington County Circuit Court
P.O. Box 667
Collins, MS 39428

RESPECTFULLY SUBMITTED this THIRTIETH day of June 2010,

Will Bardwell
Attorney for Eric Harrison

Will Bardwell
Mississippi Bar No. [redacted]
Will Bardwell Law Firm, PLLC
416 E. Amite Street
Jackson, MS 39201
P.O. Box 13305
Jackson, MS 39236
Phone: (601) 604-4150
E-mail: will.bardwell@gmail.com