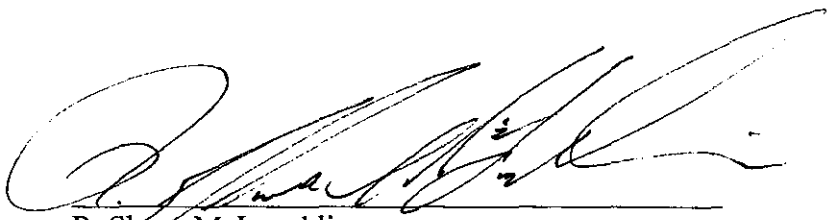
2010 CA 0105 T

CERTIFICATE OF INTERESTED PERSONS

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

1. Mignon Willis, Appellant
2. Rehab Solutions, PLLC, Appellee
3. Chad Willis, member of Rehab Solutions, PLLC
4. Renee Willis, member of Rehab Solutions, PLLC
5. L. Bradley Dillard, counsel for Appellee
6. R. Shane McLaughlin, counsel for Appellant
7. Nicole H. McLaughlin, counsel for Appellant



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STATEMENT REGARDING ORAL ARGUMENT

This case involves a question of first impression under Mississippi law. Specifically, whether Mississippi law will allow an employer to recover wages that were paid to an employee for the employee's alleged failure to perform certain job duties in addition to recovering actual damages sustained by the employer.

This case addresses an important issue for all employees in the State. Oral argument should be granted to discuss this issue.

STATEMENT OF THE ISSUES

1. Whether Mississippi law allows an employer to recover wages paid to an employee as damages for the employee's failure to perform certain job duties during her employment.
2. Even if Mississippi law allows an employee's compensation to be recovered by the employer as unjust enrichment, whether the record can support recovery based on unjust enrichment in this case.
3. Whether the compensatory damages of $133,543.17 awarded in this case are supported by the evidence, since the only actual damages proven at trial totaled $24,803.77.
4. Whether the Trial Court erred as a matter of law in finding that the discovery rule applied to toll the statute of limitations.
5. Whether the Court erred by instructing the jury that the employment at-will relationship of the parties included an implied covenant of good faith and fair dealing.
6. Whether the evidence adduced at trial can support an award of punitive damages.

STATEMENT OF THE CASE

Rehab Solutions, PLLC filed a Complaint against its former employee, Mignon Willis, on April 8, 2008. (C.P. p. 1)[1]. Mignon Willis filed an Answer and Counterclaim. (C.P. p. 9). Rehab Solutions, PLLC answered the Counterclaim. (C.P. p. 23).

Mignon Willis filed four (4) separate Motions requesting dismissal of certain claims alleged by Rehab Solutions. (C.P. p. 79). Two of the Motions were denied before trial. (T. p. 68). The Court dispensed with the third motion by allowing the Plaintiff to amend the Complaint to substitute an unjust enrichment claim for the quantum meriut claim alleged in the Complaint. (*Id.*). The Court held the final motion to dismiss, regarding the statue of limitations defense, in abeyance pending the proof at trial. (*Id.*). The case proceeded to trial from May 17, 2010, to May 20, 2010. (*See* C.P. p. 58).

At the conclusion of Plaintiff's case-in-chief, Defendant moved for a directed verdict. (T. p. 493-96). The Trial Court denied the motion for a directed verdict in all respects. (T. p. 504). At the conclusion of the proof, the Court granted a partial directed verdict in favor of the Plaintiff in the amount of $13,721.21 representing penalties, interest and increased taxes allegedly caused by Defendant's actions while she was employed by Plaintiff. (T. p. 586-87).

The jury returned a verdict of $133,543.17 against Defendant. (C.P. p. 199). Defendant moved to set the verdict aside and the motion was denied. (T. p. 660). The jury was subsequently instructed regarding punitive damages, over Defendant's objection, and returned a verdict imposing punitive damages of $50,000. (*See* T. p. 662, 669-70; C.P. p. 190). Defendant likewise moved to set aside the verdict imposing punitive damages and the Trial Court denied the Motion. (T. p. 677-78).

[1] Throughout this Brief Clerk's Papers are cited as "C.P." and the trial transcript is cited as "T."

The Trial Court entered an Order on all motions on May 24, 2010. (C.P. p. 210). The Trial Court entered the Final Judgment on May 24, 2010. (C.P. p. 211). Defendant timely perfected this appeal. (C.P. p. 213).

STATEMENT OF FACTS

Siblings Chad Willis and Renee Willis are both physical therapists. (T. p. 92-93). Chad and Renee owned a private physical therapy practice called Rehab Solutions, PLLC, in Tupelo, Mississippi. (T. p. 92-93). Rehab Solutions generally employed about eight (8) or nine (9) employees and at various times had locations in Tupelo, Amory and Baldwyn, Mississippi. (T. p. 115, 203, 234-35).

Around January 2003 Chad and Renee began moving their practice to a new location within Tupelo. (T. p. 97). As part of the transition, Chad and Renee wanted to bring all aspects of their business in-house. (*Id.*). Chad and Renee approached Mignon Willis, their first cousin, about working for them doing in-house accounting work and serving as the office manager. (T. p. 98). Mignon had worked previously as an accountant. (Id). Mignon eventually accepted and started to work as an employee of Rehab Solutions in January 2003.[2] (T. p. 97).

When Mignon was hired Rehab Solutions agreed to employ her at the rate of $30 per hour. (T. p. 196). Mignon's rate of pay never changed during the time of her employment. (*Id.*). Mignon's job duties were to generally serve as the office manager for the practice. (*See, e.g.,* 192). Mignon was responsible for a wide range of duties. Mignon was in charge of retrieving the business's mail, ordering medical supplies, dealing with insurance companies and receivables, collections from patients, handling payroll for the employees, making deposits, paying vendors, expense reimbursements and preparing tax returns. (*See, e.g.,* T. p. 101, 192, 336, 255, 524). Mignon was not an authorized signer on the business's checking account so either Chad or Renee signed all of the checks which Mignon prepared. (T. p. 236).

[2] There is no dispute in the Record that Mignon was an employee of Rehab Solutions, not an independent contractor. (T. p. 122, 193).

Chad claimed that he first learned of some problems with Mignon's job performance around November 2007. (T. p. 109-10). In November 2007 a representative of one of the business's suppliers, DuraTech, informed Chad that Rehab Solutions was late on its bill. (T. p. 112-13). Chad claimed he was surprised as he thought all of the bills were paid. (T. p. 113-14). Chad confronted Mignon and Mignon claimed the bill had been paid. (T p. 114). Chad, however, testified that he learned that the bill had in-fact not been paid. (T. p. 115). Mignon was supposed to have paid the bill but had not done so. (*Id.*).

Chad and Renee reduced Mignon's hours after November 2007. (T. p. 115). Chad took over some of Mignon's duties. (*Id.*). Chad claims that in January 2008 he learned that there were liens for unpaid taxes on his property. (T. p. 116-17). Chad contacted a local accounting firm and had another accountant, Amanda Angle, come to the facility to audit the business's financial records. (T. p. 121). Chad and Renee testified that they began looking in Mignon's office and found a large amount of unopened mail. (*See* T. p. 133). The mail included several unopened tax notices, vendor bills as well as payments sent to Rehab Solutions. (T. p. 133, 150; Exhibit P-31). Several checks to Rehab Solutions had not been opened or negotiated but were left in a box in Mignon's office. (*Id.*).

Mignon was out of the office with kidney stones when Angle came to the business and began her audit. (T. p. 545-46). Chad testified that he demanded that Mignon meet with Angle about the financial issues but that Mignon refused. (T. 123-26). Chad testified that as Angle entered the front door of the building Mignon left through the back door. (*Id.*). Mignon did participate in a telephone conference call with Angle regarding the issues. (T. p. 447-48). However, Mignon testified that she was out sick for several days during this time period. (T. p. 545-46). She eventually declined to return to work after several threatening telephone calls from

Chad in which Chad accused her of stealing money and stated he never wanted to see her again. (T. p. 549). Mignon's last day working for Rehab Solutions was January 14, 2008. (T. p. 247).

It was undisputed at trial that Mignon Willis never improperly converted or misappropriated any money from Rehab Solutions. (*See, e.g,* T. p. 209-10, 379). Mignon was not accused of embezzlement or conversion in this case. (T. P. 209-10). Chad Willis conceded that the investigation did not reveal that Mignon improperly took any money. (T. p. 209). Renee likewise testified that Mignon had made no inappropriate expenditures during her employment. (T. p. 381). Specifically, Renee testified:

> Q. Okay . . . Ms. Willis, again, to hit on this, you certainly don't contend that there was any embezzlement or any stealing going on, anything of that nature?
>
> A. No. I don't feel like Mignon embezzled anything from us.

(T. p. 379). Chad and Renee repeatedly conceded that Mignon had stolen nothing, but claimed Mignon had simply not performed all of her job duties. (*See id.*).

Amanda Angle, the outside accountant, similarly testified that her investigation uncovered no evidence of any illegal activity committed by Mignon and that Mignon had simply failed to perform certain tasks. (T. p. 464). Angle explained her findings:

> Q. Ms. Angle, just a few questions I want to ask you. And going back to the beginning and looking at some of this, as I understand, you offered an opinion of maybe some intent in this situation. But, I mean, did you find any evidence of any illegal activity when you went through these records, went through these documents?
>
> A. Illegal activity?
>
> Q. Yes. Embezzlement, fraud, forged checks, anything like that.
>
> A. No, no. And that -- you know, initially when this kind of thing to this extent goes this far, you think there has to be something here, a purpose, a reasoning. And there was -- we didn't find any reason for fraud or embezzlement. It was just obvious not doing the job.

Q. Some things that weren't done and mistakes were made. Fair enough?

A. Correct.

(T. p. 464).

At trial Chad and Renee's new accountants claimed that Mignon had failed to pay bills owed to vendors in the amount of about $26,000 and had failed to pay federal and state unemployment taxes for several years. (*See* T. p. 408, 416). While Mignon had properly paid employee payroll withholding taxes, Chad and Renee claimed she had failed to file the appropriate tax returns for several years. (T. p. 416). Rehab Solutions claimed that as a result of Mignon not paying the unemployment taxes and failing to file tax returns, the business incurred damages of $13,731.21. (T. p. 459). This sum accounted for all of the penalties and interest as well as accounting for an unemployment tax rate increase due to the failure to pay unemployment taxes. (T. p. 459). Amanda Angle testified that the incursion of these penalties, interest and the rate increase was the result of Mignon failing to perform all of her job duties. (T. p. 459). Amanda Angle's accounting firm charged Rehab Solutions accounting fees of $11,071.96 which Chad and Renee also claimed were incurred because of Mignon's failings. (T. p. 163, 406). Thus, the total of the penalties, interest, rate increases and accounting fees alleged at trial was $24,803.77.

Aside from not paying some vendor bills and not filing corporate tax returns Chad and Renee also claimed that Mignon ordered unnecessary medical supplies. (T. p. 255). Chad complained that Mignon improperly ordered non-essential supplies when the business owed outstanding bills to other vendors. (*Id.*).

At trial the Parties hotly disputed the reason that Mignon had not paid various bills and taxes. Mignon claimed that there were several instances of insufficient cash flow to pay all of

the bills. (*See, e.g.*, T. p. 298-99, 309-10). In fact, Mignon claimed that she had not cashed her own payroll checks for several pay periods because of cash flow problems. (T. P. 323-34). Chad and Renee conceded that Mignon had not negotiated several of her payroll checks but claimed she did this voluntarily and not because of insufficient cash flow. (T. p. 244-45). Chad and Renee simply claimed Mignon neglected her job duties. (*See id.*).

Mignon admitted that she made mistakes in failing to file the tax returns and failing to pay the unemployment taxes. (T. p. 511). Mignon admitted that the $13,371.21 in penalties, interest and unemployment tax rate increases were caused by her mistakes of not filing the necessary returns. (T. p. 511). Mignon admitted that some of the accounting fees alleged were incurred in correcting her mistakes. (T. p. 565). However, Mignon maintained that many of the business's bills were not paid because of insufficient cash flow. (T. p. 535, 563). Mignon testified that she knew some vendors were unpaid simply because there was not enough cash to cover the bills. (T. p. 563).

Chad and Renee claimed that they were entitled not only to damages for the penalties, interest and accounting fees, but that Mignon should also repay one-half of her salary over the five (5) year period in which she worked for Rehab Solutions. (T. p. 170-71, 356). Ostensibly, Chad and Renee opined that Mignon probably did about half of her job duties, so she should be liable to return half of her pay over the entire duration of her employment. (*See* T. p. 170-71, 356).

Chad testified that Mignon Willis had been paid about $255,000 over the course of her five (5) years working for Rehab Solutions, at the rate of $30 per hour. (T. p. 170). Chad testified that the business was entitled to an award in the range of $125,000 to $150,000 because Mignon did not perform all of her job duties. (T. p. 171). Chad explained that Mignon had

unquestionably performed some of her job duties, and in "trying to be fair" he only asked that she repay in the range of half of the compensation paid to her rather than all of it. (*Id.*). Renee Willis likewise requested about half Mignon's salary back, testifying as follows:

> Q. In an effort to save time, do you understand the total amount of money paid to Ms. Willis over the five-year period to be in the neighborhood of $255,000?
>
> A. I'd say that that's close.
>
> Q. Did you hear Mr. Willis's testimony as to the amount that he would ask the jury to award from that being half?
>
> A. I do. I do.
>
> Q. Do you agree with that?
>
> A. Well, I do know, like he said, she did perform some of the duties. I feel like that half of that would be fair.
>
> Q. Based on what you know now, do you believe that Rehab Solutions got fair value for what was paid to Ms. Willis?
>
> A. No.

(T. p. 356).

However, it is apparently undisputed in the Record that Mignon was actually at the office for all of the hours for which she was paid. (*See, e.g.,* T. p. 115, 186, 202). There was no evidence or contention at trial that Mignon Willis had been paid for hours she had not been present at the Rehab Solutions facility. (*See id.*). Chad Willis testified as follows:

> Q. Right, right. But those were hours that she was present. I understand you may have an issue with her performance. She came in, she put the time in the office, either you or your sister or both signed the paycheck to her.
>
> A. Right. She entered in her hours and the time she was there being in the management position of when she said that she was there, correct.

(T. p. 202). There was no evidence at trial showing that Mignon had falsified her time records or was ever paid for hours she had not been present. (*See generally id*). Chad and Renee signed

every one of Mignon's paychecks over the five (5) years she worked for them. (*Id.*). Chad and Renee never questioned Mignon's pay or her hours. (*Id.*).

At various points during the trial Chad and Renee agreed that Mignon had performed many of her assigned tasks such as retrieving the mail, completing weekly payroll for the employees and ordering medical supplies. (*See, e.g.,* T. p. 171, 200, 356) Chad and Renee claimed that Mignon failed to pay some vendor bills, failed to pay unemployment taxes and failed to file corporate tax returns. (T. p 170). For these failings, Chad and Renee were allowed to pursue a claim for not only damages allegedly caused by Mignon's failures, but for the return of compensation paid to her.

Chad and Renee testified that they never looked at a single bank statement or monitored accounts payable or accounts receivable after Mignon was hired. (T. p. 220-21, 371-73). The business ran smoothly from January 2003 until November 2007 and neither of the owners ever monitored Mignon's handling of the finances. (T. p. 221-22). Chad testified that "there was no reason to . . . monitor her job" since the business was running profitably. (T. p. 222). Renee echoed that she "truly trusted her to do that job for us. I didn't expect anything less." (T. p. 369). Renee summarized as follows:

> Q. I mean, did the thought ever even cross your mind about maybe checking on your money?
>
> A. Absolutely not. It didn't.

(T. p. 373).

Chad and Renee claim they had "total faith and trust" in Mignon handling the finances. (T. p. 102, 210; *see also* T. p. 340). Chad and Renee testified that after January 2003 they assumed that Mignon was doing everything that needed to be done in that regard. (*See, e.g.,* T.

p. 198-200, 340). Chad and Renee completely relinquished control over the business side of the business to Mignon. (*See, e.g.*, T. p. 222, 370).

STANDARD OF REVIEW

This Court reviews issues of law *de novo*. *Corban v. United Servs. Auto. Ass'n*, 20 So. 3d 601, 609 (Miss. 2009). A Trial Court's ruling regarding a statute of limitations defense is a question of law reviewed *de novo*. *Fletcher v. Lyles*, 999 So. 2d 1271, 1276 (Miss. 2009).

In jurisdictions which have discussed employees' liability to return compensation to an employer, the issue is generally reviewed *de novo*. *Milwaukee Precision Casting, Inc. v. Hagedorn*, 590 N.W.2d 281 (Wis. 1999). (citing *Burg v. Miniature Precision Components, Inc.*, 330 N.W.2d 192, 198 (1983)). The Wisconsin Courts recognized that "whether [an employer] has met its burden of establishing a *prima facie* case [that it is entitled to the return of compensation paid to a disloyal employee] is a question of law which [the reviewing] court may examine independently." *Burg v. Miniature Precision Components, Inc.*, 330 N.W.2d 192, 198 (Wis. 1983).

The Court will reverse a jury verdict where "it is clear that the verdict is a result of prejudice, bias or fraud, or is manifestly against the weight of the credible evidence." *Garris v. Smith's G&G, LLC*, 941 So. 2d 228, 231 (Miss. Ct. App. 2006). The Court looks at the evidence in the light most favorable to the party in whose favor the jury decided. *Lewis v. Hiatt*, 683 So. 2d 937, 941 (Miss. 1996). However, a jury award of damages is reversed where the award shocks the conscience when compared to the amount of actual damages proven. *United States Fld. & Guar. Co. v. Martin*, 998 So. 2d 956, 969 (Miss. 2008). In evaluating these issues "the Court assumes a role as a "thirteenth juror." *Estate of Jones v. Phillips*, 992 So. 2d 1131, 1149 (Miss. 2008).

SUMMARY OF THE ARGUMENTS

The Trial Court erred by instructing the jury that Mignon Willis could be liable to Rehab Solutions for wages she was paid during her employment under the doctrine of unjust enrichment. No law in Mississippi, or in any other State, stands for the proposition that an employee can be liable to return wages paid by the employer simply because the employee shirked job duties. The wages paid to an employee are not the proper measure of damages even if the employee's inactions damaged an employer. At most, Mignon Willis could be liable for the damages actually proven at trial. An award greater than this, representing a portion of the wages paid to Mignon over five (5) years, awards compensation to Rehab Solutions above the damages it actually sustained.

Allowing an employer to recover wages paid to an employee simply because the employee failed to perform some job duties will amount to untenable public policy. Under the result reached by the Trial Court in this case, any employee could be liable for unjust enrichment if the employee fails to perform some of the employee's job duties even if the employee worked all of the hours for which he was paid. This Court should announce that this is not the law in Mississippi. This Court should hold that employees cannot be held liable to repay their hourly compensation simply for failing to perform all of their job duties.

However, even if the doctrine of unjust enrichment did allow employers to recover wages from employees, the doctrine of unjust enrichment would not apply in this case. No proof at trial established that Mignon Willis was paid for hours that she had not actually been present at Rehab Solutions. While Mignon did not perform every job duty assigned to her, she did perform many job duties. The proof was insufficient to establish that Mignon's receipt of hourly compensation was an "unjust" enrichment.

The Trial Court also erred in finding that the discovery rule tolled the statute of limitations until Chad and Renee actually learned that Mignon had failed to pay a vendor bill. The alleged injuries in this case are not "latent injuries" within the meaning of Mississippi Code section 15-1-49 such that the discovery rule applies to this case. The fact that Mignon did not perform some of her job duties was not latent, but was readily apparent to both owners of Rehab Solutions if they had made any inquiry whatsoever. The discovery rule does not toll the statute of limitations under these circumstances.

The Trial Court likewise erred in instructing the jury that the at-will employment contract between Mignon and Rehab Solutions included an implied covenant of good faith and fair dealing for which Mignon could be liable for breaching. The Mississippi Supreme Court has held that an at-will employment contract does not contain an implied covenant of good faith and fair dealing.

Finally, the Trial Court erred in submitting the issue of punitive damages to the jury. Punitive damages must be proven by clear and convincing evidence and are appropriate only in cases of intentional or egregious conduct. The proof at trial was insufficient to support an award of punitive damages.

ARGUMENT I.

AN EMPLOYEE'S PAST WAGES SHOULD NOT BE RECOVERABLE AS DAMAGES IN AN ACTION BROUGHT BY THE EMPLOYER FOR FAILURE TO PERFORM JOB DUTIES.

Rehab Solutions had provable damages at trial of, at most, $24,803.77. However, in addition to this sum, Rehab Solutions sought a judgment against Mignon Willis for a portion of the compensation she received during her employment based on a claim that she did not perform all of her job duties.

There is no Mississippi precedent for an employer recovering wages paid to an employee because of the employee's failure to perform job duties. No Mississippi Court has ever allowed recovery based on such a theory.

Undeterred by the absence of any law, Rehab Solutions proposed a novel theory on which it based its claim. Rehab Solutions claimed that Mignon was "unjustly enriched" by receiving her compensation since she did not perform all of her job duties. The jury was instructed in instruction number C-12 as follows:

> Unjust enrichment is defined as:
>
> > An . . . action based on a promise which is implied in law that one will pay a person what he is entitled to according to "equity and good conscience." Thus, the action is based on the equitable principle "that a person shall not be allowed to enrich himself unjustly at the expense of another." It is an obligation created by law in the absence of any agreement. Therefore, it is an implied-in-law contract.
> >
> > ***If you find that plaintiff has proven that defendant was unjustly enriched through payment of wages which defendant did not earn through performance of her job duties, you shall find for the plaintiff on this claim.***

(C.P. p. 180) (emphasis added).

The doctrine of unjust enrichment "applies to situations where there is no legal contract but where the person sought to be charged is in possession of . . . property which in good

conscience and justice he should not retain but should deliver to another." *Joel v. Joel*, 43 So. 3d 424, 432 (Miss. 2010).

There is no basis for instruction C-12 in Mississippi law. No Mississippi Court has ever held that an employee could be liable for unjust enrichment and liable to repay wages for failing to perform the employee's job duties. This Court should specifically reject this argument. The Court should hold that an employee cannot be liable to repay wages paid to the employee based on a theory of unjust enrichment.

Several states which have addressed similar issues have held that even when an employee acts wrongly and may be liable to an employer for damages, the wages paid to the employee are not the proper measure of damages. *See Nutrition Found., Inc. v. Gitzen*, 62 A.2d 943, 943 (N.Y. 1978). The Court in *Gitzen* held:

> [T]he law is clear that an employer may not recover wages paid to or other compensation received by an employee during a period of completed employment upon allegations of negligence by the employee in the performance of his duties, in the absence of an agreement to that effect.

Gitzen, 62 A.2d at 943. Notably, the *Gitzen* decision involved allegations that the employee had been an "incompetent bookkeeper." *Id.* The Court ruled that the bookkeeper could be liable for damages caused by her negligence in handling the books and for costs to correct the errors if she was an independent contractor. *Id.* at 944. However, the employer could not recover as damages the wages paid to the bookkeeper as an employee during her employment. *Id.* at 943.

Similarly, New Jersey law recognizes that even the wages of an overtly "disloyal" employee are not the proper measure of damages in a suit against the employee. *Toker, Inc. v. Cohen*, 169 A.2d 838 (N.J. 1961). In *Toker* the disloyal employee formed a business to compete with his employer during his employment, misspent his employer's money to further his competing business and misappropriated a company vehicle for his own benefit. *Id.* The Court

held that, while the employee could be liable for damages actually sustained by the employer, the employee was not liable for the wages he had been paid during his employment. *Id.* The Court reasoned that "[t]he foregoing acts, at most, might bolster an independent claim to recover the plaintiff's damages, if any, consequent thereon; they do not aid Toker's effort to recover salary paid to the defendant under his employment contract." *Id.* The *Toker* Court explained:

> There is no doubt that an employer may recover in damages for his employee's breach of duty of loyalty. Moreover, upon a showing of actual injury, compensation may justifiably be withheld by the employer because of the employee's disloyalty. ***This is not, however, the equivalent of a suit for repayment of compensation advanced, as not earned in accordance with the contract. In the absence of fraud, duress, mistake, or express or implied agreement to the contrary, a voluntary payment of wages may not be recovered from an employee, even though the latter's conduct subsequent to receipt of the payments would have disentitled him to receive them.***

Toker, 169 A.2d at 844 (emphasis added).

Appellant is unable to find a single case in any Court across the Nation in which an employee has been held liable to repay wages based on allegations that the employee simply failed to perform job duties.

Rehab Solutions conceded at trial the Mignon Willis had not stolen any money. It is undisputed in the Record that Mignon Willis never received any improper benefit, never misappropriated assets and never engaged in disloyalty or competition with her employer. Rehab Solutions even conceded that Mignon did some of her job duties, but failed to do others. At most, the proof shows that Mignon Willis did not perform all of the tasks expected of her.

Disgorgement of Mignon's hourly wages under an unjust enrichment theory is not the proper measure of Rehab Solutions' damages. As explained by *Toker*, while the employee may be liable for damages, but the employer may not simply recover the wages paid to the employee during the employment.

Further, a ruling that an employee could be liable to an employer to repay wages for failing to perform job duties will amount to deplorable public policy within the State. If the law applied by the Trial Court in this case is the law of the State, every employee with whom an employer becomes dissatisfied is a potential defendant. Invariably, employers become dissatisfied with employees who fail to perform their job duties. Under the law applied in this case, any such dissatisfied employer could properly recover some portion of the employee's previously paid wages based on a theory of unjust enrichment.[3] Every employee in Mississippi who failed to perform anything less than all of their required job duties would be vulnerable to a judgment to repay some part of wages previously paid by the employer.

Such a result is, of course, untenable. Mississippi law already recognizes the appropriate remedy when an employee fails to perform job duties in the form of the doctrine of employment at-will. *See HeartSouth, PLLC v. Boyd*, 865 So. 2d 1095, 1108 (Miss. 2003). Under the employment at-will doctrine an employee may be terminated for any reason, at any time, without justification. *Heartsouth*, 865 So. 2d at 1108. That is "an employee may be discharged at the employer's will for good reason, bad reason, or no reason at all, excepting only reasons independently declared legally impermissible." *Id.* (quoting *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 606 (Miss. 1993)).

Mississippi law clearly allowed Rehab Solutions to terminate Mignon Willis' employment. However, no Mississippi law allowed Rehab Solutions to recover wages it had paid Mignon throughout her five (5) year employment.

[3] Moreover, as discussed below, the statute of limitations would not protect employees for any period of time based on the application of the discovery rule as applied in this case. Since an employer would not "discover" the conduct until the employer had actual knowledge of the employee's failure to perform job duties, the unjust enrichment claims would extend back indefinitely. This scenario, which may seem far-fetched at first blush, is exactly what happened in this case.

Even if Mignon Willis could be held liable for her negligence in performing her duties, there is no legal basis for her to be liable to repay the wages she was paid by her employer. The Court should hold that employees are not liable to return compensation paid to them under any theory simply because they failed to perform job duties or performed job duties negligently. A return of the employee's wages compensates the employer in excess of actual damages and is a windfall to the employer.

The Trial Court erred in allowing Rehab Solutions to present evidence and argument relating to the unjust enrichment theory and in giving instruction C-12. The Court's decision should be reversed in this regard.

ARGUMENT II.

EVEN IF AN EMPLOYEE'S WAGES WERE RECOVERABLE AS DAMAGES UNDER MISSISSIPPI LAW, THE RECORD DOES NOT SUPPORT SUCH RECOVERY IN THIS CASE.

As previously noted, the doctrine of unjust enrichment "applies to situations where there is no legal contract but where the person sought to be charged is in possession of . . . property which in good conscience and justice he should not retain but should deliver to another." *Joel,* 43 So. 3d at 432. In order to recover based under the doctrine the plaintiff must show that the defendant retained money which should rightfully be the defendant's. *Powell v. Campbell*, 912 So. 2d 978, 982 (Miss. 2005). *Powell* explained that the doctrine "only applies to situations where there is no legal contract." *Powell*, 912 So. 2d at 982. The Supreme Court has further explained as follows regarding unjust enrichment.

Unjust enrichment is an equitable claim:

> Money paid to another by mistake of fact, although such mistake may have been caused by payor's negligence, may be recovered from the person to whom it was paid, in an action for money had and received. The ground on which recovery is allowed is that one receiving money paid to him by mistake should not be allowed

> to enrich himself at the expense of the party who paid the money to him by retaining it, but in equity and good conscience should refund it. In order that this rule may apply, the party to whom the payment mistake was made must be left in the same situation after he refunds it as he would have been left had the payment to him not been made.

Union Nat'l Life Ins. Co. v. Crosby, 870 So. 2d 1175, 1180 (Miss. 2004).

Of course, in order to recover under the doctrine the defendant's enrichment must not have been legitimate but must have been "objectively seen as unjust." *Omnibank of Mantee v. United Southern Bank*, 607 So. 2d 76, 91 (Miss. 1992) (discussing "the difference between mere enrichments and unjust enrichments"). Notably, the Court in *Omnibank* treated the issue of whether an enrichment is "unjust" as an issue of law subject to plenary review. *See Omnibank*, 607 So. 2d at 91-92. The Court in *Omnibank* reversed and rendered the Trial Court's award based on unjust enrichment, finding that the enrichment was not, as a matter of law, unjust. *Id.*

There are multiple reasons why the doctrine of unjust enrichment is inapplicable to this case, even if the doctrine could be used to recover wages paid to an employee for the employee's failure to perform required job duties.

First of all, there is no evidence in the Record that the compensation paid to Mignon Willis was an "unjust" enrichment. Nothing in the Record establishes that Mignon ever received compensation for any hour in which she had not actually done work for Rehab Solutions. In fact, it was effectively conceded that Mignon had been paid only for hours she actually worked. Although Mignon was paid for hours she worked, she simply did not do some of the things that Rehab Solutions had instructed her to do. This does not mean that she did not earn the compensation for the hours for which she was paid.

Rehab Solutions did not, because it could not, introduce any evidence that Mignon had been paid for any hours that she had not actually worked. There is no evidence that Mignon was

paid for hours she was not physically present in the Rehab Solutions office. Mignon was paid $30 per hour for each hour she was employed by Rehab Solutions. Mignon's enrichment could not be "unjust" merely because she did not accomplish as many tasks in her hours as Rehab Solutions believed she should have. On this basis alone, the doctrine of unjust enrichment was manifestly inapplicable.

Additionally, as noted by *Powell*, the doctrine of unjust enrichment can apply only when there is no contract between the parties. Of course, there *was* a contract between the Parties in this case. It is firmly established that an employment at-will relationship is simply a contract between the employee and the employer. *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25, 26 (Miss. 2003) (employment at-will is a contract of employment for an indefinite duration). *Harris v. Tom Griffith Water Well & Conductor Serv.*, 26 So. 3d 338, 342 (Miss. 2010) (treating employment at-will as a contract); *Dubard v. Biloxi H.M.A., Inc.*, 778 So. 2d 113, 114 (Miss. 2000) (employment at-will is a contract). Because there was a contract between Mignon and Rehab Solutions any action sounds in breach of contract, not unjust enrichment. For this fundamental reason, Rehab Solutions' action against Mignon would have to be based on breach of contract and it could not recover under a theory of unjust enrichment for wages she was paid.

Finally, the proof as to the alleged extent of the unjust enrichment was woefully inadequate at trial. The record contains no evidence whatsoever as to the alleged amount of time Mignon spent doing her job duties or anything else while she was paid $30 per hour. Rehab Solution's demand for the return of "about half" of Mignon's pay is arbitrary. A plaintiff must "provide substantial proof of damages in order for a jury to have a foundation to assess any loss." *Investor Res. Servs. v. Cato*, 15 So. 3d 412, 423 (Miss. 2009). Rehab Solutions did not provide

any proof as to the extent which Mignon was unjustly enriched. The jury could not possibly have calculated the number of hours in which she failed to perform job duties. Thus, the evidence is insufficient to support the jury's award of damages.

Accordingly, even if the doctrine of unjust enrichment could extend so far as to allow recovery of wages paid to employees, the doctrine would nevertheless be inapplicable in this case and the Trial Court's judgment should be reversed.

ARGUMENT III.

ALTERNATIVELY, THE JURY'S VERDICT SHOULD BE REVERSED SINCE THE ONLY PROVEN DAMAGES IN THIS CASE TOTALLED $24,803.77.

Even if Rehab Solutions could recover damages in this case under any of the theories at trial, the maximum damages actually proven at trial totaled $24,803.77. This is the total amount of the penalties, interest, increased unemployment taxes and accounting fees Rehab Solutions claims was caused by Mignon's conduct. No other damages were established with sufficient proof to allow any greater jury verdict to stand.

Damages must be shown with reasonable certainty and may not be left open to speculation and conjecture. *Kennedy v. Ill. Cent. R.R. Co.*, 30 So. 3d 333, 337 (Miss. 2010). While damages need not be proven with mathematical certainty, there must be sufficient evidence from which the jury could determine the amount of damages. *Kennedy*, 30 So. 3d at 337. As noted above, the Supreme Court has held that a plaintiff must "provide substantial proof of damages in order for a jury to have a foundation to assess any loss." *Investor Res. Servs. v. Cato*, 15 So. 3d 412, 423 (Miss. 2009). A plaintiff cannot recover actual damages where the evidence is "so speculative that no reasonable juror could find more than nominal damages." *Id.* There must be at least "a foundation which will enable the trier of fact to make a fair and

reasonable estimate of the amount of damage." *Warren v. Derivaux*, 996 So. 2d 729, 737 (Miss. 2008).

There was no evidence at trial that Rehab Solutions sustained any damages other than $24,803.77. There was no evidence from which a jury could even estimate damages in excess of this amount. Nevertheless, the jury returned a verdict for compensatory damages of $133,543.17. There was no evidence in the Record which could justify this difference – amounting to $108,739.40. Any other "losses" sustained by Rehab Solutions were entirely speculative and could be assessed only based on conjecture. At best, Rehab Solutions complained that Mignon failing to pay some vendor bills hurt its "reputation." However, there was no proof whatsoever that Rehab Solutions actually sustained compensable damages or any pecuniary loss other than the $24,803.77.

Throughout the trial and in arguments to the jury Rehab Solutions asked for an award of representing about half of the hourly compensation it had paid to Mignon over her five (5) year employment. This argument and the Court's erroneous instruction obviously accounts for the jury verdict that is otherwise disproportionate to the evidence at trial. Either the jury's verdict was based on the faulty unjust enrichment theory or it was based on nothing more than speculation. The jury's verdict of $133,543.17 was the product of bias, prejudice and is against the great weight of the evidence in that no evidence supports the award. There simply is no evidence in the record which could support this jury verdict.

The most recoverable damages proven at trial were in the amount of $24,803.77. Even if the Court rejects Mignon's other arguments, there were no recoverable damages in excess of this amount proven at trial.

ARGUMENT IV.

THE TRIAL COURT ERRED IN FINDING THAT NONE OF REHAB SOLUTION'S CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS.

This Court reviews Mignon's statute of limitations defense *de novo*. *Fletcher v. Lyles*, 999 So. 2d 1271, 1276 (Miss. 2009).

The three (3) year residual statute of limitations set forth in Mississippi Code section 15-1-49 applies to the claims against Mignon. MISS. CODE ANN. § 15-1-49. Section 15-1-49 provides as follows:

> (1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.
>
> (2) In actions for which no other period of limitation is prescribed ***and which involve latent injury or disease***, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

Id. (emphasis added). The Supreme Court has explained that the discovery rule codified in section 15-1-49 should "only be applied in limited circumstances in negligence and products liability cases involving latent injury." *PPG Architectural Finishes, Inc. v. Lowery*, 909 So. 2d 47, 50 (Miss. 2005). When an injury is not "latent" the discovery rule can not be applied. *PPG*, 909 So. 2d at 50. The Court explained when an injury may be characterized as "latent" as follows:

> A latent injury is defined as one where the "plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question...[or] when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act."

Id.

The Trial Court ruled that the discovery rule applied in this case and tolled the limitations period until Rehab Solutions learned of Mignon's negligence in 2007. The Court explained its ruling:

> Mr. Griffie, you have certainly protected the record, and I must admit on a couple of these issues, it's very tempting. However, on the statute of limitation issue, I think clearly whether they should or shouldn't have, I understand that argument, but the facts show pretty clearly that the owners of Rehab Solutions, Inc., did not discover this action until late in '07, early in '08. I'm going to and do overrule and deny the motion for directed verdict with regard to the statute of limitations issue.

However, this case does not involve a latent injury as defined by the Supreme Court in *PPG*. This case involves an employee who did not pay bills owed to vendors, did not open all of her employer's mail and failed to reconcile bank statements or prepare tax returns. These are not injuries which are "inherently undiscoverable" by laypeople. Rather, these are injuries which any level of care would promptly detect. It is a far cry from "unrealistic" to expect a business owner to glance at a bank statement once over a five year period, and to have at least some general idea as to the business's finances. Accordingly, the damages allegedly caused by Mignon's actions are not "latent." The discovery rule is thus inapplicable.

Similarly, in the exercise of any reasonable diligence an employer could readily ascertain whether an employee had failed to perform these job duties. Since the employer could have, in exercising reasonable diligence, discovered the conduct, the discovery rule is inapplicable.

The Court of Appeals recently addressed precisely this issue in *Fulkerson v. Odom*, No. 2009-CA-01848-COA, 2011 Miss. App. LEXIS 69 (Miss. Ct. App. Feb. 8, 2011) (mandate issued March 1, 2011). The *Fulkerson* case involved a claim of alienation of affection where plaintiff alleged that defendant had an affair with plaintiff's wife. *Fulkerson*, 2011 Miss. App. LEXIS 69 at * 1-2. The subject affair had ended in June 2003 but the plaintiff did not learn of the affair until November 2006. *Id.* The Court of Appeals held that the discovery rule of 15-1-

49 was inapplicable because the alienation of affection had not been a "latent injury." *Id.* at 8. Although the plaintiff claimed he did not notice a loss of affections until he learned of the affair in 2006, the Court held, as a matter of law, that in the exercise of reasonable diligence he should have known of the his actionable injury no later than 2003. *Id.* Thus, the Court ruled that the discovery rule could not apply to non-latent injuries and the statute of limitations began to run upon the commission of the actionable conduct. *Id.*

This case is analogous to *Fulkerson.* Here, Rehab Solutions claims that Mignon failed to perform her job duties from January 2003 until January 2008. An employee failing to perform their job duties cannot be said to be a "latent injury." If an alienation of affection caused by a clandestine affair, as in *Fulkerson*, does not constitute a latent injury, clearly an employee's failure to pay the employer's vendors or reconcile the employer's bank statements is not latent. Far more so than a spouse, an employer is expected to supervise its employees.

Both owners of Rehab Solutions had access to Mignon's office and their own financial records, but both chose not to avail themselves of any opportunity to supervise their employee. Both of the owners had access to collect the mail from the post office and to review vendor statements, but neither chose to exercise any supervision or monitoring over their employee. Any reasonable level of supervision would have revealed the injuries which Rehab Solutions complained about in this case. The law does not allow a plaintiff to turn a blind eye toward potential harm and then ignore the statute of limitations under the guise of a "latent injury" when none exists. Based on the plain language of section 15-1-49 and consistent with *PPG* and *Fulkerson*, this case did not present a latent injury which would allow the application of the discovery rule.

The Complaint in this case was not filed until April 8, 2008. Since there was no latent injury, and any injury could have been discovered with reasonable diligence, the discovery rule does not apply to toll the limitations period. Thus, the Trial Court should have confined the jury's consideration to conduct on or after April 8, 2005, and should have dismissed any claims involving conduct prior to April 8, 2005.

The Court should reverse and remand for a new trial as to any actionable conduct or damages that was not barred by the statute of limitations.

ARGUMENT V.

THE TRIAL COURT ERRED IN GIVING INSTRUCTION C-14 STATING THE AT-WILL EMPLOYMENT RELATIONSHIP INCLUDED A COVENANT OF GOOD FAITH AND FAIR DEALING.

Instruction C-14, given by the Court, was as follows:

> A duty of good faith and fair dealing is implied in the performance and enforcement of all contracts. This duty mandates that parties to a contract must abstain from conduct which injures the right of another to receive the "benefits of the agreement."
>
> This duty is based on fundamental notions of fairness, and its scope necessarily varies according to the nature of the agreement. Some conduct, such as subterfuge and evasion, clearly violates the duty. However, the duty may not only proscribe undesirable conduct, but may require affirmative action as well. A party may thus be under a duty not only to refrain from hindering or preventing the occurrence or conditions of his own duty or the performance of the other party's duty, but also to take some affirmative steps to cooperate in achieving these goals. In this case, if you find that defendant, Mignon Willis, owed a duty of good faith and fair dealing to the plaintiff which she breached, and that this breach caused damage to the plaintiff, Rehab Solutions, PLLC, then you shall find for the plaintiff on this claim.

(C.P. p. 184).

There are several cases which state, generally, that every contract includes an implied covenant of good faith and fair dealing. *See, e.g., University of Southern Mississippi v. Williams*, 891 So.2d 160, 170-71 (Miss. 2004). However, the Courts have specifically exempted at-will

employment contracts from these pronouncements and held that there is no covenant of good faith and fair dealing in an employment at-will relationship. The Court of Appeals explained as follows:

> However, the Supreme Court has corrected its sometimes overly-broad statements that all contracts have implied covenants of good faith and fair dealing. While "[t]here are numerous Mississippi contract cases that state that all contracts contain an implied duty of good faith and fair dealing, [the Supreme Court] has never recognized a cause of action based on such a duty arising from an employment at-will relationship." *Young v. North Miss. Med. Ctr.*, 783 So.2d 661, 663-64 (Miss. 2001) (emphasis removed). "[A]t-will employment relationships are not governed by a covenant of good faith and fair dealing which gives rise to a cause of action for wrongful termination."

Miranda v. Wesley Health Sys., LLC, 949 So. 2d 63, 68 (Miss. Ct. App. 2006). Indeed, the Supreme Court has specifically held that "there is no implied duty of good faith and fair dealing in employment contracts." *Cothern v. Vickers, Inc.*, 759 So. 2d 1241, 1248 (Miss. 2000).

Instruction C-14 flies in the face of *Cothern* and *Miranda*. Either there is a covenant of good faith and fair dealing in at-will employment contracts, or there is not. The Supreme Court and Court of Appeals have both held that there is no covenant of good faith and fair dealing in these contractual relationships.

Accordingly, instruction C-14 was manifestly erroneous and the Trial Court's decision should be reversed for this reason as well.

ARGUMENT VI.

THE FACTS PROVEN AT TRIAL DO NOT SUPPORT AN AWARD OF PUNITIVE DAMAGES.

The jury awarded $50,000 in punitive damages. The evidence in the Record is insufficient for an award of punitive damages as a matter of law.

"Mississippi law does not favor punitive damages; they are considered an extraordinary remedy and are allowed 'with caution and within narrow limits.'" *Warren v. Derivaux*, 996 So.

2d 729, 738 (Miss. 2008). In order for an award of punitive damages to stand there must be clear and convincing evidence that the defendant acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud. MISS. CODE ANN. § 11-1-65.

Punitive damages should be awarded only where "the violation of a right or the actual damages sustained, import insult, fraud, or oppression and not merely injuries, but injuries inflicted in the spirit of wanton disregard for the rights of others . . . . [In other words, there must be] some element of aggression or some coloring of insult, malice or gross negligence, evincing ruthless disregard for the rights of others, so as to take the case out of the ordinary rule." *Bradfield v. Schwartz*, 936 So. 2d 931, 936 (Miss. 2006). "Punitive damages are only appropriate in the most egregious cases so as to discourage similar conduct and should only be awarded in cases where the actions are extreme." *Paracelsus Healthcare Corp. v. Willard,* 754 So. 2d 437, 442 (Miss. 1999) (citing *Wirtz v. Switzer*, 586 So. 2d 775, 783 (Miss. 1991)).

After the jury returned a verdict in favor of Rehab Solutions awarding compensatory damages, the Court instructed the jury as to punitive damages. (T. p. 669-70). Rehab Solutions did not introduce any new evidence for the punitive damages phase. (T. p. 662). The issue of punitive damages was submitted upon the same proof that had already been introduced. (*Id.*).

The proof at trial does not, as a matter of law, rise to the level of egregious conduct required for the imposition of punitive damages. Even taken in the light most favorable to Rehab Solutions, the evidence simply showed that Mignon Willis shirked her duties and failed to perform several tasks for her employer. Rehab Solutions conceded that Mignon had not stolen any money.

There was no evidence that Mignon's actions were malicious or calculated to cause harm. Notably, the claims against Mignon did not involve any affirmative act which caused damage to Rehab Solutions but merely involved omissions on the part Mignon in performing her job duties.

This case cannot be said to constitute one of "the most egregious cases" cases where the misconduct was "extreme" as contemplated by *Paracelsus.* Mignon's conduct in this case does not, as a matter of law, rise to the level justifying an award of punitive damages. The Circuit Court erred in sending the issue of punitive damages to the jury. The award of punitive damages should be reversed and rendered.

CONCLUSION

Mississippi law does not, and should not, allow an employee's past wages to be a measure of the employer's damages in a claim for the employee's failure to perform job duties. The Court should clearly announce this principal and should reverse the judgment against Mignon Willis on this basis.

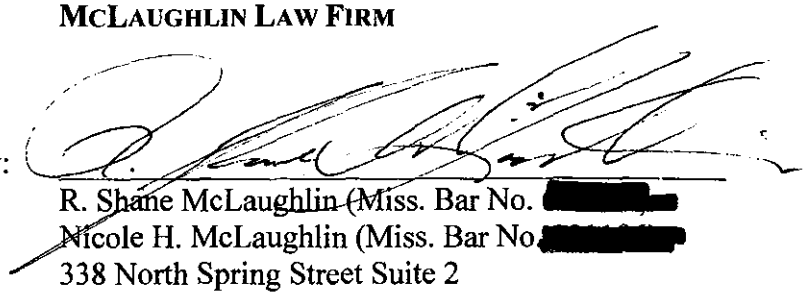
Even if an unjust enrichment measure of damages were otherwise appropriate, the Record cannot support the unjust enrichment instruction in this case since there was a contract between Mignon and Rehab Solutions and since no evidence established that Mignon's hourly compensation was "unjust."

The Circuit Court also erred in failing to dismiss some of Rehab Solution's claims as barred by the statute of limitations, in instructing the jury that the employment at-will contract contained in implied covenant of good-faith and fair dealing and in submitting the issue of punitive damages to the jury.

Accordingly, for all of the above and foregoing reasons, the judgment by the Circuit Court should be reversed.

RESPECTFULLY SUBMITTED, this the 7th day of March, 2011.

MCLAUGHLIN LAW FIRM

By: 

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CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

L. Bradley Dillard
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P.O. Box 7120
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Hon. James L. Roberts, Jr.
Circuit Court Judge
Post Office Box 1100
Tupelo, Mississippi 38802

This the 7th day of March, 2011.

R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

This, the 7th day of March, 2011.

R. Shane McLaughlin