IN THE SUPREME COURT OF MISSISSIPPI
NO. 2011-CA-00304

GULFPORT SHOPPING CENTER, INC., ET AL
APPELLANTS

v.

WILLIAM H. DURHAM
APPELLEE

ON APPEAL FROM THE CHANCERY COURT OF
THE FIRST JUDICIAL DISTRICT OF HARRISON COUNTY,
MISSISSIPPI

BRIEF OF APPELLEE, WILLIAM H. DURHAM

ORAL ARGUMENT NOT REQUESTED

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v.

WILLIAM H. DURHAM **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

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Michael V. Shannon – Appellant;

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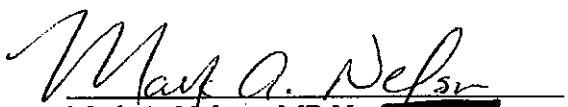

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STATEMENT OF THE ISSUES

The appellee, being dissatisfied with the statement of the appellants, makes the following statement of the issues, pursuant to Miss.R.App.P. 28(b):

A. Whether The Chancellor Was Manifestly Wrong Or Clearly Erroneous

B. Whether The Individual Defendants Are Liable

STATEMENT OF THE CASE

A. Statement of the Facts

Dr. William Durham, a physician, was recruited in March, 1994 by the individual defendants to invest in a closely held one asset corporation, Gulfport Shopping Center, Inc. R.163. Dr. Durham paid $500,000 to the defendant Williams for stock. The corporation did not use the money in furtherance of the business of the corporation. Ex.P-31; R.164. At the time Dr. Durham purchased his stock, the corporation owned improved real estate in Gulfport, and had as its tenant, Bruno's food store, operating as Food World Grocery Store. Bruno's filed for bankruptcy in March 1998 and ceased paying rent. The shareholder defendants agreed to stop making the mortgage payments and let the property go into foreclosure. R.164, 610.

But, Dr. Durham agreed to take over the project provided the individual shareholder defendants delivered their stock ownership to him. An option for the stock dated May 5, 1998 was executed by the corporation and for the individual shareholders. Ex.D-4, Appellee's Record Excerpts. The individual defendants executed stock powers of attorney in May, 1998 and delivered their stock certificates to an escrow agent. R.165, Ex.D-4.

The brief of Appellants is based upon an incomplete record excerpt. Appellants' Record Excerpts at Tab 6 is not an accurate depiction of the May 5, 1998 option since it failed to include page 2 of the trial exhibit, which is critical to a complete understanding of the material facts at issue.[1] Tab 1 of Appellee's Record Excerpts includes page 2 of the option that expressly authorized a single shareholder to execute the agreement "in behalf of . . . all stockholders,"

[1] The purpose of the record is to "convey a fair, accurate, and complete account of what transpired in the trial court," and extracts are intended to depict matters "essential to an understanding of the issues raised." Miss.R.App.P. 10(f) and 30(b).

binding the individual defendants to performance. Appellee's Record Excerpts Tab 1 is an accurate depiction of the exhibit actually introduced at trial contained in D-4.

Pursuant to the agreement, Dr. Durham paid the first mortgage current, paid the second mortgage current, funded the escrow accounts, and paid taxes, insurance and maintenance on the building. R.164. During the next two (2) years[2], Dr. Durham paid $912,239.96 under his option agreement. R.612, Ex.P-31.

Approximately two (2) years after the option agreement was entered into, the individual defendants received a $263,000 payment from Bruno's bankruptcy estate, but did not inform Dr. Durham. R.164, 613. The defendants received and used the Bruno bankruptcy funds held in escrow until the property was foreclosed upon. Some of the money was used for, among other things, payment of the defendants' legal fees in this lawsuit. *See* Ex. D-9. Today there remains over $20,000.00 held in escrow from the original Bruno payment. *Id.*

In May, 2000, the defendant shareholders and corporation terminated the option to convey the stock to Dr. Durham. Dr. Durham stopped making the $25,000 per month payment only after he received notice that the option would be terminated. Ex.P-31. In September, 2000, the individual defendant shareholders approved a sale of the property to the defendant Williams. R.167, 612, Ex.46. In summary, Dr. Durham paid over $1,038,251 in cash and lost the $263,000 surreptitiously retained by the defendants. R.171, 612; Ex.P-31. None of the individual defendants, who are real estate developers, lost any money in the transaction, since the acquisition and improvement of the property was on 100% financing. Dr. Durham was victimized by the defendants' misappropriation of his funds for which he filed this suit for an accounting and return of all of his money paid and lost. R.171.

[2] Exhibit P-31 is the accountant's calculation of "basis" performed by a certified public accountant called by Dr. Durham as an expert. The sum of $912,239.96 includes the $263,988.89 paid by Bruno's and is denominated as "due to Durham" by the C.P.A. (Attached in Appellee's Record Excerpts)

B. Course of the Proceedings

As a result of the shenanigans involving the corporation, the shareholders and the property, Dr. Durham filed a complaint in 2001 in the Chancery Court of Forrest County, seeking an accounting and shareholder proceedings. R.1-13. The defendants answered and filed a motion to transfer venue (R.33), which was granted. R.42. The action was transferred to the Chancery Court of Harrison County in 2002, and the case proceeded in that Court. R.44.

All of the Chancellors of Harrison County recused themselves and requested appointment of a Special Chancellor. R.64. On May 20, 2005 the Supreme Court appointed the Honorable H.C. Thomas, Jr. as Special Judge to preside in the matter. R.65.

The defendants filed two (2) Motions for Summary Judgment on January 3, 2007, (R.100) and September 9, 2007. R.485. The Court held a hearing on the motions and on December 11, 2007 entered Partial Summary Judgment. R.508. As Chancellor Thomas observed, the complaint "basically seeks... an accounting of the corporation's activities" during the time that plaintiff held an option to purchase the stock of the corporation. R.508. The undisputed facts revealed that plaintiff "entered into a 60 day option . . . to buy all of the capital stock of the corporation with provisions that he pay or restructure the corporate financing to avoid default and give letters of credit to shareholders following the loss of its major tenant, and a claim that plaintiff paid in excess of $680,000.00 to maintain the existing financing." *Id.*

Chancellor Thomas granted partial summary judgment, ruling that most of the claims were derivative actions, and plaintiff had "no legal standing as a shareholder to file his claims sub judice which must be brought as a derivative action; . . . ." R.509. However, the Chancellor allowed the claim for an accounting to proceed, and held:

> The option created a separate obligation between Plaintiff and the Defendants as a corporation and fellow share holders. The real issue. .. . (is) . . . what liability the Plaintiff, under his option, had taken for corporate obligations, as he expended funds

> towards the ultimate ownership of corporate property as intended by the option. That he continued beyond the stated 60 day period was an extension of the option by the actions of the parties. He should, however, have had the benefit, whatever it may be, of any funds which came into the corporate hands during the time he had assumed the liabilities of the corporation under the option.

R.509-10.

Importantly, Chancellor Thomas continued: "Here he entered into a contract with the corporation, i.e. the option, which puts the Plaintiff on a different legal basis with the corporation other than as a shareholder, and which must be viewed on its own merits as a contractual obligation." *Id.* The issue remaining for trial was succinctly put by the Chancellor:

> Plaintiff is entitled to a hearing on issues of an accounting of corporate funds from the time in 1998 when he acted under his option until the corporation ceased activity, whether the corporation's use of funds during Plaintiff's option period had an effect on the performance of the option, and what legal effect, if any, the option had to require the corporation or other shareholders to give a return on the payment of corporate obligations he made during the term of the option.

R.510. At the center of the dispute was the fact that the tenant for the property had filed for bankruptcy, and during the time at issue, the corporation received $263,000.00 from the bankruptcy. It was clear that plaintiff had no knowledge about the receipt of the bankruptcy payment, and that the other shareholders seized and used the funds in degradation of Dr. Durham's rights under his option agreement. See e.g. R.509, 612.

C. The Chancellor's Judgment

The case was tried on November 12 and 13, 2009. Tr.90. After taking extensive factual and expert accounting testimony, the Chancellor entered Judgment on April 8, 2010. R.609. Unfortunately, Chancellor Thomas died, and this Court appointed Chancellor William J. Lutz to preside over the case on August 31, 2010. R.682. After denial of the defendants' post trial motions, (R.686), the notice of appeal was timely filed. R.705.

Chancellor Thomas entered a detailed eight (8) page opinion making his findings based upon "clear and convincing evidence." R.610. In 1994 Dr. Durham purchased stock in the corporation, Gulfport Shopping Center, Inc. He paid Dwayne Williams $500,000.00 for a portion of Mr. Williams' stock in Gulfport Shopping Center, Inc. *See* Ex.P-31.

The corporation was a single asset corporation and had as its anchor tenant Food World Grocery Store, owned by Bruno's. In 1998 Bruno's filed bankruptcy and ceased its operation, ending its lease. The continuing operations of the corporation at that time included a first mortgage to Guardian Life and a second UDAG mortgage to the City of Gulfport, Mississippi. R.610. The property was acquired and improved with 100% financing.

After the Bruno's bankruptcy, the corporation and its shareholders on May 5, 1998, adopted an option agreement with a stated term of 60 days for Dr. Durham to acquire the corporate stock. In that pursuit, the plaintiff accepted the option terms, brought the Guardian mortgage current and paid an outstanding $25,000 note to Hancock Bank that had been used to pay taxes. R.611. Dr. Durham began making the regular $25,000 per month Guardian payments which he did for two years. He acquired another tenant, State Farm Insurance, which temporarily occupied the premises, for which Dr. Durham received rental income of $110,000.00. Subsequently, he entered into a lease agreement with the University of Mississippi, which was ultimately set aside following a lawsuit[3] in which Dr. Durham was determined to have a lack of standing to enforce. R.611.

[3] The previous litigation involving this property and the plaintiff cited by the defendants is supportive of affirmance in this appeal. In *Durham v. University of Mississippi*, 966 So.2d 832 (Miss.Ct.App.2007), the plaintiff unsuccessfully attempted to enforce a lease concerning the property. That claim was dismissed since Dr. Durham did not have standing. Judge Thomas in this case ruled similarly, dismissing all claims that were derivative on the basis of standing when the court granted partial summary judgment. R. 509. The only claims that proceeded to judgment were the issues of an accounting of corporate funds. In the *University of Mississippi* case, the claims were against a stranger to the corporation, not between the members of the closely held entity that owed fiduciary duties to each other. R.510.

On May 19, 2000, after Dr. Durham had made the March, 2000 payment to the mortgage holder, the corporate shareholders informed Dr. Durham that his latest offer was rejected. Another offer to purchase the corporation resulted in a 15 day extension of the option, because of Dr. Durham's ongoing negotiations with a prospective buyer. R. 612.

The Chancellor specifically found, "over the intervening time following the 60 day option given on May 5, 1998, until the option was terminated in 2000, plaintiff had expended $912,239.96 on Guardian payments, escrow payments, taxes and insurance in his efforts under the 1998 option to utilize or market the property and acquire the corporate stock." R.612.

On August 17, 2000, the corporation ended its option and gave to shareholder Dwayne Williams the same option, with some variations, that was previously given to Dr. Durham. But, the project had been significantly improved financially by Dr. Durham. Thereafter, the corporate property was ultimately foreclosed on following the expiration of Williams' option. R.612. The foreclosure resulted in the transfer of the property to an unrelated third party.

The trial Court found: "As a consequence of the Bruno's bankruptcy the corporation received a check in the amount of $263,988.89 on May 25, 2000 payable to Gulfport Shopping Center, Inc. and defendants Strobel and Weaver . . . . A compromise and release of its claim through the United States Bankruptcy Court, dated May 12, 2000 . . . was executed for the corporation by defendant Hill . . . . The steps taken which culminated in the receipt of the check were orchestrated by representatives of the corporation without the prior knowledge, or involvement of the plaintiff in the bankruptcy claim . . . . The plaintiff testified he was unaware of the receipt of the Bruno's bankruptcy funds at the meeting of June 8, 2000 . . . ." R.613.

The trial Court held the option agreement valid between the parties under ordinary contractual principles. R.613. In the words of the trial Court, "although he was a shareholder, plaintiff placed himself contractually on a different legal footing with the other shareholders in

entering into the option in 1998. While the option was for a stated period of only 60 days, the conduct of the parties extended the option for two years by allowing plaintiff to continue to perform, which their attorney described as acquiescence. The option was then expressly extended for another 15 days at the June 8, 2000 meeting." R.614.

The Chancellor found that Dr. Durham acted in good faith to complete his arrangements to obtain the stock but in the end was unable to do so and found that he "cannot now complain that his bargain to pay corporate expenses was not what he intended to do in the process." R.614. The 60 day option period was "extended by operation of law evidenced by the conduct of the parties." R.614. "Plaintiff had agreed to assume the liabilities of the corporation during that period and cannot now recover the amounts from the defendants he paid during his extension of the option." R.614.

The Chancellor concluded that "the plaintiff was not made aware" of the Bruno's bankruptcy payment at the time of the termination of his option on May 19, 2000. R.615. The Bruno money was received, however, on May 25, 2000 by the defendants. R.613. The Court further stated that: "The shareholders knew the funds had been received and none the less couched the June 8, 2000 minutes with language that presupposed the funds were not on hand or may not even materialize. The Court finds those funds were realized by the corporation during the period of time when plaintiff, under the option and its acquiescence period, was responsible for the corporate expenses and should have had the benefit of those funds for existing corporate liabilities." R.615. The money was deposited into an account controlled by defendants on June 13, 2000. Ex.D-9. While the Court did not find those funds would have effectively changed the outcome of the plaintiff's attempt to acquire the corporate stock by successful completion of the option, the Chancellor found that "good faith and fair dealing as is implied in every contract should have given plaintiff the knowledge of the benefit and use of those funds in his efforts

during the time when he had assumed the corporate obligations. Plaintiff is therefore awarded a judgment in the amount of those funds against the defendants in the sum of $263,988.89." R.615. The trial court did not award prejudgment interest. R.616.

SUMMARY OF THE ARGUMENT

Plaintiff, a physician, was recruited by the defendants to invest in a real estate venture in Gulfport. Dr. Durham paid one of the individual defendants for shares in the corporation, a single asset, closely held entity. When the corporation's tenant went into bankruptcy and stopped paying rent, Dr. Durham agreed to take the project over.

The corporation and the individual shareholders agreed to an option for Dr. Durham to acquire the corporate stock and entered into an option executed by the corporation and for the individual shareholders. Dr. Durham performed his end of the bargain and funded the operations, significantly reducing the debt during that time. Meanwhile, the individual defendants learned about money that was to be paid by the tenant's trustee in bankruptcy, but did not inform the plaintiff Durham. The individual and corporate defendants terminated the option to convey the stock to plaintiff Durham, secretly received the trustee's money and spent it on, among other things, their own legal fees in this case. Ultimately the property was sold at foreclosure.

In summary, the plaintiff paid over $1,038.251 in cash for the venture. The bankruptcy trustee's funds in the amount of $263,000.00 were surreptitiously taken by the defendants during the option period and should have been paid to plaintiff. None of the defendants, who are real estate developers, lost any money since the project was funded 100% with borrowed funds. Dr. Durham brought this action to get his money back in excess of $1.4 million and was only awarded $263,000 by the Chancellor after trial on the merits.

After trial on an accounting, the Chancellor entered a detailed judgment making specific findings and conclusions. The trial Court found that defendants breached the option agreement

and failed in their obligations of good faith and fair dealings. The Court accepted the uncontradicted testimony of the expert accountant, and found the individual defendants liable under the option agreement. Appellants' arguments that the individual defendants are not liable because of the corporate veil are without merit. The defendants breached their fiduciary duties as co-shareholders in a closely held corporation and breached a separate option agreement. There is no basis to disturb the Chancellor's judgment.

ARGUMENT

A.

Whether The Chancellor Was Manifestly Wrong Or Clearly Erroneous

Chancellor Thomas made specific and detailed findings of fact based on "clear and convincing evidence" and based his conclusions of law on those facts. R.610. The appellate Court has a limited scope of review of the Chancellor's findings of fact. The Chancellor sits as a fact-finder and his conclusions are entitled to "substantial deference." Only if the appellate Court is convinced that the Chancellor was "manifestly wrong or clearly erroneous in his findings" may the appellate Court intervene. *R.B.S. v. T.M.S.*, 765 So.2d 616 (Miss.App.2000). Upon review of the record, the appellate Court accepts all findings of fact and reasonable inferences therefrom which support the Chancellor's findings. *In re Estate of Byrd*, 749 So.2d 1214 (Miss.App.1999).

Chancellor Thomas found that the defendants breached the option agreement and failed in their obligations of "good faith and fair dealings." R.610. The Chancellor had the authority to award a judgment in a monetary amount against the individual defendants finding them personally liable for acts of intentional wrongdoing, here in failing to disclose the receipt of the Bruno's funds notwithstanding the corporate veil. See *Bluewater Logistics, LLC v. Williford*, 55 So.3d 148, 160 (Miss.2001). Under these circumstances, the appellate Court ordinarily accepts a

Chancellor's factual findings unless "the Chancellor abused his or her discretion, and no reasonable Chancellor could have come to the same conclusion." *Id.* at 155. This Court should not impose its "own view of the facts." *Id.* at 156. The evidence outlined elsewhere, especially the fact and the expert accounting testimony, shows that the judgment was "supported by substantial evidence." *Id.* at 157.

"An accounting is by definition a detailed statement of the debits and credits between parties arising out of a contract or a fiduciary relation. It is a statement in writing of debts and credits or of receipts and payments. Thus an accounting is an act or a system of making up or settling accounts, consisting of a statement of the account with debits and credits arising from the relationship of the parties." *Union Nat'l Life Ins. v. Crosby*, 870 So.2d 1175, ¶3, n.2 (Miss. 2004).

An accounting "implies that one is responsible to another for moneys or other things, either on the score of contract or of some fiduciary relation, of a public or private nature, created by law, or otherwise." *Miller v. Henry*, 103 So.203, 204 (1925); *cited by* 870 So.2d 1175, at n.2. *See also University Nursing Assoc. v. Phillips*, 842 So.2d 1270, ¶8 (Miss.2003).

The Court accepted Ms. Chellie Eavenson, C.P.A. as an expert in accounting. T.93-94. Ms. Eavenson prepared exhibit P-31 which was admitted into evidence as her accounting and a summary of volumous records. T.95. Ms. Eavenson, within a reasonable degree of accounting certainty, calculated Dr. Durham's "basis" in the venture. She confirmed that Dr. Durham made the payments and those were properly credited within reasonable certainty. Dr. Durham made the payments for the monthly note, insurance, the stock purchase, taxes, maintenance and

accounted for the income from the tenant,[4] State Farm. T.97-100. She also calculated interest due on the payments. T.101. The Court, however, chose not to award prejudgment interest. R.609-16. She examined numerous checks, voluminous records, and confirmed that the payments were actually made by Dr. Durham during the times indicated. T.114-16.

The contract for the stock was still in effect when the defendants learned about the Bruno payment, and the defendants' taking the money violated the contract as found by the Chancellor. R. 609-12. The defendants argue that since Dr. Durham was no longer paying the corporate expenses at the moment in time when the money was received, then the Bruno payment was not due to be paid to him. Appellant's Brief at 13-17. That argument misses the point, since the defendants owed a fiduciary duty to Dr. Durham to act in good faith to give Dr. Durham the opportunity to credit his corporate expenses made in furtherance of valid contractual rights separate and distinct from the stock ownership. Instead, the defendants secreted the payment from the plaintiff and usurped Dr. Durham's prerogative to receive the Bruno payment. In fact, the defendants knew about the Bruno payment months in advance and failed to even inform Dr. Durham about it, ultimately seizing the money and using it to partially fund this litigation against Dr. Durham. *See* R. 610; D-9.

B.

Whether The Individual Defendants Are Liable

The record is clear that Gulfport Shopping Center, Inc. was a closely held corporation with a single asset in which Dr. Durham was a minority shareholder. As such, the shareholders owed duties to each other as fiduciaries. "We . . . , hold that in a close corporation where a

[4] The Court specifically gave credit to rents received during plaintiff's option term which were paid by State Farm in the amount of $110,000.00. The trial court stated: "These funds were found to have been received by plaintiff during the option period when he had full fiscal responsibility of the corporate activities and were received in consequence of his performance under the option which precludes any claim thereto by the other shareholders. The counterclaim of defendants is dismissed." R.615.

majority stands to benefit as a controlling stockholder, the majority's action must be 'intrinsically fair' to the minority interest. Thus, stockholders in close corporations must bear toward each other the same relationship of trust and confidence which prevails in partnerships, rather than resort to statutory defenses." *Fought v. Morris*, 543 So.2d 167, 171 (Miss.1989), overruling *Ross v. Biggs*, 40 So.2d 293 (Miss.1949). Thus, the defendants here were not entitled to circumvent the corporation's agreements for their own benefit to the detriment of the plaintiff minority shareholder. "[B]lind adherence to corporate statutes may not be used to circumvent the corporation's by-laws, charter or various agreements, such as a stock redemption agreement, because of the 'intrinsically fair' standard we here adopt today." *Fought*, 543 So.2d at 171.

The defendants clearly circumvented the option agreement when the corporation and the individual shareholders "orchestrated" receipt of the Bruno's funds "without the prior knowledge or involvement" of the plaintiff. *See* R.613 (Judgment). The Defendants' conduct is intrinsically unfair and is a breach of trust and confidence by the defendants warranting the relief granted.

Appellants' reliance on *Limbert v. Mississippi University for Women Alumnae Assoc.*, 998 So.2d 993 (Miss.2008) is completely misplaced. *Limbert* supports the plaintiffs' prayer for affirmance. Brief of Appellants, at 13-15. An alumni association filed an action against MUW to prevent the termination of an affiliation agreement with the university. The Court held that the president of MUW could not have acted in bad faith when she exercised the contractual right to terminate the agreement, and that the Chancellor abused its discretion in ordering dissolution of the agreement. 998 So.2d at 998-99. The Court held that the defendants could not have acted in bad faith by merely exercising a clear contractual right, and that the plaintiffs offered no evidence of bad faith, since the case concerned a governmental decision for which the Chancellor could not substitute his interpretation. *Id.* at 998-1002. Although the Court observed that issues of contract construction are questions of law that are reviewed de novo, the Court

took great care to emphasize that the findings of the Chancellor will not be disturbed "when supported by substantial evidence" unless the Chancellor "abused his discretion, applied an erroneous legal standard, was manifestly wrong, or was clearly erroneous." *Id. Limbert* was simply resolved on the basis that the plaintiffs offered no evidence of "bad faith" and set out the general principle that all contracts contained implied covenants of good faith and fair dealings, that were not breached under the facts of the case. Good faith was defined by the Court as "the faithfulness of an agreed purpose . . . consistent with the justified expectations of the other party." *Id.*, citing *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss.1992).

In fact, *Limbert* supports **affirmance** here because the defendants acted outside the scope of the corporation, breaching the option agreement and the parties' course of dealings since those actions were not authorized by the contract. Moreover, the Chancellor did not rewrite the agreements, but enforced them consistent with the reasonable and justified expectations of the parties, including the plaintiff. *See* 998 So.2d at 999.

Likewise, appellants improperly relied on *Nash Plumbing v. Shasco Wholesale Supply*, 875 So.2d 1077 (Miss.2004) for the proposition that the corporate veil cannot be pierced in this case. Brief of Appellants at 21. *Nash Plumbing* is not a case between co-shareholders in a closely held corporation, and cannot be relied on to warrant reversal in this case. Here, plaintiff Dr. Durham was a minority shareholder with the individual defendants of Gulfport Shopping Center, which owed him fiduciary duties to act in good faith and tell him the truth, duties that were breached as a matter of fact, directly causing damages to the plaintiff. Moreover, *Nash Plumbing* turned on the procedural deficiency that there were not "sufficiently particularized allegations" to pierce the corporate veil of a corporation in which the plaintiff was not a shareholder. 875 So.2d at 1082. So, unlike the case of *Nash Plumbing* where the record "holds too many unknowns and too many contradictions," in this action the Chancellor was manifestly

correct in holding the individual defendants liable for their own misdeeds, conduct outside the scope of the corporate veil. *See Id.* at 1082.

Defendants also rely on *Foamex v. Superior Products Sales*, 361 F.Supp.2d 576 (N.D.Miss.2005) for the proposition that the individual defendants cannot be held liable since the corporate veil protects them from judgment. Appellants' Brief at 21. Again, *Foamex* does not shield the defendants since the case is about a stranger to the corporation suing for breach of contract. Distinguishing *Foamex*, the defendants here are co-shareholders who had fiduciary duties owed to plaintiff and parties to a separate contract.

The plaintiff is not a mere third party stranger seeking to enforce a commercial contract as in *Foamex* and *Nash Plumbing*, but sues for an accounting that was granted based on defendants' breach of the covenant of good faith and fair dealings and breach of a separate contract.[5] The option at issue here was executed both by the corporate defendant and "for" the shareholders giving separate and independent rights to the plaintiff against his fellow shareholders. *See* Ex.D-4 (attached therein as "B") and R.613-14 (Judgment) (both contained in Appellee's Record Excerpts).

CONCLUSION

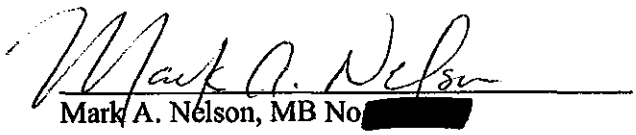
Because the defendants breached their duties to plaintiff, a shareholder, the corporation is liable and the individual defendants are personally liable for breach of contract. The defendants must account for the funds they secretly received, controlled and spent to the detriment of plaintiff's rights under the option agreement. None of the defendants informed plaintiff about the funds until after they terminated the option agreement and used the funds to pay for their own

[5] *See Bluewater Logistics, LLC v. Williford*, 55 So.3d 148, 160-61 (Miss.2011) (individual members of LLC liable to minority member for breach of duty of good faith), citing *Fought v. Morris*, 543 So.2d 167 (Miss. 1989).

lawyers in this case. This Court should, therefore, affirm the Chancellor below since there are no errors warranting reversal.

Respectfully submitted,

WILLIAM H. DURHAM, APPELLEE



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CERTIFICATE OF SERVICE

I, the undersigned attorney of record for the above-named Appellee, William H. Durham, do hereby certify that I have this day served via electronic mail and U.S. Mail, postage prepaid, a true and correct copy of the foregoing pleading to:

Honorable Luther T. Munford
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Honorable B. Lyle Robinson
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This the 30th day of November, 2011.

Mark A. Nelson
Counsel