2011-CA-00610

IN THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

BAILEY BRAKE FARMS, INC., APPELLANT

V.

GEORGE CALVIN TROUT AND RON NASSAR, APPELLEES

On Appeal from the Chancery Court of Lafayette County, Mississippi
(Cause No. 2002-42GA)

Honorable Billy G. Bridges, Special Chancellor
Hon. Robert W. Sneed, Special Master
Hon. Jack F. Dunbar, Arbiter
Hon. Michael T. Lewis, Arbiter

APPELLANT'S REPLY/CROSS-APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

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[1]The following abbreviations are used herein to refer to the record, exhibits and transcripts:

(1) Trial Record—[R];

(2) Trial Exhibits—[TE] (followed by the Trial Exhibit Designation);

(3) Transcript—[TR]; and

(4) Bailey Brake Farms, Inc.'s Record Excerpts—**[BRE]**

TABLE OF AUTHORITIES

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STATEMENT OF THE ISSUES

APPELLANT/CROSS APPELLEE:

I. Did the trial court exceed its authority in violation of the Federal Arbitration Act ("FAA") and the Mississippi Arbitration Act ("MAA") by signing, verbatim, the March 22, 2011 Order prepared by Trout's and Nassar's attorneys reversing the binding decision of the arbiters as to (a) which real property appraisal should be used to value Trout's and Nassar's stock in the closely held corporation, (b) whether to apply a combined minority/marketability discount to said stock, (c) the number of shareholders to be used when valuing said stock, and (d) dues owed by Trout and Nassar?

II. Was the trial court's entry of Plaintiffs-prepared order, contrary to the previously adopted Special Master's reports and recommendations, and contrary to the arbiters' binding decision, without hearing a single word of additional testimony or admitting a single shred of additional evidence, arbitrary and capricious?

III. Are Plaintiffs judicially estopped from seeking any relief beyond that awarded by the arbiters because (a) that is all the relief they sought in their Complaint and (b) their attorney repeatedly represented that was all the relief they were seeking?

APPELLEES/CROSS APPELLANTS:

IV. Whether the trial court erred in denying Plaintiff's motion to amend their complaint?

V. Whether the trial court erred in denying Plaintiff's contractual interest?

CORRECTIONS TO TROUT AND NASSAR'S "STATEMENT OF THE CASE", "STATEMENT OF THE FACTS", "NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW".

M.R.A.P. 28(a)(4) instructs appellate counsel to provide this Court with a Statement of the Case as follows:

> This statement shall first indicate briefly the nature of the case, the course of the proceedings, and its disposition in the court below. There shall follow the statement of facts relevant to the issues presented for review, with appropriate references to the record.

Trout and Nassar's "Statement of the Case", Statement of the Facts" and "Nature of the Case, etc." consists of 13 pages of mostly argumentative "factual" statements and legal conclusions. Although this Court has not addressed the rule, other courts have addressed similar (though more detailed) rules of appellate procedure, and explained their purpose:

> Ideally, a statement of facts should be so objective and fair that a court could use the statement from a brief for the statement of facts in its opinion . . .. Arguments should not appear in the statement of facts but should appear only in the argument portion of the brief . . .. *** Candor, accuracy and fairness are indispensable. It must always be remembered that the facts upon which the case turns on appeal generally are not the facts advanced by counsel or his client before the case is tried but rather those that were determined by the court or jury in their findings and verdict.

Vodicka v. Upjohn Co., 869 S.W.2d 258, 262 (Mo. App. S.D. 1994) (internal citations and quoted secondary authority omitted).

Correction No. 1: Trout and Nassar state that they "joined shareholder George Horton in their 2001 tender". Trout/Nassar Brief at p.1. Per Trout and Nassar's own exhibit, **TE(P-36)**, however, George Horton sought to tender his share by letter dated April 10, 2001, and sold his shares on July 30, 2011.**TE58; BRE66** Nassar, who unlike Trout actually paid the full subscription price for the shares, initially informed Bailey Brake that he wanted to sell his shares on August 21, 1997,**TE(P-8)** for $30,000.00 (his own calculated value on 1/16 of the corporation) on January 5,

1998.[TE(P-12)] Trout, who failed to pay the full subscription price of the shares,[R732-33; BRE13-14] initially expressed interest in selling his "membership" by letter dated November 29, 1999. [TE(P-25)]

Correction No. 2: Trout and Nassar state that the non-profit Hunting & Fishing Association revoked their memberships. The statement is unsupported by any evidence in the record.[2]

Correction No. 3: Trout and Nassar characterize the arbitration they repeatedly demanded (and ultimately received) as a mere valuation proceeding. The Chancery Court referred the matter to arbitration pursuant to Article IV of the Buy-Sell Stock Restriction Agreement.[3] *Id.* at [R719]

Correction No. 4: Trout and Nassar repeatedly state that Bailey Brake "acted in bad faith". There is not a single finding, by the Special Master, by the arbiters, or by the Chancellor that Bailey Brake acted in "bad faith". Trout and Nassar argue that Bailey Brake acted in bad faith by "submitting conflicting documents" and that because of Bailey Brake's conduct, the arbiters could not determine a final, definite value. The only issue the arbiters did not decide was the

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[2]Paragraph 6 of the Order prepared by Trout and Nassar,[R961] adopted *in toto* by the Chancellor without hearing any further evidence, states that Trout and Nassar were denied any use and enjoyment of membership, but there is no evidence in the record that the Hunting and Fishing Association revoked Trout and Nassar's memberships. Bailey Brake did argue that the hunting rights were separately controlled by the non-profit, but the Special Master rejected the argument (although the Special Master did recommend that Bailey Brake be permitted to deduct outstanding dues and assessments that Trout and Nassar had not paid).[R692-97](Special Master's November 2, 2009 Supplemental Report and Recommendation at 11-16).

[3] Article IV(B) of the Buy-Sell and Stock Restriction Agreement states in pertinent part:

If they are unable to come to an agreement within thirty (30) days, **the value of each share of the Corporation shall be determined by arbitration** as follows: the Corporation and the transferring Shareholder or his representative shall each name an arbitrator (the cost of which is to be paid by the appointing party) **and a decision by the arbitrators so named shall be binding on all parties.**

[R12-13; BRE28-30] (Buy-Sell and Stock Restriction Agreement, Article IV(B) (emphasis supplied)).

amount of assessments to be deducted from Trout and Nassar's shares[R733, BRE14] (as a result of Trout and Nassar's failure to pay assessments after May 21, 2001[TR837]). That issue was rendered moot by Bailey Brake's on-the-record waiver of assessments, [TR971, ll. 26-29], to which Trout and Nassar did not raise an objection. *Id.* The Chancery Court, in paragraph 5 of its March 22, 2011 Order (the order prepared by Trout and Nassar's attorneys), specifically permitted Bailey Brake to withdraw the issue of assessments.[R961] Trout and Nassar did not appeal that issue.

Correction No. 5: Trout and Nassar state that "[t]he Defendant Corporation also formed a separate non-profit entity, Bailey Brake Hunting & Fishing Association, to manage duck hunting on the land." Trout/Nassar Brief at p.2. Bailey Brake Hunting & Fishing Association, Inc. was formed on the same day as Bailey Brake, June 16, 1992, by Ralph E. Rood as the initial incorporator for each entity. [TE(P-29)] (Articles of Incorporation for both entities). It was not formed by Bailey Brake.

Correction No. 6: Trout and Nassar argue that one of the members misrepresented the February 1, 1998 meeting of the shareholders and directors of Bailey Brake, a meeting that Nassar and Trout failed to attend. Trout/Nassar Brief at p.5, nn.6, 8. Trout and Nassar's argument is based upon a semantic distinction they draw between the February 1, 1998 minutes, which stated the directors voted to "secure amendments", and a single sentence within the February 3, 1998, two-page, single-spaced letter, wherein the member stated that the shareholders "voted unanimously to amend" the Buy-Sell portion of the Subscription Agreement. . ." [TE(P-16 at 2)] It is not accurate to state that the shareholders (there was only one shareholder at the time, the remainder were still subscribers who had not then paid the full price under the subscription agreement) voted to "secure amendments" to the Buy-Sell portion of the Subscription Agreement. Although one can argue that the statement in the letter is technically incorrect, to suggest it was a

misrepresentation is unfair, particularly when a fair reading of the letter reveals its purpose: to communicate the corporation's offer to purchase Nassar's shares, **TE(P-16 at 2)** an offer Nassar rejected exactly one week later.**TE(P-17)** Nassar himself testified that he considered the letter a "frivolous gesture". **TR188, ll. 21-22**

Correction No. 7: Trout and Nassar again claim that the same member, in a letter to Trout, "misrepresent[ed] the effect of the attempt to amend by the board of directors" when "Trout tendered his share." Trout/Nassar Brief at p.6. Both statements are inaccurate. First, Trout merely stated that he was "interested in selling my membership."**TE(P-25)** Second, the letter complained of accurately states in pertinent part that the motion was "to the effect that the Buy/Sell potions of the agreements for Bailey Brake Farms, Inc [were] *to be modified. . ..* "**TE(P-26 at p.1)**

Finally, Trout and Nassar argue (again in their "Statement of the Case") that they were promised "contractual fair market value", Trout/Nassar Brief at p.1., wholly disregarding the governing contractual provision which provided that the value of the shares of any shareholder would be determined by binding **arbitration**:

> If they are unable to come to an agreement within thirty (30) days, **the value of each share of the Corporation shall be determined by arbitration** as follows: the Corporation and the transferring Shareholder or his representative shall each name an arbitrator (the cost of which is to be paid by the appointing party) **and a decision by the arbitrators so named shall be binding on all parties.**

R12-13; BRE28-30 (Buy-Sell and Stock Restriction Agreement, Article IV(B) (emphasis supplied)).

The primary purpose of the corporations was to provide hunting rights, not a market investment:

> [T]he evidence establishes that the primary consideration of Plaintiffs Nassar and Trout in executing the Stock Subscription Agreements and Buy Sell Agreements and thereby purchasing shares of stock in Bailey Brake, is (and was) their right to own, possess, exercise, and enjoy the hunting rights on the land owned by the Corporation.

R616(Special Master's April 16, 2009 Report and Recommendation at 9).

> [E]very Corporate Shareholder/member that testified agreed that the primary purpose, (and many felt that the sole purpose) of owning stock Bailey Brake Farms, Inc., was to have a place to hunt, fish and enjoy the outdoors with their family members and other Stockholders/members of "the club" and enjoy the fellowship associated therewith.

R616-17(Special Master's April 16, 2009 Report and Recommendation at 9-10). Furthermore, Trout and Nassar fail to acknowledge the substantial investments made by the other shareholders of Bailey Brake and members of the non-profit in improvements to the real property not included in the aged, partial appraisal of real property (not shares) relied upon by Trout and Nassar.

SUMMARY OF THE ARGUMENT

Trout and Nassar's brief is unpersuasive. First, even if a trial court could permissibly probe into the substance of documents reviewed by arbiters to determine whether they conflict, and it cannot under the exceedingly narrow scope of review governing arbitration awards under *Hutto* and other cases cited in Bailey Brake's initial brief, the question of whether "conflicting documents" meets the statutory definition of "undue means" is a question of law, subject to de novo review, not a question of fact as Trout and Nassar contend. Moreover, if the submission of "conflicting documents" to arbiters meets the statutory definition of undue means, arbitration proceedings would become meaningless because the substance of documents reviewed by arbiters (and decisions made based upon those documents) would be subject to broad judicial review. Furthermore, Trout and Nassar's contention that the arbiters' review of "conflicting documents" constitutes "undue means" is not supported by any record evidence: the decision by the Chancellor to adopt Trout and Nassar's order whole cloth was not based upon judicial review of any evidence, nor was it based upon any motion before the Court seeking such relief, i.e., it was arbitrary and capricious under *Love* and other authorities.

Second, Trout and Nassar's contention that the Decision of Arbiters lacked finality or was incomplete is based solely upon the assessment issue, an issue waived by Bailey Brake on the record, not objected to by Trout or Nassar, and indeed confirmed in the Order prepared by Trout and Nassar's attorneys that was adopted whole cloth by the trial court. Trout and Nassar are judicially estopped from arguing the issue was not waived. For the same reason, Trout and Nassar cannot insist for years that the only remedy they seek is arbitration, successfully obtain that remedy, and then state, by the way, we also want something else (and then provide an Order granting them relief that they did not seek by motion and which was not based upon an iota or scintilla of evidence).

Finally, Trout and Nassar's contention that the trial court erred by not permitting them to amend their declaratory judgment complaint to state wholly new causes of action, seek damages, including punitive damages, attorney's fees and prejudgment interest in connection with those causes of action, which Trout and Nassar filed 5 ½ years after they commenced this litigation, Trout and Nassar's attorneys announced they were "ready", and after trial had commenced, is not an example of an abuse of discretion—it is instead an example of carelessness and dilatoriness. Although M.R.C.P. 15 favors amendments when required by justice, it is not a license for such carelessness and undue delay. Moreover, Trout and Nassar's attorney waived the motion to amend on the record.

At the end of the day, Trout and Nassar (under the decision of the arbiters that Bailey Brake contends should be enforced) will receive $45,323.88 and $47,235.88, respectively, more than a 100% net return on their capital contribution for hunting rights. Under the trial court's March 22, 2011 adoption of the Plaintiff's prepared order, rejecting the arbiters' decision and substituting its judgment, Trout and Nassar would receive windfall judgments of $155,666.67 and $157,586.67,

respectively, amounting to more than a 600% net return on their capital contribution (again for hunting rights). The trial court's gross overstepping of its judicial authority to vacate and modify the arbiters' decision to grant Trout and Nassar such a windfall return on highly restricted and practically unmarketable shares in a duck hunting club should be reversed and rendered with mandamus to enter a Final Judgment affirming the November 1, 2010 Decision of Arbiters.

ARGUMENT

I. Trout and Nassar's argument that the arbitration proceeding they demanded for over a decade was a mere "appraisement" is without merit.

Trout and Nassar quote a case cited by Bailey Brake for the astounding assertion that the arbitration they sought for over a decade (and obtained) was a mere appraisement.[4] The quoted case, *IP Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 726 So.2d 96 (Miss. 1998), reversed a circuit court and held that it erred by failing to enforce an unambiguous agreement that arbitrators, not appraisers, would fix value of land. The contractual provision at issue in *IP Timberlands* provided for the selection of arbitrators to fix a price:

> At any time between January 1, 1986, and December 31, 1995, to purchase all of said lands, not theretofore released from it, *at a price to be fixed by three arbitrators* to be named at that time—one by DENKMANN, its successors and assigns, one by KRAFT, its successors and assigns, and the third by the two so named; or, in case they shall be unable to agree upon said third arbitrator, said third arbitrator shall be named upon application by either party by one of the Judges of the United States District Courts for the State of Mississippi, after notification to the other party of intent to apply to such Judge for such appointment, given in writing at least thirty (30) days in advance of such application, such amount so fixed to be paid upon execution and delivery of deed conveying such lands, with warranty as in other instance.

IP Timberlands, 726 So.2d at 99, ¶6. (emphasis supplied).

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[4]Trout and Nassar quote a portion of *IP Timberlands* which in turn quotes the decision in *Hartford Fire Ins. Co. v. Jones*, 235 Miss. 37, 108 So.2d 571 (Miss. 1959) in which this Court rejected arguments that a "Memorandum of Appraisal" which called for appraisers to appraise a loss incurred by an insured, and in which the word arbitration was never mentioned, was an arbitration proceeding.

Like Trout and Nassar, the lessee therein argued that the arbitration provision was merely a statement that the price was to be fixed by appraisal and did not contemplate arbitration. *Id.* at 106, ¶39. This Court, applying well-established principles of contract construction, rejected the contention and held that the parties meant what they said, i.e., the contract called for arbitrators, not appraisers. *IP Timberlands*, 726 So.2d at 106, ¶42. This Court reasoned that the parties therein (as in this case) were sophisticated parties[5] and could have used the term appraisers instead of the term arbitrators if a mere appraisal was all that was intended. The Court further explained that the terms "arbitration" and "appraisal" are both well-defined terms and that "[a]s a matter of common sense, a word that has its own well defined meaning cannot be found to unambiguously mean other." *IP Timberlands*, 726 So.2d at 106, ¶43.

Here, the contract specifically calls for arbitration, not a mere appraisement:

> If they are unable to come to an agreement within thirty (30) days, **the value of each share of the Corporation shall be determined by arbitration** as follows: the Corporation and the transferring Shareholder or his representative shall each name an arbitrator (the cost of which is to be paid by the appointing party) **and a decision by the arbitrators so named shall be binding on all parties.**

R12-13; BRE28-30 (Buy-Sell and Stock Restriction Agreement, Article IV(B) (emphasis supplied)).

Just as in *IP Timberlands* the parties in this case are sophisticated parties. If the parties merely wanted an appraisal, they could have called for an appraisal in the contract rather than for arbitration. Moreover, notwithstanding the attempt to "change horses midstream", Trout and Nassar repeatedly demanded arbitration, not appraisement:

> So **what we think should happen is that this matter should go to arbitration** and the arbitrator make a decision as to what the value of the stock is subject to the lease of the non-profit.**TR470, ll. 18-22; BRE54**

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[5]Trout earned a B.A. from the University of Mississippi**TR206, l. 16**; Nassar earned a Ph.D from the University of Louisiana.**TR51, l. 29 thru TR52, l.1**

> ***
>
> **All of these gentlemen agreed i[f] a dispute arise, we will arbitrate.** **TR490, ll. 26-28; BRE55**
>
> ***
>
> **We're saying arbitrate the value of our shares of stock. <u>That's the only relief we requested</u>.** **TR491, ll. 11-12; BRE56**
>
> ***
>
> Your Honor, **we have asked that this thing go to arbitration. That's what we've asked for. <u>Nothing more</u>.** **TR492, ll. 6-8; BRE57**
>
> ***
>
> **I've always thought the only thing we're asking this Court to do is say go to arbitration.** **TR493, ll. 20-22; BRE58**
>
> ***
>
> **Our only prayer is arbitration, that you order this be arbitrated.** **TR495, ll. 13-15; BRE59**

(Representations made by Trout's and Nassar's attorney at August 21, 2007 hearing) (emphasis supplied).

> Your Honor, **what we're seeking,** if we win this case, **all we want to do is go to an arbitrator.** And I have to tell you, the rules of arbitration is,[sic] they take everything into consideration and more than a court can. **TR626, ll. 8-12; BRE60**
>
> ***
>
> Arbitrators decide everything. Questions of law, questions of fact. They have a panel - - depending on - - we can agree how to do it, but they get to decide everything. That's their job. Decide the law and decide the facts. **TR628, ll. 23-29; BRE61**

(Representations made by Trout's and Nassar's attorney at January 2, 2008 hearing) (emphasis supplied).

Trout and Nassar's quotation of a case that holds on all fours against them is puzzling. *IP Timberlands*, 726 So.2d at 105-106, ¶¶36-37. Trout and Nassar's argument that the arbitration

proceeding they repeatedly demanded, the arbitration proceeding called for by the contract, was for a mere appraisement is meritless.

II. Trout and Nassar's arguments about the proper standard of review, the incompleteness of the arbitration award and the sham legal conclusion they inserted in the Order regarding undue means are without merit.

Trout and Nassar's arguments about the incompleteness of the Decision of Arbiters and alleged undue means are without merit, founded upon citations to their own motions as "evidence", disregard their own silent acceptance of waiver of the issue of assessments, and disregard the inconvenient fact that their own attorneys prepared the order signed by the Chancellor accepting Bailey Brake's waiver of assessments.

A. Trout and Nassar did not assert "undue means" (based upon alleged "conflicting documents" submitted to the arbiters during a proceeding of which there is no record) as a basis to vacate the Decision of Arbiters until their attorneys inserted the sham legal conclusion in the Order adopted whole cloth by the Chancellor: simply stated, the sham legal conclusion is not based upon any record evidence.

The March 22, 2011 Plaintiffs-prepared Order was entered after Trout and Nassar filed a Motion to Add Third Arbiter or, in the Alternative, to Reconsider Decision of Arbiters and for Hearing.[R737-741] A careful reading of Trout and Nassar's motion reveals that their principal complaint was the evidence reviewed and to be reviewed by the arbiters, matters wholly beyond the scope of judicial review, a request for appointment of a third arbiter, and a complaint of the lack of completeness of the arbitration award. The relief sought by Trout and Nassar states in full:

> **WHEREFORE, PREMISES CONSIDERED**, as the contract expressly calls for the addition of a third arbiter, the Plaintiffs wish to exercise that option and pray that the Court Order [sic] the addition of a third Arbiter [sic] to review the entire arbiters' decision with full powers to seek additional information, amend the current decision and join with the two arbiters to make a final decision, or in the alternative, for the Court to review and strike portions of the Decision of Arbiters, and for a hearing thereon.

[R740-41](Relief Paragraph).

A thorough review of the entire transcript of the February 23, 2011 hearing,[TR964-988] reveals that Trout and Nassar failed to assert much less prove "undue means". Instead, Trout and Nassar's counsel incorrectly stated the governing standard of review applicable to arbitration awards, repeatedly making statements such as "it's at your discretion, completely at your discretion based on equitable reasons",[TR969,ll.18-21], when Mississippi law could not be clearer that Chancellors do not have the authority to strike or modify arbitration decisions for such reasons or to review the substance of evidentiary or non-evidentiary documents considered by arbiters. *Wilson v. Greyhound Bus Lines, Inc.*, 830 So.2d 1151, 1156, ¶¶11-12 (Miss. 2002); *Hutto v. Jordan*, 204 Miss. 30, 40, 36 So.2d 809, 811 (Miss. 1948) ("there is no review or correction of errors of the judgment, either upon the law or facts" of arbitration decisions); *Margerum v. Bud's Mobile Homes, Inc.*, 823 So.2d 1167, 1173, ¶17 (Miss. 2002) (Judicial review of an arbitrator's award is "extremely narrow"—a trial court is "not allowed to substitute its own judgment on the merits of the controversy for that of the arbitrator") *cf. Craig v. Barber*, 524 So.2d 974, 978 (Miss. 1988); *see also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38–39 (1987) ("Courts . . . do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.").[6]

Moreover, notwithstanding Trout and Nassar's repeated statements to the contrary, apparently based upon their mistaken view that attachments to their motions were "evidence", the

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[6]"[A] lawyer is duty bound to apprise the court of binding authority 'directly adverse to the position of his client . . . unless his adversary has done so.'" *U.S. v. De La Rosa*, 171 F.3d 215, 220, n.19 (5th Cir. 1999) quoting *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1344 n. 16 (5th Cir. 1990). In this case, notwithstanding Trout and Nassar's failure to properly explain the governing extremely narrow scope of review to the Chancellor, Bailey Brake's counsel properly explained the applicable standard under Miss. Code Ann. § 11-15-23, and that there was no evidence submitted by Trout and Nassar to support any statutory grounds for vacatur of the arbiters' decision.[TR976]

Plaintiffs-prepared Order entered verbatim by the trial court on March 22, 2011 followed a February 23, 2011 hearing regarding the November 1, 2010 Decision of Arbiters without hearing or considering any additional evidence. No transcripts of any hearings before the Court, the Special Master, or the Arbiters were available to the Chancellor to review. *Compare* **R980**(April 21, 2011 Court Reporter's Estimate for hearings on July 25, 2007, August 6-7, 2007, and August 21, 2007) *with* **R981**(May 3, 2011 Court Reporter's Estimated Cost Bill for hearings on November 19, 2007 and July 23-24, 2008) and *with* **R991**(May 10, 2011 Court Reporting Estimated Cost for hearings on January 2, 2008 and February 23, 2011). Notwithstanding their arguments to the contrary, Trout and Nassar's citation to their own motion and attachments thereto as "evidence", *see* Trout and Nassar's Brief at p.19 (citing **R737-48** and **R784-958**) does not make it so. Absolutely no evidence, not a scintilla, not an iota, was put forth or considered by Chancellor between the time of the arbiters' decision and the substitution of his judgment for the arbiters by signing the Plaintiffs'-prepared order, which includes the following statement and legal conclusion:

> 3. Documents on which to base the valuation and submitted to the arbiters conflicted. *The Court finds that the conflicting documents submitted for the valuation of the shares indicate the valuation to have been based on undue means.*

R960; BRE8(March 22, 2011 Order) (emphasis supplied).

Setting aside an arbitration decision based upon a proceeding of which no record exists is *ipso facto* arbitrary and capricious. Stated another way, although the manifest error/substantial evidence standard of review applies to a Chancellor's findings of fact (i.e., this Court will not reverse such findings of fact unless manifestly wrong or clearly erroneous) that standard of review does not apply when a Chancellor could not have performed his or her judicial fact-finding function. That is precisely what occurred in this case. The Chancellor entered Plaintiffs' order purporting to judicially review the arbitration proceeding (at which the Chancellor was not

present) the proceeding before the Special Master (at which the Chancellor was not present) without having access to any transcripts of those proceedings upon which to exercise judicial review, i.e., the Chancellor's act was arbitrary and capricious. *Love v. Barnett*, 611 So.2d 205, 208 (Miss. 1992) (final judgment entered by a chancellor who neither heard the evidence nor had access to a transcript was arbitrary and capricious); *Wright v. Rub-a-Dub Car Wash, Inc.*, 740 So.2d 891, 895, ¶11 (Miss. 1999) ("We find that the chancellor's determination of ownership was not supported by substantial evidence; therefore, his decision was arbitrary and capricious.") (en banc) (quoting Mississippi Court of Appeals decision).[7] The Plaintiffs' prepared order was a sham, containing findings and conclusions that Trout and Nassar neither sought nor which could have been based upon the reality of the proceedings, i.e., a non-existent record of the arbitration proceedings.

Furthermore, this Court reviews a Chancellor's resolution of questions of law de novo. *Syngenta Crop Protection, Inc. v. Monsanto Co.*, 908 So.2d 121, 124, ¶5 (Miss. 2005) (question of whether trial court had personal jurisdiction over defendant is a question of law subject to de novo review); *Tucker v. Prisock*, 791 So.2d 190, 192, ¶¶8-10 (Miss. 2001) (question of whether a chancery court had jurisdiction to review a board decision is a question of law subject to de novo review); *Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828, 837-38, ¶¶23-24 (Miss. 2003) (reviewing arbitration contract de novo and holding that contracting party waived right to

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[7]Moreover, even if a Chancellor could have and did in fact perform the judicial fact-finding function, a Chancellor's findings of fact can still be reversed if they indicate arbitrariness or caprice. *Uglem v. Uglem*, 831 So.2d 1175, 1177, ¶7 (Miss. App. 2002) (factual determinations by a Chancellor, "if supported by substantial evidence and not indicating arbitrariness or caprice, will be upheld"); *compare Apperson v. White*, 950 So.2d 1113, 1119, ¶17 (Miss. App. 2007) (Chancellor may be reversed "where we find evidence that the decision was arbitrary and capricious, clearly erroneous, manifestly in error, or an incorrect legal standard was applied").

arbitrate); *Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, 908 So.2d 107, 110, ¶5 (Miss. 2005) (questions concerning the construction of contracts are questions of law subject to de novo review) (reversing Court of Appeals' decision and reinstating Chancellor's decision); *In re Carney*, 758 So.2d 1017, 1019-20, ¶¶11-12 (Miss. 2000) (affirming Court of Appeals, but explaining that the Court of Appeals applied the wrong standard—de novo review applies to construction of wills).

Here, even assuming there was an underlying *evidentiary* record for the Chancellor to have actually reviewed and made a determination of "undue means" based upon "conflicting documents" (and there was not such a record), the question of whether such a factual finding meets the legal standard of "undue means" set forth in the statute is a question of law subject to de novo review, not a question of fact. *Compare Wilson v. Greyhound Bus Lines, Inc.*, 830 So.2d 1151, 1155, ¶9 (Miss. 2002) (scope of judicial review of an arbitration award is narrow, every reasonable presumption indulged in favor of validity of arbitration proceedings) (quoted case omitted) *with Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469 (5th Cir. 2012) (affirming refusal to vacate award and explaining that de novo review applies to confirmation of an award, but review of the underlying award is "exceedingly deferential" with the purpose of "reinforc[ing] the strong deference due an arbitrative tribunal") (quoted and cited cases omitted); *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 380 (5th Cir. 2004) (trial court orders vacating arbitration awards are reviewed de novo, while carefully noting that its review of the award itself is exceedingly deferential).

Indeed, this Court has established an exceedingly narrow scope of judicial review to arbitration proceedings, a narrow standard that precludes chancellors from inquiring into evidentiary issues, findings of fact and conclusions of law made by arbiters, even if erroneous or unjust, which strictly limits judicial review to narrow statutory grounds. *Wilson*, 830 So.2d at

1156, ¶¶11-12. Any coherent and logical application of this standard compels the conclusion that the Chancellor's non-existent (and indeed impossible) review and consideration of "evidence" (or more accurately in this case, non-evidentiary documents attached to Trout and Nassar's motion), by the arbiters was beyond the proper scope of judicial review.

B. Trout and Nassar, who stood silent when the issue of assessments was waived on the record by Bailey Brake, whose counsel wrote the Order stating that the "Court will allow the Corporation to withdraw its assessments", and who failed to cross-appeal that determination, are barred from raising that issue.

With respect to the alleged incompleteness of the arbiters' decision, the sole item that the arbiters could not agree upon was the assessments (not dues).[R732-733; BRE13-14] Trout and Nassar's counsel stood silent when Bailey Brake waived the assessments on the record at the February 23, 2011 hearing.[TR971,ll.19-29] Nowhere in the transcript of the February 23, 2011 hearing can one find a single objection by Trout and Nassar to Bailey Brake's waiver of assessments.

Moreover, the Plaintiffs'-prepared Order entered whole cloth by the trial court includes the following statement:

> 5. At a hearing on the Plaintiffs' Motion, the Corporation orally represented that it would withdraw its own assessments. *The Court will allow the Corporation to withdraw its submission of assessments.*

[R961; BRE9](March 22, 2011 Order) (emphasis supplied).

Stated another way, Trout and Nassar's counsel prepared the very Order affirming Bailey Brake's waiver of assessments. The issue of assessments rose out of the arbiters' inability to resolve that contractual question, an issue expressly waived by Bailey Brake on the record. It is a basic principle of contract law that a party may waive the protections of any provision of a contract, including the contractual right to arbitrate in the first instance. *Scott Addison Constr., Inc. v. Lauderdale County Sch. Sys.*, 789 So.2d 771, 775 (Miss.2001) ("[A] party to a contract may by

words or conduct waive a right to which he would otherwise have been entitled") (quoted case omitted); *see, e.g.*, *Sanderson Farms,* 848 So.2d 828, 838, ¶24 (party waived right to arbitrate by refusing to pay contractual one-half share of arbitration filing fees and costs). Waiver may be express or implied or inferred from the actions and conduct of the parties. *Brent Towing v. Scott Petroleum*, 735 So.2d 355, 359 (Miss. 1999) (acceptance of late payment waived breach of contract claim); *Mariana v. Hennington*, 229 Miss. 212, 226, 90 So.2d 356, 362 (Miss. 1956) (party waived provision providing for inspection by repeatedly accepting shipments without inspection).

In this case, even if Trout and Nassar's silence (lack of objection) did not constitute a waiver, or otherwise procedurally bar them contesting that issue when they did not cross appeal the issue,[8] surely their own attorneys' drafting of the order in which the Chancellor accepted the waiver bars them from using that as a basis to argue (and it is their only basis) that the arbiters' decision was incomplete and lacked finality.[9]

Trout and Nassar's gamesmanship on this issue is but another example of why the doctrine of judicial estoppel should be triggered in this case. Judicial estoppel does not require a decision in a *separate and prior* litigation. *See* Trout and Nassar's Brief at p. 28 (asserting there is a "general requirement that the prior inconsistent position be taken in a separate judicial proceeding"). This Court has held to the contrary, explaining that application of the doctrine merely requires that a

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[8]*See Ory v. Ory*, 936 So.2d 405, 409-10, ¶¶9-10 (Miss. App. 2006) (party's failure to object or file post-trial motion in trial court procedurally bars party from raising issue on appeal) (citations omitted).

[9]*See* Trout and Nassar's Brief at p. 19: "The special chancellor, in adopting Plaintiffs' proposed order and setting aside the arbiters' award, based the vacatur on both *a lack of finality with regard to determination of assessments*. . .." (emphasis supplied); *see also* Trout and Nassar's Brief at 20: "*This incompleteness stemmed from the arbiters' inability to reach a final determination regarding the amount of assessments to be deducted from Plaintiff's shares*." (emphasis supplied).

party (or a party through their attorney) assert one position in a prior action *or in a prior pleading in the same litigation*, benefit from the earlier position, and then take a contrary position thereafter:

> Judicial estoppel precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in *the* litigation.

Dockins v. Allred, 849 So.2d 151, 155 (Miss. 2003) (emphasis supplied).

In *Dockins*, this Court held that an attorney who argued at a hearing in the lower court that the amount in controversy was 21.53% of the attorney's fee was judicially estopped from later taking a contrary position in that *same litigation* because his client benefitted from the position. Similarly, this Court in *Estate of Richardson*, 903 So.2d 51 (Miss. 2005), held that an administratrix who had filed sworn pleadings that the decedent's biological father was an heir, was thereafter judicially estopped from seeking to disinherit the biological father in the *same litigation*. Therein, this Court reversed the Court of Appeals' decision, *Estate of Richardson*, 905 So.2d 620 (Miss. App. 2004). After quoting *Dockins* as set forth above, this Court explained:

> **Because of judicial estoppel, a party cannot assume a position <u>at one stage of a proceeding</u> and then take a contrary stand later <u>in the same litigation</u>**.

Estate of Richardson, 903 So.2d at 56, ¶17 (quoted case omitted) (emphasis supplied)

> ***
>
> Richardson and Turnage filed the pleadings that resulted in the case being decided based on the equitable doctrines of judicial estoppel, unclean hands and equitable estoppel, rather than on the statutory structure of Mississippi Code Annotated Section 91–1–15(3). Had Richardson and Turnage taken a different procedural route, i.e., shown candor and honesty with the chancellor, a different result may have been obtained. Instead, they chose not to do so.

Id. (quoted case omitted).

Trout and Nassar cite three cases in support of their contention that a *separate*, prior litigation is necessary to trigger judicial estoppel. In the first case, *Daughtrey v. Daughtrey*, 474 So.2d 598 (Miss. 1985), this Court affirmed a trial court's application of the doctrine to a party

who had taken a position in a prior case, with full knowledge of the facts, that was inconsistent with the position the party was taking in the case appealed from. In the second case, *Thomas v. Bailey*, 375 So.2d 1049 (Miss. 1979) this Court affirmed a Chancellor's refusal to apply the doctrine where the initial position taken by the party (taken in estate litigation prior to the case that was appealed from) was the result of mistake and did not benefit from the position.

The third and final case cited by Trout and Nassar, *Lone Star Industries, Inc. v. McGraw*, __ So.3d __, 2012 WL 309317 (Miss. 2012) (an opinion not released for publication and subject to revision as of the date of this writing) is somewhat confusing.[10] On the one hand, the case initially states the doctrine accurately: "Judicial estoppel is a doctrine of law applied by a trial court to a situation where a party asserts one position in a prior action *or pleading* but then seeks to take a contrary position to the detriment of the party opposite." *Lone Star*, 2012 WL 309317 at *5, ¶17 (quoted case omitted) (emphasis supplied). It then states, as Trout and Nassar argue, that the party against whom judicial estoppel was sought to be applied "should not be estopped, because this is not a separate action".*Id.*[11] Unless this Court has decided to markedly narrow the scope of judicial estoppel, *Lone Star* should be confined to its facts in its pre-publication version.

A careful reading of *Lone Star*, assuming this Court did not intend to markedly change the doctrine of judicial estoppel, suggests that the *ratio decidendi* of the decision was a well-established exception that applies when a party gives former testimony that was either mistaken, inadvertent, or without full knowledge of the facts. *Lone Star*, 2012 WL 309317 at *5. If

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[10]*Lone Star* was released several months after Bailey Brake's principal brief was submitted. A final decision, the 67th reported Mississippi case containing the phrase "judicial estoppel", *B.A.D. v. Finnegan*, 82 So.3d 608 (Miss. 2012) was published on March 15, 2012. *B.A.D.* mentioned, but did not reach the issue.

[11]In *Lone Star*, the defendants sought to apply the doctrine of judicial estoppel to preclude the plaintiff from adding new defendants based upon purported conflicting testimony at two depositions. *Lone Star*, 2012 WL 309317 at *5, ¶18.

that is not an accurate reading of *Lone Star*, then this Court has markedly altered the doctrine of judicial estoppel, something this Court does not normally do without specifically noting that it is overruling prior judicial precedent.

Bailey Brake's reading of *Lone Star* is consistent with the principal policy underlying the doctrine: to preclude litigants from playing fast and loose with the Courts. The first reported case in Mississippi (that the undersigned could find) that clearly distinguished judicial estoppel from other types of estoppel and explained its purpose is *Great Southern Box Co. of Miss. v. Barrett*, 231 Miss. 101, 94 So.2d 912 (Miss. 1957). Therein, the Court explained the purpose of the doctrine, stating that it protects "orderliness, regularity and expedition of litigation", which "are essential to a proper judicial inquiry." *Great Southern Box*, 231 Miss. at 111-12, 94 So.2d at 915-916. Therein, this Court judicially estopped a party from arguing on one hand that they were not liable for one aspect of the *same* suit, but were liable with respect to another aspect of the *same* suit. *Id.* (explaining that judicial estoppel differs from equitable estoppel in that it is not necessary to show the elements of reliance and injury).[12]

In *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808 (2001), the United States Supreme Court examined the doctrine, its roots and its purpose: "to protect the integrity of the

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[12]The first reported Mississippi case the undersigned could find is *United Timber & Lumber Co. v. Alleged Dependents of Hill*, 226 Miss. 540, 84 So.2d 921 (Miss. 1956), wherein this Court declared:

> The elements of judicial estoppel do not here appear. None of the parties knew that Ike Moore was alive when the employer and its carrier filed their brief on the former appeal. Besides, one of the essential elements of judicial estoppel is that the party claiming estoppel must have been misled and changed his position. Neither of the claimants in this case changed their position because of the position taken by the employer and its carrier on the former appeal.

Id. at 552, 925-26. Subsequent cases have made clear that reliance is not a necessary element of judicial estoppel. *See Great Southern Box*, *supra*.

judicial process." *Id.* at 750 (quoted case omitted). It explained that the "circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle", but that several factors typically inform the decision: (1) the later position must be clearly inconsistent, (2) the party must have persuaded a court to accept the earlier position, and (3) whether the party would derive an unfair advantage (or impose an unfair detriment on the opposing party). *Id.* (quoted and cited cases omitted). *Scarano v. Central R. Co. of N. J.*, 203 F.2d 510 (3d Cir. 1953), the case approvingly quoted by the U.S. Supreme Court for the proposition that the doctrine prohibits litigants from playing "fast and loose with the courts" stated the doctrine generally as a rule that "a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter *in the same* or a successive series of suits." *Id*. at 513.[13]

There is clearly some tension in the law, and conflicting cases in this Court's precedent as to whether an actual prior *separate* litigation is necessary to trigger the doctrine. The Fifth Circuit recognized the tension in *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298 (5th Cir. 1998) wherein it stated:

> There appears to be some tension in the doctrine about whether judicial estoppel can bar a litigant from raising an inconsistent position in the same court proceeding, or whether the bar can arise only in a subsequent proceeding. *** Because, in the instant case, the conduct does not, in any event, appear to meet the other criteria

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[13]*See also Davis v. Wakelee*, 156 U.S. 680, 689 (1895) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."); *Jett v. Zink*, 474 F.2d 149, 154–55, *cert. denied, sub nom. Sterling Oil of Oklahoma, Inc. v. Chamberlain*, 414 U.S. 854 (1973) (party who argued that action was quasi *in rem* was precluded from later arguing action was *in personam*); *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process.") (party that persuaded court to entertain legal issue precluded from changing legal position because he was unhappy with result).

> needed to invoke the bar, we will assume *arguendo* that a single court proceeding is sufficient.

Id. at 303, n.11 (emphasis in original) (citations omitted).

See also Ergo Science, Inc. v. Martin, 73 F.3d 595 (5th Cir. 1996) (same) ("The doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken *in the same* or some earlier proceeding.") (citation omitted).

Bailey Brake respectfully suggests that Trout and Nassar's counsel's repeated representation to the Chancellor, both before (*see supra* pp. 8-9, quoting Trout and Nassar's counsel at the August 21, 2007 hearing) and after they filed a motion for leave to amend on November 13, 2007, (*see supra* p.9, quoting Trout and Nassar's counsel at the January 2, 2008 hearing) that all they wanted was to arbitrate the issue and nothing more, should judicially estop and confine them for several reasons.

First, Trout and Nassar benefitted from their position (obtaining the arbitration they sought) through repeated representations to the Chancellor. Second, after prevailing on that position and getting a decision from the arbiters, Trout and Nassar filed a motion for a third arbiter complaining about the evidence reviewed by the arbiters (misstating Mississippi law governing judicial review of the arbiters' decision), and complained that the arbitration award was not complete for the sole reason of the assessments not having been decided by the arbiters. Trout and Nassar then not only stood silent when Bailey Brake waived the issue of assessments (thereby deriving a benefit from Bailey Brake's waiver), but also drafted the very order signed by Chancellor affirming the waiver (thereby cementing the benefit of Bailey Brake's waiver). For Trout and Nassar to now argue that on the one hand, we received the benefit of the waiver (which they did not challenge on their cross appeal), but on the other hand argue that the waived

assessments, which we adopted in the order prepared by our counsel, is a sufficient ground to deem the arbitration award incomplete, is doublespeak.

The doctrine of judicial estoppel does not permit such game playing.

III. The Chancery Court did not abuse its discretion by denying Trout and Nassar's motion for leave to amend their initial declaratory judgment complaint, filed 5 ½ years after the litigation was commenced, seeking to add wholly new causes of action, punitive damages and to seek interest, among other things.

Trout and Nassar's contentions regarding the denial of their motion for leave to amend and denial of interest are interrelated and not well taken. Although M.R.C.P. 15 favors amendments when required by justice, it is not a license for carelessness or undue delay. Trout and Nassar's contention that the Chancellor erred in not permitting their motion for leave to amend to assert new causes of action and seek prejudgment interest, filed 5 ½ years after their declaratory judgment complaint, after a key witness for Bailey Brake died, after Trout and Nassar appeared and announced they were "ready" for trial, and after trial began, is subject to the abuse of discretion standard. *Natural Mother v. Paternal Aunt*, 583 So.2d 614, 616-17 (Miss. 1991) (affirming denial of motion for leave to amend filed two days before trial, explaining that amendments permitted in the latter stages of litigation may deny the important policy favoring finality of judgments and the expeditious termination of litigation) *quoting* Griffith, Mississippi Chancery Practice § 392 (2d ed. 1950) for the principle that "liberality in permitting amendments is not allowed to encourage delay, laches and negligence."); *Wilner v. White*, 929 So.2d 315 (Miss. 2006) (reversing Court of Appeals decision and reinstating trial court's denial of motion for leave to amend where motion was filed on the day that the statute of limitations ran); *Charlot v. Henry*, 45 So.3d 1237, 1244, ¶21 (Miss. App. 2010) (Chancellor did not err in refusing leave to amend to assert counterclaim upon motion filed 6 months after motion for summary judgment was filed).

Trout and Nassar commenced this action on February 7, 2002, by filing a declaratory

judgment complaint seeking declaration of their rights "as shareholders" under the Stock Subscription Agreement, to enjoin Bailey Brake from denying plaintiffs "equal benefits of the profits and benefits of the corporation" and for "general relief". Trout and Nassar sought no other relief.[14] In their February 7, 2002 complaint, Trout and Nassar asserted that they purchased their shares as an investment in hunting property (contrary to the testimony of every other shareholder **R616-17**(Special Master's April 16, 2009 Report and Recommendation at 9-10)), that Bailey Brake had taken the position that the hunting rights belonged to a separate unincorporated hunting club to which the real estate and improvements were exclusively leased,[15] that *all of Bailey Brake's income was used to improve the leasehold for the club*, that Bailey Brake had taken the position that their shares could be sold only to the corporation for their capital contribution, that the corporation was not being operated for the equal benefit of all shareholders, and that they were entitled to arbitration to establish fair market value of their shares.**R1-2**

In its May 30, 2002 Answer and Counter-Complaint, Bailey Brake asserted a host of affirmative defenses, which included a fourth affirmative defense that Trout and Nassar had failed to join a necessary party, specifically Bailey Brake Hunting and Fishing Association, Inc. (hereinafter "BBHF").**R29-37** On June 28, 2002, Trout and Nassar filed a Response to Affirmative Defenses in form of a general denial.**R38-40**

After over two years in which to complete discovery, on May 28, 2004, Trout and Nassar filed a motion for summary judgment.**R72** On October 7, 2004, Bailey Brake filed its motion for

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[14]Trout and Nassar admit that they sought no other relief in their brief, stating that their "original complaint did not include prejudgment interest because it only sought declaratory judgments regarding Plaintiffs' rights, thus, **a demand of prejudgment interest was inappropriate** at the time." Trout and Nassar Brief at p.29.

[15]Bailey Brake Hunting & Fishing Association, Inc., a separate non-profit, was formed on the same day as Bailey Brake, January 16, 1992.**TE65-66** Both Trout and Nassar were original members of the non-profit.**TE63**

summary judgment,[R311] and a motion to amend its answer and counter-complaint[16] to assert, among other things, rescission based upon Trout and Nassar's continuing failure to pay capital contributions and assessments under the Stock Subscription Agreements.[R299] On November 3, 2004, the parties entered an agreed order *consenting* to Bailey Brake's filing of an amended answer and counter-complaint and granting Trout and Nassar an additional sixty days in which to respond to Bailey Brake's motion for summary judgment.[R318] On September 13, 2006, both motions for summary judgment were heard and subsequently overruled on January 30, 2007.[R383]

On April 7, 2007, by agreement of the parties, the matter was set for trial on August 6-7, 2007.[R388] On July 19, 2007, Bailey Brake filed a motion to join BBHF as a necessary party,[R391] to which Trout and Nassar responded on July 25, 2007 by motion to strike,[R395] to which Bailey Brake responded by an amended motion for joinder of BBHF as a necessary party.[R400] By agreed order on July 30, 2007, the parties added an additional day to try the case, August 21, 2007.[R413]

On August 6, 2007, the parties appeared and Trout and Nassar's attorney announced to the Court that they were "ready" for trial.[TR22,lll.7-8] After argument on Bailey Brake's motion for joinder, the court reserved ruling, and heard testimony from 3 witnesses over the course of August 6-7, 2007, comprising over 400 pages of trial testimony.[TR44,ll.12-14, TR49-458] At the conclusion of the second day of trial, August 7, 2007, the court ruled from the bench that it was going to grant the

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[16]On page 28 of their brief, Trout and Nassar state: "The Defendant Corporation twice moved to amend its counter-claims; *the trial court granted both of those motions*.R. 00318" The italicized portion of that representation is inaccurate. Trout and Nassar *consented* (by Agreed Order entered November 3, 2004,[R318]) to Bailey Brake's first amendment (to assert, among other things, rescission based upon Trout and Nassar's continuing failure to pay capital contributions and assessments under the Stock Subscription Agreements).[R299] The court did grant leave to Bailey Brake to add 3 narrow issues relating to a declaratory judgment. *See* January 15, 2008 Order, [R521], permitting an amendment for a declaratory judgment as to the validity of Bailey Brake Hunting and Fishing Association, Inc. ("BBHF", that the lease entered by BBHF was a valid and binding contract, that hunting rights were exclusively possessed (by virtue of the lease) by BBHF, and that such hunting rights were not an incident of owning stock in Bailey Brake.[R447-448]

motion to join BBHF as a necessary party.[R461,ll.19-20]

Trout and Nassar filed a motion to reconsider the joinder issue on August 17, 2007.[R416] On August 21, 2007, the court heard additional argument on the issue of joining BBHF.[R467-513] Trout and Nassar's attorney made many representations at that hearing regarding the simple scope of their lawsuit, insisting they were only seeking arbitration, in a clear effort to persuade the court to deny Bailey Brake's motions. *See supra* pp.8-9.

During the August 21, 2007 hearing, the court ruled that either party would have 30 days in which to add BBHF.[R505] On September 27, 2007, the court entered an order providing for Bailey Brake to amend the pleadings to join Bailey Brake Hunting and Fishing Association, Inc. as a necessary party (and continuing the third day of trial until November 19, 2007).[R418] That order provided that the amendment had to be filed within 25 days of the Order, or October 22, 2007. On October 31, 2007, the court entered a second order *nunc pro tunc* to August 21, 2007, providing that Bailey Brake Hunting and Fishing Association, Inc. would be joined as a necessary party by either party and that any such amended pleadings had to be filed by September 21, 2007.[R419]

On November 13, 2007, less than one week before the third day of trial was to commence, after more than 400 pages of testimony had been taken, 2,105 days after they filed their declaratory judgment complaint, Trout and Nassar filed an out-of-time motion to amend their complaint.[R420-437] In their motion to amend, Trout and Nassar misstated the nature of the court's bench ruling at the August 21, 2007, the orders entered by the court on September 27, 2007 and the September 21, 2007 (*nunc pro tunc*) order.[R420-21,¶¶3-4] Trout and Nassar also asserted that Bailey Brake was judicially estopped from "any and all objections" to amending the complaint.[R420] Trout and Nassar, in addition to filing their motion untimely, failed to comply with the court's instructions to simply add BBHF as an indispensable party. Instead, Trout and Nassar sought to

file an amended complaint changing the entire nature of the case, seeking to add breach of contract and breach of fiduciary duty counts, among others, seeking various damages, including punitive damages, attorney's fees and interest.[R420-437]

On November 16, 2007, Bailey Brake filed its objection to Trout and Nassar's motion to amend, asserting the untimeliness of the motion, the failure of Trout and Nassar to comply with the court's order regarding the simple joinder of BBHF, the extreme delay and additional expense the amendment would result from permitting the amendment, Trout and Nassar's failure to give proper notice of what they then proposed, i.e., in effect a stockholder's derivate action, and the extreme prejudice that would be suffered by Bailey Brake, including without limitation intervening changes in stockholders, and the death of a principal witness, Ralph Rood, since the filing of the initial declaratory judgment complaint, who prepared not only all of the documents at issue in the case, but also documents that no one could locate at that time.[R438] Bailey Brake also filed a motion to dismiss BBHF on November 16, 2007, as a result of Trout and Nassar's failure to comply with the court's orders regarding joinder.[R443-446]

Bailey Brake filed a motion for leave to amend its counter-complaint on November 16, 2007, to seek a declaratory judgment as to the validity of BBHF, that the lease entered by BBHF was a valid and binding contract, that hunting rights were exclusively possessed (by virtue of the lease) by BBHF, and that such hunting rights were not an incident of owning stock in Bailey Brake.

On November 19, 2007, the court held a hearing on the pending motions, including Trout and Nassar's motion to amend and entertained yet more extensive argument about joinder of BBHF, argument consisting of 52 pages.[TR518-570] Trout and Nassar's attorney notified the court that they were going to move to transfer the case to Circuit Court and demand a trial by jury if their

motion to amend was granted.[TR520] The Chancellor was provided with supporting case law citations by Bailey Brake's counsel with respect to its objection to the amendment sought by Trout and Nassar.

Beginning on page 554 of the transcript, the court intervened (after noting that it could reverse itself on its decision to require joinder of BBHF, [TR553, l.22-26]) and stated:

> BY THE COURT: Wait, wait, wait. My intentions were that they be brought in as a party, and if I was mistaken about declaring them as a necessary party, I apologize, but I – I understood you to say that you wanted to bring them in as a party or that they should be brought in yet as a party. **And so I could simply at this time order that this trial proceed without their being a party.**
>
> BY [TROUT AND NASSAR'S COUNSEL]: **Your Honor, we'll accept that.** All I want to say is if they are trying to force us to bring somebody in, they can't do it two ways, saying, "You can bring them in, but you only do this." **If Your [sic] Honor wants to do that, that's fine. I've argued for that.** I thought lawyers should be consistent within the same case they are in. **Since I've advocated that position, we have no objection to that**. Your [sic] Honor. I think we all should be consistent, but I always understood they were trying to get them in and if they want them in, they bring them in. **And that's fine with me. If we can get a trial date, let's move forward with the trial.**

[TR554,l.20-TR555,l.12] (emphasis supplied).

> ***
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> BY [TROUT AND NASSAR'S COUNSEL]: No, sir, he can't limit us to a declaratory judgment. That's not the rule under Rule 15. He didn't raise it properly under Rule 19, and he's trying to keep shifting to keep this case going. **Your Honor, you can simplify this if, say, they had a chance to bring them in and they didn't do it. They passed your thirty-day order based on the oral testimony. We have set this thing for trial, Your [sic] Honor. We'll go forward.**

[TR555,ll.21-29] (emphasis supplied).

Simply stated, Trout and Nassar's counsel waived Trout and Nassar's motion to amend on the record. At best for Trout and Nassar, it is akin to "invited error". *Cf. Smith v. State*, 28 So.3d 678 (Miss. App. 2010) (applying the doctrine in a criminal case to preclude a defendant from complaining about testimony elicited by his counsel). If Trout and Nassar's waiver of their motion

to amend is not abundantly clear by reviewing the foregoing quoted portions of the transcript, exclamation points are put on the waiver by the subsequent colloquy:

> BY [BAILEY BRAKE'S COUNSEL]: Your Honor, **are we going to proceed on a declaratory judgment action?**
>
> BY THE COURT: **Yes, sir. That's what was filed initially and that's where we are going from here.**
>
> BY [BAILEY BRAKE'S COUNSEL]: Yes, sir. **So you are denying their motion to amend on the Complaint for money damages, punitive damages?**
>
> BY THE COURT: **Yes, sir, because they are not a party.**
>
> BY [TROUT AND NASSAR'S COUNSEL]: You Honor, **we will prepare an order** and send a copy to Mr. Smith, and I'm sure he will call you if he has objections of the ruling here today.

TR556,ll.16-29 (emphasis supplied).

After no objections were stated by Trout and Nassar's counsel, their counsel further stated:

> BY [TROUT AND NASSAR'S COUNSEL]: Yes, **if we are going forward on this, there's nothing that needs to be done**, Your [sic] Honor. **All the discovery is shut off, we started the trial, and we don't have to do repeated testimony.**

TR558,ll.14-17 (emphasis supplied).

Based upon these facts,[17] the delay of 2,105 days between the initial complaint and the motion for leave to amend to completely recast the lawsuit from one for a declaratory judgment before a Chancellor to one before a jury in Circuit Court, to include claims broadly ranging from breach of contract to breach of fiduciary duties, to include punitive damages, attorney's fees and interest, the extreme prejudice to Bailey Brake, not only in significant additional costs and delay, but also resulting from the death of a key witness, Ralph Rood, and the prejudice to the new

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[17]Although Trout and Nassar (as the cross-appellants) complain of the lack of findings in the order denying their motion for leave to amend, "[w]here the chancellor makes no specific findings, this Court proceeds on the assumption that the chancellor resolved all fact issues in favor of the appellee." *Ruff v. Estate of Ruff*, 989 So.2d 366, 369, ¶11 (Miss. 2008) (citations omitted).

shareholders that purchased shares of Bailey Brake during Trout and Nassar's 5 ½ year delay in bringing their motion to amend, coupled with Trout and Nassar's waiver of their motion to amend on the record, the Chancellor did not err in denying Trout and Nassar's motion to amend. *Natural Mother*, 583 So.2d at 616-17; *Wilner*, 929 So.2d 315; *Charlot*, 45 So.3d at 1244, ¶21; *Marchbanks v. Borum*, 806 So.2d 278, 285-286, ¶¶20-22 (Miss. App. 2001) (trial court did not err in refusing amendment two days before trial to add another theory of the case, negligence, explaining that such an amendment would have caused undue and severe prejudice to the defendant); *see also Par Industries, Inc. v. Target Container Co.*, 708 So.2d 44 (Miss. 1998) (affirming trial court's refusal to permit amendment to conform to evidence filed on the last day of trial and explaining that motions for leave to amend should be "prompt and not the result of an inexcusable want of diligence" and further noting that amendments "permitted in the latter stages of litigation may deny the important policy favoring finality of judgments and the expeditious termination of litigation[; t]hus, liberality in permitting amendments is not allowed to encourage delay, laches and negligence." (quoted and cited authorities omitted); *accord Feldman v. Allegheny Intern., Inc.*, 850 F.2d 1217, 1225-26 (7th Cir. 1988) (affirming denial of motion to amend complaint to add new theory of liability 3 weeks before trial and explaining that although "Fed.R.Civ.P. 15 favors amendments when required by justice, it is not a license for carelessness or gamesmanship. Parties to litigation have an interest in speedy resolution of their disputes without undue expense. Substantive amendments to the complaint just before trial are not to be countenanced and only serve to defeat these interests.").

Because Trout and Nassar did not seek interest in their 2002 complaint, their contention that the failure to award that interest must likewise fail: "We wish to make clear today that . . . Miss. R. Civ. P.8 does require that a party assert a demand for prejudgment interest in the

appropriate pleading." *Upchurch Plumbing, Inc. v. Greenwood Utilities Com'n*, 964 So.2d 1100, 1118, ¶45 (Miss. 2007) (but overruling *Preferred Risk Mut. Ins. Co. v. Johnson*, 730 So.2d 574 (Miss. 1998) insofar as it required the pleading to assert the date that prejudgment interest was allegedly due.). Notwithstanding Trout and Nassar's citation to general cases regarding the construction of pleadings under M.R.C.P. 8, *Upchurch* (and at the time of the pleading in 2002, *Preferred Risk*) controls this issue.

While on the one hand Trout and Nassar admit that a demand of prejudgment interest was "inappropriate" when they filed their complaint, Trout and Nassar Brief at p.29, on the other hand Trout and Nassar argue that "[b]ecause this case is based on the breach of a contract, Miss. Code Ann. § 75-17-7 controls the award of prejudgment interest." Trout and Nassar Brief at 34. This case is not based upon a breach of contract complaint; it went to trial partially before the court and partially before the Special Master and subsequently to arbitration on a declaratory judgment complaint. Indeed, the contract providing for arbitration contemplates specific performance, not monetary damages:

> The parties agree that it is impossible to measure in money the damage which may accrue to a party hereto . . . by reason of a failure to perform any of the obligations under this Agreement. Therefore, if any party hereto . . . shall institute any action or proceeding to enforce the provisions hereof, any person . . . against whom such action or proceeding is brought hereby waives the claim or defense that such party . . . has or have an adequate remedy at law.

R171-8; BRE34-35 (Buy-Sell and Stock Restriction Agreement, Article XII).

The remainder of Trout and Nassar's arguments regarding interest not only presuppose that they actually filed a breach of contract complaint, but are also founded on red herrings and straw men. Even Trout and Nassar eventually admit that the contracts they claim they are entitled to prejudgment interest upon "did not require [Bailey Brake] to purchase the stock." Trout and Nassar Brief at p.37. The Chancellor correctly denied interest.

CONCLUSION

For the other reasons set forth herein and in its brief and to be set forth in oral argument, Bailey Brake respectfully requests:

1. That the Chancery Court's March 22, 2011 Order be reversed and rendered;
2. That mandamus issue directing the Chancery Court to enter a Final Judgment confirming the Decision of Arbiters;
3. That it be awarded its attorney's fees and expenses on this appeal and such additional relief as it may be entitled to under the premises.

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CERTIFICATE OF FILING

The undersigned does hereby certify that on June 1, 2012, the foregoing original Appellant's Reply/Cross-Appellee's Brief and three (3) copies of the same, along with an electronic copy of the same on optical disk in PDF format, were deposited in the U.S. mail for filing, postage prepaid, and addressed to:

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