

IN THE SUPREME COURT OF MISSISSIPPI

**ERNEST LANE, III, as EXECUTOR
OF THE ESTATE OF JAMES OLDRUM
SMITH, JR. and LIMESTONE
PRODUCTS, INC.**

APPELLANTS/CROSS APPELLEES

VS.

NO. 2016-CA-00941

RONALD D. LAMPKIN

APPELLEE/CROSS APPELLANT

**ON APPEAL FROM
THE CHANCERY COURT OF WARREN COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
CAUSE NO. 2007-151GN**

REPLY TO BRIEF OF APPELLEE / RESPONSE TO APPELLEE'S CROSS-APPEAL

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. Hon. George M. Ward, Chancellor, Jefferson County, Mississippi, Seventeenth Chancery Court District, P.O. Box 1144, Natchez, Mississippi 39121
2. Harris H. Barnes, III, Barnes Law Firm, P.A., Attorney for the Appellants, 5 River Bend Place, Suite A, Flowood, Mississippi 39232-7618
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5. David W. Mockbee, Mockbee, Hall, Drake & Hodge, P.A., Attorney for Appellee, 125 South Congress Street, Jackson, Mississippi 39201
6. D. Wesley Mockbee, Mockbee, Hall, Drake & Hodge, P.A., Attorney for Appellee, 125 South Congress Street, Jackson, Mississippi 39201

By: s/ Harris H. Barnes, III
Harris H. Barnes, III, Esq. (MSB #2018)

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STATEMENT REGARDING ORAL ARGUMENT

As this case involves highly complex issues and methodologies utilized in the accounting and valuation communities, which are essential to the calculation of damages; Appellants contend oral argument is absolutely necessary in order to make clear that there are accepted standards and methods under the applicable case law and within the accounting and valuation communities, as well as show all methodologies utilized by the Chancellor were, again, arbitrary and entirely contrary to these standards and methods, resulting in inadequate damages owed Appellants.

ARGUMENT

Appellee, Ronald D. Lampkin (“Lampkin”), in response to the *Brief of Appellants* filed by Appellants, the Estate of James Oldrum Smith, Jr. and Limestone Products, Inc. (the “Estate,” “Limestone,” or “Appellants”), filed its *Brief of Appellee/Cross-Appellant Ronald D. Lampkin* on January 30, 2017. Lampkin advances seven (7) primary arguments and a Cross-Appeal. Specifically, Lampkin alleges damages owed the Estate should be offset by alleged rent owed by the Estate to Lampkin after the property on which Limestone/Delta Stone operated was partitioned.

With respect to Lampkin’s Issue No. 1, “Lampkin agrees that the \$55,104.00 was incorrectly deducted from the lost assets and that one-half [1/2], or \$27,552.00, should be added back to the amount due the Smith Estate for a lost assets total of \$64,363.50 [due the Estate].”¹

Therefore, this issue is no longer in dispute.

¹ Appellee’s Br., at 3; with respect to references to the record on appeal, the number preceding the “R.” indicates the volume of the Record on Appeal. Any reference to the Supplemental Record will follow the same format, except any reference to said Supplemental Record will use “Supplemental R.” instead of “R.” Any reference following either of the two (2) formats above shall refer to the Record on Appeal in 2013-CA-00554, or 2013-CT-00554-SCT, or the initial appeal. References to the Record on Appeal for 2016-CA-00941, the present appeal, for exhibits offered by Appellee shall be designated as “Plaintiff’s Ex. 2, 55, or 56,” followed by the corresponding page number of the respective exhibits. References to the Record on Appeal for 2016-CA-00941, the present appeal, for record excerpts offered by Appellants shall be designated “2016-CA-00941 R.,” followed by the page number noted by the clerk, e.g. “Clerk Papers 1,” et

With respect to Lampkin’s Issue No. 2, which is the primary issue of contention, the Estate does not agree that its “real argument is that the Chancellor erred in refusing to accept the Smith Estate’s expert’s (Koerber’s) methodology and calculations.”² The Estate does agree that the “issue on remand was the Chancellor’s methodology and calculations.”³ The Chancellor’s method, like that of his first judgment, was entirely arbitrary and not based on reliable principles and methods accepted by the accounting and valuation communities, as well as by Mississippi courts. The issue is simple – 1) there are sound reliable principles and methods used to calculate lost profits, which are also accepted by Mississippi courts, or 2) courts are free to disregard these reliable principles and methods, opting instead to calculate lost profits based on their own ideas contrary to said reliable principles and methods, even though the trier of fact has no background or credentials in the respective fields. The Chancellor’s deviation from these principles and methods undoubtedly equates to an abuse of discretion.

With respect to Lampkin’s Issue No. 3, the Estate maintains the Chancellor erred in awarding damages in the amount of one dollar (\$1) per ton for *missing* rock. The Chancellor and Appellee have seemed confused about whether rock is *unreported* versus *missing*, and the Estate is mindful that the terms can be confusing. “Missing” means the rock never made it to the facility, being Limestone or, after conversion of the entire business, Delta Stone. Rather, this rock went to another entity controlled entirely by Lampkin. “Unreported” means the rock sales were unreported in Limestone’s accounting system. The distinguishing of the two (2) terms is important and will be discussed in greater detail below. However, the one dollar (\$1) per ton argument advanced by

seq., as there is only one (1) volume. While this brief will cite to the *Judgment on Remand* based on the record per the Clerk Papers, Appellants would note that the *Judgment on Remand* is also included as Appellants second record excerpt, or pages 41-60 of Appellants’ record excerpts.

² *Id.*

³ *Id.*

Lampkin is based on an unenforceable oral agreement between Lampkin and Smith while Smith was alive. Upholding this oral agreement only serves to reduce the amount of damages owed Limestone, and the proof is undeniable that this oral agreement was not honored when Smith was alive. Not to mention, the oral agreement cannot be enforced due to the statute of frauds.

With respect to Lampkin's Issue No. 4, the Estate does not agree that the Chancellor "properly declined to award lost rental damages to the Smith Estate for the period of November, 2011 through June, 2012."⁴ Lampkin contends no rent is due after the land at issue was partitioned. However, if lost profits run through the first half of 2012, as the Chancellor determined, these lost profits would still factor this avoided rent that was no longer being paid, as it was no longer a fixed cost, regardless of any partition of the property. Therefore, even if the Estate would be barred from seeking rent owed after the property was partitioned as landlord, Limestone would still have a claim based on the rent being avoided after the partition in the form of lost profits, which would increase damages owed the Estate. Contrary to Lampkin's assertions, the damages were liquidated via the terms of the valid lease agreement; as such, prejudgment interest is warranted. Similarly, the terms of the valid lease agreement expressly provided for the payment of attorneys' fees.

With respect to Lampkin's Issue No. 5, the Estate contends attorneys' fees, expert witness fees, and expenses are warranted in order to compensate the Estate for the "entire loss" suffered."⁵ This liability is not limited to the recovery of profits or to 'out-of-pocket' loss."⁶ While the trial court was correct in its *Judgment on Remand*, that "the remand did not [specifically] include the need to provide attorneys' fees and costs of litigation as an element of damages," the Supreme

⁴ *Id.*, at 33.

⁵ *Lane v. Lampkin*, 175 So.3d 1222, ¶¶ 11, 14, 16, 17, and 21 (Miss. 2015).

⁶ *Id.* ¶ 11; citing *Aqua-Culture Techs., Ltd. v. Holly*, 677 So. 2d 171, 183-84 (Miss. 1996) (quoting *Norte & Co. v. Huffines*, 288 F. Supp. 855, 864 (S.D.N.Y. 1968)).

Court did continually emphasize the need to compensate for the entire loss suffered.⁷ This entire loss should absolutely include attorneys' fees and expert witness fees incurred in pursuing the damages for the breach on behalf of the corporation. The Estate absolutely contends the fees are warranted given the usurpation of an entire business. Further, based on proper damage calculations, coupled with appropriate damages for the lease agreement, Lampkin's conduct could easily be found to warrant punitive damages. Regardless, these fees are "out-of-pocket" losses.

With respect to Lampkin's Issue No. 6, the Estate simply seeks consistency. The Chancellor determined that lost profits should end at the first half of 2012; yet, the Chancellor allowed Lampkin a setoff based on a quarterly management draw through the end of 2012. This management draw never existed until the fourth quarter of 2006, after Smith's death. Therefore, no setoff is warranted. Damages for rent were cut off at the partition date, which was in November of 2011. Regardless of the partition date, lost profits, if lasting through the first half of 2012, should include the avoided rent. The partition of the property does not change the fact that rent was not paid through at least the first half of 2012, which would increase lost profits. Similarly, lost profits cannot last through the first half of 2012 and then be set off by management draws for the remainder of the year, assuming *arguendo* that such a setoff is even warranted. If the lost profits damage period is cut off at the first half of 2012, then rent should be included through that date; and no setoff for management draws should be allowed beyond that date, if at all.

With respect to Lampkin's Issue No. 7, the Estate contends that no reduction per Lampkin's Cross-Appeal is warranted. Lampkin is essentially asking this Court to create a lease that did not exist out of thin air. The record is clear that Limestone, or Delta Stone (which is only Limestone with a new name), would pay \$4,000 per month to Lampkin and Smith to lease the premises on

⁷ (2016-CA-00941 R. at 7).

which it operated; and Limestone continually paid this amount monthly until Lampkin ceased making payments after usurping Limestone and forming Delta Stone. The record is entirely devoid of any agreement or intent by any party that the Estate owe Smith and Lampkin any rent for occupying part of the land subject to the valid lease agreement. The deed whereby Lampkin became an owner of the land clearly shows that Smith conveyed Lampkin “an undivided one-half interest” in the land at issue; and Smith retained the same interest.⁸ Therefore, Smith, as well as his estate, was allowed to use one hundred percent (100%) of the leased premises, as was Limestone; however, only Limestone was required to pay rent per a valid lease agreement. Therefore, there should be no setoff due to the Estate occupying any portion of the leased premises.

On the first appeal, the Supreme Court found that Chancellor’s damages assessment to be “arbitrary.”⁹ The Chancellor’s damages assessment in his *Judgment on Remand* is also arbitrary.

I. Lost Assets

With respect to Lampkin’s Issue No. 1, “Lampkin agrees that the \$55,104.00 was incorrectly deducted from the assets valuation and that one-half [1/2], or \$27,552.00, should be added back to the amount due the Smith Estate for a lost assets total of \$64,363.50 [due the Estate].”¹⁰ This issue is no longer in dispute. As such, the Estate is due \$64,363.50 for lost assets.

II. The Chancellor’s Lost Profits Methodology and Calculations

With respect lost profits, which is the primary issue of contention, the Estate does not agree that its “real argument is that the Chancellor erred in refusing to accept the Smith Estate’s expert’s

⁸ The deed was duly recorded at Book 1168, Page 689 in the land records of Warren County, Mississippi. As such, this Court may take judicial notice of this fact via Rule 201(b) of the Mississippi Rules of Evidence, as explained in *Enroth v. Mem’l Hosp. at Gulfport*, 566 So. 2d 202, 205 (Miss. 1990).

⁹ *Lane v. Lampkin*, at ¶ 29.

¹⁰ Appellee’s Br., at 3.

(Koerber's) methodology and calculations."¹¹ The Estate does agree that the "issue on remand was the Chancellor's methodology and calculations."¹² However, the Chancellor's method was entirely arbitrary and not based on reliable principles and methods accepted by the accounting and valuation communities, as well as by Mississippi courts. The Estate contends the Chancellor should have performed its calculations based on reliable principles and methods, as Koerber did, even if he reached a somewhat different conclusion. Koerber's methodology and calculations, on the other hand, were entirely based on reliable principles and methods accepted by the accounting and valuation communities, as well as by Mississippi courts; and Koerber adhered to these principles and methods without deviation. In essence, had the Chancellor followed these same principles and methods, he would have reached essentially the same conclusions as Koerber. The issue is simple – 1) there are sound reliable principles and methods used to calculate lost profits, which are also accepted by Mississippi courts, or 2) courts are free to disregard these reliable principles and methods, opting instead to calculate lost profits based on their own ideas contrary to said reliable principles and methods, even though the trier of fact has no background or credentials in the respective fields. The Estate contends the reliable principles and methods, which are accepted by Mississippi courts, must be followed. The Chancellor's deviation from these principles and methods undoubtedly equates to an abuse of discretion.

The reliable principles and methods *must* be used to calculate lost profits. The Chancellor's use of actual gross sales, gross profits, and average operating expenses to arrive at net profits, despite contradicting the reliable principles and methods, does not show the damage caused by Lampkin's usurpation of an entire company. Per the *Judgment on Remand*, gross sales were \$4,040,975 in 2007; \$3,340,577 in 2008; \$3,616,547 in 2009; \$2,546,965 in 2010; and

¹¹ *Id.*

¹² *Id.*

\$2,906,452.25, respectively.¹³ During this time, Lampkin also greatly increased the price of rock sold; and, after the usurpation, Lampkin was solely responsible for any additional expenses incurred other than the variable/avoided costs. Had Lampkin not usurped the company, he and the Estate would evenly split whatever net profit may have existed, if any. Of course, the Estate would've been allowed to participate as a shareholder, including the right to elect directors and, in turn, officers, who would've made decisions related to the company's operations. However, this was not the case; and the Estate cannot be forced to "tag along" while Lampkin ran the company into the ground, again, after he also greatly increased the price of the product being sold. Whatever happened after the usurpation was entirely out of the Estate's control. In the tort arena, you take your victim as you find them. This is why reliable principles and methods must be used, as opposed to actual net profits; but the reliable principles and methods make perfect sense. We know how much product was ordered to be sold, and we know its cost per the Tower and Luhr invoices. We know the prices at which the rock was sold by the company, which were significantly higher than prior to the usurpation. Based on historical financials prior to the usurpation, one can accurately determine the variable costs associated with the sales of the all the products with a reasonable degree of certainty. That's all that's needed to calculate lost profits, and it can be done with a reasonable degree of certainty, as was done by Koerber. If nothing else changed, looking at things inside a vacuum with no other factors related to actual operations, net profits would have increased by this amount. This is how lost profits are calculated. That's why they're lost. This is why actual profits are entirely irrelevant. If Lampkin didn't want to risk being sued for lost profits, he shouldn't have stolen a company, but he did; and the lost profits must be calculated appropriately in order to compensate the Estate for the entire loss suffered.

¹³ *Judgment on Remand*, at 13.

A Practice Aid promulgated by the AICPA contains the following:

Only lost “net” profits are allowed as damages. Lost “net” profit is computed, in general, **by estimating the gross revenue** that would have been earned but for the wrongful act **reduced by avoided costs**. *Avoided costs* are defined as those incremental costs that were not incurred because of the loss of the revenue. After the net lost profits are determined, any actual profits earned are deducted to compute the damages.¹⁴

Koerber’s methodology is sound and supported by the following Mississippi law:

So, under Mississippi law, a plaintiff is entitled to the gross amount that **would have** been received pursuant to the business that was interrupted by a defendant's wrongful act, less the cost of running the business. *Fred's Stores of Mississippi, Inc. v. M & H Drugs, Inc.*, 725 So.2d 902, 914 (Miss.1998) (quoting *Cook Indus., Inc. v. Carlson*, 334 F.Supp. 809, 817 (N.D.Miss.1971)). **Variable costs**^{FN7} **related to lost business opportunities (e.g., labor, utilities, etc.) must be deducted from a gross profit estimate. Fixed overhead costs that would have been incurred under any circumstance (e.g., depreciation, rent, etc.) need not be.**^{FN8} **Reduced to a simple equation, lost income equals the revenue that would have been generated less those variable costs that would have been incurred in the absence of the complained of breach. See *Work v. Commercial Underwriters Ins. Co.*, 61 Fed.Appx. 120 (5th Cir.2003), citing *Lovett and Sure-Trip, Inc. v. Westinghouse Engineering*, 47 F.3d 526, 531 (2d Cir.1995) (“Where plaintiff is seeking to recover lost profits, such damages are equal to the revenue that would have been derived, less additional costs that would have been incurred”).**

FN7. **Variable costs include labor, material or overhead that changes according to the change in the volume of production units.** Combined with fixed costs, variable costs make up the total cost of production. While the total variable cost changes with increased production, the total fixed costs stay the same. See www.investorwords.com.

FN8. **Fixed costs, which do not vary depending on production or sales levels, are costs such as rent, property tax, insurance, or interest expense.** See www.investorwords.com.¹⁵

Koerber’s methodology was entirely sound and not “speculative,” as contended by Lampkin.¹⁶

Koerber’s methodology followed these principles and methods without deviation; and the Chancellor never even attempted to employ these principles and methods. Further, with respect

¹⁴ (7 Supplemental R. at 0945).

¹⁵ *J&B Entertainment v. City of Jackson, Mississippi*, et al., 720 F. Supp.2d 757, at 764-765 (S.D. Miss. 2010).

¹⁶ Appellee’s Br., at 15.

to lost profits, “[d]amages are deemed speculative only when the cause is uncertain, not when the amount is uncertain.”¹⁷ Koerber’s calculations can hardly be considered speculative. They analyzed all product bought and shipped to the facility, prices at which the product was sold, and all variable costs associated with the sales of all product – all of this information was directly taken from invoices and utilized the company’s financials for variable costs. Yet, Lampkin contends “methodology used [by the Chancellor] accords with Mississippi law on lost profits and [the] AICPA’s Practice Aid...”¹⁸ Nothing could be further from the truth.

Lampkin contends the Chancellor’s use of “actual gross sales” was “reasonable,” but all authority mandates the gross revenues *must* be estimated, which Koerber did using reliable principles and methods by taking the tons of rock sold and multiplying by the sales prices.¹⁹ The costs of goods sold were approximately ninety percent (90%), and these variable costs should be factored in calculating lost profits. However, the Chancellor went on to deduct all operating expenses from the gross profit, albeit based on an average, which Lampkin refers to as “Overhead.”²⁰ This is ludicrous, as these operating expenses include many fixed costs that should absolutely not be utilized in calculating lost profits, as these expenses would have been borne regardless. The relevant case law and AICPA materials state exactly that. Some of these expenses were variable, such as repairs and maintenance, equipment fuel and maintenance, and fleeting; and Koerber included these costs in calculating lost profits where applicable, as was proper. However, reductions to lost profits for taxes and licenses, interest, depreciation, advertising, rent (that wasn’t paid), insurance, utilities and phone, professional fee, office supplies, etc. are not warranted under the law or pursuant to reliable principles and methods. It is worth noting that the figures utilized

¹⁷ *Parker Tractor & Implement Co. v. Johnson*, 819 So.2d 1234, 1239 (Miss.2002).

¹⁸ *Id.*

¹⁹ Appellee’s Br., at 18.

²⁰ *Id.*, at 19.

by the Chancellor for costs of goods sold and overhead came from Korber's *Financial Analysis*, which was solely used to determine the financial condition of Limestone as it related to the necessity of the line of credit. Koerber's *Forensic Analysis*, on the other hand, was used to calculate lost profits. Similarly, the revenue figures used incorrectly by the Chancellor, while from the *Forensic Analysis*, came from Koerber's Cost Analysis where he determined which costs were fixed and which were avoided, or variable, based on historical financials.

Yet, Lampkin contends the Chancellor's methodology was proper. Lampkin claims using actual sales figures from Delta Stone adhered to the Yardstick Method, and actual operating expenses adhered to the Before and After Method.²¹ Lampkin discusses the Before and After Method, quoting from the AICPA Practice Aid, stating, "[t]he underlying theory is that, 'but for' the defendant's action, the plaintiff would have experienced the same level of revenues and profits after the event or action as the plaintiff did before that event or action."²²

First, the Before and After Method addresses *revenues*; and Lampkin offers this method to support using actual operating *expenses*, which, for the most part, being fixed costs, would not affect lost profits. Second, the same materials warn that "the practitioner, however, should consider other factors that could have affected the plaintiff's level of *revenues* and demonstrate how those factors have been taken into consideration."²³ This would include the increases in the price of rock sold. The same warning regarding "other factors that could have caused plaintiff's performance to differ from the yardstick" are present in the AICPA materials cited by Lampkin with respect to the Yardstick Method.²⁴ The rock price increases are such factors. Additionally, the Yardstick Method cannot be used for revenue figures, as argued by Lampkin, since revenues

²¹ *Id.*

²² *Id.*, at 17.

²³ *Id.*

²⁴ *Id.*

must be estimated where a breach of fiduciary duty exists. Based on the foregoing, the Chancellor did not apply “AICPA principles and guidelines to the facts and circumstances” and did not “estimate the loss using the most reasonable basis available given the information provided by the parties per the AICPA’s Practice Aid 06-4,” as argued by Lampkin.²⁵ Assuming the Chancellor “found that Koerber did not prove that the lost profits damages Koerber calculated were reasonable or calculated using reliable factors without undue speculation per AICPA’s Practice Aid 06-4,” the Chancellor is manifestly in error, which is the basis for the abuse of discretion alleged. Based on Lampkin’s own brief, the Chancellor did not “appl[y] a combination of the ‘Before and After’ and ‘Yardstick’ methods...,” at least not per the AICPA’s Practice Aid 06-4, as alleged.²⁶

The Chancellor indicated “Koerber failed to consider shrinkage.”²⁷ Yet, nowhere in the initial judgment was shrinkage factored into damages; and nowhere in the Supreme Court’s decision was the Chancellor instructed to consider shrinkage. Why should shrinkage be considered now, especially since no records or accounts were ever kept with respect to shrinkage like depreciation? If shrinkage did, in fact, exist, it would be an avoided cost; but, with no prior historical entries related to shrinkage, it cannot now be considered as an avoided cost. Now, on remand, despite no instruction to do so, the Chancellor has now applied a shrinkage factor.

The Chancellor also stated, “to expect [figures from the year after Hurricane Katrina] to continue is unreasonable and not supported by the actual numbers from Delta Stone.”²⁸ The Chancellor, like Lampkin appears to argue that if the actual profits of the company were so low, then lost profits could not possibly be so high. This is the very flaw in the Chancellor’s reasoning

²⁵ *Id.*, at 19.

²⁶ *Id.*, at 20.

²⁷ *Id.*, at 20.

²⁸ *Id.*, at 20.

present in the excerpt from the trial transcript. In his *Judgment on Remand*, the Chancellor referenced the following exchange between Lampkin’s counsel and the Estate’s expert:

Q: So you’re projecting that Limestone would have made after 2007 on average 10 times the profit that it enjoyed prior to 2007?

A: ***Based on lost profits, not net income, but lost profits.*** Yes, sir. That’s different. ***That’s apples and oranges.***

Q: But the year 2000 to 2008, the financial data gave you a good trend of how the business had gone, didn’t it?

A: ***Yes, sir. But that’s financial. This is damages.***²⁹

It is apples and oranges. Actual profits simply have no bearing on lost profits. For the same reason, it doesn’t matter that “Koerber’s damage calculation was ‘ten times greater than the average net income for the company...’” or that “actual sales and expense numbers of the alter ego [Delta Stone] do not support this great leap of profits.”³⁰ Lost profits and actual profits are simply unrelated. Period. As Koerber made clear, one (1) is financial, the other is damages.

Recall the Estate’s example from the first appeal with respect to a law firm. Assume this law firm operates at a \$100,000 loss for 5 years before one fifty percent (50%) co-owner, the lawyer, usurps the business. Immediately after the usurpation, this lawyer doubles his billing rate from \$200 per hour to \$400 per hour and works the same amount of hours each year for five (5) years prior to the usurpation, as well as the five (5) years post-usurpation. Assume the amount of hours worked each year is one hundred (100) hours. Expenses stay the same – fixed costs. Assume no variable costs in light of the fact that the firm’s overhead remains the same, and no such variable costs, e.g. loading costs, based on the amount of product sold exist – costs of goods sold. The firm now has \$20,000 more in revenue each year, but the company would still operate at a “loss” of \$80,000 per year after the usurpation. The frozen-out owner would still be entitled to \$50,000, or

²⁹ (2016-CA-00941 R. at 51-52).

³⁰ Appellee’s Br., at 20.

\$10,000 per year, in lost profits, even though the firm operated at a loss both before and after the usurpation. This is why lost profits are wholly irrelevant from actual profits.

Koerber has repeatedly explained that his “failure to use the 2004 year to compute averages” was based on the fact that there were no discrepancies warranting lost profits in 2004. Similarly, with respect to Koerber’s “use of 16 months of income with twelve months of expenses for the 2006 year,” Koerber explained that some lost profits were removed from 2007 and added to 2006 to represent a clear break between the time when Limestone was operating and the time it was unilaterally shutdown by Lampkin, allowing a clear break in calculating lost profits prior to and after the shutdown of Limestone.³¹ Variable costs were still factored into the lost profits removed from 2007 and added to 2006; and actual overhead, or fixed costs, need not be factored into the analysis. Lampkin also addresses the Chancellor’s comments that “issues of credibility of witnesses and reliability of evidence...[were] not changed by reversal and remand.” This is true, but the Supreme Court entirely rejected Lampkin’s expert’s entire analysis.

Lampkin states the following with respect to the Chancellor’s alleged lost profits analysis:

More specifically, Chancellor Ward employed a lost profits analysis that calculated “the entire loss suffered by the corporation” after concluding:

(a) “...the only place to look for these totals is the gross sales for each year.”

Judgment on Remand, p. 9; CP. at 49;

(b) The Court then had to “find a way to approximate the actual expenses.”

Id.;

This is simply not how lost profits are calculated. Rather than look to gross sales, revenues should have been estimated based on reliable principles and methods, as Koerber did. Actual expenses should not be used; instead, variable costs are determined based on reliable principles and methods, as Koerber did. The Chancellor continued to balk at lost profits calculated in accordance with reliable principles and methods based on actual profits, because the Chancellor simply does not

³¹ *Id.*, at 21.

understand how lost profits are calculated and why. The two (2) concepts are unrelated – apples and oranges. The fact that the Estate is stressing this issue is not “an attempt to hide the fact that Chancellor Ward rejected the Smith Estate’s lost profits calculations because of the lack of credible proof offered by the Smith Estate at trial.”³² There was no lack of credible proof; the Chancellor simply applied his own method, because of his lack of understanding. Koerber’s figures were not one-sided; they were simply calculated based on reliable principles and methods. Had the Chancellor done the same, he would have arrived at similar figures.

Similarly, the Chancellor did not understand the “unreported rock” when he determined Koerber’s calculation[s] were erroneous and tainted Koerber’s entire lost profits[] figure.”³³ The confusion with respect to the terms, “missing” and “unreported” have been addressed above. Further, the Supreme Court instructed the Chancellor, on remand, to consider this unreported rock.³⁴ Specifically, the Supreme Court stated the following:

“We hold that such ‘entire loss’ includes the corporate inventory diverted from Limestone to Delta Stone. *It is clear that the rock was not accounted for*, as the Chancellor held, but also that it had been removed from Limestone to Delta Stone. This transfer of corporate assets constituted a breach of Lampkin’s fiduciary obligation to Limestone for which he should be held accountable.”³⁵

As such, it just does not matter that rock was found in Delta Stone or its books. It remains unreported in Limestone and its accounting system, which warrants lost profits calculated in accordance with reliable principles and methods.

III. \$1/ton for Missing Rock

The Estate maintains the Chancellor erred in awarding damages in the amount of one dollar (\$1) per ton for *missing* rock. The Chancellor and Appellee have seemed confused about whether

³² *Id.*, at 25.

³³ *Id.*

³⁴ *Lane v. Lampkin*, 175 So.3d 1222, at ¶¶ 22 (Miss. 2015).

³⁵ *Id.*, at ¶¶ 21.

rock is *unreported* versus *missing*, and the Estate is mindful that the terms can be confusing. “Missing” means the rock never made it to the facility, being Limestone or, after conversion of the entire business, Delta Stone. Rather, this rock went to another entity controlled entirely by Lampkin, such as Lampkin Construction, or directly to one (1) of Lampkin’s jobs in Natchez. “Unreported” means the rock sales were unreported in Limestone’s accounting system. The distinguishing of the two (2) terms is important. However, the one dollar (\$1) per ton argument is based on an unenforceable oral agreement between Lampkin and Smith while Smith was alive. Upholding this oral agreement only serves to reduce the amount of damages owed Limestone, and the proof is undeniable that this oral agreement was not honored when Smith was alive. Not to mention, the oral agreement cannot be enforced due to the statute of frauds.

In the portion of the trial court’s *Judgment on Remand*, the Chancellor was concerned with “35,000 [to] 36,000 tons” that were “not part of Limestone Products[‘] business...”³⁶ Thus, while Koerber found “808,023 tons” unreported from Limestone’s books, “36,000 tons” were missing from Limestone’s books and Delta Stone’s books.³⁷ Lampkin claims that any damages for these 36,000 tons should be calculated at \$1 per ton based on an alleged oral agreement between Smith and Lampkin prior to the death of Smith. However, the tons at issue were based on rock that showed up on the Tower and Luhr invoices that was not reported through Limestone or Delta Stone, which was formed after Smith’s death. The distinction between missing and unreported rock should clear up any and all issues in the Estate’s favor.

The Supreme Court of Mississippi has previously discussed whether such an oral contract is too indefinite in the following excerpt from *Poole v. Johns-Manville Products Corp.*:

³⁶ (2016-CA-00941 R. at 55).

³⁷ Appellee’s Br., at 26.

In the case of *Gerachi v. Sherwin-Williams Co.*, 156 Miss. 36, 125 So. 410, the Court held that under the statute a suit cannot be maintained upon an oral agreement which is not performed within the space of fifteen months from the making thereof, and that where a verbal contract did not have a specified period of time within which it was to be performed, but was considered by the parties to be permanent and to remain in force as long as the buyer paid for the goods sold, an action could not be maintained to enforce the agreement.³⁸

The Estate agrees that such an agreement, while too indefinite, could still be unaffected by the statute of frauds if both parties continued to comply with agreement. However, the facts show that the parties did not abide by this agreement. Even Lampkin's expert stated, "and as a result of that sample we found that in [2005 and 2006] in computation of paying the dollar over cost, [Lampkin] actually paid a little bit more in those samples."³⁹ According to Lampkin's expert, it was around forty percent (40%) more.⁴⁰ Even if this Court finds the agreement valid; it cannot be valid after Smith's death or the conversion of the company. It is also noteworthy that the trial court sustained all objections as to anything said by J.O. Smith, while living, regarding this oral agreement.⁴¹

As the oral agreement is unenforceable, damages should be awarded at a higher amount than \$1 per ton. The Estate is mindful that these missing 36,000 tons were missing during 2007 and forward; and these missing tons were not included in Koerber's lost profits calculations for unreported rock. As such, based on Koerber's reliable lost profits calculations, lost profits per ton from 2007 through 2010 averaged \$1.70 per ton. This results in damages in the amount of \$61,200, one-half (1/2) of which is due the Estate.

³⁸ *Poole v. Johns-Manville Products Corp.*, 49 So.2d 891, at 893 (Miss. 1951)(emphasis added).

³⁹ (10 R. at 355:24-27).

⁴⁰ *Id.* at 355:22-23.

⁴¹ (9 R. at 238-243).

IV. Damage Period for Rent Owed the Estate

The Estate does not agree that the Chancellor “properly declined to award lost rental damages to the Smith Estate for the period of November, 2011 through June, 2012.”⁴² Lampkin contends no rent is due after the land at issue was partitioned. However, if lost profits run through the first half of 2012, as the Chancellor determined, these lost profits would still factor in rent that was no longer being paid, as it was no longer a fixed cost, regardless of any partition of the property. Therefore, even if the Estate would be barred from seeking rent owed after the property was partitioned as landlord, Limestone would still have a claim based on the rent being avoided after the partition in the form of lost profits, which would increase damages owed the Estate. Contrary to Lampkin’s assertions, the damages were liquidated via the terms of the valid lease agreement; as such, prejudgment interest is warranted. Similarly, the terms of the valid lease agreement expressly provided for the payment of attorneys’ fees.

Lampkin contends that, due to the Partition Suit judgment, “the Smith Estate lost any ownership interest in the property leased by Limestone Products (and later used by Delta Stone)” at that time. This may be true with respect to ownership, but it doesn’t change the fact that rent was not paid during this period, which is inside the lost profits period, as determined by the Chancellor. As will be discussed in greater detail below, the damage period must be consistent for all damages associated with lost profits.

Lampkin further claims that no interest is due the Estate, since the “claim was not liquidated prior to judgment.”⁴³ Lampkin’s reliance on *Warwick v. Matheny* is misguided. Of course, the claim was liquidated. The amount of rent owed is clearly in the lease agreement. Mississippi recognizes judicial authority to award prejudgment interest to a prevailing party in

⁴² *Id.*, at 33.

⁴³ Appellee’s Br., at 34.

a breach of contract suit.⁴⁴ Damages being “liquidated” refers to damages that are set or determined by a contract when a breach occurs.⁴⁵ There can be no dispute that the damages are liquidated based on the terms of the lease agreement requiring rent in the amount of \$4,000 per month, a liquidated amount when the breach occurred each month after Lampkin ceased paying rent. The principal amount has been fixed at \$4,000 per month, or \$2,000 per month to the Estate. Mississippi law provides that “The rate of legal interest on . . . contracts shall be 8% per annum calculated according to the actuarial method. . . .”⁴⁶ In *Baxter*, the Court held that the above-referenced statute requires that interest be compounded annually, citing *Stovall v. Illinois Central Gulf R.R. Co.*, 722 F.2d 190, 192 (5th Cir. 1984). Therefore, prejudgment interest should be awarded and should be compounded annually on \$2,000 from the date each month’s rent was not paid throughout the damage period.

While Lampkin is correct that “the claim for attorneys’ fees under the Lease Agreement was not an issue on remand...”⁴⁷ However, the Mississippi Supreme Court did remand the issue of whether any rent was owed at all.⁴⁸ The Estate has continually sought attorneys’ fees expressly provided for in the valid lease agreement and cannot now be barred from seeking interest when, in fact, rent has actually been awarded on remand. As for Lampkin’s assertions that the “claim for attorneys’ fees is not supported by any proof as to the reasonableness of the attorneys’ fees claimed,” the Estate would argue that twenty-five percent (25%) is customarily awarded for attorneys’ fees across multiple areas of law.

⁴⁴ *Moeller v. American Guarantee and Liability Insurance*, 812 So.2d 953, at ¶ 11 (Miss. 2002); citing *Preferred Risk Mut. Ins. Co. v. Johnson*, 730 So.2d 574, 577 (Miss.1998).

⁴⁵ *Id.*; citing Black’s Law Dictionary 395, at (7th ed.1999).

⁴⁶ Miss. Code Ann. 75-17-1(1) (Rev. 2000). *Baxter v. Shaw Assoc., Inc.*, 797 So.2d 396 (Ct.App.Miss. 2001).

⁴⁷ *Id.*, at 35.

⁴⁸ *Id.*, at 1; see also *Lane v. Lampkin*, 175 So.3d 1222, at ¶ 5 (Miss. 2015).

V. Attorney's Fees, Expert Witness Fees, and Expenses

The Estate contends attorneys' fees, expert witness fees, and expenses are warranted in order to compensate the Estate for the "entire loss" suffered, as directed by the Mississippi Supreme Court.⁴⁹ This liability is not limited to the recovery of profits or to 'out-of-pocket' loss."⁵⁰ While the trial court was correct in its *Judgment on Remand*, that "the remand did not [specifically] include the need to provide attorneys' fees and costs of litigation as an element of damages," the Supreme Court did continually emphasize the need to compensate for the entire loss suffered.⁵¹ This entire loss should absolutely include attorneys' fees and expert witness fees incurred in pursuing the damages for the breach on behalf of the corporation. As with all other damages, one-half (1/2) would typically be due the Estate. However, the Estate has essentially advanced all attorneys' fees and expert witness fees on behalf of the corporation; and the corporation should be made whole via an award of attorneys' fees and expert witness fees, which should be, first, paid to reimburse to the Estate before being split evenly among the shareholders. Lampkin continually refers to the Estate's failure to guarantee the line of credit of Limestone; however, Lampkin also continues to ignore that the trial court found that the Estate was not given the requisite financial records to make a determination with respect to the line of credit. Rather than provide this information at a later date, even if that meant allowing the time to guarantee to expire, as the Chancellor pointed out would have been more appropriate, Lampkin simply stole an entire business. The Estate absolutely contends the fees are warranted given the usurpation of an entire business. Lampkin also took all the money from Limestone's bank account. Further, if lost profits damages are calculated in accordance with reliable principles and methods, coupled with

⁴⁹ *Lane v. Lampkin*, 175 So.3d 1222, ¶¶ 11, 14, 16, 17, and 21 (Miss. 2015).

⁵⁰ *Id.* ¶ 11; citing *Aqua-Culture Techs., Ltd. v. Holly*, 677 So. 2d 171, 183-84 (Miss. 1996) (quoting *Norte & Co. v. Huffines*, 288 F. Supp. 855, 864 (S.D.N.Y. 1968)).

⁵¹ (2016-CA-00941 R. at 7).

appropriate damages for breach of the lease agreement, Lampkin’s conduct could easily be found to warrant punitive damages. Regardless, these fees are “out-of-pocket” losses. Put frankly, if punitive damages are not appropriate for Lampkin’s deceit and statutory violations related to the line of credit and theft of an entire business, which would warrant attorneys’ fees, the Estate has a hard time imagining what type of conduct would warrant fees, particularly where Mississippi courts have routinely awarded such for similar conduct.

Lampkin is also being entirely disingenuous in stating that the Estate “claims, again[,] for the first time on this appeal, that attorneys’ fees should be calculated as part of the ‘entire loss suffered...’”⁵² An entire section of the Estate’s Supplemental Brief submitted to the trial court was dedicated to this issue, and the Estate has continued to advance its arguments for fees throughout both appeals in an attempt to compensated for the entire loss suffered. Further, Lampkin ignores that the Chancellor noted, in its initial judgment where it found Lampkin usurped the business, “the Court is also not convinced that the Estate was given ample information or time to decide whether they wanted to re[]new the line of credit.”⁵³ In this judgment, the Chancellor also noted that shareholders were not allowed to inspect the company’s records contrary to rights afforded all shareholders by Mississippi law.⁵⁴ The Chancellor continued with the following:

If the line [of credit] was so crucial to operating the business, Lampkin, who was aware of the deadline, had a fiduciary duty to the corporation to cooperate with the Estate to meet that deadline. Where it appears that Lampkin did not timely provide the estate with the financial information they needed to make an informed decision on whether to renew the line of credit, he cannot argue that since the estate failed to renew the line of credit he should be relieved from any further fiduciary duty he owed to Limestone. The Estate should have been provided more time to make a determination, even if that meant allowing the line to mature and letting the line sit for a few more weeks or months while Limestone’s documents were inspected.

⁵² Appellee’s Br., at 37.

⁵³ *Judgment on Valuation of Business*, at 4.

⁵⁴ *Id.*, at 5.

What is particularly troubling to the Court, is that Lampkin had so much to gain by the Estate not renewing the line of credit by the deadline. Lampkin Construction, which is owned by Mr. Lampkin was Limestone's largest customer. In fact, Lampkin Construction at times accounted for as much as 50% of Limestone's business. Moreover, according to Mr. Lampkin, a part of the agreement made with Mr. Smith in 1999 was that Lampkin Construction would buy its rock from Limestone Products. When the line of credit was not renewed in 2006, Lampkin no longer bought rock from Limestone, and his new company Delta Stone, began operating the same business, using the same real property, facilities, and equipment, and selling rock to the same customers as Limestone Products.⁵⁵

Again, Lampkin also refused to allow the Estate to examine the books and records of Limestone, even though the Estate had a statutory right to do so, and even insisted the Estate sign a confidentiality agreement with respect to its review of the records if it were allowed to inspect said records. The Estate contends attorneys' fees are justified, as Lampkin's conduct warrants the imposition of punitive damages. Even if this were not the case, the Estate and Limestone should be reimbursed for the entire loss suffered, which would include out-of-pocket costs, or the attorneys' fees and expert witness fees. These fees were incurred by Limestone and the Estate in pursuing the theft of the business. These fees should be paid by Lampkin, the wrongdoer.

VI. Damage Period

With respect to Lampkin's Issue No. 6, all the Estate asks for is consistency. The Chancellor determined that lost profits should end at the first half of 2012; yet the Chancellor allowed Lampkin a setoff based on a quarterly management draw through the end of 2012. Recall, this quarterly management draw is a fixed cost, which should not serve to reduce lost profits based on the relevant case law, as well as reliable principles and methods accepted by the accounting and valuation communities. Additionally, damages for rent were cut off at the partition date, which was in November of 2011. Again, regardless of the partition date, lost profits, if lasting through the first half of 2012, should include rent, since rent was no longer a fixed cost, as it was avoided

⁵⁵ *Id.*, at 7-8.

once Lampkin ceased paying rent. The partition of the property does not change the fact that rent was not paid through at least the first half of 2012; as such, that would increase lost profits. Similarly, lost profits cannot last through the first half of 2012 and then be set off by management draws for the remainder of the year, even though the setoff is entirely unwarranted due to the fact that the fee was first imposed in the further quarter of 2006 after Smith died. If the lost profits damage period is truly cut off at the first half of 2012, then rent should be included through date; and no setoff for management draws should be allowed at all and certainly not beyond that date, if at all. Lastly, the Estate contends lost profits damages should also include unreported rock from 2003 through 2006.

VII. Damages Recap

The Estate contends that no reduction per Lampkin's Cross-Appeal is warranted. Lampkin is essentially asking this Court to create a lease that did not exist out of thin air. The record is clear that Limestone, or Delta Stone (which is only Limestone with a new name), would pay \$4,000 per month to Lampkin and Smith to lease the premises on which it operated; and Limestone continually paid this amount monthly until Lampkin ceases making payments after usurping Limestone and forming Delta Stone. Further, the record is entirely devoid of any agreement or intent by any party that the Estate owe Smith and Lampkin any rent for occupying part of the land subject to the valid lease agreement. Further, the deed whereby Lampkin became an owner of the land clearly shows that Smith conveyed Lampkin "an undivided one-half interest" in the land at issue.⁵⁶ Therefore, Smith, as well as his estate, was allowed to use one hundred percent (100%) of the leased premises during the term in which Lampkin seeks a setoff, as was Limestone;

⁵⁶ The deed was duly recorded at Book 1168, Page 689 in the land records of Warren County, Mississippi. As such, this Court may take judicial notice of this fact via Rule 201(b) of the Mississippi Rules of Evidence, as explained in *Enroth v. Mem'l Hosp. at Gulfport*, 566 So. 2d 202, 205 (Miss. 1990).

however, only Limestone was required to pay rent in accordance with a valid lease agreement. Therefore, there should be no setoff due to the Estate occupying any portion of the leased premises.

VIII. Cross-Appeal Issue – Effect of Partition Suit, of Lack Thereof

The Estate contends the lack of merit with respect to Lampkin's claim for an offset of rent from January 2007 through the date of the partition judgment has been thoroughly addressed in Section VII, above. The Estate and Lampkin each owned an undivided one-half interest in the entire property; however, only Limestone/Delta Stone was required to pay rent pursuant to a valid lease agreement.

IX. Calculation of Damages.

Based on the foregoing, the damages owed the Estate are as follows:

- 1) \$64,363.50 for lost assets;
- 2) \$244,611 (1/2 of \$489,222 for lost profits 2003 through 2006);
- 3) \$438,431 (1/2 of \$876,863 for lost profits 2007 through July 22, 2012, the date of trial)
This figure would be reduced by \$12,437.70 if the cutoff date is June 30, 2012; and this figure would be increased by \$91,586.70 if the cutoff date is December 31, 2012;
- 4) \$30,600 (1/2 of missing rock based on 36,000 tons and no \$1/per)
This figure would be reduced to \$18,000 if the oral agreement is honored;
- 5) \$132,000 for rent
This figure would be increased by \$12,000 if the cutoff date is December 31, 2012;
- 6) Statutory interest of eight percent (8%) per annum, calculated in accordance with the actuarial method per the lease agreement based on the amount recovered – the interest should be calculated at the above-referenced interest rate for each month where rent was not paid coming forward;
- 7) Attorneys' fees in the amount of twenty-five percent (25%) of the amount recovered per the lease agreement based on the amount recovered in 5) and 6), above;
- 8) \$117,314.62 for expert witness fees;
- 9) \$163,135 for attorneys' fees;
- 10) Interest on lost assets damages;

- 11) Interest on lost profits damages; and
- 12) Interest on missing rock damages.

CONCLUSION

As with the original trial court judgment, the Chancellor erroneously employed his own methodology in calculating lost profits, as opposed to the methodology in conformity with reliable principles and methods utilized by the accounting and valuation communities, as well as accepted under Mississippi law. The award for lost assets was also inadequate, as it failed to consider that the remaining assets were not distributed to the shareholders. The trial court also erred in honoring an unenforceable oral agreement with respect to unidentifiable rock that was diverted to Lampkin Construction. While the trial court did award damages pursuant to a valid lease agreement, the trial court cut off damages after the leased land was partitioned; however, any rent not paid after this point should still be included as lost profits throughout the damages period due to the fact that the company no longer paid rent. Interest and attorneys' fees are also owed pursuant to the valid lease agreement. The Estate further contends the trial court failed to award attorney's fees and expert witness fees based on the conduct of Lampkin warranting punitive damages. The trial court also erred with respect to the damages period, as it was inconsistent with respect to cutting off damages for lost profits, cutting off damages for rent, and allowing setoff for Lampkin across three (3) different dates.

Again, the main issue before this Court is the Chancellor's utilization of actual total sales and average total expenses in order to determine the amount of lost profits to be awarded. This is simply not how lost profits are calculated. The Estate's expert correctly estimated gross revenues based on the amount of rock sold and the price at which this rock was sold. Next, the Estate's expert correctly reduced the estimated revenues by all costs associated with all sales of rock, e.g.

direct material (rock) costs, towing costs, unloading costs, direct labor costs, trucking costs, fleeting costs, and repairs and fuel (miscellaneous) costs. The fact that Lampkin, via Delta Stone, actually incurred additional non-variable expenses after Limestone was shut down and the Estate was frozen out is wholly irrelevant to any calculation of lost profits, as the costs associated with sales of rock would be, as is the case here, factored into any calculation of lost profits. It is simply not the Estate's problem that Lampkin proceeded to run the company into the ground after shutting down Limestone, converting its assets, and starting Delta Stone. The Chancellor noted that actual operating expenses for Delta Stone from 2008 through 2010 were \$355,431; \$688,760; and \$515,125, respectively, per Koerber, and \$512,055.34; \$857,028.33; and \$523,991.96, respectively, per Saunders. However, from 2000 until the shutdown of Limestone, total operating expenses for Limestone averaged approximately \$250,000 per year; and the cost of goods sold did not increase anywhere near the proportion associated with the price of rock increases.

Therefore, increases in the price of rock should have only made the company more profitable; and no calculation of lost profits should include actual expenses of Delta Stone not associated with the unreported rock. Had the Estate not been frozen out and Limestone not unilaterally shutdown, both shareholders could have proceeded together and enjoyed whatever actual profits may have been. However, since Lampkin acted on his own and to the detriment of the Estate, a fifty percent (50%) shareholder, Lampkin must be responsible for the entire loss suffered by Limestone. As such, the damages owed Limestone and, in turn, the Estate must be the result of reliable principles and methods supported by the relevant communities and applicable laws. To date, only the Estate's expert, Mr. Koerber, has employed these reliable principles and methods; and these methods should be given deference.

CERTIFICATE OF SERVICE

I, Harris H. Barnes, III, one of the attorneys of record for Appellants, Ernest Lane, III, Co-Executor of the Estate of J.O. Smith, Jr. and Limestone Products, Inc., certify that I have this day electronically filed this *Reply to Brief of Appellee / Response to Appellee's Cross-Appeal* with the Clerk of this Court using the MEC system, which sent notification of such filing to the following:

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Chancellor George Ward
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SO CERTIFIED, this the 13th day of February, 2017.

By: s/ Harris H. Barnes, III
Harris H. Barnes, III, Esq. (MSB #2018)