2015 WL 5969606 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

Gerald SCAFIDI, Individually, Wheel-In Trailer Park, Inc., Scafidi's Wheel-Inn Restaurant, Inc., and, Wheel-Inn Park and Campgrounds, Inc., Appellants,
v.
Jo Ann S. HILLE, Appellee.

No. 2014-CA-01261.
June 8, 2015.

Appeal from the Chancery Court of Hancock County, Mississippi
Oral Argument Requested

Brief of Appellee

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*1 STATEMENT OF ISSUES

In answer to Appellant Scafidi's arguments, Appellee Jo Ann Hille would assert:

1. Standard of Review.

2 Jo Ann Hille did have standing to bring claims in the name of a corporate director and officer of the respective corporations.

3. Jo Ann Hille believes that her brother, Gerald has missed the whole point of closely held companies, and therefore, the Chancellor and Special Judge did not commit error in granting relief regarding the assets of the Defendant Corporations outside the scope of Miss. Code Ann. § 79-4-14.30 (West 2015); Miss. Code Ann. § 79-4-14.33 (West 2015), and Miss. Code Ann. § 79-4-14.34 (West 2015).

4. The Chancellor and the Special Judge did not commit error in ordering Partition by Sale or in kind of Real Property Solely held in the name of the Corporate Parties.

5. The Chancellor and Special Judge did not commit error by divesting Gerald Scafidi of his interest in the Wheel-Inn Trailer Park, Inc.

6. The Chancellor and Special Judge did not commit error in granting partition in kind between Jo Ann Hille and Gerald Scafidi without consideration of accurate valuation of such real property, without considering the exclusive use or occupancy of Jo Ann Hille and without considering Jo Ann Hille' s acquisition of the one-half share of Gerald Scafidi in the Imbornone Property.

7. The Chancellor and Special Judge did not commit error by not allowing the Appellants a fair opportunity to respond to the *sua sponte* exclusion of the Alexander Van Loon (AVL) forensic accounting report from evidence after the close of the record.

8. The Chancellor and Special Judge did not commit error by granting relief for items not ***2** specifically contained in Jo Ann Hille' s Second Amended Complaint.

STATEMENT OF THE PROCEEDINGS

This lawsuit is the story of family businesses started on family property by August and Audrey Scafidi, the parents of our litigant siblings, which on the parents' deaths, became a matter of conflict between their children, with a brother domineering and controlling his sister and the family business.

This litigation commenced when the Plaintiff, Jo Ann (“Jo Ann”) Scafidi Hille, filed her Complaint against her brother, the Defendant, Gerald W. Scafidi (“Gerald”) on August 3, 2006. (1 CP Vol. 1, Pages 1-22), regarding a division of the business and properties. Gerald answered the Complaint on June 8, 2007. (1 CP Vol. 1, Pages 23-27) After the Agreed Order of August 15, 2007, Jo Ann filed her First Amended Complaint (1 CP Vol. 1, Pages 30-50), which added as additional Defendants, their nephews and nieces who owned a small interest in part of the business (Wheel-Inn Trailer Park, Inc and Scafidi' s Wheel-Inn Restaurant, Inc.), namely Shari Gaines, August Scafidi, III, Angelique Crawford, Peter Scafidi, Maria Scafidi, as well as a lien holder, The Peoples Bank. (1 CP Vol. 1, Pages 30-56), who then filed their Answer to the First Amended Complaint. (1 CP Vol. 1, Pages 57-79) Gerald and the three closely held family companies filed their Combined Answer to First Amended Complaint, Affirmative Defenses and Counter-Claims (1 CP Vol. 1, Pages 97-116) and Motion to Remove Officers and Directors of the Corporations on November 12, 2007. (1 CP Vol. 1, Pages 80-89) Jo Ann filed her Answer to the Counter-claim (1 CP Vol. 1 Pages 123-126) and filed her Response to Motion to Remove Officers/Directors of the Corporations on December 4, 2007. (1 CP Vol. 1, Pages 117-122)

On August 21, 2008, Gerald filed a Motion for Partial Dismissal of Plaintiff's First Amended Complaint. (1 CP Vol 1, Pages 127-128) Subsequently, the Defendants, Shari Gaines, August Scafidi, III, Angelique Crawford, Peter Scafidi and, Maria Scafidi filed their Response to Motion of Jo Ann S. Hille and Cross Motion to Dismiss on October 15, 2008. (1 CP Vol 1, Pages 129-130) Jo ***3** Ann filed her Motion for Preliminary Injunction on October 27, 2008. (1 CP Vol.1, Pages 131-150 and 1 CP Vol. 2, Pages151-155) Gerald filed his response to Plaintiff's Motion for Preliminary Injunction on October 27, 2008. (1 CP Vol. 2, Pages 156-164) Chancellor Jim Person entered the Court's Order on October 31, 2008, setting matters for hearing. (1 CP Vol. 2, Pages 165-166) Based upon the hearing, Chancellor Persons entered an Order Dismissing the Defendants, Shari Gaines, August Scafidi, III, Angelique Crawford, Peter Scafidi and Maria Scafidi. (1 CP Vol. 2, Page 167) Next, the Court entered its Order on Motions on December 7, 2009, an important order which placed restraints on the various parties during the litigation and required that the status quo remain until final order. (1 CP Vol. 2, Pages 168-172)

As the trial of this matter progressed, the Court entered its Order on October 27, 2011, to allow Jo Ann to file her Second Amended Complaint. (C.P. Set 1, Vol. 2, Pages 173-174) Jo Ann filed her Second Amended Complaint on October 27, 2011.

(C.P. Set 1, Vol. 2, Pages 175-187) In response the Second Amended Complaint, Gerald filed his Combined Petition and Election to Purchase Shares and Effect Share Purchase by Partition in Kind. (1 CP Vol. 2, Pages 188-194) Jo Ann filed her Answer to Combined Petition and Election to Purchase Shares and to Effect Purchase by Partition in Kind on December 27, 2011. (1 CP Vol. 2, Pages 195-196)

During the litigation, some further housekeeping matters after the December 9, 2009 Order had to be addressed. The Court entered an Agreed Order regarding the use of the property on June 25, 2012 (1 CP Vol. 2, Pages 197-200) and, thereafter, the Court entered a Judgment on August 20, 2012, dealing with real property ad valorem taxes on August 20, 2012. (1 CP Vol. 2, Pages 201-202)

In 2013, after lengthy testimony and many exhibits, the Court entered its detailed Judgment on January 17, 2013. (1 CP Vol. 2, Pages 204-221) This detailed, lengthy judgment details how these three closely held corporations would be divided under the testimony and proof presented at the trial. Then, the post trial actions began. Gerald, the Trailer Park and the Restaurant corporations filed ***4** their January 25, 2013, Motion to Amend/Alter the Judgment, for New Trial and for J.N.O.V. (1 CP Vol. 2, Pages 222-227) Jo Ann filed her response to Gerald's Motion on February 1, 2013. (1 CP Vol. 2, Pages 228-233) In response to the previous filing, the Court entered it Corrected Judgment on April 8, 2013, nunc pro tunc to January 17, 2013. (1 CP Vol. 2, Pages 234-252) On April 25, 2013, the Court entered the jointly Agreed Order that the Restaurant building and land be sold. (2 CP Vol. 1, Pages 1-25) The Court on April 25, 2013, entered in Final Judgment. (1 CP Vol. 2, Pages 259-273). The Court's Judgment basically treated the parties businesses not as corporations, but as closely held family companies under pertinent law; further, the Court divided the property and companies.

Gerald then filed his Notice of Appeal on May 24, 2013. (1 CP Vol. 2, Pages 274-275)

In partial effectuation of the Final Judgment, the Hancock County Chancery Clerk, Timothy A. Kellar, as Special Commissioner, filed his Petition to Sell the Restaurant Building and Real Property on July 15, 2013. (2 CP Vol. 1, Pages 1-25) An Order was entered by the Court on July 19, 2013, approving the sale of the restaurant property. (2 CP Vol. 1, Pages 26-32) Another Order was entered by the Court on January 30, 2014, which authorized the payment of the Special Commissioner's fee and the fee for the Special Commissioner's attorney. (2 CP Vol. 1, Pages 33-34) Thereafter, another Order was entered on February 3, 2014, which authorized the payment of fees to Alexander Van Loon, Sloan, Levens & Favre, PLLC for the fee due AVL by Gerald W. Scafidi. (2 CP Vol. 1, Pages 35-37) On February 10, 2014, the Court entered its Order for the Disbursement of Funds held by the Special Commissioner. (2 CP Vol. 1, Pages 38-42)

As there were still some pending post trial motions - despite the uncontested Orders above, on February 6, 2014, Chancellor Persons entered his Order on Pending Post Trial Motions. (2 CP Vol. 1, Pages 43-48) After that last post trial order, Chancellor Jim Persons entered his Order of Recusal of March 6, 2014, as Gerald W. Scafidi filed suit against Chancellor Persons in federal ***5** court. (2 CP Vol. 1, Pages 49-50) By Order of the Supreme Court, dated March 12, 2014, Judge Michael H. Ward was appointed as Special Judge. (2 CP Vol. 1, Pages 51-52)

At this juncture, more post trial activity occurred. On April 7, 2014, the Defendant, Gerald filed his Motion Seeking Relief from Final Judgment. (2 CP Vol. 1, Pages 53-106) Then, on April 21, 2014, the Mississippi Supreme Court dismissed the appeal of Gerald and remanded the case to the Chancery Court of Hancock for further hearings on Motions. (2 CP Vol. 1, Pages 107-108). Then, Gerald filed his Supplemental Motion to Amend/Alter Judgment, for New Trial, for J.N.O.V., and to Supplement the Record. (2 CP Vol. 1, Pages 109-123) An Order on Post Trial Motion was signed and entered by Special Chancellor Michael H. Ward on May 12, 2014, (2 CP Vol. 1, Pages 124-127) and, an Amended Final Judgment was entered by Special Chancellor Ward on Mary 12, 2014. (2 CP Vol. 1, Pages 128-144)

On May 20, 2014, Defendant, Gerald filed his Second Motion to Amend/Alter Judgment, for NewTrial, for J.N.O.V., and to Supplement the Record. (2 CP Vol. 1, Pages 145-150 and 2 CP Vol. 2, Pages 151-159) On August 4, 2014, after hearing the parties, the Agreed Final Judgment on Post Trial Motion was entered by Special Chancellor Ward. (2 CP Vol. 2, Pages 161-164)

Then, Gerald again filed a Notice of Appeal on August 29, 2014, (2 CP Vol. 2, Pages 165-180), and again, asserts that the court should strictly adhere to corporate statutes despite the fact that there was never adherence to any corporate formalities in this family owned closely held corporation.

STATEMENT OF FACTS

The Plaintiff, Jo Ann S. Hille ("Jo Ann") and the Defendant, Gerald W. Scafidi ("Gerald") are sister and brother. (1 CP Vol. 2, Page 204) The other Defendants, named in the Complaint and amendments were family members and lien holders: Shari Gaines, August J. Scafidi, III, Angelique S. Crawford, Peter Scafidi, and Ana Maria Scafidi were children of the sibling of Jo Ann and Gerald. They were dismissed by Order Dismissing Former Minority Shareholders of Court dated the 4th day ***6** of November, 2008. (1 CP Vol. 2, Page 168) The Peoples Bank's lien was satisfied prior to trial and the bank was dismissed. (1 CP Vol. 2, Pages 204-205). Effectively, despite company names and properties, there were two litigants: Jo Ann Hille, Plaintiff, and her brother, Gerald Scafidi, Defendant.

History of Property

August and Audrey Scafidi (the "**elder** Scafidis") were the parents of litigants Jo Ann and Gerald. The **elder** Scafidis bought all of the subject property in the early 1950's and built the restaurant and gas station (TT Vol. 1, Page 33, Lines 8-14), as well as a house on the property, where they lived until their deaths in 1996 and 1998 respectively. (TT Vol. 1, Page 32, Lines 5-6)

During the **elder** Scafidis lifetime, the overall Scafidi property was divided into separate properties and, in part, separate family owned companies. All of this property fronts Highway 90 in Bay St. Louis, Mississippi.

The *Hille Home.* Although not directly involved in this litigation, Jo Ann Hille had her home on one acre in the middle of the overall properties. This property is owned individually by her, having been directly deeded to her by the parents. (TT Vol. 1, Page 35, Lines 17-19)

Wheel Inn Restaurant, Inc. At the Highway 90 frontage, there is a parcel of land which is owned by the Wheel Inn Restaurant, Inc. (also referred to as Scafidi's Wheel-Inn Restaurant, Inc). This parcel was first a gas station, then a truck stop, then the restaurant. August Scafidi built a small building adjacent to the restaurant in order to have a building for Jo Ann's beauty salon. (TT Vol. 1, Pages 37-38). When August died, he left this company to his wife, Audrey; further, when Audrey died, she left 383 shares to Jo Ann Hille, 383 to Gerald Scafidi, and 84 shares to her grandchildren. (1 CP Vol. 2, Page 206) Then, in August of 2008, after an attempted mediation, Gerald Scafidi purchased the other relatives 84 shares, thus giving him 467 shares to Jo Ann's 383 (TT Vol. 1, Pages 19). When the litigation began, the restaurant had not been rented or used for years; however, ***7** just prior to the final hearings, Gerald Scafidi began doing work on the building. (TT Vol. 2, Pages 164-165)

Wheel Inn Park and Campgrounds, Inc. The largest parcel, situated behind the restaurant, is an operating company owned 50/50 by Jo Ann Hille and Gerald Scafidi. The company is for short term rentals and had a campground, but also space for motor homes, tents and trailers; however, the company does not own the real estate (TT Vol. 1, Page 47, Line 20). The land on which this company operates is titled in the individual names of Jo Ann Hille and Gerald Scafidi, as tenants in common by virtue of an Executor's Deed for an undivided one-half interest each from John A. Scafidi, Jr., Executor of the Estate of Audrey R. Scafidi dated the 17th day of June, 2002 (TT Vol. 1, Page 20, Lines 1-5). All of the buildings and improvements on that property belong to Jo Ann Hille and Gerald Scafidi as property owners and not to the company. (TT Vol. 1, Page 47, Lines 11-18)

Wheel Inn Trailer Park, Inc. This property is the second largest parcel. Like the restaurant, Jo Ann Hille and Gerald Scafidi each owned 40 shares, with the remaining 20 shares owned by other relatives; however, in August of 2008, after an attempted mediation, Gerald Scafidi purchased the other relatives' shares and now owns 60% of the company. This property rents spaces for mobile homes which are usually long term rentals.

At the time of the litigation, Jo Ann Hille was managing the Wheel Inn Trailer Park, renting the Latino Shop (attached to the restaurant), and living in her house (TT Vol. 3, Pages 353-354); further, Gerald Scafidi was managing the Wheel Inn Park and Campground, living in an apartment above the small park grocery store, and running other profit making ventures off the property. This litigation involved both the real property and businesses the **elder** Scafidis started. (1 CP Vol. 2, Page 204).

John Scafidi, a relative of all the parties, was the **elder** Scafidi' s attorney (TT Vol. 1, Page 31). John testified that Gerald was the dominant more assertive of the siblings. (TT Vol. 1 Page 50, ***8** Lines 5-12) He further noted that the **elder** Scafidis were worried about Jo Ann and made sure that their house was in her name, that she had a part of the businesses and property, and that she could lease the Latino Shop for one dollar a year. (TT Vol. 1, Page 58, Lines 10-26; TT Vol. 1 Pages 37-38; TT Vol. 3, Pages 379-383; TT Vol. 4, Page 553) As Jon Scafidi noted, the **elder** Scafidis' intentions were that Jo Ann and Gerry were to share equally in everything that was out there, and that's what was reflected in their wills and estate plan. (TT Vol. 1, Page 60, Lines 2-29 and Page 61, Lines 1-13). Additionally, John Scafidi said that around 1998, there were two meetings of Hille and Scafidi, but there were no agreements made and no minutes. (TT Vol. 1, Pages 48-49, Lines 1-10, Page 52, Lines 3-22; TT Vol. 3, Page 387, Lines 9-21). It is note worthy that, according to both parties, they just starting handling different things, with Gerald at the campground and Jo Ann at the trailer park. (TT Vol. 5, Page 684) John Scafidi also testified that he understood what a closely held corporation was and, therein, that the parties owed fiduciary duty to each other and good faith dealing. (TT Vol. 1, Pages 59-60)

The Family Problem

Jo Ann was unable to work with her brother in the various businesses on the property. Eventually, Jo Ann stayed on the eastern side and ran the Wheel-Inn Trailer Park, Inc., while Gerald ran Scafidi's Wheel-Inn Restaurant, Inc. and Wheel-Inn Park and Campgrounds, Inc. (TT Vol. 1, Page 53, Lines 3-20) This division was informal and there was never any contract, written agreement, minutes or other documentation of the arrangement; further, each professed concerns about what the other was doing on the properties and in the businesses (TT Vol. 1, Page 54 Lines 3-11).

Jo Ann stated that she had tried to talk to her brother often, but was unsuccessful, even trying to have her pastor intercede and help communication (TT Vol. 3, Pages 398-399.) On her attempts, she stated:

***9** He would explode and call me a religious fanatic and call me stupid, my family stupid, and that there's nobody else that can run any of these businesses but him, and I ought to thank God for him, you know, being so smart

(TT Vol. 3, Page 387; see also, TT Vol. 4, Page 467). Jo Ann attempted meeting him for business discussions off and on, but he continued to be emotionally **abusive** to her (TT Vol. 3, Page 399). He would not discuss business and certainly not the financial accounts (TT Vol. 3, Page 397) As to reviewing the “rental account”, Gerald's response was:

He said, the only way you're going to get me to come to a meeting and sit down at a table is to sue me, and if you sue me, I will sue you, with not using one penny of my own money.

(TT Vol. 3, Page 389; see also TT Vol. 4, Page 568) Jo Ann tried many ways to resolve the dispute (TT Vol. 4, Page 579); however, her last attempt was after Hurricane Katrina and, after the above response from Gerald, Jo Ann retained counsel and filed this lawsuit.

Other than Jo Ann's statements about wanting to review the books and have meetings on running the businesses, Jo Ann does not know what caused the problem with her brother (TT Vol. 4, Page 560); however, she knew that she could not stay in business with him. (TT Vol. 4, Page 548).

The Financial Issues with the Companies

Alexander Van Loon, a certified public accountant firm, was appointed the Court's expert regarding the company finances. Kim Marmalich, CPA, testified as an expert forensic accountant and provided a report (TT Vol. 1,Page 102; Ex.28). She noted that the subject properties were all closely held corporations (TT Vol. 1, Page 102, Lines 21-23). She stated that Jo Ann Hille filed personal tax returns (TT. Vol. 1, Page 118, Lines 14-22), but Gerald had not filed since 2004 (TT Vol. 1, Page 105, Lines 12-13). She did not have enough information to determine what Gerald's income was, nor what monies were made on the properties he ran (TT Vol. 1, Pages 105, 107, 112, and 117); further, ***10** Gerald's books were not clear and she had to estimate some income using analytical methods. (TT Vol. 1, Pages 115-116). In fact, Kim Marmalich said company activity was commingled on all three companies. (TT Vol. 1, Pages 113-114)

Shelley Ray, an accountant with the Rigsby CPA firm, which did work for both Jo Ann Hille and Gerald Scafidi; further, corroborated the accounting nightmare. (TT Vol. 3, Page 314) Jo Ann provides bank statements and verifying receipts. (TT Vol. 3, Page 318), but Gerald only provides receipts for cash payments (TT Vol. 3, Page 376) Shelly Ray does not know what goes in the rental account (TT Vol. 3, Pages 322-3), stating at TT Vol. 3, Page 323:

Q. So from the time when you looked back through the books at Mr. Rigby's office, has -- does anyone ever see any accounts or anything, checks, books, anything, for this rental account?

A. No.

Q. And you particularly, have you ever been shown any statements or checks or income receipts or anything concerning that rental account?

A. No.

She was surprised that the Alexander Van Loon report showed income that she had never seen (TT Vol. 3, Page 374). Gerald commingled monies from one company for another company (TT Vol. 1, Page 114; TT Vol. 3, Pages 318-9 and 343) even after he was advised for over the last two and one-half years not to do so. (TT Vol. 3, Page 343, Lines 21-28) Gerald would assign things as loans, but there were no loan documents to his company, nor minutes (TT Vol. 3, Pages 331-334). Gerald set up other businesses on the property, such as his sawmill and equipment rentals, but did not pay rent to the underlying company (TT Vol. 3, Pages 336-337) Gerald paid his personal credit card with company monies, but never provided the credit card accounts (TT Vol. 3, Page 336). She had no documents about the laundry or about any purchase of the washers and dryers for that laundry (TT Vol. 3, Page 333, Lines 10-16). She was not aware that he lived on the property but testified there ***11** was no rent collected for the apartment above the office, but the company paid the utilities and his phone and provided him a truck (TT Vol. 3, Pages 339-341).

Conversely, Shelly Raye stated that Jo Ann kept good records and receipts, had no problems with commingling, accountings, personal taxes or corporate taxes (TT Vol. 3, Page 348). Shelly Raye also noted that she could not get Jo Ann and Gerald in the same room to discuss business matters (TT Vol. 3, Page 350).

Overall, neither the CPA firm that did the litigants work or the Court's forensic expert really had any clear idea what income Gerald Scafidi made on the property (TT Vol. 1, Pages 107, Lines 5-9 and Page 112, Lines 1-7; TT Vol. 3, Pages 399-400 and 415-417). Neither had verification of title to personal property claimed by Gerald, nor monies made from use of those personal properties.

Jo Ann's complaints centered on not being able to discuss any business with Gerald, his treatment of her, and not knowing anything about the other companies income. Like the accountants, Jo Ann never saw the rental account (TT Vol. 3, Pages 323 and TT Vol. 5, Page 747), and, as so much of his business was cash business (TT Vol. 1, Pages 66-8, 78, 94, 108; TT Vol. 2,

Pages 160, 288-9) had no way to see what it was making. If she inquired, she would get yelled at (TT Vol. 3, Page 396, Lines 12-23). He used the accounts as his private bank accounts:

Q. And so you know that part of the problem that your sister has is this rental account has been used as a private fund by you to pay whatever, but you know that's been upsetting to her?

A. Yes, it has been upsetting to her.

(TT Vol. 6, Page 752)

Even Gerald corroborated some of the problems. Gerald W. Scafidi admitted that he had not filed personal income tax returns for the last nine or ten years. (TT Vol. 1, Page 63, Lines 28-29; TT Vol. 1. Page 64, Line 1; TT Vol. 1, Pages 84 and 105; TT Vol. 5, Pages 744-745), but argued that he did not have to file a tax return until his income reached $37,000.00 (TT Vol. 1, Page 98 Lines. ***12** 16-29 and Page 99, Lines 1-7; TT Vol. 5, Pages 744-745); however, this contradicts the testimony of Shelly Ray (TT Vol. 3, Pages 345-6). His Social Security Lifetime Earning Statement shows income of $5,000 to $14,000 for twenty years (TT Vol. 5, Pages 744-746), whether he filed taxes or not.

Further, Gerald admitted sometimes that the company owned equipment and that sometimes he owned equipment that was stored on the property including an auger truck, backhoe, crane, trailer, large trucks (TT Vol. 1, Pages 64-65 and 88-89; TT Vol. 6, Page 751; TT Vol. 3, Pages 337-8 and 373-4; TT Vol. 4, Pages 490-1). Though these large pieces of equipment were on the company property, Gerald did not pay any rent to the companies or have any agreement about the equipment and, in the end, he did not have evidence that he personally owned the large equipment situated on the property. (TT Vol. 1, Page 64, Lines 18-22, Page 88, Lines 20-27, Page 89, Lines 9-16). Gerald also stated that the business conducted on the park and campgrounds property was mostly a cash business (TT Vol. 1, Pages 66, Lines 4-29 and Page 67, Lines 1- 15), and that all of Gerald's living expenses were paid by park and campgrounds corporation. (TT Vol. 1, Page 72, Lines 9-29 and Page 73, Line 15; TT Vol. 1 Page 88, Lines 20-27 and Page 89 Lines 9-16).

Gerald never discussed what he did with Jo Ann: Gerald Scafidi did not consult with Jo Ann Hille about putting a sawmill on jointly held property, nor share money, nor talk about how the sawmill operations would be handled. (TT Vol. 1, Pages 71 and 91; TT Vol. 1, Page 90, Lines. 7-17; TT Vol. 1, Page 95; TT Vol. 3, Pages 424, Lines 26-29 and 444; TT Vol. 4, Page 499; TT Vol. 5, Pages 719-720). Gerald never sought Jo Ann's agreement, nor had meetings (TT Vol. 3, Page 416, Line 20), or had signed minutes (TT Vol. 1, Page 49, Lines 8-10), nor responded to her inquiries-he did what he wanted to do. (TT Vol. 1, Page 91) It is noteworthy that Gerald generated money by renting the large items of equipment (TT Vol. 1, Page 90, Lines 18-28 and Page 91, Lines 1-15), from coin machines, from the campground, from the saw mill, and even from charging for showers ***13** after Hurricane Katrina. (TT Vol. 1, Page 78 Lines 3-25; Page 94, Lines 9-29; Page 96 Lines 1-29)

Gerald had the company provide all his monthly expenses. As noted above, he lived rent free above the campground office and store, and his gas, electricity, cable, phone and other amenities were paid by the company.

Gerald did not listen to Jo Ann, but, of course, he did not listen to his accounting advisor either (TT Vol. 3, Pages 343 and 396). What is worse, he did not listen to the Court. In the Order on Motions on December 9, 2009, the parties were restrained from certain actions; however, Gerald used money from the campground account to repair and start up the restaurant. This renovation and restaurant action was something Jo Ann disagreed with and had her attorneys send Gerald's attorney requests to stop the work. (TT Vol. 3, Pages 403, Lines 5-15 and 420; see also TT Vol. 6, Page 802) What's worse, this was in defiance of that 2009 Order. (TT Vol. 6, Pages 825-6; MT Vol. 2, Pages 158-159)

The Purported Buy-Out

Gerald Scafidi argued that he purchased the minority shareholders' interest in the Trailer Park and Restaurant Corporations with funds that he borrowed and argued that he should have been given full control of the companies. Scafidi, however, in the years before the trial, did not produce any documents on the finances behind this purchase in the discovery or his deposition (see generally, TT Vol. 1, Pages 11-12 and TT Vol. 3, Pages 396-397).

In the Amended Final Judgment filed on the 12th day of May, 2014, (2 CP Vol. 1. Pages 128-142), the Court found that Gerald's purchase of the those nieces and nephews small shares was an attempt to acquire absolute control of these two corporations to the detriment and oppression of Jo Ann, as a minority shareholder. (2 CP Vol. 1, Page129, ¶2). See also, (TT Pg. 755 Lns. 14-29). Moreover, in the Corrected Judgment, the Court found specifically that the parties never operated with corporate formalities or had meetings, that Gerald operated effectively as a sole proprietorship. ***14** (1 CP, Vol. 2, Pages 239-240, ¶8). Finally, in the Amended Final Judgment the Court ruled specifically against Gerald on this borrowing:

[T]he Court does not find the testimony of Gerald or his witnesses credible as to the source of the $180,000 used to purchase the shares of his nieces and nephews in the restaurant and trailer park corporations whereby he became the majority shareholder. The Court finds Gerald to have been less than forthcoming to the point of being secretive and non-responsive to discovery requests regarding all financial matters, specifically including the income and expenses of the restaurant, campgrounds or rental account. The Court's prior rulings sufficiently explain it reasons why the corporations cannot be treated other than a family partnership.

(2 CP, Vol. 1, Pages 129-130, ¶3). The Court found no credibility in Gerald's story about the source of the that $180,000, finding the only credible source of the funds was from the restaurant and campground companies, together with unreported income diverted from those companies and properties in which Jo Ann had an interest. (2 CP Vol. 1, Page 130, ¶4 of the Amended Final Judgment).

The Ruling

The Court heard all this evidence and treated this like a partnership. The Court rationale was this was a closely held corporation, run by siblings who never truly followed any corporate formalities and who never conducted themselves like a corporation. (TT Vol. 6, Pages 822-824). Further, the Court could not use the expert CPA because of the failure of Gerald Scafidi to answer discovery, to keep adequate records, and to provide reliable information. (TT Vol. 6, page 824). Therefore, the Court used the valuation expert, Harry Hebert, and the surveyor, Michael Cassady, to divide up the campground and trailer park properties, ordered the sale of the restaurant, and then assessed costs. (See, Corrected Judgment 1 CP Vol. 2, Pages 234-251; see also, 1 CP Vol. 2, Pages 241 and 251; TT Vol. 2, Pages 195-199 and 237-240; TT Vol. 7, Pages 877-882 and 888-889)

***15** The Court's division was as follows:

As to Scafidi's Wheel-Inn Restaurant, Inc., which was a building on approximately .92 acres, fronting on Highway in Bay St. Louis, Mississippi (1 CP Vol. 2, Page 206), the Court ordered it sold; further, it was sold to relatives of Gerald Scafidi and the net proceeds divided by Court Order. Having already found that Scafidi commingled monies and having disbelief in Scafidi' s evidence, the Court disregarded share interest and treated this as an equal partnership. (2 CP Vol. 2, Pages 137 ¶24)

As to the Wheel-Inn Park and Campgrounds, Inc., the entity Gerald ran, Jo Ann and Gerald each owned an undivided one-half (1/2) interest in approximately 12.7 acres of real property on which the Wheel-Inn Park and Campgrounds, Inc. operated a RV Park, cabin rentals and campgrounds, but on which Gerald lived and ran his sawmill and rental heavy equipment enterprise. (1 CP Vol. 2, Page 207) The Court gave this stock to Gerald and then adjusted the property line along the Herbert valuation and Cassady survey. (2 CP Vol. 1, Page 137)

As to the Wheel-Inn Trailer Park, Inc., the entity Jo Ann ran, the company owned an approximate 3.6 acre tract which was the long term trailer park. It is noteworthy than Jo Ann's separately owned home with one acre is adjacent to this property.

Although at the time of trial Gerald had 60% of the stock, the Court gave this stock to Jo Ann and then added property from the Herbert valuation and Cassady survey to equalize the overall interest of the parties. (1 CP Vol. 1, Page 208)

SUMMARY OF ARGUMENT

ISSUE ONE:

STANDARD OF REVIEW

We concur with Appellant, Gerald Scafidi' s statement on the standard of review, but would add the language of Bluewater Logistics, LLC v. Williford, 55 So. 3d 148, 155 (Miss. 2011), which stated, "We review a chancellor's legal conclusions de novo; that is, we reach our own conclusions ***16** as to the applicable law. But we ordinarily accept a chancellor's factual findings unless - given the evidence in the record - we conclude that the chancellor **abused** his or her discretion, and no reasonable chancellor could have come to the same factual conclusions."

ISSUE TWO:

JO ANN HILLE DID NOT LACK STANDING TO BRING DERIVATIVE CLAIMS IN THE NAMES OF THE WHEEL-IN TRAILER PARK, INC., SCAFIDI'S WHEEL-INN RESTAURANT, INC., AND THE WHEEL-INN PARK AND CAMPGROUNDS.

Appellant, Gerald Scafidi sees only a strict corporate issue and fails to understand that these three family corporations are all closely held corporations, where there are strong fiduciary responsibilities and which the Court can pierce that corporation and find that the families should be treated like partnerships in order to avoid oppressive and wrongful actions. Fought v. Morris, 543 So.2d 167, 169 (Miss. 1989) Because of the conduct of Gerald Scafidi and the breach of his fiduciary duty to Jo Ann Hille as a stockholder and a partner, the law allows a shareholder to file a direct action against a shareholder, director or officer of the corporation. The corporations did not acquire a derivative right to bring the suit against Gerald Scafidi.

ISSUE THREE:

THE CHANCELLOR AND SPECIAL JUDGE DID NOT COMMIT ERROR IN GRANTING RELIEF REGARDING THE ASSETS OF THE DEFENDANT CORPORATIONS OUTSIDE THE SCOPE OF MISS. CODE ANN. § 79-4-14.30 (West 2015); MISS. CODE ANN. § 79-4-14.33 (West 2015), AND MISS. CODE ANN. § 79-4-14.34 (West 2015).

Again, Gerald sees only a strict corporate issue and fails to understand that these three family corporations are all closely held corporations, where there are strong fiduciary responsibilities and which the court can pierce that corporation and find that the families should be treated like partnerships in order to avoid oppressive and wrongful actions. ***17** *Fought v. Morris,* 543 So.2d 167, 169 (Miss. 1989) Further, after finding the Fought situation, a Chancellor may do complete justice for the situation. *Knights' Piping Inc. v. Knight,* 123 So.3d. 451, 455-56 (¶13) (Miss. Ct. App. 2012) (quoting *Derr Plantation Inc. v. Swarek,* 14 So.3d 711, 718 (¶16) (Miss. 2009)).

ISSUE FOUR:

THE CHANCELLOR AND THE SPECIAL JUDGE DID NOT COMMIT ERROR IN ORDERING PARTITION BY SALE OR IN KIND OF REAL PROPERTY SOLELY HELD IN THE NAMES OF THE WHEEL-INN TRAILER PARK, INC., AND SCAFIDI'S WHEEL INN RESTAURANT.

Consolidated for Argument with

ISSUE FIVE:

THE CHANCELLOR AND SPECIAL JUDGE DID NOT COMMIT ERROR BY DIVESTING GERALD SCAFIDI OF HIS SEPARATE INTEREST IN THE WHEEL-INN TRAILER PARK, INC. CONTRARY TO THE REQUIREMENTS OF MISS. CODE ANN. § 11-21-3 (West 2015).

The Court did not order a partition of the Wheel-Inn Trailer Park, Inc., but instead found an equitable solution to a difficult problem. The Chancellor actually awarded full ownership of the Wheel-Inn Trailer Park's common stock to the Plaintiff, Jo Ann S. Hille, while simultaneously awarding full common stock of the Wheel-Inn Park and Campground to Defendant Gerald Scafidi. The Chancery Court had this authority under Barry v. Mattocks et al, 125 So. 554, 556 (Miss. 1930), Fuller v. Chimento, 824 So.2d 599,602 (Miss. 2002), and Miss. Code Ann. § 11-21-11 (West 2015).

The restaurant issue should be a moot issue. After the Judgment, the parties sold the property and divided the proceeds per Court Order; further, Appellant Gerald Scafidi' s children and their spouses bought the property.

***18 ISSUE SIX:**

THE CHANCELLOR AND SPECIAL JUDGE DID NOT COMMIT ERROR IN GRANTING PARTITION IN KIND BETWEEN JO ANN HILLE AND GERALD SCAFIDI WITHOUT CONSIDERATION OF ACCURATE VALUATION OF SUCH REAL PROPERTY, WITHOUT CONSIDERING THE EXCLUSIVE USE OR OCCUPANCY OF THE SUBJECT REAL PROPERTIES BY JO ANN HILLE AND GERALD SCAFIDI, WITHOUT GRANTING AN ACCESS EASEMENT FOR INGRESS AND EGRESS TO GERALD SCAFIDI, AND WITHOUT CONSIDERING JO ANN HILLE'S ACQUISITION OF THE ONE-HALF SHARE OF GERALD SCAFIDI IN THE IMBORNONE PROPERTY.

Appellant Scafidi' s sixth issue is a factual argument Appellee asserts that the Court's decision was a reasonable and practical equitable resolution that has credible supporting substantiation in the testimony of the parties and the experts.

ISSUE SEVEN.

THE CHANCELLOR AND SPECIAL JUDGE DID NOT COMMIT ERROR BY NOT ALLOWING THE APPELLANTS A FAIR OPPORTUNITY TO RESPOND TO THE SUA SPONTE EXCLUSION OF THE AVL FORENSIC ACCOUNTING REPORT FROM EVIDENCE AFTER THE CLOSE OF THE RECORD.

Appellant appears to treat a factual issue as a legal issue. The Court did not exclude the AVL Forensic Accounting Report. The Court found that Gerald Scafidi' s accounting and record keeping were so poor, incomplete and inaccurate that it could not use the financial conclusions. However, the Court did not exclude the report. The Court found Scafidi' s Campground books and records and tax returns are false and incomplete as to both gross income and expenditures. This decision is supported under *Puckett v. State*, 737 So.2d 322, 372 (Miss. 1999), Miss. R. Civ. P. 702, *Univ. of Miss. Med. Ctr. v. Pounders*, 970 So.2d 141, 146 (Miss. 2007)

***19 ISSUE EIGHT:**

THE CHANCELLOR AND SPECIAL JUDGE DID NOT COMMIT ERROR BY GRANTING RELIEF UNTO JO ANN HILLE WHICH WAS BEYOND THE SCOPE OF CLAIMS ASSERTED BY MS. HILLE.

Appellant, Gerald Scafidi again foregoes the closely held corporation issue with *Fought.* The Court did not err for this and other reasons, as Mississippi has been a “notice pleading” state, the matters were tried openly as per Miss. R. Civ. P. 15 (b), and the Court rendered an equitable decision based on the evidence presented. *Bluewater Logistics, LLC v. Williford*, 55 So.3d

148 (Miss. 2011); *Pilgrim Rest Missionary Baptist Church ex rel. Bd. of Deacons v. Wallace,* 838 So.2d 67, 75 (Miss. 2003) (citing Miss. R. Civ. P. 54 cmt: *Turner v. Terry,* 799 So.2d 25, 39 (Miss. 2001); *Tuck v. Blackmon,* 798 So.2d 402, 410 (Miss. 2001) And, in *Turner,* the Court stated "A trial judge may award a party any relief to which he is entitled, even if the party fails to make a specific demand for such." *Turner,* 799 So.2d at 39.

ARGUMENT

ISSUE ONE: STANDARD OF REVIEW "This Court will not reverse a Chancery Court's factual findings, be they of ultimate fact or of evidentiary fact, where there is substantial evidence in the record supporting these findings of fact *Smith v. Jones,* 654 So.2d 480, 485 (Miss. 1995) (quoting *Crab v. Cooper,* 587 So.2d 236, 239 (Miss. 1991). Furthermore, "the chancellor's findings will not be disturbed when supported by substantial evidence unless the chancellor **abused** his discretion, was manifestly wrong or clearly erroneous or applied an erroneous legal standard." *Williams v. Williams,* 656 So.2d 325, 330 (Miss. 1995); *Smith,* 654 So.2d at 485; *Chamblee v. Chamblee,* 637 So.2d 850, 860 (Miss. 1994), quoted in *Brocato v. Bracoto,* 731 So.2d 1138, 1140 (Miss. 1999). This Court uses that "reasonable Chancellor" standard, *Bluewater Logistics, LLC v. Williford,* 55 So. 3d 148, 155 (Miss. 2011), ***20** which stated, "We review a chancellor's legal conclusions de novo; that is, we reach our own conclusions as to the applicable law. But we ordinarily accept a chancellor's factual findings unless - given the evidence in the record - we conclude that the chancellor **abused** his or her discretion, and no reasonable chancellor could have come to the same factual conclusions."

ISSUE TWO:

JO ANN HILLE DID HAVE STANDING TO BRING DERIVATIVE CLAIMS IN THE NAMES OF THE WHEEL-IN TRAILER PARK, INC. SCAFIDI'S WHEEL-INN RESTAURANT, INC., AND THE WHEEL-INN PARK AND CAMPGROUNDS.

Appellant, Gerald Scafidi, having avoided any semblance of corporate structure, for the preceding decade or so, now wants to use corporate statutes to shield him from review and remedy. Appellant argues statutes and cases on derivative actions (e.g., Speetjens v. Malaco, Inc. 929 So.2d 3030 (Miss. 2006) and judicial dissolution (e.g. Miss. Code Ann. § 79-4-14.30.34 (West 2015)) However, as in "can't see the forest for the trees", Appellant Scafidi fails to address the actual findings of the Court-that that these three companies are closely held companies, not a company owned and run by stock holders or that is publicly traded. This is a family business, despite the complexities of company and real estate.

A closely held corporation is defined as a corporation having fifty or fewer shareholders and where management operates in an informal manner akin to a partnership. Fought v. Morris, 543 So.2d 167, 169 (Miss. 1989). Directors and officers of the corporation stand in a fiduciary relationship to the corporation and its shareholders. Generally, when a stockholder charges an officer or director with a breach of his fiduciary duty of fair dealing to the corporation, the violation is the duty owed to the corporation. *Derouen v. Murrat,* 604 So.2d 1091 (Miss. 1992). ***21** A derivative action may be brought for the benefit of a shareholder, where the defendant officer or director used his position improperly to obtain a benefit for himself as a shareholder to the exclusion of other shareholders similarly situated. In closely held corporations, where many of the primary parties are related, the Court treated these like partnerships, and not derivative actions. *Fought, Id.*

The fiduciary duty of a director or officer of a closely held corporation has fiduciary obligations, including these duties: "to exercise the utmost good faith and loyalty in discharge of the corporate office, to exercise utmost good faith and loyalty in dealing with the corporate property, and to repay the corporation for any illegal diversions of corporate assets for which a shareholder, office or director may have participated". *Gibson v. Manuel,* 534 So.2d 199, 201-2012 (Miss. 1988); see also *Fought v. Morris,* 543 So.2d 167 (Miss. 1989) and *Donahue v. Rodd Electrotype,* 367 Mass. 578, 328 N.E.2d 505 (1975) (recognized in Fought.).

In these closely held corporation cases, courts have protected the minority interest. In a Massachuessets case following *Donahue, Hallahan v. Halton Corporation,* 7 Mass.App. 68, 385 N.E.2d 1033 (1979), the court refused to allow a secret acquisition of

stock to change the balance of power. Similarly, in *Orchard v. Covelli,* 590 F.Supp. 1548 (W.D.Penn. 1984, aff'd 802 F.2d (3rd Cir. 1986), the controlling interest owed a duty of loyalty and fairness to minority shareholders and their actions are required to be "intrinsically fair" to the minority interest. *Id.* at 155. *Orchard* further noted that fiduciary duty is particularly critical in the context of the closely-held corporation because of the inherent and acute vulnerability of minority shareholders, and that court noted that any attempt to squeeze out a minority shareholder must be viewed as a breach of his fiduciary duty: "such conduct is injurious when the result is the exclusion of the minority ***22** shareholders without adequate recompense and it is particularly harmful when carried out with malevolence or indifference..." The law recognizes a right to recovery under such circumstances. *Id.* at 1557. This rationale is followed in *Fought,* where the court noted "stockholders in close corporations must bear toward each other the same relationship of trust and confidence which prevails in partnerships, rather than resort to statutory defenses." (*Fought* at page 171)

Appellant's argument is that these companies must be treated as an entity distinct from its individual members or stockholders; however, even if that were true, general rules stated that a corporation is a legal theory introduced for the purposes of convenience and to sub-serve the ends of justice, and cannot therefore, be extended to a point beyond its reason and policy. 18 Am Jur 2d, Corporations § 14. Even in a true, non-family, non-closely held, if a director or stockholder ignores the corporate entity, so can the court. 18 Am Jur 2d, Corporations § 3-6. This had occurred where there have been wrongful acts, where stockholders engage in business as individuals and disregarded the corporate entity, and where stockholders acted more like partners. Ferdinand S. Tinio, LL.B., LL.M, Annotation, *Stockholder's Personal Conduct Of Operations Or Management Of Assets As Factor Justifying Disregard Of Corporate Entity,* 46 A.L.R. 3d 428 (---).

Previous to and continuing through the trial, neither Gerald nor Jo Ann observed any semblance of corporate formalities. Although Jo Ann requested corporate meetings beginning in 1998, they never had meetings after 1998, nor any minutes for any corporate activities. (TT Vol. 3, Page 387, Lines 9-21) Jo Ann testified that Gerald would get angry anytime she wanted to talk about the business (TT Vol. 3, Pages 387, Lines 9-21), while the accountant Shelly Raye stated that they could not be in the same room together. (TT Vol. 3, Page 350) In fact, Gerald conducted ***23** the corporate business the restaurant and campground corporations effectively as if he were sole owner, without regard to Jo Ann's then perceived status as a minority shareholder. He did as he pleased, when he pleased. In fact, he had other businesses running on the jointly owned property, but paid no rent, nor sought Jo Ann's permission (TT Vol. 1, Pages 71; Page 90, Lines 7-17 and Page 92). The income and expenses of the entities under his control were not accurately reported or produced to the accountant or Jo Ann despite their requests. (TT Vol. 1, Page 64-65) Jo Ann never saw his rental account, nor did the accountant (TT Vol. 1, Pages 95 and 119; TT Vol. 3, Page 303, Lines 1-5 and Pages 323, Lines 16-24) Neither were they produced to Jo Ann's attorneys in response to Discovery request herein nor were they produced at trial. (1 CP Vol. 2, Pages 239-240). The Trial Court found that Gerald Scafidi's actions were not in accord with his duties in a closely held corporation. Gerald would not discuss business with his sister Jo Anne (TT Vol., Page 91, Lines 12-16); he would not have meeting with her (TT Vol.3, Page 387, Lines 9-29; Page 388, Lines 1-29 and page 389, Lines 1-7); there were no minutes of corporations upon which the parties could act (TT Vol. 3, Page 353-354); and Gerald ran the Campground and later the restaurant without any type of corporate formality. (MT Vol. 2, Page 158). Further, Gerald refused to provide accountings or even allow Jo Ann to look at the accounts (TT Vol. 3, Pages 389 and 397, TT Vol. 4, Page 568) and instead, ran other businesses on the property, like the sawmill and the heavy equipment rental, without any consent of Jo Ann and in derogation of their business relationship (TT Vol. 3, Page 396, Lines 12-23). Even after the Court's expert reviewed the books, she was unable to determine what monies were made on the property Gerald controlled. (TT Vol. 3, Page 323; TT Vol. 5, Page 747)

In resolving the remaining issues, the Court treated the business entities as the parties treated them, i.e., with disregard for the corporate entities insofar as the issues between Jo Ann ***24** and Gerald. (1 CP Vol. 2, Page 245) As our Court has noted before, "The issues in an equitable cause of action in a complex factual setting such as the present one are inherently somewhat vague and subject to a great deal of discretion on the part of the Chancellor." *Wholey v. Cal Maine Foods, Inc.,* 700 So. 2d 291, 294 (Miss. 1997) Needless to say, without meetings, there could not be corporate minutes; without corporate minutes, the corporation could not really act; and without some semblance of any corporate structure, neither party could assert corporate law to protect their un-corporate like acts.

Because of the conduct of Gerald Scafidi and the breach of his fiduciary duty to Jo Ann Hille as a stockholder and a partner in this closely held set of family companies, the Court followed *Fought,* disregarded corporate structure and limiting strictures, and found standing and relief for Jo Ann Hille. Needless to say, this is also clearly within the intent of their parents, August and Audrey Scafidi, the parents of the parties, who intended that Jo Ann and Gerald would share equally in the business and property. (1 CP Vol. 2, Page 239)

Therefore, equitably, this follows the intent of the parents; legally, this follows the actions of the party and the *Fought* line regarding closely held corporations. (1 CP Vol. 2, Page 241)

Appellee asserts that the Chancellor was imminently correct.

ISSUE THREE:

THE CHANCELLOR AND SPECIAL JUDGE DID NOT COMMIT ERROR IN GRANTING RELIEF REGARDING THE ASSETS OF THE DEFENDANT CORPORATION OUTSIDE THE SCOPE OF MISS. CODE ANN. § 79-4-14.30 (WEST 2015); MISS. CODE ANN. § 79-4-14.33 (WEST 2015), AND MISS. CODE ANN. § 79-4-14.34 (WEST 2015).

***25** Appellant Scafidi believes that the Court is limited by only the relief under the statutes and not to equitable relief. As stated earlier, this litigation was about three closely held corporations, and because of the way they were handled by the officers, directors and shareholders, the Court treated the corporations as partnerships. As such, the Court had to unravel the partnerships using the tools of equity including accounting, tracing and partitions. *Fought v. Morris,* 543 So.2d 167, 169 (Miss. 1989). In dealing with the issues in the case, the Chancery Court has inherent equity powers to fashion a remedy between the parties.

The Chancellor, knowing this was a closely held corporation, run by siblings who never followed any corporate formalities nor conducted themselves like a corporation over a period of twenty years, clearly did not believe that the corporation rules could be used. Therefore, besides using a Fought partnership analysis (TT Vol. 6, Pages 822-824), the Chancellor determined that it was equitable to set aside Gerald's election under Miss. Code Ann. § 79-4-34(a). (2 CP Vol. 2, Page 211) Besides this being an inherently chancery procedure of both looking to substance rather than form and also to looking to whether one does equity before giving that person equity, this is consistent with Fought *Id.*, at 171;*Hallahan v. Halton Corporation,* 7 Mass.App. 68, 385 N.E.2d 1033 (1979); *Orchard v. Covelli,* 590 F.Supp. 1548 (W.D.Penn. 1984, aff'd 802 F.2d (3rd Cir. 1986).

One of the pre-eminent principles of equity procedure, is that the Chancery Court having taken jurisdiction on any one ground of equity, will thereupon proceed in the one suit to a complete adjudication and settlement of every one of all the several disputed questions materially involved in the entire transaction, awarding single comprehensive decree all appropriate remedies, legal as well as equitable; moreover, having taken jurisdiction, the power of the Court to ***26** administer full relief is limited by nothing but justice itself. *Knights' Piping Inc. v. Knight,* 123 So.3d, 451, 455-56 (¶13) (Miss. CT. App. 2012) (quoting *Derr Plantation Inc. v. Swarek,* 14 So.3d 711, 718 (¶ 16) (Miss. 2009)). Our court stated this about a Chancellor's power to find a solution:
The remedial powers of our chancellors are sufficient to vindicate the claims and interests of all litigants. Those powers are as broad as equity and justice require. Those powers have always been marked by flexibility and expansiveness so that appropriate remedies may be decreed to satisfy the needs of the particular case. The chancellor's remedial powers are marked by plasticity. Equity jurisdiction permits innovation that justice may be done) See *Higginbottom v. Short,* 25 Miss. 160 (1852)). That there is no precedent for the precise relief sought is of no consequence.

Courts of equity have all remedial powers necessary to the particular case, except those that are expressly forbidden by law. Accordingly, we look to our law to see if impression of a lien to enforce compliance with an injunction is a power forbidden to the chancellor by our law. We find no statutory or decisional impediment to such power, nor is there apparent in juridical logic any rationale under which this power ought be denied our chancellors.

In holding that the chancellor had the authority to impress a lien, we have taken only the first step. The exercise of such remedial authorities as are committed to our chancellors is ultimately a matter of sound discretion. If the authority exists, we will interfere with the exercise of the authority only where it is demonstrated that the discretion has clearly been **abused**. No such showing of **abuse** has been made. On this assignment of error, we affirm.

Hall v. Wood, 443 So. 2d 834, 842-43 (Miss. 1983)

Having followed *Fought*, the Court's logic led it through a review of the fiduciary duties of Gerald toward Jo Ann and a comparison of Gerald's actual behavior; therefore, this logic resulted in the equitable relief granted by the Chancellor and the Special Judge which relief was appropriate for the situation under *Fought* and the inherent equity powers of the Chancery Court.

***27 ISSUE FOUR;**

THE CHANCELLOR AND THE SPECIAL JUDGE DID NOT COMMIT ERROR IN ORDERING PARTITION BY SALE OR IN KIND OF REAL PROPERTY SOLELY HELD IN THE NAMES OF THE WHEEL-INN TRAILER PARK, INC., AND SCAFIDI'S WHEEL INN RESTAURANT

consolidated for argument with

ISSUE FIVE

THE CHANCELLOR AND SPECIAL JUDGE DID NOT COMMIT ERROR BY DIVESTING GERALD SCAFIDI OF HIS SEPARATE INTEREST IN THE WHEEL-INN TRAILER PARK, INC. CONTRARY TO THE REQUIREMENTS OF MISS. CODE ANN. § 11-21-3 (WEST 2015).

Wheel Inn Trailer Park, Inc.

The Court did not order a partition of the Wheel-Inn Trailer, Inc., but instead found an equitable solution to a difficult problem. The Chancellor actually awarded full ownership of the Wheel-Inn Trailer Park's common stock to the Plaintiff, Jo Ann S. Hille, while simultaneously awarding full common stock of the Wheel-Inn Park and Campground to Defendant Gerald Scafidi. In its Final Judgment filed on the 25th day of April, 2013, nunc pro tunc to the 17th day of January, 2013 (1 CP Vol.2, Pages 259-273, the Court ruled in part as follows:
5. ORDERED AND ADJUDGED, that the Court divides, partites and equitable separates the parties by granting each party full ownership of separate companies and then adjusting the property line to accommodate the findings of this Court; therefore,

***28** A. The Court does hereby order that the remaining property shall be divided in accordance with the revised survey as noted above;

B. The Court finds that Jo Ann shall be the owner of the Wheel-Inn Trailer Park, Inc., together will all personal property on that property as expanded by the revised survery;

C. The Court finds that Gerald shall be the owner of the Wheel-Inn Park and Campgrounds, Inc., together with all personal property on that property as reduced by the Cassidy survey;

E. The Court hereby orders that each of the parties is to execute the necessary documents, including deeds, bills of sale and stock certificates to accomplish the directions of the court contained in this Judgment.

(1 CP Vol. 2, Pages 269-270)

The entire ownership of common stock of Wheel-Inn Trailer, Inc was awarded to Jo Ann Hille to equalize the assets owned by both Jo Ann and Gerald. Gerald objects to the award of the Trailer Park ownership to Jo Ann. The common stock of Wheel-Inn Trailer Park, Inc. is considered personal property. If Gerald Scafidi believes that the Court partitioned the Wheel-Inn Trailer, Inc., then this is allowed as a partition of personal property.

As one court stated, the partition of personalty is a statutory proceeding of which the Chancery Court has jurisdiction, citing Section 3057, Hemingway's 1927 Code (section 3543, Code of 1906) and stating: "We deem it unnecessary to cite authorities for the proposition that equity has original jurisdiction of the settlement of partnership estates and an accounting between partners." *Barry v. Mattocks et al,* 125 So. 554, 556 (Miss. 1930). Mississippi Code Annotated section 11-21-11 (West 2015) provides for a partition sale where a chancellor determines: (1) "a sale of the lands, or any part thereof, will better promote the interest of all parties that a partition in kind"; or (2) "an equal division cannot be made". Only one of these two requisites must be ***29** satisfied for a partition sale to be proper. *Fuller v. Chimento,* 824 So.2d 599,602 (¶9) (Miss. 2002) "The propriety of a partition sale or partition in kind is determined on a case-by-case basis." *Fuller,* 824 So.2d at 601 (¶9)

The Wheel Inn Restaurant

The Chancellor did order the restaurant sold in its Final Judgment (1 CP Vol. 2, Pages 259-273), stating in part:

> 6. ORDERED AND ADJUDGED, that the restaurant building, including the Latino Shop, shall be sold together will all personal property on site; further, the Chancery Clerk can sell the property or place it with a real estate agent or do a public sale at his option under the following rules....

Although Appellant addresses this as error here, there was no objection to the sale of the restaurant building and land by either Jo Ann or Gerald. On July 15, 2013, the Petition for Authority to Sell Real Property was filed with the clerk of court (2 CP Vol. 1, Pages 1-25) On the 19th day of July, 2013, an Order was signed by Chancellor Persons which authorized the sale of the Scafidi's Wheel Restaurant property to Jay M. Pennisson, Donna S. Pennisson, Ernest J. Zimmerman and Kim S. Zimmerson. (2 CP Vol. 1, Pages 26-28) For the record, Donna S. Pennisson and Kim S. Zimmerman are the daughters of Gerald W. Scafidi. Clearly, in direct conflict with his appeal stance, counsel for all parties approved the Order. (2 CP Vol. 1, Pages 28-29)

At the time of the Court's ruling, Gerald owned 55% of the corporate stock and Jo Ann owned 45% of the corporate stock of Scafidi's Wheel-Inn Restaurant, Inc. The underlying asset of the restaurant corporation was the real estate on which the restaurant was located. The Court ***30** could not award the restaurant corporation to both Jo Ann and Gerald as the parties did not get along; further, it could not be partited in kind, therefore sale was the only available method.

Based upon the above, the Chancellor and the Special Judge did not commit error by awarding the trailer park to Jo Ann -while simultaneously awarding the campground to Gerald---and by dividing restaurant corporation by sale.

ISSUE SIX:

THE CHANCELLOR AND SPECIAL JUDGE DID NOT COMMIT ERROR IN GRANTING PARTITION IN KIND BETWEEN JO ANN HILLE AND GERALD SCAFIDI WITHOUT CONSIDERATION OF ACCURATE VALUATION OF SUCH REAL PROPERTY, WITHOUT CONSIDERING THE EXCLUSIVE USE OR OCCUPANCY OF THE SUBJECT REAL PROPERTIES BY JO ANN HILLE AND GERALD SCAFIDI, WITHOUT GRANTING AN ACCESS EASEMENT FOR INGRESS

AND EGRESS TO GERALD SCAFIDI, AND WITHOUT CONSIDERING JO ANN HILLE'S ACQUISITION OF THE ONE-HALF SHARE OF GERALD SCAFIDI IN THE IMBORNONE PROPERTY.

This is a fact issue clothed by Appellant as a legal issue.

Valuation and the Hebert Report

The respective claims of Jo Ann and Gerald may be summarized as each seeking to separate their business interests, an accounting of sums and benefits received by the other from corporate defendants, and partition of the real property including a defacto partition of the real property owned by the trailer park and restaurant corporations. (1 CP Vol. 2, Page 241) To effectuate that, the Court directed that the remaining properties be divided in accordance with ***31** Mr. Hebert's recommendations and the survey of Mr. Cassidy, in evidence to his testimony. (1 CP Vol. 2, Page 251)

Before examining valuation, it is noteworthy that Appellant Scafidi offered no expert testimony on valuation, a survey, the division of the property or assets, nor any other matter subject to the Chancellor's decision. (MT Vol. 2, Page 152, Lines 22-29 and Page 157, Lines 10-15) Further, it was clear that Scafidi offered no help to any valuation and his record keeping and production of records were the cause of valuation deficiencies. (MT Vol. 2, Pages 152, Lines 10-19)

Harry Hebert, an appraiser for 40 years, was accepted as a commercial appraiser (TT Vol. 2, Page 195). Hebert has done a previous appraisal on the property in 2006. (TT Vol. 2, Page 196, Lines 5-13). In 2006, Hebert determined that the improvements on the property were not utilizing the property then to its highest potential value and, in fact, thought the property would be worth more without the improvements (TT Vol. 2, Page 197, Lines 17-20 and Page205, Lines 8-13). He based that value on market because he only got rental income from Jo Ann's trailer side and got no information from Gerald's side (TT Vol. 2, Page 199, Lines 3-25 and Pages 237-240)

Hebert then did a report in 2012. (TT Vol. 2, Page 231; Ex. 39) The examination of the testimony of the Plaintiff's expert witness, Harry Hebert, Real Estate Appraiser, established that the restaurant property had to be treated differently than the Trailer Park and Campground properties, which had the same value. The only expert testimony on valuation and separation of interest was Herbert's. For 2012, he noted again that he cannot use an income approach because of the inaccuracy and unreliability of Scafidi's records, and so stated the following: (TT Vol. 2, Page 240, Lines 3-29 and Page 241, Lines 1-27):

> ***32** A. Since the majority of that property - the two parks are basically gravel roads with sewer and water line hookups. They're similar in that respect. To me ---- and all of the land probably in the back would be of equal value if it's not located on Highway 90. All of that big chunk of land behind those businesses as a big place would have X number of the dollars per square foot. And in my opinion, I think if you split it physically where each party has an equal number of acres on an equal size of property, that would be the best way to come up with an equitable division.

And continuing that later:
Q. So, again, to recharacterize everything that we've said so far, as an appraiser what your opinion is, is that the restaurant has to be treated separately because it's on Highway 90 and all of the other properties have been treated the same?

A. That's my opinion for division purposes, yes.

In a similar vein, even Gerald Scafidi believed the properties could be divided (TT Vol. 2, Page 169, Lines 10-29 and Page 170, Lines 1-5) :
Q. Now, this property, when we're looking at the whole property, consists of really four different things. There's the trailer park company and property; and then there is Jo Ann's house, which is separate; and then we have the park and campground property

with a company kind of on top of that. Now, as far as the land itself, sir, are you telling me you do not believe that it can be divided in separate pieces of property so both you and Jo Ann get a piece of that property, the overall property?

A. I think it could be done if I was compensated for all the money that was taken, all the legal fees that was brought on me. That would never have been incurred but because of what Ms. Hille has done.

Q. From that answer, I'm assuming that you're are saying that you believe it can be divided by parcel somehow?

A. With allowances for the money that was ---- the cost factors that was brung upon me.

Q. Well, again, sir, subject to all the restrictions you might have about other aspects of the case, do you believe the property can be divided into two pieces between you and Jo Ann?

A. Yes, sir.

***33** Basically, Hebert made clear conclusions: (1) that he could not do an income approach because Appellant Scafidi's records were unreliable; (2) that the properties of the Trailer Park and of the jointly owned property on which the campground sits are not being used to their best and highest use and so improvements don't impact the best value; (3) that those properties, the park and the campground, therefore have the same value per acre; and (4) only the restaurant has a different value because it fronts Highway 90.(TT Vol. 2, Page 241, Lines 22-27). Therefore, based upon the testimony of Harry Hebert and Gerald Scafidi, the Court was correct in determining that an equal division of acreage on the property other than the restaurant would be appropriate.

The Imbornone Property

The Imbornone property sits behind both the trailer park property and the campground property. It is undeveloped land (TT Vol. 6, Page 862, Lines 1-6), but has access to Keller Street (MT Vol. 1, Page 119, Lines 26-29 and Page 120, Lines 1-18). It was bought and then was lost and confirmed at a tax sale. Jo Ann had negotiated a price to buy it, but had not bought it at the trial. (TT Vol. 3, Page 410). Technically, the property was not the parties property at the time of the hearings; however, by the time of the motions, because the parties were unable to reach agreement on this strip, Jo Ann personally bought that Imbornone strip. (MT Vol. 2, Page 119, Lines 26-29 and Page 120, Lines 1-18) Further, in an attempt to be fair with her brother, she stated this at the May 2014 post trial hearing that she would trade him part of the Imbornone strip for campground property or, if he paid part of the purchase price, sell him part of that property, which would also give him access to Keller Street. (TT Vol. 2, Page 26; MT Vol. 1, Page 119, Lines 26-29 and Page 120, Lines 1-18)

***34** Factually, because the property was not the parties at the time of the trial, it could not be added to the division. However, after the Court's Final Judgment, the parties were not joint tenants or business partners, and Jo Ann, like Gerald, could buy the property individually. When she bought that property it was not, as Appellant argues, buying his one-half interest. Moreover, it is noteworthy that Gerald has not offered to pay part of the purchase price nor trade regarding the property because as Chancellor's often say, one must do equity to get equity.

Ingress and Egress

Appellant argues a lack on ingress and egress; however, this was not a true issue at the main trial; further, this is not, of course, what Scafidi actually states in the Post Trial Hearing, where he noted that he has access on both the east and west sides of the restaurant which his daughters now own. (MT Vol. 1, Page 114, Lines 27-29; Page 115, Lines 1-10 and Page 135, Lines 6-18). Further, he has been offered and not responded to ingress and egress through a trade or purchase of part of the Imbornone property (MT Vol. 1, Page 120, Lines 6-18)

Besides, there is no dispute that all properties were originally part of the August and Audrey Scafidi properties, thus have a common ancestry. In *Huggins v. Wright,* 774 So.2d 408, 410 (Miss. 2000), the Court states:
"An easement may be acquired by express grant, implied grant (implication), or prescription, which presupposes a grant to have existed." *Dethlefs v. Beau Maison Dev. Corp.,* 511 So.2d 112, 116 (Miss. 1987). *An easement by necessity arises by implied grant when a part of a commonly-owned tract of land is severed in such a way that either portion of the property has been rendered inaccessible except by passing over the other portion or by trespassing on the lands of another. Taylor v. Hays,* 551 So.2d 906, 908 (Miss.1989). The fact that the dominant *411 and servient estates originated from the severance of a "commonly-owned tract of land" is undisputed in the present case. The parties agree that the es are entitled to an easement by necessity across the Wrights' five acre tract. *(Emphasis added)*

***35** Even though not addressed to the trial court directly, this is therefore no issue: Scafidi has actual access; he can easily get additional access across the Imbornone tract; he has rights to force access under *Huggins, Id.*

Jo Ann Hille therefore asserts that there is no valuation issue here. Scafidi chose not to have an appraiser. The expert made his findings generally about the separate value of the restaurant and the like values of the back campground and trailer properties. The Imbornone property was not owned by either at the final trial. There is access for ingress and egress. The Court did not err in this decision.

ISSUE SEVEN:

THE CHANCELLOR AND SPECIAL JUDGE DID NOT COMMIT ERROR BY NOT ALLOWING THE APPELLANTS A FAIR OPPORTUNITY TO RESPOND TO THE SUA SPONTE EXCLUSION OF THE AVL FORENSIC ACCOUNTING REPORT FROM EVIDENCE AFTER THE CLOSE OF THE RECORD.

The Appellant is misreading the Court's decision. Clearly, the Court did not exclude the AVL Forensic Accounting Report, but noted its limitation as a final statement on value. What the Court said was:

> The Court accepts the difficulty encountered by the forensic accounting firm in determining income and expenses using an indirect method of accounting necessitated by incomplete and inaccurate books and records and a non-cooperating principal of the business such as Gerald. The report (Ex. 27) does confirm an understatement of the Campground's revenue by Gerald, but the Court does not accept the accountant's computation of the shortfall of the Campground's gross receipts. The report does not prove by clear and convincing proof that Gerald is responsible for the shortfall computed by the accountants. The report itself states that the shortfall may be the result of several different causes, including mismanagement, charging below market ***36** rates or excess expenditures. None of these stated possibilities constitute malfeasance sufficient to charge Gerald with computed shortfall. The Court finds that the methods used by the accountants may not be reliably applied to the facts of this case to establish the amount of any misappropriation of money by Gerald. M.R.E. 702(3). The Court finds from the totality of the evidence that the Campground books and records and tax returns are false and incomplete as to both gross income and expenditures.

(1 CP, Vol. 2, Page 214 ¶18)

This limitation on the use of the expert evidence is well within the decision making power of the court In *Puckett v. State,* 737 So.2d 322, 372 (Miss. 1999), this Court stated that the admission of expert testimony is within the sound discretion of the trial judge. Therefore, the decision of a trial judge will stand "unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an **abuse** of discretion." Id. "Mississippi law requires the trial court to ensure that proposed [expert]

testimony satisfies Rule 702 of Mississippi Rules of Evidence." *Univ. of Miss. Med. Ctr. v. Pounders*, 9700 So.2d 141, 146 (Miss. 2007). This Rule "recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable." Miss. R. Evid, 702 cmt.

Basically, the Court accepted the report and the work of the forensic CPA, but found that the conclusions could not be accepted because of the unreliability of Appellant Scafidi's own actions. The Chancellor did not **abuse** his discretion in choosing not to consider the shortfall in favor of Jo Ann.

ISSUE EIGHT:

THE CHANCELLOR AND SPECIAL JUDGE DID NOT COMMIT ERROR BY GRANTING RELIEF UNTO JO ANN HILLE WHICH WAS BEYOND THE SCOPE OF CLAIMS ASSERTED BY MS. HILLE.

***37** Appellant Scafidi is again arguing a statutory limitation on the actions of the Chancellor; however, Scafidi ignores the assertion of *Fought v. Morris*, 543 So.2d 167 (Miss. 1989.) and ignores how finding *Fought* applicable changes the analysis and treatment of these three family owned closely held corporations.

Jo Ann broadly sought relief, as shown in her Second Amended Complaint, which contained a broad prayer for relief. (1 CP Vol. 1, Pages 4-6) Jo Ann noted, among other matters, that the property be partitioned in kind under § 11-21-11 of the Mississippi Code of 1972, and, additionally, "...that the Court order the subject property be partitioned based upon the evidence presented by the Plaintiff's expert in the percentage of ownership of the Plaintiff and the Respondent", among "...such other relief that she may be entitled, premises considered". (1 CP, Vol. 2, Pages 184-186), Further, in addition to pretrial motions back to 2009, Jo Ann argued the *Fought* matter in her opening statement (TT Vol. 1, Page 28; MT Vol. 1, Pages 184-185) and the trial testimony was directed to that analysis.

Regardless, Mississippi has been a "notice pleading" state since January 1, 1982, when we adopted the Mississippi Rules of Civil Procedure. *Upchurch Plumbing Inc. v. Greenwood Utils. Comm'n*, 964 So.2d 1100, 1117 (Miss. 2007) (citing Miss. R. Civ. P. 8 and cmt.). Under Rule 8, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief "and" a demand for judgment." Miss. R. Civ. P. 8(a). "No technical forms of pleading or motions are required." Miss. R. Civ. P. 8(e)(1). Moreover, "all pleadings shall be construed as to do substantial justice." Miss. R. Civ. P. 8(f). Miss. R. Civ. P. 54(c) states that every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the ***38** proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings.

In *Bluewater Logistics, LLC v. Williford*, 55 So.3d 148 (Miss. 2011), the Court noted that, Our decisions have reflected the shift from older forms of "code pleading" to the Rules' "notice pleading" paradigm. In *Pilgrim Rest Missionary Baptist v. Wallace*, we stated "it is axiomatic that the relief need not be limited in kind or amount by the demand but may include relief not requested in the Complaint." *Pilgrim Rest Missionary Baptist Church ex rel. Bd. of Deacons v. Wallace*, 838 So.2d 67, 75 (Miss. 2003) (citing Miss. R. Civ. P. 54 cmt: *Turner v. Terry*, 799 So.2d 25, 39 (Miss. 2001); *Tuck v. Blackmon*, 798 So.2d 402, 410 (Miss. 2001) And, in *Turner*, the Court stated, "A trial judge may award a party any relief to which his is entitled, even if the party fails to make a specific demand for such." *Turner*, 799 So.2d at 39.

Without reiterating the matters set forth in Jo Ann's arguments above in issues two, three and four, based upon the evidence presented by Jo Ann and the testimony of her witnesses, together with the pleadings filed by Jo Ann, the Chancellor and the Special Judge did not commit error in his remedial rulings.

CONCLUSION

This lawsuit is the sad story of family businesses started on family property by August and Audrey Scafidi, the parents of our litigants Jo Ann Hille and Gerald Scafidi, which on the parents' deaths, became a matter of conflict between their children, with one brother domineering and controlling his sister and the family business.

Appellant Gerald Scafidi, having avoided any semblance of corporate structure for the preceding decade or so, now wants to use corporate statutes to shield him from review and remedy. ***39** Throughout his brief Appellant Gerald Scafidi argued statutes and corporate cases on derivative actions (*i.e., Speetjens v. Malaco, Inc.*, 929 So.2d 3030 (Miss 2006) and judicial dissolution (i.e., Miss. Code Ann. § 79-4-14.30-34 (West 2015). However, as in "can't see the forest for the trees", Appellant Scafidi failed to address the actual findings of the court - that these three companies are closely held companies, not a company owned and run by stock holders or that are publicly traded. Both the cousin and attorney John Scafidi, the business accountant Shelly Raye, and the forensic CPA, Kim Marmalich, like our judge, recognized these were family businesses, despite the complexities of company name and real estate.

As the testimony revealed, Gerald, happy with the status quo of his control, did not cooperate with discovery or with any experts. Gerald, happy with his own system of finance and accounting, resisted normal record keeping and production of sufficient reliable records for the forensic CPA and for the valuation expert Scafidi, happy with a cash system and his commingling of accounts, refused to evidence his income by filing personal state and federal taxes. However, once all the testimony and evidence was presented, Gerald, unhappy with the ruling, continued his mantra of form over substance - corporate requirements regardless of its being a closely held corporation that never, ever followed any corporate rules.

Your Appellee Jo Ann Hille asserts that the Chancellor and Special Chancellor rendered the best decision available. That decision was based on substantial, credible evidence from Jo Ann Hille ***40** and the experts, rendered in a long, explanatory judgment, and is clearly not an **abuse** of discretion or manifestly wrong. Jo Ann Hille requests that this Court uphold that Judgment.

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