*Chapter 2*

Courts and Alternative Dispute Resolution

***Case 2.1***

Fla.App. 3 Dist.,2013.

Espresso Disposition Corp. 1 v. Santana Sales & Marketing Group, Inc.

--- So.3d ----, 2013 WL 11714 (Fla.App. 3 Dist.), 38 Fla. L. Weekly D88

District Court of Appeal of Florida,

Third District.

**ESPRESSO DISPOSITION CORP. 1 and Rowland Coffee Roasters, Inc., Appellants,**

**v.**

**SANTANA SALES & MARKETING GROUP, INC., Appellee.**

No. 3D12–1147.

Jan. 2, 2013.

*On Motion for Rehearing*

[CORTIÑAS](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0343975301&FindType=h), J.

We grant Santana Sales & Marketing Group, Inc.'s (“Appellee”) amended motion for rehearing, withdraw our former opinion dated November 14, 2012, and substitute the following opinion in its stead:

Espresso Disposition Corporation 1 and Rowland Coffee Roasters, Inc. (collectively “Appellants”) seek review of the trial court's order denying their motions to dismiss Appellee's third amended complaint. Appellants claim that the trial court erred in denying their motions to dismiss because the plain and unambiguous language in the parties' brokerage agreement contains a mandatory forum selection clause requiring that all lawsuits brought under the agreement shall be in Illinois. We agree.

Espresso Disposition Corporation 1 and Santana and Associates entered into the brokerage agreement in 2002.[FN1](#Document1zzB00112029548971) The agreement provides for a mandatory forum selection clause in paragraph 8. The provision states:

The ***venue*** with respect to *any action pertaining to this Agreement* ***shall be the State of Illinois.*** The *laws of the State of Illinois shall govern* the application and interpretation of this Agreement.

(Emphasis added). However, Appellee filed a lawsuit against Appellants alleging a breach of the agreement in Miami–Dade County, Florida. In fact, Appellee filed four subsequent complaints—an initial complaint, amended complaint, second amended complaint, and third amended complaint—after each and every previous pleading's dismissal was based upon venue as provided for in the agreement's mandatory forum selection clause. Appellee's third amended complaint alleges the forum selection clause was a mistake that was made at the time the agreement was drafted. Additionally, Appellee attached an affidavit which states that, in drafting the agreement, Appellee's principal copied a form version of an agreement between different parties, and by mistake, forgot to change the venue provision from Illinois to Florida. In response, Appellants filed their motions to dismiss the third amended complaint, which the trial court denied.[FN2](#Document1zzB00222029548971) Because the trial court erred in denying Appellants' motions to dismiss that sought to enforce a forum selection clause, we reverse and remand for entry of an order dismissing the third amended complaint.

[[1]](#Document1zzF12029548971)[[2]](#Document1zzF22029548971) Florida appellate courts interpret a contractual forum selection clause under a de novo standard of review. [*Am. Safety Cas. Ins. Co. v. Mijares Holding Co., LLC,* 76 So.3d 1089, 1091 (Fla. 3d DCA 2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2026765905&ReferencePosition=1091) (citations omitted). Likewise, “[a]s the trial court's order denying [appellant's] motion to dismiss is based on the interpretation of the contractual forum selection clause, this Court's standard of review is de novo.” [*Celistics, LLC v. Gonzalez,* 22 So.3d 824, 825 (Fla. 3d DCA 2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2020513217&ReferencePosition=825). Therefore, the narrow issue before this Court is whether the brokerage agreement provides for a mandatory forum selection clause that is enforceable under Florida law.

[[3]](#Document1zzF32029548971) Florida courts have long recognized that “forum selection clauses such as the one at issue here are presumptively valid.” [*Corsec, S.L. v. VMC Int'l Franchising, LLC,* 909 So.2d 945, 947 (Fla. 3d DCA 2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2007143271&ReferencePosition=947) (enforcing forum selection clause in agreement that stated: “[t]he parties expressly submit to the jurisdiction of the courts and tribunals of the capital City of Madrid....”). This is because forum selection clauses “provide a degree of certainty to business contracts by obviating jurisdictional struggles and by allowing parties to tailor the dispute resolution mechanism to their particular situation.” [*Am. Safety Cas.,* 76 So.3d at 1091](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2026765905&ReferencePosition=1091) (quoting [*Manrique v. Fabbri,* 493 So.2d 437, 439 (Fla.1986)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1986143659&ReferencePosition=439)). Moreover, “[f]orum selection clauses reduce litigation over venue, thereby conserving judicial resources, reducing business expenses, and lowering consumer prices.” [*Am. Safety Cas.,* 76 So.3d at 1091](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2026765905&ReferencePosition=1091).

[[4]](#Document1zzF42029548971)[[5]](#Document1zzF52029548971) Because Florida law presumes that forum selection clauses are valid and enforceable, the “party seeking to avoid enforcement of such a clause must establish that enforcement would be unjust or unreasonable.” [*Am. Safety Cas.,* 76 So.3d at 1092;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2026765905&ReferencePosition=1092) *see also* [*Corsec,* 909 So.2d at 947;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2007143271&ReferencePosition=947) [*Manrique,* 493 So.2d at 440, n. 4.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1986143659&ReferencePosition=440) Under Florida law, the clause is only considered unjust or unreasonable if the party seeking avoidance establishes that enforcement would result in “no forum at all.” [*Am. Safety Cas.,* 76 So.3d at 1092](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2026765905&ReferencePosition=1092) (quoting [*Corsec,* 909 So.2d at 947);](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2007143271&ReferencePosition=947) *see also* [*Golden Palm Hospitality, Inc. v. Stearns Bank Nat'l Ass'n,* 874 So.2d 1231, 1235 (Fla. 5th DCA 2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2004522553&ReferencePosition=1235) (“Thus, it is generally appropriate for a court in Florida, as a procedural issue, to determine the validity and enforceability of a forum selection clause despite a choice of law provision in the agreement.”). There is absolutely no set of facts that Appellee could plead and prove to demonstrate that Illinois state courts do not exist. Illinois became the twenty-first state in 1818, and has since established an extensive system of state trial and appellate courts. Clearly, Appellee failed to establish that enforcement would be unreasonable since the designated forum—Illinois—does not result in Appellee's having “no forum at all.”

[[6]](#Document1zzF62029548971)[[7]](#Document1zzF72029548971)[[8]](#Document1zzF82029548971)[[9]](#Document1zzF92029548971) Further, “[a]s we have said on a number of occasions, if a forum selection clause ‘unambiguously’ mandates that litigation be subject to an agreed upon forum, then it is reversible error for the trial court to ignore the clause.” [*Sonus–USA, Inc. v. Thomas W. Lyons, Inc.,* 966 So.2d 992, 993 (Fla. 5th DCA 2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2013300192&ReferencePosition=993). Generally, the clause is mandatory where the plain language used by the parties indicates “exclusivity.” [*Sonus–USA, Inc.,* 966 So.2d at 993](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2013300192&ReferencePosition=993) (quoting [*Golden Palm Hospitality, Inc.,* 874 So.2d at 1236.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2004522553&ReferencePosition=1236) Importantly, “[i]f the forum selection clause state[s] or clearly indicate[s] that any litigation must or **shall** be initiated in a specified forum, then it is mandatory.” [*Sonus–USA, Inc.,* 966 So.2d at 993](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2013300192&ReferencePosition=993) (quoting [*Shoppes L.P. v. Conn,* 829 So.2d 356, 358 (Fla. 5th DCA 2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2002691599&ReferencePosition=358) (internal quotation marks omitted) (emphasis added). Here, the agreement's plain language provides that the venue for any action relating to a controversy under the agreement any litigation “shall be the State of Illinois.” *See* [*Sonus–USA, Inc.,* 966 So.2d at 993](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2013300192&ReferencePosition=993) (holding that the agreement's use of the word shall indicated the forum selection clause was a mandatory provision that must be enforced); *see also* [*Corsec, S.L.,* 909 So.2d at 946.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2007143271&ReferencePosition=946) The clear language unequivocally renders the forum selection clause mandatory.

[[10]](#Document1zzF102029548971) Appellee would have us create an exception to our jurisprudence on mandatory forum selection clauses based on their error in cutting and pasting the clause from another agreement. Of course, the origin of “cutting and pasting” comes from the traditional practice of manuscript-editing whereby writers used to cut paragraphs from a page with “editing scissors,” that had blades long enough to cut an 8 1/2 "—wide page, and then physically pasted them onto another page. Wikipedia, http://en.wikipedia.org/wiki/Cut,\_copy,\_and\_ paste (last visited September 17, 2012). Today, the cut, copy, and paste functions contained in word processing software render unnecessary the use of scissors or glue. However, what has not been eliminated is the need to actually read and analyze the text being pasted, especially where it is to have legal significance. Thus, in reviewing the mandatory selection clause which Appellant seeks to enforce, we apply the legal maxim “be careful what you ask for” and enforce the pasted forum.

[[11]](#Document1zzF112029548971) Accordingly, we reverse trial court's denial of the motions to dismiss Appellee's third amended complaint on the basis of improper venue, and remand for entry of an order of dismissal.[FN3](#Document1zzB00332029548971)

Reversed and remanded.

[FN1.](#Document1zzF00112029548971) Rowland assumed the agreement in May 2011. Rowland purchased Espresso Disposition Corporation f/k/a Rowland Coffee Roasters. Thus, Rowland acquired Rowland Coffee Rosters. As such, the Rowland Coffee Roasters named in the 2002 agreement in now Espresso Disposition Corporation.

[FN2.](#Document1zzF00222029548971) During the pendency of the underlying lawsuit, Appellants filed and served three separate motions for sanctions pursuant to [section 57.105, Florida Statutes](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000006&DocName=FLSTS57.105&FindType=L), claiming that Appellee's lawsuit was frivolous given the well-established law on mandatory forum selection provisions and the substantive deficiencies in Appellee's allegations.

[FN3.](#Document1zzF00332029548971) Appellee did not argue unilateral mistake to the trial court. However, even if Appellee had so argued, any purported unilateral mistake resulted from an inexcusable lack of due care on the part of Appellee's counsel, thereby precluding relief under a theory of unilateral mistake. *See* [*Stamato v. Stamato,* 818 So.2d 662 (Fla. 4th DCA 2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=2002364816); [*BMW of N. Am., Inc. v. Krathen,* 471 So.2d 585 (Fla. 4th DCA 1985)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=1985129992).

Although Appellee argued mutual mistake, that argument was equally meritless as there was simply no evidence in the record of any mistake whatsoever by Appellants. *See* [*Keystone Creations, Inc. v. City of Delray Beach,* 890 So.2d 1119 (Fla. 4th DCA 2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=2005640316); [*Feldman v. Kritch,* 824 So.2d 274, 277 (Fla. 4th DCA 2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2002528386&ReferencePosition=277) (“It is never the role of the trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be a bad bargain.”).

***Case 2.2***

Miss.,2014.

Brothers v. Winstead

129 So.3d 906

Supreme Court of Mississippi.

**Phillips BROTHERS, Kilby Brake Fisheries, LLC and Harry Simmons**

**v.**

**Ray WINSTEAD.**

No. 2011–CA–01846–SCT.

Jan. 9, 2014.

[WALLER](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0218928101&FindType=h), Chief Justice, for the Court:

1. Defendants Phillips Brothers, Kilby Brake Fisheries, LLC, and Harry Simmons seek review of a $1,724,923 judgment in favor of Ray Winstead for shareholder and employment claims. Finding multiple errors, we reverse and render in part; and remand in part.

**Facts & Procedural History**

2. In March 2000, Kilby Brake Fisheries, LLC, was formed as a catfish hatchery and farm. An operating agreement was signed by the three members—Harry Simmons, Phillips Brothers, LP, and Ray Winstead. The Kilby Brake operating agreement provided each member a one-third percent ownership stake in Kilby Brake. At the start of the LLC, bank loans were made and signed by all three members as guarantors. There were three loans: one in the amount of $300,300 (for the purchase of inventory), one in the amount of $201,040 (the purchase of equipment), and one in the amount of $300,900 (revolving line of credit to be used for operating expenses). Shortly after Kilby Brake was formed, Phillips and Simmons purchased an adjacent catfish farm (“the Wise Place”) to be used to support the Kilby Brake operation. Winstead declined to be a part of the purchase of the Wise Place.

3. The members agreed that Winstead would be the hatchery operator and, for his work, he would receive $30,000 per year from Kilby Brake and use of a company truck, and Kilby Brake would pay for his and his family's housing on the farm, utilities, and health insurance. Winstead, as hatchery operator, was subject to the direction of Simmons, serving as the manager under the operating agreement. Simmons, under the Kilby Brake operating agreement, was authorized to carry out the business functions of the hatchery, including borrowing money and check-writing.

4. Kilby Brake's records indicated it was profitable for only two of the almost eight years while Winstead was the hatchery operator. Simmons fired Winstead in late 2007.

5. In September 2009, Winstead filed a complaint against Kilby Brake, Harry Simmons, Chat Phillips, Simmons Farm Raised Catfish, Inc., Five Mile Fisheries, Inc., and H.D. Simmons Corp. in the Circuit Court of Yazoo County.[FN1](#Document1zzB00112032505486) His complaint was amended to add Phillips Brothers, LP, as a defendant. Winstead alleged that Simmons and Phillips Brothers had failed to pay him his agreed-upon salary, asserting claims of fraud, breach of fiduciary duty, corporate freeze-out, conversion, slander, slander *per se,* and tortious interference with business relations. He also requested an accounting and dissolution of the LLC.

[FN1.](#Document1zzF00112032505486) Harry Simmons and Phillips Brothers were members of a number of other entities involved in the catfish industry. The partners' other companies also were named as defendants in Winstead's complaint.

6. Along with their answers, Simmons, Phillips and Kilby Brake (Defendants) filed counterclaims against Winstead asserting theft, conversion, usurpation of corporate opportunities, tortious interference with business relations, conversion, theft by deception, breach of contractual and fiduciary duties, and unjust enrichment. They requested replevin and judicial dissolution. The counterclaims alleged that Winstead took Kilby Brake property for his personal use, provided property to others to use, and sold property, including fish products, food products, equipment, chemicals and fuel without authorization, while retaining all profits. The trial court granted Winstead's motion to dismiss the claims of tortious interference with Kilby Brake's business relations and claims that were barred by the three-year statute of limitations.

7. Trial commenced in April 2011 and, at the completion, a jury awarded Winstead compensatory damages in the amount of $1,160,000 and punitive damages against Simmons of an additional $100,000. The court also awarded Winstead attorneys' fees and costs in the amount of $464,923, bringing the total judgment against Harry Simmons and Phillips Brothers to $1,724,923. Further, the court awarded post-judgment interest at a rate of eight percent. Defendants appealed. The jury denied three of Defendants' four counterclaims—theft, unjust enrichment, and breach of fiduciary duty. Kilby Brake prevailed on its replevin counterclaim, and the jury ordered that Winstead return the company truck to Kilby Brake.

8. Defendants filed a motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, a motion for new trial, which were denied. Although both parties asked in their pleadings for the LLC to be dissolved, they were unable to agree about the terms of dissolution. In the final judgment, the parties' claims for judicial dissolution were dismissed without prejudice. No issue is made of this dismissal on appeal. Because of the many issues in this case, we will discuss the facts relevant to each issue below.

**DISCUSSION**

9. The issues raised by the three defendants in this appeal fall into six categories: (1) Whether the admission of testimony regarding an oral agreement for cash contributions violated the parol evidence rule; (2) whether there was sufficient evidence to support Winstead's award for fraud; (3) whether there was sufficient evidence to support Winstead's award for corporate freeze-out; (4) whether there was sufficient evidence to support Winstead's award for breach of fiduciary duty; (5) whether Kilby Brake is entitled to a new trial; (6) whether Winstead met the requisite elements of slander *per se?*

**I. Whether the admission of testimony regarding an oral argument for case contributions violated the parol evidence rule.**

[[1]](#Document1zzF12032505486) 10. Winstead asserted that Simmons and Phillips Brothers had agreed to provide $600,000 in paid-in capital from cash contributions for the purchase of the startup equipment and fish inventory. Over Simmons and Phillips Brothers' objections, the trial court allowed Winstead to testify to this alleged oral agreement because the operating agreement was “silent as to the contributions.” Winstead's expert also was permitted to testify, over objections, that he believed it was the intent of Simmons and Phillips to pay $600,000 in capital, out of cash.

[[2]](#Document1zzF22032505486)[[3]](#Document1zzF32032505486) 11. “Questions concerning the construction of contracts are questions of law that are committed to the court rather than questions of fact committed to the fact finder.” [*Facilities, Inc. v. Rogers–Usry Chevrolet, Inc.,* 908 So.2d 107 (Miss.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=2006989281) (quoting [*Miss. State Highway Comm'n v. Patterson Enters. Ltd.,* 627 So.2d 261, 263 (Miss.1993)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1993067012&ReferencePosition=263)). An appellate court applies a *de novo* standard of review for questions of law. [*Starcher v. Byrne,* 687 So.2d 737, 739 (Miss.1997)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1997041853&ReferencePosition=739).

12. The relevant portion of the Kilby Brake operating agreement at issue is set out as follows:

**ARTICLE VI**

**CAPITAL CONTRIBUTIONS AND CAPITAL ACCOUNTS**

Section 6.1 *Initial Capital Contributions.* As initial capital contributions to the Company, the Members shall contribute the Property more particularly described in Schedule “A”.[FN2](#Document1zzB00222032505486)

[FN2.](#Document1zzF00222032505486) See Schedule “A,” attached as an exhibit to this opinion.

Section 6.2 *Additional Contributions.* Except as set forth in Section 6.1 above, no Member shall be required to make any capital contributions.

[[4]](#Document1zzF42032505486)[[5]](#Document1zzF52032505486)[[6]](#Document1zzF62032505486)[[7]](#Document1zzF72032505486)[[8]](#Document1zzF82032505486)[[9]](#Document1zzF92032505486)[[10]](#Document1zzF102032505486) 13. “The primary purpose of all contract construction principles and methods is to determine and record the intent of the contracting parties.” [*Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.,* 857 So.2d 748, 752 (Miss.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2003719098&ReferencePosition=752) (citing [*Kight v. Sheppard Bldg. Supply, Inc.,* 537 So.2d 1355, 1358 (Miss.1989)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1989017410&ReferencePosition=1358)). In contract construction cases, the court's focus is on the language of the contract. [*Royer Homes,* 857 So.2d at 752](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2003719098&ReferencePosition=752) (citing [*Turner v. Terry,* 799 So.2d 25, 32 (Miss.2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2001173515&ReferencePosition=32); [*Osborne v. Bullins,* 549 So.2d 1337, 1339 (Miss.1989)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1989143126&ReferencePosition=1339)). A court should look to the “four corners” of a contract to determine how to interpret it. [*McKee v. McKee,* 568 So.2d 262, 266 (Miss.1990)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1990107225&ReferencePosition=266). It is well established that “parol extrinsic evidence is not admissible to add to, subtract from, vary or contradict written instruments, contractual in nature, and which are valid, complete, unambiguous and unaffected by accident, mistake or fraud.” [*Byrd v. Rees,* 251 Miss. 876, 171 So.2d 864, 867 (Miss.1965)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1965130327&ReferencePosition=867). “Our concern is not nearly so much with what the parties may have intended, but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy.” [*In re Estate of Fitzner,* 881 So.2d 164 (Miss.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=2003098036) (citing [*Simmons v. Bank of Miss.,* 593 So.2d 40, 42–43 (Miss.1992)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1992026285&ReferencePosition=42)). If the language in the contract is clear and unambiguous, the intent of the contract must be effectuated. [*Rotenberry v. Hooker,* 864 So.2d 266, 270 (Miss.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2003754150&ReferencePosition=270); *see also* [*Pfisterer v. Noble,* 320 So.2d 383, 384 (Miss.1975)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1975139877&ReferencePosition=384). “The mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law.” [*Burton v. Choctaw County,* 730 So.2d 1, 6 (Miss.1997)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1997166034&ReferencePosition=6) (quoting [*Cherry v. Anthony, Gibbs, Sage,* 501 So.2d 416, 419 (Miss.1987)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1987010200&ReferencePosition=419)).

14. This Court has said that “silence alone does not necessarily create an ambiguity as a matter of law.” [*Facilities, Inc. v. Rogers–Usry Chevrolet, Inc.,* 908 So.2d 107, 115 (Miss.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2006989281&ReferencePosition=115). In [*Facilities, Inc.,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2006989281) this Court found that, although the Court of Appeals held that a lease agreement between the parties was not ambiguous, the Court of Appeals improperly considered extrinsic or parol evidence in the analysis portion of its opinion. [*Id.* at 110.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2006989281) We found that, although the lease agreement was *silent* as to whether the bonus rent would apply to new vehicle sales at the subject property, it was *not ambiguous* and, therefore, Rogers–Usry was not required to pay bonus rent for sales that did not occur on the leased property. [*Id.* at 115–16](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2006989281) (“It is the *silence, not the language of the* [operating agreement], that has created this dispute. However, silence alone does not necessarily create an ambiguity as a matter of law”) (emphasis in original). Further, we noted this concept is not novel and has been adopted in a number of jurisdictions. [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2006989281)

15. The Kilby Brake operating agreement is clear. It states “no member shall be required to make any capital contributions” except as provided in Schedule A.[FN3](#Document1zzB00332032505486) Nothing is listed in Schedule A. Kilby Brake was financed by the three loans totaling more than $800,000, which Winstead signed for and subsequently renewed as a one-third partner. For more than eight years, Winstead never raised an issue about the capital investment. Winstead's expert testified that it was not unusual to leave capital contributions blank for completion at closing. No amounts were ever filled in or added.

[FN3.](#Document1zzF00332032505486) See Schedule “A,” attached as an exhibit to this opinion.

16. Constraining our review to the “four corners” of the document, it is clear the language used in the Kilby Brake operating agreement is not ambiguous. Thus, it was error for the trial court to go outside the operating agreement to interpret the intent of the parties. Because the trial court never should have considered the offer to make cash contributions, the interest-expense-savings portion of Winstead's corporate freeze-out damage award also is without merit. We thus reverse the judgment of the trial court on its parol-evidence finding as well as the damages awarded and render judgment in favor of Simmons on this portion of Winstead's freeze-out damages. Having limited our review to the admissible evidence, we now address the merits of Defendants' claims.

**II. Whether there was sufficient evidence to support Winstead's award for fraud.**

17. Winstead's theory of recovery for fraud was based on two claims. The first is that Simmons and Phillips Brothers purchased the Wise Place in their names only, with funds from Kilby Brake. The second is that money was withheld fraudulently from his salary. Winstead was awarded a total of $140,000 for fraud: $90,000 for one-third of the value of the Wise Place and $50,000 for money withheld from his paychecks. Simmons and Phillips Brothers were both found liable and both moved for JNOV, arguing Winstead had failed to prove all of the elements of fraud by clear and convincing evidence or, in the alternative, that the overwhelming weight of the evidence required a new trial.

[[11]](#Document1zzF112032505486)[[12]](#Document1zzF122032505486)[[13]](#Document1zzF132032505486)[[14]](#Document1zzF142032505486)[[15]](#Document1zzF152032505486) 18. The standard of review for the denial of a motion for JNOV is *de novo.* [*InTown Lessee Assocs., LLC v. Howard,* 67 So.3d 711, 718 (Miss.2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2025584192&ReferencePosition=718). We consider the facts in the light most favorable to the nonmoving party. [*Natchez Elec. & Supply Co. v. Johnson,* 968 So.2d 358, 361 (Miss.2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2013122691&ReferencePosition=361). “ ‘If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, [we are] required to reverse and render.’ ” [*Leaf River Forest Prods., Inc. v. Ferguson,* 662 So.2d 648, 659 (Miss.1995)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1995209482&ReferencePosition=659) (quoting [*Munford, Inc. v. Fleming,* 597 So.2d 1282, 1284 (Miss.1992)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1992079117&ReferencePosition=1284)). We will affirm the denial of JNOV if there is substantial evidence in support of the verdict. [*Natchez Elec. & Supply Co.,* 968 So.2d at 362.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2013122691&ReferencePosition=362) “Substantial evidence is information of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions.” [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2013122691) (citations omitted).

[[16]](#Document1zzF162032505486)[[17]](#Document1zzF172032505486) 19. In order to recover for fraud, a plaintiff must prove the following elements: “(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.” [*Holland v. Peoples Bank & Trust Co.,* 3 So.3d 94, 100 (Miss.2008)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2017632440&ReferencePosition=100) (citations omitted). These elements must be proven by clear and convincing evidence. [*Bank of Shaw v. Posey,* 573 So.2d 1355, 1363 (Miss.1990)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1991028952&ReferencePosition=1363). Clear and convincing evidence is of such a high order that “this Court held that the ‘overwhelming weight of the evidence’ falls short of being ‘clear and convincing.’ ” *In the* [*Interest of C.B.,* 574 So.2d 1369, 1375 (Miss.1990)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1991028967&ReferencePosition=1375) (quoting [*Aponaug Mfg. Co. v. Collins,* 207 Miss. 460, 42 So.2d 431, 434 (1949)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1949106545&ReferencePosition=434)).

***A. The Wise Place***

[[18]](#Document1zzF182032505486) 20. The Wise Place is a catfish farm located adjacent to Kilby Brake. Winstead testified that Simmons informed him that “they had gotten the Wise Place” and that it was his understanding “that, basically, Kilby Brake bought the Wise Place.” Simmons testified that he and Phillips Brothers purchased the Wise Place and the equipment thereon individually and allowed Kilby Brake to use it as part of the hatchery operation. He further testified that Winstead was unwilling to join in the purchase because he did not feel that a bank would lend him more money. The deed to the property was dated April 12, 2000, and was recorded in the names of Harry Simmons and Phillips Brothers.

21. At trial, Simmons initially testified that the purchase price of the Wise Place was $190,000, however, he later explained that the total purchase price for the land and equipment was $230,000. Phillips also testified that the purchase price for the land at the Wise Place was $190,000, but that the equipment that came with the deal was an additional cost. Simmons and Phillips Brothers permitted Kilby Brake to use the Wise Place, rent free, and even gave the proceeds from the sale of the Wise Place equipment to Kilby Brake. Although Kilby Brake did not pay rent for use of the Wise Place, Kilby Brake spent $78,305.70 to make improvements to the pond walls and access roads to benefit Kilby Brake.

22. At the start of the company, Kilby Brake secured three loans from BankPlus, which were signed by all members, totaling $800,000. Simmons testified that they paid $400,000 for inventory and $200,000 for equipment, which left $200,000 in operating capital. A Kilby Brake bank statement from March 2000 was submitted into evidence showing that $610,000 was deposited into the account. Winstead's attorney thoroughly questioned Simmons about the purchase of the Wise Place and the March 2000 bank statement, claiming this is where the $190,000 came from to purchase the Wise Place. Simmons denied this, later testifying that he recalled purchasing the Wise Place with Phillips Brothers using cash.

23. The record contains no evidence that Kilby Brake funds were used to purchase the Wise Place. Winstead's forensic accountant, Robert Alexander, testified that *no* Kilby Brake funds were used to purchase the property, and neither Simmons nor Phillips *ever* took any money from the Kilby Brake account, whether salary, dividends, or other distributions. The deed to the Wise Place was in the name of Simmons and Phillips Brothers and was on record at the Humphreys County Courthouse. Interestingly, the jury form stated Simmons and Phillips Brothers were guilty of a material misrepresentation and all nine elements of fraud but then stated the jury found Simmons and Phillips Brothers not guilty of “misappropriat[ing] and convert[ing] Kilby Brake Fisheries' funds or property....”

24. This Court finds that insufficient evidence, much less clear and convincing evidence, was presented to prove the funds to purchase the Wise Place came from Kilby Brake. Further, Winstead's mere assertion that he thought Kilby Brake owned the Wise Place is not enough to carry his burden that he was defrauded by Simmons and Phillips Brothers. We find that the trial court erred by failing to grant Defendants' motion for JNOV for the claim of fraud surrounding the purchase of the Wise Place. Thus, we reverse and render judgment on this issue in favor of Simmons and Phillips Brothers.

***B. Withheld Pay***

[[19]](#Document1zzF192032505486) 25. The jury ruled Winstead was defrauded by Phillips Brothers and Simmons with regard to withholdings from his paycheck over the course of his employment at Kilby Brake. Whether Winstead was owed money based on the amounts withheld from his paycheck was heavily contested by both sides. Winstead claims improper deductions were taken from his paychecks and he was never paid the amount he was promised. Simmons claims Winstead actually owed Kilby Brake for personal charges and cash advances. Both sides produced documents which were admitted into evidence showing records of payments and deductions. Based on Winstead's stated $30,000 annual salary, Alexander calculated that Winstead was owed $50,000 in withheld pay over eight years. The jury found Phillips Brothers and Simmons liable for $25,000 each.

26. In [*Natchez Electric Supply Inc.,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2013122691) the plaintiff was seeking to recover on an open account. Despite some uncontroverted charges by the defendant, the jury returned a defense verdict with no recovery for the plaintiff. Because the record contained undisputed evidence of one party's obligation to pay another, this Court held “no reasonable and fair-minded juror in the exercise of fair and impartial judgement” could find the obligating party owed absolutely nothing. [*Natchez Elec. & Supply Co., Inc.,* 968 So.2d at 363.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2013122691&ReferencePosition=363) The case at bar bears striking similarities.

27. In the record we find Winstead admitting to making personal charges on his Kilby Brake account for some items that were indisputably personal, such as multiple deer-rifle scopes, dog food, and hunting accessories. When asked if the purchase of a “Gobbler's Lounge,” used for turkey hunting, was for Kilby Brake, Winstead responded, “[n]o sir. That would be a personal item for me.” It was further undisputed that Winstead charged Kilby Brake for gasoline used at his father's hunting camp in Durant. Winstead's damages for lost pay were based on testimony that money was taken out of all his paychecks; however, payroll records indicate that Winstead was actually paid in excess of his $30,000 annual salary for four of his eight years with Kilby Brake. What is more, Winstead admitted he had received cash advances on his paycheck and that money subsequently would be taken out to repay the advances. Because fault was apportioned between Phillips Brothers and Simmons, we address both separately.

28. As to Phillips Brothers, we can find no proof of any involvement in the decision-making process regarding the execution of Winstead's checks. Contractually, Simmons was the manager and supervised Winstead. The only testimony in the record regarding Winstead's salary was between Simmons and Winstead. Further, all actions on Winstead's pay checks, including any deductions, were made by Simmons and his bookkeepers, not by Phillips Brothers. Winstead even testified that he and Phillips had very little contact, and when they did, they “didn't discuss the farm a whole lot.” Nothing in the record indicates Phillips Brothers ever made a representation to Winstead regarding his pay at all. Thus, there is no evidence at all that Phillips Brothers fraudulently withheld pay from Winstead's salary. We therefore reverse and render judgment in favor of Phillips Brothers.

29. With regard to Simmons, Winstead admitted at trial that he knew deductions were taken from his paycheck for cash advances and for personal charges he made on his Kilby Brake account. Although Winstead disagreed that some of the charges were personal in nature, there was no dispute that he was aware Simmons was making deductions. We find no clear and convincing evidence in the record that any pay shortage which may have occurred was caused by a fraudulent representation made by Simmons upon which Winstead relied. Thus, we reverse the judgment against Simmons for fraud with regard to withheld pay.

30. However, Kilby Brake may be liable to Winstead for any improper deductions from Winstead's pay that may have occurred, or Winstead may be liable to Kilby Brake if it is shown he still owes money to Kilby Brake for charges made on his account. We find Winstead's own testimony, coupled with other evidence in the record, provides overwhelming evidence, based upon which no reasonable and fair-minded juror in the exercise of fair and impartial judgment could award Winstead the full amount that he alleged was taken from each of his paychecks.

31. In addition, for reasons discussed below, we reverse and remand this issue to the trial court for a new trial to determine any amounts Kilby Brake may owe Winstead or vice versa.

**III. Whether Winstead proved the requisite elements of corporate freeze-out.**

32. As early as 1913, this Court used the term ‘frozen out’ when it held that a chancery court could appoint a receiver for a corporation to wind up the business at the insistence of minority stockholders “when it shall appear that by gross mismanagement ... the rights of the stockholders ... are being put in jeopardy.” [*Brent v. B.E. Brister Sawmill Co.,* 103 Miss. 876, 60 So. 1018, 1022 (1913)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=734&FindType=Y&ReferencePositionType=S&SerialNum=1913021912&ReferencePosition=1022). Since that time, Mississippi courts began to recognize freeze-out [FN4](#Document1zzB00442032505486) as a distinctly individual and direct cause of action, separate from a derivative action. *See, e.g.,* [*Bluewater Logistics, LLC v. Williford,* 55 So.3d 148 (Miss.2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&SerialNum=2024474819); [*Missala Marine Serv., Inc. v. Odom,* 861 So.2d 290 (Miss.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=2003420413); [*Fought v. Morris,* 543 So.2d 167 (Miss.1989)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=1989059461); [*Cook v. Wallot,* ––– So.3d –––– (Miss.Ct.App.2013)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&SerialNum=2030485807); [*Knights' Piping, Inc. v. Knight,* 123 So.3d 451 (Miss.Ct.App.2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&SerialNum=2029390659), *cert. denied,* [2011–CT–00409–SCT, 123 So.3d 450 (Oct. 3, 2013)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&SerialNum=2031885258). This Court recognized in [*Fought v. Morris*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1989059461) that “the distinctive characteristics and needs” of closely held corporations made them different from traditional corporations. [*Fought v. Morris,* 543 So.2d 167, 169 (Miss.1989)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1989059461&ReferencePosition=169).

[FN4.](#Document1zzF00442032505486) Other jurisdictions use the term “squeeze out.”

[[20]](#Document1zzF202032505486) 33. A closely held corporation is a “business entity with few shareholders, the shares of which are not publicly traded.” [*Fought v. Morris,* 543 So.2d 167, 169 (Miss.1989)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1989059461&ReferencePosition=169). This Court has held that limited-liability corporations with few members resemble closely held corporations. *See* [*Bluewater Logistics, LLC v. Williford,* 55 So.3d 148, 161 (Miss.2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2024474819&ReferencePosition=161). Minority shareholders in closely held corporations are particularly vulnerable, because they usually lack the control the majority has and there is seldom a fair market available for selling their shares. [*Fought,* 543 So.2d at 170](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1989059461&ReferencePosition=170) (citing [*Orchard v. Covelli,* 590 F.Supp. 1548, 1557 (W.D.Pa.1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=345&FindType=Y&ReferencePositionType=S&SerialNum=1984133736&ReferencePosition=1557); *aff'd* [802 F.2d 448 (3rd Cir.1986)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&DocName=802FE2D448&FindType=Y)). Thus, if a dispute arises between the minority member and the majority, it is usually the case that a “minority shareholder can neither profitably leave, nor safely stay with, the corporation.” [*Fought,* 543 So.2d at 171](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1989059461&ReferencePosition=171).

34. Because of their size, membership in closely held corporations resembles that of a partnership rather than a traditional corporation with directors and stockholders. In its most classic form, a freeze-out of the minority shareholders by the majority occurs when the majority purposefully denies the minority member from sharing proportionally in corporate earnings or gains. This could be accomplished by a number of techniques. For example, the majority could refuse to declare dividends, pay themselves exorbitant salaries, or sell corporate assets to themselves at inadequate prices. *See* F.H. O'Neal and R. Thompson, *O'Neal's Oppression of Minority Shareholders* § 3.02 (2d ed.1985). The freeze-out cause of action, therefore, addresses the central problem: the majority, through its right of control, intentionally reduces or eliminates the minority shareholder's right to corporate earnings or gains coupled with virtual inability of the minority member to withdraw or sell.

35. Although the jury instructions used at trial in the case before us state there are “elements” to the corporate freeze-out cause of action, no specific elements were set out. This Court previously has said that “[c]orporate freeze-out is an intentional tort that is committed with *willful* and *wanton* disregard for the right of the shareholder who is frozen out.” [*Missala Marine Serv., Inc. v. Odom,* 861 So.2d 290, 295 (Miss.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2003420413&ReferencePosition=295) (emphasis added); [*Bluewater,* 55 So.3d at 163](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2024474819&ReferencePosition=163) (upholding chancellor's finding that willful and grossly negligent breach of the operating agreement constituted freeze-out). Recognizing the problems inherent in close corporations, the [*Fought*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1989059461) Court held that majority shareholder actions in these close corporations must “be ‘intrinsically fair’ to the minority interest.” [543 So.2d at 171](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1989059461&ReferencePosition=171) (*overruling* [*Ross v. Biggs,* 206 Miss. 542, 40 So.2d 293 (1949)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=1949106522)). The Court went on to define expressly the relationship between those in control and minority members, stating “[d]irectors and officers of a corporation stand in a fiduciary relationship to the corporation and its stockholders. These duties include exercising the utmost good faith and loyalty in discharge of the corporate office.” [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1989059461) (citations omitted). We noted recently that the [*Fought*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1989059461) rationale “applies with equal force” to limited-liability companies. [*Bluewater Logistics, LLC v. Williford,* 55 So.3d 148, 161 (Miss.2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2024474819&ReferencePosition=161).

[[21]](#Document1zzF212032505486)[[22]](#Document1zzF222032505486) 36. Using traditional elements for an intentional-tort claim and reviewing the above-discussed cases, we find that, in order to prove a claim of corporate freeze-out, the plaintiff must establish: (1) the existence of a legally defined duty owed to or right of a minority shareholder arising out of his or her ownership interest in a corporation; (2) the intentional or willful breach of that duty by the majority or controlling shareholder(s); (3) that the breach proximately caused plaintiff's direct injury; and (4) the fact and extent of injury. *See generally* Prosser & Keeton, *On the Law of Torts* § 30 (5th ed.1984). When we evaluate the duties and the alleged breach of these duties, we will look to the parties' agreements and applicable state law. In the case of Kilby Brake, LLC, that would be applicable caselaw, the Kilby Brake operating agreement, and the March 2000 version of the Mississippi Limited Liability Company Act. *See* Miss. Laws Ch. 402, §§ 1–87, *repealed by* Revised Mississippi Limited Liability Company Act, 2010 Miss. Laws Ch. 532, § 1, eff. Jan. 1, 2011. *See also* [Miss.Code Ann. §§ 79–29–101](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000933&DocName=MSSTS79-29-101&FindType=L) to [79–29–1317](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000933&DocName=MSSTS79-29-1317&FindType=L) (Rev.2013).

37. In his argument for freeze-out, Winstead alleged Simmons and Phillips Brothers took actions to exclude Winstead from his ownership interest in Kilby Brake without justification and in willful disregard of Winstead's rights. Winstead's amended complaint states this conduct did not “allow him to in any way participate as a true managing shareholder during his eight years with Kilby Brake.” In support of this claim, Winstead argued Phillips and Simmons did not make alleged cash contributions to start the LLC; they misappropriated funds from Kilby Brake; Simmons made detrimental loans for the company without his consent; and Simmons did not allow him to inspect the company books. After he was fired as hatchery operator and moved off the farm, Winstead claimed Simmons and Phillips Brothers mismanaged Kilby Brake to his detriment. The jury found only Simmons guilty of freezing out Winstead.

38. As noted above, we found the alleged promise of cash contributions inadmissable and that Winstead had failed to prove Simmons or Phillips Brothers committed fraud by misappropriating funds from Kilby Brake; thus, these arguments as a basis for his freeze-out claim are without merit. The only remaining claims by Winstead are that Simmons improperly fired him, made detrimental loans to the LLC, refused to share financial records with Winstead, and that Simmons and Phillips Brothers mismanaged Kilby Brake after he was fired in 2008. Thus, we look to see if these claims give rise to a cause of action for corporate freeze-out.

***1. Participation as a Managing Shareholder***

[[23]](#Document1zzF232032505486) 39. The Kilby Brake operating agreement named Harry Simmons as manager. It stated that Simmons, as manager, had “full and complete authority, power and discretion to manage and control the business, affairs, and properties of [Kilby Brake]....” Further, the operating agreement gave Simmons alone the power to acquire property from any person, to borrow money from banks or other members of Kilby Brake on the terms Simmons deemed appropriate, control the business affairs of the company and to make “all decisions regarding those matters.” Winstead admitted at trial he signed the operating agreement and understood all of the terms. Although Winstead asserted he “managed” the day-to-day operations, he admitted he was not named as a manager of Kilby Brake anywhere in the operating agreement and that his title was hatchery operator. Simmons never needed Winstead's permission to borrow money on behalf of Kilby Brake. Further, it is evident from the record that, had Simmons not borrowed the money from his other entities, Kilby Brake would have ceased business operations. When asked whether Simmons had the authority as manager to borrow money to be sure that payroll was made, Winstead answered affirmatively.

40. We find nothing in the record that would lead to the conclusion that Winstead could participate in Kilby Brake as a managing shareholder. Further, Simmons, as the only manager of Kilby Brake, did not use his control of Kilby Brake to violate any terms of the operating agreement, thereby breaching the duty he owed to Winstead. Thus, Winstead's argument that he was frozen out of the LLC because he was denied participation as “a true managing shareholder” in the company is without merit.

***2. Winstead's Termination as Hatchery Operator***

[[24]](#Document1zzF242032505486) 41. Although many commentators point to being fired by management as possible evidence a minority member in a closely held corporation has been frozen out, the Fifth Circuit has held that in employment-at-will states like Mississippi, nonmanaging members of a closely held corporation do not have “fiduciary-rooted entitlements to their jobs.” [*Hollis v. Hill,* 232 F.3d 460, 470 (5th Cir.2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000596516&ReferencePosition=470). *See also* [*Knights' Piping, Inc. v. Knight,* 123 So.3d at 459 (Miss.Ct.App.2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2029390659&ReferencePosition=459) (“a majority shareholder does not breach his fiduciary duty when he terminates a minority shareholder if he has ‘acted pursuant to a legitimate business purpose.’ ”). There is nothing in the Kilby Brake operating agreement that could be construed as guaranteeing Winstead employment with Kilby Brake. Further, there was certainly enough evidence in the record to suggest Simmons was acting pursuant to a legitimate business purpose in firing Winstead.

42. Simmons had designated authority as manager to terminate Winstead. Though not required, Simmons had several arguable causes to fire Winstead. Winstead made several personal charges on his Kilby Brake account, even after he was told not to. Winstead used Kilby Brake employees, while they were being paid by Kilby Brake, to make improvements to his deer camp and to work in his father's ham store during the holidays. Kilby Brake equipment also was used to make improvements to Winstead's deer camp. The survival ratio of fish was around forty to fifty percent under Winstead and increased to seventy-five percent after he left the hatchery. Most importantly, the business was profitable for only two of the eight years Winstead ran the day-to-day operations at the hatchery. Thus, we find Simmons presented sufficient evidence to show he acted pursuant to a legitimate business purpose, and Winstead's firing did not, by itself, constitute a freeze-out of his interest.

***3. Inspection of Kilby Brake Finances***

[[25]](#Document1zzF252032505486) 43. The Kilby Brake operating agreement states that every member, at their own expense, “shall have the right to inspect, copy, and audit [Kilby Brake's] books and records at any time during normal business hours without notice to any other member or the manager.” It also states each member “shall be furnished [with] ... a copy of the balance sheet of [Kilby Brake]” for each accounting period. The records for Kilby Brake all were held at Kilby Brake's principal place of business, which was Simmons's office in Yazoo City.

44. The record shows Simmons proposed that either he or Winstead leave the company in mid-to-late 2007. Winstead alleged that he was interested in purchasing Kilby Brake, but that Simmons failed to provide him with appropriate company financial information that he needed to obtain a loan from a bank. Simmons testified he could not recall the last time that he had sent a balance sheet to Winstead and he doubted that he had sent one since Winstead moved off the farm in January 2008. He further admitted that Winstead remained a member of the LLC, was entitled to the records, and that he continued to send them to Phillips Brothers. However, Simmons delivered 3,500 pages of financial documents relating to Kilby Brake to Winstead's accountant in Canton in June 2008.

45. Winstead never presented any evidence to show he was denied access to Kilby Brake's offices and records or that he even attempted to “inspect, copy, and audit” the records at his own expense, which, under the operating agreement, he had a right to do without notice to Simmons. However, as manager and keeper of the records, Simmons also had a duty under the operating agreement to furnish his other partners with balance sheets for each accounting period, which he admittedly did not do for Winstead once he was fired.

46. Although Simmons arguably breached his duty to Winstead by not providing the balance sheets to him, Winstead did not present any evidence on how these acts damaged him. The purpose of trying to obtain the financial documents from Simmons was to try and get financing to purchase Kilby Brake. Winstead had a right under the operating agreement to inspect and copy Kilby Brake's books without Simmons's permission. And Simmons eventually delivered the voluminous documents to Winstead's accountant prior to filing suit; thus, we find this claim to be without merit.

***4. Mismanagement in 2008***

[[26]](#Document1zzF262032505486) 47. Winstead's claim for mismanagement was submitted to the jury in the same instruction as his freeze-out claim. Winstead received damages on his mismanagement claim in both his award for freeze-out and breach of fiduciary duty. The jury instruction stated that, to prove a claim for mismanagement, “Winstead must show by a preponderance of the evidence that during his corporate freeze-out, Harry Simmons and Phillips Brothers made decisions, purchases, or acquisitions without his consent and that *these actions devalued the business, and in turn, Plaintiff's ownership interest.*” (Emphasis added.) Winstead's argument alleges Simmons's mismanagement of Kilby Brake caused a lack of corporate gains and devalued his interest. Thus, it clear from his amended complaint and the jury instruction at trial that these allegations are better viewed as a derivative claim on behalf of Kilby Brake and not a direct cause of action for corporate freeze-out. *See* [*Mathis v. ERA Franchise Systems, Inc.,* 25 So.3d 298, 303 (Miss.2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2020367863&ReferencePosition=303) (“[I]n determining whether the action belongs to the corporation or the individual, the focus of the inquiry is whether the corporation or the individual suffered injury.”).

48. In the case *sub judice,* Winstead presented a number of claims that were derivative because he sought relief on behalf of Kilby Brake, and his injury was based on his ownership in the company. This Court requested supplemental briefing on the issue of whether it was error for the circuit court to allow the claims to proceed without making a determination of whether the “ [*Murray*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1992127711) exceptions [FN5](#Document1zzB00552032505486)” applied, which would permit Winstead to bring the derivative claims in a direct action. *See* [*Derouen v. Murray,* 604 So.2d 1086, 1091 (Miss.1992)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1992127711&ReferencePosition=1091).

[FN5.](#Document1zzF00552032505486) The Murray exceptions allow for derivative claims to be tried as direct actions if the trial judge finds that doing so will not: “(i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.” [*Derouen v. Murray,* 604 So.2d 1086, 1091 n. 2 (Miss.1992)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1992127711&ReferencePosition=1091).

[[27]](#Document1zzF272032505486) 49. Although the trial court did not apply the [*Murray*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1992127711) exceptions, Defendants never challenged whether Winstead should be permitted to bring the derivative claims in a direct action; therefore, we find the derivative claims were tried by implied consent, and the pre-trial procedural requisites that apply in derivative actions were waived. *See* [*id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1992127711) We also find that the trial court was not required to consider, *sua sponte,* whether Winstead was entitled to bring the derivative claims as a direct action; therefore, the trial court did not err in failing to address the issue.

[[28]](#Document1zzF282032505486)[[29]](#Document1zzF292032505486) 50. Alabama, like Mississippi, has held that managers in a closely held corporation owe a duty to act fairly to minority interests. *See* [*Burt v. Burt Boiler Works, Inc.,* 360 So.2d 327, 331 (Ala.1978)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1978136869&ReferencePosition=331). We find persuasive the statement of the Alabama Supreme Court that the freeze-out cause of action “is not a panacea for any and all conduct undertaken ... that could be deemed ‘unfair’ to the minority.” [*Stallworth v. AmSouth Bank of Alabama,* 709 So.2d 458, 468 (Ala.1997)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1997247143&ReferencePosition=468). “[A] minority shareholder cannot parlay a wrong committed primarily against the corporation, which gives rise to a derivative claim only, into a personal recovery of damages under a squeeze out theory by simply stating the injury to the corporation is also ‘unfair’ to him as well.” [*Id.* at 467.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1997247143) Even though we find this language to be persuasive, Winstead claimed the mismanagement of Kilby Brake factored into his freeze-out. Thus, we review this claim in light of the elements we have cited above for corporate freeze-out, which necessarily include proving the conduct complained of was willful and wanton and that it proximately caused individual damages.

51. Winstead argued at trial and in his brief that, after he was fired, “Simmons undertook activities which negatively affected Kilby's financial sustainability and further devalued Winstead's interest.” Winstead presented evidence that, in the year following his term as hatchery operator, Kilby Brake's sales decreased by seventy-six percent, from $756,451.64 in 2007 to $181,146.44 in 2008. Winstead's expert, Alexander, testified that, while Winstead was operator, Kilby Brake's sales consistently were close to $775,000 per year. Alexander further testified that, although the economy was bad, the economy was not the cause of the nearly eighty-percent decline in sales. In fact, Kilby Brake's sales were back up in 2009.

52. None of the parties disputes that sales were low in 2008 and, of course, each side blames the other. Simmons testified that sales were low because there were no fish in 2008 and attempted to show that Winstead was responsible for the missing fish by either taking them or mismanaging the farm. Members of Kilby Brake's staff testified that, when the ponds were seined in 2008, there was a remarkably low number of fish. However, evidence showed that the seining and feed expenses in 2008 were higher than they were in 2007. Simmons testified this was because he had to restock the ponds to replace the fish that were missing. Winstead argued that the increase in food and seining costs indicated there were fish at Kilby Brake that were not reported. In sum, a sharp dispute exists in the record as to what happened to the fish.

53. A number of witnesses testified that if Winstead had moved the millions of missing fish, someone would have known. In fact, testimony was presented that it would be nearly impossible to move the fish in the night and that moving the fish would require a crew of six men, two tractors, a seine and reel, and a boat to move a million fish. However, there was also testimony that large amounts of “swim-up fry” could be moved in a standard ice chest. Alexander stated that he could not testify that the defendants caused the drop in sales; however, he testified that the sales should have occurred if the parties had carried on normal business in Winstead's absence.

54. To carry his claim for corporate freeze-out, Winstead was required to demonstrate that Simmons intentionally and willfully used his control of Kilby Brake in 2008 in a way that harmed Winstead individually. We find Winstead failed to prove that Simmons “willfully and wantonly” mismanaged Kilby Brake in a manner that harmed Winstead alone.

***5. Conclusion on Corporate Freeze-out***

55. Taken as a whole, Winstead failed to prove that he was frozen out of Kilby Brake by Simmons. The record does not indicate that Simmons used his position in control of Kilby Brake to breach a duty he owed to Winstead by denying him his proportional share of any corporate benefits. The reality is the record does not reflect any corporate gains whatsoever. Winstead's expert testified that neither Simmons nor Phillips Brothers ever received any payment from Kilby Brake in the form of salary, dividends, or any other distribution. None of the actions undertaken by Simmons, which Winstead might have felt to be unfair to him, circumvented the powers delegated to Simmons under the Kilby Brake operating agreement. When viewing Winstead's complaints for freeze-out in light of the agreements of the parties and applicable law, we find Simmons did nothing to willfully breach the duty he owed to Winstead. Therefore, for the reasons stated above, we reverse and render the judgment of corporate freeze-out against Simmons.

**IV. Whether Simmons and Phillips Brothers breached a fiduciary duty they owed Winstead.**

[[30]](#Document1zzF302032505486) 56. The jury found both Simmons and Phillips Brothers breached a fiduciary duty they owed to Winstead and awarded him $395,000, being two thirds of Alexander's valuation of the missing fish sales in 2008 due to mismanagement. Simmons and Phillips Brothers argued first that they did not breach a duty owed to Winstead or, in the alternative, Winstead's damages were speculative and amounted to a double recovery. Winstead counters that a plaintiff who proves breach of a fiduciary duty is entitled to the damages incurred as a result of the breach.

57. In his amended complaint, Winstead argued Simmons and Phillips Brothers “negligently, carelessly, and intentionally failed to perform their duties as ... managing officers of Kilby Brake so that the assets of Kilby Brake ... were mismanaged, wasted, diverted to and converted by the defendants....” A breach of fiduciary duty owed to Kilby Brake should be separated from Winstead's corporate freeze-out claim, which is an individual claim for Simmons's intentional breach of the duty owed directly to Winstead that caused him personal damages, separate and apart from any damages to Kilby Brake. *See* [*Fought,* 543 So.2d at 171](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1989059461&ReferencePosition=171) (“ ‘any attempt [by the majority] to squeeze out a minority shareholder must be viewed as a breach of his fiduciary duty ....’ ”) (quoting [*Orchard v. Covelli,* 590 F.Supp. 1548, 1557 (W.D.Pa.1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=345&FindType=Y&ReferencePositionType=S&SerialNum=1984133736&ReferencePosition=1557), *aff'd* [802 F.2d 448 (3d Cir.1986)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&DocName=802FE2D448&FindType=Y)). By contrast, a claim that Simmons breached his fiduciary duty through mismanagement or dissipation of corporate assets belongs to the corporation because the wrong necessarily damages the corporation and damages Winstead only derivatively. [FN6](#Document1zzB00662032505486) *See* [*Mathis,* 25 So.3d at 304](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2020367863&ReferencePosition=304).

[FN6.](#Document1zzF00662032505486) We make this distinction to emphasize that the corporate freeze-out cause of action is distinct from a general breach of fiduciary duty because of the injury involved. Indeed, if a plaintiff proves he or she has been intentionally frozen out, that cause of action would also be the support for an award of personal damages for a breach of fiduciary duty. However, if the wrong directly damages the corporation and its assets from waste, conversion, and mismanagement, the claim is the corporation's.

58. This Court held in [*Fought*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1989059461) that directors and officers in a closely held corporation stood in a fiduciary relationship with the corporation and its members. [*Fought,* 543 So.2d at 171;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1989059461&ReferencePosition=171) *see also* [*Bluewater,* 55 So.3d at 161](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2024474819&ReferencePosition=161) (holding the [*Fought*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1989059461) rationale “applies with equal force” to limited liability companies). Before we look to any common-law standards of care, we look to the agreement of the parties. The Kilby Brake operating agreement and [*Fought*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1989059461) lead us to conclude that Simmons, as manager, owed a fiduciary duty to the other members of Kilby Brake. However, the operating agreement also indemnified Simmons from any actions he took on behalf of Kilby Brake as long as he “conducted himself in good faith” and reasonably believed “his conduct was in [Kilby Brake's] best interest.” Thus, for Winstead to succeed on his claim that Simmons's mismanagement of Kilby Brake in 2008 breached the fiduciary duty Simmons owed Kilby Brake, he must first establish that Simmons was at the very least in breach of the Kilby Brake operating agreement. Because Simmons and Phillips Brothers both were found to have breached the duties they owed to Winstead, we discuss them separately.

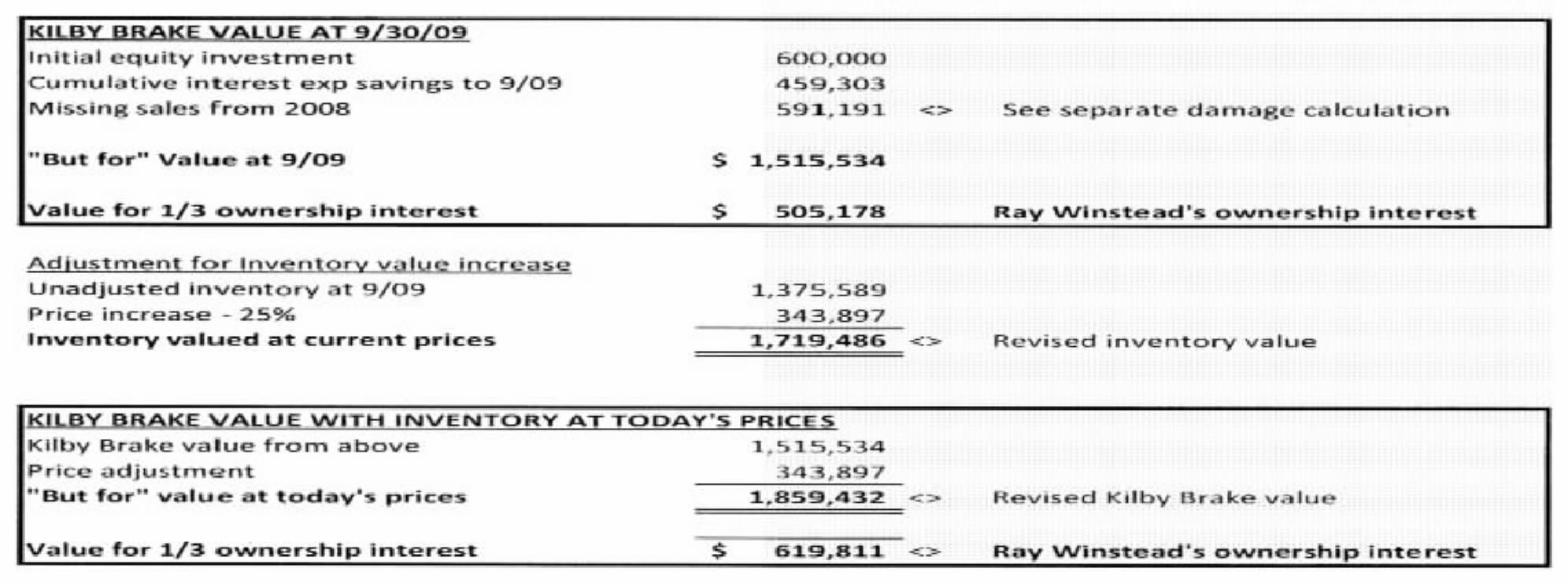
59. It is clear from the record that Winstead ran the day-to-day operations at the farm. After he was fired, Simmons took over this responsibility and hired a new hatchery operator, Dan Bradshaw. Importantly, Phillips Brothers was never involved in decision-making in the day-to-day operations of Kilby Brake. There is no proof that any employee from Phillips Brothers visited Kilby Brake at the time the fish went missing or that any fish were moved to property in which Phillips Brothers had an interest. If anything, the damages resulting from the mismanagement of Kilby Brake in 2008 were detrimental to the Phillips Brothers' one-third interest in the company as well. Although as co-members of Kilby Brake, each party owed a fiduciary duty to the other, Winstead presents no evidence that this duty was breached by Phillips Brothers with regard to the mismanaged assets in 2008. Thus, we reverse the jury's judgment on this claim and render a decision in favor of Phillips Brothers.

60. Simmons, as manager of Kilby Brake, owed a duty to Winstead even after he was fired. As noted above, both parties presented plenty of evidence and conjecture as to what caused the missing fish sales in 2008. However, as will be discussed below, we find prejudicial error in the trial court's decisions to prevent Kilby Brake from discovering and cross-examining Winstead on certain financial items that will necessitate a new trial on whether Simmons breached a fiduciary duty he owed to Winstead. Because we also find error in Winstead's damages for breach of fiduciary duty, we discuss those first.

***A. Damages for Breach of Fiduciary Duty***

[[31]](#Document1zzF312032505486) 61. Winstead received one third of the value of his interest in Kilby Brake as calculated by his expert in his damages for corporate freeze-out.[FN7](#Document1zzB00772032505486) This calculation included one third of the value of the missing fish sales from 2008. Winstead received the other two-thirds of the value of the missing fish sales in his damages for breach of fiduciary duty. Due to the numerous errors in Winstead's expert's valuation of what Kilby Brake was worth and the amount of the missing fish sales and because Kilby Brake also was improperly limited in its discovery and cross-examination of Winstead as discussed in Issue V *supra,* we must reverse and remand for a new trial with regard to any breach of fiduciary duty.

[FN7.](#Document1zzF00772032505486) Alexander calculated the value of Kilby Brake as follows:



62. To begin, Alexander erroneously used the alleged promise of cash contributions at the formation of the LLC and cumulative interest savings to help determine a faulty starting value of Kilby Brake addressed in Issue I *supra.* In addition, Alexander calculated the price of the mismanaged assets, being the missing fish sales in 2008, to be $591,191 and added this number into his total valuation of Kilby Brake. Because we reverse and render the findings of the trial court on the alleged cash contributions and cumulative interest expense savings, the only damages left to assess are the damages for the missing fish sales.

63. Winstead was required to provide substantial proof of damages that he suffered so the jury could have a reasonable basis to assess his loss. [*Missala Marine,* 861 So.2d at 294.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2003420413&ReferencePosition=294) This Court has held that the plaintiff has the burden of proving any amount of damages with reasonable certainty. [*Adams v. U.S. Homecrafters, Inc.,* 744 So.2d 736, 740 (Miss.1999)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1999133358&ReferencePosition=740). However, this Court also has noted that “a measure of speculation and conjecture attends even damage proof all would agree reasonably certain.” [*Wall v. Swilley,* 562 So.2d 1252, 1256 (Miss.1990)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1990083247&ReferencePosition=1256). This Court has stated that it will not overturn a jury's verdict unless no reasonable juror could find damages in the amount that the jury awarded. [*Missala Marine Services,* 861 So.2d 290, 295 (Miss.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2003420413&ReferencePosition=295) (citing [*Wal–Mart Stores, Inc. v. Johnson,* 807 So.2d 382, 389 (Miss.2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2001881937&ReferencePosition=389)).

64. Alexander testified that, in the year after Winstead left the hatchery, fish sales were seventy-six percent lower than they had been throughout the company's existence. He opined that the low sales indicated that either Kilby Brake was mismanaged in 2008, or that the sales were under reported by Simmons and Phillips Brothers. To reach the value of the missing fish sales, Alexander found the difference between the average of the gross sales that occurred in 2007 and 2009 versus the gross sales that occurred in 2008: a $591,000 difference. To get to $591,000, Alexander also added a speculative twenty-five percent increase to the price of fingerlings, thus increasing the value of the assets. However, this price increase took place in 2011, long after Winstead filed suit to dissolve Kilby Brake in 2009. Winstead was awarded one-third of Alexander's valuation of the missing fish sales in his corporate freeze-out damages and the other two thirds of this value in his breach-of-fiduciary-duty damages, arguing Simmons and Phillips Brothers received a disgorgement of profits from their breach.

[[32]](#Document1zzF322032505486) 65. There are several problems with Alexander's valuation of the mismanaged assets which require a new trial on these damages. To calculate lost profits as damages, the lost profits a party must prove are the “net profits as opposed to gross profits.” [*Ballard Realty Co. Inc. v. Ohazurike,* 97 So.3d 52, 62 (Miss.2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2028556797&ReferencePosition=62) (quoting [*Lovett v. E.L. Garner, Inc.,* 511 So.2d 1346, 1353 (Miss.1987)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1987095882&ReferencePosition=1353)); [*Puckett Machinery Co. v. Edwards,* 641 So.2d 29, 37 (Miss.1994)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1994154120&ReferencePosition=37) (“[T]his Court has held that in calculating the loss of profits, the loss to be calculated is that of net profits, not gross profits.”). “To ascertain net profits, a party must deduct such items as overhead, depreciation, taxes and inflation.” [*Lovett,* 511 So.2d at 1353.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1987095882&ReferencePosition=1353) Alexander testified that he added the $591,000 into the value of Kilby Brake “to account for those fish that should have been there but have not been sold.” However, his valuation of the total amount of lost profits from missing fish sales failed to account for items such as overhead, labor, taxes, or debt. Indeed, the valuation simply calculated the gross amount of missing fish sales.

66. Further, Winstead filed suit in September 2009 for, among other things, dissolution of Kilby Brake. In valuing the business, both experts stated at trial that they used the date Winstead filed suit as the valuation date. Inexplicably, Alexander adjusted the price of the missing fish sales by increasing their value by twenty-five percent to “current prices” to account for what he deemed an increase in value from 2009–2011. Any valuation on his right to recover for the 2008 lost fish sales ended the date he filed suit in September of 2009 to dissolve the LLC. *See, e.g.,* [*Hollis v. Hill,* 232 F.3d 460, 472 (5th Cir.2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000596516&ReferencePosition=472) (holding the presumptive valuation date on a freeze-out claim to be the date of filing the suit). Both experts stated at trial they used that date in their valuation of Kilby Brake. The use of this date will allow the Court to take into account both parties' actions, inactions and business decisions which affected the value of the business from the time Winstead left Kilby Brake until suit was filed. Alexander's calculations were purely speculative in nature and artificially inflated the value of Kilby Brake. Therefore, we are compelled to reverse and remand for a new trial on issues regarding any breach of fiduciary duty with regard to the loss of fish inventory.

**V. Whether Kilby Brake is entitled to a new trial.**

[[33]](#Document1zzF332032505486) 67. During discovery, Winstead produced his tax returns from 2006 to 2009 which showed substantial income as coming from the Winstead Cattle Company. The only other income listed on Winstead's tax returns was from Kilby Brake and his wife's job. Winstead had also produced two Forms 1099 from a fish farmer named Scott Kiker, which did not appear on his tax returns. Kilby Brake's theory was the entries for “cattle” represented income from sales of Kilby Brake fish Winstead was brokering and thus, it sought to compel production of all of the Winstead Cattle Company's financial records. Winstead admitted in his deposition and again at trial that the Winstead Cattle Company did no actual business, and it was simply his hunting camp. The trial court denied Kilby Brake's motion to compel discovery into Winstead's finances.

68. While cross-examining Winstead, counsel for Kilby Brake began to question him about the two Forms 1099 Winstead had produced in discovery showing income from Kiker. Winstead testified that he would often act as a middle man if he knew of a farmer who was in need of fish and another who had fish for sale; taking a commission for brokering the deal. Kilby Brake's counsel was not allowed to question Winstead about where this income from brokering fish sales appeared on the tax returns, because the returns were prepared by Winstead's accountant. The trial court ruled Winstead did not have personal knowledge of the returns and thus, the returns were inadmissable hearsay.

[[34]](#Document1zzF342032505486)[[35]](#Document1zzF352032505486) 69. A trial court's discovery orders will not be disturbed unless there is an abuse of discretion. [*Dawkins v. Redd Pest Control Co., Inc.,* 607 So.2d 1232, 1235 (Miss.1992)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1992185566&ReferencePosition=1235). This Court said where “important information is denied a litigant reversal will obtain.” [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1992185566) “ ‘[A]dmission or suppression of evidence is within the discretion of the trial judge and will not be reversed absent an abuse of that discretion.’ ” [*Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc.,* 716 So.2d 200, 210 (Miss.1998)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1998119434&ReferencePosition=210) (citation omitted) (quoting [*Sumrall v. Mississippi Power Co.,* 693 So.2d 359, 365 (Miss.1997)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1997064437&ReferencePosition=365)). Even if an abuse of discretion has occurred, “for a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party.” [*Terrain Enter., Inc. v. Mockbee,* 654 So.2d 1122, 1131 (Miss.1995)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1995087962&ReferencePosition=1131) (citations omitted).

70. Kilby Brake's attorney made a proffer that he would have questioned Winstead on where the income from Kiker appeared on his income tax return and whether it was indicated under the Winstead Cattle Company entry, because Winstead already had testified Winstead Cattle Company did no business and was merely a hunting camp. Winstead cited [*U.S. Fidelity & Guaranty Co. v. Whitfield*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1978112690) as authority for the proposition that it is inadmissible hearsay for a witness who did not prepare a tax return to testify as to that tax return because he lacks personal knowledge. *See* [*U.S. Fid. & Guar. Co. v. Whitfield,* 355 So.2d 307 (Miss.1978)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=1978112690). However, this case is easily distinguishable.

71. In [*U.S. Fidelity,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1978112690) the insured's witness, a certified public accountant (CPA), testified as to the amount of the loss the insured sustained after a fire, basing it on the inventory reflected in the insured's federal income tax return. [*Id.* at 309.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1978112690) This Court held that, because the witness CPA did not prepare the insured's tax return nor discuss it with the actual preparer, the witness CPA's testimony “was rank hearsay.” [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1978112690) In the case at bar, Kilby Brake was questioning Winstead about his own tax return. The signature line of the federal income tax return, Form 1040, states that, under the penalty of perjury, the signer has examined the return and believes it to be true and complete. Further, any information used by Winstead's accountant in calculating Winstead's income tax return would have come from Winstead. Thus, we find the trial court's decision not to allow Kilby Brake to cross examine Winstead on his tax return because he lacked personal knowledge was error.

72. Winstead argues that, if there were any errors in the trial court's decisions, they were harmless. However, the record indicates a third Form 1099 from Kiker to Winstead was found in the company truck which Winstead returned after the jury verdict against him on Kilby Brake's replevin claim. Further, Kiker testified that he had received a load of fish from Kilby Brake that Winstead claimed Simmons was going to “drain'em in the ditch.” Kiker testified there was no paperwork on the transaction; that he sold this load of fish, gave Winstead a commission and did not pay Kilby Brake for the sales.

73. From the evidence noted above, we find the trial court's refusal to allow both discovery into the finances of Winstead and questions concerning Winstead Cattle Company on his tax return prevented Kilby Brake and the jury from finding out whether Winstead was selling fish from Kilby Brake and disguising it on his income tax returns, thereby prejudicing Kilby Brake's ability to present its case. What happened to the fish inventory was central to both parties' theories of the case. Importantly, the decisions by the trial court denied Kilby Brake the ability to present its case as to what happened to the fish. The record shows there were years in which Winstead received substantial income from brokering fish sales, almost $20,000 in one year. He admitted that Winstead Cattle Company did no business and was simply his hunting camp, yet it made significant amounts of money. We therefore reverse the trial court's decision to deny discovery into the finances of Winstead and remand for a new trial on Winstead and Kilby Brake's breach-of-fiduciary-duty claims, as they pertain to the missing fish sales. Specifically, Kilby Brake should be allowed discovery into the finances of Winstead concerning outside income and specifically the stated income from Winstead Cattle Company.

**VI. Whether Winstead met the requisite elements of slander *per se.***

[[36]](#Document1zzF362032505486) 74. The jury found Simmons guilty of slander *per se* and awarded Winstead $5,000 on this claim. Simmons argues that Winstead never presented any evidence that he made slanderous statements about Winstead prior to judicial proceedings. Further, Simmons argues no witnesses testified that he published the alleged slanderous statements about Winstead. Finally, Simmons argues truth as a defense and that he was entitled to his opinion of Winstead as a hatchery operator.

[[37]](#Document1zzF372032505486)[[38]](#Document1zzF382032505486) 75. To prove slander, Winstead had the burden to prove the following elements: (1) a false and defamatory statement concerning the plaintiff; (2) unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. [*Franklin v. Thompson,* 722 So.2d 688, 692 (Miss.1998)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1998231502&ReferencePosition=692) (citations omitted). Because publication is an essential element to slander, “if the words were spoken only to the complaining party or to his agent, representing him in the matter discussed ... it is not such a publication as will support an action for slander.” [*Kirk Jewelers v. Bynum,* 222 Miss. 134, 75 So.2d 463 (1954)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=1954107099).

76. In Mississippi, statements are actionable *per se* if they are:

(1) Words imputing the guilt or commission of some criminal offense involving moral turpitude and infamous punishment. (2) Words imputing the existence of some contagious disease. (3) Words imputing unfitness in an officer who holds an office of profit or emolument, either in respect of morals or inability to discharge the duties thereof. (4) Words imputing a want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade or business; and in this and some other jurisdictions (5) words imputing to a female a want of chastity.

[*Speed v. Scott,* 787 So.2d 626, 632 (Miss.2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2001340779&ReferencePosition=632) (quoting [*W.T. Farley, Inc. v. Bufkin,* 159 Miss. 350, 132 So. 86, 87 (1931)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=734&FindType=Y&ReferencePositionType=S&SerialNum=1931109298&ReferencePosition=87)).

[[39]](#Document1zzF392032505486)[[40]](#Document1zzF402032505486)[[41]](#Document1zzF412032505486) 77. Further, “[t]he slander ... must be clear and unmistakable from the words themselves and not be the product of any innuendo, speculation or conjecture.” [*Baugh v. Baugh,* 512 So.2d 1283, 1285 (Miss.1987)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1987118687&ReferencePosition=1285). If the language is actionable *per se,* general damages are presumed to result. [*McCrory Corp. v. Istre,* 252 Miss. 679, 173 So.2d 640, 646 (1965)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1965130750&ReferencePosition=646) (citations omitted). It is well settled that truth is a complete defense to a charge of slander. [*Franklin,* 722 So.2d at 692](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1998231502&ReferencePosition=692).

[[42]](#Document1zzF422032505486)[[43]](#Document1zzF432032505486) 78. When analyzing a slander claim, Mississippi courts first determine if “the occasion called for a qualified privilege” and if a qualified privilege does exist, “the Court must then determine whether the privilege is overcome by malice, bad faith, or abuse.” [*Eckman v. Cooper Tire & Rubber Co.,* 893 So.2d 1049, 1052 (Miss.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2006244222&ReferencePosition=1052) (citing [*Garziano v. E.I. Du Pont De Nemours & Co.,* 818 F.2d 380, 386–87 (5th Cir.1987)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1987063074&ReferencePosition=386) (applying Mississippi law)). One of the qualified privileges recognized by this Court protects communications between employers and their employees. *See* [*Holland v. Kennedy,* 548 So.2d 982, 987 (Miss.1989)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1989124449&ReferencePosition=987). In speaking of this privilege, this Court held: “[t]he law guards jealously the right to the enjoyment of a good reputation, but public policy, ... the interests of society, and sound business demand that an employer ... be permitted to discuss freely with an employee, or his chosen representative, charges made against the employee affecting the latter's employment.” [*Killebrew v. Jackson City Lines,* 225 Miss. 84, 82 So.2d 648, 650 (1955)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1955107101&ReferencePosition=650). In describing the contours of the employer/employee privilege, this Court held “ ‘[w]hen qualified privilege is established, statements or written communications are not actionable as slanderous or libelous absent bad faith or malice if the communications are limited to those persons who have a legitimate and direct interest in the subject matter.’ ” [*Young v. Jackson,* 572 So.2d 378, 383 (Miss.1990)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1990174049&ReferencePosition=383) (quoting [*Bush v. Mullen,* 478 So.2d 313 (Miss.1985)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=1985156172) (internal citations omitted)).

79. In his amended complaint, Winstead asserted claims for slander and slander *per se* against Simmons. In his count for slander, he accused Simmons of telling members of the catfish farming community that Winstead stole fish from Kilby Brake. In his complaint for slander *per se,* he asserted the statements which were inherently defamatory were the statements adopted in his slander argument. The trial court granted Simmons's motion for a directed verdict on Winstead's slander claim but denied his motion on the slander *per se* claim.

80. No witnesses testified that Simmons told them Winstead was stealing fish from Kilby Brake. The only evidence in the record of Simmons stating Winstead stole fish was when he read his deposition testimony on the stand. Winstead's attorney asked if Simmons had ever used the word stealing when talking about Winstead. Simmons responded “not to my recollection.” Winstead's attorney then asked Simmons to read from his prior deposition testimony. Simmons read the relevant portion, in which he stated, “I knew we needed to get out of this situation ... when he was falsifying fish movement tickets ... [i]t was stealing from, from one of my other entities.”

81. Although Simmons said Winstead was stealing from Kilby Brake, Winstead did not put on any proof that Simmons published these statements to third parties. Simmons's deposition testimony was about why he fired Winstead. Further, it was in response to a question from Winstead's attorney about why Winstead was fired. Winstead's response was published only to Winstead's chosen representative and regarded charges made against Winstead affecting his employment. Thus, we find no merit in this argument.

82. The other evidence Winstead argues proves his slander *per se* claim developed during trial. Simmons was asked by Winstead's counsel whether he believed that Winstead could not run a successful operation because he was golfing, hunting, drinking, and gambling all of the time. Simmons responded he believed so, and that he probably said that to people. Therefore, the only evidence in front of the jury on this claim was Simmons's own admission that he “probably” expressed his belief to other people. The record does not reveal the identities of these other parties.

83. Testimony from other witnesses indicated that Winstead drank to excess at times, hunted often, golfed, and had gambled in a weekly card game regularly for years. All this occurred while he was working for Kilby Brake. Further, it was undisputed that Kilby Brake was successful for only two of the eight years Winstead was hatchery operator. However, no witness testified that he or she could say Winstead's golfing, hunting, drinking, or gambling interfered with his abilities to operate Kilby Brake.

84. Winstead bore the burden to prove by a preponderance of the evidence that Simmons published the above statements to parties outside of those within the circle of privileged individuals and that these statements were indeed false. We find that, alone, the statements of Simmons that he probably had expressed his belief to others insufficient for Winstead to carry the burden that Simmons's statement were published to unprivileged third parties or that they were even false. Therefore, we reverse the judgment for slander *per se* and render a decision in favor of Simmons.

**CONCLUSION**

85. We reverse the judgment of the Yazoo County Circuit Court and remand this case for a new trial on whether Winstead or Kilby Brake is entitled to any damages regarding Winstead's pay and personal charges. In addition, we reverse and remand for a new trial on the breach-of-fiduciary-duty claim as to liability and damages for the missing fish and any damages that may occur as a result. We also reverse and render all claims against Phillips Brothers. Further, we reverse and render the claims for corporate freeze-out and slander *per se* against Simmons. Because we reverse for a new trial, we also reverse all awards of punitive damages, attorneys' fees, and interest.

86. **REVERSED; REMANDED IN PART; RENDERED IN PART.**

***Case 2.3***

Cleveland Const., Inc. v. Levco Const., Inc.

359 S.W.3d 843, 2012 WL 246497 (Tex.App.-Hous. (1 Dist.))

Court of Appeals of Texas,

Houston (1st Dist.).

**CLEVELAND CONSTRUCTION, INC., Appellant**

**v.**

**LEVCO CONSTRUCTION, INC., Appellee.**

No. 01–11–00530–CV.

Jan. 26, 2012.

**OPINION**

EVELYN V. KEYES, Justice.

Appellant, Cleveland Construction, Inc. (“CCI”), appeals the trial court's denial of its motion to compel arbitration. In two issues, CCI argues that the trial court erroneously denied its motion to compel arbitration because (1) the Federal Arbitration Act (“FAA”) applies, the arbitration provision is valid, and the claim is within the scope of the arbitration provision, and (2) the law favors arbitration and the FAA preempts conflicting state law.

We reverse and remand.

**Background**

Whole Foods Market, Inc. (“Whole Foods”) hired CCI to serve as general contractor to construct a store in Houston, Texas (“the Project”). The contract between Whole Foods and CCI (“the Whole Foods Contract”) allowed CCI to hire subcontractors.

CCI contracted with appellee, Levco Construction, Inc. (“Levco”), as a subcontractor, to perform certain tasks related to the construction, including excavating, grading, digging for laying utilities, paving, and preparing the foundation (“the Construction Contract”). The Construction Contract contained the following arbitration provision:

*Article 30. DISPUTE RESOLUTION*

....

30.3 Any controversy or claims of CCI against Subcontractor [Levco] or Subcontractor against CCI shall, at the option of CCI, be resolved by arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association in effect on the date on which the demand for arbitration is made. Any such arbitration shall be held in Lake County, Ohio. Any award arising out of such arbitration may be entered by any court having jurisdiction....

Levco also obtained a surety bond (“the Bond”) from Intervener, Insurors Indemnity Company (“the Surety”). Both the Whole Foods Contract and the Bond issued by the Surety provided that disputes were to be resolved in a court in the county in which the Project was built, Harris County, Texas. Specifically, the Bond provided, in part:

§ 4 When the Owner [CCI] has satisfied the conditions of Section 3 [requiring notice of Contractor Default and other conditions precedent triggering the Surety's obligations under the Bond], the Surety shall promptly and at the Surety's expense take one of the following actions:

§ 4.1 Arrange for the Contractor [Levco], with consent of the Owner, to perform and complete the Construction Contract; or

§ 4.2 Undertake to perform and complete the Construction Contract itself, through its agents or through independent contractors; or

§ 4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract ... and to pay to the Owner the amount of damages as described in Section 6 in excess of the Balance of the Contract Price incurred by the Owner resulting from the Contractor's default; or

§ 4.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor with reasonable promptness under the circumstance....

....

§ 6 After the Owner has terminated the Contractor's right to complete the Construction Contract, and if the Surety elects to act under Section 4.1, 4.2, or 4.3 above, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract....

....

§ 9 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first....

After Levco had partially performed under the Construction Contract, disputes arose between CCI and Levco concerning the Project, and on, January 17, 2011, CCI sent a letter to Levco informing it that “CCI elects to terminate its Agreement with Levco Construction.” The work was subsequently completed by Levco under the provisions of the Bond.

On April 14, 2011, Levco filed suit against CCI and Whole Foods in Texas state court. According to its pleadings, Levco discovered upon beginning the work that CCI and Whole Foods had failed to obtain all necessary construction permits and that the building design and plans were not complete, so Levco was required to make numerous changes. Levco made multiple requests to change the scope of the contracted-for work to include the new work, including requests for additional time and compensation. Levco alleges that CCI and Whole Foods refused to consent to the changes Levco sought. Levco also alleges that CCI maintained unreasonable deadlines, interfered with Levco's work under the Construction Contract, failed to pay Levco for work it had completed from July 2010 to April 2011, and wrongfully terminated the contract in January 2011. Thus, Levco was unable to pay its subcontractors, resulting in liens being filed against the Project.

Levco alleges that CCI eventually reinstated Levco as a subcontractor pursuant to section 4.1 of the Bond, but CCI “continued to refuse to reinstate the [Construction Contract] itself.” Levco claims that because CCI refused to reinstate the Construction Contract between them it was left in the position of “working essentially as a subcontractor for the [S]urety” under the terms of the Bond. Specifically, Levco alleges that, in its role as the issuer of the Bond, the Surety mandated that Levco be allowed to continue to work on the Project, as provided in section 4.1 of the Bond, and made an agreement with CCI regarding payment of Levco and Levco's subcontractors, as provided in section 6 of the Bond. Levco alleges that the Surety and CCI agreed that the Surety would pay Levco's subcontractors money owed them in exchange for CCI releasing the corresponding payments it owed Levco once the subcontractors released their liens on the Project. Levco states that the Surety complied with this agreement and paid Levco's subcontractors, but that CCI did not comply and release the money it owed Levco or Levco's subcontractors. Nor did CCI reinstate the Construction Contract it had terminated. Levco contends that CCI and Whole Foods are “now improperly withholding more than $500,000 in funds owed to Levco.”

Levco claims that CCI breached its agreement with Levco; that CCI and Whole Foods breached their duties to perform with care in accordance with the terms of the Construction Contract (as provided in both the Construction Contract and section 6 of the Bond) and the Whole Foods Contract and to cooperate in performance of the contracts; that CCI and Whole Foods owe it damages under theories of quantum meruit, unjust enrichment, and promissory estoppel; that CCI and Whole Foods violated Property Code section 28.001; and that CCI misapplied trust funds received from Whole Foods for payment of obligations under the Construction Contract and the Bond.

In addition, Levco sought a declaratory judgment that the arbitration clause in the Construction Contract is invalid and does not require arbitration because it is illusory, or, alternatively, that the provision in the Construction Contract requiring arbitration in Ohio is void because it contravenes Texas law in that “it purports to require a subcontractor to a contract involving the improvement or real property in Texas to submit to arbitration in a state other than Texas.” Finally, Levco sought attorney's fees pursuant to Civil Practice and Remedies Code section 37.009 and chapter 38 and Property Code section 28.005, and it sought a temporary restraining order or temporary injunction prohibiting CCI and Whole Foods from releasing any funds related to the Project.

On April 14, the trial court granted Levco's temporary restraining order until April 29, 2011, and it set a hearing on Levco's request for a temporary injunction for April 29.

CCI filed an arbitration demand with the American Arbitration Association, alleging, under “nature of the dispute,”

Respondent [Levco] is a subcontractor to Claimant [CCI] on the construction of a Whole Foods Market located in Houston, Texas (“Project”). Levco breached the subcontract and was terminated by CCI. Levco was bonded on the Project and the surety, Insurer's Indemnity Company utilized its option to have Levco complete the work on the Project; however, further breaches have occurred [and] CCI has been damaged by Levco's breach in [an] amount not yet fully determined but in [an] amount that CCI does not anticipate will exceed $150,000.

CCI requested that Lake County, Ohio be the arbitration locale.

On April 26, 2011, Levco filed an emergency motion to stay the arbitration proceeding.

On May 11, 2011, CCI answered Levco's suit with a general denial and asserted the affirmative defenses that a valid contract precluded Levco's quantum meruit claims, that CCI had paid Levco under the Construction Contract, that Levco failed to meet all conditions precedent to payment under the Construction Contract, that CCI was entitled to the defenses of “excuse” and “justification,” and that Levco lacked standing to assert its claims against CCI, had failed to state a claim for which relief can be granted, and was the first to breach the Construction Contract.

CCI alleged that Levco defaulted under the Construction Contract within a month after beginning the Project and that CCI issued notices of default on multiple dates following. CCI attached several of these notices to its answer. It also alleged that “Levco was upside down on the Project from the beginning and failed to pay its vendors and suppliers in a timely manner” and that “Levco's financial mismanagement caused numerous, unnecessary liens on the Project.” CCI also attached several notices from “lower tier” subcontractors claiming they had not been paid by Levco. This led CCI to terminate Levco from the Project in January 2011 and to notify the Surety of Levco's breach.

CCI alleged that the Surety elected its option under the terms of the Bond to arrange “for Levco to perform and complete its obligations under the Contract.” CCI argues that “[b]y selecting this option, [the Surety] undertook Levco's obligations under the Contract and CCI was to reciprocally perform its obligations directly to [the Surety] ... and, as required by the Performance Bond, any money currently owed by CCI must be paid to [the Surety], not Levco.” CCI also alleged that it agreed to 26 of the 31 change orders submitted by Levco and that it offered to pay the Surety the outstanding pay applications if Levco would execute a release, which Levco refused to do.

CCI also responded to Levco's application for a temporary injunction and moved to compel arbitration and to stay the trial court proceedings, or alternatively, to dismiss the trial court proceedings.

In its motion to compel arbitration, also filed on May 11, CCI argued that the arbitration clause between it and Levco was valid, that it was not illusory or in contravention of Texas state law, and that the dispute at issue fell within the scope of the agreement. CCI also argued that the FAA preempts Levco's claim based on Business and Commerce Code section 272.001. Levco responded that the arbitration clause was invalid and illusory and that it failed to survive termination of the Construction Contract.

On May 26, 2011, the Surety filed a plea in intervention, arguing that “mandatory jurisdiction and venue with respect to the claims and causes of action asserted by Intervenor against [CCI] herein properly lie in this Court pursuant to the express provisions of § 9” of the Bond. It likewise alleged that, after CCI terminated the Contract between itself and Levco, CCI called upon it, as Surety, to complete Levco's obligations pursuant to the Bond. The Surety alleged that it elected to utilize Levco to continue performance of the subcontract work with the Surety itself advancing Levco's payroll and certain of its overhead expenses, as provided in section 4.1 of the Bond. In exchange, CCI agreed to pay to the Surety “all remaining monies due and owing or to become due and owing under the Levco Subcontract Agreement,” in accordance with section 6 of the Bond.

The Surety alleged that CCI subsequently breached this agreement by failing to make those payments. It alleged that it had expended $983,790.49 and that “under the express provisions of Levco's General Indemnity Agreement and pursuant to [its] common law rights to indemnity and equitable subrogation, [the Surety] has a superior lien upon and is entitled to payment directly from CCI on any and all contract sums or compensatory damages adjudged by this Court to be due and owing ... to Levco and/or [the Surety].”

On May 27, 2011, the trial court granted Levco's emergency motion to stay the arbitration proceeding initiated by CCI. This appeal followed.

**Analysis**

CCI argues that the trial court erred in denying its motion to compel arbitration because the FAA applies, the arbitration provision in the Construction Contract is valid, and the claims in the case are within the scope of the arbitration provision. It also argues that the FAA preempts any conflicting state law. Levco, however, argues that the arbitration provision in the Construction Contract is illusory and, therefore, unenforceable as a matter of law; that the Construction Contract was terminated and the arbitration provision does not contain a survival clause that would allow it to survive termination of the contract; and that Business and Commerce Code section 272.001 is not preempted by the FAA because it restricts venue, rather than restricting a party's right to arbitrate.

**A. Jurisdiction**

We first address our jurisdiction to review the trial court's order staying the arbitration proceedings. Civil Practice and Remedies Code section 51.016 provides:

In a matter subject to the Federal Arbitration Act (9 U.S.C. Section 1 et seq.), a person may take an appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court, county court at law, or county court under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16.

TEX. CIV. PRAC. & REM.CODE ANN. § 51.016 (Vernon Supp. 2011). Section 16 of the FAA, “Appeals,” provides:

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title [stay of trial proceedings where issue therein is referable to arbitration],

(B) denying a petition under section 4 of this title to order arbitration to proceed, [or]

(C) denying an application under section 206 of this title to compel arbitration....

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16 (2006).

[1] Thus, an interlocutory appeal is permitted in this case only if it would be permitted under the same circumstances under section 16 of the FAA in federal court. *See CMH Homes v. Perez,* 340 S.W.3d 444, 448–49 (Tex.2011). The United States Supreme Court has held that the FAA “generally permits immediate appeal of orders hostile to arbitration.” *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 86, 121 S.Ct. 513, 519, 148 L.Ed.2d 373 (2000). Several circuit courts have held that the FAA permits interlocutory review of an order staying arbitration. *Arciniaga v. Gen. Motors Corp.,* 460 F.3d 231, 234 (2nd Cir.2006) (holding FAA subsection 16(a)(2) permits interlocutory review of stay of arbitration); *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.,* 184 F.3d 42, 47 (1st Cir.1999) (holding that order staying pending arbitration was immediately appealable as injunction under both 28 U.S.C. § 1292(a)(1) and FAA section 16(a)(2)); *Se. Res. Recovery Facility Auth. v. Montenay Int'l Corp.,* 973 F.2d 711, 712 (9th Cir.1992) (holding it had jurisdiction over district court's order staying arbitration pursuant to section 16(a)(2) allowing appeal from an order enjoining arbitration). Furthermore, the Fifth Circuit has held that an order granting a stay of arbitration is appealable pursuant to 28 U.S.C. § 1292(a)(1), governing appeals of interlocutory orders involving injunctions generally. *See Tai Ping Ins. Co. v. M/V Warschau,* 731 F.2d 1141, 1143 (5th Cir.1984).

**B. Standard of Review**

Prior to September 1, 2009, an order denying a motion to compel arbitration under the FAA was reviewed in a mandamus proceeding using an abuse of discretion standard. *In re Merrill Lynch & Co.,* 315 S.W.3d 888, 890–91 & n. 3 (Tex.2010) (orig. proceeding); *Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 272–73 (Tex.1992) (orig. proceeding). The Texas Supreme Court held that the abuse of discretion standard, as applied to such orders, required reviewing courts to defer to the trial court's factual determinations if they are supported by the evidence and to review the trial court's legal determinations de novo. *In re Labatt Food Serv., L.P.,* 279 S.W.3d 640, 643 (Tex.2009) (orig. proceeding). This is the same standard by which we review interlocutory appeals of orders denying motions to compel arbitration under the Texas Arbitration Act (“TAA”). *See McReynolds v. Elston,* 222 S.W.3d 731, 739 (Tex.App.-Houston [14th Dist.] 2007, no pet.) (holding, under TAA, “we review factual conclusions under a legal sufficiency or ‘no evidence’ standard and legal conclusions de novo”); *see also In re Trammell,* 246 S.W.3d 815, 820 (Tex.App.-Dallas 2008, no pet.) (orig. proceeding) (holding same).

Civil Practice and Remedies Code section 51.016 now permits an order denying a motion to compel arbitration under the FAA to be reviewed via interlocutory appeal. TEX. CIV. PRAC. & REM.CODE ANN. § 51.016. Neither this Court nor the Texas Supreme Court has addressed the appropriate standard of review for such interlocutory appeals. However, various courts of appeals have considered this issue and held that interlocutory appeals of orders denying motions to compel arbitration should be reviewed under the abuse of discretion standard, in which we defer to the trial court's factual determinations and review questions of law de novo. *See Garcia v. Huerta,* 340 S.W.3d 864, 868–69 (Tex.App.-San Antonio 2011, pet. filed); *SEB, Inc. v. Campbell,* No. 03–10–00375–CV, 2011 WL 749292, at \*2 (Tex.App.-Austin Mar. 2, 2011, no pet.) (mem. op.); *Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.,* 327 S.W.3d 859, 862–63 (Tex.App.-Dallas 2010, no pet.); *see also Torster v. Panda Energy Mgmt., LP,* No. 07–10–0442–CV, 2011 WL 780522, at \*2 (Tex.App.-Amarillo Mar. 7, 2011, pet. filed) (mem. op) (citing *Sidley, Austin, Brown & Wood* in holding that whether trial court erred in denying motion to compel arbitration “depends on whether it abused its discretion”).

[2] Thus, in reviewing an order denying a motion to compel arbitration under the FAA, we give deference to the trial court's factual determinations that are supported by evidence and we review de novo its legal conclusions.

[3][4] A party seeking to compel arbitration under the FAA must establish that there is a valid arbitration agreement and that the claims raised fall within that agreement's scope. *In re Kellogg Brown & Root, Inc.,* 166 S.W.3d 732, 737 (Tex.2005) (orig. proceeding); *J.M. Davidson, Inc. v. Webster,* 128 S.W.3d 223, 227 (Tex.2003). If the trial court finds a valid agreement, the burden shifts to the party opposing arbitration to raise an affirmative defense to enforcing arbitration. *J.M. Davidson,* 128 S.W.3d at 227. The trial court's determination as to the validity of an arbitration agreement is a legal determination that we review de novo. *Id.*

[5][6][7] Under the FAA, ordinary principles of state contract law determine whether there is a valid agreement to arbitrate. *Kellogg Brown & Root,* 166 S.W.3d at 738. Although there is a strong presumption favoring arbitration, that presumption arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists. *J.M. Davidson,* 128 S.W.3d at 227. Because arbitration is contractual in nature, the FAA generally does not require parties to arbitrate when they have not agreed to do so. *Kellogg Brown & Root,* 166 S.W.3d at 738 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 478–79, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989)).

**C. Determination of Existence of Valid Agreement to Arbitrate**

CCI argues that the arbitration clause in the Construction Contract is a valid and binding agreement to arbitrate. Levco, however, argues that it is illusory and unenforceable as a matter of law. Levco also argues that, even if the agreement to arbitrate in the Construction Contract is not illusory, the arbitration agreement in the Construction Contract does not contain a survival clause that would allow it to survive termination of the contract.FN1

[8][9][10] In determining the validity of agreements to arbitrate that are subject to the FAA, we generally apply ordinary state contract law principles. *In re Palm Harbor Homes, Inc.,* 195 S.W.3d 672, 676 (Tex.2006) (orig. proceeding). The elements of a valid contract are (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Prime Prods., Inc. v. S.S.I. Plastics, Inc.,* 97 S.W.3d 631, 636 (Tex.App.-Houston [1st Dist.] 2002, pet. denied). “Under generally accepted principles of contract interpretation, all writings that pertain to the same transaction will be considered together, even if they were executed at different times and do not expressly refer to one another.”   *DeWitt Cnty. Elec. Coop., Inc. v. Parks,* 1 S.W.3d 96, 102 (Tex.1999); *IP Petroleum Co. v. Wevanco Energy, L.L.C.,* 116 S.W.3d 888, 889 (Tex.App.-Houston [1st Dist.] 2003, pet. denied) (“Instruments pertaining to the same transaction may be read together to ascertain the parties' intent, even if the parties executed the instruments at different times.”) (citing *Fort Worth Indep. Sch. Dist. v. City of Fort Worth,* 22 S.W.3d 831, 840 (Tex.2000)); *see also DeClaire v. G & B McIntosh Family Ltd. P'Ship,* 260 S.W.3d 34, 44 (Tex.App.-Houston [1st Dist.] 2008, no pet.) (holding that contract can be effective if signed by only one party if other party accepts by his acts, conduct, or acquiescence in the terms of the contract).

CCI presented the Construction Contract, which provides, in part:

Any controversy or claims of CCI against Subcontractor [Levco] or Subcontractor against CCI shall, at the option of CCI, be resolved by arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association in effect on the date on which the demand for arbitration is made. Any such arbitration shall be held in Lake County, Ohio.

CCI argues that this is a valid arbitration agreement. However, Levco argues, both here and in the trial court, that the arbitration agreement in the Construction Contract is not valid because it is illusory.FN2

**D. Analysis of Levco's Claims that Abritration Provision is Illusory**

[11][12][13] “A promise is illusory if it does not bind the promisor, such as when the promisor retains the option to discontinue performance.” *In re 24R, Inc.,* 324 S.W.3d 564, 567 (Tex.2010) (orig. proceeding) (per curiam); *see also J.M. Davidson,* 128 S.W.3d at 235 (Schneider, J., dissenting) (“[I]f the terms of a promise make performance optional, the promise is illusory and cannot constitute valid consideration.”). Arbitration agreements must be supported by consideration, or mutuality of obligation, to be enforceable.   *Palm Harbor Homes,* 195 S.W.3d at 676; *Dorfman v. Max Int'l, LLC,* No. 05–10–00776–CV, 2011 WL 1680070, at \*2 (Tex.App.-Dallas May 5, 2011, no pet.) (mem. op.).

[14] In the context of stand-alone arbitration agreements, binding promises are required on both sides as they are the only consideration rendered to create a contract. *In re AdvancePCS Health L.P.,* 172 S.W.3d 603, 607 (Tex.2005) (orig. proceeding) (per curiam); *Dorfman,* 2011 WL 1680070, at \*2. When, however, an arbitration clause is part of an underlying contract, the rest of the parties' agreement provides the consideration. *AdvancePCS Health,* 172 S.W.3d at 607; *see Palm Harbor Homes,* 195 S.W.3d at 676–77.

Here, the plain language of the arbitration provision does not mutually bind the parties because arbitration is “at the option of CCI.” However, this arbitration provision does not stand alone—it is part of an underlying contract. Thus, consideration, or the presence of mutual obligation, is provided by the underlying contract. *See AdvancePCS Health,* 172 S.W.3d at 607.

Levco seems to argue that the underlying contract does not provide any consideration for the arbitration provision because it, too, permits CCI to terminate, suspend, or modify its terms at its sole discretion, without notice. Levco's reliance on those provisions of the Construction Contract is misplaced. The modification provision's plain language does not state that CCI is the only party that can modify the agreement—it provides only that any modifications must be signed by CCI's representative to be effective. Furthermore, while the Construction Contract provides that termination or suspension will be “at the sole option and convenience to CCI,” the contract also provides that CCI must pay for work and materials already purchased at the time it gives notice of such termination or suspension. Thus, the parties are bound by mutual obligations and the agreement is not illusory.

**E. Analysis of Levco's Termination and Savings Clause Argument**

Levco also argues that CCI is complaining of work primarily completed after CCI terminated the Construction Contract and that the dispute resolution clause in the Construction Contract cannot survive the termination because it did not contain a savings clause.

[15] “[A]n arbitration agreement contained within a contract survives the termination or repudiation of the contract as a whole.” *Henry v. Gonzalez,* 18 S.W.3d 684, 690 (Tex.App.-San Antonio 2000, pet. dism'd) (relying, in context of TAA, on line of reasoning that agreement to arbitrate contained in written contract is separable from entire contract); *see also In re Koch Indus., Inc.,* 49 S.W.3d 439, 445 (Tex.App.-San Antonio 2001, orig. proceeding) (holding same in context of FAA). Thus, a savings clause was not required for the arbitration provision in the Construction Contract to survive any termination by CCI.

[16] To the extent that Levco is attempting to argue that the dispute between the parties does not fall within the scope of the arbitration provision in the Construction Contract because some of the dispute between itself and CCI arose from work that was completed after CCI terminated the Construction Contract, this is also unavailing. The terms of the Bond expressly incorporate the terms of the Construction Contract. Section 4.1, the provision invoked by the Surety, allows it to “[a]rrange from the Contractor [Levco] ... to perform and complete the Construction Contract.” Section 6 of the Bond further states that if the Surety elects to act under section 4.1, “the responsibilities of the Surety to the Owner [CCI] shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract.” Thus, the terms of the Bond expressly provided for Levco to complete the work under the terms of the Construction Contract even after CCI's termination of the contract.

We conclude that CCI proved, as a matter of law, the existence of a valid arbitration agreement and that the claims between it and Levco fall within the scope of that agreement. Thus, CCI is entitled to arbitrate these claims, and the trial court abused its discretion in refusing to enforce the arbitration proceedings. *See, e.g., Jack B. Anglin Co.,* 842 S.W.2d at 272–73 (recognizing, prior to enactment of Civil Practice and Remedies Code section 51.016, appropriateness of mandamus relief “[w]hen a Texas court enforces or refuses to enforce an arbitration agreement pursuant to the [FAA]” because that party “would be deprived of the benefits of the arbitration clause it contracted for, and the purpose of providing a rapid, inexpensive alternative to traditional litigation would be defeated”); *see also In re Bruce Terminix Co.,* 988 S.W.2d 702, 704 (Tex.1998) (orig. proceeding) (holding there is no adequate remedy by appeal for denial of right to arbitration “because the very purpose of arbitration is to avoid the time and expense of a trial and appeal”).

**FAA Preemption of State Law Venue Provision**

Finally, Levco argues that we should “affirm the trial court's denial of [CCI's] Motion to Compel because the Texas Business and Commerce Code section 272.001 prohibits compelling Levco to arbitration in Lake County, Ohio and is not preempted by the [FAA].” It argues that the arbitration must take place in Harris County.

Business and Commerce Code section 272.001 provides:

If a contract contains a provision making the contract or any conflict arising under the contract subject to another state's law, litigation in the courts of another state, or arbitration in another state, that provision is voidable by the party obligated by the contract to perform the construction or repair.

TEX. BUS. & COM.CODE ANN. § 272.001(b) (Vernon 2006). Levco argues in its appellate brief that it “exercised its option to void the requirement in the Contract to arbitrate in Lake County, Ohio” and, “[a]s a result, the trial court properly denied [CCI's] motion to compel arbitration in Lake County, Ohio.” It further argues that if this Court narrowly construes the word “provision” to mean only the choice of venue rather than the arbitration clause as a whole, this statute would not fall under the FAA's preemption provision.

[17][18][19] The FAA preempts all otherwise applicable inconsistent state laws, including any inconsistent provisions of the TAA, under the Supremacy Clause of the United States Constitution. U.S. CONST. art. VI; *see Allied–Bruce Terminix Co. v. Dobson,* 513 U.S. 265, 272, 115 S.Ct. 834, 838, 130 L.Ed.2d 753 (1995). The FAA declares written provisions for arbitration “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2006); *OPE Int'l LP v. Chet Morrison Contractors, Inc.,* 258 F.3d 443, 446 (5th Cir.2001). “In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *OPE Int'l,* 258 F.3d at 446 (quoting *Southland Corp. v. Keating,* 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983) (“Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”)).

In *OPE International,* the Fifth Circuit held that a Louisiana provision invalidating arbitration of certain disputes out-of-state was preempted by the FAA, on the ground that the statute “condition[ed] the enforceability of arbitration agreements on selection of a Louisiana forum; a requirement not applicable to contracts generally.” *Id.* at 447; *see also Commerce Park at DFW Freeport v. Mardian Constr. Co.,* 729 F.2d 334, 337 (5th Cir.1984) (holding that FAA preempted provisions in Texas Deceptive Trade Practices Act that required parties to submit to judicial forum).

We hold that the same reasoning applies here. Applying section 272.001 as Levco asks us to do here would prevent us from enforcing a term of the parties' arbitration agreement—the venue—on a ground that is not recognized by the FAA or by general state-law contract principles. *See OPE Int'l,* 258 F.3d at 447; *see also KKW Enters., Inc.,* 184 F.3d at 50 (“The venue in which arbitration is to take place is a ‘term’ of the parties' arbitration agreement.”). We hold that the FAA preempts application of this provision under the facts of this case.

Levco argues that this case is distinguishable from *OPE International* because the Louisiana provision in *OPE International* “declare [d] null and void and unenforceable” any non-Louisiana venue provision, while section 272.001 declares such provisions only “voidable.” However, by allowing a party to subsequently declare void a previously bargained-for provision, application of section 272.001 would undermine the declared federal policy of rigorous enforcement of arbitration agreements. *See Perry v. Thomas,* 482 U.S. 483, 490, 107 S.Ct. 2520, 2526, 96 L.Ed.2d 426 (1987) (analyzing section 2 and holding that it embodies Congress' intent to provide for enforcement of arbitration agreements within full reach of the Commerce Clause” and that “[i]t's general applicability reflects that the preeminent concern of Congress ... was to enforce private agreements into which parties had entered”).

**Conclusion**

We reverse the order of the trial court and remand the case for further proceedings consistent with this opinion.

FN1. Levco's appellate brief mentions in passing that the dispute resolution provision in the Bond conflicts with the terms of the Construction Contract. However, it cites no authority and provides no legal analysis on this issue. Therefore, to the extent Levco is attempting to argue that the terms of the Bond prevent arbitration of its dispute with CCI over the claims arising from the Construction Contract, that issue is waived for lack of briefing. *See* TEX.R.APP. P. 38.1(i) (requiring that appellate “brief must contain a clear and concise argument for the contention made, with appropriate citations to authorities” for party to assert issue on appeal); *Brown v. Hearthwood II Owners Ass'n.,* 201 S.W.3d 153, 161 (Tex.App.-Houston [14th Dist.] 2006, pet. denied) (holding argument can be waived for failure to adequately brief).

Levco also argues that the Surety is a necessary party to any arbitration proceeding. However, the Surety is not before this Court as a party to the appeal, nor was it a party to the motion to stay arbitration in the trial court. Thus, we are not called upon to consider the Surety's obligations or rights regarding arbitration.

FN2. CCI argues that we cannot consider Levco's arguments concerning termination of the agreement and subsequent performance under the terms of the Bond because it was not expressly presented to the trial court. This argument is unpersuasive. When, as here, no findings of fact and conclusions of law are filed by the trial court, we must affirm the trial court's order if any legal theory supports it. *Rachal v. Reitz,* 347 S.W.3d 305, 308 (Tex.App.-Dallas 2011, pet. filed). Levco, CCI, and the Surety all informed the trial court of the January 2011 termination by CCI and of the subsequent arrangements under the terms of the Bond, so the trial court was aware of this information.