*Chapter 2*

Courts and Alternative Dispute Resolution

***Case 2.1***

N.D.Cal.,2011.

Gucci America v. Wang Huoqing

Slip Copy, 2011 WL 30972 (N.D.Cal.)

United States District Court,

N.D. California.

**GUCCI AMERICA, Plaintiff,**

**v.**

**WANG HUOQING, Defendant.**

No. C 09-05969 CRB.

Jan. 5, 2011.

**ORDER ADOPTING REPORT AND RECOMMENDATION, GRANTING DEFAULT JUDGMENT AGAINST DEFENDANT, AND ENTERING PERMANENT INJUNCTION**

CHARLES R. BREYER, District Judge.

The Court has reviewed Magistrate Judge Spero's Report and Recommendation. The Court finds the Report correct, well-reasoned, and thorough, and ADOPTS it in every respect. Accordingly, the Court GRANTS default judgment against Defendant Wang Huoqing on Plaintiffs' trademark infringement and false designation of origin claims. The Court awards statutory damages to each Plaintiff in the following amounts: for Gucci America, Inc. $440,000; for Bottega Veneta International S.A.R.L. $4,000; and for Balenciaga S.A. $8,000. The Court awards prejudgment interest to each Plaintiff in the following amounts: for Gucci America, Inc. $12,768.92; for Bottega Veneta International S.A.R.L. $116.08; and for Balenciaga S.A. $232.16. Additionally, the Court awards $233.33 in costs to each Plaintiff on the basis of Defendant's trademark infringement.

Further, a permanent injunction is hereby ENTERED against the Defendant as follows:

Defendant and his respective officers, agents, servants, employees, and attorneys, and all persons acting in concert and participation with him are hereby permanently restrained and enjoined from:

(a) manufacturing or causing to be manufactured, importing, advertising, or promoting, distributing, selling or offering to sell counterfeit and infringing goods using the Plaintiffs' Marks;

(b) using the Plaintiffs' Marks in connection with the sale of any unauthorized goods;

(c) using any logo, and/or layout which may be calculated to falsely advertise the services or products of Defendant offered for sale or sold via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop. com, myokshop.com, and myrshop.com and/or any other website or business, as being sponsored by, authorized by, endorsed by, or in any way associated with Plaintiffs;

(d) falsely representing himself as being connected with Plaintiffs, through sponsorship or association;

(e) engaging in any act which is likely to falsely cause members of the trade and/or of the purchasing public to believe any goods or services of Defendant offered for sale o[r] sold via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com and/or any other website or business are in any way endorsed by, approved by, and/or associated with Plaintiffs;

(f) using any reproduction, counterfeit, copy or colorable imitation of the Plaintiffs' Marks in connection with the publicity, promotion, sale or advertising of any goods sold by Defendant via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop .net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com and/or any other website or business, including, without limitation, footwear, belts, sunglasses, handbags, wallets, hats, necklaces, bracelets, scarves, ties, and/or umbrellas;

(g) affixing, applying, annexing or using in connection with the sale of any goods, a false description or representation, including words or other symbols tending to falsely describe or represent goods offered for sale or sold by Defendant via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com and/or any other website or business, as being those of Plaintiffs or in any way endorsed by Plaintiffs;

(h) offering such goods in commerce;

(i) otherwise unfairly competing with Plaintiffs;

(j) secreting, destroying, altering, removing, or otherwise dealing with the unauthorized products or any books or records which contain any information relating to the importing, manufacturing, producing, distributing, circulation, selling, marketing, offering for sale, advertising, promoting, renting or displaying of all unauthorized products which infringe the Plaintiffs' Marks; and

(k) effecting assignments or transfers, forming new entities or associations or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth above.

Finally, the Court orders as follows:

(l) In order to give practical effect to the Permanent Injunction, the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com are hereby ordered to be immediately transferred by Defendant, his assignees and/or successors in interest or title, and the Registrars to Plaintiff Gucci's control. To the extent the current Registrars do not facilitate the transfer of the domain names to Plaintiffs' control within ten (10) days of receipt of this judgment, the United States based Registry shall, within thirty (30) days, transfer the Subject Domain Names to a United States based Registrar of Plaintiffs' choosing, and that Registrar shall transfer the Subject Domain Names to Plaintiff Gucci; and

(m) Upon Plaintiffs' request, the top level domain (TLD) Registries for the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com and myrshop.com shall place the websites on Registry Hold status within thirty (30) days of receipt of this Order, thus removing them from the TLD zone files maintained by the Registries which link the websites to the IP addresses where the associated websites are hosted.

**IT IS SO ORDERED.**

***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.

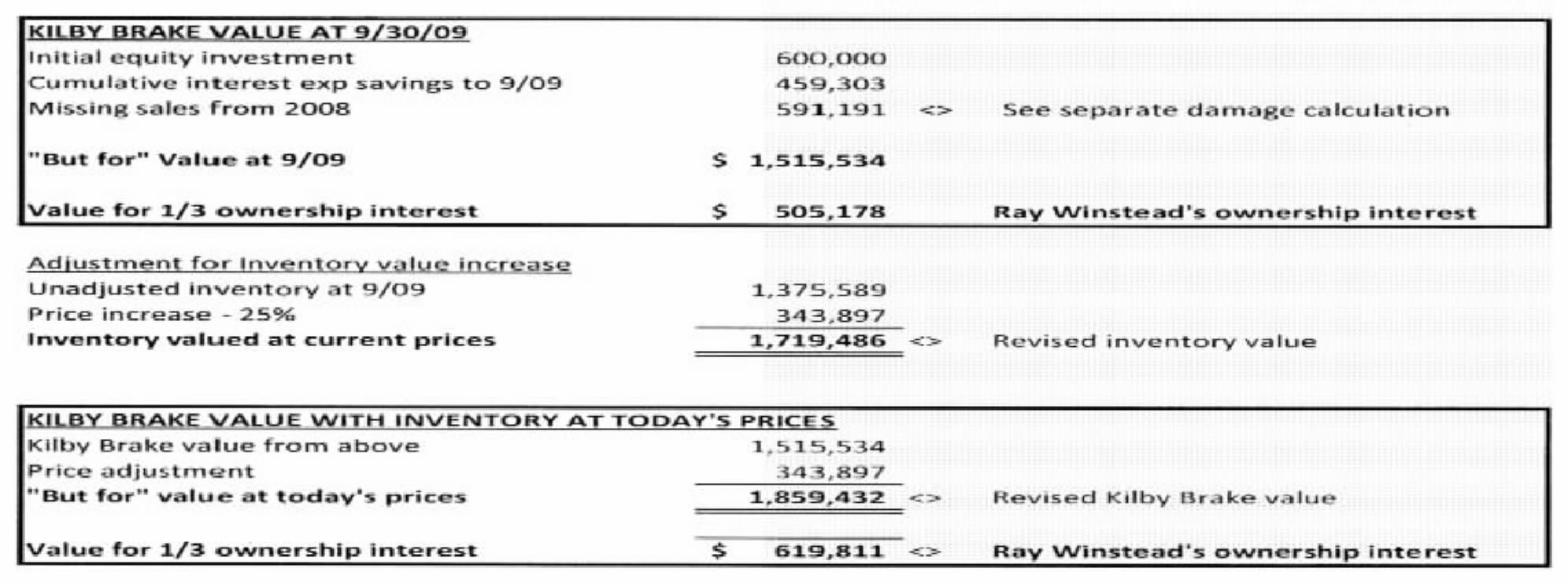
59. It is clear from the record that Winstead ran the day-to-day operations at the farm. After he was fired, Simmons took over this responsibility and hired a new hatchery operator, Dan Bradshaw. Importantly, Phillips Brothers was never involved in decision-making in the day-to-day operations of Kilby 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***

Cal.App. 2 Dist., 2015

Cruise v. Kroger Co.

233 Cal.App.4th 390, 183 Cal.Rptr.3d 17, 39 IER Cases 1165, 15 Cal. Daily Op. Serv. 652, 2015 Daily Journal D.A.R. 823

Court of Appeal,

**Second District, Division 3, California.**

**Stephanie CRUISE, Plaintiff and Respondent,**

**v.**

**KROGER CO. et al., Defendants and Appellants.**

B248430

Filed 1/20/2015

[ALDRICH](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0210028601&FindType=h), J.

Defendants and appellants Kroger Co., Kroger Manufacturing, Compton Creamery, Keith Oldenkamp, Steve Kuebbing, Jesse Turner, Keith Henry, Jill McIntosh and Tony Ramirez (sometimes collectively referred to as Kroger or the Kroger defendants) appeal an order denying their motion to compel arbitration of an employment discrimination action filed by plaintiff and respondent Stephanie Cruise (Cruise).[FN1](#Document1zzB00012035302835)

[FN1.](#Document1zzF00012035302835) An order denying a motion to compel arbitration is appealable. ([Code Civ. Proc., § 1294, subd. (a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000201&DocName=CACPS1294&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4); [*Reyes v. Macy's Inc.* (2011) 202 Cal.App.4th 1119, 1122, 135 Cal.Rptr.3d 832](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007047&FindType=Y&SerialNum=2026725195).)

All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

At the time Cruise applied for employment with Kroger in 2007, she completed an employment application which contained an arbitration clause requiring arbitration of employment-related disputes. The employment application also incorporated by reference Kroger's Mediation & Binding Arbitration Policy (Arbitration Policy or Policy).

The trial court denied Kroger's motion to compel arbitration, ruling that Kroger failed to meet its burden to prove the existence of an arbitration agreement. The trial court was not persuaded the undated four-page arbitration policy attached to Kroger's moving papers was extant at the time Cruise read and signed the employment application, and that it was the same Arbitration Policy to which the employment application referred.

We conclude the arbitration clause in the employment application, standing alone, is sufficient to establish the parties agreed to arbitrate their employment-related disputes, and that Cruise's claims against Kroger fall within the ambit of the arbitration agreement. The only impact of Kroger's inability to establish the contents of the 2007 Arbitration Policy is that Kroger failed to establish the parties agreed to govern their arbitration by procedures different from those prescribed in the California Arbitration Act (CAA) (§ 1280 et seq.). Therefore, the arbitration is to be governed by the CAA, rather than by the procedures set forth in the employer's Arbitration Policy. Accordingly, the order denying the motion to compel arbitration is reversed with directions to grant the motion.

**FACTUAL AND PROCEDURAL BACKGROUND**

1. *Events preceding litigation.*

On October 20, 2007, Cruise completed and signed an employment application for the position of Human Resources Assistant Manager at Compton Creamery & Deli Kitchen, and appeared for an interview at that location.

The employment application included the following provision, which Cruise separately initialed, and which stated in relevant part: “*MANDATORY FINAL & BINDING ARBITRATION:* I acknowledge and understand that the Company has a Dispute Resolution Program that includes a Mediation & Binding Arbitration Policy (the ‘Policy’) applicable to all employees and applicants for employment.... I acknowledge, *understand and agree that the Policy is incorporated into this Employment Application by this reference as though it is set forth in full,* that except for claims or disputes arising out of the terms and conditions of any applicable CBA [collective bargaining agreement] (‘Excluded Disputes') the Policy applies to any employment-related disputes that exist or arise between Employees and the Company or ‘Compton Creamery’ (as defined in the Policy) that would constitute cognizable claims or causes of action in a court or government agency under applicable law including individual statutory claims or disputes (‘Covered Disputes'), that Covered Disputes are such claims or disputes that have to do with an Employee's seeking, attempted, actual, or alleged employment with the Company or Compton Creamery (or any of them) other than Excluded Disputes, and that the Policy requires that any Employee who wishes to initiate or participate in formal proceedings to resolve any Covered Disputes must submit the claims or disputes to final and binding arbitration in accordance with the Policy. I acknowledge, understand, and agree that (1) if any Covered Disputes exist or arise between me and the Company or Compton Creamery (or any of them), other than any Excluded Disputes, I am bound by the provisions, terms and conditions of the Policy which provides for mediation and mandatory final and binding arbitration of any Covered Disputes; (2) I am and will hereafter be deemed and treated as an ‘Employee’ as defined in the Policy for the purposes thereof, (3) there are no judge or jury trials of any Covered Disputes permitted under the Policy, (4) I waive any right that I have or may have to a judge or jury trial of any Covered Disputes, (5) I waive any right that I have or may have to have any formal dispute resolution proceedings concerning any Covered Disputes take place in a local, state, or federal court or agency and to have such proceedings heard or presided over by an active local, state, or federal judge, judicial officer, or administrative officer, (6) all Covered Disputes must be heard, determined and resolved only by an Arbitrator through final and binding arbitration in accordance with the Policy, (7) the Company likewise agrees to mandatory final and binding arbitration of any Covered Disputes, whether initiated or participated in by me or by the Company, in accordance with the Policy, and (8) *I have received a copy of the Policy or one has been made available to me through the Company's Human Resource Manager, 2201 South Wilmington Ave., Compton, CA 90220.*” (Italics added.)

The above mentioned Arbitration Policy was not attached to the employment application and Cruise stated the Policy was not provided to her at the time she applied for employment.

On December 7, 2007, seven weeks after Cruise submitted the employment application, she was hired by Compton Creamery. On April 1, 2012, her employment was terminated.

2. *Proceedings.*

Cruise initially filed a discrimination complaint with the Department of Fair Employment & Housing, obtained a right to sue letter, and filed suit against the Kroger defendants.

The operative first amended complaint, filed August 30, 2012, alleged statutory causes of action pursuant to the Fair Employment and Housing Act (FEHA) ([Gov. Code, § 12900 et seq.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000211&DocName=CAGTS12900&FindType=L)) for retaliation, sexual harassment, sexual and racial discrimination, failure to investigate and prevent harassment and retaliation, as well as common law claims for wrongful termination in violation of public policy, intentional infliction of emotional distress and defamation. The complaint also included a demand for a jury trial.

a. *Kroger's motion to compel arbitration.*

On November 29, 2012, the Kroger defendants filed a motion to compel arbitration and stay judicial proceedings. Kroger contended a valid agreement to arbitrate exists; Cruise was bound by the arbitration clause in the signed employment application and by Kroger's four-page Arbitration Policy; Kroger was entitled to enforce the arbitration agreement; and the arbitration agreement extended to all of Cruise's claims against Kroger.

b. *Cruise's opposition to motion to compel arbitration.*

Cruise contended, inter alia, she never signed an arbitration agreement with Kroger. The arbitration clause in the employment application was “vague,” “brief” and unenforceable. As for the four-page Arbitration Policy on which Kroger also relied, that was merely an undated, unauthenticated page from a Ralphs handbook that was not provided to Cruise when she applied for the position. Cruise asserted Kroger's failure to provide her with a copy of the Arbitration Policy meant that no contract was formed with respect to the undisclosed terms. ( *[Metters v. Ralphs Grocery Co](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007047&FindType=Y&SerialNum=2015368671)*[. (2008) 161 Cal.App.4th 696, 702, 74 Cal.Rptr.3d 210](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007047&FindType=Y&SerialNum=2015368671) ( *[Metters](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004041&FindType=Y&SerialNum=2015368671)* ).) Cruise further argued that even assuming the Arbitration Policy was properly presented to her, it was unconscionable, both procedurally and substantively.

c. *Trial court's ruling.*

On January 25, 2013, the matter came on for hearing. On April 12, 2013, the trial court denied the motion to compel arbitration and set forth its rationale in an extensive written ruling, which stated, inter alia:

“The Defendants have failed to meet their burden to prove the existence of a signed arbitration agreement. [*Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 74 Cal.Rptr.3d 210](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007047&FindType=Y&SerialNum=2015368671).[[FN2](#Document1zzB00022035302835)]

[FN2.](#Document1zzF00022035302835) In [*Metters,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004041&FindType=Y&SerialNum=2015368671) defendant Ralphs Grocery Co. moved to compel arbitration claiming the employee had entered into a binding arbitration agreement when he filled out a dispute resolution form. ( [161 Cal.App.4th at p. 698, 74 Cal.Rptr.3d 210](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007047&FindType=Y&SerialNum=2015368671).) However, the dispute form failed to warn the employee that he was agreeing to binding arbitration. The dispute form, which was titled Notice of Dispute & Request for Resolution, “did not alert [the employee] he was agreeing to anything, let alone arbitration.” ( *[Id.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007047&FindType=Y&SerialNum=2015368671)* [at pp. 702–703, 74 Cal.Rptr.3d 210](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007047&FindType=Y&SerialNum=2015368671).) [*Metters*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007047&FindType=Y&SerialNum=2015368671) concluded substantial evidence supported the trial court's finding that there was no valid arbitration agreement. ( *[Id.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007047&FindType=Y&SerialNum=2015368671)* [at p. 704, 74 Cal.Rptr.3d 210](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007047&FindType=Y&SerialNum=2015368671).)

“1. Defendants have failed to prove the existence of a written agreement to arbitrate....

“2. The defendants present Exhibit ‘A’ to the Snell declaration as the signed arbitration agreement. However, Exhibit ‘A’ to the Snell declaration consisted merely of pages from a Ralph's employee handbook. The Snell declaration does not state that this document was ever given to plaintiff. Plaintiff submits a declaration in opposition stating that she never received the Ralphs employee handbook. (See Cruise Declaration). *There is no date on the document and the Snell declaration does not state whether that document existed in 2007.*” (Italics added.)

The trial court further found that in any event, the Arbitration Policy submitted by Kroger was unconscionable, both procedurally and substantively. It found procedural unconscionability on the ground Cruise was required to accept the Arbitration Policy in order to apply for employment. It found substantive unconscionability on the grounds that (1) the Arbitration Policy limited the selection of potential arbitrators, by prohibiting the American Arbitration Association (AAA) and the Judicial Arbitration & Mediation Services (JAMS) from administering any arbitration held pursuant to the Arbitration Policy, and (2) the Arbitration Policy required each of the parties to bear half of the expense of the arbitration fees at the outset of the arbitration proceeding, contrary to [*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004645&FindType=Y&SerialNum=2000487703) ( *[Armendariz](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004040&FindType=Y&SerialNum=2000487703)* ).

The trial court entered an order denying Kroger's motion to compel arbitration and stay the action.

This timely appeal followed.

**CONTENTIONS**

Kroger contends: the Federal Arbitration Act (FAA) governs the instant arbitration agreement; California and federal law favor arbitration; the trial court erred as a matter of law in holding that no valid contract to arbitrate exists, in that Cruise expressed her assent to the terms of the Arbitration Policy by her initials and signature on the employment application, the Arbitration Policy was properly incorporated by reference, and Cruise is charged with knowledge of the terms of the Arbitration Policy and is deemed to have assented thereto; the trial court erred in ruling the Arbitration Policy was procedurally and substantively unconscionable; the trial court should sever any offending provisions and order arbitration; Cruise must arbitrate against all of the defendants; and the trial court proceeding should be stayed pending arbitration.

**DISCUSSION**

1. *The undisputed evidence establishes the parties agreed to arbitrate their employment disputes.*

[[1]](#Document1zzF12035302835)Under “both federal and state law, *the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate*.” ( *[Cheng–Canindin v. Renaissance Hotel Associates](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0003484&FindType=Y&SerialNum=1996242833)* [(1996) 50 Cal.App.4th 676, 683, 57 Cal.Rptr.2d 867](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0003484&FindType=Y&SerialNum=1996242833), italics added.)

[[2]](#Document1zzF22035302835)The instant employment application, which was signed by Cruise, contained the following provision, which Cruise separately initialed, and which stated in relevant part: “*MANDATORY FINAL & BINDING ARBITRATION: I acknowledge and understand that the Company has a Dispute Resolution Program that includes a Mediation & Binding Arbitration Policy (the ‘Policy’) applicable to all employees and applicants for employment.... I acknowledge, understand and agree that the Policy is incorporated into this Employment Application by this reference as though it is set forth in full,* ... *the Policy applies to any employment-related disputes that exist or arise between Employees and the Company* ... *and that the Policy requires that any Employee who wishes to initiate or participate in formal proceedings to resolve any Covered Disputes must submit the claims or disputes to final and binding arbitration in accordance with the Policy.*” (Italics added.)

The above language eliminates any argument the parties did not agree to arbitrate their employment-related disputes.

[[3]](#Document1zzF32035302835)Further, in view of the above provision, Cruise cannot contend her claims against Kroger fall outside the scope of arbitrable issues. “ ‘In California, the general rule is that arbitration should be upheld unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute.’ ” ( *[Izzi v. Mesquite Country Club](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000227&FindType=Y&SerialNum=1986155296)* [(1986) 186 Cal.App.3d 1309, 1315, 231 Cal.Rptr. 315](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000227&FindType=Y&SerialNum=1986155296).) Cruise's statutory causes of action against Kroger pursuant to FEHA ([Gov. Code, § 12900 et seq.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000211&DocName=CAGTS12900&FindType=L)) for retaliation, sexual harassment, sexual and racial discrimination, failure to investigate and prevent harassment and retaliation, as well as her common law claims for wrongful termination in violation of public policy, intentional infliction of emotional distress and defamation, are all “employment-related disputes” within the meaning of the above arbitration clause, and therefore clearly are covered disputes subject to the arbitration agreement.

Thus, there is no question the parties agreed to arbitrate their employment-related disputes, and that Cruise's claims against Kroger fall within the ambit of the arbitration agreement. Therefore, Kroger is entitled to enforce the agreement to arbitrate.

2. *No merit to Cruise's contention the arbitration agreement lacked mutuality because it only required the employee to submit to arbitration.*

[[4]](#Document1zzF42035302835)Cruise's contention that the employment application only subjected the applicant/employee to arbitration is meritless. The arbitration provision in the employment application stated in pertinent part: “(7) the Company likewise agrees to mandatory final and binding arbitration of any Covered Disputes, whether initiated or participated in by me or by the Company, in accordance with the Policy.” This language disposes of Cruise's assertion that Kroger did not waive its right to a jury trial.

Further, the fact that only Cruise manually signed the employment application is of no moment. In [*Lara v. Onsite Health, Inc*. (N.D. Cal. 2012) 896 F.Supp.2d 831](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004637&FindType=Y&SerialNum=2028640926) ( *[Lara](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004637&FindType=Y&SerialNum=2028640926)* ), the employee contended the arbitration agreement lacked mutuality because the employer did not sign it. In response, the employer argued its intent to be bound was evidenced by the fact that the arbitration agreement was printed on its company letterhead. ( *[Id](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004637&FindType=Y&ReferencePositionType=S&SerialNum=2028640926&ReferencePosition=844)*[. at p. 844](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004637&FindType=Y&ReferencePositionType=S&SerialNum=2028640926&ReferencePosition=844).)

The [*Lara*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004637&FindType=Y&SerialNum=2028640926) court concluded the employer intended to be bound by the agreement and that its letterhead was intended to authenticate the agreement. ( *[Lara, supra,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004637&FindType=Y&ReferencePositionType=S&SerialNum=2028640926&ReferencePosition=844)* [896 F.Supp.2d at p. 844](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004637&FindType=Y&ReferencePositionType=S&SerialNum=2028640926&ReferencePosition=844).) It explained: “The signature of a party to be bound by a contract ‘need not be manually affixed, but may in some cases be printed, stamped or typewritten.’ [*Marks v. Walter G. McCarty Corp.,* 33 Cal.2d 814, 820 [205 P.2d 1025] (1949)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000661&FindType=Y&SerialNum=1949113497) (citations omitted). However, if there is no manual signature, it must still be shown ‘that the name relied upon as a signature was placed on the document or adopted by the party to be charged with the intention of authenticating the writing. In other words the defendant must intend to appropriate the name as a signature.’ [*Id*.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000231&FindType=Y&SerialNum=1949113497); see also [*Donovan v. RRL Corp*., 26 Cal.4th 261, 277 [109 Cal.Rptr.2d 807, 27 P.3d 702] (2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004645&FindType=Y&SerialNum=2001651717) (The appearance of the defendant's name in an advertisement constituted an offer; therefore, the defendant's intent to authenticate his or her name as a signature can be established from the face of the advertisement).” ( *[Lara, supra,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004637&FindType=Y&ReferencePositionType=S&SerialNum=2028640926&ReferencePosition=844)* [896 F.Supp.2d at p. 844](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004637&FindType=Y&ReferencePositionType=S&SerialNum=2028640926&ReferencePosition=844).)

[*Lara*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004637&FindType=Y&SerialNum=2028640926) found the employer “intended to be bound by the Arbitration Agreement. First, [the employer's] intent is evidenced by the fact that the Agreement is printed on its company letterhead and, because [the employer] submitted its offer of employment in this manner, the Court finds that [the employer] intended to authenticate its name as a signature.... Second, [the employer's] intent to be bound is further evidenced by the fact that it presented the Agreement to [the employee] as part of its New Hire packet, with a letter explaining that [the employee] must complete and sign all documents to be processed.... Third, the Agreement itself binds both parties to arbitration, repeatedly referring to ‘you and Onsite Health, Inc.,’ or ‘you and the Company.’ ... This language establishes that both parties are bound to arbitrate any disputes, with the exception of injunctive relief. Thus, the Agreement is written in terms of both parties' obligations and evidences [the employer's] intent to be bound. See [*Armendariz,* 24 Cal.4th at 117–118, 99 Cal.Rptr.2d 745, 6 P.3d 669](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004645&FindType=Y&SerialNum=2000487703) (recognizing the ‘modicum of bilaterality’ required in an arbitration agreement).” ( *[Lara, supra,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004637&FindType=Y&ReferencePositionType=S&SerialNum=2028640926&ReferencePosition=844)* [896 F.Supp.2d at p. 844](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004637&FindType=Y&ReferencePositionType=S&SerialNum=2028640926&ReferencePosition=844).)

Here, we readily conclude Kroger intended to be bound by the arbitration clause in its employment application. Kroger's intent is evidenced by the fact that the employment application was printed on its company letterhead and the arbitration clause declared Kroger's intent to be bound by thereby [“(7) the Company likewise agrees to mandatory final and binding arbitration of any Covered Disputes”]. Under these circumstances, we conclude Kroger intended to intended to authenticate its name as a signature, so as to bind both parties to arbitration.

3. *The impact of the trial court's finding that Kroger failed to establish the precise terms of the Arbitration Policy.*

[[5]](#Document1zzF52035302835)Kroger's moving papers were supported by the declaration of Savarda Kia Snell, Human Resource Manager for Compton Creamery. The Snell declaration, dated November 28, 2012, provided in relevant part at paragraph 3: “Attached hereto as Exhibit A is a true and correct copy of the Mediation & Binding Arbitration Policy (referred to in Defendants' Memorandum of Points and Authorities as the ‘Arbitration Policy’).” Exhibit A to the Snell declaration consisted of a four-page document captioned “RALPHS GROCERY COMPANY [¶] DISPUTE RESOLUTION PROGRAM [¶] MEDIATION & BINDING ARBITRATION POLICY.” Kroger asserted said document was a copy of the operative Arbitration Policy which was incorporated by reference into the employment application which Cruise executed five years earlier, on October 20, 2007.

However, the trial court was not persuaded the undated four-page arbitration policy attached to the Snell declaration was extant at the time Cruise read and signed the employment application, and that it was the same Arbitration Policy to which the employment application referred.

*Nonetheless,* Kroger's inability to establish the precise language of the Arbitration Policy which was in effect at the time of Cruise's hiring in 2007, does not support the trial court's conclusion that Kroger “failed to prove the existence of a written agreement to arbitrate.” The undisputed evidence, specifically, the employment application, is sufficient to establish the existence of a written agreement to arbitrate the employment-related disputes pled herein by Cruise. Therefore, Kroger's inability to establish the precise terms of the Arbitration Policy does not relieve Cruise of the obligation to arbitrate.

[[6]](#Document1zzF62035302835)The only impact of Kroger's inability to establish the contents of the 2007 Arbitration Policy is that Kroger failed to establish that the parties agreed to govern their arbitration by procedures different from those prescribed in the CAA (§ 1280 et seq.). Unless the parties otherwise agree, the conduct of an arbitration proceeding is controlled by the CAA. (See, e.g., §§ 1281.6, 1282, 1282.2.) Here, because Kroger failed to establish an agreement to the contrary, the instant arbitration proceeding is to be governed by the procedures set forth in the CAA. Because this arbitration is controlled by California statutory and case law, Cruise's arguments that Kroger's Arbitration Policy is unconscionable, both procedurally and substantively, are meritless.[FN3](#Document1zzB00032035302835)

[FN3.](#Document1zzF00032035302835) A “compulsory predispute arbitration agreement is not rendered unenforceable just because it is required as a condition of employment or offered on a ‘take it or leave it’ basis.” ( *[Lagatree v. Luce, Forward, Hamilton & Scripps](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0003484&FindType=Y&SerialNum=1999209760)* [(1999) 74 Cal.App.4th 1105, 1122–1123, 88 Cal.Rptr.2d 664](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0003484&FindType=Y&SerialNum=1999209760).) With respect to appointment of the arbitrator, section 1281.6 provides that where the parties' arbitration agreement fails to provide a method of appointing an arbitrator, the method prescribed in section 1281.6 shall control. (See [*HM DG, Inc. v. Amini* (2013) 219 Cal.App.4th 1100, 1107, 162 Cal.Rptr.3d 412](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007047&FindType=Y&SerialNum=2031613361) [parties need not agree upon a specific method for appointing an arbitrator to form a binding arbitration agreement].) Finally, with respect to apportionment of costs, [*Armendariz*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004040&FindType=Y&SerialNum=2000487703) held “a mandatory employment arbitration agreement that contains within its scope the arbitration of FEHA claims impliedly obliges *the employer* to pay all types of costs that are unique to arbitration.” ( [24 Cal.4th at p. 113, 99 Cal.Rptr.2d 745, 6 P.3d 669](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004645&FindType=Y&SerialNum=2000487703), italics added.)

Nothing herein should be construed as enabling an employer to enforce a missing arbitration agreement. Here, the movant employer successfully established the *existence* of an agreement to arbitrate, based on the language of the arbitration clause contained in the employment application; however, the employer failed to establish the contents of the purported four-page Arbitration Policy setting forth the procedures which would govern the arbitration. The language of the arbitration clause in the instant employment application, standing alone, was sufficient to establish the *existence* of an agreement by the parties to arbitrate employment-related disputes. While the parties' agreement to arbitrate is enforceable, the employer's inability to establish the contents of its Arbitration Policy precludes the employer from enforcing the provisions of said policy. Instead, the arbitration proceeding is to be conducted in accordance with the procedures set forth in the CAA as well as applicable case law.

In concluding the arbitration proceeding is to be governed by the procedures set forth in the CAA, this court is not rewriting the arbitration agreement or severing any objectionable provisions in the four-page Arbitration Policy in order to save the arbitration agreement. ( *[Armendariz, supra,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004645&FindType=Y&SerialNum=2000487703)* [24 Cal.4th at p. 122, 99 Cal.Rptr.2d 745, 6 P.3d 669](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004645&FindType=Y&SerialNum=2000487703) [trial court has “some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement”].) The applicability of the CAA's procedures is the product of Kroger's inability to establish the contents of the purported four-page Arbitration Policy. Because Kroger failed to establish an agreement binding the parties to alternative procedures, the instant arbitration proceeding is to be governed by the procedures set forth in the CAA.

**DISPOSITION**

The order denying the motion to compel arbitration and stay the action is reversed with directions to grant the motion. The parties shall bear their respective costs on appeal.

We concur:

[KITCHING](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0166851201&FindType=h), Acting P.J.

[KLEIN](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0222396601&FindType=h), J.[FN\*](#Document1zzB00042035302835)

[FN\*](#Document1zzF00042035302835) Retired Presiding Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000203&DocName=CACNART6S6&FindType=L).

**Supplemental Case Printout for: *Adapting the Law to the Online Environment***

Del.Supr.,2014.

Baird v. Owczarek

93 A.3d 1222

Supreme Court of Delaware.

**Thomas BAIRD, Plaintiff Below, Appellant,**

**v.**

**Frank R. OWCZAREK, M.D., Eye Care of Delaware LLC, and Cataract and Laser Center, LLC, Defendants Below, Appellees.**

No. 504, 2013.

Submitted: May 14, 2014.

Decided: May 28, 2014.

[HOLLAND](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0182412001&FindType=h), Justice:

This is an appeal from a final judgment of the Superior Court that was entered after a jury verdict in favor of defendants-appellees, Frank R. Owczarek, M.D. (“Dr. Owczarek”), Eye Care of Delaware, LLC, and Cataract and Laser Center, LLC (collectively, the “Appellees”). The plaintiff-appellant, Thomas Baird (“Baird”), appeals on a number of grounds. We have concluded that the Superior Court's failure to conduct *any* investigation into alleged egregious juror misconduct (internet research), which violated the Superior Court's direct instruction to refrain from consulting outside sources of information, constituted reversible error. In addition, the Superior Court's failure to exclude evidence of informed consent in this medical negligence action also constituted reversible error. Accordingly, the judgments of the Superior Court are reversed and this matter is remanded for a new trial. [FN1](#Document1zzB00112033467524)

[FN1.](#Document1zzF00112033467524) We do not address the other evidentiary issues raised by Baird in this appeal but instead hold that those evidentiary rulings shall not constitute the law of the case at a new trial.

***Facts***

On January 27, 2004, Baird underwent a LASIK [FN2](#Document1zzB00222033467524) procedure on both eyes performed by Dr. Owczarek. On October 14, 2009, Baird underwent a second LASIK surgery on his left eye—a LASIK “enhancement.” Baird alleged that as a result of the surgeries, he developed post-LASIK ectasia, a vision-threatening corneal disease that required a DALK [FN3](#Document1zzB00332033467524) procedure.

[FN2.](#Document1zzF00222033467524) Laser–Assisted *In Situ* Keratomileusis.

[FN3.](#Document1zzF00332033467524) Deep Anterior Lamellar Keratoplasty.

On September 30, 2011, Baird filed a medical negligence action, alleging that the Dr. Owczarek was negligent, not during his performance of the surgeries themselves, but in his decision to perform the surgeries in the first place. Baird also brought a claim based on a lack of informed consent, which he later withdrew.

Having withdrawn his informed consent claim, Baird moved to exclude the defense of assumption of risk and evidence of informed consent. In the same motion, Baird requested that the trial judge exclude the expert testimony of Dr. Steven Siepser, the defendant's standard of care expert. The trial judge denied the motions, but agreed to give a limiting instruction on the issue of informed consent.

An eight-day trial began on April 1, 2013. The jury returned a verdict in favor of the defendants. Over a two-week period following the trial, Juror No. 6 left a telephone message with Baird's counsel and repeatedly attempted to contact the trial judge to inform him of juror misconduct. Eventually, Juror No. 6 wrote a letter to the trial judge alleging that Juror No. 9 had done internet research during the jury's deliberations. Baird moved for a new trial based upon the allegations of misconduct by Juror No. 6. After hearing oral argument, the trial judge summarily denied the motion for a new trial without conducting any investigation.

***Delaware Constitution***

The historical origins of the right to trial by jury which is provided for in the Delaware Constitution was reviewed by this Court in *Claudio v. State.* [FN4](#Document1zzB00442033467524) When the Delaware Constitution of 1792 was adopted, the right to trial by jury set forth in the federal Bill of Rights as the Sixth [FN5](#Document1zzB00552033467524) and Seventh [FN6](#Document1zzB00662033467524) Amendments to the United States Constitution was only a protection against action by the federal government.[FN7](#Document1zzB00772033467524) In *Claudio,* this Court noted that when Delaware adopted its Constitution in 1792, notwithstanding the ratification of the first ten amendments or federal Bill of Rights in 1791, it did not create “a mirror image of the United States Constitution” with regard to trial by jury.[FN8](#Document1zzB00882033467524)

[FN4.](#Document1zzF00442033467524) [*Claudio v. State,* 585 A.2d 1278 (Del.1991)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&SerialNum=1991028813).

[FN5.](#Document1zzF00552033467524) The Sixth Amendment pertains to criminal trials. For a discussion of the history of trial by jury in criminal proceedings in Delaware *see* [*Claudio v. State,* 585 A.2d 1278 (Del.1991)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&SerialNum=1991028813).

[FN6.](#Document1zzF00662033467524) The Seventh Amendment pertains to civil trials and provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no *fact* tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” [U.S. Const. amend. VII](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000583&DocName=USCOAMENDVII&FindType=L) (emphasis added). For a discussion of the history of trial by jury in civil proceedings in Delaware *see* [*McCool v. Gehret,* 657 A.2d 269 (Del.1995)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&SerialNum=1995103718).

[FN7.](#Document1zzF00772033467524) *Barron v. Mayor of Baltimore,* 32 U.S. (7 Pet.) 243, [8 L.Ed. 672 (1833)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000470&FindType=Y&SerialNum=1833191656).

[FN8.](#Document1zzF00882033467524) [*Claudio v. State,* 585 A.2d at 1289](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=1991028813&ReferencePosition=1289).

Following the adoption of the Fourteenth Amendment to the United States Constitution, the Sixth Amendment right to trial by jury in *criminal* proceedings has been deemed to have been incorporated by the Due Process clause and now also provides protection against state action.[FN9](#Document1zzB00992033467524) Nevertheless, the United States Supreme Court has not held that the Seventh Amendment's guarantee of jury trials in *civil* proceedings was made applicable to the states by the incorporation doctrine [FN10](#Document1zzB010102033467524) with the adoption of the Fourteenth Amendment to the United States Constitution.[FN11](#Document1zzB011112033467524) Accordingly, the right to a jury trial in civil proceedings has always been and remains exclusively protected by provisions in the Delaware Constitution.[FN12](#Document1zzB012122033467524)

[FN9.](#Document1zzF00992033467524) [*Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000708&FindType=Y&SerialNum=1968131174).

[FN10.](#Document1zzF010102033467524) *See* [*McDonald v. City of Chicago,* 561 U.S. 742, 130 S.Ct. 3020, 3034 n. 12, 177 L.Ed.2d 894](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000708&FindType=Y&ReferencePositionType=S&SerialNum=2022394586&ReferencePosition=3034) (collecting cases where federal Bill of Rights have been incorporated) & n. 13 (collecting cases where federal Bill of Rights have not been incorporated) (2010).

[FN11.](#Document1zzF011112033467524) [*Minneapolis & St. Louis R.R. v. Bombolis,* 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000708&FindType=Y&SerialNum=1916100439); [*Walker v. Sauvinet,* 92 U.S. 90, 23 L.Ed. 678 (1876)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000780&FindType=Y&SerialNum=1800138707).

[FN12.](#Document1zzF012122033467524) [*McCool v. Gehret,* 657 A.2d 269 (Del.1995)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&SerialNum=1995103718).

***Jury Determines Facts***

When the Delaware Constitution was rewritten in 1897, the General Assembly included several significant provisions regarding the right to trial by jury. Article I of the 1897 Delaware Constitution was denominated for the first time as the “Bill of Rights.” Section 4 of that article provided for the right to trial by jury as “heretofore.” [Article IV, Section 19](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000232&DocName=DECNART4S19&FindType=L) was a new addition in the 1897 Constitution and provided: “Judges shall not charge juries with respect to matters of *fact,* but may state the questions of *fact* in issue and declare the law.” [FN13](#Document1zzB013132033467524) The reason given during the Constitutional Debates for the adoption of [Section 19](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000232&DocName=DECNART4S19&FindType=L) was to ensure “that Judges shall confine themselves to their business, which is to adjudge the law and leave *juries to determine the facts.*” [FN14](#Document1zzB014142033467524)

[FN13.](#Document1zzF013132033467524) [Del. Const. art. IV, § 19](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000232&DocName=DECNART4S19&FindType=L) (emphasis added).

[FN14.](#Document1zzF014142033467524) 3 *Constitutional Debates* at 1730 (emphasis added). *See* [*Storey v. Camper,* 401 A.2d 458, 463 n. 4 (Del.1979)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=1979108864&ReferencePosition=463).

In *Storey,* this Court characterized [Section 19](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000232&DocName=DECNART4S19&FindType=L) as perpetuating Delaware's commitment to trial by jury in civil actions at law with regard to *issues of fact.*[FN15](#Document1zzB015152033467524) In examining when a trial judge may set aside a jury verdict, this Court described Delaware's long history of commitment to trial by jury.[FN16](#Document1zzB016162033467524) We explained that [Section 19](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000232&DocName=DECNART4S19&FindType=L) reaffirmed Delaware's commitment to the common law principles regarding trial by jury:

[FN15.](#Document1zzF015152033467524) [*Storey v. Camper,* 401 A.2d at 462–65](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=1979108864&ReferencePosition=462).

[FN16.](#Document1zzF016162033467524) *Id.*

In the policy of the law of this state, declared by the courts in numberless decisions, the *jury is the sole judge of the facts* of a case, and so jealous is the law of this policy that by express provision of the Constitution the court is forbidden to touch upon the facts of the case in its charge to the jury. [FN17](#Document1zzB017172033467524)

[FN17.](#Document1zzF017172033467524) *Id.* at 462 (quoting [*Philadelphia, B. & W. R. Co. v. Gatta,* 85 A. 721, 729 (Del.1913)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000161&FindType=Y&ReferencePositionType=S&SerialNum=1913026511&ReferencePosition=729)) (emphasis added).

[[1]](#Document1zzF12033467524)[[2]](#Document1zzF22033467524)[[3]](#Document1zzF32033467524) Accordingly, under the Delaware Constitution, an essential element of the right to trial by jury is for verdicts to be based solely on *factual determinations* that are made from the evidence presented at trial. [FN18](#Document1zzB018182033467524) The accused's rights to confrontation, cross-examination and the assistance of counsel [FN19](#Document1zzB019192033467524) assure the accuracy of the testimony which the jurors hear and safeguard the proper admission of other evidence.[FN20](#Document1zzB020202033467524) *Those rights can be exercised effectively only if evidence is presented to the jury in the courtroom,*[FN21](#Document1zzB021212033467524) where that evidence can be subjected to the adversarial process under the authoritative guidance of a trial judge. These principles are equally applicable to the parties' rights in a Delaware civil jury trial. In addition, the Delaware Constitution provides that, in a civil proceeding that is appealed to this Court, “from a verdict of a jury, the findings of the jury, if supported by the evidence, shall be conclusive.” [FN22](#Document1zzB022222033467524)

[FN18.](#Document1zzF018182033467524) [*Hughes v. State,* 490 A.2d 1034, 1040 (Del.1985)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=1985119503&ReferencePosition=1040).

[FN19.](#Document1zzF019192033467524) [*Turner v. Louisiana,* 379 U.S. 466, 473, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000708&FindType=Y&SerialNum=1965125016).

[FN20.](#Document1zzF020202033467524) [*Smith v. State,* 317 A.2d 20, 23 (Del.1974)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=1974100600&ReferencePosition=23).

[FN21.](#Document1zzF021212033467524) *Id.*

[FN22.](#Document1zzF022222033467524) [Del. Const. art. IV, § 11](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000232&DocName=DECNART4S11&FindType=L)(1)(a) (emphasis added).

***Ascertaining Juror Misconduct***

[[4]](#Document1zzF42033467524) The right to an impartial jury is compromised if even one juror is improperly influenced.[FN23](#Document1zzB023232033467524) This Court has recognized the difficulty which a party has in *proving actual prejudice within a jury panel.*[FN24](#Document1zzB024242033467524) That difficulty is attributable to the sanctity of the jury's deliberations and the common law prohibition against jurors impeaching their own verdict. Accordingly, this Court has held “that a flat prohibition against receiving post-verdict testimony from jurors would contravene another important public policy: that of ‘redressing the injury of the private litigant where a verdict was reached by a jury that was not impartial.’ ” [FN25](#Document1zzB025252033467524)

[FN23.](#Document1zzF023232033467524) [*Styler v. State,* 417 A.2d 948, 951–52 (Del.1980)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=1980124176&ReferencePosition=951).

[FN24.](#Document1zzF024242033467524) [*Massey v. State,* 541 A.2d 1254, 1257–58 (Del.1988)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=1988058735&ReferencePosition=1257).

[FN25.](#Document1zzF025252033467524) [*Sheeran v. State,* 526 A.2d 886, 895 (Del.1987)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=1987068117&ReferencePosition=895) (citing [*Patterson v. Colorado,* 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000708&FindType=Y&SerialNum=1907100428)).

The need to accommodate the conflicting policies of preserving the sanctity of a jury's deliberations and the parties' right to an impartial jury, has resulted in the recognition of a distinction between extrinsic and intrinsic influences upon a jury's verdict.[FN26](#Document1zzB026262033467524) [D.R.E. 606(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR606&FindType=L) codifies the common law prohibition against inquiry into the jurors' mental processes, [FN27](#Document1zzB027272033467524) but also provides an exception:

[FN26.](#Document1zzF026262033467524) *Id.*

[FN27.](#Document1zzF027272033467524) It has been codified in [Delaware Rule of Evidence 606(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR606&FindType=L):

COMPETENCY OF JUROR AS WITNESS. *Inquiry into Validity of Verdict or Indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

[A] juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether **any outside influence** was improperly brought to bear upon **any** juror.[FN28](#Document1zzB028282033467524)

[FN28.](#Document1zzF028282033467524) *Id.* (emphasis added).

***Egregious Circumstance Test***

[[5]](#Document1zzF52033467524) In an effort to address the evidentiary limitations caused by precluding any inquiry into a juror's mental processes, this Court has adopted an inherently prejudicial egregious circumstance test.[FN29](#Document1zzB029292033467524) To succeed on a claim of improper jury influence, a party must either prove that he or she was “identifiably prejudiced” by the juror misconduct or prove the existence of “ ‘egregious circumstances,’—i.e., circumstances that, if true, would be deemed inherently prejudicial so as to raise a presumption of prejudice.” [FN30](#Document1zzB030302033467524) The presumption of prejudice can be rebutted, however, by a post-trial investigation conducted by the trial judge.[FN31](#Document1zzB031312033467524)

[FN29.](#Document1zzF029292033467524) [*Massey v. State,* 541 A.2d at 1258–59](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=1988058735&ReferencePosition=1258).

[FN30.](#Document1zzF030302033467524) [*Sykes v. State,* 953 A.2d 261 (Del.2008)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&SerialNum=2015174048).

[FN31.](#Document1zzF031312033467524) [*Remmer v. United States,* 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000708&FindType=Y&SerialNum=1954119980).

***Juror Internet Research Improper***

[[6]](#Document1zzF62033467524) In this case, the Superior Court clearly and appropriately instructed the jury that they were not to “... use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, computer; the Internet, any Internet service, or any text or instant messaging service; or Internet chat room, blog, or website such as Facebook, My Space, LinkedIN [sic], YouTube or Twitter to communicate to anyone any information in this case or conduct any research about this case until I accept your verdict.” [FN32](#Document1zzB032322033467524)

[FN32.](#Document1zzF032322033467524) *See* Appellant's Op. Br.App. at A–1211.

Baird argues that Juror No. 9's internet research was an improper extraneous influence and was an “egregious circumstance” that raised a presumption of prejudice. We agree. Internet research provides a juror with access to information that was not admitted into evidence and consists of written “text” that is inadmissible into evidence under any circumstance.

This Court has held that “charts” admitted into evidence, which included explanatory “text” cannot be distinguished in a principled way from a “text from learned treatises” which the policy underlying [D.R.E. 803(18)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR803&FindType=L) prohibits from going into the jury room during deliberations.[FN33](#Document1zzB033332033467524) [Delaware Rule of Evidence 803(18)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR803&FindType=L) states:

[FN33.](#Document1zzF033332033467524) [*Berry v. Cardiology Consultants, P.A.,* 935 A.2d 255 (Del.2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&SerialNum=2013370807).

[t]o the extent called to the attention of an expert witness upon cross-examination, or relied upon by him in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the *statements may be read into evidence but may not be received as exhibits.*

According to *Weinstein and Berger,* the purpose of [Rule 803(18)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR803&FindType=L) is to help “ensure that the jurors will not be unduly impressed by the treatise, and that they will not use the text as a starting point for conclusions untested by expert testimony....” [FN34](#Document1zzB034342033467524) The *Handbook of Federal Evidence* notes that the “provision attempts to prevent jurors from overvaluing the written word....” [FN35](#Document1zzB035352033467524) *Jones on Evidence Civil and Criminal* states:

[FN34.](#Document1zzF034342033467524) 4 *Weinstein and Berger, United States Rules,* ¶ 803(18)[02], at 803–375 (1995).

[FN35.](#Document1zzF035352033467524) Michael H. Graham, [*Handbook of Federal Evidence* § 803:18, at 415 (6th ed.2006)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0102078&FindType=Y&SerialNum=0283066083).

The last sentence of the rule permits the attorney to read relevant passages from the treatise into evidence to bolster, or as the basis of questions to challenge the witness, but neither the treatise itself, or the relevant passages, may be received as exhibits. **This restriction is intended to prevent jurors from attempting to interpret or apply the treatise on their own independent of the testimony of the expert witness(es) who are questioned about it.**[FN36](#Document1zzB036362033467524)

[FN36.](#Document1zzF036362033467524) 5 *Jones on Evidence Civil and Criminal,* § 35:28, at 317 (7th ed. 2003) (emphasis added).

[[7]](#Document1zzF72033467524) Internet research by a juror is an improper extrinsic influence that is an egregious circumstance because it has the prospect of being so inherently prejudicial that it raises a presumption of prejudice. Several decades ago, this Court held “fairness and, indeed, the integrity of the judicial process, make it imperative that jurors receive information about the case only as a corporate body in the courtroom.” [FN37](#Document1zzB037372033467524) “Nothing is more repugnant to our traditions of justice than to be at the mercy of witnesses [or written text] one cannot see or challenge, or to have one's rights stand or fall on the basis of unrevealed facts that perhaps could be explained or refuted.” [FN38](#Document1zzB038382033467524) The following rationale is applicable to internet research by a juror:

[FN37.](#Document1zzF037372033467524) [*Smith v. State,* 317 A.2d at 23](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=1974100600&ReferencePosition=23).

[FN38.](#Document1zzF038382033467524) [*Torres v. Allen Family Foods,* 672 A.2d 26, 31 (Del.1995)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=1996034595&ReferencePosition=31).

Had evidence of such matters been offered and admitted over his objections, it would have been reversible error. If the admission of such evidence in the trial, where he at least might have had opportunity to meet and perchance explain the damaging facts, would be prejudicial, it cannot be less so when the facts are brought to the attention of the jurors in the jury room by one of their fellows whose word, of course, the others have no reason to doubt and without the knowledge or consent of defendant nor with any opportunity for him to explain the facts or rebut the unfavorable inferences. [FN39](#Document1zzB039392033467524)

[FN39.](#Document1zzF039392033467524) [*Hughes v. State,* 490 A.2d at 1045 n. 13](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=1985119503&ReferencePosition=1045).

Jurors cannot render a fair verdict when *facts* to support the basis for that verdict do not appear in the record evidence that was presented to them in the courtroom. Similarly, a judge may not investigate issues of fact on the internet, when a judge sits as the fact finder without a jury.[FN40](#Document1zzB040402033467524)

[FN40.](#Document1zzF040402033467524) [*Tribbitt v. Tribbitt,* 963 A.2d 1128 (Del.2008)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&SerialNum=2017711389).

***Further Investigation Mandatory***

[[8]](#Document1zzF82033467524) Under [D.R.E. 606(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR606&FindType=L), “a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror.” [FN41](#Document1zzB041412033467524) Thus, testimony about “extrinsic” influences is permissible under the rule. The trial judge acknowledged that under the rules of evidence, Juror No. 6 would be permitted to testify about the “something” that was researched by Juror No. 9.

[FN41.](#Document1zzF041412033467524) [D.R.E. 606(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR606&FindType=L).

Nevertheless, the trial judge did not call Juror No. 6 to testify. The trial judge explained why he concluded that the circumstances alleged in the letter from Juror No. 6 did warrant further investigation:

The circumstances do not come close to warranting a new trial or further investigation here because Juror No. 6 has not stated with any detail what Juror No. 9 researched online. Juror No. 6 has not explained (if she even knows) what Juror No. 9 “looked up” on the internet. Any prejudice is thus completely speculative. In other words, Plaintiff has not shown that here is a “reasonable probability” that what Juror No. 9 researched online affected the verdict.

[[9]](#Document1zzF92033467524) Baird argues that the Superior Court abused its discretion in finding that Juror No. 6 could, pursuant to [D.R.E. 606(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR606&FindType=L), testify that Juror No. 9 did internet research, but in failing to call her to testify or conduct any further investigation to determine the content of the outside research. We agree. Generally, “[t]he trial court has discretion to decide that allegations of juror misconduct are not sufficiently credible or specific to warrant investigation.” [FN42](#Document1zzB042422033467524) However, once the trial court has been presented with evidence of internet research by a juror it is incumbent on the trial judge to conduct an investigation.

[FN42.](#Document1zzF042422033467524) [*Black v. State,* 3 A.3d 218, 221 (Del.2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007691&FindType=Y&ReferencePositionType=S&SerialNum=2022476329&ReferencePosition=221).

[[10]](#Document1zzF102033467524)[[11]](#Document1zzF112033467524) Internet research by a juror is intolerable misconduct because it is an extrinsic influence that has the potential to prejudicially compromise the jury's function under the Delaware Constitution to *determine facts* exclusively based upon evidence that is presented in the courtroom. Accordingly, we hold that where, as here, a juror makes allegations that one or more jurors violated a direct instruction of the trial judge to refrain from conducting internet research, such allegations represent an egregious circumstance giving rise to a rebuttable presumption of prejudice from exposure to an improper extrinsic influence. The presumption of prejudice can be rebutted by an investigation.[FN43](#Document1zzB043432033467524)

[FN43.](#Document1zzF043432033467524) [*Black v. State,* 3 A.3d 218, 220 (Del.2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007691&FindType=Y&ReferencePositionType=S&SerialNum=2022476329&ReferencePosition=220).

[[12]](#Document1zzF122033467524)[[13]](#Document1zzF132033467524) An investigation is mandatory when there is an allegation of internet research by a juror. The trial judge must determine whether the alleged internet research actually occurred; if it occurred, the content of the outside research; whether the content of the internet research prejudiced the errant juror; and whether the results of the internet research were communicated to other jurors. If after the trial judge's investigation there is sufficient evidence to rebut the presumption of prejudice, the trial judge may deny a motion for a new trial. If, however, the opposing party fails to rebut the presumption of prejudice arising from a showing of an egregious circumstance (internet research), the trial judge must grant a motion for a new trial.

In this case, the allegation of internet research by a juror presented an egregious circumstance. It raised a rebuttable presumption of prejudice by an extrinsic influence that may have been rebutted by a post-trial investigation. The trial judge's failure to conduct *any* investigation was an abuse of discretion and reversible error.[FN44](#Document1zzB044442033467524) Since the presumption of prejudice was not rebutted, the unexpanded, uncontradicted record reflects that parties' rights under the Delaware Constitution, to have the case exclusively decided by evidence that was presented to the jury in the courtroom, were violated.

[FN44.](#Document1zzF044442033467524) [*Black v. State,* 3 A.3d 218, 221 (Del.2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007691&FindType=Y&ReferencePositionType=S&SerialNum=2022476329&ReferencePosition=221). *Accord* [*Gov't of the Virgin Islands v. Weatherwax,* 20 F.3d 572, 578 (3d Cir.1994)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000506&FindType=Y&ReferencePositionType=S&SerialNum=1994074621&ReferencePosition=578) (“We have emphasized the importance of questioning jurors whenever the integrity of their deliberations is jeopardized.... failure to evaluate the nature of the jury misconduct or the existence of prejudice require[s] a new trial.”). *See also* [*United States v. Bristol–Martir,* 570 F.3d 29 (1st Cir.2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000506&FindType=Y&SerialNum=2019220942); [*United States v. Resko,* 3 F.3d 684 (3d Cir.1993)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000506&FindType=Y&SerialNum=1993166345) (failure to adequately investigate the prejudicial effect of jury misconduct on the jury's deliberations). *See also* George L. Blum, Annotation, [*Prejudicial Effect of Juror Misconduct Arising from Internet Usage,* 48 A.L.R.6th 135 (2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007185&FindType=Y&SerialNum=2019945470).

***Informed Consent Forms Improperly Admitted***

[[14]](#Document1zzF142033467524) After Baird withdrew his claim for lack of informed consent, his counsel filed a motion *in limine* which sought to preclude the presentation of several pieces of evidence. Among the evidence objected to was the various informed consent forms signed by Baird prior to his surgeries. In the motion, Baird's counsel argued that the informed consent evidence “bears only upon issues relating to Plaintiff's withdrawn informed consent claim.” “Therefore, they now have no probative value to any issues remaining in this action. Moreover, the consent forms would prejudice, confuse and mislead the jury.”

In a pretrial conference, the trial judge addressed the various parts of Baird's motion *in limine,* including the informed consent evidence. The trial judge denied Baird's motion after finding that the informed consent forms were relevant as part of “the work-up done by the defendant” in the context of an elective procedure. The trial judge then requested that Baird's counsel “take the lead” in drafting a jury instruction that would inform the jury about the proper use of the evidence. The jury instructions ultimately contained the following language:

Informed consent is not a valid defense to a medical negligence action. Plaintiff-patient cannot consent to the negligence of a defendant-doctor. The fact that the defendant-doctor may have informed the plaintiff of certain known and accepted risks, does not excuse him of liability for any negligence.

When determining whether or not Dr. Owczarek committed medical negligence, you may not, and should not, consider any evidence of Mr. Baird's consent or any warnings given by Dr. Owczarek, as evidence that Mr. Baird consented to Dr. Owczarek's negligence, if any.

[[15]](#Document1zzF152033467524) In Delaware, assumption of risk is not a valid defense to a medical negligence action as a matter of public policy.[FN45](#Document1zzB045452033467524) This Court has never addressed the question of whether evidence of informed consent may be entered into evidence in a medical negligence case where the plaintiff makes no claim for lack of informed consent. That question has been addressed, however, by courts in a number of other jurisdictions. Those cases “uniformly have concluded that evidence of informed consent, such as consent forms, is both irrelevant and unduly prejudicial in medical malpractice cases without claims of lack of informed consent.” [FN46](#Document1zzB046462033467524) We agree.

[FN45.](#Document1zzF045452033467524) *See* [*Storm v. NSL Rockland Place, LLC,* 898 A.2d 874, 885 (Del.Super.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=2009289131&ReferencePosition=885).

[FN46.](#Document1zzF046462033467524) [*Hayes v. Camel,* 283 Conn. 475, 927 A.2d 880, 889 (2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=2012847169&ReferencePosition=889) (finding that trial court abused its discretion by allowing into evidence informed consent forms in a claim for negligence, but finding error harmless). *See also* [*Waller v. Aggarwal,* 116 Ohio App.3d 355, 688 N.E.2d 274, 275–76 (1996)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000578&FindType=Y&ReferencePositionType=S&SerialNum=1997234497&ReferencePosition=275) (finding that the issue of informed consent, and therefore evidence thereof, was irrelevant to plaintiff's claim of negligence and carried great potential for jury confusion); [*Liscio v. Pinson,* 83 P.3d 1149, 1156 (Colo.App.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004645&FindType=Y&ReferencePositionType=S&SerialNum=2003435376&ReferencePosition=1156) (finding that evidence pertaining to a patient's informed consent may be unfairly prejudicial and irrelevant to a negligence claim, but finding no reversible error because plaintiff “opened the door”); [*Wright v. Kaye,* 267 Va. 510, 593 S.E.2d 307, 317 (2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000711&FindType=Y&ReferencePositionType=S&SerialNum=2004203178&ReferencePosition=317) (finding reversible error where trial court failed to grant plaintiff's motion *in limine* to exclude evidence of informed consent where no claim for lack of informed consent); [*Warren v. Imperia,* 252 Or.App. 272, 287 P.3d 1128 (2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004645&FindType=Y&SerialNum=2028595637) (trial court did not abuse its discretion in excluding evidence of informed consent in a medical malpractice case where no “lack of informed consent” claim was brought because the evidence was irrelevant and, to the extent relevant, unfairly prejudicial and confusing to the jury); [*Schwartz v. Johnson,* 206 Md.App. 458, 49 A.3d 359, 371–75 (Md.Ct.Spec.App.2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007691&FindType=Y&ReferencePositionType=S&SerialNum=2027985558&ReferencePosition=371) (trial court did not abuse its discretion in excluding evidence of informed consent because irrelevant to claim for medical malpractice without a “lack of informed consent” claim and overly prejudicial or confusing to jury even if relevant).

In order to be admissible at trial, evidence must be relevant. [FN47](#Document1zzB047472033467524) Relevant evidence, as defined by [Delaware Rule of Evidence 401](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR401&FindType=L), is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” [FN48](#Document1zzB048482033467524) [D.R.E. 401](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR401&FindType=L)'s definition of relevance contains aspects of materiality and probative value.[FN49](#Document1zzB049492033467524) This Court has said that “evidence is material if it is offered to prove a fact that is of consequence to the action[, and it] has probative value if it affects the probability that the fact is as the party offering the evidence asserts it to be.” [FN50](#Document1zzB050502033467524)

[FN47.](#Document1zzF047472033467524) [*Stickel v. State,* 975 A.2d 780, 782 (Del.2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=2019134531&ReferencePosition=782).

[FN48.](#Document1zzF048482033467524) [D.R.E. 401](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR401&FindType=L).

[FN49.](#Document1zzF049492033467524) [*Stickel v. State,* 975 A.2d at 783](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=2019134531&ReferencePosition=783) (citing [*Lilly v. State,* 649 A.2d 1055, 1060 (Del.1994)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=1994239180&ReferencePosition=1060)).

[FN50.](#Document1zzF050502033467524) *Id.*

Dr. Owczarek argues that the evidence of informed consent, especially the consent forms Baird signed, was relevant to the work-up done prior to the surgery, which Dr. Owczarek contends was put at issue during trial. In addition, Dr. Owczarek submits that the consent forms were relevant to the historical context of Baird's treatment and the fact that the surgery was elective. We conclude that Dr. Owczarek's arguments are without merit.

In this case, Baird originally brought claims for lack of informed consent and for medical malpractice. Significantly, however, Baird dismissed his claim for lack of informed consent prior to trial. Once Baird's claim for lack of informed consent was removed from the suit, the consent forms Baird signed pre-surgery became irrelevant, because assumption of the risk is not a valid defense to a claim of medical negligence,[FN51](#Document1zzB051512033467524) and because evidence of informed consent is neither material or probative of whether Dr. Owczarek met the standard care in concluding that Baird was an eligible candidate for the surgery.[FN52](#Document1zzB052522033467524) Therefore, the evidence should have been excluded pursuant to [D.R.E. 401](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR401&FindType=L).

[FN51.](#Document1zzF051512033467524) [*Storm v. NSL Rockland Place, LLC,* 898 A.2d 874, 885 (Del.Super.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=2009289131&ReferencePosition=885).

[FN52.](#Document1zzF052522033467524) [*Schwartz v. Johnson,* 206 Md.App. 458, 49 A.3d 359, 374–75 (Md.Ct.Spec.App.2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007691&FindType=Y&ReferencePositionType=S&SerialNum=2027985558&ReferencePosition=374).

Even if relevant, “evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading he jury....” [FN53](#Document1zzB053532033467524) Informing the jury of a plaintiff's consent does not help a defendant show that he was not negligent. Evidence of informed consent in a medical malpractice action could confuse the jury by creating the impression that consent to the surgery was consent to the injury.[FN54](#Document1zzB054542033467524) Therefore, because evidence of informed consent in this case carried a clear danger of confusing the jury, even if the evidence would have been otherwise relevant, it should have been excluded pursuant to [D.R.E. 403](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR403&FindType=L). The trial judge's failure to do so was an abuse of its discretion.

[FN53.](#Document1zzF053532033467524) [D.R.E. 403](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1007675&DocName=DERREVR403&FindType=L).

[FN54.](#Document1zzF054542033467524) [*Schwartz v. Johnson,* 206 Md.App. 458, 49 A.3d 359, 374 (Md.Ct.Spec.App.2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0007691&FindType=Y&ReferencePositionType=S&SerialNum=2027985558&ReferencePosition=374) (citing [*Hayes v. Camel,* 283 Conn. 475, 927 A.2d 880, 888–89 (2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000162&FindType=Y&ReferencePositionType=S&SerialNum=2012847169&ReferencePosition=888)).

***Conclusion***

The judgment of the Superior Court is reversed, and the matter is remanded for a new trial.

**Supplemental Case Printout for: *Landmark in the Law***

U.S.Dist.Col.,1803.

Marbury v. Madison

1 Cranch 137, 5 U.S. 137, 1803 WL 893 (U.S.Dist.Col.), 2 L.Ed. 60

Supreme Court of the United States

**William MARBURY**

**v.**

**James MADISON, Secretary of State of the United States.**

Feb. 1803.

MARSHALL.

**\*\*1** **\*138** The supreme court of the U. States has not power to issue a mandamus to a secretary of state of the U. States, it being an exercise of *original* jurisdiction not warranted by the constitution. Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution. An act of congress repugnant to the constitution cannot become a law. The courts of the U. States are bound to take notice of the constitution. A commission is not necessary to the appointment of an officer by the executive-Semb. A commission is only *evidence* of an appointment.

Delivery is not necessary to the validity of letters patent. The President cannot authorize a secretary of state to omit the performance**\*139** of those duties which are enjoined by law.

A justice of peace in the district of Columbia is not removable at the will of the President. When a commission for an officer not holding his office at the will of the President, is by him signed and transmitted to the secretary of state to be sealed and recorded, it is irrevocable; the appointment is complete. A mandamus is the proper remedy to compel a secretary of state to deliver a commission to which the party is entitled.

**\*137** At the last term, viz. December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, esq. late attorney general of the United States, severally moved the court for a rule to James Madison, secretary of state of the United States, to shew cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state or any officer in the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to shew cause on the 4th day of this term. This rule having been duly served,

Mr. Lee, in support of the rule, observed that it was important to know on what ground a justice of peace in the district of Columbia holds his office, and what proceedings are necessary to constitute an appointment to an office not held at the will of the president. However notorious the facts are, upon the suggestion of which this rule has been laid, yet the applicants have been much embarrassed in obtaining evidence of them. Reasonable information has been denied at the office of the department of state. Although a respectful memorial has been made to the senate praying them to suffer their secretary to give extracts from their executive journals respecting the nomination of the applicants to the senate, and of their advice and consent to the appointments, yet their request has been denied, and their petition rejected. They have therefore been compelled to summon witnesses to attend in court, whose voluntary affidavits they could not obtain. Mr. Lee here read the affidavit of Dennis Ramsay, and the printed journals of the senate of 31 January, 1803, respecting the refusal of the senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging that they were clerks in the department of state and not bound to disclose any facts relating to the business or transactions in the office.

**\*\*2** Mr. Lee observed, that to shew the propriety of examining these witnesses, he would make a few remarks on the nature of the office of secretary of state. His duties are of two kinds, and he exercises his functions in two distinct capacities; as a public ministerial officer of the United States, and as agent of the President. In the first his duty is to the United States or its citizens; in the other his duty is to the President; in the one he is an independent, and an accountable officer; in the other he is dependent upon the President, is his agent, and accountable to him alone. In the former capacity he is compellable by mandamus to do his duty; in the latter he is not. This distinction is clearly pointed out by the two acts of congress upon this subject. The first was passed 27th July, 1789, vol. 1. p. 359, entitled “an act for establishing an executive department, to be denominated the department of foreign affairs.”The first section ascertains the duties of the secretary so far as he is considered as a mere executive agent. It is in these words, “Be it enacted, &c. that there shall be an executive department, to be denominated the department of foreign affairs, and that there shall be a principal officer therein, to be called the secretary of the department of foreign affairs, who shall perform and execute such duties as shall from time to time be enjoined on, or intrusted to him by the President of the United States, agreeable to the constitution, relative to correspondencies, commissions**\*140** or instructions to or with public ministers or consuls from the United States; or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct.”

The second section provides for the appointment of a chief clerk; the third section prescribes the oath to be taken which is simply, “well and faithfully to execute the trust committed to him;” and the fourth and last section gives him the custody of the books and papers of the department of foreign affairs under the old congress. Respecting the powers given and the duties imposed by this act, no mandamus will lie. The secretary is responsible only to the President. The other act of congress respecting this department was passed at the same session on the 15th September 1789, vol. 1, p. 41, c. 14, and is entitled “An act to provide for the safe keeping of the acts, records, and seal of the United States, and for other purposes.”The first section changes the name of the department and of the secretary, calling the one the department and the other the secretary of state. The second section assigns new duties to the secretary, in the performance of which it is evident, from their nature, he cannot be lawfully controlled by the president, and for the non-performance of which he is not more responsible to the president than to any other citizen of the United States. It provides that he shall receive from the president all bills, orders, resolutions and votes of the senate and house of representatives, which shall have been approved and signed by him; and shall cause them to be published, and printed copies to be delivered to the senators and representatives and to the executives of the several states; and makes it his duty carefully to preserve the originals; and to cause them to be recorded in books to be provided for that purpose. The third section provides a seal of the United States. The fourth makes it his duty to keep the said seal, and to make out and record, and to affix the seal of the United States to all civil commissions, after they **\*141** shall have been signed by the President. The fifth section provides for a seal of office, and that all copies of records and papers in his office, authenticated under that seal, shall be as good evidence as the originals. The sixth section establishes fees for copies, &c. The seventh and last section gives him the custody of the papers of the office of the secretary of the old congress. Most of the duties assigned by this act are of a public nature, and the secretary is bound to perform them, without the control of any person. The President has no right to prevent him from receiving the bills, orders, resolutions and votes of the legislature, or from publishing and distributing them, or from preserving or recording them. While the secretary remains in office the President cannot take from his custody the seal of the United States, nor prevent him from recording, and affixing the seal to civil commissions of such officers as hold not their offices at the will of the President, after he has signed them and delivered them to the secretary for that purpose. By other laws he is to make out and record in his office patents for useful discoveries, and patents of lands granted under the authority of the United States. In the performance of all these duties he is a public ministerial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrollable by the President; and if he neglects or refuses to perform them, he may be compelled by mandamus, in the same manner as other persons holding offices under the authority of the United States. The President is no party to this case. The secretary is called upon to perform a duty over which the President has no control, and in regard to which he has no dispensing power, and for the neglect of which he is in no manner responsible. The secretary alone is the person to whom they are entrusted, and he alone is answerable for their due performance. The secretary of state, therefore, being in the same situation, as to these duties, as every other ministerial officer of the United States, and equally liable to be compelled to perform them, is also bound by the same rules of evidence. These duties are not of a confidential nature, but are of a public kind, and his clerks can have no exclusive privileges. There are undoubtedly facts, which may come to their knowledge by means of their connection with the secretary of state, respecting which **\*142** they cannot be bound to answer. Such are the facts concerning foreign correspondencies, and confidential communications between the head of the department and the President. This, however, can be no objection to their being sworn, but may be a ground of objection to any particular question. Suppose I claim title to land under a patent from the United States. I demand a copy of it from the secretary of state. He refuses. Surely he may be compelled by mandamus to give it. But in order to obtain a mandamus, I must shew that the patent is recorded in his office. My case would be hard indeed if I could not call upon the clerks in the office to give evidence of that fact. Again, suppose a private act of congress had passed for my benefit. It becomes necessary for me to have the use of that act in a court of law. I apply for a copy. I am refused. Shall I not be permitted, on a motion for a mandamus, to call upon the clerks in the office to prove that such an act is among the rolls of the office, or that it is duly recorded? Surely it cannot be contended that although the laws are to be recorded, yet no access is to be had to the records, and no benefit to result therefrom.

**\*\*3** The court ordered the witnesses to be sworn and their answers taken in writing, but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

**\*\*4** Mr. Wagner being examined upon interrogatories, testified, that at this distance of time he could not recollect whether he had seen any commission in the office, constituting the applicants, or either of them justices of the peace. That Mr. Marbury and Mr. Ramsay called on the secretary of state respecting their commissions. That the secretary referred them to him; he took them into another room and mentioned to them, that two of the commissions had been signed, but the other had not. That he did not know that fact of his own knowledge, but by the information of others. Mr. Wagner declined answering the question “who gave him that information;” and the court decided that he was not bound to answer it, because it was not pertinent to this cause. He further testified that some of the commissions of the justices, but he believed not all, were recorded. He did not know whether the commissions of the applicants were **\*143** recorded, as he had not had recourse to the book for more than twelve months past.

Mr. Daniel Brent testified, that he did not remember certainly the names of any of the persons in the commissions of justices of the peace signed by Mr. Adams; but believed, and was almost certain, that Mr. Marbury's and col. Hooe's commissions were made out, and that Mr. Ramsay's was not; that he made out the list of names by which the clerk who filled up the commissions was guided; he believed that the name of Mr. Ramsay was pretermitted by mistake, but to the best of his knowledge it contained the names of the other two; he believed none of the commissions for justices of the peace signed by Mr. Adams, were recorded. After the commissions for justices of the peace were made out, he carried them to Mr. Adams for his signature. After being signed he carried them back to the secretary's office, where the seal of the United States was affixed to them. That commissions are not usually delivered out of the office before they are recorded; but sometimes they are, and a note of them only is taken, and they are recorded afterwards. He believed none of those commissions of justices were ever sent out, or delivered to the persons for whom they were intended; he did not know what became of them, nor did he know that they are now in the office of the secretary of state.

Mr. Lincoln, attorney general, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as secretary of state at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.

The questions being written were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds.

**\*\*5** **\*144** 1st. He did not think himself bound to disclose his official transactions while acting as secretary of state; and

2d. He ought not to be compelled to answer any thing which might tend to criminate himself.

Mr. Lee, in reply, repeated the substance of the observations he had before made in answer to the objection of Mr. Wagner and Mr. Brent. He stated that the duties of a secretary of state were two-fold. In discharging one part of those duties he acted as a public ministerial officer of the United States, totally independent of the President, and that as to any facts which came officially to his knowledge, while acting in this capacity, he was as much bound to answer as a marshal, a collector, or any other ministerial officer. But that in the discharge of the other part of his duties, he did not act as a public ministerial officer, but in the capacity of an agent of the President, bound to obey his orders, and accountable to him for his conduct. And that as to any facts which came officially to his knowledge in the discharge of this part of his duties, he was not bound to answer. He agreed that Mr. Lincoln was not bound to disclose any thing which might tend to criminate himself.

Mr. Lincoln thought it was going a great way to say that every secretary of state should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.

The court said, that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it **\*145** is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.

Mr. Lincoln then prayed time till the next day to consider of his answers under this opinion of the court.

The court granted it and postponed further consideration of the cause till the next day.

At the opening of the court on the next morning, Mr. Lincoln said he had no objection to answering the questions proposed, excepting the last which he did not think himself obliged to answer fully. The question was, what had been done with the commissions. He had no hesitation in saying that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office when Mr. Madison took possession of it. He prayed the opinion of the court whether he was obliged to disclose what had been done with the commissions.

The court were of opinion that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison, it was immaterial to the present cause, what had been done with them by others.

**\*\*6** To the other questions he answered that he had seen commissions of justices of the peace of the district of Columbia, signed by Mr. Adams, and sealed with the seal of the United States. He did not recollect whether any of them constituted Mr. Marbury, col. Hooe, or col. Ramsay, justices of the peace; there were when he went into the office several commissions for justices of peace of the district made out; but he was furnished with a list of names to be put into a general commission, which was done, and was considered as superseding the particular commissions; and the individuals whose names were contained in this general commission were informed of their being thus appointed. He did not know that any one of the commissions was ever sent to the person for whom it was made out, and did not believe that any one had been sent.

**\*146** Mr. Lee then read the affidavit of James Marshall, who had been also summoned as a witness. It stated that on the 4th of March 1801, having been informed by some person from Alexandria that there was reason to apprehend riotous proceedings in that town on that night, he was induced to return immediately home, and to call at the office of the secretary of state, for the commissions of the justices of the peace; that as many as 12, as he believed, commissions of justices for that county were delivered to him for which he gave a receipt, which he left in the office. That finding he could not conveniently carry the whole, he returned several of them, and struck a pen through the names of those, in the receipt, which he returned. Among the commissions so returned, according to the best of his knowledge and belief, was one for colonel Hooe, and one for William Harper.

Mr. Lee then observed, that having proved the existence of the commissions, he should confine such further remarks as he had to make in support of the rule to three questions;

1st. Whether the supreme court can award the writ of mandamus in any case.

2d. Whether it will lie to a secretary of state in any case whatever.

3d. Whether in the present case the court may award a mandamus to James Madison, secretary of state.

The argument upon the 1st question is derived not only from the principles and practice of that country, from whence we derive many of the principles of our political institutions, but from the constitution and laws of the United States.

This is the *supreme* court, and by reason of its supremacy must have the superintendance of the inferior tribunals and officers, whether judicial or ministerial. In this respect there is no difference between a judicial and a ministerial officer. From this principle alone the court of king's bench in England derives the power of issuing the writs of mandamus and prohibition. 3. Inst. 70, 71. **\*147** Shall it be said that the court of king's bench has this power in consequence of its being the supreme court of judicature, and shall we deny it to this court which the constitution makes the *supreme* court? It is a beneficial, and a necessary power; and it can never be applied where there is another *adequate, specific, legal remedy.*

The second section of the third article of the constitution gives this court appellate jurisdiction in all cases in law and equity arising under the constitution and laws of the United States (except the cases in which it has original jurisdiction) with such exceptions, and under such regulations as congress shall make. The term “appellate jurisdiction” is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals.

**\*\*7** Proceedings in nature of appeals are of various kinds, according to the subject matter. 3 Bl. com. 402. It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 Bl. com. 109. There are some injuries which can only be redressed by a writ of mandamus, and others by a writ of prohibition. There must then be a jurisdiction some where competent to issue that kind of process. Where are we to look for it but in that court which the constitution and laws have made supreme, and to which they have given appellate jurisdiction? Blackstone, vol. 3, p. 110, says that a writ of mandamus is “a command issuing in the king's name from the court of king's bench, and directed to any *person,* corporation or inferior court, requiring them to do some particular thing therein specified, *which appertains to their office and duty,* and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, *and has no other specific means of compelling its performance.”*

In the Federalist, vol. 2, p. 239, it is said, that the word “appellate” is not to be taken in its technical sense, as used in reference to appeals in the course of the *civil* law, but in its broadest sense, in which it denotes nothing more than the power of one tribunal to review the proceedings**\*148** of another, either as to law or fact, or both. The writ of mandamus is in the nature of an appeal as to fact as well as law. It is competent for congress to prescribe the forms of process by which the supreme court shall exercise its appellate jurisdiction, and they may well declare a mandamus to be one. But the power does not depend upon implication alone. It has been recognized by legislative provision as well as in judicial decisions in this court.

Congress, by a law passed at the very first session after the adoption of the constitution, vol. 1, p. 58, sec. 13, have expressly given the supreme court the power of issuing writs of mandamus. The words are, “The supreme court shall also have appellate jurisdiction from the circuit courts, and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus,* in cases warranted by the principles and usages of law, to any courts appointed, or *persons holding office,* under the authority of the United States.”

Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution. 2 Dal. Rep. 298.

**\*\*8** This court has entertained jurisdiction on a mandamus in one case, and on a prohibition in another. In the case of the United States v. judge Lawrence, 3. Dal. Rep. 42, a mandamus was moved for by the attorney general at the instance of the French minister, to compel judge Lawrence to issue a warrant against captain Barre, commander of the French ship of war Le Perdrix, grounded on an article of the consular convention with France. In this case the power of the court to issue writs of mandamus, was taken for granted in the arguments of counsel on both sides, and seems to have been so considered by the court. The mandamus was refused, because the case in which it was required, was not a proper one to support the motion. In the case of the United States v. judge Peters a writ of prohibition was granted, 3. Dal. Rep. 121, 129. This was the celebrated case of the French **\*149** corvette the Cassius, which afterwards became a subject of diplomatic controversy between the two nations. On the 5th Feb. 1794, a motion was made to the supreme court in behalf of one John Chandler, a citizen of Connecticut, for a mandamus to the *secretary at war,* commanding him to place Chandler on the invalid pension list. After argument, the court refused the mandamus, because the two acts of congress respecting invalids, did not support the case on which the applicant grounded his motion. The case of the United States v. Hopkins, at February term, 1794, was a motion for a mandamus to Hopkins, loan officer for the district of Virginia, to command him to admit a person to subscribe to the United States loan. Upon argument the mandamus was refused because the applicant had not sufficiently established his title. In none of these cases, nor in any other, was the power of this court to issue a mandamus ever denied. Hence it appears there has been a legislative construction of the constitution upon this point, and a judicial practice under it, for the whole time since the formation of the government.

2d. The second point is, can a mandamus go to a secretary of state in any case? It certainly cannot in *all* cases; nor to the President in *any* case. It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth, that a mandamus to a secretary of state is equivalent to a mandamus to the President of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution. The secretary of state acts, as before observed, in two capacities. As the agent of the President, he is not liable to a mandamus; but as a recorder of the laws of the United States; as keeper of the great seal, as recorder of deeds of land, of letters patent, and of commissions, &c. he is a ministerial officer of the people of the United States. As such he has duties assigned him by law, in the execution of which he is independent of all control, but that of the laws. It is true he is a high officer, but he is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, **\*150** should be above the compulsion of law in the exercise of those duties. As a ministerial officer he is compellable to do his duty, and if he refuses, is liable to indictment. A prosecution of this kind might be the means of punishing the officer, but a specific civil remedy to the injured party can only be obtained by a writ of mandamus. If a mandamus can be awarded by this court in any case, it may issue to a secretary of state; for the act of congress expressly gives the power to award it, “in cases warranted by the principles and usages of law, *to any person holding offices under the authority of the United States.”*

Many cases may be supposed, in which a secretary of state ought to be compelled to perform his duty specifically. By the 5th and 6th sections of the act of congress, vol. 1, p. 43, copies under seal of the office of the department of state are made evidence in courts of law, and fees are given for making them out. The intention of the law must have been, that every person needing a copy should be entitled to it. Suppose the secretary refuses to give a copy, ought he not to be compelled? Suppose I am entitled to a patent for lands purchased of the United States; it is made out and signed by the President who gives a warrant to the secretary to affix the great seal to the patent; he refuses to do it; shall I not have a mandamus to compel him? Suppose the seal is affixed, but the secretary refuses to record it; shall he not be compelled? Suppose it recorded, and he refuses to deliver it; shall I have no remedy?

**\*\*9** In this respect there is no difference between a patent for lands, and the commission of a judicial officer. The duty of the secretary is precisely the same.

Judge Patterson inquired of Mr. Lee whether he understood it to be the duty of the secretary to deliver a commission, unless ordered so to do by the President.

Mr. Lee replied, that after the President has signed a commission for an office not held at his will, and it comes to the secretary to be sealed, the President has done with it, and nothing remains, but that the secretary perform those ministerial acts which the law imposes upon him. It immediately becomes his duty to seal, record, and deliver**\*151** it on demand. In such a case the appointment becomes complete by the signing and sealing; and the secretary does wrong if he withholds the commission.

3d. The third point is, whether in the present case a writ of mandamus ought to be awarded to James Madison, secretary of state.

The justices of the peace in the district of Columbia are judicial officers, and hold their office for five years. The office is established by the act of Congress passed the 27th of Feb. 1801, entitled “An act concerning the district of Columbia,” ch. 86, sec. 11 and 14; page 271, 273. They are authorized to hold courts and have cognizance of personal demands of the value of 20 dollars. The act of May 3d, 1802, ch. 52, sec. 4, considers them as judicial officers, and provides the mode in which execution shall issue upon their judgments. They hold their offices independent of the will of the President. The appointment of such an officer is complete when the President has nominated him to the senate, and the senate have advised and consented, and the President has signed the commission and delivered it to the secretary to be sealed. The President has then done with it; it becomes irrevocable. An appointment of a judge once completed, is made forever. He holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In contemplation of law they are as if done.

These justices exercise part of the judicial power of the United States. They ought therefore to be independent. Mr. Lee begged leave again to refer to the Federalist, vol. 2, Nos. 78 and 79, as containing a correct view of this subject. They contained observations and ideas which he wished might be generally read and understood. They contained the principles upon which this branch of our constitution was constructed. It is important to the citizens of this district that the justices should be independent; almost all the authority immediately exercised over them is that of the justices. They wish to know whether the justices of this district are to hold their commissions at the will of a secretary of state. **\*152** This cause may seem trivial at first view, but it is important in principle. It is for this reason that this court is now troubled with it. The emoluments or the dignity of the office, are no objects with the applicants. They conceive themselves to be duly appointed justices of the peace, and they believe it to be their duty to maintain the rights of their office, and not to suffer them to be violated by the hand of power. The citizens of this district have their fears excited by every stretch of power by a person so high in office as the secretary of state.

**\*\*10** It only remains now to consider whether a mandamus to compel the delivery of a commission by a public ministerial officer, is one of “the cases warranted by the principles and usages of law.”

It is the general principle of law that a mandamus lies, if there be no other *adequate, specific, legal* remedy; 3 *Burrow,* 1067, *King v. Barker, and al.* This seems to be the result of a view of all the cases on the subject.

The case of Rex.v. Borough of Midhurst, 1. Wils. 283, was a mandamus to compel the presentment of certain conveyances to purchasers of burgage tenements, whereby they would be entitled to vote for members of parliament. In the case of Rex v. Dr. Hay, 1. W.Bl.Rep. 640, a mandamus issued to admit one to administer an estate.

A mandamus gives no right, but only puts the party in a way to try his right. Sid. 286.

It lies to compel a ministerial act which concerns the public. 1. Wilson, 283, 1. Bl.Rep. 640-although there be a more tedious remedy, Str. 1082, 4 Bur. 2188, 2 Bur. 1045; So if there be a legal right, and a remedy in equity, 3. Term Rep. 652. A mandamus lies to obtain admission into a trading company.Rex v. Turkey Company, 2 Bur. 1000.Carthew 448. 5 Mod. 402; So it lies to put the corporate seal to an instrument. 4. Term.Rep. 699; to commissioners of the excise to grant a permit, 2 Term.Rep. 381; to admit to an office, 3 Term.Rep. 575; to deliver papers which concern the public, 2 Sid. 31. A mandamus will sometimes lie in a **\*153** doubtful case, 1 Levinz 123, to be further considered on the return, 2 Levinz, 14. 1 Sidersin, 169.

It lies to be admitted a member of a church, 3. Bur. 1265, 1043.

**\*\*11** The process is as ancient as the time of Ed.2d. 1 Levinz 23.

The first writ of mandamus is not peremptory, it only commands the officer to do the thing or shew cause why he should not do it. If the cause returned be sufficient, there is an end of the proceeding, if not, a peremptory mandamus is then awarded.

It is said to be a writ of discretion. But the discretion of a court always means a found, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court are bound to grant it. They can refuse justice to no man.

On a subsequent day, and before the court had given an opinion, Mr. Lee read the affidavit of Hazen Kimball, who had been a clerk in the office of the Secretary of State, and had been to a distant part of the United States, but whose return was not known to the applicant till after the argument of the case.

It stated that on the third of March, 1801, he was a clerk in the department of state. That there were in the office, on that day, commissions made out and signed by the president, appointing William Marbury a justice of peace for the county of Washington; and Robert T. Hooe a justice of the peace for the county of Alexandria, in the district of Columbia.

Afterwards, on the 24th of February the following opinion of the court was delivered by the chief justice.

*Opinion of the court.*

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to shew cause why a mandamus **\*154** should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shewn, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles, on which the opinion to be given by the court, is founded.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of inquiry is,

1st. Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February 1801, concerning the district of Columbia.

After dividing the district into two counties, the 11th section of this law, enacts, “that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years.

**\*155** It appears, from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington, was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

**\*\*12** In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the constitution, declares, that, “the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for.”

The third section declares, that “he shall commission all the officers of the United States.”

An act of congress directs the secretary of state to keep the seal of the United States, “to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the President, by and with the consent of the senate, or by the President alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States.”

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

1st. The nomination. This is the sole act of the President, and is completely voluntary.

2d. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.

**\*156** 3d. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. “He shall,” says that instrument, “commission all the officers of the United States.”

The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission will be rendered more apparent, by adverting to that provision in the second section of the second article of the constitution, which authorizes congress “to vest, by law, the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments;” thus contemplating cases where the law may direct the President to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.

Although that clause of the constitution which requires the President to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence the constitutional distinction between the appointment to an office and the commission of an officer, who has been appointed, remains the same as if in practice the President had commissioned officers appointed by an authority other than his own.

**\*\*13** It follows too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

**\*157** This is an appointment made by the President, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to shew an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment; though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment being the sole act of the President, must be completely evidenced, when it is shewn that he has done everything to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete.

The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the legislature, when the act passed, converting the department **\*158** of foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, “and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the President:”“Provided that the said seal shall not be affixed to any commission, before the same shall have been signed by the President of the United States; nor to any other instrument or act, without the special warrant of the President therefore.”

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the Presidential signature.

**\*\*14** It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal, is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal is affixed the appointment is made, and **\*159** the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to invest the person with his office, is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

In considering this question, it has been conjectured that the commission may have been assimilated to a deed, to the validity of which, delivery is essential.

This idea is founded on the supposition that the commission is not merely *evidence* of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly, let it be conceded, that the principle, claimed for its support, is established.

The appointment being, under the constitution, to be made by the President *personally,* the delivery of the deed of appointment, if necessary to its completion, must be made by the President also. It is not necessary that the livery should be made personally to the grantee of the office: It never is so made. The law would seem to contemplate that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission *after* it shall have been signed by the President. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences **\*160** of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the President, and the seal of the United States, are those solemnities. This objection therefore does not touch the case.

**\*\*15** It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission, is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment which must precede it, and which is the mere act of the President. If the executive required that every person appointed to an office, should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the President; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to enquire, whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted, but that a copy from the record of the office of the secretary of state, would be, to every intent and purpose, equal to the original. The act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but, not that the original had been transmitted. If indeed it should appear that **\*161** the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labour of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions, the law orders the secretary of state to record them. When therefore they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees, to be paid by a person requiring a copy, are ascertained by law. Can a keeper of a public record, erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

**\*\*16** Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment; still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept: but neither the one, nor the other, is capable of rendering the appointment a non-entity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct.

A commission bears date, and the salary of the officer commences from his appointment; not from the transmission or acceptance of his commission. When a person, appointed to any office, refuses to accept that office, the successor is nominated in the place of the person who **\*162** has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

It is therefore decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of this country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

2dly. If he has a right, and that right has been violated, do the laws of this country afford him a remedy?

**\*\*17** **\*163** The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the 3d vol. of his commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

“In all other cases,” he says, “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”

And afterwards, p. 109, of the same vol. he says, “I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.”

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behoves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself, is, whether this can be arranged **\*164** with that class of cases which come under the description of *damnum absque injuria* -a loss without an injury.

This description of cases never has been considered, and it is believed never can be considered, as comprehending offices of trust, of honor or of profit. The office of justice of peace in the district of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. It is not then on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

**\*\*18** By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained.**\*165** No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3. p. 255, says, “ but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.”

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river (vol.3d. p. 299) the purchaser, on paying his purchase money, becomes completely entitled to the property purchased; and on producing to the secretary of state, the receipt of the treasurer upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent; or the patent being lost, should refuse a copy of it; can it be imagined that the law furnishes to the injured person no remedy?

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the President is invested with certain important political powers, in the **\*166** exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

**\*\*19** But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us enquire how it applies to the case under the consideration of the court.

**\*167** The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the President; the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defense had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right, either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

**\*\*20** That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is then the opinion of the court,

1st. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice **\*168** of peace, for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for, and,

2dly. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his commentaries, page 110, defines a mandamus to be, “a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.”

Lord Mansfield, in 3d Burrows 1266, in the case of the *King v. Baker, et al.* states with much precision and explicitness the cases in which this writ may be used.

“Whenever,” says that very able judge, “there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern, or attended with profit) and a person is kept out of possession, or dispossessed of such right, and **\*169** has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government.”In the same case he says, “this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.”

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, “to do a particular thing therein specified, which appertains to his office and duty and which the court has previously determined, or at least supposes, to be consonant to right and justice.”Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

**\*\*21** These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice; to which claims it is the duty of that court to attend; should at first view be considered **\*170** by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is **\*171** again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

**\*\*22** But where he is the head of a good department is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which, the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now, for the first time, to be taken up in this country.

It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons, who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act in February, 1793, making it the duty of the secretary of war, in conjunction with the attorney general, to take such measures, as might be necessary to obtain an adjudication of the supreme court of the United **\*172** States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a mandamus was moved for, to be directed to the secretary at war, commanding him to place on the pension list, a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant, was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court the decision was, not that a mandamus would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a mandamus ought not to issue in that case-the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

**\*\*23** The judgment in that case, is understood to have decided the merits of all claims of that description; and the persons on the report of the commissioners found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.

The doctrine, therefore, now advanced, is by no means a novel one.

It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subject the acts of Congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable, at the will of the executive; and being so **\*173** appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by any other person.

It was at first doubted whether the action of *detinue* was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in *detinue* is for the thing itself, *or* its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court “to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present **\*174** case; because the right claimed is given by a law of the United States.

**\*\*24** In the distribution of this power it is declared that “the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.”

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

**\*175** If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shewn to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

**\*\*25** It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to **\*176** appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited**\*177** and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

**\*\*26** If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

**\*178** So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed as pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions-a written constitution-would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

**\*\*27** The judicial power of the United States is extended to all cases arising under the constitution.

**\*179** Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that “no tax or duty shall be laid on articles exported from any state.”Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that “no bill of attainder or *ex post facto* law shall be passed.”

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

“No person,” says the constitution, “shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out of* court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution**\*180** contemplated that instrument, as a rule for the government of *courts,* as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, “I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to *the constitution,* and laws of the United States.”

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

**\*\*28** If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts,* as well as other departments, are bound by that instrument.

The rule must be discharged.

√**Supplemental Case Printout for: *Beyond Our Borders***

Tex.App.-Fort Worth,2003.

Jabri v. Qaddura

108 S.W.3d 404

Court of Appeals of Texas,

Fort Worth.

**Saadallah JABRI and Aida Jabri, Appellants,**

**v.**

**Jamal QADDURA, Appellee.**

**and**

**Rola Qaddura, Appellant,**

**v.**

**Jamal Qaddura and Osama Qaddura, Appellees.**

**Nos. 2-02-415-CV, 2-02-416-CV.**

May 8, 2003.

DIXON W. HOLMAN, Justice.

These consolidated appeals involve the denial of Appellants' motions to stay litigation and compel arbitration under the Texas General Arbitration Act. We reverse and render judgment in favor of Appellants.

**BACKGROUND**

***The parties to this litigation:***

There are five parties to these two consolidated appeals: a husband and wife, the wife's parents, and the husband's brother.

Rola Qaddura and Jamal Qaddura were married on September 3, 1993. Previously, on August 28, 1993, they had signed an “Islamic Society of Arlington Islamic Marriage Certificate” which reflects that the **\*407** “dowry for the bride” was: “One-half of the value of the house located at 2206 Gladstone. This is in addition to $40,000 Fourty [sic] Thousand U.S. Dollars the payment of which is deferred.”

On October 19, 1999, Rola filed for divorce. She sought sole managing conservatorship of the parties' two children, child support, division of the parties' estate, and enforcement of the terms of the Islamic Marriage Certificate. Rola subsequently sued Jamal's brother, Osama Qaddura, as a third-party defendant, alleging he was engaged in a conspiracy with Jamal whereby Jamal was wrongfully transferring community assets to Osama, including a house on Vesta Via Court.

Jamal filed a counterclaim seeking sole managing conservatorship and child support. He sought a declaration that the Islamic Marriage Certificate was unenforceable because it was induced by Rola by fraud. He also alleged a separate cause of action against Rola for “defamation and false light,” in which he sought $250,000 actual damages and $1,000,000 exemplary damages.

Osama filed a counterclaim seeking a declaratory judgment that he is the sole owner of the house on Vesta Via Court (with no right of reimbursement by Rola or Jamal) and of a specific bank account.

On January 18, 2002, Jamal filed a separate suit seeking a protective order against Rola's parents (the children's grandparents), Saadallah Jabri and Aida Jabri, alleging the children had been injured while in their care.

***The partial summary judgment:***

On April 27, 2001, the trial court granted Jamal's motion for partial summary judgment in the divorce case. The court found: the “purported Islamic Dowry agreement” is not an enforceable agreement under Texas law, nor is it a valid or qualified premarital agreement under the Texas Family Code; the house on Gladstone Drive is the separate property of Jamal; the house on Vesta Via Court is owned by Osama; and two certificates of deposit (for $102,348 and $5,398) are currently non-existent and neither party has a claim of reimbursement for the monies. Accordingly, the trial court's partial summary judgment ordered that Rola take nothing on these claims.

***The Arbitration Agreement:***

On September 25, 2002, all five parties signed an “Arbitration Agreement.” This document recites, in full, that the parties:

after consultation with their respective attorneys, agree to submit all claims and disputes among them to arbitration by the TEXAS ISLAMIC COURT, 888 s. Greenville Ave., suite 188, Richardson, Texas, as follows:

A. Cause No. 322-291577-99, styled “In the Matter of the Marriage of Rola Jabri Qadura and Jamal Qaddura and In the Interest of Noor Qaddura and Farah Qaddura Minor children”, pending in the 322nd Judicial District Court of Tarrant County, Texas.

B. Cause No. 76-184050-00, Styled “Jamal Qaddura Versus Saadallah Jabri”, pending in the 67th Judicial District Court of Tarrant County, Texas.[[[[[FN1]

FN1. Cause No. 76-184050-00 is not part of these consolidated appeals and is not pending before this court.

C. Cause No. NO. 322-328238-02 (FORMERLY 325-328238-02), styled “Jamal Qaddura v. Saadallah Jabri and Aida Jabri” pending in **\*408** the 322 Judicial District Court of Tarrant County, Texas.

1.The Parties agree to arbitrate all existing issues among them in the above mentioned Cause Numbers in the appropriate District Court, which includes the Divorce Case, the child custody of the [sic] Noor Qaddura and Farah Qaddura, the determination of each party's responsibilities and duties according to the Islamic rules of law by Texas Islamic Court.

2.All parties agree to sign the Texas Islamic Court required legal forms, and each party pays his required fees.

3.The panel of arbitrators of Texas Islamic Court will be formed according to the rules and regulations of Texas Islamic Court. However, the parties agree and suggest the following names for the panel:

**.**Mujahid Bakhash, the Imam of the Islamic Association of Tarrant County, Fort Worth, Texas.

**.**Main El-quda, the Imam of the Islamic Society of Arlington, Arlington, Texas.

**.**Abdel Salam Abu-Nar, the Imam of Dar Assalam Islamic Center, Arlington, Texas

4.Each Party will submit all of his documents, exhibits, and evidence to Texas Islamic Court.

5.The parties agree that the Ruling of the Texas Islamic Court in the above mentioned Cause Numbers is Binding, and Final, and no party will take any appeal or future legal action of any matter afterwards.

6.Each party will cause the above cause numbers to be abated pending the decision by the arbitrators, and submit the decision of the arbitrators for adoption by the respective courts. The parties will ask the courts to refer the cases for arbitration to Texas Islamic court within “Seven Days” from the establishment of the Texas Islamic Court panel of Arbitrators. The assignment must include ALL cases, including those filed against or on behalf of other family members related to the parties. Each party will notify the other party, Texas Islamic Court, and their respective attorneys, in writing of the assignment of all the above Cause Numbers from the above appropriate District Court to Texas Islamic Court.

All five parties signed this Arbitration Agreement, as did the attorneys for Jamal, Rola, and Saadallah. The document was witnessed by four other individuals whose signatures are on the document. At the hearing on Appellants' motion to compel arbitration, Appellants' attorney explained the circumstances regarding the parties' decision to submit to arbitration:

The parties got together and approached my client, Rola Qaddura, with the proposal that they submit this to arbitration. The parties got together over the weekend. They all signed it and then directed their attorneys to take whatever legal action was necessary to enforce the arbitration.

On September 30 and October 3, 2002, the same five parties, and the same two attorneys, signed a document entitled “Stipulations and Agreements Covering Arbitration.” This document reiterates much of the binding language of the Arbitration Agreement and specifies that the parties agree to be bound by the rules of arbitration of the Texas Islamic Court.

A dispute arose among the parties over the scope of the issues that were subject to arbitration under the Arbitration Agreement, and on October 7, 2002 Rola filed a motion in the divorce suit seeking to stay **\*409** litigation and compel arbitration.FN2 Saadallah and Aida filed an identical motion in the protective order suit. Appellees did not file written objections or responses to Appellants' motions.

FN2. *See*TEX. CIV. PRAC. & REM.CODE ANN. §§ 171.021, 171.025 (Vernon Supp.2003).

***The hearing in the trial court:***

On November 14, 2002, the trial court held a hearing on Appellants' motion to compel arbitration. The court heard argument of counsel, and Appellants established that the signatures on the Arbitration Agreement and the stipulations document were authentic.FN3 The attorney representing Rola, Saddallah, and Aida and the attorney representing Jamal told the court their clients could not agree on what issues were covered by the Arbitration Agreement.

FN3. Osama did not attend the hearing. His attorney informed the court that the attorney was not present when the two arbitration documents were signed, he did not sign the documents on behalf of his client, and he could not agree that the signature on the documents belonged to his client. The court, however, determined the signature belonged to Osama.

Appellants argued it covered every issue raised in the pending lawsuits, including those issues upon which the trial court had previously entered interlocutory rulings (specifically, the matters covered by the partial summary judgment, which ruling Appellants emphasized was interlocutory and subject to being changed by the court until final judgment is entered).FN4 Appellants told the court that since there was a dispute about the scope of the Arbitration Agreement, pursuant to the Texas General Arbitration Act it was the court's duty to decide what the Arbitration Agreement covered.

FN4. Appellants' attorney stated that after she became involved in the case she filed a motion to set aside the partial summary judgment.

Appellee Jamal argued in favor of arbitration but claimed the Arbitration Agreement only covered those issues that had not been previously determined by the court (that is, the Arbitration Agreement excluded the subject matter of the prior partial summary judgment). Appellee Osama's attorney stated he revoked his client's signature and consent to the Arbitration Agreement.FN5

FN5. Osama's attorney attempted to persuade the trial court to sever the partial summary judgment from the remainder of the case so the judgment in favor of his client could be final. The court denied the motion to sever.

The trial court determined the parties disagreed regarding the scope of the Arbitration Agreement and it therefore was not valid or binding. The court denied Appellants' motions to stay litigation and compel arbitration. The trial court did not make findings of fact or conclusions of law.FN6 Rola, Saadallah, and Aida have appealed the court's orders refusing to compel arbitration and denying a stay of the pending proceedings.FN7

FN6. *See*TEX.R.APP. P. 28.1 (“The trial court need not, but may-within 30 days after the order is signed-file findings of fact and conclusions of law.”).

FN7. The divorce suit is appeal no. 2-02-416-CV; the protective order suit is appeal no. 2-02-415-CV. This court previously granted Appellants' motion to consolidate the two suits for purposes of appeal.

**THE TEXAS GENERAL ARBITRATION ACT**

The Texas General Arbitration Act provides:

**§ 171.001. Arbitration Agreements Valid**

**\*410** (a) A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that:

(1) exists at the time of the agreement; or

(2) arises between the parties after the date of the agreement.

(b) A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.

TEX. CIV. PRAC. & REM.CODE ANN. § 171.001. A court shall order the parties to arbitrate on application of a party showing an agreement to arbitrate, and the opposing party's refusal to arbitrate. *Id.*§ 171.021(a). If a party opposing the application denies the existence of the agreement, the court shall summarily determine that issue. *Id.*§ 171.021(b). The court shall order the arbitration if it finds for the party that made the application. *Id.* An order compelling arbitration must include a stay of any proceeding subject to section 171.025. *Id.*§§ 171.021(b), 171.025.

[1][2][3][4] A party seeking to compel arbitration must establish the existence of an arbitration agreement, and show that the claims raised fall within the scope of the agreement. *In re Oakwood Mobile Homes, Inc.,* 987 S.W.2d 571, 573 (Tex.1999) (orig.proceeding). Once the party establishes a claim within the arbitration agreement, the trial court must compel arbitration and stay its own proceedings. *Id.; Ikon Office Solutions, Inc. v. Eifert,* 2 S.W.3d 688, 693 (Tex.App.-Houston [14th Dist.] 1999, no pet.). The trial court may summarily decide whether to compel arbitration on the basis of affidavits, pleadings, discovery, and stipulations of the parties. *Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 269 (Tex.1992) (orig.proceeding). The court must conduct an evidentiary hearing, however, when there are disputed material facts. *See id.*

[5][6][7] In the instant case, the parties did not deny the existence of the written Arbitration Agreement, they differed over which claims fell within the scope of the Agreement. Arbitration is strongly favored under federal and state law. *Cantella & Co. v. Goodwin,* 924 S.W.2d 943, 944 (Tex.1996) (orig.proceeding); *Prudential Sec. Inc. v. Marshall,* 909 S.W.2d 896, 898 (Tex.1995) (orig.proceeding). Any doubts regarding the scope of an arbitration agreement should be resolved in favor of arbitration. *Cantella,* 924 S.W.2d at 944; *Merrill Lynch, Pierce, Fenner & Smith v. Eddings,* 838 S.W.2d 874, 880 (Tex.App.-Waco 1992, writ denied). Every reasonable presumption must be decided in favor of arbitration. *See Ikon,* 2 S.W.3d at 693.

**STANDARD OF REVIEW ON APPEAL**

[8][9][10] On appeal, we must determine whether the trial court's ruling as to the scope of the Arbitration Agreement was an abuse of discretion. *See Am. Employers' Ins. Co. v. Aiken,* 942 S.W.2d 156, 159 (Tex.App.-Fort Worth 1997, no writ). We must decide whether the trial court's ruling was arbitrary and unreasonable, that is, made without reference to any guiding rules or principles. *See Worford v. Stamper,* 801 S.W.2d 108, 109 (Tex.1990); *Southwest Health Plan, Inc. v. Sparkman,* 921 S.W.2d 355, 357 (Tex.App.-Fort Worth 1996, no writ). The trial court's legal conclusions are reviewed by us *de novo. See Ikon,* 2 S.W.3d at 693.

[11][12][13][14][15] Whether the Arbitration Agreement imposes a duty to arbitrate the claims in a particular dispute is a matter of contract interpretation. *See Am. Employers' Ins.,* 942 S.W.2d at 159; *BDO Seidman v. Miller,* 949 S.W.2d 858, 860 (Tex.App.-Austin 1997, writ dism'd w.o.j.) (op. on reh'g). Whether a contract is ambiguous is a question of law. **\*411***Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.,* 940 S.W.2d 587, 589 (Tex.1996). If there is no ambiguity, the construction of the written instrument is a question of law for the court. *City of Pinehurst v. Spooner Addition Water Co.,* 432 S.W.2d 515, 518 (Tex.1968). Our primary goal in construing a written contract is to ascertain and give effect to the intent of the parties as expressed in the instrument. *See Balandran v. Safeco Ins. Co.,* 972 S.W.2d 738, 741 (Tex.1998); *Nat'l Union Fire Ins. Co. v. CBI Indus.,* 907 S.W.2d 517, 520 (Tex.1995). If a written contract is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law. *Nat'l Union,* 907 S.W.2d at 520; *Coker v. Coker,* 650 S.W.2d 391, 393 (Tex.1983).

[16][17] An ambiguity does not arise simply because parties advance differing interpretations of the terms of a contract. *Columbia Gas,* 940 S.W.2d at 589; *Forbau v. Aetna Life Ins. Co.,* 876 S.W.2d 132, 134 (Tex.1994); *Sun Oil Co. v. Madeley,* 626 S.W.2d 726, 727 (Tex.1981). For an ambiguity to exist, the language of the contract must remain uncertain or subject to two or more reasonable interpretations after applying the pertinent rules of construction. *Columbia Gas,* 940 S.W.2d at 589.

[18][19][20] In construing the Arbitration Agreement, we are to examine all parts of the document and the circumstances surrounding the formulation of the contract. *See id.; Nat'l Union,* 907 S.W.2d at 520; *Forbau,* 876 S.W.2d at 133. We must consider all of the provisions with reference to the entire Arbitration Agreement; no single provision will be controlling. *See Coker,* 650 S.W.2d at 393; *Cook Composites, Inc. v. Westlake Styrene Corp.,* 15 S.W.3d 124, 132 (Tex.App.-Houston [14th Dist.] 2000, pet. dism'd). Only where a contract is determined to be ambiguous after application of the rules of construction may the courts consider parol evidence of the parties' interpretations. *Nat'l Union,* 907 S.W.2d at 520; *Sun Oil Co.,* 626 S.W.2d at 732. Where there is a broad arbitration clause, arbitration of a particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Kline v. O'Quinn,* 874 S.W.2d 776, 782 (Tex.App.-Houston [14th Dist.] 1994, writ denied), *cert. denied,* 515 U.S. 1142, 115 S.Ct. 2579, 132 L.Ed.2d 829 (1995).

**DISCUSSION**

[21][22] In three issues Appellants contend: the Arbitration Agreement is valid and binding and encompasses any dispute or matter upon which the trial court could subsequently rule at trial, including the claims made the basis of the prior interlocutory partial summary judgment (issues one and three); and the trial court erred in holding the Arbitration Agreement was invalid for the lack of signature of Osama's trial attorney (issue two).

We summarily overrule issue two because there is no indication in the record that the trial court's ruling was based upon the lack of signature of Osama's attorney on the Arbitration Agreement.

In response to issues one and three, Appellee Jamal asserts the trial court properly denied arbitration because there was no “meeting of the minds” inasmuch as the parties could not agree on the scope of the Agreement and Appellants offered no evidence regarding the Agreement.FN8

FN8. Appellee Osama is proceeding pro se on appeal and has not filed an appellee's brief.

As mentioned earlier, the trial court determined the parties' signatures on the **\*412** Arbitration Agreement were authentic. Appellants were not required to offer additional evidence in order for the trial court to make a ruling regarding the validity of the Agreement. *See Jack B. Anglin Co.,* 842 S.W.2d at 269. Applying contract construction principles, we must review the entire Arbitration Agreement to determine whether it is so worded that it can be given a certain or definite legal meaning or interpretation. *See Coker,* 650 S.W.2d at 393. An examination of the document reveals:

• “[the parties] agree to submit *all claims and disputes among them* to arbitration....” [Emphasis added.]

• “The Parties agree to arbitrate *all existing issues among them in the above mentioned Cause Numbers* in the appropriate District Court, which includes the Divorce Case, the child custody of the [sic] Noor Qaddura and Farah Qaddura, the determination of each party's responsibilities and duties according to the Islamic rules of law....” [Emphasis added.]

• The Arbitration Agreement *lists with specificity the exact cause numbers,* case styles, and names of the trial courts in which the three causes that are subject to the Agreement are pending.

• The document states that the parties agree the ruling of the arbitration panel is “Binding, and Final, and no party will take any appeal or future legal action of any matter afterwards.”

• The Arbitration Agreement concludes with the recitation that each party will cause the above cause numbers to be abated pending the decision of the arbitrators, and will ask the courts to refer the cases for arbitration within seven days from the establishment of the panel of arbitrators. Further, “[t]he assignment must include **ALL** cases, including those filed against or on behalf of other family members related to the parties.”

[23] The Arbitration Agreement does not contain any language purporting to except the applicability of the Agreement to certain issues, causes of action, or claims between the parties.

[24][25] Jamal asserts that the issues disposed of by the partial summary judgment were no longer “existing issues” at the time the Arbitration Agreement was signed; therefore, the Agreement does not encompass these matters. A summary judgment that does not dispose of all parties and issues in the pending suit is interlocutory and not appealable unless a severance of that phase of the case is ordered by the trial court. *City of Beaumont v. Guillory,* 751 S.W.2d 491, 492 (Tex.1988). It is proper for a trial court to reconsider and reverse its prior interlocutory ruling on a partial summary judgment. *Elder Const., Inc. v. City of Colleyville,* 839 S.W.2d 91, 92 (Tex.1992), citing *Cunningham v. Eastham,* 465 S.W.2d 189, 192 (Tex.Civ.App.-Houston [1st Dist.] 1971, writ ref'd n.r.e.). Accordingly, the partial summary judgment in this case was interlocutory and subject to being reconsidered and set aside by the trial court. The trial court could elect to re-examine the evidence on which the partial summary judgment was based and could subsequently conclude that it does not support the judgment. *See Cunningham,* 465 S.W.2d at 192. Therefore, the issues addressed in the partial summary judgment were not finally disposed of and remained pending between the parties at the time the Arbitration Agreement was signed.

Additionally, an examination of the circumstances surrounding the formation of the Arbitration Agreement reveals that although the partial summary judgment had **\*413** been granted on several issues,FN9 the parties' pleadings still sought considerable relief:

FN9. The court held the Islamic Marriage Certificate was unenforceable, the house on Gladstone Drive is the separate property of Jamal, the house on Vesta Via Court belongs to Osama, and two certificates of deposit were never the community property of Rola and Jamal and belong solely to Osama.

***The divorce case:***

*Rola and Jamal:* Each wants to be appointed sole managing conservator of the two children, with the possessory conservator ordered to pay child support. Each requests the court divide the parties' community property-Rola seeks a disproportionate share for herself, Jamal states he wants a just and right distribution. Rola wants Jamal to pay her attorney's fees.

In his counterclaim, Jamal alleges a separate cause of action against Rola for “defamation and false light,” in which he seeks $250,000 actual damages and $1,000,000 exemplary damages.

*Rola and Osama:* Rola seeks reimbursement for all community funds tendered to Osama by Jamal, whether in the form of a business or in community assets or in cash.

In his counterclaim, Osama seeks attorney's fees from Rola or from the community estate of Rola and Jamal.

***The protective order case:***

Jamal filed an application for a protective order pursuant to section 81.001 of the Texas Family Code, seeking to protect his two children from their maternal grandparents. *See*TEX. FAM.CODE ANN. § 81.001 (Vernon 2002). The court master held a hearing on the application and denied it on February 27, 2002; Jamal was ordered to pay the grandparents' attorney $3,350 in attorney's fees. The next day, Jamal filed a notice of appeal from the master's recommendation. The record before us does not contain any further orders or judgments in this case.

As evidenced by a review of the issues that have yet to be addressed by the trial court in these two cases, the parties still had much to resolve on the date the Arbitration Agreement was signed.

Applying the pertinent rules of contract construction, we conclude the Arbitration Agreement is worded so that it can be given only one certain or definite legal meaning or interpretation, and it is therefore not ambiguous. We hold that as a matter of law the plain language of the Arbitration Agreement expresses the intent of the parties that the scope of the Agreement include all claims raised by the parties' pleadings in the two cases before us up until September 25, 2002, the date the Agreement was signed by the parties. The scope of the Arbitration Agreement therefore includes all claims and matters previously ruled upon by the trial judge in the partial summary judgment. Accordingly, we hold that the trial court abused its discretion in finding the Arbitration Agreement to be invalid and in denying Appellants' motions to stay litigation and compel arbitration under the Texas General Arbitration Act. We sustain Appellants' first and third issues.

**CONCLUSION**

We reverse the trial court's orders denying Appellants' motions to stay litigation and to compel arbitration in these two consolidated cases. We render judgment that the Arbitration Agreement signed by the parties is valid and enforceable and covers all disputes between the parties that arose prior to the date the parties signed the Arbitration Agreement, including**\*414** all matters that were the subject of the partial summary judgment previously granted by the trial court.