IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01265 COA

DR. GLENN COOK APPELLANT

v.

DR. CLAUDE HENRY ROBERTS APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. WILLIAM L. STEWART

COURT FROM WHICH APPEALED: HARRISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT: RICHARD V. DYMOND

ATTORNEY FOR APPELLEE: SANFORD R. STECKLER

NATURE OF THE CASE: CIVIL - CONTRACT DISPUTE

TRIAL COURT DISPOSITION: JUDGMENT RENDERED FOR DR. ROBERTS AGAINST DR. COOK IN THE AMOUNT OF $23,204.54.

MANDATE ISSUED: 9/30/97

EN BANC

COLEMAN, J., FOR THE COURT:

The genesis of this appeal was a complaint filed in the Circuit Court of the Second Judicial District of Harrison County by Dr. Claude Henry Roberts (Dr. Roberts), a dentist who had an established dental practice in Biloxi, against Dr. Glenn Cook (Dr. Cook), a 1989 graduate of the University of Mississippi School of Dentistry. Drs. Roberts and Cook had entered into an agreement by which Dr. Cook would share Dr. Roberts' office for a period of three years beginning July 1, 1989, and ending June 30, 1992. In his complaint, Dr. Roberts sought construction of the contract, specific performance of the contract, eviction of Dr. Cook from Dr. Robert's office, and additional damages from Dr. Cook in the amount of $300,000. A flurry of other pleadings and counterpleadings followed Dr. Roberts' complaint, in response to which the Harrison County Circuit Court transferred the case to the Chancery Court of the Second Judicial District of Harrison County. The chancellor opined "that none of the chancellors in this district have the requisite skills to conduct an inquiry of the nature involved," and appointed an attorney-C.P.A. as a master in chancery "to fully hear this cause upon its merits" pursuant to Rule 53 of the Mississippi Rules of Civil Procedure. After the master in chancery had conducted a hearing in this case, the chancellor entered an order by which he awarded judgment against Dr. Cook for the benefit of Dr. Roberts in the amount of $23,204.54. Dr. Cook has appealed from this order by which the chancellor rendered judgment against him. We affirm.

I. FACTS

Dr. Roberts, a 1970 graduate of the University of Tennessee School of Dentistry who had established a dental practice in Biloxi, and Dr. Cook, who had spent two weeks as a preceptor in Dr. Roberts' office in February, 1989, entered into an agreement by the terms of which Dr. Cook would be assured the right to practice dentistry in Dr. Roberts' office for three years beginning July 1, 1989. The agreement, which Dr. Roberts drafted, required Dr. Cook to pay Dr. Roberts thirty thousand dollars and forty percent (40%) of Dr. Cook's gross receipts per month. Dr. Cook understood that his payment of thirty thousand dollars to Dr. Roberts guaranteed him the right to practice in Dr. Roberts' office for three years, and Dr. Roberts understood that he was entitled to keep the entire sum of thirty thousand dollars even if Dr. Cook decided to leave his office at any time after July 1, 1989. According to the language of their agreement, Dr. Cook's payment of forty percent (40%) of his gross income to Dr. Roberts included "the office note payment, utility payment, all the phone bills except long distance incurred by Dr. Cook, salaries of receptionist and office maintenance people, paper and expendables for actual office or clerical work, use of all equipment and good will."

Dr. Roberts and Dr. Cook would each maintain his separate practice of dentistry; their agreement contemplated that Dr. Cook would share Dr. Roberts' office and staff. Each dentist would be

responsible for paying his malpractice insurance premiums. Their agreement provided that the receptionist, Virginia Raley, who had worked for Dr. Roberts for more than ten years, would alternately assign patients who did not request either dentist between Drs. Roberts and Cook. The receptionist also maintained the day sheets which were used to calculate Dr. Cook's gross income of which he was to pay Dr. Roberts forty percentum in accordance with their agreement. Ms. Raley, the receptionist, maintained the day sheets for both dentists by recording on them the patient's name, the amount actually collected by the dentist who attended to the patient's need, and the hygienist's compensation, if any, for each day Dr. Roberts' office was open.

In response to Dr. Cook's lament that he was financially unable to pay Dr. Roberts forty percentum of his gross income as their agreement provided, Dr. Roberts began to accept Dr. Cook's monthly payments of smaller percentages of his gross income. According to the evidence presented at trial, Dr. Cook's payment to Roberts fluctuated between forty percent (40%) and twenty percent (20%) of his gross income. Roberts accepted Dr. Cook's reduced payments until September 19, 1991, when Dr. Roberts' attorney wrote Dr. Cook a letter to advise him that effective immediately, Dr. Cook must resume paying Dr. Roberts forty percentum of his gross income in accordance with their agreement.

On January 8, 1991, Dr. Cook delivered a letter to the receptionist in which he requested that she no longer open any mail addressed to him. Previously, the receptionist had opened Dr. Cook's mail so that she might record payments of Dr. Cook's fees from his patients or his patients' various insurance companies which had been mailed to him. Dr. Cook eventually changed his postal address, to which all of his payments were then mailed directly to him. Dr. Cook left Dr. Roberts' office on February 12, 1992, and began his own practice of dentistry in Ocean Springs.

II. LITIGATION

After the circuit court transferred this case to the chancery court, Dr. Cook, as the original defendant, filed a motion for temporary restraining order and preliminary injunction on February 14, 1992, in which he sought the chancery court's temporary restraining order against Dr. Roberts' interfering with Dr. Cook's practice of dentistry in Dr. Roberts' office in specific ways. As a consequence of Dr. Cook's filing his motion for temporary restraining order, the chancery court entered an order by agreement of both the dentists that provided that Dr. Cook would pay the sum of $4,606.90 to Dr. Roberts as a partial payment on what Dr. Cook owed Dr. Roberts for the months of December, 1991 and January, 1992. The two dentists had derived this amount from multiplying Dr. Cook's gross receipts for the months of October and November by twenty percentum. The two dentists further agreed that the final amount which Dr. Cook owed Dr. Roberts for this final period of their professional relationship "would be determined upon a full evidentiary hearing in this cause on the merits." This same order further required Dr. Cook "to provide Dr. Roberts with a complete accounting of all patient accounts, including work performed, amounts charged, paid, and accounts receivable." Dr. Cook was ordered to furnish this accounting to Dr. Roberts "prior to a final hearing hereon." The chancery court further ordered that Dr. Cook was to enjoy access to Dr. Roberts' office for various purposes on Monday, February 17, 1992, from 9:00 a. m. until 5:00 p.m. and on Wednesday, February 26, 1992, from 9:00 a. m. until 12:00 noon.

On May 28, 1992, Drs. Roberts and Cook entered into yet another memorandum agreement to

"resolve the current dispute concerning the possession of Dr. Cook's patient records underlying Dr. Cook's Motion for Preliminary Injunction filed in this cause . . . ." By the terms of this agreement, Dr. Roberts agreed to release Dr. Cook's patient records which Dr. Roberts then held in return for certain commitments by Dr. Cook, among which were Dr. Cook's providing Dr. Roberts "with a complete accounting of the patients seen by Dr. Cook between December 1,1991, and February 12, 1992." Dr. Cook further agreed that he would provide Dr. Roberts "with an accounting of the monies received on the work performed and completed on those patients as of February 12, 1992, as such payments are received by Dr. Cook."

The chancellor appointed John E. Montgomery, a public accountant of Gulfport, to serve as the court's special agent "with full power and authority to investigate all the claims and transactions of [Drs. Roberts and Cook]," after which Montgomery was to submit a report to the court about the results of his investigation. The chancellor further ordered that Montgomery was to be paid a retainer of one thousand dollars, of which each dentist was to pay one half. After Montgomery filed his report with the court, the chancellor appointed Al Koenenn, a lawyer - certified public accountant, to serve as a master in chancery "to fully hear this cause upon its merits, with complete authority to do and perform all acts judged by him to be essential in carrying the matter to final judgment."

The special master tried this case, after which the chancellor accepted his findings and recommendations and rendered judgment for Dr. Claude Henry Roberts against Dr. Glenn Cook in the amount $23,204.54. The amount of the judgment was determined pursuant to the following analysis which the special master made:

1. Rebate to Dr. Cook from Dr. Roberts, <credit> 3,780.00

2. Other delinquent gross receipts, <debit> 16,476.00

3. Reimbursement for medical supplies, <debit> 5,000.00

4. Reimbursement for advance to JEM, <debit> 500.00

(John E. Montgomery, court appointed accountant)

5. Additional amount due John Montgomery, <debit> 1,383.54

6. Special Master fee, <debit> 3,625.00

Total $23,204.54

The amount of the judgment included forty percentum of Dr. Cook's gross income from December 1, 1991, through February 12, 1992, the only period of time which remained in controversy between Dr. Roberts and Dr. Cook.

IV. REVIEW, ANALYSIS AND RESOLUTION OF THE ISSUES

We quote Dr. Cook's four issues verbatim from his brief:

1. The special master erred in allowing the Appellee to unilaterally modify the terms of the parties' contract after the fact, including the raising of [Dr. Cook's] commission payment owed to [Dr. Roberts] from [twenty] percent of his gross receipts to [forty] percent of the gross receipts.

2. In the alternative, that the special master erred in that the previous reduction of the required commission payments were an irrevocable inter vivos gift which the [special m]aster allowed to be revoked.

3. That the special master committed manifest error in his decision as it was against the overwhelming weight of the evidence.

4. That it was error to allow the introduction of a deposition in lieu of the actual witness's testimony without any showing of unavailability on the part of the witness.

Standard of Review

The standard of review this Court must employ in the resolution of the issues in this case has long been established by the Mississippi Supreme Court. We will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Denson v. George*, 642 So. 2d 909, 913 (Miss. 1994). However, "[w]here a lower court misperceives the correct legal standard to be applied, the error becomes one of law, and we do not give deference to the findings of the trial court." *Brooks v. Brooks*, 652 So. 2d 1113, 1117 (Miss. 1995). Keeping these standards of review in mind, we will now resolve the four issues Cook has presented in his appeal.

Issue 1. The special master erred in allowing the Appellee to unilaterally modify the terms of the parties' contract after the fact, including the raising of [Dr. Cook's] commission payment owed to [Dr. Roberts] from [twenty] percent of his gross receipts to [forty] percent of the gross receipts.

A. Modification of Agreement:

On direct examination, Dr. Roberts explained his reason for reducing Dr. Cook's payment of forty percentum of his gross income to thirty percentum of his gross income and then further to twenty percentum of Dr. Cook's gross income as follows:

[W]hen I reduced the fees, it was not for any compensation whatsoever. I wanted a good, long-lasting relationship with someone so in order for me just simply to be, to keep someone happy, when he came to me, I felt sorry for him; and I personally unilaterally reduced it. It was not a signed two-way type of thing. I just did it. I received nothing in return. He didn't give me any more work. He didn't do any more production. He didn't do anything. I just simply reduced it hoping to be able to keep the gentleman happy in that position. It didn't work, obviously, so I went back and went back to the forty percent.

The period of controversy between Drs. Roberts and Cook extends only from December 1, 1991, to February 12, 1992, by which latter date Dr. Cook had initiated his own dental practice in Ocean Springs. Nevertheless, relevant to our resolution of this first issue are the following findings of the court's special agent, John E. Montgomery, about the percentage of gross income which Dr. Cook paid Dr. Roberts for these periods of time:

July, August and September, 1989 40%

October, November and December, 1989 30%

January and February, 1990 40%

March through June, 1990 30%

July, 1990 through September 19, 1991 20%

In the order from which Dr. Cook has appealed, the chancellor adopted these findings of these percentages of Dr. Cook's gross income which Dr. Cook paid Dr. Roberts during the life of their agreement.

The chancellor then found that Dr. Roberts restored the contract to forty percent (40%) of Dr. Cook's gross receipts effective September 20, 1991, which restoration to forty percent (40%) Dr. Cook accepted by paying that percentage for the period from September 20 through 30, 1991. The chancellor concluded that Dr. Cook had waived his right to assert that the contract was modified beyond September 19, 1991, because he had failed to file pleadings to that effect "as required by law."

We begin our review of this first issue by analyzing Dr. Cook's argument that Dr. Roberts and he modified the original agreement, which required him to pay Dr. Roberts forty percentum of his gross income every month, so that Dr. Cook would then be required to pay Dr. Roberts only twenty percentum of his gross monthly income from and after the date of the modification. If Dr. Cook is correct in his argument, then this Court must resolve this issue favorably to him. Cook continues in his brief, "[Dr.] Roberts testified that he initially reduced the gross receipts payment for Cook, requesting Cook to stay and practice at Roberts' office, and Cook did stay following the reduction. *The question of consideration at that point is not at issue."* (emphasis added). In support of his argument, Dr. Cook cites *Singing River Mall v. Mark Fields, Inc.*, 599 So. 2d 938 (Miss. 1992), in which the Mississippi Supreme Court explained:

For a subsequent agreement to modify an existing contract, the later agreement must, itself, meet the requirements for a valid contract. Since a contract modification must have the same essentials as a contract, a binding post-contract agreement must fulfill the requirements of a contract regardless of whether a party characterizes it as a modification or a stand-alone contract.

Id. at 947 (citations omitted). In *Iuka Guaranty Bank v. Beard,* 658 So. 2d 1367, 1372 (Miss. 1995), the Mississippi Supreme Court has explained that while a written contract may be modified by a

subsequent agreement, "the law of this state is that such an agreement must be supported by *new or additional consideration.* Consideration is sufficient if there is any benefit to the promisor or any loss, detriment, or inconvenience to the promisee. Consideration must constitute legal detriment as opposed to detriment in fact." (emphasis added) (citations omitted). The following explication of "consideration" is fundamental:

A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other. While the formula for this element is stated in the alternative, benefit to the promisor *or* detriment to the promisee, the typical contract will manifest *both* benefits and detriments. If, for example, Ames agrees to purchase Barnes' car at a price of $10,000, there are benefits and detriments to both parties. The benefit to Ames is the receipt of Barnes' car. The benefit to Barnes is the receipt of Ames's $10,000. The detriment to Ames is the surrender of $10,000, and the detriment to Barnes is the surrender of his car.

John E. Murray, Jr., Murray on Contracts § 56A, at 205-206 (3rd ed. 1990).

The question which we must address becomes whether their agreement as modified was supported by *new or additional consideration.* In other words, was there "any benefit to the promisor or any loss, detriment, or inconvenience to the promisee?" *See Iuka Guaranty Bank,* 658 So. 2d at 1372. This Court considers Dr. Roberts to be the promisor because Dr. Cook argues that Dr. Roberts promised to reduce Dr. Cook's payment from forty percentum of his gross income to twenty percentum of his gross income, and it considers Dr. Cook to be the promisee because it was to Dr. Cook that Dr. Roberts made the promise. A fifty percentum reduction in Dr. Roberts' income under the terms of the original agreement was not benefit to Dr. Roberts. Dr. Cook sustained no loss, detriment, or inconvenience by the fifty percentum increase in his gross income. This Court finds this to be especially correct because, as Dr. Cook testified under cross-examination by Dr. Roberts' counsel:

When I gave [Dr. Roberts] the payment [of $30,000], it insured me a three-year deal where I could practice in his office for three years with no questions asked. If I left the office within three years, the $30,000 was gone, it was his. If he wanted me to leave, he was going to have to pay me back the $30, 000. That assured me that I had a place to stay for three years and he had an associate for three years.

Dr. Roberts testified about his receipt of Dr. Cook's payment to him of $30,000 as follows: "If he chose to stay two days and leave, that's his own business, he still paid me $30,000 and he owed me $30,000. If he stayed for two and a half years, which he did, he still owed me the $30,000 which he had already paid. It was just for the right and benefit of coming into the office . . . ." Nothing changed in terms of Dr. Cook's right to continue using Dr. Roberts' office after he began to pay Dr. Roberts only twenty percentum of his gross income beginning with the month of July, 1990, as the chancellor found in the final order which he entered in this case.

The original agreement between the two dentists became effective July 1, 1989. This Court concludes that there was no consideration to support the modification of that original agreement when Dr. Roberts began accepting Dr. Cook's payment of only twenty percentum of Dr. Cook's gross income for the month of July, 1990, and continued to accept Dr. Cook's payment of only twenty percentum

of Dr. Cook's gross income until September 19, 1991, when Dr. Roberts' attorney wrote Dr. Cook a letter in which he advised Dr. Cook that Dr. Roberts would require him to resume paying forty percentum of his gross income in accordance with their agreement which had been in effect since July 1, 1989.

This Court accordingly rejects Cook's argument that "the question of consideration at the time of Roberts' attempt to increase the percentage a year later [to the original forty percentum of Dr. Cook's gross income] is at issue [and that s]ince Roberts was attempting a contract modification, consideration and acceptance on the part of Cook were required." Neither new consideration nor Dr. Cook's acceptance of Dr. Roberts' return to receiving payment of forty percentum of Dr. Cook's gross income was required beginning September 19, 1990, because there had been no consideration to support any modification of the original agreement when Dr. Roberts began to accept only twenty percentum of Dr. Cook's gross income beginning with the month of July, 1990. The original contract remained in full force and effect. Therefore this Court affirms the chancellor's finding "that . . . no consideration passed from Dr. Cook to Dr. Roberts for the reduction of the percentage of gross receipts," and it resolves this portion of the first issue adversely to Dr. Cook.

B. Dental Supplies:

Dr. Cook argues that Dr. Roberts and he "never intended that Cook would pay for medical

and dental supplies, and probably did intend for the term 'office supplies' in the written agreement to encompass all such supplies as Cook had free access and use of the medical and dental supplies for the majority of his time with Roberts." Dr. Cook adds, "Since the purchase and furnishing of all of these supplies had been Roberts' responsibility for the entire time, certainly the Court should have construed it to be an obvious term of the contract."

In its final order, the chancellor found

[T]he contract entered into between the parties provided for Dr. Roberts to pay for those items as specifically set forth in the agreement, which this Court has previously defined in this Order. This Court is of the opinion that the obligations of Dr. Roberts did not include any obligation on the part of Dr. Roberts to pay for medical supplies used by Dr. Cook. The Court listened to a great deal of testimony concerning medical supplies, specifically, what constitutes medical supplies, and based upon this testimony, the Court is keenly aware of items comprising medical supplies. There is no sure way for this Court to determine how many medical supplies were used by Dr. Roberts and how many were used by Dr. Cook since no inventory system was used to determine who used what. The Court is aware that Dr. Roberts' medical supply cost is more for each year that Dr. Cook practiced in Dr. Roberts' office. The agreement between the parties provided that each Doctor was to have about the same number of patients, and therefore the use of medical supplies should be about the same for each dentist. The Court requested and has obtained income tax information from both [sic] Dr. Roberts. Dr. Roberts, in 1991, spent $17,481.00 for medical supplies; in 1992, Dr. Roberts spent $13,702.00 for medical supplies. The Court notes that the difference is $3,779.00 from 1991 and 1992. The Court is of the opinion that the difference in the cost of medical supplies for 1991 to that of 1992 is attributed to Dr. Cook. In addition, the Court is of the opinion that some of the medical supplies purchased in 1992 by Dr. Roberts were used by Dr. Cook. Therefore, contrary to the testimony of Dr. Roberts, this Court awards a judgement against Dr. Cook in the amount of $5,000.00 for medical

supplies used by Dr. Cook. This judgement amount does not take into consideration the entire term of the contract as the Court is of the opinion that Dr. Roberts should have raised this issue in 1989 and 1990 when his income tax return was prepared, and therefore is estopped at this time in asserting a claim that he should have raised long ago.

This Court has included the foregoing findings of the chancellor on the subject of payment for dental supplies as a foundation for its review of this second phase of Dr. Cook's first issue.

We begin our review of this matter by noting that the chancellor found that Dr. Cook's payment of forty percent of his gross income from his dental practice served "as Dr. Cook's share of the note payment on the building, utilities, telephone, except for long distance, salary for the receptionist, office maintenance people, paper and expendables for actual office or clerical work, use of all equipment and good will." This finding is nothing more than a verbatim recitation of a sentence contained in the agreement between Drs. Roberts and Cook. We note that the term "office supplies" is not included in the foregoing quotation, instead the phrase, "actual office . . . work," were the words of Dr. Roberts' choice. We further note that the terms "dental supplies" and "medical supplies" do not appear in the agreement. Thus, for Dr. Cook to argue that the terms of the agreement, specifically "office supplies," included "dental supplies" is to argue that the terms of the agreement were ambiguous.

The Mississippi Supreme Court has explained the method of dealing with the matter ambiguity in a contract in *Ellis v. Powe*, 645 So. 2d 947, 952-53 (Miss. 1994):

The meaning and effect of a contract are matters of law which may be determined by the court where the contract is clear and unambiguous. However, "where the contract is ambiguous and its meaning uncertain, questions of fact are presented which are to be resolved by the trier of facts after plenary trial on the merits."

(citations omitted). In the case *sub judice*, the chancellor was the trial judge who sat without a jury. Thus, the chancellor was also the trier of the facts as well as the law. This Court "must let stand a trial judge's findings of evidentiary or ultimate fact when substantial evidence in the record supports those findings, or when the findings are not 'clearly erroneous.'" *Crowe v. Smith*, 603 So. 2d 301, 305 (Miss. 1992) (quoting *Matter of Estate of Varvaris*, 528 So. 2d 800, 802 (Miss. 1988).

There is no ambiguity in so far as the omission of the term "dental supplies" from the agreement is concerned. Dr. Roberts' obligation to supply Dr. Cook with dental supplies under their agreement can only arise from their interpretation of the phrase, "actual office . . . work." To argue that this phrase included dental supplies is to assert that this phrase is ambiguous because "office" can hardly mean "dental." This Court "must let stand a trial judge's findings of evidentiary or ultimate fact when substantial evidence in the record supports those findings, or when the findings are not 'clearly erroneous.'" *Crowe*, 603 So. 2d at 305 (citation omitted). We next glean from the record testimony about whether the two dentists intended for the phrase, "actual office . . . work," to include "dental supplies."

Denise Cooksey, Dr. Roberts' chair-side dental assistant, identified "dental supplies" as "patient

napkins, cups, anesthetics, amalgam, cotton rolls, two by twos, just supplies like that." Dr. Roberts testified on direct examination that the word "supplies" referred only to "clerical supplies," such as "envelopes, stamps, anything clerical that is written like that," for which Dr. Roberts understood that he was obligated by the agreement to pay. Dr. Roberts further testified that the agreement made no mention of dental supplies because "our agreement was that each of us [Dr. Cook and he] would maintain our own practice and have to pay for our own [dental] supplies."

Janice Roberts, Dr. Roberts' wife and bookkeeper, testified that her husband and Dr. Cook maintained their separate practices and that Dr. Cook was to pay for his own dental supplies. Under cross-examination by Dr. Cook's attorney, Janice Roberts identified two checks, one for $63.46 and the other for $91.19, which Dr. Cook had written to someone for dental supplies in 1990. During further cross-examination of Mrs. Roberts, the special master asked Dr. Cook's attorney if he intended to introduce into evidence some checks which Dr. Cook had written to pay for dental supplies, to which he replied that he would decide whether to move to introduce the checks when he called Dr. Cook to testify. The checks were never introduced into evidence.

On direct examination Dr. Cook stated that when he began practicing with Dr. Roberts, he bought his own "initial dental supplies," for which he had gotten "checks, receipts, copies." Dr. Cook's federal income tax return for 1991, which was the final full calendar year that Drs. Roberts and he practiced dentistry pursuant to their agreement, reflected his claim that he had spent $20,380 for supplies. When the special master inquired of Dr. Cook how that figure was calculated, Dr. Cook replied, "Everything that I wrote checks to dental companies for dental supplies used by myself, checks right here, were totaled up and that's how I arrived at it." Even from the perspective of ambiguity of the terms of the agreement, the evidence overwhelmingly supported the chancellor's finding that "the obligations of Dr. Roberts did not include any obligation on the part of Dr. Roberts to pay for medical supplies used by Dr. Cook." We affirm the chancellor's finding.

Dr. Cook also argues that "it's undeniable that the court should have required competent evidence of [Dr. Roberts' expense for dental supplies] such as an inventory, receipts and invoices." Dr. Cook then asserts that this Court should find that the chancellor erred "in assessing the speculative costs of medical supplies in the form of a judgment against [him]." However, the chancellor noted in the final order that "[t]here [was] no sure way for [him] to determine how many medical supplies were used by Dr. Roberts and how many were used by Dr. Cook since no inventory system was used to determine who used what." "It is well recognized that 'Mississippi is equally firm in its determination that a party will not be permitted to escape liability because of the lack of a perfect measure of damages his wrong has caused.'" *R & S Development, Inc. v. Wilson*, 534 So. 2d 1008, 1012 (Miss. 1988).

In the case *sub judice* the chancellor obtained income tax information from Dr. Roberts for the years 1991 and 1992. That information indicated that Dr. Roberts spent $17,481 for medical supplies in 1991 and $13,702 for medical supplies for the year 1992, which was a difference of $3,779. The chancellor then opined that this difference must be attributed to Dr. Cook's practice in Dr. Roberts' office in 1991. The chancellor further opined that some of the medical supplies which Dr. Roberts purchased in 1992 were also used by Dr. Cook. Therefore, the chancellor awarded Dr. Roberts judgement against Dr. Cook in the amount of $5,000 for medical supplies used by Dr. Cook only for the years 1991 and 1992 only because the chancellor further opined that "Dr. Roberts should have

raised this issue in 1989 and 1990 when his income tax return was prepared, and therefore is estopped at this time in asserting a claim that he should have raised long ago." Dr. Roberts did not cross-appeal to contest the chancellor's refusal to award him compensation for Dr. Cook's use of dental supplies in 1989 and 1990.

We noted earlier that Dr. Cook did not introduce into evidence the canceled checks for the payment of dental supplies which his counsel professed to have during the trial. This Court finds that the chancellor's award of $5,000 to Dr. Roberts for compensation for the dental supplies which Dr. Cook used was supported by substantial evidence, that it was not manifestly wrong, and that he applied no erroneous legal standard when he awarded the judgment for $5,000 to Dr. Roberts. We resolve this aspect of Dr. Cook's first issue against him and affirm the judgment for $5,000 which the chancellor awarded to Dr. Roberts against Dr. Cook.

Issue 2. In the alternative, that the Special Master erred in that the previous reduction of the required commission payments were an irrevocable inter vivos gift which the [chancellor] allowed to be revoked.

Dr. Cook did not raise this issue as an affirmative defense in his answer to Dr. Cook's complaint. The chancellor did not address the issue of whether Dr. Roberts' acceptance of twenty percentum of Dr. Cook's gross income was an irrevocable inter vivos gift which the chancellor revoked. Dr. Cook appealed directly from the order which the chancellor rendered on November 16, 1994. He filed no motion to alter or to amend this judgment pursuant to Rule 59(e) of the Mississippi Rules of Civil Procedure; neither did he file a motion for relief from this order pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure. In short, Dr. Cook did nothing to present this issue to the chancellor for his review and resolution. He raises this issue for the first time on appeal.

In *Estate of Myers v. Myers*, 498 So. 2d 376, 378 (Miss. 1986), the Mississippi Supreme Court once more explained that "[o]ne of the most fundamental and long established rules of law in Mississippi is that the Mississippi Supreme Court will not review matters on appeal that were not raised at the trial court level. *Adams v. City of Clarksdale*, 95 Miss. 88, 48 So. 242 (1909)." Neither should the trial court "be put in error on appeal for a matter not presented to it for a decision." *Myers*, 498 So. 2d at 379.

Pursuant to *Myers*, this court finds that this issue is procedurally barred on this appeal, and we decline to put the chancellor in error for a matter which was not presented to him for a decision.

Issue 3. That the Special Master committed manifest error in his decision as it was against the overwhelming weight of the evidence.

Dr. Cook's complaints in his third issue are not truly evidentiary in nature. He complains about the court's special agent, John E. Montgomery, including accounts receivable in the amount of $4,984.10 in Dr. Cook's gross income for the period ending February 12, 1992. The basis of Dr. Cook's complaint is that he had written off these accounts, which were six months old, "due to age and lack of collectibility." In his report to the chancellor, Montgomery explained that he included these accounts receivable in Dr. Cook's gross income because they were for services that Dr. Cook had

completed before February 12, 1992, but for which Dr. Cook "did not bill patients for amounts owed to him as of the date he left Dr. Roberts' office, February 12, 1992, unless the amount was 'substantial.'" Montgomery explained that "[s]ince this decision was made independently by Dr. Cook, " he had added the total amount to Dr. Cook's "gross collections for computation purposes."

As with the issue of Dr. Roberts' inter vivos gift of the reduced payment of his gross income to Dr. Cook, Dr. Cook did nothing after the trial to seek modification of or relief from the judgment against him for the total sum of $21,076.70. The chancellor was denied the opportunity to consider this issue, and neither are we required to do so. However, the record contains no evidence to establish any basis to assert that these accounts were not collectible, and Section 15-1-29 of the Mississippi Code of 1972 (Rev. 1995) provides a three year statute of limitation on the collection of open accounts. This Court concludes that other than Dr. Cook's opinion that these accounts were uncollectible and his personal decision not to bill further for their collection, there was no evidence to support his opinion. As a legal issue, these accounts receivable appeared collectible because they were not yet three years old and thus not barred by Section 15-1-29. Thus, as an evidentiary issue, we resolve this part of this issue against Dr. Cook.

Dr. Cook's second complaint included in this issue is the judgment against him for $5,000 for his share of dental supplies for which he owed Dr. Roberts. We have already dealt with this issue from both its legal and evidentiary aspects, and nothing here need be added.

Dr. Cook's third complaint in this issue is the chancellor's ordering him to pay a total of $1,383.54 to the court's special agent, John E. Montgomery, and to reimburse Dr. Roberts in the amount of $500 for Dr. Roberts' share of Montgomery's retainer which the chancellor had ordered each dentist to pay. Montgomery, the court's special agent, testified that the patients' records which Dr. Cook provided were in such a state of disarray that they could not be used to determine an accurate accounting of Dr. Cook's gross income. Dr. Cook blamed the state of disarray on Dr. Roberts by testifying that he presented the patient records to Montgomery in the same order that Dr. Roberts had presented them to him. However, primarily on the basis of Montgomery's testimony the chancellor found in his final order: "[O]nly after a Motion was filed for Citation for Contempt for failure to provide the accounting did Dr. Cook ever provide what purported to be an accounting. This court concludes that the documents supplied by Dr. Cook [were] not an accounting as contemplated by this court." There is ample evidence to support the chancellor's order that Cook pay Montgomery's fee in full, and we affirm the order.

Implicit in our analysis and resolution of Dr. Cook's first issue was this Court's finding that the chancellor's findings contained in the final order were supported by substantial evidence. Thus, we resolve Dr. Cook's third interest adversely to him.

Issue 4. That it was error to allow the introduction of a deposition in lieu of the actual witness's testimony without any showing of unavailability on the part of the witness.

Hien Nguyen was a twenty-year-old Vietnamese woman whose family had been in the United States since 1975. Dr. Cook had employed Nguyen to recommend his professional services to her friends and family. Dr. Cook paid her eight dollars for every new patient whom she sent to his office for dental services. Dr. Roberts' attorney deposed her on January 18, 1993. The sole topic of her

deposition was her employment by Dr. Cook for this purpose. According to her testimony, she referred approximately thirty to thirty five new patients, including both members of her family and others, to Dr. Cook. These facts were wholly irrelevant to the issues which were litigated in this case. Their irrelevancy is demonstrated by the chancellor's failure to refer to her deposition in his final order. Even Dr. Cook fails to suggest any relevancy of Ms. Nguyen's deposition to the issues which he has presented to this Court in his appeal.

Rule 32(a)(3) of the Mississippi Rules of Civil Procedure provides for the circumstances under which the deposition of a witness may be used by any party for any purpose.[(1)] Dr. Cook asserts that the special master erred when he admitted Nguyen's deposition into evidence because Dr. Roberts failed to show that she was unavailable to testify personally during the trial. Dr. Roberts counters that implicit in the special master's decision to admit her deposition was his finding that Ms. Nguyen was not available for trial, "especially after the matter had been fully discussed in pretrial and in chambers with the attorneys."

The record fails to reflect that Dr. Roberts demonstrated that Ms. Nguyen was not available to testify during the trial. Thus, this Court must conclude that the special master erred when he admitted her deposition into evidence. However, the error was harmless because, as we have demonstrated, the topic of Ms. Nguyen's deposition was utterly irrelevant to the issues which Drs. Roberts and Cook litigated. The Mississippi Supreme Court has written: "[F]or 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 Enterprises v. Mockbee*, 654 So. 2d 1122, 1130 (Miss. 1995). *See* Rule 61 of the Mississippi Rules of Civil Procedure and Rule 103 of the Mississippi Rules of Evidence. This Court resolves Dr. Cook's fourth issue against him by holding that the special master's admission of the deposition of Hien Nguyen into evidence was harmless error.

IV. SUMMARY

The original agreement into which Drs. Roberts and Cook entered as of July 1, 1989, was not modified by Dr. Roberts' acceptance of Dr. Cook's payment of only twenty percentum of his gross income beginning with the month of July in the year 1990 because there was no new consideration to sustain the modification of their contract. There was no new consideration because, as we have demonstrated, the promisor, Dr. Roberts, gained no benefit from accepting one-half of what Dr. Cook had previously paid; neither did Dr. Cook experience any detriment by that change. The chancellor's inclusion of an award of $5,000 for dental supplies in the judgment against Dr. Cook for Dr. Roberts' benefit was not error because the omission of the term "dental supplies" from the agreement created no ambiguity in its terms. Nevertheless, even if the phrase, "actual office . . . work," was arguably ambiguous, there was ample evidence to support the chancellor's finding that the phrase, "actual office . . . work," did not include dental supplies. The chancellor's order was not against the overwhelming weight of the evidence. Although the special master's admission of Hien Nguyen's deposition into evidence was error because Dr. Roberts had failed to demonstrate that she was not available to testify at the trial, that error was clearly harmless because the topic of her deposition, which was the purpose and terms of Dr. Cook's employment of her to solicit new patients for him, was irrelevant to the issues which these two dentists litigated between them. Therefore, this Court

affirms the order of the Chancery Court of the Second Judicial District of Harrison County, Mississippi.

THE ORDER OF THE HARRISON COUNTY CHANCERY COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN , P.J., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J. NOT PARTICIPATING.

1. Rule 32(a)(3) reads in relevant part:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than one hundred miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) that the witness is a medical doctor or (F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be so used.

M.R.C.P. 32(a)(3).