IN THE SUPREME COURT OF MISSISSIPPI
NO. 2006-CA-00707

SHERRY SCALES — APPELLANT

V.

LACKEY MEMORIAL HOSPITAL — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF SSCOTT COUNTY, MISSISSIPPI

BRIEF OF APPELLEE LACKEY MEMORIAL HOSPITAL

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

In order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

1. Sherry Scales, Appellant;
2. Michael P. Younger, Younger Law Firm, Counsel for Appellant;
3. Lackey Memorial Hospital, Appellee;
4. Louis G. Baine, III, and Jan F. Gadow, Page, Kruger & Holland, P.A., Counsel for Lackey Memorial Hospital, Appellee;
5. Honorable Vernon Cotten, trial judge.

This, the 15th day of October, 2007.

Jan F. Gadow

Louis G. Baine, III
Jan F. Gadow

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STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that the facts and legal arguments are adequately presented in the briefs and the record; therefore, this Court's decisional process will not be significantly aided by oral argument. M.R.A.P. 34 (a)(3).

STATEMENT OF THE ISSUE

A. Whether the Lower Court Properly Granted Summary Judgment in Favor of Lackey Memorial Hospital in this Medical Malpractice Action where Sherry Scales Failed to Provide Testimony of a Medical Expert Concerning Breach of the Applicable Standard of Care.

I. STATEMENT OF THE CASE

Plaintiff/Appellant Sherry Scales filed a medical malpractice action against Lackey Memorial Hospital, but failed to provide testimony from a medical expert, which is required to present a *prima facie* case. With no medical expert and no *prima facie* case, Scales failed to present a genuine issue of material fact and the trial court properly granted summary judgment in favor of Lackey Memorial.

Scales filed her complaint on April 22, 2003. (C.P. 1, 2) Lackey Memorial filed its answer and affirmative defenses on October 23, 2003. (C.P. 1, 9) Following some discovery, Lackey Memorial moved for summary judgment on October 19, 2005, which the trial court granted by Order entered in March 2006. (C.P. 1, 19, 39) The trial court subsequently entered a final Judgment of dismissal with prejudice. (C.P. 1, 48) Scales thereafter perfected this appeal. (C.P. 1, 49)

II. STATEMENT OF THE FACTS

Sherry Scales arrived at the Lackey Memorial Hospital Emergency Room on January 17, 2002, complaining of chest pain. (C.P. 2) According to Scales, the Lackey Memorial medical staff "failed to detect obvious symptoms of the onset of a heart attack and further failed to properly treat [her] for the symptoms present." (C.P. 3) Scales claims that she should have been given certain drugs and treatment and that she should have

been immediately transported to the nearest cardiac care unit and that the failure of the staff at Lackey Memorial to follow the appropriate standard of care caused her to suffer a massive heart attack and undergo bypass surgery and several other heart procedures. (C.P. 3, R. 4)

In response to Scales' complaint for medical negligence, Lackey Memorial propounded discovery, including Interrogatory 20, which reads:

> For each and every expert, including medical doctors, whom you expect to call as an expert witness at trial, please identify each expert, identify the subject matter on which each expert is expected to testify, state the substance of the facts and opinions to which each such expert is expected to testify, and provide a summary of the grounds for each such opinion.

(C.P. 43) To answer this Interrogatory, Scales simply named two doctors - Dr. George Reynolds and Dr. Steve Hindman - but provided no other information. (R. 4, Supp. Vol. p. 10, C.P. 32, 79) After informal requests for additional medical expert information went unanswered, Lackey Memorial filed its motion for summary judgment in October 2005. (R. 4; C.P. 19, 72)

In February 2006, along with her response to the motion for summary judgment, Scales filed a supplemental answer to interrogatory 20, which provides that Dr. Reynolds would testify that Scales suffered a massive heart attack on the subject date and has required surgery and other treatment since that time and is totally disabled as a result of her medical condition. (C.P. 32, 35-36, 43) Also, this supplemental response identified for the first time a Dr. Donald Marks and states that he would testify that Lackey Memorial failed to use ordinary skill and care in treating Scales and breached the standard of care. (C.P. 36-37, 44, 80, R. 5) This supplemental response, signed only by Scales' attorney,

was filed three years after the complaint was filed, two years after Lackey Memorial first propounded discovery, and almost four months after Lackey Memorial filed its motion for summary judgment. (C.P. 37, R. 6)

Following a hearing, the trial court granted Lackey Memorial's motion for summary judgment, finding that Scales' unsworn supplemental response to interrogatory 20 created no genuine issue of material fact and, instead, provided only hearsay, self-serving, and conclusionary statements. (C.P. 45-46)

III. SUMMARY OF THE ARGUMENT

The trial court properly granted summary judgment in favor of Lackey Memorial Hospital in this medical negligence action because the plaintiff Scales failed to provide any sworn expert testimony, which is required in order to prove professional negligence or to survive a motion for summary judgment in such a cause. Summary judgment is not premature despite that Scales' medical experts have not yet been deposed. Scales knew or should have known from the time she filed her complaint in April 2003 that expert testimony was required, yet she has to date failed to provide any competent evidence to support her allegations of medical negligence. Scales failed to provide any sworn medical expert testimony in response to Lackey Memorial's motion for summary judgment and failed to provide an affidavit stating the reasons she could not provide same, therefore she failed to establish the existence of a genuine issue of material fact. Given her failure to obtain sworn medical expert testimony for two and a half years, her failure to comply with M.R.C.P.56 cannot be excused. This Court should affirm the trial court's grant of summary judgment in favor of Lackey Memorial Hospital.

IV. LEGAL ARGUMENT

A. The Lower Court Properly Granted Summary Judgment in Favor of Lackey Memorial Hospital in this Medical Malpractice Action where Sherry Scales Failed to Provide Testimony of a Medical Expert Concerning Breach of the Applicable Standard of Care.

1. Summary Judgment and Standard of Review

Mississippi Rule of Civil Procedure 56 provides that summary judgment may be entered by a trial court if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. ***Robinson v. Ratliff,*** 757 So.2d 1098, 1100 (¶ 6) (Miss. App. 2000). Summary judgment is proper when there exists no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. ***Ellis v. Powe***, 645 So.2d 947, 950 (Miss.1994). However, not every factual issue will defeat a motion for summary judgment. To justify denial of a motion for summary judgment, there must be an issue of *material* fact, *i.e.,* a fact essential to the claim at issue. ***Shaw v. Burchfield,*** 481 So.2d 247, 252 (Miss. 1985); ***Vickers v. Fires Mississippi Nat1 Bank***, 458 So.2d 1055, 1061 (Miss. 1984).

This Court reviews a grant of summary judgment *de novo.* ***Gregory v. Central Sec. Life Ins. Co.,*** 953 So. 2d 233, 238 (¶ 19)(Miss. 2007) (citations therein omitted). If, when viewed in the light most favorable to the non-movant, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law, summary judgment is proper. ***Id.*** A *de novo* review involves reviewing all evidentiary matters in the record, including affidavits, depositions, admissions, interrogatories, etc. ***Montgomery v. Woolbright,*** 904 So. 2d 1027, 1029 (¶ 7) (Miss. 2004) (citing ***Saucier v. Biloxi Reg'l Med.***

Ctr., 708 So. 2d 1351, 1354 (Miss. 1998) (citations therein omitted)). Where there is a complete failure of proof on any one of the essential elements of the nonmovant's claim, summary judgment is warranted. ***Galloway v. Travelers,*** 515 So. 2d 678, 683 (Miss. 1987). *See also* ***Montgomery,*** 904 So. 2d at 1029 (¶ 9).

When the allegations in the pleadings, as supported by the sworn evidence in the record, establish that one party is entitled to judgment in his favor because the record contains insufficient legal evidence to support the other party's claim or defense that is the subject of the motion, and there is no genuine dispute of the material sworn facts, summary judgment is proper. Comment, M.R.C.P. 56. Lackey Memorial maintains that summary judgment in its favor is proper because Scales did not provide any probative evidence (sworn expert testimony) in opposition to the motion for summary judgment.

2. To Survive Summary Judgment, Scales was Required to Produce Expert Testimony to Meet her Burden of Production.

Scales' complaint alleges medical negligence on the part of Lackey Memorial. Evidence sufficient to establish the elements of duty, breach, proximate cause, and damages is necessary to support Scales' claims. ***Montgomery,*** 904 So. 2d at 1029 (¶ 9) (citing ***Palmer v. Anderson Infirmary Benevolent Ass'n,*** 656 So. 2d 790, 794 (Miss. 1995)). This being a medical negligence action, in order to show the duty owed Scales must establish not only a doctor/patient relationship, but the content and details of the standard of care to which the defendant is held. ***Walker v. Skiwski,,*** 529 So. 2d 184, 185 (Miss. 1988) (citing ***Boyd v. Lynch,*** 493 So. 2d 1315, 1318 (Miss. 1986); ***Marshall v. The Clinic for Women, P.A.,*** 490 So. 2d 861, 864-65 (Miss. 1986); ***Hammond v. Grissom,*** 470 So. 2d 1049, 1053 (Miss. 1985); ***Ross v. Hodges,*** 234 So. 2d 905, 909 (Miss. 1970)).

Regarding the elements of breach and proximate cause, Scales must establish that Lackey Memorial failed, in some particular respect, to conform to the applicable standard of medical care and that such failure was the proximate cause or a proximate contributing cause of the injuries. ***McCaffrey v. Puckett,*** 784 So. 2d 197, 203 (¶ 20) (Miss. 2001); ***Walker,*** 529 So. 2d at 185; ***Hall v. Hilbun,*** 466 So. 2d 856, 871, 873 (Miss. 1985); ***Dazet v. Bass,*** 254 So. 2d 183, 186-87 (Miss. 1971).

"[E]xpert testimony is required in order to prove professional negligence". ***Montgomery,*** 904 So. 2d at 1030 (¶ 13). Specifically, Scales must establish the duty or applicable standard of care, deviation therefrom, causation, and damages by expert proof. ***Partin v. North Mississippi Medical Center,*** 929 So. 2d 924, 929 (¶ 15) (Miss. App. 2005) (citing ***McCaffrey,*** 784 So. 2d at 206 (¶ 33). *See also* ***Potter v. Hopper,*** 907 So. 2d 376, 379-80 (¶10) (Miss. App. 2005) (citing ***Phillips v. Hull,*** 516 So. 2d 488, 491 (Miss. 1987)); ***Ekornes-Duncan v. Rankin Medical Center,*** 808 So. 2d 955, 958 (¶ 6)(Miss. 2002) (citations therein omitted); ***Mallet v. Carter,*** 803 So. 2d 504, 508 (¶ 11) (Miss. App. 2002) (citations therein omitted); ***Hill v. Warden,*** 796 So. 2d 276, 281 (¶ 17) (Miss. App. 2001); ***Paepke v. North Mississippi Medical Center,*** 744 So. 2d 809, 811 (¶ 9) (Miss. App. 1999); ***Palmer,*** 656 So. 2d at 794, 795; ***Barner v. Gorman,*** 605 So. 2d 805, 809 (Miss. 1992) (citations therein omitted); ***Walker v. Skiwski***, 529 So.2d 184 (Miss. 1988); ***Phillips,*** 516 So. 2d at 491, overruled on other grounds by ***Whittington v. Mason,*** 905 So. 2d 1261 (Miss. 2005); ***Cole v. Wiggins,*** 487 So. 2d 203, 206 (Miss. 1986); ***Hall,*** 466 So. 2d at 874; ***Pittman v. Hodges***, 462 So.2d 330 (Miss.1984); ***Ross,*** 234 So. 2d at 909. Just as the plaintiff in a professional negligence action is required to provide expert testimony to

prove the elements of his cause, he is likewise required to provide expert testimony to survive summary judgment. ***Montgomery,*** 904 So. 2d at 1030 (¶ 13) (citations therein omitted). *See also* ***Maxwell v. Baptist Memorial Hospital-Desoto,*** 958 So. 2d 284 (Miss. App. 2007); ***Smith v. Gilmore,*** 952 So. 2d 177 (Miss. 2007); ***Griffin v. Pinson,*** 952 So. 2d 963 (Miss. App. 2006); ***McMichael v. Howell,*** 919 So. 2d 18 (Miss. 2005).

a. Expert Testimony Must be Sworn

In order to survive a Motion for Summary Judgment, the plaintiff in a medical negligence action must offer *sworn*, competent medical expert testimony articulating the content of the standard of care and opining that the defendant deviated from the appropriate standard of care, causing in whole or in part the damages claimed by the plaintiff. ***Walker,*** 529 So. 2d at 186, 187. *See also* ***Partin,*** 929 So. 2d at 929 (¶ 15) (citing ***Daily v. Methodist Medical Center,*** 790 So. 2d 903, 915-16 (¶ 15) (Miss. App. 2001)) (to survive summary judgment plaintiff must establish genuine issue of material fact with evidence by expert testimony or affidavit); ***Potter,*** 907 So. 2d at 380 (¶¶ 12, 13) (summary judgment for defendant affirmed because plaintiff failed to respond to motion for summary judgment with medical expert affidavit); ***Paepke,*** 744 So. 2d at 812-13 (¶ 14) (medical expert affidavit sufficient to survive summary judgment); ***Palmer,*** 656 So. 2d at 797 (medical expert depositions and affidavits sufficient to survive summary judgment); ***Walker,*** 529 So. 2d at 186; ***Phillips,*** 516 So. 2d at 490, 491, overruled on other grounds by ***Whittington v. Mason,*** 905 So. 2d 1261 (Miss. 2005).

In ***Walker,*** this Court stated that the Walkers' opposition to Skiwski's motion for summary judgment is deficient because it is not based on personal knowledge and that the

law is clear in its requirement that the party opposing summary judgment must support his claims by facts sworn to on personal knowledge. But, further, the Court says of the Walkers' failure to provide the *sworn* testimony of any of their five designated experts: "here lies the fatal deficiency in their opposition to summary judgment." ***Walker,*** 529 So. 2d at 187. The Court also identifies as the "critical inadequacy" in the Walkers' opposition to summary judgment their failure to provide evidence in a form that would be competent at trial, *i.e.,* sworn expert opinion evidence, to establish the applicable standard of care and that Dr. Skiwski had deviated therefrom. ***Walker,*** 529 So. 2d at 186. Scales' fatal deficiency, too, is that she failed to provide sworn expert opinion evidence to establish the elements of her claim and to support the allegations of her pleadings.

Scales' pleadings allege medical negligence as to Lackey Memorial, but it is undisputed that these allegations are not supported by any sworn evidence in the record concerning the duty/applicable standard of care, breach/deviation therefrom, causation, or damages. Allegations alone are insufficient legal evidence to support Scales' claim of medical negligence, therefore Lackey Memorial is entitled to judgment as a matter of law. M.R.C.P. 56 (b); ***Montgomery,*** 904 So. 2d at 1130 (¶ 13); ***Walker,*** 529 So. 2d at 186, 187.

As set forth above, Mississippi law has long provided that to meet his or her burden of proof in an action for medical negligence, a plaintiff must come forward with expert proof to support claims of malpractice. ***Partin,*** 929 So. 2d at 929 (¶ 15) (Miss. App. 2005) (citing ***McCaffrey,*** 784 So. 2d at 206 (¶ 33)). As this Court has previously commented, in a case of medical negligence in Mississippi, a plaintiff knows from the inception of the suit that sworn expert proof will be required to survive summary judgment:

> From the very moment the suit was filed it [should have been] known that an expert witness would be needed to survive summary judgment, for it is our general rule that in a medical malpractice action negligence *cannot be established* without medical testimony that the defendant failed to use ordinary skill and care.

Brooks v. Roberts, 882 So. 2d 229, 232 (¶ 10) (Miss. 2004) (citing ***Sheffield v. Goodwin,*** 740 So. 2d 854, 858 (Miss. 1999)).

Thus, when Scales elected to file her claim of medical negligence against Lackey Memorial on April 22, 2003, she knew or should have known at that time that expert proof would be required. Lackey Memorial filed its answer and defenses and first served Scales with discovery in October 2003. (C.P. 9, 14) Scales responded to interrogatory 20 in November 2003, but simply provided the names of two doctors. (R. 4, Supp. Vol. p. 10, C.P. 32, 79) Two years after discovery was served and two and a half years after suit was initiated by Scales, Lackey Memorial filed its motion for summary judgment, citing the absence of any expert proof from Scales. This was the sole basis for Lackey Memorial's motion. (C.P. 19-21) As a result, Scales undeniably knew then that probative expert proof was required to meet her burden and to proceed with her lawsuit. The hearing on this motion was set and continued several times and was finally set for February 13, 2006. (C.P. 23, 26, 28, 30)

In response to Lackey Memorial's motion for summary judgment, the only evidence Scales offered is her supplemental answer to Interrogatory 20, which provides that Dr. Reynolds would testify that Scales suffered a massive heart attack and has required surgery and other treatment since that time and is totally disabled as a result of her medical condition. (C.P. 32, 35-36, 43) This supplemental response also identified for the first time

a Dr. Donald Marks and states that he would testify that Lackey Memorial failed to use ordinary skill and care in treating Scales and breached the standard of care. (C.P. 36-37, 44, 80, R. 5) This supplemental response, however, is not sworn to and is signed only by Scales' attorney. This evidence is clearly not sufficient to satisfy Scales' burden. ***Brooks,*** 882 So. 2d at 232 (¶ 10). The record is simply without competent evidence to support Scales' allegations of medical negligence and summary judgment in favor of Lackey Memorial is just. ***Montgomery,*** 904 So. 2de at 1030 (¶ 13) (citations therein omitted). *See also* ***Maxwell,*** 958 So. 2d 284 (Miss. App. 2007); ***Smith,*** 952 So. 2d 177 (Miss. 2007); ***Griffin,*** 952 So. 2d 963 (Miss. App. 2006); ***McMichael,*** 919 So. 2d 18 (Miss. 2005).

b. Summary Judgment is not Premature

At the hearing on Lackey Memorial's motion for summary judgment, Scales argued that summary judgment was premature and that the motion should be stayed until her experts could be deposed. (T. 14-16) Scales' counsel admitted that he was responsible for the untimeliness of his filings and lack of discovery, including depositions of Scales' experts. (T. 16, 18) Counsel's reason for the delay was that he had suffered health problems that caused him to miss two or three months of work in 2005 and some of his family members had been displaced by Hurricane Katrina in August 2005. (T. 14, 16, 18) The trial court noted these reasons for delay, but also noted that Scales' complaint was filed more than two years before the stated reasons for delay occurred. (C.P. 45) On appeal, Scales still urges that summary judgment is premature. (Scales' brief, p. 10)

A plaintiff's failure to respond to discovery, to designate medical experts, and/or to provide medical expert affidavits until after the defendant has filed a motion for summary

judgment, without a showing of excusable neglect, is a discovery violation properly sanctioned by the trial court's denial of late expert designation (or request for same) or by striking any untimely affidavits. ***Bowie v. Montfort Jones Mem'l Hosp.,*** 861 So. 2d 1037, 1042-43 (¶¶ 13-15)(Miss. 2003); ***Ekornes-Duncan,*** 808 So. 2d at 958-59 (¶¶ 7-11); ***Mallet,*** 803 So. 2d at 506, 507 (¶¶ 5, 7); ***Hill,*** 796 So. 2d at 281 (¶ 16). The usual result of such sanction is that the plaintiff is left with no medical expert testimony and the defendant's motion for summary judgment is, therefore, granted. ***Bowie,*** 861 So. 2d at 1043 (¶ 15); ***Ekornes-Duncan,*** 808 So. 2d at 958, 959 (¶¶ 8, 12); ***Hill,*** 796 So. 2d at 281 (¶ 17). Scales has failed to provide medical expert affidavits even after Lackey Memorial filed its motion for summary judgment and, in fact, Scales *still* has not provided any medical expert affidavits. Scales' failure to provide sworn medical testimony is properly sanctioned by the trial court's denial of additional time in which to conduct discovery, specifically depositions of Scales' experts. ***Bowie,*** 861 So. 2d at 1042-43 (¶¶ 13-15); ***Ekornes-Duncan,*** 808 So. 2d at 958-59 (¶¶ 7-11); ***Mallet,*** 803 So. 2d at 506, 507 (¶¶ 5, 7); ***Hill,*** 796 So. 2d at 281 (¶ 16). Without an extension of time to allow Scales to provide some sworn medical testimony, she was and is without any competent evidence in the record to support the allegations of her complaint. Because the trial court properly denied additional time for discovery, the grant of summary judgment in favor of Lackey Memorial is not premature. Scales knew or should have known, from the time she filed her complaint in April 2003, that expert proof would be required. ***Brooks,*** 882 So. 2d at 232 (¶ 10).

c. Affidavits are Required

Scales claims that she was not required to file an affidavit in opposition to Lackey Memorial's motion for summary judgment. (Scales' brief, p. 10) However, Rule 56 is unequivocal in that a party must respond to a motion for summary judgment by establishing a genuine issue for trial as provided by Rule 56, which does not include resting on the allegations or denial of his pleadings. M.R.C.P. 56 (e). That affidavits are required in response to a motion for summary judgment is made clear by Rule 56 itself: "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." M.R.C.P. 56 (f). Clearly, M.R.C.P. 56 requires sworn testimony in response to a motion for summary judgment in order to establish the existence of a genuine issue of material fact.

Mississippi case law is in accord. *See* ***Potter,*** 907 So. 2d at 380 (¶ 12) ("We affirm because Potter failed to respond to Dr. Hopper's motion for summary judgment with an affidavit, submitted by an expert . . . "); ***Palmer,*** 656 So. 2d at 797 ("The Palmers put on sufficient expert testimony [depositions and affidavits] . . ." to defeat summary judgment); ***Walker,*** 529 So. 2d at 186, 187 (party opposing summary judgment must oppose with facts sworn to on personal knowledge in depositions, answers to interrogatories, affidavits, stipulations, or admissions; evidence must be in a form that would be competent at trial, *i.e.,* sworn; failure to supply sworn testimony of a designated expert is fatal deficiency in opposition to summary judgment). It is this requirement of sworn expert testimony that

prevents prosecution of medical negligence claims based solely on unsupported allegations. ***Potter,*** 907 So. 2d at 380 (¶ 13).

Scales knew or should have known, from the time she filed her complaint in April 2003, that expert proof would be required. ***Brooks,*** 882 So. 2d at 232 (¶ 10). Her failure to obtain same for two and a half years cannot be considered diligent, therefore her failure to comply with M.R.C.P. 56 must not be excused. *See* ***Owens v. Tomae,*** 759 So. 2d 1117, 1121 (¶ 17) (Miss. 1999).

In ***Griffin,*** this Court found that the plaintiff's responses to interrogatories did not create a fact issue as to the defendant physician's negligence as required for summary judgment. As it did in ***Griffin,*** this Court should find that:

> in neglecting to provide the affidavit of a medical expert to support her medical malpractice claim, [Scales] failed to comply with Rule 56 (e) of the Mississippi Rules of Civil Procedure. The anticipated expert opinion set forth by [Scales' counsel] could not have been based on [ ] personal knowledge. Furthermore, [Scales] had more than adequate time to submit the affidavit of a medical expert.
>
> ***Griffin,*** 952 So. 2d at 967 (¶ 11).

V. CONCLUSION

In the present case, Lackey Memorial's motion for summary judgment is based on Scales' failure to prove all requisite elements of medical negligence by sworn medical expert testimony, as required by law. Scales, therefore, bears the burden of production on the same issues she would have to prove at trial, to wit: duty, breach, proximate cause, and damages. "Sufficient" evidence of duty, breach, and proximate cause, in medical negligence cases including this one, requires sworn medical expert testimony. Scales failed to meet her burden of production in support of her claim and there is no genuine

CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellee, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to:

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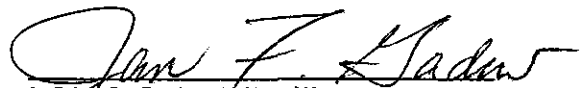
DATED: This the 15th day of October, 2007.



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