IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY L. DUPREE, In His Official Capacity as Mayor of the City of Hattiesburg, Mississippi — APPELLANT

VERSUS — CASE NO.: 2006-CA-01875

CARTER CARROLL, C.E. BAILEY, and KIM BRADLEY — APPELLEES

Appealed from the Circuit Court of Forrest County, Mississippi
Case No. CI06-0132

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable S. Wayne Easterling, Attorney for Appellees
2. Honorable Frank D. Montague, Jr., Attorney for Appellees,
3. Honorable Bob Helfrich, Forrest County Circuit Court Judge
4. Deborah Delgado, Councilwoman Ward 2, City of Hattiesburg
5. Henry Naylor, Councilman Ward 5, City of Hattiesburg
6. Beverly Magee Commodore, Chief Administrative Officer, City of Hattiesburg
7. Eddie Myers, Director of Administration and City Clerk
8. Willie Horton, Director of Urban Planning
9. Bennie Sellers, Director of Engineering
10. Dr. Clemon Terrell, Director of Parks and Recreation

DATED this the 28th day of March 2007.

CHARLES E. LAWRENCE, JR.
Attorney for Appellant

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STATEMENT OF THE CASE

This case was commenced by the Appellees filing a complaint for a writ of mandamus in the Circuit Court of Forrest County on May 30, 2006. The Appellees sought the issuance of a writ of mandamus against the Appellant to compel the Appellant to re-nominate or resubmit his department directors during his second term of office as mayor of the City of Hattiesburg. Appellees contend that the reappointment of the Appellant's departmental directors is a non-discretionary duty mandated by Section 21-8-23(2) of the Mississippi Code of 1972, as amended. The Appellant contends he is not required to resubmit his department directors to the council once they have been confirmed, even during a previous term of office, and that said department directors continue to serve in their appointed capacity "until the appointment and qualification of his successor," which the Appellant interprets to mean until he changes department directors.

The matter was scheduled for trial on August 24, 2006. After appearing in court on the scheduled trial date and conferencing with the court, the parties agreed to submit the matter to the court by filing competing motions for summary judgment. Upon the court's consideration of said matter by way of competing summary judgment motions, the court issued a written opinion consisting of it findings of facts and conclusions of law determining that a writ of mandamus was

appropriate on September 29, 2006 and issued its order of mandamus. (R. E. pages) It is from this order of mandamus that the Appellant perfected this appeal.

STATEMENT OF FACTS

The facts of the case were stipulated to and/or submitted to the Circuit Court as undisputed facts. The facts as submitted by the Appellant were the City of Hattiesburg operated under the Mayor-Council form of government as established pursuant to Section 21-8-1 et seq. of the Mississippi Code of 1972, as amended. Further, that the complaining party, C. E. Bailey, resigned from his position on the city council effective as of July 19, 2006 and therefore no longer had any authority to act as an elected official for the city and further, that he had sold his residential home on or about April 28, 2006. The Appellees did not state a private interest in the complaint that was separate and different from the general public interest and there had been no resolution or official action adopted by the city council to authorize the filing of the complaint. Finally, the complaint for writ of mandamus was not brought on the complaint of the State of Mississippi filed by the Attorney General or a District Attorney. (R. E. pages 157-158).

The facts as submitted by the Appellees were the mayor is a member of the executive branch of government and the city council is a member of the legislative branch of government and that the city is divided into five (5) wards. The mayor was sued in his official capacity and all the Appellees at the time of the filing of the initial complaint were elected officials of the city council and the Appellant was serving his second term. Further, the Appellant submitted his department directors during his first term of office for confirmation by the city council and each director has remained in office after their initial confirmation and during the mayor's second

term of office and the mayor did not intend to re-nominate his department directors during his second term of office. (R. E. pages 120-122).

SUMMARY OF THE ARGUMENT

The Appellant argues and contends that the Appellees lack standing to bring an action and seek a writ of mandamus pursuant to Section 11-41-1 of the Mississippi Code because the code is very specific as to who have standing pursuant to said provision and the Appellees did not meet any of the criteria established thereunder and therefore there complaint should have been dismissed. The Appellant also argues that the Circuit Court in interpreting Section 21-8-23(2) failed to consider all of the provisions of said code section and therefore misinterpreted said section and failed to give it the full intent meant by the legislature which would not require a re-elected mayor to resubmit his returning department directors that were previously approved under his/her prior term of office.

I. Whether the Appellees lack standing to bring an action to seek a writ of mandamus pursuant to Section 11-41-1 of the Mississippi Code?

The Appellant in defending the complaint for writ of mandamus raised as an affirmative defense in his answer to the complaint and by way of his motion for summary judgment the issue of standing. (R. E. pages 22-25). The Appellant argued that the Appellees sought a writ of mandamus pursuant to Section 11-41-1 of the Mississippi Code, but did not meet the requirements of the statute to bring the action and therefore did not have standing to bring said action. (See paragraph A of the prayer of the Complaint). (R. E. page 11). Section 11-41-1 of the Mississippi Code is very specific regarding how an action for writ of mandamus must be

brought, who has the authority to bring such a writ and which court has jurisdiction to hear a complaint for such a writ.

Specifically, Section 11-41-1 of the Mississippi Code of 1972, as amended, reads as follows:

> "On the complaint of the state, by its Attorney General or a district attorney, in any matter affecting the public interest, or on the complaint of any private person who is interested, the judgment shall be issued by the circuit court, commanding any inferior tribunal, corporation, board, officer, or person to do or not to do an act the performance or omission of which the law specially enjoins as a duty resulting from and office, trust, or station, where there is not a plain, adequate, and speedy remedy in the ordinary course of law. All procedural aspects of this action shall be governed by the Mississippi Rules of civil Procedure."

A complaint for a writ of mandamus is an action brought against a public official to compel the performance of a duty imposed by law. Because it is an action brought against a public official the law requires that said action must be brought on the complaint of the state, in other words, the State of Mississippi must be the complaining party and it must be brought by the Attorney General or by a district attorney.

The Appellees alleged that they sought to bring their action in their official capacity (and in their individual capacity, (paragraph number VII of the complaint). (R. E. page 8). The Circuit Court found that the Appellees had a duty to confirm directors appointed by the mayor and therefore had "an interest separate from or in excess of that of the general public." (R. E. page 215). The court in coming to this conclusion did not state whether this finding conferred upon the Appellees a private interest or public interest arising out of their official duties. A private interest would be one that is limited to the party seeking to enforce or protect that interest. Since the appointment of directors does not have a direct impact upon the private interest or right of

any individual citizen the Appellees lack standing to seek a writ of mandamus as private citizens and the only interest that the Appellees could have would be a public interest. Since the only interest of the Appellees is derived from a statutory duty to confirm appointment of directors the court should have looked to Section 11-41-1 for the specific authority granted only to the Attorney General or a district attorney to bring such an action.

The Mississippi Supreme Court, on May 18, 2006, approximately twelve (12) days before the Appellees filed their complaint, addressed the issue of standing under Section 11-41-1 of the Mississippi Code of 1972, as amended, in the case of Aldridge v. West, 2005-CA-00960-SCT (Miss. 2006). The court in Aldridge, citing its decision in Board of Education of Forrest County, v. Sigler, 208 So.2d 890, 892 (Miss. 1968) (citing Board of Supervisors of Prentiss County v. Mississippi State Highway Commission, 207 Miss. 839, 42 So. 2d 802 (1949) reiterated that it has established a four-part test to determine if a party is entitled to obtain a writ of mandamus. The essential elements of the four-part test are:

> (1) the petition must be brought by the officers or persons authorized to bring the suit; (2) there must appear a clear right in petitioner to the relief sought; (3) there must exist a legal duty on the part of the defendant to do the thing which the petitioner seeks to compel; and (4) there must be an absence of another remedy at law.

The plaintiffs sought to obtain a writ of mandamus in the Aldridge case as private individuals. The court held that a private person could seek a writ of mandamus "if he can show an interest separate from or in excess of that of the general public." The court in Aldridge further stated, "Plaintiffs clearly did not have standing to pursue a mandamus action under Miss. Code Ann. Section 11-41-1, because they admitted that they did not suffer distinct injury from the other citizens of Natchez." The Appellees in this case has also admitted in their response to

interrogatories, specifically interrogatory number 18 and 19, that they did not suffer a distinct injury from others in the general public.

The Circuit Court examined each of the specific elements required by the Supreme Court as reiterated in the Aldridge decision. The court found that the petition was brought by the officers or persons authorized to bring the suit. (R. e. page 216). The Appellant disputes this finding because said suit was not brought by the Attorney General or by a district attorney. The court also found that there was a clear right in the Appellees for the relief they sought, that right being the right to confirm the appointment of directors. While on its face it appears to be a clear right but upon closer examination that is not a clear right conferred upon the Appellees. It is not a clear right because the very last clause of the last sentence of Section 21-8-23(2) mandates that a director will continue to serve in his/her capacity as director until the appointment and qualification of his successor. This language is very specific that a director continues to hold the position of director until his successor in office has been appointed and qualified. The second element of the four prong test of Aldridge is not so clear in this instance in that the Appellees only have a right to confirm when a successor in office has been nominated. The court in addressing the third element determined that the Appellant had a legal duty under Section 21-8-23(2) to appoint directors. (R. E. page 217). Each of the directors presently serving had been nominated by the mayor and voted upon and confirmed by the council. The Appellant contends and argues that he met that legal duty when his department directors were originally confirmed by the council and therefore that legal duty no longer existed when re-elected to a successive term.

In the case of Board of Education of Forrest County v. Sigler, 208 So.2d 890 (Miss. 1968) a very detailed discussion is presented regarding writs of mandamus. This discussion goes

in depth regarding who has the authority to bring an action seeking such a writ. The court considered the statute that granted the authority to prosecute an application for writ of mandamus. The predecessor to our present statute, found at Section 1109, Mississippi Code 1942 Annotated (1956), reads identical to Section 11-41-1 and is recited entirely at Board of Education of Forrest County v. Sigler, pages 891-892. One such discussion involving the statute is the case of Hancock County v. State Highway Commission, 188 Miss. 158, 193 So. 808 (1940) wherein the Court stated as follows:

> "The writ of mandamus is distinct from ordinary suits. It is a prerogative writ issued by the State through such representatives as it may entrust with that power, and under Section 2348 suits involving the public interest are to be brought on the petition of the attorney general or a district attorney. It is true the section authorizes a mandamus to issue for the enforcement of the private right by a person whose private rights entitled him to coerce a mandatory duty, but the State Highway Commission is a public body and its funds to be expended by it are for public purposes, and the dealings in its powers with the public interests and the matters sought to be enforced in the present proceeding represent public interest, both as to the action of the State Highway Commission, and as to the county's right, if any, to reimburse it for its expenditures for a public bridge. 188 Miss. at 162-163, 193 So. at 809.

The Court also held in this case:

> "Nothing short of a statute specifically giving right to mandamus would enable a county to sue out a mandamus affecting a public matter, or a matter of public interest. It may be that a county having property or rights or action in it purely private or proprietary capacity might have the same remedy as a private individual would have to coerce the performance of the duty, where no discretion is required or contemplated, that a private individual would have. Mandamus being a prerogative writ to be issued only in extraordinary circumstances and only on the conditions and by the persons authorized by statute to have it issued, it is not available to the appellant in this suit, consequently the county had no standing in the Court, and one of the fundamental principles in invoking a court's jurisdiction is that the

> plaintiff or complainant, as the case may be, must show a right in himself to invoke the jurisdiction of the court." Id at 163-164, 193 So. 810.

"This decision was reached despite section 270 of the Code of 1930 (now appearing as section 2955) which provides that a county may sue or be sued in its own name. It appears that, mandamus being an extraordinary remedy, the statute granting the right to petition for such remedy will be construed very strictly." See, Board of Education of Forrest County v. Sigler at pages 892-893.

The Appellees argued that they have standing to bring this action and cite several cases in support of their argument. A close examination of each of the cases relied upon by the Appellees before the Circuit court support the Appellant's position that they do not have standing.

The Appellees cited Fondren v. State Tax Commission, 350 So.2d 1329 (Miss. 1977) in support of their standing argument. The court in Fondren upholds the requirement that a private individual must show that he has an interest "separate from or in excess" of that of the general public to maintain an action under Section 11-41-1 of the Mississippi Code. See, Fondren at page 1332. The court further found that Fondren had specific statutory authority under Section 11-13-11 of the Mississippi Code to bring such a suit. See, Fondren at page 1333. No such statutory authority exists for the Appellees to bring such an action in this matter.

The Appellees also cited Dye v. State, 507 So.2d 332, (Miss. 1987) in their brief as support for their argument that they have standing to bring this action. The central question raise in the case of Dye v. State, is whether the office of Lt. Governor is part of the executive or legislative branch of government. The plaintiffs filed suit as a result of rules being promulgated by the Senate that the Lt. Governor was responsible for enforcing and carrying out those rules. A question of separation of power was raised and whether the Senators bringing the suit had standing to bring such an action. Said action was not brought by the Senators pursuant to Section 11-41-1 of the Mississippi Code but rather they sought to have Article I, Sections 1 and 2

(separation of powers provision) of the Mississippi Constitution of 1890 interpreted regarding a delegation or power by Senate Rules upon the Lt. Governor that may have been outside the scope and authority of the Lt. Governor as established by the Constitution of the State of Mississippi. The court in reaching its decision that the Senators had standing to bring their action stated "[w]e refuse to relegate to the Attorney General either the exclusive authority to bring a suit such as this or the discretion whether and how that authority should be exercised." See, Dye v. State at page 338. The court in essence determined that there was no statutory authority that limited that specific type of action to be brought by the Attorney General. The statutory authority relied upon by the Appellees in this case, specifically, Section 11-41-1 of the Mississippi Code, for a writ of mandamus, has limited the authority regarding who may bring an action for writ of mandamus and the Appellees have not been conferred with any such authority.

The Appellees argued that the standing requirement for bringing an action in the State of Mississippi is very liberal, and cited Van Slyke v. The Board of Trustee of State Institutions of Higher Learning, 613 So.2d 872 (Miss. 1993) and Fordice v. Bryan, 651 So.2d 998, (Miss. 1995) in support of their argument. In the case of Van Slyke v. Board of Trustees, the court held that a private citizen have standing to challenge the constitutionality and/or review of government action. The Appellees attempted to make this a constitutional question by arguing that it is a separation of powers question. The fallacy with the Appellees' argument is that the form of government that exists in the City of Hattiesburg is established pursuant to legislative statutes and not by a constitutional mandate. There can be no constitutional question unless the statute, which grants the authority to the plaintiff or Appellant, is called into question as being unconstitutional. The decision in Van Slyke must be read in conjunction with the Supreme Court decisions that addresses a private citizen effort to obtain a writ of mandamus pursuant to Section

11-41-1 of the Mississippi Code. In the case In Re Fordice, 691 So.2d 429 (Miss. 1997) the governor sought a writ of mandamus against an officer within the executive branch of government. The court reviewed and discussed the requirements of Section 11-41-1 of the Mississippi Code and determined that Governor Fordice did not meet the requirements of the statute and therefore did not have standing to bring the action. Specifically, the court held "[t]he Petitioner, suing in his capacity as Governor and Administrator of the Medicaid Division, does not meet the statutory requirements," to seek a writ of mandamus under Section 11-41-1 of the Mississippi Code. See, In Re Fordice at page 433. Governor Fordice as the chief executive officer of the State of Mississippi did not have standing to seek a writ of mandamus under Section 11-41-1 of the Mississippi Code. Therefore, when a writ of mandamus is sought pursuant to Section 11-41-1 of the Mississippi Code the standing requirements are not liberal but are rather very strict.

II. Whether the court must construe all the provisions of a statute when interpreting said statute to determine the scope and application of the statute and what is the application of the language in Section 21-8-23(2) that department directors serves "until the appointment and qualification of his successor"?

This Circuit Court was asked by the Appellees to interpret Section 21-8-23(2) and the Appellant requested that Section 11-41-1 of the Mississippi Code be interpreted. The court has an obligation that "[w]here a statute is unambiguous, the Court must apply the statute according to its plain meaning, refraining from principles of statutory construction." See, OXY USA v. Mississippi State Tax Commission, 757 So. 2d 271, 274 (Miss. 2000). Section 11-41-1 of the Code is very clear with regards to who may seek a writ of mandamus and the Appellees do not meet the requirements of the statute. Further, the Appellees requested that the Circuit Court

engage in statutory construction by mandating that the Appellant must re-submit his departmental directors as nominees for confirmation or rejection during his second term of office and by imposing a time frame during which said nomination shall be made because the statute itself is silent as to when any nominees should be made regardless of whether it is during a first term or successive term of office. The Supreme Court has cautioned and restrained itself from engaging in judicial legislation. See, Fondren v. State Tax Commission, 350 So. 2d 1329 at 1335 (Miss. 1977). The Circuit Court was being asked by the Appellees to engage in judicial legislation first by disregarding and nullifying the last clause of Section 21-8-23(2) which mandates that departmental directors continues to serve in office "until the appointment and qualification of his successor," and secondly to engage in judicial legislation by imposing a time frame for the appointment of departmental directors by newly elected or reelected mayors. If the state legislature had intended for there to be a time frame for the appointment of directors they would have written that requirement in the legislation. The Appellees relied heavily upon language in Attorney General's opinions that were issued to the Appellees and Appellant. Specifically, the Appellees relied upon the language in the attorney generals opinions that in the absence of a time frame being specified in the statute the appointment of department directors must be made within a reasonable time. The Appellees pointed to these opinions and asked the court to give these opinions the authority of law. The Supreme Court has commented upon the weight and authority to be given to Attorney General's opinions. See, Frazier v. State By and Through Pittman, 504 So. 2d 676, 691 (Miss. 1987) wherein the court held,

> "It therefore follows that while the Attorney General's office in advising state agencies as to the law and whether or not a suit should be filed will almost invariably be persuasive, his advice is not necessarily conclusive."

The court also addressed the issue of standing in Frazier and held that the Attorney General is the proper party to institute and manage litigation on behalf of the state because he is the chief legal office for this State and he has this duty by virtue of common law, statute and our constitution especially when the subject matter is determined to be of statewide interest. See, Frazier v. State at page 690. Certainly the interpretation of Section 21-8-23(2) is a matter of statewide interest as it will affect mayoral appointments throughout the State, particularly if the court judicially legislate a time limit for making those appointments.

In the Frazier case the Attorney General raise the issue of standing of whether the State Ethics Commission and/or its members had the authority to initiate litigation against other public servants and the court determined that the Commission had specific authority under Section 25-4-19 of the Mississippi Code to file an action to seek restitution, (Frazier page 692) and further that the Attorney General had the authority to file and prosecute the suit, and his failure to do so did not deprive the Commission of exercising its authority as conferred by statute. (Frazier page 693). The Hattiesburg City Council and/or its members do not have specific statutory authority to seek a writ of mandamus and have not first sought the assistance of the Attorney General by requesting that an action of this nature be pursued on their behalf. See, Frazier v. State at page 691.

The Circuit Court sought to interpret Section 21-8-23(2) of the Mississippi Code and focused its interpretation upon the mandatory language "shall" and determined that said section required a re-elected mayor to resubmit his department directors to the council for confirmation or rejection. The court concluded that a mayor's term of office is for four years and therefore a director's service is limited to the term of office of the appointing mayor. Further, that because the council term of office coincides with that of the mayor, a new council may be elected and

therefore are not the same persons who previously confirmed the appointment of directors and the council must have the opportunity to confirm the directors appointments. The fallacy with this finding can be found in the re-election of the President of the United States. Upon being elected to the office of President, the President of the United States presents his cabinet (department directors) to the Senate for confirmation. If the President is re-elected to a successive term in office he does not resubmit his cabinet to the Senate for a second confirmation. Further, during the President's first term of office, mid-term elections are held during which new members of the Senate may be elected. These new members of the Senate will not be given the opportunity to vote upon the President's cabinet that is in place upon their election if the President is elected to a successive term, unless there are cabinet changes. Further, to require that the President must resubmit his cabinet to the Senate for another confirmation upon a successive re-election would be disruptive to the President's administration and could be utilized by a hostile Senate to terminate the President's cabinet and disrupt his team. The same is true of a re-elected mayor and a hostile council.

The Appellant argues and content that it was the intent of the Mississippi legislature by the adoption of Section 21-8-23(2) to have in place a mechanism whereby a newly elected mayor would have the right to appoint his/her own department directors should he/she so chooses otherwise those serving in department director positions would continue to do so until the appointment and qualifications of said department director's successor.

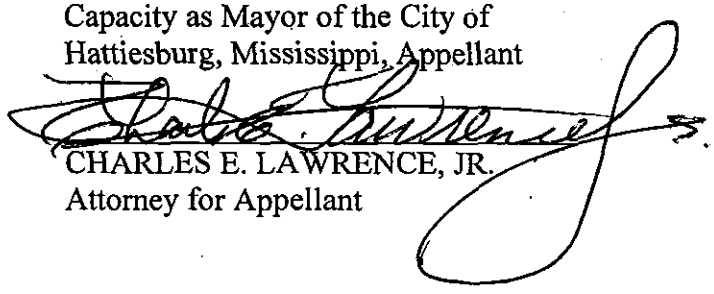
The Circuit Court when interpreting Section 21-8-23(2) never addressed the meaning of the last clause of the last sentence of said section. The language of the last sentence is ambiguous and does not convey a clear and definite meaning because it conflicts with the previous clause of said sentence which limits the term of office of a director to the term of the mayor appointing

him. When there is ambiguity in the language used by the Legislature in a statute the court must resort to statutory construction or interpretation. See, Forman v. Carter, 269 So.2d 865, 868 (Miss. 1972) citing State v. Heard, 246 Miss. 774, 151 So.2d 417 (1963). The ultimate goal of the Court in interpreting a statute is to discern and give effect to the legislative intent. See, City of Natchez, Miss. v. Sullivan, 612 So.2d 1087, 1089 (Miss. 1992) citing Anderson v. Lambert, 494 So.2d 370, 372 (Miss. 1986) and Clark v. State ex. rel Mississippi State Med. Ass'n., 381 So.2d 1046 (Miss. 1980). See also, Sykes v. State, 757 So.2d 997, 1000 (Miss. 2000) citing Mississippi Power Co. v. Jones, 369 So.2d 1381, 1388 (Miss. 1979). The Circuit Court failed to discern and give effect to the legislative intent and instead limited itself to only a part of the Section 21-8-23(2) without looking the said section as a whole. See, City of Natchez, id. at page 1089 citing McCaffrey's Food Mkt., Inc. v. Mississippi Milk Com'm, 227 So.2d 459, 463 (Miss. 1969) and State v. Board of Supervisors of Warren County, 233 Miss. 240, 102 So.2d 198, 210 (1958). The Supreme Court also when addressing the issue of statutory construction and interpretation in the case of City of Natchez, id at page 1089 reiterated its previous holdings in Warner v. Board of Trustees of Jackson Mun. Sep. School Dist., 359 So.2d 345, 347 (Miss. 1978) (quoting Coker v. Wilkinson, 142 Miss. 1, 106 So. 886, 887 (1926)) wherein it held that "Where there are two conflicting provisions in the same statute, the last expression of the Legislature must prevail over the former." The last provision of the last sentence of Section 21-8-23(2) provides that department directors will serve until the appointment and qualification of his successor. The logical conclusion and intent of the Legislature for said clause is, if there is no successor the department director remains in office.

CONCLUSION

The order granting a writ of mandamus to the Appellees should be set aside because the Appellees were not the proper party to bring said action, the action was not authorized by a vote of the council and spread upon the minutes of the city, and the council has never made a request to the Attorney General's office for said action to be brought on a complaint of the state. Further the writ of mandamus should be set aside because it violate the intent of Section 21-8-23(2) that department director that have been previously approved by a council vote are not required to be re-approved after each municipal election if the appointing mayor succeeds himself and there are no successor of said department director being appointed.

Respectfully submitted,
JOHNNY L. DUPREE, In his official
Capacity as Mayor of the City of
Hattiesburg, Mississippi, Appellant



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CERTIFICATE OF SERVICE

I, CHARLES E. LAWRENCE, JR., Attorney for Appellant, 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 Appellant's Brief to the following:

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THIS the 28th day of March 2007.

CHARLES E. LAWRENCE, JR.