

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
IN THE SUPREME COURT OF MISSISSIPPI**

**ISAAC K. BYRD, JR., KATRINA M. GIBBS  
AND BYRD, GIBBS and MARTIN, PLLC  
f/k/a BYRD & ASSOCIATES, PLLC**

**APPELLANTS**

**vs.**

**NO.: 2006-CA-1999**

**WILLIE J. BOWIE, Individually, and  
CHARLES BROWN, Individually, being  
the sole wrongful death beneficiaries of  
Lois Brown, Deceased**

**APPELLEES**

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**BRIEF OF THE APPELLEES**

Appeal from the  
Circuit Court of Rankin County, Mississippi

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**I. 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 the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Willie J. Bowie and Charles Brown, Appellees (collectively, "Brown Parties").
2. Isaac K. Byrd, Jr. ("Byrd"), Katrina M. Gibbs ("Gibbs"), and Byrd, Gibbs, and Martin, PLLC f/k/a Byrd & Associates, PLLC, Appellants (collectively, "Byrd Parties").
3. Eddie J. Abdeen, Esq. and Stephen L. Gowan, Esq., Attorneys for Appellees.
4. Hiawatha Northington, Northington Law Firm; and Precious T. Martin, Sr., Esq., Precious Martin, Sr. and Associates, Attorneys for Appellants.
5. Honorable Samac Richardson, Circuit Court Judge, Rankin County, Mississippi.



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#### **IV. STATEMENT OF THE ISSUES**

1. Whether the trial court properly granted summary judgment in relation to the Brown Parties' negligence claim against the Byrd Parties.
2. Whether this Court's 2006 Byrd Decision (*Byrd v. Bowie*, 933 So. 2d 899, 904-905 (Miss. 2006)) constitutes the law of the case and establishes the Byrd Parties' negligence (breach of duty) as a matter of law.
3. Whether the Byrd Parties' default admissions to the Brown Parties' requests for admission establish proximate cause and damages, thereby establishing the Brown Parties' legal negligence claim against the Byrd Parties in its entirety.

#### **V. STATEMENT OF THE CASE/OPERATIVE FACTS**

As the Court will recall, this action arises out of the dismissal, with prejudice, of a medical malpractice action filed by the Byrd Parties on behalf of the Brown Parties arising out of the death of their mother, Lois Brown. *Bowie v. Montfort Jones Memorial Hospital*, 861 So. 2d 1037 (Miss. 2003) (sometimes hereinafter referred to as the "Brown Death Action"). Specifically, the Court affirmed summary judgment in favor of the defendants in the Brown Death Action because of the Byrd Parties' failure to timely designate an expert and failure to show ANY excusable neglect as to why the expert designation was not timely. *Bowie*, 861 So. 2d at 1041-1043(emphasis added by the Court)(R.00029/Brown Parties' Motion to Supplement the Record - Exhibit 1 - Brown Parties' Motion for Partial Summary Judgment filed in the trial court on October 19, 2004 at Exhibit A)<sup>1</sup>.

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<sup>1</sup> The Brown Parties have moved to supplement the record pursuant to M.R.A.P. 10 with a certified copy of the Brown Parties' Motion for Partial Summary Judgment, including the related exhibits, that was part of the record when this case was previously before the Court on interlocutory appeal. Based on, among other things, this Court's rulings in *Byrd v. Bowie*, 933 So. 2d 899, 904-905 (Miss. 2006)(rehearing denied Aug. 3, 2006), the trial court has granted summary judgment on Brown Parties' negligence claim in its entirety and entered the final judgment that is at issue in this appeal. While the Brown Parties' Motion for Summary Judgment and the related pleadings are in the current record, the Brown Parties' motion incorporated the exhibits from their initial partial summary judgment by reference

On or about January 31, 2005, the trial court entered an order that, among other things, granted the Brown Parties' Motion for Partial Summary Judgment as to the Brown Parties' negligence claim (finding that the Byrd Parties were negligent as a matter of law) and denied the Byrd Parties' Motion to Withdraw Default Responses to the Brown Parties' First Set of Requests for Admission. Thereafter, with permission of the trial court, the Byrd Parties perfected an interlocutory appeal to this Court.

On April 6, 2006, this Court affirmed the trial court's rulings which found, among other things, that the Byrd Parties were negligent as a matter of law and that the Byrd Parties were not entitled to have their default responses to the Brown Parties' admission requests withdrawn. *Byrd v. Bowie*, 933 So. 2d 899, 904-905 (Miss. 2006)(rehearing denied Aug. 3, 2006)(sometimes hereinafter referred to as "2006 Byrd Decision")(Byrd Parties negligent as a matter of law and Brown Parties entitled to summary judgment as to the Byrd Parties' liability; trial court did not abuse its discretion [in not allowing the Byrd Parties to withdraw their default responses to the Brown Parties' requests for admission], the trial court's findings related thereto were supported by reasonable evidence and were not manifestly wrong) (R.00035-00044).

Based on the Court's 2006 Byrd Decision and the Byrd Parties' default admissions to the Brown Parties' requests for admission, the Brown Parties, on September 7, 2006, filed their Motion for Summary Judgment which sought to establish their negligence claim against the Byrd Parties in its entirety, including proximately caused actual damages in the amount of \$2,000,000.00. (R.00029-00044). On September 29, 2006, the Byrd Parties filed their response in opposition to the Brown Parties' summary judgment motion and on October 9, 2006, the Brown Parties filed their

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pursuant to M.R.C.P. 10. As a result, the current record does not include such exhibits and, while parts of such exhibits are quoted in the Brown Parties' summary judgment motion and rebuttal contained in the record, the entirety of the subject exhibits need to be available to the Court for a just resolution of the issues before the Court.

rebuttal in support of summary judgment. (R.00070-00073;R.00074-00088, respectively).

After considering the Brown Parties' summary judgment motion, the Byrd Parties' response thereto, the Brown Parties' rebuttal and the argument of counsel (R.Vol. 2 pp. 1-20), the trial court entered its final judgment on October 13, 2006 granting the Brown Parties' summary judgment on their negligence claim and awarding the Brown Parties a judgment against the Byrd Parties, jointly and severally, for actual damages in the amount of \$2,000,000.00, plus post-judgment interest at the statutory rate and all costs of the proceedings. (R.00089-00090). At issue in this appeal filed by the Byrd Parties is the propriety of the trial court's entry of such judgment.

As will be demonstrated herein, the Brown Parties have established their negligence claim against the Byrd Parties in its entirety and the ruling of the trial court related thereto, including the entry of a final judgment in the amount of \$2,000,000.00 against the Byrd Parties, was proper and supported by the facts and applicable law.

#### **VI. SUMMARY OF THE ARGUMENT**

Through the application of the doctrine of the law of the case, this Court's 2006 Byrd Decision establishes that the Byrd Parties' were negligent as a matter of law. Moreover, such decision affirmed the trial court's ruling that the Byrd Parties were not allowed to withdraw their default admissions to the Brown Parties' requests for admission. As a result, the Byrd Parties are bound to such admissions and the Brown Parties' admissions establish proximate cause and damages in this case. Therefore, the trial court properly granted the Brown Parties' Motion for Summary Judgment on the Brown Parties' negligence claim and entered a \$2,000,000.00 final judgment against the Byrd Parties.



## **VII. ARGUMENT**

**The trial court properly granted summary judgment in relation to the Brown Parties' negligence claim against the Byrd Parties.**

### **A. Law of the case.**

The 2006 Byrd Decision constitutes the "law of the case" between the Brown Parties and the Byrd Parties in this action. *Mauck v. Columbus Hotel Co.*, 741 So. 2d 259, 266-267 (Miss. 1999)(whatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case). As a result, the Byrd Parties are bound and cannot dispute that they were negligent as a matter of law and are not entitled to have their default admissions to the Brown Parties' admission requests withdrawn. *Byrd v. Bowie*, 933 So. 2d 899, 904-905 (Miss. 2006).

### **B. The Brown Parties' have established their negligence claim(duty, breach, proximate cause and damages) in its entirety.**

#### **(1) Elements of a legal malpractice action and establishment of the Byrd Parties' duty and breach of duty.**

As this Court has observed,

The elements of negligence are duty, breach, proximate cause and damages.(citation omitted). The elements of legal malpractice are attorney-client relationship (which imposes a duty), negligence (breach), proximate cause, and damages.(citation omitted). At most, a legal malpractice action is a negligence action dressed in its Sunday best.

*Century 21 Deep South Properties, Ltd. v. Corson*, 612 So. 2d 359, 373 (Miss. 1993). As to the negligence element, a lawyer owes his client the duty to exercise the knowledge, skill, and ability ordinarily possessed and exercised by the members of the legal profession similarly situated. *Luvene v. Waldrup*, 903 So. 2d 745, 748 (Miss. 2005). Failure to do so constitutes negligent conduct on the part of the lawyer. *Luvene*, 903 So. 2d at 748.

In this case, there is no dispute that a lawyer-client relationship existed between the Brown Parties and the Byrd Parties<sup>2</sup> and this Court's 2006 Byrd Decision establishes breach of duty/negligence as a matter of law. *Byrd v. Bowie*, 933 So. 2d 899, 904-905 (Miss. 2006). As demonstrated below, the remaining elements of the Brown Parties' legal negligence claim (proximate cause and damages) are established through the Byrd Parties' default admissions to the Brown Parties' requests for admission.

**(2) The Byrd Parties' default admissions to the Brown Parties' requests for admission are conclusively established.**

This Court's 2006 Byrd Decision affirmed the trial court's ruling that the Byrd Parties were not entitled to have their default admissions to the Brown Parties' requests for admission withdrawn. *Byrd v. Bowie*, 933 So. 2d 899, 904 (Miss. 2006) As a result, all of Brown Parties' admission requests are **conclusively established** and binding on the Byrd Parties, including the Brown Parties' admission requests regarding proximate cause and damages. *M.R.C.P.* 36(b)(any matter admitted under this rule is conclusively established); *Sunbelt Royalty, Inc. v. Big-G Drilling Co., Inc.*, 592 So. 2d 1011,1012 (Miss. 1992)(affirming trial court's grant of summary judgment on an action on a note on the basis of deemed admissions); *Sawyer v. Hannan*, 556 So. 2d 696,698-699 (Miss. 1990)(affirming trial court's grant of summary judgment on action for breach of contract in relation to the construction of certain improvements to a house on the basis of , among other things, deemed admissions; including an admission directed at damages).

As in the trial court, the Byrd Parties still fail to perceive the significance of their admissions in this case. The following matters, among others, are conclusively established against the Byrd

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<sup>2</sup> The Byrd Parties have also admitted an attorney-client relationship existed between them and the Brown Parties.(R.00079/Brown Parties' Motion to Supplement the Record - Exhibit 1 - Brown Parties' Motion for Partial Summary Judgment filed in the trial court on October 19, 2004 at Composite Exhibit C – Request No. 1 to Gibbs and Byrd.

Parties:

- a. Byrd and Gibbs had an attorney-client relationship with the Brown Parties in connection with the Brown Death Action (Request No. 1 to Gibbs and Byrd<sup>3</sup>);
- b. The failure of Byrd and Gibbs to timely designate an expert on behalf of the Brown Parties in the Brown Death Action proximately caused the dismissal of such action with prejudice (Request No. 23 to Gibbs and Byrd);
- c. The failure of Byrd and Gibbs to timely designate an expert on behalf of the Brown Parties in the Brown Death Action, which resulted in such action being dismissed with prejudice, constituted negligence by Byrd and Gibbs (Request No. 24 to Gibbs and Byrd );
- d. The failure of Byrd and Gibbs to timely designate an expert on behalf of the Brown Parties in the Brown Death Action, which resulted in such action being dismissed with prejudice, constituted gross negligence by Byrd and Gibbs (Request No. 25 to Gibbs and Byrd);
- e. The physician Byrd and Gibbs had review the facts and circumstances surrounding the death of Mrs. Brown concluded the defendants in the Brown Death Action failed to comply with the standard of care applicable to medical professionals (Request No. 4 to Gibbs and Byrd);
- f. Dr. Obie McNair, the physician Byrd and Gibbs retained as an expert in the Brown Death Action, opined that, to a reasonable degree of medical probability, the death of Mrs. Brown could have been avoided if proper monitoring of her heart and blood chemistries had been monitored and attended to more closely (Request Nos. 13 and

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<sup>3</sup> See Brown Parties' Motion to Supplement the Record - Exhibit 1 - Brown Parties' Motion for Partial Summary Judgment filed in the trial court on October 19, 2004 at Composite Exhibit C.

14 to Gibbs and Byrd).

- g. The damages of the Brown Parties in the Brown Death Action were \$2,000,000.00 (Request No. 18 to Gibbs and Byrd); and
- h. The negligence of Byrd and Gibbs in the Brown Death Action resulted in the Brown Parties sustaining damages in the amount of \$2,000,000.00 (Request No. 26 to Gibbs and Byrd).

(R.00079-00080/Brown Parties' Motion to Supplement the Record - Exhibit 1 - Brown Parties' Motion for Partial Summary Judgment filed in the trial court on October 19, 2004 at Composite Exhibit C.

Based on the foregoing admissions, the analysis of the remaining elements of the Brown Parties' legal negligence claim (proximate cause and damages) is straightforward. The Byrd Parties simply cannot dispute this point.

**(3) Proximate cause and damages.**

As to proximate cause, this Court has stated that in a legal malpractice action, a "plaintiff must show that but for his attorney's negligence he would have been successful in the prosecution ... of the underlying action [in this case, the prosecution of the Brown Death Action]." *Corson*, 612 So. 2d at 372 (citing, *Hickox v. Holleman*, 502 So. 2d 626, 634 (Miss. 1987)); *See Luvene*, 903 So. 2d at 748. The Byrd Parties' admissions establish proximate cause in this action.

As set forth herein, the Brown Death Action was a medical malpractice action arising out of the death of the Brown Parties' mother, Lois Brown ("Mrs. Brown"). *See Bowie v. Montfort Jones Memorial Hospital*, 861 So. 2d 1037 (Miss. 2003). In a medical malpractice action, negligence is established through medical testimony that the defendant health professional failed to use ordinary skill and care and a causal connection between the injury and the defendant's conduct or acts. *Powell v. Methodist Health Care-Jackson Hospitals*, 876 So. 2d 347, 348 (Miss. 2004).

In the Brown Death Action, Mrs. Brown died while under the care of the medical professional defendants. The Byrd Parties have admitted that the physician the Byrd Parties had review the facts and circumstances surrounding the death of Mrs. Brown concluded such defendants failed to comply with the standard of care applicable to medical professionals; that , to a reasonable degree of medical probability, the death of Mrs. Brown (the injury) could have been avoided if proper monitoring of her heart and blood chemistries had been monitored and attended to more closely; and that the damages of the Brown Parties in the Brown Death Action were \$2,000,000.00. These admissions establish the medical malpractice negligence claim in the Brown Death Action.

In addition to the admissions that establish the medical malpractice claim in the Brown Death Action, the Byrd Parties have admitted that their failure to timely designate an expert on behalf of the Brown Parties in the Brown Death Action proximately caused the dismissal of such action with prejudice; that such failure constituted negligence and that the negligence of the Byrd Parties in the Brown Death Action resulted in the Brown Parties sustaining damages in the amount of \$2,000,000.00.

Given the admissions of the Byrd Parties set forth above, coupled with the applicable cited authorities, the Brown Parties have demonstrated that but for the negligence of the Byrd Parties the Brown Parties would have been successful in the prosecution of the Brown Death Action (which establishes proximate cause) and that the Brown Parties have sustained actual damages in the amount of \$2,000,000.00. As a result, the Byrd Parties cannot legitimate dispute that the Brown Parties have established their negligence claim in its entirety against the Byrd Parties and the trial court did not err in granting the Brown Parties' summary judgment motion.

**C.     The Byrd Parties' assertions related to the trial court's ruling on the Brown Parties' summary judgment motion.**

Assertion No. 1: The Byrd Parties assert that, in granting the Brown Parties' summary

judgment motion, the trial court found that the Court's 2006 Byrd Decision established **all elements** (duty, breach, causation and damages) of the Brown Parties' legal negligence claim against the Byrd Parties. (Appellants' Brief at p. 14). In relation thereto, the Byrd Parties further assert that the trial court found that the Brown Parties "did not need to prove that the Byrd Defendants'[Byrd Parties] alleged negligence was the proximate cause of Bowie's [the Brown Parties'] alleged injuries." (Appellants' Brief at p. 14).

Response: Such assertion has no basis in fact. The summary judgment motion and rebuttal of the Brown Parties clearly reflects the assertions of the Brown Parties were that the 2006 Byrd Decision established the Byrd Parties' negligence as a matter of law (i.e. breach of duty) and that the Byrd Parties' default admissions to the Brown Parties' requests for admission established proximate cause and damages. (R.00029-00044 (Brown Parties' Summary Judgment Motion at paras. 3-7); R.00074-00088 (Brown Parties' Rebuttal in Support of Summary Judgment at pp. 6-9)). The Brown Parties' argument to the trial court was consistent with the Brown Parties' summary judgment motion and rebuttal. (R.Vol.2 at pp. 3-8; 11-19). The final judgment of the trial court reflects that the court considered the Brown Parties' Summary Judgment Motion, rebuttal and argument of counsel. (R.00089-00090). Under such circumstances, there simply is no basis in fact for the Byrd Parties to assert the trial court concluded that this Court's 2006 Byrd Decision established the Brown Parties' negligence claim in its entirety (duty, breach, causation and damages) and/or that the Brown Parties did not need to establish proximate cause. (See e.g. R. Vol. 2 at p. 19 (trial court assessing \$2,000,000.00 damage amount based on the Brown Parties' admission requests))<sup>4</sup>.

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<sup>4</sup> The Byrd Parties do not cite to the record in this case regarding their assertion that the trial court found that the Brown Parties' did not need to prove that the Byrd Parties' negligence was the proximate cause of the Brown Parties' injuries. (Appellants' Brief at p. 14). To the extent that, in rebuttal, the Byrd Parties point to the trial court's comments on pp. 14-15 of the hearing transcript (R.Vol. 2 at pp. 14-15)[that proximate cause was established on the basis of the trial court's previous

Assertion No. 2: The Byrd Parties boldly assert that “nothing in the record evidences any proof that Bowie [the Brown Parties] would have prevailed in the underlying wrongful death action [the Brown Death Action], that “Bowie [the Brown Parties] submitted no affidavits from medical experts stating causation as to the underlying medical negligence action” and that absent such a sworn statement from a medical expert, there is no evidence of medical malpractice or of any injury caused by the Byrd Parties. (Appellants’ Brief at p. 16).

Response: Such assertion is simply not supported by the record in this case. See the Brown Parties’ brief at section B. (2) and (3), above. The Byrd Parties’ admissions, including those related to Dr. Obie McNair, the medical expert obtained by the Byrd Parties in the Brown Death Action and which the Byrd Parties failed to timely designate, clearly and unambiguously establish proximate cause and damages in this case. As a result, the Byrd Parties’ argument that the Brown Parties’ negligence claim fails for lack of being supported by medical expert testimony is devoid of logic, common sense and/or any reasoning whatsoever.

Assertion No. 3: Incredibly, the Byrd Parties assert, consistent with their previous interlocutory appeal in this case, that a fact question exists as to whether they were served with the Brown Parties’ requests for admission. (Appellants’ Brief at p. 17).

Response: This Court’s 2006 Byrd Decision found that the trial court did not abuse its discretion [in not allowing the Byrd Parties to withdraw their default responses to the Brown Parties’ requests for admission], the trial court’s findings related thereto were supported by reasonable

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rulings], it is unclear whether the court was referring to its ruling that the Byrd Parties would not be allowed to withdraw their default admissions to the Brown Parties’ admission requests or not. In any event, there is no error because the Brown Parties’ admission requests establish proximate cause and damages so the trial court’s entry of its final judgment was proper and supported by the facts (the matters deemed admitted by the Byrd Parties) and the applicable law. What is clear is that the trial court has never found, nor could it, that the Brown Parties did not have to establish proximate cause.

evidence and were not manifestly wrong. *Byrd v. Bowie*, 933 So. 2d 899, 904-905 (Miss. 2006). As a result, all of the Brown Parties' admission requests are **conclusively established** and binding on the Byrd Parties, including the Brown Parties' admission requests regarding proximate cause and damages, and the doctrine of the law of the case precludes the Byrd Parties from attempting to re-interject this issue in this appeal. *M.R.C.P.* 36(b)(any matter admitted under this rule is conclusively established); *Mauck v. Columbus Hotel Co.*, 741 So. 2d 259, 266-267 (Miss. 1999)(whatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case).

Assertion No. 4: The Byrd Parties, consistent with their tactic in response to the Brown Parties' Motion for Summary Judgment at the trial court, improperly attempt to suggest to this Court that the trial court rejected the Brown Parties' admission requests related to damages. (Appellants' Brief at pp. 18 and 19).

Response: What actually occurred was that at the hearing on the Brown Parties' Motion for Partial Summary Judgment, that was the subject of the interlocutory appeal that culminated in the 2006 Byrd Decision, the trial court rejected the Brown Parties' argument that the Byrd Parties were "judicially estopped" from contesting the Brown Parties' damages were \$2,000,000.00 based upon a bankruptcy proof of claim filed by the Byrd Parties in the bankruptcy action of one of the defendants in the Brown Death Action. (R.00074-00076; 00084-00088; Brown Parties' Motion to Supplement the Record - Exhibit 1 - Brown Parties' Motion for Partial Summary Judgment filed in the trial court on October 19, 2004 at Exhibit A to Composite Exhibit C (the subject bankruptcy proof of claim)). Simply put, the trial court did not "reject" the Brown Parties' admission requests related to damages. In fact, the trial court denied the Byrd Parties request to withdraw their default responses to the Brown Parties' admission requests and the Court's 2006 Byrd Decision affirmed such ruling of the trial court.



Assertion No. 5: The Byrd Parties, once again, selectively quote the trial court and assert that the court was reluctant about awarding damages and that “[w]hat is conspicuously absent, then, is any explanation as to why the damages in this particular matter should amount to \$2,000,000.00.

Response: The trial court assessed actual damages in the amount of \$2,000,000 on the basis of the Byrd Parties’ admission that such amount were the damages of the Brown Parties in this case. (R.Vol.2 at p. 19). As demonstrated herein, the Brown Parties’ admissions, including those related to damages, are conclusively established and binding on the Byrd Parties in this action. *M.R.C.P.* 36(b)(any matter admitted under this rule is conclusively established); *Sunbelt Royalty, Inc. v. Big-G Drilling Co., Inc.*, 592 So. 2d 1011,1012 (Miss. 1992)(affirming trial court’s grant of summary judgment on an action on a note on the basis of deemed admissions); *Sawyer v. Hannan*, 556 So. 2d 696,698-699 (Miss. 1990)(affirming trial court’s grant of summary judgment on action for breach of contract in relation to the construction of certain improvements to a house on the basis of , among other things, deemed admissions, including an admission directed at damages).

Another important point here is that the Brown Parties had a Rule 11 basis upon which to seek the Byrd Parties’ admission that the Brown Parties’ damages in this case were \$2,000,000.00 because of the bankruptcy proof of claim that the Byrd Parties submitted to the United States Bankruptcy Court for the District of Maryland in connection with the bankruptcy of one of the defendants in the Brown Death Action. The Byrd Parties’ represented the damages to be \$2,000,000.00 in the subject proof of claim and such representation was made under penalty of criminal prosecution which provided, “Penalty for presenting fraudulent claim: Fine of up to \$500,000.00 or imprisonment for up to 5 years, or both. 18 U.S.C. § § 152 and 3571.”(Brown Parties’ Motion to Supplement the Record - Exhibit 1 - Brown Parties’ Motion for Partial Summary Judgment filed in the trial court on October 19, 2004 at Exhibit A to Composite Exhibit C (the subject bankruptcy proof of claim)). Given such facts and, more importantly, the Byrd Parties’

admissions that the Brown Parties' actual damages are \$2,000,000.00, the Byrd Parties simply have no basis to complain about the damages awarded in this action.

Assertion No. 6: The Byrd Parties assert, for the first time, that the Brown Parties cannot establish damages on the basis of the Byrd Parties' admissions in relation thereto because, among other things, the Brown Parties damages were unliquidated and the admissions don't constitute a stipulation as to damages. (Appellants' Brief at p. 20 citing *Newsome v. State*, 922 S.W. 2d 274,281 (Tex. Ct. App. 1996); *Moeller v. Fort Worth Capital Corp.*, 610 S.W. 2d 857, 862(Tex. Ct. App. 1980) and *Gray v. Parker*, 1997 WL 198145 (Tex. Ct. App. 1997)(deemed admissions were not sufficient to justify award of actual damages in a specific amount).

Response: The Byrd Parties are procedurally barred from raising this assertion for the first time on appeal. *Canadian National/Illinois Central Railroad Co. v. Hall*, 953 So. 2d 1084, 1098 (Miss. 2007); *Chantey Music Publishing, Inc. v. Malaco, Inc.*, 915 So. 2d 1052, 1060 (Miss. 2005)(same; "a trial judge cannot be put in error on a matter not presented to him."). Nowhere in the Byrd Parties' response to the Brown Parties' Motion for Summary Judgment did they make this argument. (R.00070-00073).

More importantly, the Byrd Parties appear to suggest their cited authorities stand for the proposition that admission requests can not serve as a basis upon which to establish damages. To the extent that is what the Byrd Parties are doing, they are playing fast and loose with the Court. *Newsome* and *Moeller* merely stand for the proposition that, under Texas law, summary judgment is inappropriate where damages are unliquidated and having nothing to do with requests for admissions directed at the issue of damages. *Newsome*, 922 S.W. 2d at 281; *Moeller*, 610 S.W. 2d at 862. In *Parker*, the court reiterated the Texas rule of law was that summary judgment was inappropriate where damages were unliquidated. *Parker*, 1997 WL 198145 \*2. The Parker Court further stated that a deemed admission that the defendant attorney **represented** to the plaintiff client

a settlement offer amount of a third party the plaintiff sued in a personal injury lawsuit could not establish a damage amount and did not act as a stipulation of damages. *Parker*, 1997 WL 198145 \*2 (emphasis added by the Court). The admission in *Parker* is in no way analogous to those of the Brown Parties in this case because *Parker* merely dealt with an admission that the defendant “represented” a settlement amount offered. In contrast to the admission in *Parker*, the Byrd Parties’ admissions in this case clearly and unambiguously establish the Brown Parties’ damages. (See the Brown Parties’ Brief at sections B. (2) and (3), above).

In any event, in Mississippi, admissions to requests for admission conclusively establish the matters admitted, including damages, whether liquidated or not. *M.R.C.P.* 36(b)(any matter admitted under this rule is conclusively established); *Sunbelt Royalty, Inc. v. Big-G Drilling Co., Inc.*, 592 So. 2d 1011,1012 (Miss. 1992)(affirming trial court’s grant of summary judgment on an action on a note on the basis of deemed admissions); *Sawyer v. Hannan*, 556 So. 2d 696,698-699 (Miss. 1990)(affirming trial court’s grant of summary judgment on action for breach of contract in relation to the construction of certain improvements to a house which, by their very nature would have been unliquidated, on the basis of , among other things, deemed admissions, including an admission directed at damages).

Assertion No. 7: The Byrd Parties assert that the Brown Parties’ admission requests can not serve as a basis for a damage award and that an evidentiary hearing is required to establish such damages. (Appellants’ Brief at p. 22 citing *Capital One Services, Inc. v. Rawls*, 904 So. 2d 1010, 1018-19 (Miss. 2004)(requiring an evidentiary hearing on the record as to damages after the entry of default judgment). In connection with this assertion the Byrd Parties also argue they are unduly and unfairly prejudiced by the trial court’s judgment setting damages at \$2,000,000.00 and that they have not been afforded an opportunity to rebut the amount of alleged damages. (Appellants’ Brief at pp. 20-21).

Response: The Byrd Parties' assertion simply is not supported by the law of Mississippi. *M.R.C.P. 36(b)*(any matter admitted under this rule is conclusively established); *Sunbelt Royalty, Inc. v. Big-G Drilling Co., Inc.*, 592 So. 2d 1011,1012 (Miss. 1992)(affirming trial court's grant of summary judgment on an action on a note on the basis of deemed admissions); *Sawyer v. Hannan*, 556 So. 2d 696,698-699 (Miss. 1990)(affirming trial court's grant of summary judgment on action for breach of contract in relation to the construction of certain improvements to a house which, by their very nature would have been unliquidated, on the basis of , among other things, deemed admissions, including an admission directed at damages). Moreover, the Byrd Parties have not been unduly or unfairly prejudiced by the trial court's entry of the \$2,000,000.00 final judgment against them. The Byrd Parties could have contested damages had they not admitted the Brown Parties' requests for admission. However, the Byrd Parties chose not to respond to such admissions and have now lost the right to contest damages in this case.

### VIII. CONCLUSION

For the reasons set forth herein, the trial court properly granted the Brown Parties' summary judgment motion. The Brown Parties respectfully request the Court to affirm the ruling of the trial court in relation to such motion and the trial court's entry of a final judgment against the Byrd Parties, jointly and/or severally, in the amount of \$2,000,000.00 in relation to the Brown Parties' negligence claim.

Respectfully submitted this the 24<sup>th</sup> day of August, 2007.

WILLIE J. BOWIE, Individually and  
CHARLES BROWN, Individually, sole  
wrongful death beneficiaries of Lois Brown

By:



One of their attorneys

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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that he has this day mailed by United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing document to the following:

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This the 24<sup>th</sup> day of August, 2007.



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Honorable Samac Richardson

Rankin County Circuit Court Judge

Post Office Box 1885

Brandon, MS 39043


Ms. Carol B. Swilley, Clerk

Rankin County Circuit Court

Post Office Box 1599

Brandon, MS 39043

This the 24<sup>th</sup> day of August, 2007.



EDDIE J. ABDEEN