IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2007-TS-01119

ROBERT STAFFORD JUSTUS, SR.
APPELLANT

VS.

BRENDA LOTT JUSTUS
APPELLEE

BRIEF OF THE APPELLEE

Appeal from the Chancery Court of Lauderdale County
State of Mississippi

COUNSEL FOR THE APPELLEE:

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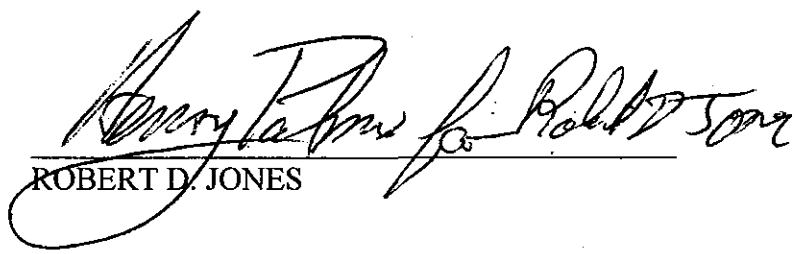
CERTIFICATE OF INTERESTED PARTIES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NO. 2007-TS-01119

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

1. Judge Jerry G. Mason
2. Honorable William B. Jacob
3. Honorable Joseph A. Kieronski, Jr.
4. Honorable Daniel P. Self, Jr.
5. Honorable Robert D. Jones
6. Honorable Henry Palmer
7. Robert Stafford Justus, Sr.
8. Brenda Lott Justus



ROBERT D. JONES

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PROPOSITION 2: THE TRIAL COURT APPLIED THE PROPER LEGAL STANDARD TO THE ARMSTRONG FACTORS

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Robert S. Justus, Sr. (hereinafter referred to as Dr. Robert Justus), was married to Brenda Lott Justus (hereinafter referred to as Brenda). They were married on December 21, 1974 (E-3) (RE-78). They were divorced on April 30, 1991 (E-41-50) (RE-66-75). Prior to their separation, they had been married for sixteen (16) years.

Pursuant to the Judgment of Divorce (E-41-50) (RE-66-75), Dr. Robert Justus was to pay Brenda, as alimony, the sum of $3,250.00 per month.

On March 24, 1998, an Order was entered by the Trial Court wherein the parties had agreed to reduce the alimony to the sum of $2,900.00 per month (E-51-56) (RE-116-121). The attorney for Brenda announced into the record the agreement of the parties and stated:

> "This reduction (in alimony and child support) is based upon the alleged decrease in the defendant's income (Dr. Robert Justus) and the **contemplated employment** of the plaintiff (Brenda) at Lamar Elementary School as a full time school teacher, which will become effective, hopefully, in August 1998." (E-52) (RE-117).

Again, in February 2005, Dr. Robert Justus filed a Complaint for Modification of the prior decree for, among other things, a reduction and/or elimination of alimony, but really was based upon a "I've paid her enough" theory; After extensive discovery and a lengthy pretrial order being entered (CP 250-259), trial was held in this cause.

II. DISPOSITION AT THE TRIAL

Trial was conducted on October 9, 10, 12, and 13, 2006, along with December 8, 2006 and February 23, 2007. At the conclusion of the trial, the Court rendered a Memorandum

Opinion (CP 274-336) with a corresponding Order (CP 337-338). This Judgment was entered on May 30, 2007. The Trial Court concluded that the alimony to be paid by Dr. Robert Justus to Brenda should remain at $2,900.00 per month. Dr. Robert Justus filed and appeal challenging the Chancellor's ruling and Brenda has filed her Appellee's Brief in response.

SUMMARY OF THE ARGUMENT

A. STANDARD OF REVIEW

It is well founded in Mississippi Law that the scope of the Mississippi Supreme Court's review of an alimony award is well-settled. Alimony awards are within the discretion of the chancellor, and his discretion will not be reversed on appeal unless the chancellor was manifestly in error in his finding of fact and abused his discretion." Ethridge v. Ethridge, 648 So.2d 1143, 1145-46 (Miss.1995)(citing Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss.1993)). See also Voda v. Voda, 731 So.2d 1152, 1154 (Miss.1999); Traxler v. Traxler, 730 So.2d 1098, 1104 (Miss.1998); Parsons v. Parsons, 678 So.2d 701, 703 (Miss.1996). The ruling of the chancellor will not be disturbed if the findings of fact are supported by credible evidence in the record. Id.

When a petitioner requests a modification in periodic alimony, the court may order either an increase, decrease or termination of the alimony award. Ivison v. Ivison, 762 So.2d 329, 333 (Miss.2000). A chancellor has the authority to modify periodic alimony "upon a finding of a substantial change in circumstances, regardless of any intent expressed by the parties to the contrary." McDonald v. McDonald, 683 So.2d 929, 931 (Miss.1996). The change in circumstance must not be anticipated by the parties at the time of the original decree. Ivison, 762 So.2d at 333.

B. THE APPELLANT MAKES TWO ASSIGNMENTS OF ERROR TO-WIT:

PROPOSITION 1: THE COURT ERRED IN FAILING TO FIND A MATERIAL CHANGE OF CIRCUMSTANCES HAS OCCURRED JUSTIFYING A SUBSTANTIALLY REDUCTION OR ELIMINATION OF THE REQUIREMENT FOR BOB TO PAY ALIMONY TO BRENDA

PROPOSITION 2: THE TRIAL COURT ERRED BY APPLYING AN ERRONEOUS LEGAL STANDARD TO THE ARMSTRONG FACTORS

For brevities sake, these issued will be addressed simultaneously by the Appellee, Brenda Justus. As to the assertion that the Court Erred in Failing to find a material change in circumstances warranting a modification in alimony, the appellee respectfully submits the following facts.

The trial court properly found that there was no material change in circumstances. In fact, the Appellant seeks to punish Brenda for reducing her expenses, becoming frugal in her financial affairs and obtaining full time employment. There has not been a material change in circumstances, specifically, Brenda and Dr. Robert Justus agreed to reduce Dr. Robert Justus' monthly alimony payments to the sum of $2,900.00 wherein the parties agreed that the reason for the reduction in 1998 was based on Brenda gaining full time employment as a teacher. [RE 116-121] The Court stated "This reduction (in alimony and child support) is based upon the alleged decrease in the defendant's income (Dr. Robert Justus) and the **contemplated employment** of the plaintiff (Brenda) at Lamar Elementary School as a full time school teacher, which will become effective, hopefully, in August 1998." (E-52) (RE-117). Hence the reduction was based

on Brenda's obtaining full time employment. Brenda has since moved to Tennessee where she is employed as a full time teacher in the Memphis school system.

Brenda Justus moved her residence from the State of Mississippi to the State of Tennessee. She did so in order to be closer to her parents. She left a full time teaching position in Meridian, Mississippi and commenced a full time teaching position in Memphis, Tennessee.

The appellant raises issues purporting to be "material changes in circumstances warranting a modification of alimony" based on the facts that Brenda Justus sold the Meridian home and realized more than $85,000.00 in equity from that sale, which was used to purchase a home in Tennessee. and that Brenda Justus acquired a certificate of deposit of $25,000.00 for one of the children, and a second $12,000.00 certificate of deposit for one of the children. The sale of the former marital residence by Brenda Justus eliminated the Appellant's requirement to pay the monthly note on said residence in the sum of $1,036.44; thus, this change was a positive financial impact on Appellant. Brenda Justus made a conscious decision to down size her home and thus her expenses. Both parties knew pursuant to the Court's previous Order of Divorce that the above referenced monies were awarded unto Brenda Justus during the original divorce decree as an equitable distribution of martial property or were the children's monies. These equity monies have no material relevance to these proceedings. The Court was overly fair in allowing the Appellant to develop the issues of the prior distribution of marital assets over the continued objections of counsel for Brenda Justus.

Wise argument?

The appellant asserts in his brief that "Brenda Justus, at the time of trial, had savings in the bank, retirement accounts and Tennessee Teacher Retirement benefits. Thus, a substantial and drastic material change of circumstances has been established as to Brenda Justus." See

Appellant's Brief at page 4. This assertion is contrary to the Mississippi Law and contrary to the facts and evidence presented at the trial in this matter. Brenda Justus' retirement account is mandatory under Tennessee law and her savings were a result of conservative spending and her responsible financial practices, which is just the opposite of Appellant's continual frivolous purchases and outlandish expensive toys or assets. The Court properly found that her monthly expenses have increased since the 1998 Agreed Order of Modification. Thus the Court was correct in finding that no material change in circumstances have occurred as to Brenda.

Does that make it less of an asset for Armstrong?

Dr. Robert Justus, likewise, has also not experienced a material change of circumstance since the prior decree. In fact, since the decree his gross income has substantially increased. While his exaggerated expenses may have increased, they are solely due to the fact that he has purchased and financed enormous amounts of newly acquired assets. He has chosen voluntarily to purchase a home he estimates as a worth of $500,000.00 for which he paid according to his testimony the sum of $485,000.00. He also purchased and financed vehicles, land, motorcycles, a pontoon boat, a Dalewood resort lake house, a Dalewood lot, and he financed a beachfront condominium while paying for another pre-construction beachfront condominium. Dr. Robert Justus currently pays for five (5) cell phones, owns and pays for six (6) automobiles, owns and pays for two (2) luxury beach houses in Orange Beach, Alabama, owns a resort lake house at Dalewood Lake in Lauderdale, Mississippi and he pays over $4,000.00 per month for vehicles out of his employments office. Dr. Robert Justus further pays salaries to fictitious employees over $3,000.00 per month out of his business, including his eleven (11) year old daughter. Dr. Robert Justus owns two (2) Harley Davidson/Buell motorcycles, as well as two (2) or three (3) "dirtbikes". Any financial distress to Dr. Robert Justus' income and expenses are due to his

excessive spending, lifestyle and problematic office expenses claimed though his office. His net income is dubious at best and should be viewed with extreme caution based on the disparity of his gross income and his net income and his flagrant attempt to hide income through fictitious employees and personal expenses paid by his office.

The Appellant attempts to make an argument that Brenda's employment and subsequent employment are a material change in circumstances warranting a reduction in his alimony payments. The appellant knew that Brenda was employed full time as a teacher in 1998 when she and Dr. Robert Justus agreed to the previous reduction in alimony. There is no material change in circumstances based on her employment and subsequent slight cost of living in income and further, the Chancellor properly found that her expenses had substantially increased.

C. APPROPRIATE APPLICATION OF THE ARMSTRONG FACTORS

The Chancellor correctly identified the principle of law that in order to modify and/or terminate alimony, the Armstrong factors were applicable. The Chancellor throughly considered the Armstrong factors and applied them appropriately to the issues and facts of the case at hand.

The Chancellor correctly conducted an Armstrong analysis. The Court found that Brenda Justus' salary had increased from 1998 to 2005 and will again increase in 2006. The Court also found that her expenses have substantially increased. The move to Collierville, Tennessee relieved Dr. Justus from the monthly payment of $1,036.44. The home she purchased in Collierville cost more than the equity she received from the sale of flagrant former marital home in Meridian, Mississippi. She was forced to refinance the Collierville home and borrow an additional $25,000.00 which resulted in a second monthly note on her Collierville home. She is paying approximately $874.00 per month in mortgage payments on said home. Her net monthly

Exact amount of the missing CD

expenses are slightly exceeded by her income in the amount of $911.67.

The Chancellor was correct in finding that there has been no material change of circumstances of the parties. The Chancellor further considered evidence from (t's previous Rulings involving the original divorce decree of the partie(s) and subsequent Orders from the Court and monies appropriated to the parties as an equitable distribution of assets. The appellant's brief continually points out that the Court's previous awards concerning child support (the CD's) and the equitable distribution of marital assets (the $85,000.00 in equity from the sale of the (martial) home) somehow relate to a material change in circumstances. Counsel for Brenda continuously objected to this irrelevant evidence being allowed into the record. As stated before, the Chancellor was more than fair and considered the information anyway. These assets were distributed in 1991 [(RE 75-115] and have no bearing on the facts and issues before this Court.

ARGUMENT

A. THE FACTS

The Trial Court first relied upon the case of McDonald v. McDonald, 683 So.2d, 929 (Miss. 1996). The Court quoted a portion of that case from page 931. The Trial Court did correctly quote from the case. The appellant asserts the wrong result in its brief regarding McDonald v. M Donald . However, McDonald (supra) dealt with the question of whether or not a particular payment designated by the divorcing couple was in reality "lump sum alimony" or not. Thus, the chancellor was correct in its analysis and application of McDonald to the facts as they apply to the law in the case at bar. Further, the Court, after correctly applying and considering the Armstrong factors as they apply to this case determined that there was no material change in circumstances warranting a reduction in the alimony owed unto Brenda. The

Trial Court recognized that in Armstrong (supra), periodic alimony may be modified by increasing, decreasing or **terminating the award** in the event of **a material change of circumstances subsequent to the decree awarding alimony** (CP 280). The Chancellor was absolutely correct in his ruling on this issue. In order to determine what would constitute a material change of circumstances a review of several cases is needed. From facts of the case at hand the most applicable and appropriate cases are Dix v. Dix, 941 So.2d 913 (Miss. 2006) and Holcombe v. Holcombe, 813 So.2d 700 (Miss. 2002) and Spradling v. Spradling, 362 So.2d 620 (Miss. 1978).

A) BRENDA'S CHANGE IN CIRCUMSTANCES

As to Dr. Robert Justus' argument and assertion that Brenda's return to work is a material change in circumstances warranting a reduction or modification of alimony, the Supreme Court in Dix quoted Spradling stating "[i]n Spradling v. Spradling, 362 So.2d 620, 624 (Miss.1978), our supreme court refused to penalize a wife for obtaining a temporary teaching job by modifying her periodic alimony. The court noted that it would not punish a spouse "for being industrious and endeavoring to accomplish something rather than depend on [the paying spouse] regardless of future circumstances." Id. We find in the present case that the new employment by Karen, whether temporary or permanent, does not rise to a substantial change of circumstances sufficient to modify the alimony payments. Id.; see Hockaday v. Hockaday, 644 So.2d 446, 450 (Miss.1994) (opining that one party's having become employed and therefore having some income other than alimony does not constitute "such a substantial change in circumstances as to warrant a permanent reduction or termination of periodic alimony"). The Court went on to state that "[in Austin v. Austin, 557 So.2d 509, 510 (Miss.1990), our supreme court found the

Close quote?

chancellor manifestly erred by modifying alimony when the recipient spouse obtained full-time employment. The court observed that the husband who was initially ordered to pay alimony was affluent and maintained a high standard of living in spite of lavishly supporting six children. Id. The court noted that both parties knew that the recipient wife would secure employment after the divorce." Austin at 510. These cases are exactly on point with the case at hand. Likewise, Brenda's full time employment does not rise to a substantial change of circumstances sufficient to modify the alimony payments. Thus the Chancellor was correct in his ruling as to no material change as to Brenda warranting a decrease in alimony.

Further, Brenda's income and estate do not compare in size or value to that of Dr. Robert Justus'. The disparity of Dr. Justus' income to Brenda's income has widened in that the gap is much greater, not less. His gross income is more than ten (10) times that of Brenda's. The vast majority of his expenses are the result of irresponsible spending and the purchasing of beach houses, motorcycles, automobiles, a lake house and paying salaries to his family. Brenda lives a very modest and frugal life. This was another factor that the Supreme Court considered in Dix stating "Although Karen is gainfully employed, her net income remains significantly lower than Brian's net income. Even with the periodic alimony payments, her income does not exceed Brian's, nor do the payments result in Karen having a greater standard of living than Brian. While Brian may have experienced a slight decrease in his salary, upon comparing all of the factors, he still maintains a high standard of living. Therefore, we find that the chancellor's decision that Karen's employment was not a material and substantial change was neither clearly erroneous nor manifestly wrong" Dix at 918.

B) NO MATERIAL CHANGE OF CIRCUMSTANCES REGARDING DR. ROBERT JUSTUS

In the case at hand, Dr. Robert Justus pays more in beachfront condominium mortgage payments each year than he pays Brenda in Alimony. [RE 171, 173] He pays his step sons $24,000.00 per year out of his business. [RE 133]. He pays his mother May Phares $600.00 per month and she lives out of state. [RE 134]. Dr Justus spends approximately $900.00 per month on gas out of his office. [RE 135] Dr. Justus paid $61,000.00 for a new land cruiser on 2005. [RE 139] He purchased a Ford Truck in 2003 for $39,726.00. [RE 140] Dr. Justus purchased another land cruiser in 2006 for $60,000.00.[RE 146] and he paid $34,000.00 for a 1999 Ford Truck [RE 151]. Dr. Justus testified he pays approximately $4,000.00 per month in car notes alone out of his office. [RE 149] These figures do not include tags, insurance, maintenance or other routine expenses. Dr. Justus purchased a resort lake house in 2004 for $85,000.00 [RE 166] which includes additional expenses of taxes, insurance and membership fees. Dr. Robert Justus also has two (2) IRA or profit sharing accounts worth $80,000.00 and $275,000.00. [RE 180]. Additional purchases after 1998 by Dr. Justus include two (2) $6,000.00 motorcycles [RE 161], a $3,000.00 dirt bike [RE 162] and a home lot in the Sentinel Ridge Subdivision for $42,000.00 in 2001 and later sold it for $65,000.00 [re 176].

Dr. Robert Justus further asserts that his net income is a basis for the Court to find a material change in circumstances warranting a decrease in his alimony requirements. Dr. Robert Justus' net income is an improper basis for determining his true income. He pays thousands of dollars monthly in personal expenses, cell phones, car notes, and salaries to multiple family members including an 11 year old child and his non-resident mother. (All of which were to

manipulate the financial facts to appear to have been available income. Dr. Robert Justus admitted that his financial stress is a result of his extravagant lifestyle and expenses. [RE 40] [RE 173]

The trial Court appropriately applied the relevant Armstrong factors to the case at hand. Specifically, the trial Court found that " This Court has considered the alimony modification principals of law as previously cited in this Opinion and the evidence relevant to the Armstrong factors. [RE 50] The Court found that Dr. Justus' alimony obligations have decreased by over $1000.00 per month. [RE 51]. Dr. Justus also received a $1,400.00 per month saving or non-expenditure when Brenda sold the former marital home. The Court further correctly found Dr. Justus' net worth significantly exceeds that of Ms. Brenda Justus. [RE 54]

Dr. Robert Justus is periodontist in Meridian, Mississippi, he receives his salary and benefits from his practice and he earns rental income and he receives benefits and income from the military. His gross salary ranges from $471,290.00 to $724,895.00 according to his expert accountant and Dr. Robert Justus' testimony as well. The amount of alimony Dr. Robert Justus agreed pay at the time of the modification in 1998 was based upon the fact that Brenda would be seeking full time employment as a teacher. Dr. Robert Justus can afford to pay Brenda's entire yearly alimony with one month's gross earnings basing his income at his lowest gross income level over the past eight (8) years. The following chart reflects Dr. Robert Justus' gross income: [RE 127-129]

YEAR	BOB'S GROSS ANNUAL INCOME	BOB'S GROSS MONTHLY INCOME
1998	$471,290.00	$39,250.00
1999	$557,126.00	$46,427.17
2000	$616,934.00	$51,411.17
2001	$636,895.00	$53,074.58
2002	$683,074.00	$56,922.83
2003	$656,156.00	$54,679.67
2004	$681,207.00	$56,767.25
2005	$724,895.00	$60,407.92

[RE 127- 129]

The Trial Court correctly ruled:

> "Although **circumstances have changed** since March, 1998, this Court finds that the Petitioner (Dr. Robert Justus) has failed to prove by a preponderance of the evidence a material change in circumstances which requires or justifies a termination of periodic alimony paid by the Petitioner (Dr. Robert Justus) to the Respondent (Brenda)." (CP 325-326).

The Trial Court considered the appropriate proof since the 1998 Agreed Modification and also considered evidence from original divorce decree from 1991 as to the equitable distribution of martial assets of Brenda and even child support. [RE 66-75]

Similarly, the Supreme Court in Dix analyzed a similar distinction in the income and spending of the parties as follows "Brian is in a much better financial position than Karen. As a nurse practitioner for a health clinic, Karen earns approximately $60,000 each year. Brian is a successful anesthesiologist, with an average adjusted gross income of $534,209 from 1997 through 2003. At the time of trial, his monthly gross earned income was approximately $43,000 per month. Brian claims that he suffered a substantial decrease in salary in 2003, which renders

him unable to continue to pay Karen periodic alimony. A review of Brian's financial statements shows that a reduction in his income occurred only in 2003, and did not reflect a continuing pattern of decline. Even with a drop in income that year, Brian still made well over $350,000 and has been able to purchase luxury items such as an airplane, a recreational vehicle (RV), and to invest in numerous real estate ventures along the Mississippi Gulf Coast. Furthermore, Brian testified that his monthly disposable income, after all deductions, was $30,637. Brian pays Karen $26,400 annually in periodic alimony. Thus, Brian could pay his annual periodic alimony obligation to Karen in one month and still have $4,237 left over. Dix at 917.

The fact that Dr. Justus' lifestyle and spending led to his Petitioning the Court for a reduction in Alimony was also addressed by the Dix Court in stating " In addition, Brian admits that he continues to lead an affluent lifestyle, but he maintains that he is only able to do so by incurring debt and borrowing money. Purchasing non-necessity material items on credit is of Brian's own volition and as such, is not relevant to the modification analysis. The factors that are relevant are the fifteen year duration of the marriage, the standard of living of both parties during the marriage and now, the current needs of the parties, the current employment status of the parties, and the parties's obligations and assets. Considering the Brabham factors, there was substantial evidence that Brian did not meet the requirements necessary for a material or substantial change in circumstances that would warrant a downward modification in periodic alimony. Dix at 917.

Therefore, the ruling of the Trial Court that there was no material change of circumstances warranting a was wholly, totally and completely supported by the evidence presented. The Chancellor did not err by considering the parties current situation as compared to

the time of the settlement in 1998 and the divorce. The Chancellor was correct and did not err in finding that no a material change in circumstances had occurred. The proof was uncontradicted that no material change of circumstances had occurred as to the parties warranting a change or reduction in alimony. The Trial Court's ruling was not an abuse of discretion and the trial court properly followed the correct legal standard.

Dr. Robert Justus' basic premises for asking the Court to reduce his alimony payments are that Brenda is a full time teacher and his "net income" has decreased. The Mississippi Supreme Court has ruled that neither of these factors as they apply in the case at hand are a material change in circumstances warranting a reduction in alimony.

Because the Chancellor applied an the standard of law in analyzing the Armstrong factors, this case should be affirmed. Additionally, this Court should declare that no material change of circumstances has occurred, that all future requirements to pay alimony on the part of Dr. Robert Justus shall continue.

CONCLUSION

It is obvious from even a casual review of this record that there has been no material change of circumstances with regard to Brenda's situation financially and otherwise. The Court's original decree was modified by the parties in 1998 based on Brenda's becoming a full time teacher. She also saved the appellant over an additional $1,400.00 per month by selling the former martial home. There has been no material change as to the appellant, he has accumulated millions of dollars worth of real property and caused financial stress on himself as a result of his massive expenditures. Thus, this Court should affirm this matter and continue the requirement

of Dr. Robert Justus to continue to pay periodic alimony and assess all costs of the Appeal unto the Appellant.

The Court should award the Appellee a reasonable attorney's fee and costs for defending this Appeal, if Appellant is unsuccessful.

Respectfully submitted, this the 22nd day of May, 2008.

BRENDA LOTT JUSTUS, APPELLEE

BY: Nancy Dolan for Robert D. Jones

ROBERT D. JONES,
OF COUNSEL FOR APPELLEE

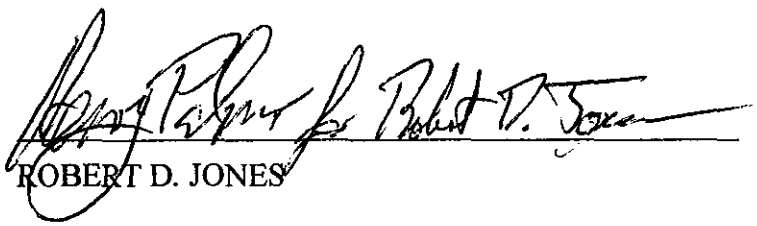
CERTIFICATE OF SERVICE

I, the undersigned, Robert D. Jones, of counsel for the Appellee, Brenda Lott Justus, do hereby certify that I have this day, caused by postage prepaid, or hand delivery, a copy of the above and foregoing Brief of Appellant to:

Honorable Jerry G. Mason
Chancellor Twelfth District
Chancery Court
Lauderdale County Courthouse
Meridian, Mississippi 39301

Honorable Bill Jacob
Post Office Box 949
Meridian, Mississippi 39302-1205.

THIS the 22nd day of May, 2008.



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