

# 2007-CA-01627-COA

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Reply

IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS

KATHY CAMPBELL

APPELLANT

VS.

CAUSE NO. 2007-CA-01627-COA

JEREMY E. DAVIS

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities 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. Kathy Campbell, Appellant, 242 CR 86, Houston, MS 38851
2. Jeremy E. Davis, Appellee, 300 Furr Cove, Houston, MS 38851
3. Honorable Henry L. Lackey, Circuit Court Judge, Calhoun City, MS 38916
4. Elizabeth Fox Ausbern, Attorney for Appellant, Houston, MS 38851
5. Eric J. Dillon, Attorney for Appellee, Jackson, MS 39205-0750



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## **REBUTTAL ARGUMENT**

**I. In the interest of justice, Appellant should be heard on her Motion to Set Aside the Order as the trial court concluded he lacked authority to set aside the order of another trial judge.**

The senior judge stated in his order that “this court does not have the authority to set aside the order of another trial judge.” (Appellant’s RE38-39) Obviously, the order entered on August 15, 2007, is inherently unfair unto the Appellant as that judge concludes he has no authority to rule on Appellant’s motion. Therefore, this matter should be reversed and reinstated to determine the appropriate authority to rule on Appellant’s motion.

**II. According to the previous order of the court, Appellant had thirty (30) days to amend the complaint to substitute Appellee as a party.**

This simple car wreck was initiated against “Dorothy Davis, as guardian of Jeremy E. Davis, a minor.” Once the lawsuit progressed, it became obvious that the Appellee was a minor on the day of the accident. Likewise, Appellee did reside with his grandmother and was driving her vehicle on the day of the accident. (T8)

Numerous pleadings filed by Appellee’s counsel referred to him as a party. Likewise, the court by previous orders has acknowledged him as a party. Indeed, the pleading titled “Dorothy Davis, as guardian of Jeremy E. Davis, a minor,” identifies him as a party. Crucial documents before the court would exhibit counsel for Appellee responding to pleadings as “Jeremy Davis, Defendant.” (RE5-6, 8-11) Importantly, an agreed order prepared by defense counsel acknowledged Appellee’s active participation in the litigation. (Appellant’s RE5-6) At the case at the bar, a subpoena for medical records was issued by **Jeremy E. Davis** (emphasis added). (RE5-6)

The Mississippi Rules of Civil Procedure are inherently designed to allow liberal amendments.

To avoid a miscarriage of justice, the Motion to Set Aside the Order should be granted and Appellant allowed to pursue her claim against Appellee.

**III. Estes and Meiger support a relation back to the date the original complaint was filed.**

In Estes v. Starnes, 732 So.2d 251 (Miss. 1999), a father was initially sued for damages from a car wreck. The son had constructive knowledge of the negotiations of Starnes' insurer. Therefore, an amendment substituting son for father was allowed after the statute of limitations had expired.

In the case at the bar, Appellant identified Dorothy Davis as guardian of Appellee. It is undisputed that on the day of the wreck Appellee remained a minor. Though disputed by Appellee's counsel, at his deposition Appellee noted his grandmother had been his legal guardian, and he had resided in her home, thus, having permissive use of the vehicle on the date of the accident.

Mississippi Rule of Civil Procedure 15(a) allows the amendment of complaints to be "freely given where justice so requires." Obviously, in the case at the bar, Judge Lackey had already entered an order allowing amendment which the mere execution of said order justified relation back to the original date of filing.

In a similar case, Mieger sent a notice of claim to the president clerk of Pearl River County Board of Supervisors. Mieger v. Pearl River County, 2008 MS-A0109.005. Later, this party plaintiff was allowed to amend a fictitious party to substitute Pearl River County. It was determined that Mieger would be allowed to proceed under Mississippi Rule of Civil Procedure

15(c) after the statute of limitations had run and to subsequently file an amended complaint naming Pearl River County as a party defendant.

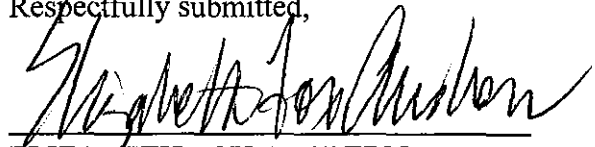
In the present case, Appellant identified the guardian of Appellee thereby giving constructive and actual notice to Appellee of the litigation. Furthermore, Appellee has filed numerous pleadings throughout this proceeding portraying his defense of the litigation. Probably the most interesting legal document filed on behalf of Appellee would be the subpoena for sensitive medical records of Appellant. Certainly, Appellee has had an active participation in this matter and would not be prejudiced by the Motion to Set Aside the Order of dismissal and reinstate Appellee as a defendant.

### CONCLUSION

On July 14, 2003, Judge Lackey entered an order, allowing the relation back to the original complaint and to amend to substitute Jeremy E. Davis as a party. Therefore, the statutory requirements of notice and limitations were satisfied. Numerous pleadings and responses filed by the defense counsel designate Appellee as the party defendant.

Accordingly, under Mississippi Rule of Civil Procedure 15(c), the dismissal should be set aside; Appellant should be allowed to pursue litigation for this car wreck against Appellee. To prevent Appellant from proceeding would be unfair and unjust.

Respectfully submitted,



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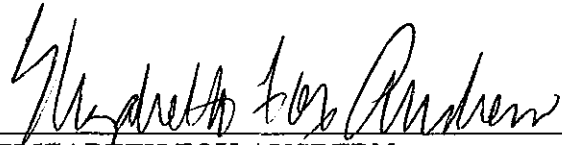
### CERTIFICATE OF SERVICE

I, the undersigned, Elizabeth Fox Ausbern, attorney of record for the Appellant herein, do hereby certify that I have this day mailed, via United States first class mail, postage prepaid, a true and correct copy of the foregoing Reply Brief for the Appellant to the following:

Honorable Henry L. Lackey  
Circuit Court Judge  
P.O. Drawer T  
Calhoun City, MS 38916

Eric J. Dillon, Esq.  
Currie Johnson Griffin Gaines & Myers  
P.O. Box 750  
Jackson, MS 39205-0750


This the 12<sup>th</sup> day of August, 2008.

  
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ELIZABETH FOX AUSBERN

## CERTIFICATE OF MAILING

I, Elizabeth Fox Ausbern, pursuant to Rule 25(a) of the Miss. Rules of Appellate Procedures, do hereby certify that on the 13<sup>th</sup> day of August, 2008, I hand-delivered to the Mississippi Supreme Court Clerk the original and three copies of the Reply Brief for Appellant .

SO CERTIFIED, this the 13<sup>th</sup> day of August, 2008.

  
ELIZABETH FOX AUSBERN