

IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI DEPARTMENT OF  
HUMAN SERVICES

APPELLANT/ CROSS-APPELLEE

VS.

CAUSE NO.: 2007-CC-02189

CAROLYN K. MCNEEL

APPELLEE/ CROSS-APPELLANT

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APPEAL FROM THE CIRCUIT COURT  
OF WINSTON COUNTY, MISSISSIPPI

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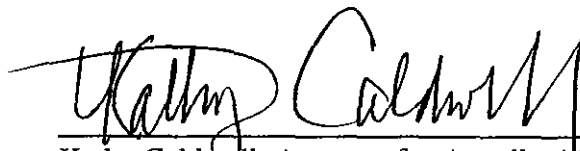
BRIEF OF THE APPELLANT/ CROSS-APPELLEE

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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 Supreme Court may evaluate possible disqualifications or recusal.

1. Carolyn McNeel, Appellant/ Cross-Appellee
2. David Bane, Attorney for Appellant/ Cross-Appellee
3. Mississippi Department of Human Services, Appellee/ Cross-Appellant
4. Kathy Caldwell, Attorney for Appellant/ Cross-Appellee
5. Donald R. Taylor, MDHS Executive Director
6. Falton O. Mason, Jr., Hearing Officer, Mississippi Employee Appeals Board
7. William H. Smith, III, Hearing Officer, Mississippi Employee Appeals Board
8. Roosevelt Daniels, II, Hearing Officer, Mississippi Employee Appeals Board
9. Ingrid D. Williams, Hearing Officer, Mississippi Employee Appeals Board
10. Joseph H. Loper, Jr., Judge for the Circuit Court of Winston County, Mississippi

A handwritten signature in black ink, appearing to read "Kathy Caldwell", is written over a horizontal line.

Kathy Caldwell, Attorney for Appellee/ Cross-Appellant

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### **STATEMENT OF ISSUES**

The following issues are presented by Mississippi Department of Human Services as the Appellant:

- I. The Circuit Court erred in affirming the decision of the Hearing Officer to award McNeel reimbursement of personal funds for medical expenses.
- II. The Circuit Court erred in reversing and remanding the decision of the Full Board of the Employee Appeals Board on the issue of interest concerning pre-judgment interest and post-judgment interest.
- III. The Circuit Court erred in reversing the decision of the Full Board of the Employee Appeals Board for McNeel's back pay to be reported to the Social Security Administration.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case:**

This case stems from an Order by the Supreme Court of Mississippi ordering Mississippi Department of Human Services, hereinafter “MDHS”, to reinstate Carolyn K. McNeel, hereinafter, “McNeel”, to her former position with back pay and benefits. McNeel and MDHS argue on what exactly should be included as back pay and benefits.

### **B. Course of Proceedings and Disposition in the Court Below:**

On August 16, 2005, Hearing Officer Falton O. Mason, Jr., entered an Order which granted and denied relief requested by McNeel. R. at Vol. III, 247-248. MDHS and McNeel appealed to the Full Board of the Mississippi Employee Appeals Board, hereinafter “EAB.” The Full Board affirmed the decision of the Hearing Officer on July 7, 2006. R. at Vol. III, 249-250. MDHS sought review by filing a Petition for Writ of Certiorari with Supersedeas in the Circuit Court for the First Judicial District of Hinds County on July 14, 2006. R. at Vol. I, 18-30. McNeel filed a Notice of Appeal with the Circuit Court of Winston County, Mississippi, on July 31, 2006. R. at Vol. I, 3-5 and 11-15. McNeel also requested the Circuit Court for the First Judicial District of Hinds County to transfer MDHS’ Petition for Writ Certiorari with Supersedeas to the Circuit Court of Winston County. R. at Vol. I, 32-35. On August 9, 2006, the Circuit Court for the First Judicial District of Hinds County, *sua sponte*, issued an Order transferring MDHS’ Petition for Writ of Certiorari with Supersedeas to the Circuit Court of Winston County. R. at Vol. I, 36-37. On November 20, 2007, the Circuit Court of Winston County entered an Opinion and Order which affirmed in part and

reversed and remanded in part the decision of the Employee Appeals Board. R. at Vol. I, 61-81. On December 5, 2007, MDHS filed its Notice of Appeal with this Court. R. at Vol. I, 82-86. Likewise, McNeel filed her Notice of Cross-Appeal on December 17, 2007. R. at Vol. I, 91-94.

**C. Statement of Facts:**

McNeel, was employed by MDHS, as a Social Worker for Winston County Department of Human Services. *Miss. Dept. of Human Serv. v. McNeel*, 869 So. 2d 1013 (Miss. 2004). On November 10, 1999, McNeel was terminated by MDHS. *McNeel*, 869 So. 2d at 1013. McNeel appealed her termination to the EAB. *Id.* at 1013. On October 20, 2000, the Hearing Officer ordered her to be reinstated to her former position with back pay and all benefits as of the date of termination, subject to set off of any sums received from other sources. *Id.* MDHS appealed the decision which was affirmed by the Full Board of the EAB. *Id.* MDHS petitioned the Hinds County Circuit Court for a writ of certiorari to review the decision. *Id.* The Hinds County Circuit Court affirmed the decision of the Hearing Officer. *Id.* MDHS appealed to the Supreme Court of Mississippi. *Id.* On 29<sup>th</sup> day of April, 2004, the Supreme Court of Mississippi affirmed the decision of the Hearing Officer. *Id.*

On July 16, 2004, MDHS sent a check in the amount of ninety-two thousand two hundred fifty-one and 39/100 dollars (\$92,251.39) for back pay. T. at 114-115. MDHS calculated McNeel's back pay, from the time she was terminated to the ruling of the Supreme Court of Mississippi, to equal the amount of one hundred forty-seven thousand two hundred ninety-four and 10/100 dollars (\$147,294.10). *Id.* at 114-115. After taxes, social security, retirement and medicare were deducted the amount was ninety-two thousand two hundred fifty-one and 39/100 dollars (\$92,251.39). *Id.* McNeel appealed to the EAB requesting back pay to include raises and promotions that McNeel may

have been eligible for during her termination, reimbursement of out of pocket medical expenses, interest on back pay, reimbursement for continuing professional education, social security taxes, the difference in income tax attributed to the lump sum payment of back pay, Court fees, attorney fees and out of pocket costs. R. at Vol. II, 1-105.

On the 16<sup>th</sup> day of August, 2005, the Hearing Officer entered an Order awarding back pay that included all possible advances and promotions during the time of termination to McNeel. R. at Vol. III, 247-248. She was also awarded reimbursement of out of pocket expenses for medical expenses. *Id.* at 247-248. McNeel was denied interest on back pay, reimbursement of continuing professional education, reimbursement of social security taxes, reimbursement of federal and state taxes on the back pay lump sum payment, Court costs, out of pocket costs and attorney fees. *Id.* McNeel and MDHS appealed to the Full Board of the Mississippi Employee Appeals Board which affirmed the decision of the Hearing Officer on July 7, 2006. R. at Vol. I, 6 and Vol. III, 249-250.

MDHS sought review by filing a Petition for Writ of Certiorari with Supersedeas in the Circuit Court for the First Judicial District of Hinds County on July 14, 2006. R. at Vol. I, 18-30. McNeel filed a Notice of Appeal with the Circuit Court of Winston County, Mississippi, on July 31, 2006. R. at Vol. I, 3-5 and 13-15. McNeel also requested the Circuit Court for the First Judicial District of Hinds County to transfer MDHS' Petition for Writ Certiorari with Supersedeas to the Circuit Court of Winston County. R. at Vol. I, 32-35. On August 9, 2006, the Circuit Court for the First Judicial District of Hinds County, *sua sponte*, issued an order transferring MDHS' Petition for Writ of Certiorari with Supersedeas to the Circuit Court of Winston County. R. at Vol. I, 36-37.

On November 20, 2007, the Circuit Court of Winston County entered an Opinion and Order which affirmed the decision of the Employee Appeals Board that denied the request for



reimbursement of travel and telephone expenses and comp time credited to her personal leave time; that awarded her reimbursement of personal funds expended on medical insurance while denying her the estimate value of the benefit of having medical insurance; that denied her reimbursement for continuing education expenses, attorney fees and related costs; that denied her reimbursement of additional federal income taxes; and that denied her request for an independent firm to calculate monies owed to her. R. at Vol. I, 61-81. The Circuit Court denied McNeel's request to clarify the language of the Hearing Officer of the EAB concerning her back pay and promotion but remanded the issue to the EAB to clarify what promotion and advancements she should be awarded, if any, by job title, and the specific pay rate from which her back pay should be calculated. *Id.* at 61-81. The Circuit Court reversed the decision that denied McNeel pre-judgment interest and remanded for the purpose of determining whether pre-judgment should be awarded and if so, at what rate. *Id.* The Circuit Court reversed the decision that denied McNeel post-judgment interest and remanded for a determination of the post-interest that McNeel was to receive on her award of back pay and benefits. *Id.* Also, the Circuit Court reversed the decision of the Employee Appeals Board that denied McNeel to have MDHS report her back pay to the Social Security Administration. *Id.*

On December 5, 2007, MDHS filed its Notice of Appeal with this Court. R. at Vol. I, 82-86. Likewise, McNeel filed her Notice of Cross-Appeal on December 17, 2007. R. at Vol. I, 91-94.

At this time, as the Appellant, MDHS is appealing to this Court the decision of the Circuit Court of Winston County, Mississippi, that affirmed the decision to award McNeel reimbursement of her personal funds for medical expenses; that reversed and remanded the decision on pre-judgment interest; that reversed and remanded the decision on post-judgment interest; and reversed the decision that denied McNeel's request for MDHS to report her back pay to the Social Security Administration.

**D. Standard of Review:**

In *Walters v. Mississippi Department of Economic and Community Development*, 768 So. 2d 893, 895 (Miss. 2000), the Supreme Court of Mississippi states that the standard of review for a Circuit Court is to review a decision of an administrative agency for substantial evidence supporting the agency's finding, and the scope of review is limited to the findings of the agency. However, the Court may reverse if after examining the record as a whole reveals that the order of the agency was based on a mere scintilla of evidence and is against the overwhelming weight of credible evidence. *Walters*, 768 So. 2d at 895.

### SUMMARY OF ARGUMENT

To begin with, the Circuit Court of Winston County erred in affirming the decision of the Full Board of the EAB to award McNeel reimbursement of personal funds for medical expenses. According to the Administrative Rules of the EAB, awarding personal funds used for medical expenses is a relief that cannot be granted. The EAB does not have the authority to award this as stated in *Mississippi Department of Human Services v. Bonnie Richmond and Mississippi Employee Appeals Board*, No. CIV.A. 251-01-001277, \*1 (Hinds County Cir. Ct. 1st Jud. Dist. Apr. 24, 2003). Also, the Supreme Court has said that an award of attorney fees is an enumerated power that the EAB does not possess. *Miss. Empl. Sec. Commn. v. Culberson*, 832 So.2d 519, 531 (Miss. 2002). Therefore, the EAB does not have the authority to award reimbursement of personal funds that McNeel used for her medical expenses.

Secondly, the Circuit Court erred in reversing and remanding the decision of the Full Board of the EAB on the issue of interest concerning pre-judgment interest and post-judgment interest. McNeel appealed her termination to the EAB that was appealed to the Supreme Court, who affirmed the decision of the Hearing Officer to reinstate McNeel to her previous position and award her back pay and benefits. *McNeel*, 869 So. 2d at 1013. This decision did not include any type of interest, whether pre-judgment interest or post-judgment interest. By not including any type of interest to her back pay, MDHS properly followed the decision of the Supreme Court. An award of interest is not an enumerated power that has been given to the EAB. It is also not a relief that is listed in the Administrative Rules of the EAB. Ergo, the EAB does not have the authority to award any type of interest to an appealing employee.

Finally, the Circuit Court erred in reversing the decision of the Full Board of the EAB for

McNeel's back pay to be reported to the Social Security Administration. MDHS acted according to the rules and regulation of the Statewide Personnel and Human Resources System, also known as SPAHRS, when calculating McNeel's Social Security taxes. Under the EAB Administrative Rules, Rule 24(B) states "... [i]f the responding agency has acted in accordance with the published policies, rules and regulations of the State Personnel Board,... the [EAB] shall not alter the action taken by the agency, including, but not limited to the compensation paid to the employee." Miss. Empl. App. Bd. Admin. R. 24(B). Therefore, McNeel should not be reimbursed for Social Security Earnings during the years of 2000 to 2003. MDHS should not have to report back wages to the Social Security Administration.

## ARGUMENT OF THE APPELLANT

### **I. The Circuit Court erred in affirming the decision of the Hearing Officer to award McNeel reimbursement of personal funds for medical expenses.**

In the decision of the Hearing Officer, McNeel was awarded reimbursement of personal funds for medical expenses during her termination. R. at Vol. III, 247-248. The decision stated that this should have been included in her award of back pay and benefits from the previous Order affirmed by the Supreme Court of Mississippi. *Id.* at 247-248. The Full Board of the EAB affirmed this decision. R. at Vol. I, 6. The Circuit Court of the First Judicial District of Hinds County, also, affirmed the decision of the Hearing Officer on this issue. R. at Vol. I, 61-81. However in *Mississippi Department of Human Services v. Bonnie Richmond and Mississippi Employee Appeals Board*, No. CIV.A. 251-01-001277, \*1 (Hinds County Cir. Ct. 1st Jud. Dist. Apr. 24, 2003), the Court ruled that out of pocket expenses for obtaining medical insurance is beyond the power of the EAB to award and is not authorized to do so.

Under Rule 24(A) of the EAB Administrative Rules, "The [EAB] may reinstate a prevailing party into employment with his or her responding agency and restore all his or her employee rights and benefits including back pay, medical leave and personal leave." Miss. Empl. App. Bd. Admin. R. 24(A). According to Rule 24(A), reimbursement of out of pocket expenses for medical insurance is not a relief that can be granted by the EAB. *Id.* Hence, MDHS did not include out of pocket expenses on medical insurance in the back pay given to McNeel.

In *Mississippi Employment Security Commission*, the Court ruled that the EAB Board was not authorized to award attorney costs. *Miss. Empl. Sec. Commn.*, 832 So.2d at 531. Attorney costs can be considered out of pocket expenses. Since, the EAB does not have the authority to award the out of pocket expenses of attorney costs then it does not have the authority to award out of pocket

expenses of medical insurance. By referring to the relief granted in Rule 24(A), MDHS was correct in not including McNeel's out of pocket expenses on her medical insurance. Miss. Empl. App. Bd. Admin. R. 24(A). Therefore, the Circuit Court erred in affirming the decision of the Full Board to award McNeel reimbursement of personal funds for medical expenses because the EAB is not authorized to award such out of pocket expenses. The Circuit Court's decision to award reimbursement of personal funds that McNeel used for her medical expenses should be reversed.

**II. The Circuit Court erred in reversing and remanding the decision of the Full Board of the Employee Appeals Board on the issue of interest concerning pre-judgment interest and post-judgment interest.**

The Circuit Court erred by reversing and remanding the decision of the Full Board of the EAB concerning pre-judgment interest for the Employee Appeals Board to re-evaluate. Also, the Circuit Court erred by reversing, remanding and awarding post-judgment interest to McNeel.

The Supreme Court of Mississippi affirmed the decision of the Hearing Officer for MDHS to reinstate McNeel to her previous position and awarded her back pay and benefits. *Miss. Dept. of Human Serv. v. McNeel*, 869 So. 2d 1013 (Miss. 2004). In compliance with the Order, MDHS sent a check in the amount of ninety-two thousand two hundred fifty-one and 39/100 dollars (\$92,251.39) for back pay. T. at 114-115. MDHS calculated McNeel's back pay, from the time she was terminated to the ruling of the Supreme Court of Mississippi, to equal the amount of one hundred forty-seven thousand two hundred ninety-four and 10/100 dollars (\$147,294.10). *Id.* at 114-115. After taxes, social security, retirement and medicare were deducted the amount was ninety-two thousand two hundred fifty-one and 39/100 dollars (\$92,251.39). *Id.* MDHS did not include any interest including pre-judgment interest or post-judgment interest because it was not stated in the Order from the Supreme Court or by the original ruling of the Hearing Officer.

McNeel contends that she should have received interest in her back pay. The Hearing Officer

and the Full Board of the Employee Appeals Board ruled that the EAB does not have the authority to award interest. R. at Vol. III, 247-248. The Circuit Court found that the EAB could award pre-judgment interest and post-judgment interest. R. at Vol. I, 61-81. However, in *Mississippi Employment Security Commission vs. Culbertson*, 832 So.2d 519, 532 (Miss. 2002), the Court ruled "... the EAB has only limited authority under Mississippi Code Annotated § 25-9-131 (2004), and that the awarding of attorneys' fees is not one of its enumerated powers." Likewise, under Mississippi Code, Annotated, § 25-9-131, the legislature did not expressly give the EAB the right to award pre-judgment interest or post-judgment interest. It is not an enumerated power. The Circuit Court contends that since a judge can award pre-judgment interest and post-judgment interest then the Hearing Officer has this right too. R. at Vol. I, 71-75. On the contrary, the Hearing Officer is bound to the rights given to the EAB under § 25-9-131. Furthermore, Rule 24(A) of the EAB Administrative Rules lists that an employee who is reinstated to employment may receive all back pay and benefits to them. Miss. Empl. App. Bd. Admin. R. 24(A). Interest is not listed as a relief that may be granted to the employee nor is it a benefit. The Circuit Court ruled that this is not an exhaustive list, however, this is what is listed under the Administrative Rule Book for the EAB to follow. R. at Vol. I, 71-75. In order to do its job, the EAB uses the Administrative Rules of the EAB to make its decisions. If it needs to consider beyond this, as the Circuit Court suggests, then that needs to be listed or decided by the legislature. Thus, according to the list of relief that can be granted, interest is not part of back pay or a benefit automatically given to an employee. If it was the intent for interest to be paid to McNeel in her back pay, it would have been ordered by the Supreme Court when it reinstated her. Also, if the legislature wanted the EAB to consider interest it would have listed this as one the powers of the EAB. MDHS properly followed the Order by not including any type of interest in her back pay.

In addition, Rule 24(B) states that the Employees Appeal Board may not alter compensation paid to an employee if the agency followed rules and regulations of the State Personnel Board. Miss. Empl. App. Bd. Admin. R. 24(B). MDHS followed the regulations that were required of it when calculating McNeel's back pay. T. at 114-115. The Hearing Officer and Full Board of the EAB were correct that the EAB does not have the power to award interest according to § 25-9-131 and the Administrative Rules of the EAB. In *Walters*, the Supreme Court of Mississippi states that the standard of review for a Circuit Court is to review a decision of an administrative agency for substantial evidence supporting the agency's finding, and the scope of review is limited to the findings of the agency. *Walters*, 768 So. 2d at 895. Substantial evidence proved that MDHS properly followed the Order when calculating McNeel's back pay when it did not include any type of interest. The Circuit Court erred in reversing the decision of the Full Board of the EAB that included remanding pre-judgment interest and post-judgment interest.

**III. The Circuit Court erred in reversing the decision of the Full Board of the Employee Appeals Board for McNeel's back pay to be reported to the Social Security Administration.**

The Circuit Court erred in reversing the decision of the Full Board of the EAB for McNeel's back pay to be reported to the Social Security Administration. McNeel argues that she should be compensated for social security earnings for the years of 2000 through 2003. Thus, she is requesting MDHS to report back wages to the Social Security Administration.

When McNeel was reinstated by the Supreme Court of Mississippi, MDHS calculated her back pay to be from the time she was terminated to when she was reinstated by the Supreme Court plus any mandated pay raises realized by the legislature minus mandatory reductions of retirement and social security taxes. T. at 114-115. MDHS testified that it calculated McNeel's social security taxes by using the SPAHRS program which is required by every state agency in the state of



Mississippi. T. at 72-73. By using this system, MDHS had to take Social Security taxes from the lump sum given to McNeel when she was reinstated by the Supreme Court on April 29, 2004. *Id.* at 72-73. The cap for the amount of taxes that could be paid in the year 2004 was \$87,900 so MDHS did not take more than this amount out of her taxes. *Id.* McNeel argues that this hurts her Social Security because it was not taken out for each year for the years of 2000 to 2003. MDHS can only take out taxes for the year that the employee received payment which was in 2004. *Id.* According to 26 United States Code, Annotated, § 3121, an employee is taxed by the year that she may receive payment from her employer. The year that McNeel received payment from MDHS was in 2004.

As mentioned previously, an employee may be reinstated by the Employee Appeals Board and restored all of her rights and benefits which include back pay, medical leave and personal leave. Miss. Empl. App. Bd. Admin. R. 24(A). Social Security taxes are taxes that are mandated by the Federal and State Government. It is not a benefit.

Also, the EAB Administrative Rules state under Rule 24(B) "... [i]f the responding agency has acted in accordance with the published policies, rules and regulations of the State Personnel Board,.... the [EAB] shall not alter the action taken by the agency, including, but not limited to the compensation paid to the employee." Miss. Empl. App. Bd. Admin. R. 24(B). MDHS acted according to the rules and regulation of the SPAHRS program when calculating McNeel's Social Security taxes. In *Walters*, the Supreme Court of Mississippi states that the standard of review for a Circuit Court is to review a decision of an administrative agency for substantial evidence supporting the agency's finding, and the scope of review is limited to the findings of the agency. *Walters*, 768 So. 2d at 895. Therefore, McNeel should not be reimbursed for Social Security Earnings during the years of 2000 to 2003. MDHS should not have to report back wages to the Social Security Administration. The Circuit Court erred in reversing the decision of the Full Board

of the EAB for McNeel's back pay to be reported to the Social Security Administration.

### **CONCLUSION**

In conclusion, the Circuit Court of Winston County erred in affirming the decision of the Full Board of the EAB to award McNeel reimbursement of personal funds for medical expenses. According to the Administrative Rules of the EAB, personal funds used for medical expenses is a relief that cannot be granted. The Supreme Court has said that an award of attorney fees is an enumerated power that the EAB does not possess. *Miss. Empl. Sec. Commn.*, 832 So.2d at 531. Therefore, the EAB does not have the authority to award reimbursement of personal funds that McNeel used for her medical expenses. The Circuit Court's decision to award reimbursement of personal funds that McNeel used for her medical expenses should be reversed.

Secondly, the Circuit Court erred in reversing and remanding the decision of the Full Board of the EAB on the issue of interest concerning pre-judgment interest and post-judgment interest. McNeel appealed her termination to the EAB that was appealed to the Supreme Court, who affirmed the decision of the Hearing Officer to reinstate McNeel to her previous position and award her back pay and benefits. *McNeel*, 869 So. 2d at 1013. This decision did not include any type of interest, whether pre-judgment interest or post-judgment interest. By not including any type of interest to her back pay, MDHS properly followed the decision of the Supreme Court. An award of interest is not an enumerated power that has been given to the EAB. It is also not a relief that is listed in the Administrative Rules of the EAB. Ergo, the EAB does not have the authority to award any type of interest to an appealing employee. The decision of the Circuit Court should be reversed.

Finally, the Circuit Court erred in reversing the decision of the Full Board of the EAB for McNeel's back pay to be reported to the Social Security Administration. MDHS acted according to the rules and regulation of the SPAHRS program when calculating McNeel's Social Security

taxes. Therefore, McNeel should not be reimbursed for Social Security Earnings during the years of 2000 to 2003. MDHS should not have to report back wages to the Social Security Administration. The decision of the Circuit Court should be reversed.

RESPECTFULLY SUBMITTED, this 25<sup>th</sup> day of April, 2008.

MISSISSIPPI DEPARTMENT OF  
HUMAN SERVICES

BY: Kathy Caldwell  
Kathy Caldwell, Attorney for MDHS

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**CERTIFICATE OF SERVICE**

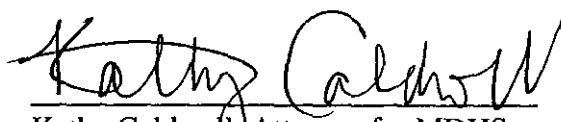
I, Kathy Caldwell, Attorney for the Appellee, Mississippi Department of Human Services, hereby certify that I have this date mailed a true and correct copy of the foregoing *Brief of the Appellant/Cross-Appellee* to the following at their usual business address:

Honorable David Bane  
Attorney for Appellee/Cross-Appellant, Carolyn K. McNeel  
Post Office Box 833  
Louisville, Mississippi 39339

Honorable Judge Joseph H. Loper, Jr.  
Winston County Circuit Court  
Post Office Box 616  
Ackerman, Mississippi 39735

This the 25<sup>th</sup> day of April, 2008.

Respectfully Submitted,

  
Kathy Caldwell, Attorney for MDHS

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