IN THE SUPREME COURT OF MISSISSIPPI

CHARLES P. BAKER — APPELLANT

VS — CAUSE NO.: 2007-WC-00305

IGA SUPER VALU FOOD STORE AND
MISSISSIPPI INSURANCE GUARANTEE ASSOCIATION — APPELLEES

BRIEF OF APPELLANT

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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 state of Mississippi may evaluate possible disqualification or recusal, to wit:

1. Charles P. Baker
2. IGA Super Valu Food Store
3. Mississippi Insurance Guaranty Association
4. David M. Sessums and Varner, Paker & Sessums PA
5. Andrew D. Sweat and Wise, Carter, Child & Carraway, PA

Respectfully Submitted,
Charles P. Baker

By:_____
DAVID M. SESSUMS
MSB #[redacted]

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STATEMENT OF ISSUES

1. The voluntary payment of medical benefits by the employer and carrier until January 9th, 2004, tolled the statue of limitations:
2. The voluntary payment of medical benefits tolled the statute of limitations for payment of future medical benefits
3. That voluntary payment of medical benefits tolled the running of the statute of limitations at least as same relates solely to the payment of medical benefits.
4. That the employer and carrier are estopped to assert the running of the statute of limitations.
5. That Pat Baker since the incident of January 9, 2002 has performed lighter or lower rated work for the same or higher pay creating an unrebutted presumption that at least part of his wages should be found to be in lieu of compensation thereby tolling the statute of limitations.
6. Alternatively that Pat Baker has not yet suffered a "disability" and/or "injury" as those terms are defined under the Workers Compensation statutes and therefore no statute of limitations has yet begin to run.

STATEMENT OF THE CASE

Pat Baker was hurt on the job on January 9, 2002. Medical benefits were paid by the employer and carrier until January 9, 2004 at which time same were terminated.

After he was hurt on January 9, 2002, Pat Baker did not miss any work at IGA Super Valu Food Store in Vicksburg, Mississippi. Pat Baker was able to continue work because his doctor prescribed daily doses of morphine.

After he was hurt at IGA Pat Baker's ability to perform his job duties diminished and he could not lift as much weight as he could lift previously and he self restricted his job activities accordingly.

Pat Baker continued to receive the same wages as before he was hurt and at the time of hearing was earning more than at the time he was hurt.

On January 9, 2004, Mississippi Insurance Guaranty Association, as successor to the defunct Legion Insurance Company, terminated payment of medical benefits claiming that the two year statute of limitations had run because no claim for disability compensation had been filed with the Commission by Pat Baker during the two years following January 9, 2002.

On March 25th, 2004 Pat Baker filed his petition to controvert with the Commission.

On March 16th, 2005 the employer presented a memorandum to Pat Baker, requesting Pat Baker review and sign same which memo stated that IGA Super Valu was alarmed to learn that he was on strong prescription medication and for this reason IGA

Super Valu was concerned for his safety and that of other employees and wanted Mr. Baker to sign the statement IGA also requested a written statement from Mr. Baker's doctor clarifying his abilities and stating that until such statement was received that IGA Super Valu would take him off of the band saw and other equipment that could pose a risk or injury to himself or others.

On February 7, 2006 the Administrative Law Judge entered her opinion finding that Pat Baker's claim for 1) disability benefits and 2) future medical benefits and medication benefits was bared by the two year statute.

Pat Baker thereafter appealed the Administrative Law Judge's decision to the full Worker's Compensation Commission which on June 14, 2006 entered its order affirming the decision of the ALJ and Pat Baker thereafter perfected his appeal to this Court.

On February 13, 2007, the Circuit Court of Warren County affirmed the decision of the Workers Compensation Commission and the appeal was filed.

SUMMARY OF THE ARGUMENT

Prior to MIGA announcing that it had terminated benefits as of January 9th, 2004, claiming that the statute of limitations had run, Pat Baker had no reason whatsoever to file a petition to controvert with the Mississippi Worker's Compensation Commission as there was nothing to controvert. His medical bills and mediation bills were being paid without question and without controversy. Such voluntary payment estopps MIGA from asserting the statute of limitations.

Also, voluntary payment of medical benefits tolls the two year statute of limitations, in toto, and at a minium the voluntary payment of benefits tolls the two year statute of limitations at least as same relates to payment of medical benefits.

It is undisputed in the record that Pat Baker is doing lighter work or what might be termed lower rated work at the same or higher pay than he was receiving at the time he was hurt and therefore at least part of his wages must be considered in lieu of compensation and compensation having been paid, the statute of limitations has been tolled.

Alternatively, since Pat Baker did not miss any work after his injury, albeit assisted by a daily intake of morphine, he has not suffered any "disability" or "injury" as that term is utilized and defined in the Mississippi Worker's Compensation law and the statue of limitations has not even begun to run.

ARGUMENT

FACTS

On January 9, 2002, Charles P. "Pat" Baker was performing his duties as meat department manager for Super Valu grocery store in Vicksburg, Mississippi , when he felt a sharp pain in the lower part of his back while he was lifting a box of beef off of a pallet. (T9-10)

He duly reported his injury to his assistant store manager, Sammie James, and went to the doctor the following day where he initially received treatment in the form of muscle relaxers with subsequent physical therapy for a few weeks. (T10)

Up until January, 2004, he was receiving medical benefits from the workers compensation carrier in the form of payment for doctor visits and medication.(T10-11)

He never received a disability check from either Legion Insurance Company or Mississippi Insurance Guaranty Association. (T11)

After his injury of January 9, 2002, he went back to work on January 10, 2002, and has not missed any work because of the injury. (T11)

However, after the injury of January 9, 2002, it is undisputed that he could not do the same things after the injury that he could do before the injury. (T11-12)

In March 2005, he was presented a document by a supervisor with Robert's Company (owner of Super Valu) and was asked to read and sign the document. After reading the document, Pat refused to sign same.(T-13) (Exhibit 9 in evidence)

Before January 9, 2004, there had been no statements or any indication of any nature to Pat by anybody representing the employer or the insurance company which led him to believe that they were going to stop paying his medical benefits. (T16)

There had been no problems with or questions about the payment of his medical benefits up to January 9, 2004. (T16) Pat believed that they were going to continue to pay those same benefits after January

9, 2004. (T16)

Pat was clear that nobody hinted, intimated, or in any way lead him to believe they were going to cut off his medical benefits after January 9, 2004. (T16)

Since and because of the injury, Pat is on 30 milligrams of morphine four (4) times a day, which is prescribed for him by Dr. Giffin at the Mission Primary Care Clinic in Vicksburg. (T17) He was not on any kind of medication before the accident. (T17) Neither Dr. Giffin nor any other doctor has led him to believe that at some point in time in the future he will not need to take the morphine. (T18)

Everyone in the IGA store including his supervisor, Mr. Burgess, knew that Pat was taking morphine on a daily basis for his injury and so he could work. (T25)

Pat's morphine costs him roughly $400.00 a month. (T27)

LAW

Pat Baker admittedly hurt his back while working at the Super Value Food Store located in Vicksburg, Mississippi on January 9,2002.

The accident was immediately reported and after an initial delay the carrier, Legion Insurance (now defunct) started paying medical benefits. MIGA has taken over for Legion.

Pat Baker did not miss any work at Super Valu because of the admitted accident and continued working at Super Valu until the date of the hearing on January 19, 2006, and hopefully thereafter.

After his injury Pat Baker's ability to perform his job duties at Super Valu diminished and he thereafter could not lift as much weight as previously and normally required of his job and restricted his on the job physical activities accordingly. Nevertheless, he continued to receive the same wages as before and in fact was earning more at the time of the hearing than at the time of the accident. He must take morphine to continue to work.

Even though the accident was admittedly work related and the carrier had voluntarily paid medical benefits without the necessity of Pat Baker filing a petition to controvert, MIGA, as of January 9, 2004, ceased paying medical benefits claiming that the two (2) year statute of limitations had run because no claim for compensation had been made by Pat Baker during the two (2) year period following his accident. They are estopped from doing so.

It is the rule of law in Mississippi that estoppel may be asserted against an employer and its workers compensation carrier. McCrary v City of Biloxi, 757 So 2d, 978 (Miss 2000)

In Holbrook v Albright Mobile Homes Inc., 703 So 2d, 824 (Miss 1997) the Supreme Court held that an employer was estopped from claiming the running of the two (2) year statue of limitations because the employer had failed to timely file the statutorally required notice of injury.

Even more to the point, the Court in Service Electric Supply Company Inc., v Hazlehurst Lumber Company Inc., 2004-CA-02135-COA, citing Koval v Koval, 576 So. 2d, 134,137 (Miss 1991) held that the doctrine of estoppel is "a rule of justice which prevails over all other rules" and may, where applicable, "operate to cut off a right or privilege conferred by statute or even by the Constitution."

Pat Baker reasonably relied on the employer and carrier to continue to pay his medical benefits and they are estopped from ceasing to do so after two (2) years.

Once the carrier took the position that the two year statute had run Pat filed his Petition to Controvert with the Commission on March 25, 2004.

On March 16, 2005, after he had filed his petition to controvert the employer presented a memorandum to Pat Baker for his review and requested his signature which memo states, inter alia, that the employer was alarmed to learn that Pat Baker was and is on strong prescription medication (the undisputed facts at hearing are that he has been on morphine since the date of the injury continuing through the date of hearing and beyond) and because of this the employer was concerned for his safety and that of other employees and wanted a written statement from Mr. Baker's doctor advising that until such statement was received the employer would "take him off the band saw and any other market equipment that may pose risk of injury to him or others." The employer thereby created a diminished working capacity on the part of Mr. Baker as of March 16, 2005.

Pat Baker presented several alternative arguments to the Commission, as follows:

1. Because Pat Baker's accident has not disabled him from employment he has not yet suffered a compensable injury (ie a "disability") within the meaning of the act and the two (2) year statute has not yet begum to run, even at this date;

2. Because of the nature of his injury (no doctor has prescribed anything other than medication) that nothing has yet manifested itself which would place Pat Baker on notice of any probable compensable character of his injury;

3. That voluntary payment of medical benefits tolls the two (2) year statute of limitations, in toto;

4. That payment of medical benefits at a minimum tolls the two (2) year statute of limitations as same relates to payment of medical benefits (as opposed to weekly monetary compensation);

5. That because Pat Baker is doing lighter or lower rated work at the same or higher pay that at least part of his wages must be considered in lieu of compensation and therefore compensation has been paid.

Beyond the estoppal issue the Court should consider and address Graeber Brothers, Inc. v. Taylor, 115 So. 2d 735 (Miss 1959), a case which has never been overruled and is still binding law in Mississippi.

The claimant in Graeber Brothers sustained an injury on September 13, 1956, and medical benefits were paid but when the employer and carrier contended that the payment of medical benefits was not to be construed as compensation, the Mississippi Supreme Court, citing cases from Alabama, Arkansas, Oklahoma, Colorado, California, Kansas, Pennsylvania, Wisconsin, Georgia, Minnesota, Rhode Island, Idaho, Massachusetts, Missouri, Montana and New York, stated:

> "The wording of the Mississippi statute, contrary to the contention of the appellates, does not define compensation as only the money payable to an injured worker or his dependants, § 6998-02 (10) reads: "Compensation means the money allowance payable to an injured worker or his dependants as provided for in this act, and includes funeral benefits provided therein"
>
> For the reasons given above we are of the opinion that **the payment**

of medical expenses is a part of and is equivalent to the payment of compensation." 115 So. 2d at 740.

Current Mississippi statute reads the same as it did at the time Graeber Brothers, supra, was decided and said opinion is still stare decisis and still controlling in the present matter before the Court. Medical benefits are compensation. The carrier paid medical benefits. The carrier paid compensation and the statute was tolled.

Payment of medical benefits completely tolls the two (2) year statute not only as to compensation but also specifically as to medical benefits which were previously voluntarily paid by the carrier up to January 9, 2004.

In discussing similar situations the author in Larsons Worker's Compensation Law , states:

> "The awkwardness of the present question stems from the dual origins of the rule, based as it is both on the admission of liability implied from payment of compensation, and on the reasonableness of claimant's conduct in refraining from filing a claim as long as he is receiving compensation.
>
> * * *
>
> But if the matter is seen from the employee's point of view, the dilemma is even worse. Suppose the employer voluntarily pays wages for eleven (11) months, and then gets tired of paying a disabled man and stops the wages. The claimant may be in a position of having had no occasion to make claim sooner, and yet of having an almost impossibly short time left of his claim period in which to discover what has happened and assert his formal rights. A theoretically correct rule - which might be rather difficult to apply with perfect accuracy - would be this: payment of wages tolls the statute if it was intended to be made on account of compensation liability, **or** if the employer reasonably believed it was so intended." Larson §78.43 (l) at page 15-288

In this matter Pat Baker continued to work after his accident because he is taking morphine four (4) times a day. Pat Baker's physical abilities have diminished and he is doing lighter work (ie: not lifting and moving the large items as he used to move before the injury) and this diminished working capacity has been recognized by the employer in its memorandum of March 16, 2005

(Exhibit "9" in evidence).

Discussing a similar situation the author in Larson, supra, states:

> "One of the commonest questions bearing on the reasonableness of what both the employer and employee believed about the nature of the payments as being in lieu of compensation is whether the employee actually earned his wages by performing full services after the injury. If he did so, the presumption is that the wages are being paid for value received, and not in lieu of compensation. But if the employee has been given lighter or lower-rated work at the same or higher pay, it is presumed that at least part of the payment must be intended by the employer to be in lieu of compensation, and that the employee must be aware of this." Larson, supra at §78-43-1, pages 15-291 through 15-294.

In this matter Pat Baker's uncontradicted and unrebutted testimony is that he performs lighter or lower rated work and yet receives the same or higher pay and this creates a presumption that at least part of the payment was intended by the employer to be in lieu of compensation. This testimony of Pat Baker is uncontradicted as no witnesses testified on behalf of the employer and carrier at the hearing of this matter on January 19, 2006.

In Tabor Motor Company v. Garrard, 233 So. 2d 811 (Miss 1970) Sam Garrard had some hot slag fall in his ear on October 7, 1964, and three (3) days later Garrard returned to work at Tabor Motors and worked regularly until September 15, 1965. Garrard did not learn the true compensable nature of his October 7, 1964, injury until well past two (2) years beyond the date of his injury. In that case the carrier had provided Garrard with medical benefits and it was clear that he received no weekly compensation benefits. (Same as in this case)

Holding under the facts of said case that Garrard's claim was not barred by the two (2) year statute the Supreme Court stated:

> "Under these circumstances, we do not think that the time for a claim to be filed with the Commission began to run until Garrard, as a reasonable man, should have recognized the nature, seriousness, and probable compensable character of his injury.

* * *

> The most troublesome problem in the entire area of notice and claim is that of the apparently trivial accident which matures into **disabling** injury after the claim period has expired. A workman is struck in the eye by a metal chip, but both he and the company doctors dismiss the accident as a petty one, and of course no claim is made, since there is no present injury or disability. Eighteen (18) months later a cataract develops as a result of the accident. If the statute bars claims filed more than one year after the "accident," the workman can never collect for the injury no matter how diligent he is: he can not claim during the year because no compensable injury exists; he can not claim after the year because the statute runs from the accident." 233 So. 2d at 814 -815

In this case Pat Baker was able to work after the accident and this being the case he could not know the probable compensable character of his injury as same had not caused any "**disability**" to him or any inability to perform his job. In other words, Pat Baker could not claim what did not exist, ie: an injury which disabled him from working and earning wages. However, suppose Pat Baker's condition worsens, much like the cataract example above, to the point where the admitted on the job injury worsens to a point where he is required to have surgery and suffers a physical permanent partial disability. Until this actually occurs, if ever, Pat has suffered no "**disability**" within the meaning of the worker's compensation law, yet if the worsening condition, surgery and permanent partial disability occurs over two (2) years after the actual date of the accident the employer and carrier contend that it is barred by the two (2) year statute.

Continuing its discussion the Court in Tabor Motor Company, supra stated:

> "Twenty-two states date the claim period from the "accident;" most of the rest date it from the "injury." Under the "injury" type of statute, there is now almost complete judicial agreement that the claim period runs from the time compensable injury becomes apparent. A demand six years after the accident for a cataract which took that long to manifest itself has been held timely under such a statute (Larson, Worker's Compensation Law §78.42 (a) at 262-263 (1969))" 233 So. 2d at 815

Discussing what is meant by the term **"disability"** and the term **"injury"** the Tabor court explained:

> "Compensation shall be payable for **disability** or death of an employee from injury . . . arising out of and in the course of employment . . .
>
> . . . compensation is payable only for "**disability**" resulting from "injury" which is work connected, the definition of "**disability**" added to § 2(9) of the act in 1960 is necessarily relevant:
>
> "**Disability**" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury and the same or other employment . . ."
>
> Hence the word **"injury"** in §12, the two-year limitation statute, refers to a compensable injury, in which incapacity and its extent can reasonably ascertained by medical findings." 233 So. 2d at 815

Thus, it is not the date of January 9, 2002, the date Pat hurt his back at Super Value but the date any "**disability**" manifests itself that the two (2) year statute begins to run. In this case no "**disability**" has yet manifested itself as Pat has continued to work at the store. Until such time as a "**disability**" caused by the accident of January 9, 2002, manifests itself, the two (2) year statute does not even begin to run.

Holding that it is for the Commission to determine as an issue of fact when the statute begins to run the Tabor Motor Company court held that:

> "The time for filing a compensation claim under the two-year statute commences to run when it becomes reasonably discoverable that claimant has sustained a compensable injury and disability. The claim period runs from the time compensable injury becomes reasonably apparent." 233 So. 2d at 817

Pat Baker hurt his back on the job on January 9, 2002. He has continued to work at this job and the accident of January 9, 2002, has not yet **disabled** him from doing so. Until such times this occurs, if ever, he has suffered "no **disability**" and the two (2) year statute does not begin to run.

In Struthers Wells-Gulfport, Inc. v. Bradford, 304 So. 2d 645 (Miss. 1974) the claimant was

bitten by an insect while at work on December 2, 1968, and was examined by a physician. Eventually the claimant suffered recurrent medical problems and the employer and carrier paid all medical bills incurred before June 1970. In December 1971, over three years after the date of the bite, the claimant filed a Petition to Controvert when the carrier refused to pay any further medical bills. In Struthers, no weekly benefits for time lost from work were paid by the carrier because the claimant never missed enough time to meet the five day waiting period and when she was off from work her employer paid her her normal salary.

The Supreme Court in Bradford held that it was not feasible for the claimant to know on December 19, 1968, that an insect bite, which was not compensable to the claimant in December 1968, would later develop into a **disabling** injury and held that the statute of limitations did not begin to run until it became apparent that a compensable injury had been sustained.

The Struthers court explained:

> "The word **"injury"** in the two-year statute refers to a compensable injury from which incapacity and its extent can reasonably be ascertained by medical evidence. Thus, Mrs. Bradford had no compensable injury resulting from the spider bite until it came reasonably apparent that she had a **disability** therefrom." 304 So. 2d at 649

Just as in Struthers, supra, while Pat Baker hurt his back, injured it in the normal sense of the word, on January 9, 2002, he did not suffer an **"injury"** as that term is used in our worker's compensation statutes as it relates to the two-year statute of limitations, until he has a **"disability** arising therefrom." 304 So. 2d at 649.

Continuing, the Struthers court held:

> "Here, Mrs. Bradford knew or had reason to believe that she sustained a spider bite, but there is nothing in the record to indicate that she, as a reasonable person, should have recognized the nature, seriousness and probable compensable cause of the injury." 304 So. 2d at 649

In this case even were the Commission to have held that the two-year statute had not begin to run or was not tolled by the payment of medical benefits, what weekly monetary benefit would the Commission have awarded to Pat Baker at that time? The simple answer is "nothing" as the injury of January 9, 2002, has not yet "disabled" Pat Baker at this point and there is nothing to controvert. Pat Baker only filed his Petition to Controvert after the employer and carrier had asserted, in writing, that his claim was barred by the two (2) year statute. (See letter of carrier dated March 22, 2004, attached hereto and incorporated herein by reference as Exhibit "A")

In Pepsi Cola Bottling Company of Tupelo, Inc. v. Long, 362 So. 2d 182 (Miss. 1978) the claimant was working for Pepsi Cola as a route salesman when on March 9, 1972, he jumped into his truck and struck his head against the door. Although he reported the accident to his employer the claimant never received compensation benefits but his neck problems then continued to the point where the claimant filed a Petition to Controvert in December 1974, at which time the ALJ held his claim barred by the two year statute. On appeal the full Commission affirmed the decision of the ALJ which Commission decision was reversed by the Circuit Court which held that the claimant acted as a reasonable and prudent person given that the injury caused a progressive deterioration of a disc which was not disabling to the claimant until on or around September 8, 1974.

On appeal the Supreme Court affirmed the decision of the Circuit Court stating:

> "We agree with the trial court that claimant was not barred by the statute of limitation." 362 So. 2d at 184.

Citing Struthers Wells-Gulfport, Inc. and Tabor Motor Co. v. Garrard, supra with approval the Pepsi Cola court stated:

> "Presently, claimant was assured in 1972 there were no problems with his neck and it was not until 1974 that he learned of his true condition. In our opinion it was virtually impossible for him to know at the time of the apparently minor accident, then non compensable, that it would develop into a compensable injury. We are of the opinion that the claimant acted with reasonable care and diligence in

pursuing compensation for his injury and the Tabor and Struthers cases are applicable. Therefore, we affirm the trial court on this assignment of error." 362 So. 2d at 185.

SUMMARY

It is first the position of Pat baker that the two year statute has not even begun to run since he has not been **"disabled"** by the January 9, 2002, accident and therefore no **"injury"** within the meaning of the statute has yet occurred and until such point in time arrives, if ever, that the two year statute does not begin to run. Struthers, Tabor and Pepsi Cola, supra.

Secondly, even if the statute did begin to run on January 9, 2002, which Claimant denies, the voluntary payment of medical benefits tolls the running of the statute for both (1) payment of weekly compensation benefits and (2) specifically for medical benefits. Graeber Brothers, supra.

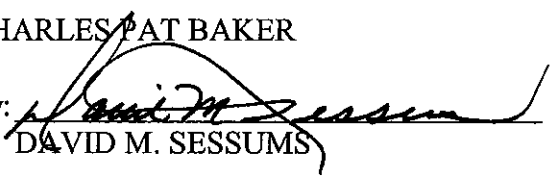
Further, because the Commission held that an "injury," as that term is defined in our worker's compensation statutes occurred on January 9, 2002, the voluntary payment of medical benefits at a minimum tolls the statute with regard to payment of medical benefits since Pat Baker reasonably relied on the continued voluntary payment of such benefits and refrained from filing a claim with the Commission until after two years from the accident date had expired. See Larson, supra. Under such facts the employer and carrier are estopped to discontinue medical benefits.

Alternatively, Pat Baker's testimony that he has been performing lighter and lower rated work since the time of the accident of January 9, 2002, (which testimony is uncontradicted by the employer and carrier) yet has continued to receive the same or higher wages, especially when combined with the memorandum of March 16, 2005, (Exhibit 9) where the employer and carrier admit a diminished working capacity, creates an unrebutted presumption that a portion of the wages paid since January 9, 2002, to Pat Baker was intended and should be held to be in lieu of compensation therefore tolling the two year statute.

For each and all of the reasons aforesaid this Court should enter its order revesrsing the decisions of the Commission and the Circuit Court and hold that the decisions of the Commission and the Circuit Court applied one or more erroneous legal standards and are also not supported by substantial evidence because without contraction, (1) Pat Baker hurt his back on January 9, 2002; (2) the employer and carrier voluntarily paid medical benefits until after January 9, 2004, at which time same were terminated; (3) Pat Baker has not yet suffered a "**disability**" and/or an "injury" as those terms are defined under the worker's compensation statutes and therefore the statute has not yet begun to run; (4) Pat Baker since the accident of January 9, 2002, has performed lighter or lower rated work for the same or higher pay creating an unrebutted presumption that at least part of his wages should be held to be in lieu of compensation thereby tolling the statute; (5) voluntary payment of medical benefits tolls the running of the statute at least as same relates solely to the payment of medical benefits; and (6) the employer and carrier are estopped to assert the statute of limitations.

Respectfully Submitted:

CHARLES PAT BAKER

By: 
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CERTIFICATE OF SERVICE

I, DAVID M. SESSUMS, do hereby certify that I have this date mailed, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief to the following:

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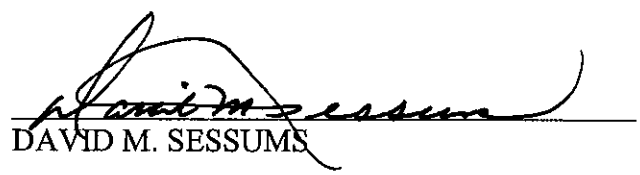
Hon. Frank G. Vollor
Circuit Court Judge
Warren County Courthouse
Vicksburg, MS 39180

THIS the 1st day of June, 2007.



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