

IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NELSON LEE

APPELLANT

VERSUS

CASE NO. 2008-CA-00795

McHANN RAILROAD SERVICES, INC.

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF MONROE COUNTY, MISSISSIPPI  
CAUSE NO. 06-110-PFM

**REPLY BRIEF OF APPELLANT,  
NELSON LEE**

W. HOWARD GUNN  
ATTORNEY AT LAW  
310 SOUTH HICKORY STREET  
PO BOX 157  
ABERDEEN MS 39730  
662-369-8533  
FAX: 662-369-9844  
[whgunn@bellsouth.net](mailto:whgunn@bellsouth.net)  
MSB NO. [REDACTED]

**ATTORNEY FOR APPELLANT**

CERTIFICATE OF INTERESTED PERSONS

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

1. Nelson Lee, Plaintiff/Appellant
2. W. Howard Gunn, Attorney for Plaintiff/Appellant
3. Kansas City Southern Railway Company, Defendant
4. Bill Lovett and Charles E. Ross, Attorneys for Defendant Kansas City Southern Railway Company
5. Edward J. Currie, Jr. and Joanna Gomez, Attorney for Defendant/Appellee, McHann Railroad Services, Inc. of MS

  
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W. HOWARD GUNN  
ATTORNEY FOR APPELLANT

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**REPLY BRIEF OF APPELLANT**

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I.

STATEMENT OF ISSUES

ISSUE

**The Statute of Limitations Provided for By Mississippi Code §15-1-49 Does Not Bar The Claim of Plaintiff Against Defendant McHann Where The Plaintiff Did Not Know The Identity of, or Have Knowledge of a Claim Against Defendant McHann, Until Defendant, Kansas City Southern Railroad Served Plaintiff With Core Discovery On December 4, 2007, After Case Removal**

II.

SUMMARY OF THE ARGUMENT

Mississippi Code §15-1-49 bars claims for which no other period of limitation is prescribed to three (3) years next after the cause of such action accrued. The novel question before this Court is should Plaintiff's claim be barred by Mississippi Code §15-1-49, from proceeding in claims against a tort feisor whose existence was unknown to him after "diligent search and inquiry". Plaintiff submits that a review of the facts in the case at bar

reveals the exhaustive extent of his futile efforts to ascertain the identity of any other tortfeasor other than KCS, who may have caused or contributed to his injuries.

On June, 2003, Plaintiff, Nelson Lee, was traveling on Highway 8 West in Monroe County, Mississippi, and as he began to cross railroad tracks which ran across said Highway 8, he struck a portion of a concrete block which was protruding upward and which had been utilized in the installation and maintenance of such tracks.

As a proximate result of striking the concrete block, the Plaintiff suffered both personal injury and property damage.

After retention of counsel, it was discovered that the Defendant, Kansas City Southern Railway Company, owned, installed, repaired and maintained such tracks. A copy of the incident report and the investigation of Plaintiff's counsel's investigator indicated the same (R.V.I, 75-77).

The Incident Report did not identify whatsoever any other party involved in the construction, repair, and maintenance of such railroad tracks (R.V.I,75).

On July 11, 2003, Plaintiff placed Defendant, Kansas City, on notice of Plaintiff's claim (R.V.I, 78).

On July 15, 2003, Plaintiff received from Jerry A. Eakin, Defendant's, KCS', general agent, a reply to his Notice of Claim. Again, said reply did not in any regard identify other parties involved in the maintenance and/or repair of said tracks (R.V.I, 80).

On July 29, 2003, Plaintiff's counsel, pursuant to Mr. Eakin's request, tendered to Defendant proof of ownership, photos, and estimate of repair pertaining to damages of Plaintiff's vehicle (R.V.I,83-90).

On August 1, 2003, Defendant, KCS, through its agent, Mr. Eakin, forwarded to Plaintiff a claim form to be completed by Plaintiff and returned. Again, no mention whatsoever was made of the involvement of any other party in the repair and maintenance of said tracks (R.V.I, 91).

On August 18, 2003, pursuant to request of Mr. Eakin, KCS' general agent, Plaintiff forwarded the completed claim form to Defendant, Kansas City (R.V.I, 95-96).

On September 10, 2003, via fax and mail, Plaintiff proposed to Defendant, KCS, an offer of settlement of the property damage claim of Plaintiff (RV.I, 105). Again, KCS did not allege or put Plaintiff on any notice of third-party liability,

On October 9, 2003, Defendant, KCS, by and through its agent, Mr. Eakin, called counsel for Plaintiff questioning the storage involved in the property damage claim and requesting a recorded statement of Plaintiff (R.V.I, 107). Again, nothing was said about other parties having involvement in the maintenance and/or repair of said tracks.

Beginning on the date of accident and continuing, Plaintiff followed an extensive and lengthy treatment regiment and, hence, could not make demand for personal injury settlement upon Defendant, Kansas City, as Plaintiff had not reached MMI.

After failing in numerous settlement discussions with Defendant, Kansas City, by and through its agent, Mr. Eakin, of Plaintiff's property damage claim, and Plaintiff having not yet reached maximum medical recovery, Plaintiff filed suit in this cause on April 13, 2006 (R.V.I, 108-110).

After being served with process, Defendant, Kansas City, filed its Answer herein with numerous affirmative defenses.

In its pre-core disclosures, following removal of the case to the United States District Court for the Northern District of Mississippi, filed herein, Defendant, Kansas City, for the first time, identified in documents received by counsel for Plaintiff on December 4, 2006, Defendant, McHann Railroad Services, Inc. of MS, as a party involved in the maintenance and repair of the railroad tracks of Defendant, Kansas City, in issue (R.V.I, 115-128).

On December 7, 2006, after being apprised on December 4, 2006, for the first time of the involvement of McHann Railroad Services, Inc. of MS in the maintenance and repair of said tracks, counsel for Plaintiff filed in the United States District Court, Case No. 1:06-CV-00233-MPM-JAD a Motion to File Amended Complaint to add McHann Railroad Services, Inc. of MS as a Defendant (R.V.I, 30-36). Such amendment was allowed by Order of the District Court Judge irrespective of the argument of KCS' that §15-1-49 would bar any claim against Defendant, McHann (R.V.I, 41-46).

On June 13, 2007, the United States District Court entered its Order granting Motion to Amend and remanding said case to the Circuit Court of Monroe County, MS (R.V.I, 20-23).

Plaintiff submits that Mississippi Code §15-1-49 does not bar Plaintiff's claim wherein the Plaintiff has acted diligently in seeking the discovery of potential liable parties in addition to KCS without success until such identity was divulged by KCS after the statute of limitations had run. In essence, the Plaintiff did not know and there were not facts or circumstances by which he "should have known" of the identity of McHann as a potential party to this litigation until December 4, 2006 (R.V.I, 115-128). Hence, pursuant to analogous case law of Mississippi regarding the discovery of latent injuries, the statute of



limitations of Mississippi Code §15-1-49 did not begin to run on Plaintiff's claim against McHann Railroad Services, Inc. until he knew or should have known of its identity as a participant in contributing to his injuries. Cases cited in Appellee's Brief are factually distinguishable from the case at bar. An analysis of such cases reveals same and their inapplicability to the factual setting presented to this Court.

### III.

#### ARGUMENT

The Plaintiff's claim against McHann is not barred by Mississippi three-year statute of limitation, §15-1-49. Mississippi Code §15-1-49 provides:

(1) All actions for which no other period of limitation is prescribed shall be commenced within three(3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

The Appellee has cited only two (2) cases which may be remotely relevant to the case at bar. However, such cases, Natalie Santangelo v. James Green, 920 So.2d 521, No. 2004-CA-01523-COA, and Ralph Walker, Inc. v. Michael E. Gallagher, 926 So.2d 890, No. 2005-IA,00586-SCT, are factually distinguishable from the case at bar.

In Santangelo v. Green, 920 So.2d 521, the following factual synopsis is in order:

¶ 4. Santangelo's complaint alleged that she underwent surgery for a fractured hip on November 2, 2000, at Memorial HMA.

After the surgery, she was placed in post-operative care. On November 3, 2000, she was injected with the anti-nausea drug Phenergan. Santangelo was allergic to Phenergan and suffered an allergic reaction and cardiac difficulties which resulted in her transfer to the intensive care unit at St. Dominic's Hospital in Jackson. Santangelo's allergy to Phenergan had been noted on her medical chart and on a wristband which she was wearing at the time that she was injected with the drug. Santangelo alleged that the administration of Phenergan to her by unknown physicians or nurses constituted gross negligence or recklessness warranting compensatory and punitive damages. The complaint listed as defendants Memorial HMA, unknown and unnamed physicians John Does One and Two, and unknown and unnamed nurses Jane Does One, Two and Three.

¶ 5. On August 15, 2003, Santangelo moved to amend her complaint to name Dr. Green, Jr. and Nurse Riley as defendants. Santangelo averred that she had learned from Memorial HMA's discovery responses that Dr. Green, Jr. had ordered the administration of Phenergan to Santangelo and that Nurse Riley had carried out the order. On September 29, 2003, the court entered an agreed order allowing the amendment. Santangelo filed the amended complaint on October 31, 2003. The style of the amended complaint was identical to that of the original complaint except that, in addition to the previously listed defendants, the amended complaint also named Dr. Green, Jr. and Nurse Riley as defendants. All five John and Jane Doe defendants remained.

¶ 6. On November 20, 2003, Dr. Green, Jr. was served with a summons and complaint. On December 3, 2003, he filed a motion to dismiss Santangelo's claims against

him. Dr. Green, Jr. argued that Santangelo's claims were barred by the applicable statute of limitations. In a second motion to dismiss filed on February 25, 2004, Dr. Green, Jr. asserted that the amendment was time-barred because it did not relate back to the date of the filing of the original complaint, under Mississippi Rule of Civil Procedure 9(h) or under Rule 15(c). In a response to the motion, Santangelo maintained that she had intended to substitute Dr. Green, Jr.'s name for John Doe Number One, but had inadvertently failed to delete John Doe Number One when she drafted the amended complaint.

Santangelo v. Green, ¶¶ 4 - 6

The court in upholding the trial court's dismissal held that Santangelo's complaint was barred by the two-year statute of limitation because, pursuant to the Mississippi Rules of Civil Procedure 9(h), Santangelo's amendment was not proper because the amended complaint failed to replace a John Doe defendant with Dr. Green, Jr. See Rule 9(h) and 15(c):

¶ 11. Rule 9(h) provides:

Fictitious Parties. When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party.

¶ 12. Rule 15(c)(2) prescribes the effect of a substitution under Rule 9(h): "[a]n amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original

pleading.” Thus, a proper substitution of a fictitious defendant with the defendant’s true name will relate back to the date of the original complaint. “The purpose of Rule 9(h) is to provide a mechanism to bring in responsible parties, known, but unidentified, who can only be ascertained through the use of judicial mechanisms such as discovery.” *Doe v. Mississippi Blood Services, Inc.*, 704 So.2d 1016, 1019 (¶ 14)(Miss. 1997).

¶ 13. Dr. Green, Jr. contends that the amendment was not a proper Rule 9(h) substitution, but instead constituted a Rule 15(c) change of the party against whom Santangelo’s claim was asserted. Rule 15(c) provides:

Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, with the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party’s defense on the merits, and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the

action would have been brought against the party. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

Santangelo v. Green, ¶¶ 11 - 13

More important to the case at bar is the finding of lack of diligence on the part of

Santangelo in ascertaining the identity of the potential defendant, Dr. Green, Jr.:

¶ 18. The lower court found that Santangelo had not made a reasonably diligent inquiry into the identity of Dr. Green, Jr. as the physician who authorized the administration of Phenergan, and that Santangelo could have identified Dr. Green, Jr. as the culpable physician from the medical records had she exercised due diligence. The court found that Santangelo had failed to show that she had inquired into Dr. Green, Jr.'s identity before the expiration of the limitations period. The court found that Santangelo could have ascertained that Dr. Green, Jr. as the culpable physician because the medical records clearly disclosed that Dr. Green, Jr. had admitted Santangelo to the hospital, performed the surgery, and released her to St. Dominic's Hospital. Further, the medical records contained a document entitled, "Drs. Green and Green, Jr., Post-Op Orders," which had the post-operative order for Phenergan. The court found that this document bore Dr. Green, Jr.'s signature.

¶ 19. On appeal, Santangelo argues that, in finding that the signature on the post-operative order was that of Dr. Green, Jr. the

lower court erroneously acted as a "handwriting expert." Santangelo contends that the court should have accepted the opinion of Nurse Zepponi that Dr. Green Jr.'s signature could not have been positively identified from the medical records. Santangelo argues that Nurse Zepponi's addiaviat (sp) stands for the proposition that Dr. Green Jr.'s identity could only have been ascertained through discovery.

¶ 20. Regardless of whether or not Santangelo could have identified Dr. Green, Jr. outside of formal discovery procedures. Santangelo was required to exercise due diligence to discover Dr. Green Jr.'s identity within the limitations period in order to substitute Dr. Green, Jr. under Rule 9(h). *Doe*, 704 So.2d at 1019(¶ 12). Thus, the initial question before this Court is not whether Santangelo could have discovered Dr. Green, Jr.'s identity had due diligence been exercised, but whether Santangelo actually exercised due diligence. *Id.* As observed by the lower court, Santangelo did not show that anyone had reviewed her medical records during the limitations period to determine who authorized or administered the Phenergan injection. Nurse Zepponi's affidavit was executed after the expiration of the limitations period and did not state when Nurse Zepponi reviewed the records. Consequently, there was no evidence to support a finding that, before the running of the statute of limitations, there was no evidence to support a finding that, before the running of the statute of limitations, Santangelo made a reasonable diligent effort to ascertain the identity of the culpable physician.

¶ 21. We further find that, had Santangelo exercised reasonable diligence, she could have ascertained Dr. Green Jr.'s identity

from her medical records as well as from her knowledge that Dr. Green Jr. was her treating physician. See *Rawson v. Jones*, 816 So.2d 367, 369-71 (¶¶ 8-10) (Miss. 2002). Santangelo was aware that Dr. Green, Jr. was the physician who admitted her to the hospital, performed her surgery, and released her to St. Dominic's Hospital. Dr. Green Jr.'s name appeared on the post-operative order for Phenergan along with that of another physician, Dr. Green. Since Santangelo's treating physician was Dr. Green, Jr., not Dr. Green, Santangelo should have been able to discern to a reasonable degree of certainty that Dr. Green, Jr. was the physician who executed the post-operative order. This Court further observes that the signature of Dr. Green, Jr. on the post-operative order is virtually identical to other signatures of Dr. Green, Jr. that appear throughout the medical records. We find that, within the limitations period, Santangelo knew, or with reasonable diligence should have known, the Dr. Green, Jr. was the physician who ordered the Phenergan injection. The amended complaint naming Dr. Green, Jr. did not relate back to the date of the original pleading under Rules 9(h) and 15(c)(2).

Santangelo v. Green, ¶¶ 18 - 21

In the case at bar, in contrast to Santangelo, the Plaintiff made reasonable and diligent inquiry to ascertain the identity of all of the potential parties defendants prior to filing his original Complaint. Prior to filing suit, Plaintiff had engaged in lengthy discussions with the Defendant's, KCS' insurance carrier regarding case settlement. After the accident, Plaintiff obtained a copy of the accident report and reviewed the same for identity of other potential defendants. No such parties were identified (R.V.I,150). Also, at no point during

negotiations with the insurance carrier of KCS was the identity of a third party defendant revealed. (R.V.I,91-96, 105 and 107).

In further effort to obtain the identity of any other party who may have been jointly responsible on the aforesaid track of KCS, Plaintiff retained an investigator who, after thorough investigation, likewise did not identify any other potential defendants (R.V.I,76-77).

After suit was filed, Defendant, KCS, filed its Answer on May 18, 2006, wherein it asserted numerous defenses (R.V.I,14-16). On August 17, 2006, Defendant, KCS, filed Notice of Removal of the case to the United States District Court for the Northern District of Mississippi (R.V.I,17-18). Subsequent to the removal of the case KCS, on December 4, 2006, tendered its pre-core disclosures to Plaintiff and identified therein, Defendant, McHann Railroad Services, Inc. (hereinafter referred to as "McHann"), as the party contracted by it to perform maintenance and repair upon its tracks and the track in question (R.V.I,115-128).

Furthermore, the Plaintiff's failure to conduct discovery from the time of filing his Complaint on April 3, 2006, to the running of the statute of limitation on June 2, 2006, under the facts and circumstances of this case is not a failure of due diligence in ascertaining the identity of other potential unknown party defendants:

- (A) As above stated, the Plaintiff, prior to his filing suit, had investigation done to ascertain the identity of all parties associated with maintenance and repair of the tracks of Kansas City Southern Railroad involved in the accident in question. After a thorough investigation, Plaintiff's investigator found no defendant other than Kansas City Southern being particularly liable for



Plaintiff's injuries.

- (B) The accident report did not identify Defendant McHann or any other potential defendant regarding maintenance, upkeep, or duties associated with Defendant's, KFC's, railroad tracks.
- (C) In correspondence, written and oral, between Plaintiff and Defendant's, KFC's, insurance carrier, the identity of McHann was not remotely alluded to.
- (D) The statute of limitation to add McHann as a party defendant would have expired on June 2, 2003. Hence, interrogatories and all other discovery, even if filed when served with Plaintiff's Complaint pursuant to the Mississippi Rules of Civil Procedure would not have been answerable until June 16, 2006, forty-five (45) days after service of discovery upon Defendant, Kansas City Southern, beyond the running of the statute of limitation.
- (E) On August 17, 2006, Defendant, Kansas City Southern, filed its Notice of Removal to the United States District Court of the case at bar. Pursuant to 28 USCA §1446(d), the State Court, upon receipt of the Notice of Removal was barred from taking further action on the case. The State Court could only re-acquire jurisdiction upon remand of the Federal Court:

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until

the case is remanded.

Hence, once the case at bar was removed to Federal Court, the Plaintiff could no longer effectuate service of process or take any further action in the State Court proceedings pursuant to the Mississippi Rules of Civil Procedure, Rule 15(c) or Rule 4(h). The action in State Court was effectively stayed. Furthermore, once the case at bar was removed, further discovery in said case could not be instituted pursuant to the Uniform District Court Rules of the Northern District of Mississippi, specifically Rule 26.1(4) which states that discovery prior to the Case Management Conference is governed by Federal Rules of Civil Procedure, 26(d). Federal Rules of Civil Procedure 26(d) states as follows:

(d) Timing and Sequence of Discovery

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

The Federal Rules of Civil Procedure 26(f) provides as follows:

(f) Conference of the Parties; Planning for Discovery.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under

Rule 16(b).

In the case at bar, no such conference was had as a scheduling conference was never set by the Court, nor a scheduling order entered.

Prior to the Case Management Conference in this matter, the Defendant, Kansas City Southern Railroad, tendered to the Plaintiff its PreDiscovery Disclosure of Core Information on December 4, 2006, wherein it identified Defendant McHann Railroad Services, Inc., as a party contracted by it to perform maintenance and repair services upon its tracks in question (R.V.I, 155-128). Upon receiving such information, Plaintiff filed a Motion to Amend his Complaint to add Defendant McHann as a party defendant (R.V.I. 30-36). On June 26, 2007, following a reply to Plaintiff's Motion to Amend filed by Defendant KFC, the United States District Court entered its Order allowing amendment to Plaintiff's Complaint to add McHann as a party defendant and remanding the case to the Circuit Court of Monroe County MS (R.V.I. 20-23). Following remand of the case to the Circuit Court of Monroe County MS, Plaintiff had process served upon McHann on August 6, 2007. Hence, upon discovery of McHann as a potential party defendant, the Plaintiff acted promptly to serve process upon McHann in the State Court proceedings following remand. Thus, the facts in the case at bar certainly are distinguishable from Walker where the Plaintiff in the case at bar upon remand of the case to the Circuit Court of Monroe County MS acted promptly, and certainly within One Hundred Twenty (120) days of remand to serve process upon Defendant McHann Railroad Services, Inc. whose identity was not known to Plaintiff until Defendant KCS served its pre-core disclosures to Plaintiff on December 4, 2006.

#### IV.

#### CONCLUSION

At issue before this Court is whether the injured party, Plaintiff, Nelson Lee, who prior to filing suit made diligent search and inquiry to identify all parties responsible for the injuries should be barred by the statute of limitation where after the statute of limitation has expired a named Defendant divulged the identity of such potential party defendant. Furthermore, and in addition thereto, whether the Plaintiff, Nelson Lee, should be barred by the statute of limitation wherein the action filed in the State Court was removed to Federal Court effectuating a stay on further State Court action and institution of discovery in the removed Federal action pending the Case Management Conference. Additionally, the Plaintiff, Nelson Lee, should not be barred by the statute of limitation where discovery in Federal Court was stayed on removal, the State Court action was stayed, and the Plaintiff discovered four (4) months after removal the identity of the potential party defendant, McHann, and successfully had the case remanded and effectuated process in State Court within One Hundred Twenty (120) days following remand.

Rule 15 did not contemplate such bar. Cases cited by Appellee in its Brief are distinguishable. In the case at bar, the Plaintiff certainly made diligent search and inquiry prior to filing suit of the identity of potential parties responsible for his injuries. As above outlined, discovery of same occurred after the statute of limitation had expired when the original Defendant, Kansas City Southern, divulged the identity of Defendant McHann in its pre-discovery disclosure as having some part in the maintenance and repair of its railroad tracks in question. Hence, based solely upon the limited facts of this case, the decision of

the Lower Court granting summary judgment should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. Howard Gunn', is written over a horizontal line.

W. HOWARD GUNN  
ATTORNEY FOR APPELLANT

W. HOWARD GUNN  
ATTORNEY AT LAW  
310 SOUTH HICKORY STREET  
PO BOX 157  
ABERDEEN, MS 39730  
1/662-369-8533  
MSB NO. [REDACTED]  
RB20485

V.

CERTIFICATE OF SERVICE


I, W. Howard Gunn, attorney for Claimant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **REPLY BRIEF OF APPELLANT** to:

Honorable Paul S. Funderburk  
Circuit Court Judge  
PO Drawer 1100  
Tupelo MS 38802

Honorable Bill Lovett  
Honorable Charles E. Ross  
Attorneys at Law  
Post Office Box 651  
Jackson, Mississippi 39205

Honorable Edward J. Currie, Jr.  
Honorable Joanna Gomez  
Attorneys at Law  
PO Box 750  
Jackson MS 39205

So certified on this the 6th day of January, 2009.

  
\_\_\_\_\_  
W. HOWARD GUNN  
ATTORNEY FOR APPELLANT