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IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2008-CA-01909

CURTIS BURNETT, JR. — APPELLANT

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF PANOLA COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY **APPELLEE**

REPLY BRIEF OF APPELLANT

INTRODUCTION

In its Brief, Appellee State Farm Mutual Automobile Insurance Company (State Farm) seeks to divert this Court's attention from the fact that the Record does not contain *any* evidence of a misrepresentation by Appellant in the procurement of the insurance policy at issue. State Farm thoroughly discusses the effect of a material misrepresentation as to the owner of the vehicle but refuses to provide any evidence that Appellant, or anyone else, actually made a misrepresentation as to the owner or principle driver of the vehicle. State Farm further asks the Court to accept an argument, which was not adopted by the trial court, that Appellant was not a "resident relative" and therefore, not entitled to recover UM or MedPay benefits. Summary Judgment was not granted on this basis and this Reply will clearly demonstrate the fallacy of the argument. Finally, Appellee attempts to minimize and dismiss the effect of its egregious withholding of information and witnesses in discovery. Appellant's Brief, in conjunction with the following reply and authorities, clearly establishes that there are genuine issues of material fact that exist in this case which preclude summary judgment.

REPLY ARGUMENT

A. MISREPRESENTATION

In its Brief to this Court, State Farm asserts that "due to the material misrepresentation regarding ownership of the vehicle, the policy should be deemed void *ab initio*." However, at no point in the course of this litigation or appeal did State Farm illustrate *any* evidence of a misrepresentation. In what essentially amounts to improper post-claims underwriting, State Farm cursorily concludes that it did not know the identity of the owner of the Buick Regal. If State Farm asked and was told by someone that the owner was an individual other than the Appellant, it certainly has not provided that to the Court or disclosed it in the course of discovery. Indeed, State Farm did not even present the application itself for consideration.[1]

As explained in Appellant's Brief, State Farm did not assert any fraud or misrepresentation defense in its Answer. Accordingly, it has waived this affirmative defense and should be barred from presenting it here. *See*, Martin v. Winfield, 455 So. 2d 762 (Miss. 1984). Indeed, State Farm even failed to address this argument in its Brief as it relates to the claim of misrepresentation as to the ownership of the vehicle. For this reason alone, the Court should reverse the lower court's determination on this issue.

Even though it has yet to properly raise this defense, State Farm claims that it would not have provided coverage "on the same terms" had it known the "true identity" of the Buick's owner. However, State Farm offered no proof that they were, in fact, unaware of the identity of

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[1] To be clear, in discovery, Appellant requested "the entire claims file relating to the accident in this case, including all correspondence, reports, notes or information stored on computer regarding the Plaintiff or the named insureds on all applicable policies of insurance." *See,* pages 12-13 of Exhibit "E" of Brief of Appellant. In response to this request, State Farm failed to disclose the application for insurance.

the owner of the vehicle, or that it was represented that someone other than the Appellant had title. Appellant admitted that he purchased the Buick Regal with help from his father. [R. 250]. However, mere ownership of the Buick Regal by Curtis Burnett, Jr. does not evidence a misrepresentation of any kind. Burnett was unable to further testify regarding the application process for the policy as his parents dealt with State Farm's agent, Ronnie Darby. [R. 262, 246]. He was a minor of 20 years old at the time. [R. 325, 202]. There is simply no evidence regarding what discussions Appellant's parents had with State Farm's agent, including what was asked and what information was provided. Furthermore, State Farm conveniently refused to allow Appellant to depose Mr. Darby to obtain these answers.

Where is the misrepresentation? Throughout this litigation, State Farm consistently failed to present any evidence of false statements by the policyholder or applicant. State Farm, likewise, did not provide any other evidence of a misrepresentation in pleadings or discovery at the trial court level and it avoided the issue in its Brief filed with this Court. State Farm did not provide the application for insurance which was allegedly falsely procured, or any other such written evidence of misstatements by the policyholder. Further, State Farm did not present any of the nine traditional elements of a misrepresentation claim. *See,* Great Southern Nat. Bank v. McCullough Environmental Services Inc., 595 So. 2d 1282, 1289 (Miss. 1992)(identifying the nine elements of a misrepresentation claim that must be proven by clear and convincing evidence). As such, this Court should find that State Farm waived any misrepresentation argument.

State Farm provided a self-serving affidavit stating that if they had known the "true and accurate" owner of the vehicle, it would not have provided coverage "on the same terms." However, they conveniently did not state what untrue or inaccurate information was provided to

State Farm and refused to produce a representative to testify regarding the information that was relied upon in the affidavit. [2] Furthermore, the affidavit is meritless without record support of what State Farm or its agent asked, or knew, with regard to the ownership issue.[3]

In any event, the language of the declarations page suggests that State Farm did, in fact, know the identity of the policyholder, or at the very least, an ambiguity was created. The declaration page for the accident vehicle, 1985 Buick Regal, was issued to a policyholder identified as simply as "**Curtis Burnett**." [R. 325]. There is no indication on State Farm's documents that this is Senior or Junior. State Farm issued two policies to Appellant's father, Curtis Burnett, Sr., for a 1993 Lexus GS300 and a 1995 Pontiac Grand Am. These policies are issued to policyholders, identified differently, as "**Curtis and Mary Burnett**." [R. 326-327]. Thus, the mere fact that the policies are issued in different names creates a question of fact as to the identity of the policyholder. Indeed, it appears that when State Farm intends to issue policies to Burnett's *parents*, it clearly knows how to do so and identifies the married couple. Only after-the-fact does State Farm now attempt to self-servingly interpret a policy issued solely to "Curtis Burnett" to only represent the father. Any ambiguity in State Farm's own documents should be

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2 State Farm is deceptively cautious as to what it represented to the Court in its affidavit. Note that the affidavit does not actually state that it ever asked, or was informed, of the identity of owner of the Buick. Furthermore, as discussed below, although State Farm contends it would not insure the car on the "same terms" it does not even allege that it would not have insured the vehicle. It would seem that in order to void a policy from its inception, State Farm would be required at least to represent that it would not have covered the vehicle if it had know the "true" facts. Otherwise, as discussed further, State Farm's policy requires that it simply adjust the premiums, something which it never did.

3 Since titled ownership of automobiles in Mississippi is a matter of public record with the Mississippi State Tax Commission for any insurance company, it appears very doubtful that State Farm could even make an argument that it was not aware of the ownership of the Buick.

construed against it. At the very least, a genuine issue of material fact was demonstrated on the face of the policy.[4]

Furthermore, to invalidate the policy, State Farm must prove not only that there was a misrepresentation but that the misrepresentation was material and substantially untrue. Sanford v. Federated Guaranty Insurance Company, 522 So. 2d 214 (Miss. 1988) (citing National Casualty Co. V. Johnson, 67 So. 2d 865, 867 (Miss. 1953). "The materiality of a representation is determined by the probable and reasonable effect which truthful answers would have had on the insurer." Sanford v. Federated Guaranty Insurance Company, 522 So. 2d 214, 217 (Miss. 1988). In Sanford, the Court specifically noted that generally "substantial truth" and materiality are both questions of fact for a jury to resolve, making summary judgment inappropriate. Sanford, 522 So. 2d at 217. In addition, although disputed by Appellant, the lower court apparently accepted State Farm's contention that the policyholder was not the Appellant, but was Curtis Burnett, Sr. Accordingly, it is unknown how the lower court could have voided a policy as to a policyholder that was never named a party and was not even before the court.

State Farm did not present uncontradicted evidence of the materiality of the alleged misrepresentation, as required. In fact, State Farm's affidavit contradicts its own policy language. That policy provides the specific procedure for handling incorrect information on a policy application and does not provide an option of unilaterally voiding the policy under these

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[4] Even if it is determined that Appellant was not the policyholder on the Buick, Appellant's parents clearly had enough insurable interest in the vehicle, even if they were not the titled owner. Appellant's father helped pay for the vehicle and thus had an economic interest in it. [R. 250, 336]. In addition, Appellant's mother co-signed a loan for the purchase of the vehicle. [R. 336]. *See,* Necaise v. USAA Cas. Co., 644 So.2d 253, 258 (Miss. 1992), citing Southeastern Fidelity Ins. Co. v. Gann, 340 So. 2d 429, 433-34 (Miss. 1976).

circumstances.[5] State Farm, therefore, breached its own insurance contract by attempting to invalidate coverage, rather than request a change in premium based on the allegedly new information "regarding . . . your car, or its use, ... [or] the persons who regularly drive your car . . . ." Voiding the policy *ab initio* is in stark contrast to the manner it agreed to follow in its policy. Furthermore, the fact still remains that no evidence was provided that Curtis Burnett, Jr., a minor of only 20 years at the time the policy was issued, made false statements. [R. 325, 202]. Appellant was not even present at the policy application. [R. 262, 246]. In addition, State Farm could have independently obtained/ verified information regarding the vehicle registration as ownership information is a matter of public record. Hence, the materiality of the alleged misrepresentation in this case would clearly be a question of fact for a jury to resolve. Indeed, it is doubtful that if this case is remanded that State Farm could even make out a prima facie case regarding the elements of a misrepresentation claim by clear and convincing evidence or otherwise.

In summary, State Farm's entire argument regarding the alleged misrepresentation focuses on its allegation that "the vehicle involved in the underlying accident was not owned by

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[5] The policy states:
"The premium for this policy is based on information State Farm has received from you or other sources. If the information is incorrect or incomplete or changes during the policy period, you must inform State Farm of any changes regarding the following:

a. your car, or its use, including annual mileage,
b. the persons who regularly drive your car, including newly licensed family members,
c. your marital status, or
d. the location where your car is principally garaged.

You agree that if this information or any other information used to determine the premium is incorrect or incomplete or changes during the policy period, we may decrease or increase the premium during the policy period based upon the corrected, completed or changed information. You agree that if the premium is decreased, or increased during the policy period, State Farm will refund or credit to you any decrease in premium you will pay for any increase in premium." [R. 134-135].

the *policyholder*." First, as explained above, there was no evidence ever presented by State Farm as to what representations were made regarding the ownership of the vehicle. We simply do not know what was said to Agent Darby when the policy was provided. Second, there is clearly an issue of fact created as to the identity of the actual policyholder.

B. RESIDENT RELATIVE

Appellant is entitled to recover UM benefits from State Farm as a resident relative living with his mother and father Mary and Curtis Burnett, Sr. Although State Farm admitted this fact in its Answer, it now contends that Appellant does not qualify for its insurance benefits.[6] It its Brief, State Farm concedes that it made this admission, however, now apparently seeks to be excused from its import. State Farm has not provided any basis to withdraw the admission. Of course, as it stands now, that admission is binding and has not been withdrawn, nor has State Farm even sought leave of court to withdraw it. If State Farm was not sure of the facts and circumstances of the case, it could surely have responded to these facts by stating that it did not have sufficient information and was unable to admit or deny the allegation.[7] However, it chose

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[6] Paragraph 8 of Complaint states:

> At the time of the accident, the Plaintiff was a resident relative living with his mother and father, Mary and Curtis Burnett. At the time of the accident, the Burnetts maintained multiple insurance policies with State Farm providing uninsured/underinsured motorist coverage as well as medical payments coverage. [R. at 8].

Paragraph 8 of Answer states:

> This Defendant admits the allegations contained in paragraph 8 of the Complaint.[R. at 36].

[7] Although Appellant submits that it would be improper at this late date, and after an appeal on this issue, for the court to permit a withdrawal of an admissions, the effect of a withdrawn admission will still create a question of fact for the jury to resolve. When admissions are made and then withdrawn or stricken, they can be used as evidence of the opposing party at trial, with the right of the other party to explain or disprove them. *See*, White v. Arco/Polymers Inc., 720 F. 2d 1391 (5th Cir. 1983) (while superseded pleadings loose their binding force, they continue to have value as evidentiary admissions);

to admit this fact outright.

State Farm contends that it was not until its one-sided discovery was conducted that it learned of the facts regarding Appellant's residency. This information was fully disclosed in the deposition of Curtis Burnett, Jr., which was taken on November 16, 2005. [R. 197]. State Farm's Motion for Summary Judgment was filed on August 16, 2006, nearly one year after the deposition. [R. 76]. The hearing on State Farm's motion was held on May 17, 2007. [Tr. Vol. II, 1-39]. State Farm had *over a year and a half* to request the court allow it to withdraw its admissions prior to this hearing. Furthermore, no final, appealable judgment was entered in this case until October 21, 2008, providing State Farm *nearly three years* to seek to withdraw its admission. State Farm had ample time to seek to amend its Answer to reflect this post-claim attempt at voiding coverage. It chose not to and should not be heard to complain about it.

Although the Court need go no further than a review of State Farm's binding admissions to determine this coverage issue, the Appellant will respond to the merits of this matter to demonstrate to the court that a genuine issue of fact was indeed created. In order to recover UM benefits provided by an insurance policy, the claimant must first prove that he is an "insured" under either the insurance policy in question or the UM statute. *See,* State Farm Mut. Auto. Ins. Co. v. Davis, 613 So. 2d 1179, 1179 (Miss. 1992); Gillespie v. Southern Farm Casualty Ins. Co., 343 So. 2d 467, 471 (Miss. 1977). Mississippi's UM statute, Miss. Code Ann. § 83-11-103(b), provides the following definition for the term "insured":

> (b) The term "insured" shall mean the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either....

McConnell v. Gregory, 91 S.E. 550 (Ga. 1917); Kutscherousky v. Integrated Communications Solutions, LLC, No. 2004 CA 00338, 2005 WL 1985228 at *7 (Ohio App. 5 Dist.).

The Courts have stated that the term "resident" does not have a technical or fixed meaning; the term is "flexible, elastic, slippery, and somewhat ambiguous." 77 C.J.S. *Resident* § 305 (1952). In addition, the word resident "has an evasive way about it, with as many colors as Joseph's coat." Weible v. United States, 244 F. 2d 158, 163 (9th Cir. 1957); *cited in,* Government Emp. Ins. Co. v. Dennis, 645 P. 2d 672, 674 (Utah 1982).

The Mississippi Supreme Court has routinely given a broad construction to the term "resident." It is important that, in defining "insured," the Mississippi UM statute uses the word "residence" rather than the narrower term "domicile." State Farm erroneously requests this Court to equate the term "residence" with the term "domicile" and relies on the assertion that Appellant "had a place of lodging other than his father's house" to deny coverage. However, in Johnson v. Preferred Risk, the Supreme Court clearly declared that "the law is clear that a person can have but one domicile. Once established, a person's domicile remains stationary absent a clear indication of intent to abandon the existing domicile and to establish another. ***However, one may still have other residences.***" Johnson v. Preferred Risk Automobile Insurance Company, 659 So. 2d 866, 873 (Miss. 1995) (emphasis added). The term "residence" is clearly a more flexible concept than the term "domicile." In Johnson, this Court further pointed out that the "limitations applicable to one's domicile do not apply to one's residence. For instance, ***a person may have multiple residences simultaneously.*** Further, a dwelling place need not be fixed and permanent in order to qualify as a residence. Even a temporary and transient habitation can qualify...." Johnson, 659 So. 2d at 873 (*citing* Aetna Cas. And Sur. Co. v. Williams, 623 So. 2d 1003, 1009-10 (Miss. 1993) (emphasis added)).

This Court also reasoned and ruled that, "whether a person "resides" at a particular location is a practical question which turns on the degree of one's attachment to a particular place

of abode. Johnson at 873-74. The preliminary threshold, and the most important consideration to be aware of, is the fact that an individual may have more than one 'residence' thereby making that individual a 'resident' of more than one location simultaneously. Aetna Cas. And Sur. Co. v. Williams, 623 So. 2d at 1009-10; In re Estate of Burshiem, 483 N.W. 2d 175 (N.D. 1992); In re Marriage of Tucker, 226 Cal. App. 3d 1249, 277 Cal. Rptr. 403 (Cal. App. Ct. 1991) (other citations omitted). In addition, "a dwelling place need not be fixed and permanent in order to qualify as a residence." Aetna Cas. and Sur. Co. v. Williams, 623 So. 2d 1003, 1010 (Miss. 1993). Furthermore, "even a temporary and transient habitation can qualify." Aetna Cas. and Sur. Co. v. Williams, 623 So. 2d at 1010; In re Brown, 132 Misc 2d 811, 505 N.Y.S. 2d 334 (N.Y. Sur. 1986).

Applying these principals to the case at hand, it is clear that Appellant was a "resident" of his parent's home at the time of the automobile accident in question. He even spent the night at his parent's home on the day of the accident, and the following week. [R. 222]. His attachment to his parents' household was considerable. He stayed there with his parents and brother. [R. 218, 220, 144]. He had a room. [R. 144]. He had clothing and personal possessions there. [R. 144]. He depended, in part, on his father and mother to provide for him. [R. 144]. He paid room and board for various expenses and bills at his parents house. [R. 336, 220]. Appellant assisted his father and mother in the upkeep and maintenance of the home. [R. 144]. He secured an apartment as temporary lodging for he and his girlfriend to stay when she was home for breaks from school. [R. 218, 220, 335]. He only stayed at the apartment "from time to time." [R. 220]. The situation presented in this case is similar to that of the Johnson case cited above, wherein the Court found that the children were residents of their parents' households and therefore, eligible to

collect UM benefits under the insurance policies issued to their parents.[8] Johnson v. Preferred Risk Automobile Insurance Company, 659 So. 2d 866 (Miss. 1995).

State Farm relies solely on the argument that Appellant had another place of lodging separate from his father's house at the time of the accident to support its denial of coverage as a resident relative. In doing so, State Farm chose to ignore the overwhelming facts that support that Appellant had *multiple* residences. As demonstrated above, the fact that a person has multiple residences simultaneously does not prevent coverage under the Mississippi UM statute. Therefore, based upon these facts, as well as the case law cited above, Appellant is entitled to recover UM benefits from State Farm. In the alternative, the degree of attachment to each of Appellant's abodes would clearly be a question of fact for a jury to consider, precluding summary judgment.

State Farm's Policy Violates Mississippi Law

The State Farm insurance policy in question defines the term "insured" as "the person or persons covered by uninsured motor vehicle coverage. This is: you; your spouse; your relatives..." The policy defines relative as "a person related to you or your spouse by blood, marriage or adoption who resides **primarily** with you." (emphasis added). [R. 115]. The term

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[8] In Johnson v. Preferred Risk Automobile Insurance Company, Plaintiffs, Ron and Dee Johnson, were adult children temporarily living with their parents in Mississippi at the time of the accident. They were in the process of moving from Knoxville, Tennessee to Arkansas to report for new jobs. They had not signed a lease for the house they intended to rent but had sent a deposit for phone service at that address. Ron was receiving mail at both his parents' and the Arkansas address. Ron had obtained a Arkansas drivers license. Dee could not remember voting in any Mississippi elections because she had been "gone." This Court found that Ron and Dee were "residents" of their parents' households at the time of the accident under the UM provisions of the insurance contract. Johnson v. Preferred Risk Automobile Insurance Company, 659 So. 2d 866, 873 (Miss. 1995).

"primarily" is not used anywhere in Mississippi's UM statute, or accompanying case law. Accordingly, State Farm's UM policy is in violation of Mississippi law as it includes an additional requirement for coverage. This clear violation should be allowed to be litigated to a jury. In any event, whether Appellant resided "primarily" with his parents is a question of fact for the jury and is not appropriate for summary judgment.

The trial court did not grant summary judgment based on State Farm's resident relative argument. Based on the facts and case law stated above, Appellant asks this Court to, likewise, reject this argument as a basis for summary judgment.

C. DISCOVERY DISPUTES

State Farm argues that evidence of discovery disputes, including egregious withholding of information and witnesses from Appellant, should not be considered because it "ignores the seminal issue on appeal" whether the trial court was correct in granting State Farm's Motion for Summary Judgment. This is a mischaracterization of Appellant's argument. Appellant argues that the trial court erred in granting summary judgment *prior to the completion of discovery* in a manner analogous to granting a directed verdict against the Plaintiff at trial prior to allowing him to put on his entire case in chief. In this context, evidence of the discovery disputes clearly relate to, and are relevant to, whether summary judgment was correctly granted as it is impossible to determine whether the trial court's decision was premature without determining the state of discovery. In other words, Rule 56 is a procedural device designed to test the factual support obtained by a party in the course of discovery. By definition, one must understand the extent that discovery was permitted, or as in this case, denied. This was in fact a significant point raised to

the trial judge at the summary judgment hearing. [Tr. Vol. II, 35].[9]

As demonstrated in Appellant's Brief, State Farm demanded deposition testimony from Burnett in an attempt to gather information for their own summary judgment motion and subsequently alleged a misrepresentation in the application process. State Farm then refused to allow the Appellant to conduct further discovery to fully respond to the allegations. For example, Appellant was not allowed to depose agent Ronnie Darby, the licensed agent who allegedly sold the insurance policy at issue. Appellant was, likewise, not allowed to depose any corporate representative of State Farm, including Mr. Harlein who provided an affidavit in support of State Farm's claim of a material misrepresentation without supporting evidence. Furthermore, State Farm was not required to produce the application for insurance even though State Farm's entire argument involves an alleged misrepresentation in the procurement of the insurance contract. Consequently, it is clear that the trial court prematurely and erroneously granted Defendant's motion for summary judgment without allowing Appellant the opportunity, pursuant to the Mississippi Rules of Civil Procedure, to gather and present all rebuttal evidence.

Appellant's issue regarding error by the trial court in denying Appellant's Written Statement of Proposed Corrections to the Appellate Record is, likewise, appropriate for appeal in this case. Clearly, it was impossible for Appellant's Notice of Appeal to include this issue as is had not yet occurred at the time the notice was filed. As a result, this Court was deprived of a

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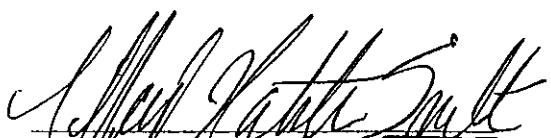
9 At the summary judgment hearing, counsel for Appellant argued that there were many undiscovered truths still to be found: "there is some truth in there that I'm trying to get to and they [State Farm] have sort of prevented me from deposing Mr. Darby, from deposing their corporate representative, from deposing anyone from State Farm because they wanted to have their coverage issue resolved. So I think I found out a lot with what I had to deal with in terms of demonstrating their bad faith but I still haven't had the opportunity to take the depositions to find out more. I don't think I'm done finding out the truth here." [Tr. Vol. II, 35].

Record that conveys a fair, accurate and complete account of what transpired in the trial court with respect to those issues that are the basis of the appeal.

CONCLUSION

State Farm did not present *any* evidence of a misrepresentation by Appellant in the procurement of the insurance policy at issue. Appellee's Motion for Summary Judgment and Appeal Brief discuss at length the effect of a material misrepresentation as to the owner of the vehicle but do not provide any evidence that Appellee actually made a misrepresentation as to the owner or principle driver of the vehicle. State Farm also asks this Court to accept an argument not adopted by the trial court that Appellant was not a resident relative entitled to recover UM or MedPay benefits. Indeed, MedPay benefits are available to non-resident occupants of the vehicle. This argument ignores overwhelming facts and case law supporting a finding that Appellant had multiple residences, as allowed by Mississippi law. As such, this Court should reverse the trial court's decision granting summary judgment based on a material misrepresentation and reject State Farm's resident relative argument as a basis for summary judgment.

BY: 

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CERTIFICATE OF SERVICE

I, TIFFANY HATCHER SMITH, of Holcomb Dunbar, P.A., do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to:

Honorable Andrew C. Baker
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And, the original and three (3) copies of the same to:
Betty W. Sephton
Mississippi Supreme Court Clerk
Carroll Gartin Justice Building
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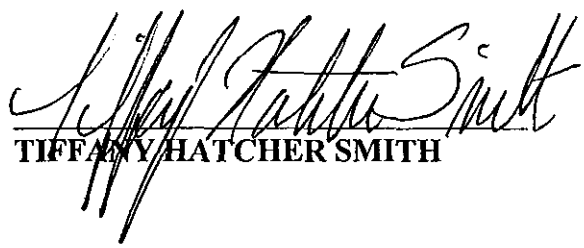
THIS, the 13th day of August, 2009.



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