

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EVA RAGAN CALDWELL O'NEAL

APPELLANT

V.

DOCKET NO.: 2008-CA-01947

**GENE LOSTON O'NEAL AND
KASEY DALTON ROOFING, INC.
A MISSISSIPPI CORPORATION**

APPELLEES

APPELLANT'S BRIEF

APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

**H.R. Garner, [REDACTED]
283 Loshier Street
P.O. Box 443
Hernando, MS 38632-0443
662-429-4411
Attorney for 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 justices of this Court may evaluate possible disqualification or recusal.

The Appellant:

Ms. Eva Ragan Caldwell O'Neal
4630 Rolling Green
Horn Lake, MS 38637

The Appellee:

Kasey Dalton Roofing, Inc.
1426 Brookhaven Drive
Southaven, MS 38671

Gene Loston O'Neal
6434 Benjestown Road
Millington, TN 38053-6935

The Lawyers:

H.R. Garner
P.O. Box 443/283 Loshier Street
Hernando, MS 38632-0443
Attorney for Appellant

Hon. Darin Vance
Attorney At Law
P. O. Box 953
Hernando, Ms. 38632
Attorney for Appellee
Kasey Dalton Roofing, Inc.,

Gene Loston O'Neal
6434 Benjestown Road
Millington, TN 38053-6935
Appellee and Pro Se

The Trial Judge:

Percy L. Lynchard, Jr.
Chancery Court Judge
P.O. Box 340
Hernando, MS 38632




H.R. Garner, 
Attorney of Record for Appellant,
Eva Ragan Caldwell O'Neal

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None

STATEMENT OF THE ISSUES

The issues presented by the Appellant in this appeal are:

ISSUE I: THE COURT IS REQUIRED TO ENFORCE THE PROVISIONS OF MISSISSIPPI CODE ANNOTATED SECTION 93-5-2(5) (1972 AMENDED) BEFORE GRANTING A DIVORCE ON THE GROUNDS OF IRRECONCILABLE DIFFERENCES ?

ISSUE II: THE COURT HAVING FAILED TO COMPLY WITH THE PROVISIONS OF MISSISSIPPI CODE ANNOTATED SECTION 93-5-2(5) (1972 AS AMENDED) SHOULD HAVE DECLARED THE JUDGMENT OF DIVORCE GRANTED ON THE GROUND OF IRRECONCILABLE DIFFERENCES VOID AND SET ASIDE SAME.

STATEMENT OF THE CASE

A. Nature Of The Case, Course Of The

Proceedings And Disposition In The Court Below *

This case stems from the decision of the Chancery Court of DeSoto County, Mississippi from an Order denying the Petition to Set Aside Judgment of Divorce and Third Party Claim to Appellant , Eva Ragan Caldwell O'Neal . The Order being entered on the 19th day of November, 2008 recorded in Chancery Court Minute Book 491, page 195 of the official Chancery Court Minutes of DeSoto County, Mississippi.(CP 123, MRE 70-71) The Petition to Set Aside Judgment of Divorce and Third Party Claim being filed by the Appellant, Eva Ragan Caldwell O'Neal , against the Appellees , Gene Loston O'Neal , and the third party defendant, Kasey Dalton Roofing, Inc. A Mississippi Corporation , on October 23, 2008. (CP 85, MRE 38-66)

The background of the parties was that Eva Ragan Caldwell O'Neal , Appellant, and Gene Loston O'Neal , Appellee , were divorced by a Judgment of Divorce entered in the Chancery Court of DeSoto County, Mississippi on the 30thday of August , 2007 recorded in Chancery Court Minute Book 452 Page 670 of the Official Chancery Court Minutes of DeSoto County, Mississippi. on the grounds of irreconcilable differences. (CP 46, MRE 7-19)

That prior to the entry of the Judgment of Divorce , the Appellee, Gene Loston O'Neal , filed a Complaint for Divorce alleging fault grounds against the Appellant, Eva Ragan Caldwell O'Neal. An answer denying the fault allegation for divorce and counter complaint for divorce on fault grounds was filed by Appellant, Eva Ragan Caldwell O'Neal , against the Appellee, Gene Loston O'Neal ; and an answer denying fault grounds contained in the Courter-Complaint for divorce was filed by the Appellee, Gene Loston O'Neal .

No Motion to withdraw Contest or Denial of fault grounds for divorce was ever filed by Appellant, Eva Ragan Caldwell O'Neal , or Appellee, Gene Loston O'Neal . Nor did the Court ever enter an Order granting leave of the Court to do so, same being a mandatory provision under Mississippi Code Annotated Section 93-5-2(5) (1972) (See Clerks papers and docket)

On February 8, 2007 a Consent Agreement of the parties was filed with the Court consenting to a divorce to be heard by the Court on the grounds of Irreconcilable Differences and agreeing for the Court to determine the other issues contained in the agreement. (CP 25, MRE 6)

A hearing or trial was held by the Court on August 6, 2007 , but apparently there was not trial record or transcript ever was made by the Court. An opinion by the Court was delivered by the Court on August 6, 2007 , granting the parties a divorce on the grounds of Irreconcilable Differences and making an equitable distribution of marital assets of the parties and other matters. (CP 36) A Judgment of Divorce was entered by the Court on August 30,2007, recorded in Chancery Court minute Book 452 page 670 of the Official Chancery Court Minutes of DeSoto County, Mississippi. (CP 46, MRE 7-19) that the opinion of the Court and the Judgment of Divorce both refer to the consent agreement entered pursuant to Mississippi Code Annotated Section 93-5-2 (1972 as amended) , but no mention is made on either an oral or written motion filed with the Court prior to trial of a Motion by either party filed either before or after the trial to withdraw contest or denial of the fault grounds for divorce, and the Court entering an order granting leave to withdraw the contest or denial of the fault grounds for divorce and the denial of same by either party . See Court 's Opinion of August 6, 2007 (CP 36, MRE 7-19) and Judgment of Divorce (CP 46, MRE 7-19)

That subsequent to the August 6, 2007 , trial but before the entry of the Judgment of Divorce being entered a Motion to Alter or Amend Judgment was filed August 28, 2007 by the

Appellant, Eva Ragan Caldwell O'Neal , (CP34, MRE 20-31) and a Response to Motion to Alter or Amend Judgment was filed on August 30, 2007 by the Appellee, Gene Loston O'Neal .(CP 46 MRE 32-33)

On September 28, 2007, a Motion for Relief from Judgment was filed by the Appellee, Gene Loston O'Neal . (CP 61, MRE 34-37) On October 3, 2007 , a Petition to Cite for Contempt was filed by Appellant, Eva Ragan Caldwell O'Neal . (CP 65) On July 23, 2008, an Order was entered by the Court Granting the Motion to withdraw as attorney for Appellee. (CP 83)

On October 23, 2008 , the Petition to Set Aside Judgment of Divorce and Third party claim was filed by the Appellant, Eva Ragan Caldwell O'Neal , against the Appellees, Gene Loston O'Neal , and the third party , Kasey Dalton Roofing, Inc. (CP 85, MRE 38-36) On November 3rd, 2008, and Order Transferring Case to Chancellor Percy L. Lynchard, Jr. and Continuing Case to November 19, 2008 was entered . (CP 120, MRE 67-69)

On November 19, 2008 , the hearing was held on the Petition to Set Aside Judgment of divorce and Third Party Claim by Chancellor Percy L. Lynchard, Jr. An Order Denying Petition to Set Aside Judgement of Divorce was entered on the 19th day of November , 2008 recorded in Chancery Court Minute Book 491, page 195 of the Official Chancery Minutes of DeSoto County, Mississippi. (CP123, MRE 70-71)

The Appellant, Eva Ragan Caldwell O'Neal , being aggrieved of the Court's decision did perfect her appeal to the Mississippi Supreme Court.

*** The following abbreviations shall apply as used herein for reference: CP means Clerk's Papers. TR means transcript. M R E means mandatory record excerpts.**

B. STATEMENT OF THE FACTS AND CIRCUMSTANCES OF THE CASE

The parties in this proceeding are the Appellant, Eva Ragan Caldwell O'Neal , hereinafter referred to as "Eva " and the Appellee, Gene Loston O'Neal , hereinafter referred to as "Gene". That both are adult residents and Citizens of DeSoto County, Mississippi; that the third party Appellee, Kasey Dalton Roofing, Inc., a Mississippi Corporation , hereinafter referred to as "Company".

On August 21, 2006 , a Complaint for Divorce was filed by "Gene" against "Eva" charging as grounds for divorce the grounds of Habitual Cruel and Inhuman Treatment as a Fault Ground for divorce and in the Alternative Irreconcilable Differences . (CP 5)

Personal service of process being had upon Eva on September 13, 2006 , Eva in turn filed an answer denying the fault grounds for divorce and filing a Counter -Complaint for Divorce against Gene charging as grounds for divorce in the Counter Complaint the fault grounds of Habitual Cruel and Inhuman Treatment and Habitual Drunkenness pursuant to Mississippi Code Annotated Section 93-5-1 (1972 as amended) and also Irreconcilable Differences . (CP 10)

On October 5, 2006, Gene filed an Answer to the Counter-Complaint for Divorce filed by Eva denying the Fault Grounds for divorce.(CP 16)

On February 8, 2007, a Consent Agreement Pursuant to Mississippi Code Annotated Section 93-5-2 (1972 as amended) was filed by the parties and their attorney signed and entered said agreement. (CP 25, MRE 6)

That no time prior to or subsequent to the trial was a withdrawal of contest or denial was withdrawn or cancelled by the party (parties) filing same by leave and order of the Court, Mississippi Code Annotated Section 93-5-2 (5) (1972 as amended). (MRE 1-5)

A hearing or trial was held by the Court on August 6, 2007 , but apparently there was not

trial record or transcript ever made by the Court. An opinion by the Court was delivered by the Court on August 6, 2007 , granting the parties a divorce on the grounds of Irreconcilable Differences and making an equitable distribution of marital assets of the parties and other matters. (CP 36) A Judgment of Divorce was entered by the Court on August 30,2007 , recorded in Chancery Court Minute Book 452, Page 670 of the Official Chancery Court Minutes of DeSoto County, Mississippi. (CP 46, MRE 7-19) That the opinion of the Court and the Judgment of Divorce both refer to the Consent Agreement Entered Pursuant to Mississippi Code Annotated Section 93-5-2 (1972 as amended) , but no mention is made on either an oral or written motion filed with the Court prior to trial of a Motion by either party filed either before or after the trial to withdraw contest or denial of the fault grounds for divorce, and the Court entering an order granting leave to withdraw the contest or denial of the fault grounds for divorce and the denial of same by either party . See Court 's Opinion of August 6, 2007 (CP 36, MRE 7-19) and Judgment of Divorce. (CP 46, MRE 7-19)

That subsequent to the August 6, 2007 , trial but before the entry of the Judgment of Divorce being entered a Motion to Alter or Amend Judgment was filed August 28, 2007 by the Appellant, Eva Ragan Caldwell O'Neal , (CP 34, MRE 20-31) and a Response to Motion to Alter or Amend Judgment was filed on September 26, 2007 by the Appellee, Gene Loston O'Neal .(CP 59, MRE 32-33)

On September 28, 2007, a Motion for Relief from Judgment was filed by the Appellee, Gene Loston O'Neal . (CP 61, MRE 34-37)

On October 3, 2007 , a Petition to Cite for Contempt was filed by Appellant, Eva Ragan Caldwell O'Neal . (CP 65)

On July 23, 2008, an Order was granted by the Court Granting the Motion to Withdraw as

attorney for Appellee. (CP 83)

On October 23, 2008 , the Petition to Set Aside Judgment of Divorce and Third Party Claim was filed by the Appellant, Eva Ragan Caldwell O'Neal , against the Appellees, Gene Loston O'Neal , and the third party , Kasey Dalton Roofing, Inc. (CP 85, MRE 38-66) The Petition requested the Court to set aside its void decree of divorce for failure to comply with the mandatory provisions of Mississippi Code Annotated Section 93-5-2 (5) (1972 as amended) and joining in third party that had purchased the marital asset or property from Gene Loston O'Neal , the Appellee under the void Judgment,

On November 3rd, 2008, an Order Transferring Case to Chancellor Percy L. Lynchard, Jr. and Continuing Case to November 19, 2008 was entered . (CP 120, MRE 67-69)

On November 19, 2008 , the hearing was held on the Petition to Set Aside Judgment of Divorce and Third Party Claim by Chancellor Percy L. Lynchard, Jr. An Order Denying Petition to Set Aside Judgement of Divorce was entered on the 19th day of November , 2008 recorded in Chancery Court Minute Book 491, Page 195 of the Official Chancery Minutes of DeSoto County, Mississippi. (CP 123, MRE 70-71)

Appellee, Eva Ragan Caldwell O'Neal , being aggrieved of the Court's decision perfected this her appeal to the Mississippi Supreme Court .

SUMMARY OF THE ARGUMENT

The argument of the Appellant, Eva Ragan Caldwell O'Neal, is summarized as follows:

ISSUE I: :THE COURT IS REQUIRED TO ENFORCE THE PROVISIONS OF MISSISSIPPI CODE ANNOTATED SECTION 93-5-2 (5) (1972 AMENDED) BEFORE GRANTING A DIVORCE ON THE GROUNDS OF IRRECONCILABLE DIFFERENCES ?

Eva argues as her basis for reversal , is that the Chancellor failed to comply with the mandatory provisions of Mississippi Code Annotated Section 93-5-2-(5) (1972 as amended). Simply put there was fault grounds for divorce alleged as grounds for divorce by both parties; and both parties contested the granting of a divorce on fault grounds one from the other. There was never before or after the granting of a divorce on the grounds of Irreconcilable Differences a motion or request orally or in writing by either party to withdraw same, nor was there any order ever entered by the Court granting leave and permission to withdraw same. Mississippi Code Annotated Section 93-5-2 (5) (1972 as amended)

Therefore , by the Court and the parties strictly to comply with the statutory grounds to grant a divorce on the grounds of Irreconcilable Differences , that the Judgment of Divorce granted by the Court on the grounds of Irreconcilable Differences and the division of martial assets and debts of the parties should be set aside, since there was never a valid divorce. Perkins v Perkins, 787 So2d 1256 (Miss. 2001) : " Gardner v. Gardner, 618 So.2d 108, 111-13 (Miss.1993) (citing Massingill v. Massingill, 594 So.2d 1173, 1175 (Miss.1992).

ISSUE II: THE COURT HAVING FAILED TO COMPLY WITH THE PROVISIONS OF MISSISSIPPI CODE ANNOTATED SECTION 93-5-2(5) (1972 AS AMENDED) SHOULD HAVE DECLARED THE JUDGMENT OF DIVORCE GRANTED ON THE GROUND OF IRRECONCILABLE DIFFERENCES VOID AND SET ASIDE SAME.

That no where in any orders being entered, opinion of the Chancellor, or anywhere else was there any indication that there was a withdrawal of contest or denial by either party of fault grounds, nor leave and permission of the Court permitting same. “ Divorce in Mississippi is a creature of statute.” Gardner v Gardner, 618 So2d 108 , 111-13 (Miss. 1993) That a failure on the parties and the Court to strictly comply with the statutory requirement to grant a divorce on the grounds of Irreconcilable Differences was not followed. Therefore, the divorce is void and should be set aside and remanded by the Supreme Court for a new trial on all issues. Perkins v Perkins, 787 So2d 1256 (Miss. 2001)

ARGUMENT

A. STANDARD OF REVIEW

The standard of review is well settled in that the Chancellor's findings will not be disturbed when supported by substantial evidence, unless the Chancellor abused his discretion, was manifestly wrong or clearly erroneous or applied an erroneous legal standard. Williams v. Williams, 656 So2d 325, 330 (Miss. 1995).

B. ISSUE I: THE COURT IS REQUIRED TO ENFORCE THE PROVISIONS OF MISSISSIPPI CODE ANNOTATED SECTION 93-5-2 (5) (1972 AMENDED) BEFORE GRANTING A DIVORCE ON THE GROUNDS OF IRRECONCILABLE DIFFERENCES .

Mississippi Code Annotated Section 93-5-2 (5) states as follows:

“(5) Except as otherwise provided in subsection (3) of this section, **no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial**; provided, however, **that a divorce may be granted on the grounds of irreconcilable differences where there has been a contest or denial, if the contest or denial has been withdrawn or cancelled by the party filing same by leave and order of the court.**”

There is no question that both parties filed a contest or denial of the others fault grounds for divorce. That at no time prior to or subsequent to the Judgement of Divorce being granted on the grounds of Irreconcilable Differences by the Court was there a Motion filed by either party, nor was an order entered by the Court granting leave to withdraw the contest of fault grounds and denial of each one had against the other .

A few cases decided by the Court regarding this particular issue have been addressed by the Mississippi Supreme Court .

A. The case of Breland v Breland, 920 So2d 510 (Miss. Ct. App. 2006) involved a case of Criminal Contempt for failure to pay child support . Mr. Breland raised the issue on the appeal that under the provisions of Mississippi Code Annotated Section 93-5-2(5) which states that “no divorce shall be granted on the ground of Irreconcilable Differences where there has been a contest or denial” unless “the contest or denial have been withdrawn or cancelled by the party filing same by leave and order of the Court.” Mr. Breland argued that the judgment of divorce and the subsequent contempt citation were void , as the Judgment of Divorce was entered without an order withdrawing the fault based ground of habitual cruel and inhuman treatment. Absent such a withdrawal, Mr. Breland alleged that the Chancery Court did not have authority and jurisdiction to enter the Divorce.

The lower Court held that Mississippi Code Annotated Section 93-5-2 (5) (1972) mandates were inapplicable to the divorce proceeding. The Court noting that Mr. Breland had neither filed an answer, nor a Counterclaim.

The Court held without a contest or denial, a withdrawal of a fault ground is not required under the provisions of Mississippi Code Annotated Section 93-5-2(5).

The O’Neal case is clearly distinguishable from the Breland case Id. That there was fault grounds denied by both parties and there was denials by both parties, none of which had been withdrawn.

B. Burge v. Burge, 851 So2d 384 (Miss. Ct. Appeal 2003) involved a divorce on a Consent Decree awarding a divorce on the grounds of Irreconcilable Differences . In the Burge Case the parties originally filed on fault grounds and answer or denial making the same fault based grounds. There was a Motion and the lower Court permitted then to withdraw their contested pleadings , and the parties applied for a consent divorce.

On Appeal, Mr. Burge argued that the lower court erred when it refused to the perfidious nature of Ms. Burge's attitudes toward the sanctity of marriage in awarding alimony. The Chancellor holding that such proofs were improperly brought in a consent proceeding.

The Court went on to hold as follows:

"In Mississippi, the consent proceedings are by definition no-fault proceedings; any evidence showing that the divorce was the fault of either party is to be eschewed. The intent of our no-fault divorce statute is to allow parties to agree to avoid the necessity of publicly putting on proofs of private matters. *Perkins v. Perkins*, 787 So.2d 1256, 1263 (¶ 21) (Miss. 2001) citing *Grier v. Grier*, 616 So.2d 337, 340 (Miss. 1993). Shelton's attempt to attack the chancellor's decision because the chancellor would not address inappropriate action for divorce based on adultery and habitual cruel and inhuman treatment, for reasons that this Court will not speculate on. Regardless, the fact remains that Shelton, as plaintiff, was fully in control of the nature of his divorce proceedings, and the chancellor can hardly be blamed for enforcing the spirit of consent divorce proceedings." *Burge*, 851 So.2d 384

Burge is clearly distinguishable from the O'Neal case. In *Burge*, the parties filed a Motion to withdraw contest and denial, and the Court entered an Order granting the Motion to withdraw contest and denial pursuant to Mississippi Code Annotated Section 93-5-2(5). In the O'Neal case, this was not done by the parties or the Court, nor was there any Order ever entered by the Court prior to and subsequent to the entry of the Judgment of Divorce sustaining a Motion to withdraw contest or denial, nor was a Motion ever even filed.

C. *Perkins v Perkins*, 787 So2d 1256 (Miss. 2001) held "Divorce in Mississippi is a creature of statute." *Gardner v. Gardner*, 618 So.2d 108, 111-13 (Miss.1993) (citing *Massingill v. Massingill*, 594 So.2d 1173, 1175 (Miss.1992)). A divorce based on irreconcilable differences has certain statutory requirements that must be met. "The starting point is that an irreconcilable differences divorce in Mississippi requires that neither spouse contest its granting." *Sanford*, 749 So.2d at 355; See Miss.Code Ann. § 93-5-2(5) (1994). "This does not mean that both spouses must fervently desire a divorce." *Sanford*, 749 So.2d at 355. "Unless a spouse exercises the right

to contest it, a decree of divorce may be entered." *Id.* "A cross-complaint or counterclaim may be a contest to a divorce; a second complaint, inconsistent with the first complaint that was jointly filed, may also serve as a contest." Massingill, 594 So.2d at 1177; McCleave v. McCleave, 491 So.2d 522, 523 (Miss.1986). "Wavering on whether a divorce should be entered may often occur and does not invalidate the divorce." *Id.* Perkins 787 So2d at 12 63 .

The Perkins case was reversed and remanded by the Court held that chancellor exceeded his authority in granting divorce on ground of irreconcilable differences when statutory requirements for such ground were not met.

There is no question that the Statutory grounds have not been strictly complied with in O'Neal , the Perkins case and citations therein clearly reveal that strict compliance with the statute is mandatory. In O'Neal it was not and the Judgment of Divorce should be set aside, the slate wiped clean, and reheard on its merits. Massingill v. Massingill, 594 So.2d 1173 (Miss.1992)

C. ISSUE II: THE COURT HAVING FAILED TO COMPLY WITH THE PROVISIONS OF MISSISSIPPI CODE ANNOTATED SECTION 39-5-2(5) (1972 AS AMENDED) SHOULD HAVE DECLARED THE JUDGMENT OF DIVORCE GRANTED ON THE GROUNDS OF IRRECONCILABLE DIFFERENCES VOID AND SET ASIDE SAME.

The Chancellor granted a divorce on the grounds of Irreconcilable Differences , even though neither party had withdrawn fault grounds one against the other , and denial of same one against the other . Mississippi Code Annotated Section 93-5-2 (5) (1972 as amended)

The Consent agreement contained nothing there in which withdraw a contest or denial of fault based grounds one against the other, therefore indirectly coming within the strict statutory application necessary to be followed to grant a divorce on Irreconcilable Differences . "Divorce in Mississippi is a creature of statute." Gardner v. Gardner, 618 So.2d 108, 111-13 (Miss.1993)

(citing Massingill v. Massingill, 594 So.2d 1173, 1175 (Miss.1992) A divorce based on irreconcilable differences has certain statutory requirements that must be met. "The starting point is that an irreconcilable differences divorce in Mississippi requires that neither spouse contest its granting." Sanford, 749 So.2d at 355; See Miss.Code Ann. § 93-5-2(5) (1994)

There was no transcript or record taken of the trial proceeding. We have only the Chancellor's opinion making an equitable division of "marital assets and debts of the parties in a divorce granted on Irreconcilable Differences." (CP 36) What testimony and other proof upon which did he rely? What was his basis for awarding a divorce on the grounds of Irreconcilable Differences ?

Simply put, in order to make an equitable division of marital assets and debts of the parties the Court must first grant a divorce , which in this case was an Irreconcilable Differences divorce , when neither party withdraw fault grounds one against the other or denial of same one against the other, nor is there anywhere in the record or orders entered by the Court granting leave and permission to withdraw contest or denial by either party prior to and subsequent to the entry of the divorce on the grounds of Irreconcilable Differences .


Without the strict compliance of the statute being followed by the parties and the court , the Court's Judgment of Divorce, should be set aside and remanded for a new trial on all issues. Perkins v Perkins, 787 So2d 1256 (Miss. 2001)

CONCLUSION

The Chancellor erred in failing to set aside the judgment of divorce granted on the grounds of Irreconcilable Differences , because the parties and the court failed to comply with the provisions of Mississippi Code Annotated Section 93-5-2(5) (1972) .

That the lower Court decision granting a divorce should be set aside and remanded to the lower court for a new trial on the merits to be heard .

Respectfully submitted,



H.R. Garner, MSB [REDACTED]
Attorney for Appellant

CERTIFICATE OF SERVICE

I, H.R. Garner, do hereby certify that I have this date mailed by United States Mail,
postage prepaid, a true and correct copy of the foregoing APPELLANTS BRIEF to:

Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 39205-0249

Percy L. Lynchard, Jr.
Chancery Court Judge
P.O. Box 340
Hernando, MS 38632

Hon. Darin Vance
Attorney At Law
P. O. Box 953
Hernando, Ms. 38632

Mr. Gene Loston O'Neal
c/o Carolyn O'Neal
6434 Benjestown Road
Millington, TN 38053-6935

Dated this the 4th day of February, 2009.



H.R. Garner,
Certifying Attorney