

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TORSHA A. BROWN,

Appellant,

Vs.

NO. 2008-CP-01430

**HARRAH'S ENTERTAINMENT
d/b/a HORSESHOE TUNICA-CASINO,**

Appellee.

BRIEF OF APPELLEE

**APPEALED FROM THE CIRCUIT COURT
OF TUNICA COUNTY, MISSISSIPPI
CIVIL ACTION 2007-0262**

**Robert L. Moore, Esq.
Russell B. Jordan, Esq.
HEATON AND MOORE, P.C.
100 North Main, Suite 3400
Memphis, Tennessee 38103
901-526-5975**

Attorneys for Appellee

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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Appellant,

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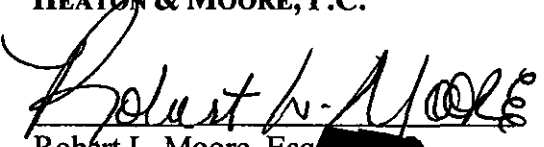
Appellee.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or refusal/recusal.

- | | |
|---|---|
| 1. Trial Judge | Honorable Albert B. Smith |
| 2. <i>Pro se</i> Appellant | Torsha A. Brown |
| 3. Appellee | Harrah's Entertainment d/b/a Horseshoe Tunica-Casino |
| 4. Attorney for Appellee | Robert L. Moore, Esq.
Russell B. Jordan, Esq.
HEATON & MOORE, P.C.
100 North Main Building, Suite 3400
Memphis, Tennessee 38103 |
| 5. Sharon Grandberry-Reynolds, Circuit Court Clerk, Tunica County | |
| 6. Horseshoe Casino and Hotel | |
| 7. Vickie Clark | |

HEATON & MOORE, P.C.

A handwritten signature in cursive script, appearing to read "Robert L. Moore", written over a horizontal line.

Robert L. Moore, Esq.

Russell B. Jordan

Attorneys for Appellee

100 North Main Building, Suite 3400

Memphis, Tennessee 38103

901.526.5975

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STATEMENT ON ORAL ARGUMENT

The Appellee respectfully requests oral argument. This appeal presents complicated facts and legal issues, and an oral argument would be beneficial to this Court and to the parties. The Appellee, therefore, respectfully submits that oral argument would be appropriate in this case.

I.

STATEMENT OF THE ISSUES

1. Whether the plaintiff's claim of false arrest was time barred.
2. Whether the plaintiff can make a claim for false arrest if probable cause existed for her arrest and resulted in her conviction in justice court.
3. Whether the plaintiff/appellant's complaint contained any allegations other than those for false arrest and whether these allegations, if present, are barred by the one-year statute of limitations.

II.

STATEMENT OF THE CASE

This case arises out of an incident that occurred on September 27, 2005, at the Horseshoe Casino in Robinsonville, Mississippi when the plaintiff/appellant, Torsha Brown, was arrested and charged with trespassing and disturbing the peace by the Tunica County Sheriff's Department. (Record at 8). Ms. Brown filed her complaint in the Circuit Court of Tunica County, Mississippi, on September 21, 2007, alleging that the defendant/appellee caused her to be falsely arrested for trespassing and disturbing the peace. (R. at 6). In her complaint, Ms. Brown requested damages of pain and suffering, future emotional distress and lost wages. (R. at 8-9).

After being served with a copy of the complaint, the defendant/appellee filed an answer on February 7, 2008, denying that it was guilty of the acts and omissions alleged in the complaint and alleging that the Plaintiff was the direct and proximate cause of any injuries and damages she incurred and that these damages were a result of the comparative fault of the Plaintiff. (R. at 22-23).

On March 31, 2008, the defendant filed its Motion for Summary Judgment, arguing that, because there was no dispute of material facts, there was no legal basis upon which the defendant could be held liable to the plaintiff. (R. at 48-53). On that same date, the defendant filed a Motion for Protective Order, seeking to have an Order entered by which the interrogatories propounded by the plaintiff would be held in abeyance until after the court ruled on the defendant's Motion for Summary Judgment. (R. at 45). The Motion for Summary Judgment (as well as the plaintiff's cross-motion for summary judgment) was argued in front of the Honorable

Albert B. Smith on July 23, 2008. (R. at 88). That defendant's Motion was granted and an Order was entered on that date, dismissing the plaintiff's complaint. (R. at 88). The Appellant, Torsha Brown, promptly filed her Notice of Appeal on August 19, 2008. (R. at 89). This Honorable Court docketed and assigned a case number, as well as, provided a briefing schedule on November 25, 2008.

III.

STATEMENT OF THE FACTS

On January 9, 2005, the plaintiff Torsha Brown was permanently evicted from the Horseshoe for her verbal and physical abuse and harassment of other guests as well as employees of the Horseshoe.¹ (Affidavit of Jimmy Joyner, attached to appendix). On September 27, 2005 the plaintiff, Torsha Brown, returned to the Horseshoe where she was recognized, approached and asked for some identification which she refused. (R. at 50-51, 54). At that point, Ms. Brown also refused to cooperate with security officers seeking to provide her with documentation of her eviction and became very loud and profane and engaged in a physical struggle with security officers resulting in a blackjack table being turned over and her subsequent arrest, all against the peace and dignity of the State of Mississippi. (R. 50-51, affidavit of Jimmy Joyner).

Ms. Brown was later charged by Tunica County Mississippi with trespassing and disturbance of the peace and was found guilty of disturbance of the peace following a trial in the Tunica County Justice Court. (R. at 55). The conviction was then (apparently) appealed to the circuit court, but the fact of the appeal and the date of the re-trial were not communicated to all of the witnesses of the plaintiff's criminal activities and all necessary witnesses were not present in circuit court for the retrial of the case when the plaintiff's conviction was reversed. (R. 50-51, affidavit of Jimmy Joyner).

¹ During the preparation of this brief, it came to the attention of counsel for the defendant/appellee that, either through oversight or inadvertence, the affidavit of Jimmy Joyner was not filed with the trial court as believed. As seen in correspondence to the Tunica County Circuit Clerk on March 28, 2008, it was believed that the affidavit was filed in conjunction with the defendant's Motion for Summary Judgment. (R. at 47). A copy of that affidavit is being provided in the appendix portion of this brief.

IV.

STANDARD OF REVIEW

The standard of review of a trial court's determination to grant or deny a Motion for summary judgment is de novo. *Leffler v. Sharp*, 891 So.2d 152, 156 (¶ 9) (Miss. 2004). Under Mississippi rule of Civil Procedure 56 (c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, showed that there is no genuine issue as to any material fact and at the moving party is entitled to a judgment as a matter of law. The evidence is considered in the light most favorable to the nonmoving party. *Russell v. Orr*, 700 So.2d 619, 622 (¶ 8) (Miss. 1997).

V.

STATEMENT OF THE ARGUMENT

The trial court correctly granted summary judgment in favor of the defendant. The plaintiff has made a claim of false arrest. She has failed to plead any other claims. A claim for false arrest is an intentional tort which must be brought within one year of the alleged incident. Because the plaintiff failed to file her intentional tort claim within the one year statute of limitations, it must be dismissed as a matter of law. Mississippi law requires the plaintiff to prove malice on the part of the defendant and allows the defendant to the right to show it acted with probable cause. Mississippi does not recognize the tort of "negligent false arrest". Her claim should also be dismissed because, under Mississippi law, if probable cause exists for an arrest, no claim for false arrest can be made.

VI.

ARGUMENT

Summary judgment is mandated, where the respondent has failed to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1214 (Miss. 1996), quoting *Galloway v. Traveler's Insurance Co.*, 515 So.2d 678, 683 (Miss. 1987). When a party opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law. *Galloway*, 515 So.2d at 684.

A. THE APPELLANT/PLAINTIFF'S CLAIM WAS FILED AFTER THE APPLICABLE STATUTE OF LIMITATIONS PERIOD HAD RUN

"False arrest" is an intentional tort which occurs when one causes another to be arrested falsely, unlawfully, maliciously and without probable cause. *Croft v. Grand Casino-Tunica, Inc.*, 910 So. 2d 66, 75 (¶ 34) (Miss. App. 2005). Pursuant to Miss. Code Ann. § 15-1-35, eight enumerated intentional torts, including malicious arrest, are subject to a one-year limitations period. Miss. Code Ann. § 15-1-35. Although not specifically enumerated, an action for false arrest is deemed to be no different from the intentional tort of malicious arrest and is subject to the same one-year limitations period as an action for malicious arrest. *Mound Bayou v. Johnson*, 562 So.2d 1212, 1218 (Miss. 1990).

An action for false arrest accrues on the day on which it occurs. *Id.* at 1217. Clearly, Ms. Brown's claim, should one exist, arose on September 27, 2005. Her complaint was not filed

until September 21, 2007. In her complaint, she alleges that "Defendant caused Plaintiff to be falsely arrested for trespassing and disturbing the peace." (R. 7-9). Throughout the whole of the complaint, this is the only allegation which she makes against the defendant/appellee. Because this complaint was not timely filed, the plaintiff/appellant's claim for false arrest must be dismissed. She admits as much in her own brief. Because the only claim which she has against the defendant/appellee is for false arrest, this entire cause of action should be dismissed.

B. BECAUSE PROBABLE CAUSE EXISTED, THE DEFENDANT CANNOT BE FOUND LIABLE FOR FALSE ARREST

Not only must the plaintiff/appellee's claim for false arrest fail because it is time barred, it also must fail because she is incapable of meeting the burden of proof necessary to prove the elements of false arrest. If there is probable cause for the charges, then the plaintiff's arrest is supported by probable cause, and a claim for false arrest must fail. *Price v. Roark*, 256 F.3d 364, 369 (5th Cir. 2001).

In evaluating probable cause, the Mississippi Supreme Court has stated that probable cause is determined from the facts apparent to the reasonable person at the time the prosecution is initiated. *Van v. Grand Casinos of Mississippi, Inc.*, 767 So.2d 1014, 1020 (¶ 14) (Miss. 2000). The Mississippi Court of Appeals, citing W. Prosser & W. Keaton, *The Law of Torts* §§ 119 (5th Ed. 1984), stated that "the existence of probable cause, which involves only the conduct of a reasonable man under the circumstances, and does not differ essentially from the determination of negligence, usually is taken out of the hands of the jury, and held to be a matter for decision by the court. That is to say, the court will determine whether upon the appearances presented to the defendant, a reasonable person would have instituted the proceeding." *Croft v. Grand Casino Tunica*, 910 So.2d 66, 74 (¶ 25) (Miss.Ct.App. 2005).

When a conviction is obtained in a lower court prosecution, whether that conviction is later reversed or not, then a *prima facie* case that probable cause is present is established. *Gaylords of Meridian v. Sicard*, 384 So. 2d 1042, 1044 (Miss. 1980); *J.C. Penney Co. Inc., v. Blush*, 356 So. 2d 590, 592 (Miss. 1978). This is true even when a defendant is subsequently tried and found to be not guilty. *Keen v. Simpson County*, 904 So. 2d 1157, 1161 (¶ 21) (Miss. App. 2004).

In a very similar case, the United States Fifth Circuit Court of Appeals held that evidence that a guest that was instructed to leave a casino but then refused to cooperate with security officers and attempted to walk past those officers was sufficient to show probable cause supporting the guest's arrest for trespass. *Kelly v. Beau Rivage Resorts*, 184 Fed. Appx. 364 (5th Cir. 2006).

Because the plaintiff was found guilty of the underlying offense, she cannot establish an absolute prerequisite of her claims against the defendant - - however she may wish to define them - - which is that the defendant acted without probable cause.

C. THE PLAINTIFF HAS NOT MADE AND DOES NOT HAVE A CLAIM OF NEGLIGENCE AGAINST THE DEFENDANT

In her brief, the plaintiff/appellant now alleges that the trial court's summary dismissal was improper because it also dismissed her claims of negligence. A thorough review of the plaintiff's complaint reveals no allegations of negligence or any act or omission similar to negligence. The plaintiff's complaint alleges only the following:

7. On September 27, 2005, while Plaintiff was playing blackjack, Defendant caused Plaintiff to be falsely arrested for trespassing and disturbing the peace.

8. In a proceeding before the Justice Court, the Plaintiff was found guilty of disturbing the peace. Upon appeal to the Circuit Court of Tunica County, this verdict was reversed and dismissed on February 16, 2006. A copy of the order of the February 16th proceeding is attached as Exhibit A.

CAUSATION

9. As a direct and proximate result of the acts of commission and omission of Defendant, Plaintiff sustained injuries and damages as set forth herein below.

(R. at 8).

Rule 8(a) of the Mississippi Rules of Civil Procedure sets forth that a pleading “which sets forth a claim for relief....shall contain a short and plain statement of the claim...”. It has been said before that, regardless of the merits of a plaintiff's claim, a defendant is entitled to reasonable notice of why it has been sued by a particular plaintiff. *Illinois Central R.R. Co. v. Adams*, 922 So.2d 787, 790 (¶ 9) (Miss. 2006). At a minimum, a complaint must identify a litigable event which entitles the particular plaintiff to recover; that is, the complaint must disclose, in general terms, what each defendant did wrong to each plaintiff, and when and where the alleged wrong took place. *Id.* at 790, (¶ 8). As the comment to Rule 8, sets forth, “[a]lthough Rule 8 abolishes many technical requirements of pleadings, it does not eliminate the necessity of stating circumstances, occurrences, and events which support the preferred claim”. Mississippi Rule of Civil Procedure 8 cmt.

In her brief, the plaintiff has made allegations and described several different types of actions which she now attempts to assert, but failed to plead within her complaint. At no time were any of these allegations plead prior to the hearing on the defendant's Motion for Summary Judgment. At no time did the plaintiff make any attempt to revise her pleadings to be consistent

with these allegations. This is in spite of the fact that, while the case remained at issue in the trial court, sufficient time and opportunity remained for the plaintiff to make these allegations. She failed to do so.

Despite failing to do so at the trial court level, the plaintiff now attempts to assert them on appeal by arguing that the pleadings set forth in her complaint are sufficient to subject the defendant to some unknown and unenumerated claim(s) of negligence. This is exactly the type of ambiguity that Rule 8 seeks to prevent.

Because she failed to assert these claims at the trial court level, and because these claims were not considered by the trial court, she is not allowed to assert them now at the appellate level. *Ditto v. Hinds County, Miss.*, 665 So.2d 878, 880 (Miss. 1995). As this court is well aware, appellate courts are limited to the evidence which appears in the record and they “may not act upon or consider matters which do not appear in the record”. *Shelton v. Kindred*, 279 So.2d 642, 644 (Miss. 1973). No attempt was ever made to amend her complaint; therefore the plaintiff is estopped from arguing that the trial court somehow prevented her from setting forth any additional allegations.

Although difficult to argue without giving credence to the plaintiff’s unpled, recently made claims of negligence, but, had a negligence claim been pled, the plaintiff failed to establish one important element of such a claim- duty. The Mississippi Supreme Court has stated that negligence is “the result of the failure to perform a duty, therefore actionable negligence cannot exist in the absence of a legal duty to an injured plaintiff.” *Stanley v. Morgan & Lindsey, Inc.*, 203 So.2d 473, 475 (Miss. 1967). In her brief, the plaintiff cites numerous instances in which she alleges that the defendant was “negligent”. Although she loosely alleges in various instances

that the defendant had a duty to her, she fails to cite any authority setting forth this legal duty. Because the defendant did not breach a legal duty owed to her, it cannot be liable for negligence.

The trial court could not entertain a cause of action that had not been pled. Since the only cause of action pled was false arrest, and because that cause of action was dismissed, the complaint in its entirety must be dismissed.

D. EACH OF THE PLAINTIFF'S ALLEGATIONS ARE INTENTIONAL TORTS

Even assuming *arguendo*, that the plaintiff was somehow permitted to include these additional acts in her cause of action, her claims are still time barred. Although it is difficult to discern and impossible to know exactly what additional allegations the plaintiff seeks to make (because they have not been pled), from her brief, it appears that these allegations also sound in intentional torts. Namely, it appears that the plaintiff desires to make additional allegations of assault, battery, intentional infliction of emotional distress and false imprisonment. As this court well knows, not only is it improper to attempt to assert these claims for the first time at the appellate level, these claims are also time barred by Miss. Code Ann. § 15-1-35.

Because each of the plaintiff's claims is time barred, the issue of whether or not a genuine issue of material fact exists is moot.

E. THE TRIAL COURT DID NOT COMMIT AN ABUSE OF DISCRETION

The plaintiff alleges that the trial court abused its discretion by making a dispositive ruling on her case without reviewing certain substantive evidence. The plaintiff is misled, however, by the fact that her case was not dismissed due to its merits. It was dismissed because she had no claim under Mississippi law. The trial judge, applying Mississippi law, found that Ms. Brown had no claim and, for this reason, her case was dismissed. Substantive evidence would not be pertinent to a case, such as this, where the plaintiff's claims are prohibited by

Mississippi law. Because the plaintiff's claims could not pass the procedural threshold, there was no need to examine her claims substantively.

The plaintiff also alleges that the trial court abused its discretion when it did nothing to remedy the "unfair advantage" benefiting the defendant because it had not responded to discovery requests prior to the hearing on its Motion for Summary Judgment. Despite these allegations, at no time did the defendant "contumaciously" disregard the interrogatories. Instead, on a date prior to them becoming due, the defendant filed and served upon Ms. Brown a Motion for a Protective Order, relieving the defendant of the obligation of responding until after the trial court had ruled on its pending Motion for Summary Judgment. The basis of the Motion was to prevent the defendant from incurring the needless and unnecessary expense of responding to the plaintiff's discovery requests in light of the pending Motion for Summary Judgment. This is, of course, one of the bases enumerated in Rule 26 of the Mississippi Rules of Civil Procedure upon which a Motion for Protective Order can be granted. No response to the Motion for Protective Order was made by the plaintiff. A Notice of Hearing was served on the plaintiff, scheduling the Motion for Protective Order to be heard on the same date as the Motion for Summary Judgment. Because the plaintiff never filed a response to the Motion and because her claim(s) was extinguished at the hearing, that issue is now moot.

Furthermore, the dismissal of the plaintiff's case had nothing to do with a "ruling regarding discovery" and therefore it is immaterial whether or not there has been an abuse of discretion.

In her brief, Ms. Brown points out that the affidavit of Jimmy Joyner was not filed with the trial court. This is clearly due to an oversight on behalf of counsel for the defendant, who has attached a copy of the sworn affidavit in the appendix of this brief. It is notable that, at no time

prior to the hearing on the defendant's Motion for Summary Judgment and certainly not in either of the plaintiff's written responses to the defendant's Motion and Supplemental Motion, did the plaintiff make note of this fact. In fact, the first time this omission was made known to the defendant's attorney was while reading the plaintiff's appellate brief. Despite this, the existence (or nonexistence) of the affidavit does nothing to change the fact that the plaintiff's claim(s) remain time barred and that the defendant had probable cause for its actions, as best evidenced by the fact that the plaintiff was convicted of the underlying offense in Justice Court. Any objection she had to the non-existence of the affidavit was waived with her failure to assert it on the trial court level

The plaintiff goes on to make additional broad, open-ended assertions that the trial court abused its discretion. This includes alleging that the trial court abused its discretion for failing to require strict compliance with its own *local* rules. Ms. Brown also alleges that the trial court refused to apply balance and equity during the hearing on Motion for Summary Judgment because it did not address the defendant's Motion for a protective order, which no response had been filed to. Because none of these arguments were addressed at the trial court level, they are waived.

VII.

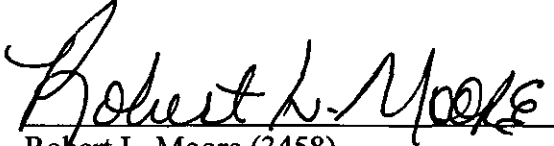
CONCLUSION

The plaintiff has made a claim of false arrest. She has failed to plead any other claims. A claim for false arrest is an intentional tort which must be brought within one year of the alleged incident. Because the plaintiff failed to file her intentional tort claim within the one year statute of limitations, it must be dismissed as a matter of law. Her claim should also be

dismissed because, under Mississippi law, if probable cause exists for an arrest, no claim for false arrest can be made.

Respectfully submitted,

HEATON AND MOORE, P.C.

By: 
Robert L. Moore (3458)
Russell B. Jordan (102366)
Attorneys for Appellee
100 North Main Building, Suite 3400
Memphis, Tennessee 38103
901.526.5975

IN THE CIRCUIT COURT OF TUNICA COUNTY, MISSISSIPPI

TORSHA A. BROWN,

Plaintiff,

Vs.

CIVIL ACTION NO. 2007-0262
JURY DEMANDED

HARRAH'S ENTERTAINMENT
d/b/a HORSESHOE TUNICA-CASINO,

Defendant.

AFFIDAVIT OF JIMMY JOYNER

The undersigned, being first duly sworn according to law deposes and states as follows:

1. I am an adult resident citizen of the State of Mississippi, having personal knowledge of the facts as set forth within this affidavit.

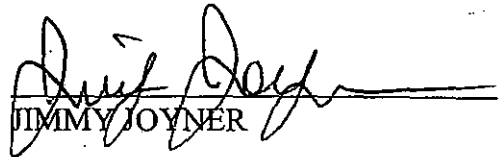
2. I am employed as a security shift supervisor at the Horseshoe Casino & Hotel located in Robinsonville, Mississippi. On January 9, 2005, the plaintiff Torsha Brown was permanently evicted from the Horseshoe for her verbal and physical abuse and harassment of other guests as well as employees of the Horseshoe. On September 27, 2005 the plaintiff, Torsha Brown, returned to the Horseshoe where she was recognized, approached and asked for some identification which she refused. At that point, Ms. Brown also refused to cooperate with security officers seeking to provide her with documentation of her eviction and became very loud and profane and engaged in a physical struggle with security officers resulting in a blackjack table being turned over and her subsequent arrest, all against the peace and dignity of the State of Mississippi.

3. Ms. Brown was charged by Tunica County Mississippi with trespassing and

disturbance of the peace and (upon information) was found guilty of disturbance of the peace following a trial in the Tunica County Justice Court. The conviction was then (apparently) appealed to the circuit court, but the fact of the appeal and the date of the re-trial were never communicated to me and no one from Horseshoe was present in circuit court for the retrial of the case when the plaintiff's conviction was reversed for lack of evidence.

4. The same would be my testimony if called upon to give evidence of these facts in open court.

AND FURTHER AFFIANT SAYETH NAUGHT.


JIMMY JOYNER

STATE OF MISSISSIPPI:
COUNTY OF TUNICA:

Sworn to and subscribed before me this 13th day of February, 2008.

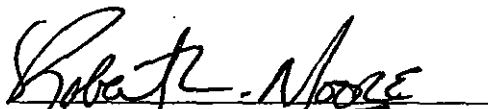

Notary Public

My Commission Expires:

09/19/2009



HEATON AND MOORE, P.C.


Robert L. Moore (M) [REDACTED]
Attorney for Defendant
100 North Main Bldg., Suite 3400
Memphis, TN 38103
Ph.: (901) 526-5975

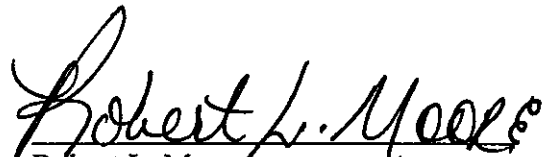
CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and exact copy of the Brief of the Appellee has been mailed, by United States Express Mail, postage prepaid, to the following:

Torsha A. Brown
1110 East Tyler
West Memphis, AR 72301

Honorable Albert Smith, III
Tunica County Circuit Court Judge
P.O. Drawer 478
Cleveland, MS 38732

This the 5 day of February, 2009.


Robert L. Moore