

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-00672

**MANDA GRIFFIN, INDIVIDUALLY AND AS A
WRONGFUL DEATH BENEFICIARY, AND
ON BEHALF OF ALL OTHER WRONGFUL
DEATH BENEFICIARIES OF GRACIE M. STEPHENS,
DECEASED** **APPELLANT**

V.

NORTH MISSISSIPPI MEDICAL CENTER **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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V.

NORTH MISSISSIPPI MEDICAL CENTER APPELLEE

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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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Appellee

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Hon. Paul S. Funderburk

Circuit Judge, Lee County, Mississippi

SO CERTIFIED, this the 8 day of January,
2010.

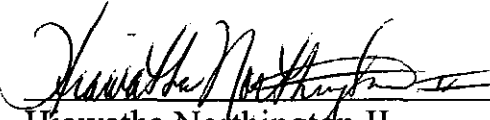

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant, Manda Griffin, respectfully submits that oral argument is necessary in this case, as it concerns the application of a legal principle which could impact future cases before the court involving medical negligence claims. The application of the issue also warrants treatment by the Supreme Court and potentially could affect parties beyond the litigants herein. It is submitted that oral argument would aid the Court in rendering an opinion in this matter.

STATEMENT OF ISSUE

- I. The Circuit Court of Lee County erred in granting a directed verdict to North Mississippi Medical Center.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition in Court Below

This is an appeal from an order of the Circuit Court of Lee County, Mississippi granting a directed verdict to the Appellee, North Mississippi Medical Center in a medical negligence wrongful death case brought by the Appellant, Manda Griffin, individually and on behalf of the wrongful death beneficiaries of Gracie Stephens, as a result of negligence in the treatment of Gracie Stephens, her natural mother.

Gracie Stephens, a sixty-one-year-old woman with end stage renal disease, was admitted to North Mississippi Medical Center on December 29, 2000 for removal of an abdominal dialysis catheter and placement of a chronic catheter in her neck. The procedure was scheduled for January 4, 2001. During this surgical procedure, the surgeon, Dr. Terry Pinson, punctured the anterior and posterior walls of the jugular vein, and subsequently perforated the carotid artery. Fluoroscopy revealed the injuries to the blood vessels, and Dr. Pinson repaired the injuries, reinserted the catheter and closed the surgical site.

Ms. Stephens had been administered the drug Heparin, an anti-coagulant, during repair of her blood vessels. When she arrived in the

recovery room, her blood pressure was very low. Ms. Stephens's hypotension persisted, along with oozing of blood from the incision in her neck. A large amount of blood also accumulated in the neck tissue, and Ms. Stephens subsequently experienced respiratory distress. Ms. Stephens was transferred to the operating room eventually, but before re-exploration of her neck could occur, she developed circulatory compromise. Although she was eventually resuscitated, Ms. Stephens suffered a severe brain injury, leaving her ventilator dependent in a non-responsive comatose state. She died approximately one week later on January 11, 2001.

Ms. Griffin filed suit against North Mississippi Medical Center on January 30, 2002, (R. at 222) and North Mississippi Medical Center responded to the Complaint, denying that it, through its staff, breached any duty owed to Ms. Stephens during the course of its treatment of her. (R. at 260). Discovery ensued, and the matter proceeded to trial beginning on March 23, 2009.

At trial, Ms. Griffin presented testimony from two expert witnesses. First, Ms. Griffin offered Patricia Ross, a registered nurse with approximately forty years of experience as practicing nurse in the United States Army, including time in the medical/surgical arena and a legal nurse consultant for both plaintiffs and defendants. (T. at 126-29). Ms. Ross

testified, inter alia, that in this case, the nursing staff (specifically Nurse Sherry Crenshaw) at North Mississippi Medical Center charged with the care of Gracie Stephens on January 4, 2001, failed to comply with the applicable standard of care in several respects: 1) failure to timely report changes to and deterioration of Gracie Stephens's condition to her primary physician; 2) failure to consistently and accurately assess and document Ms. Stephens's overall response to the surgical procedure; 3) failure to evaluate and document Ms. Stephens's pulse pressure to determine how much bleeding was occurring; 4) failure to recognize, assess and or treat the signs and symptoms of hemorrhagic shock exhibited by Ms. Stephens; 5) failure to timely and properly assess Ms. Stephens's neck wound site for bleeding. (T. at 149-181).

Ms. Griffin also tendered William Truly, M.D. as an expert witness. Dr. Truly, a physician with over thirty-five years of experience in medicine, including the hospital setting and care of post-surgical patients and patients with end-stage renal disease and other systemic maladies, testified that the breaches identified by Nurse Ross were the proximate cause of the death of Gracie Stephens.

At the close of the plaintiff's case in chief, North Mississippi Medical Center moved for a directed verdict, arguing that the plaintiff, Ms. Griffin,

failed to make out a prima facie case of medical negligence. The trial court considered the motion and agreed, granting the motion on March 26, 2009, (T. at 334-35) and entered judgment in favor of North Mississippi Medical Center on April 13, 2009. (R. at 932-33). It is from this final judgment that Ms. Griffin appeals.

SUMMARY OF THE ARGUMENT

Ms. Griffin is entitled to a reversal of the Circuit Court's order granting a directed verdict to the Appellee, North Mississippi Medical Center. In this case, Ms. Griffin established a prima facie case of medical negligence by showing that breaches in the applicable standard of care by the nurses employed at North Mississippi Medical Center proximately caused the death of Gracie Stephens. The matter should have been submitted to the jury, as reasonable jurors could find a basis for the plaintiff's recovery. The trial court's failure to recognize this constitutes error which must be reversed and remanded for trial.

STANDARD OF REVIEW

The granting of a motion for directed verdict is reviewed de novo on appeal to the Supreme Court. The evidence is viewed in the record in the same light as the trial court. *Alfa Mutual Ins. Co. v. Cascio*, 909 So. 2d 174 (Miss. 2005). The Supreme Court reviews the evidence in the record and makes a determination as to whether the parties presented evidence to establish the necessary elements of the claim, granting all reasonable inferences arising from the evidence presented by the Plaintiff. *Id.*

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING A DIRECTED VERDICT TO NORTH MISSISSIPPI MEDICAL CENTER.

The Circuit Court improperly granted the motion for directed verdict of North Mississippi Medical Center. Ms. Griffin provided sufficient evidence in her case in chief that a violation of the standard of care by North Mississippi Medical Center was a proximate cause of Gracie Stephens's injury and ultimate death. Ms. Griffin established that the actions and/or inactions of North Mississippi Medical Center caused the decedent to bleed to death. Unfortunately, the trial court, in granting the hospital's directed verdict, based its dismissal on a negligence theory which was not advanced by Ms. Griffin. Accordingly, the only proper remedy is remand and retrial of this matter in the Circuit Court of Lee County.

- A. Under Mississippi law, Ms. Griffin established sufficient evidence as to medical negligence which proximately caused the injury of the plaintiff through the testimony of an expert witness.

Under Mississippi law, a plaintiff in a medical malpractice case must prove the following elements by expert medical evidence: (1) standard of care/duty; (2) breach of standard of care/duty; (3) causal connection between the breach and the injury/death; and (4) the extent of the plaintiff's damages. *McCaffrey v. Puckett*, 784 So. 2d 197, 206 (Miss. 2001). Expert testimony

must be used to “identify and articulate the requisite standard that was not complied with... and establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries.” *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992); *see also Brown v. Baptist Memorial Hospital-DeSoto, Inc.*, 806 So. 2d 1131, 1134 (Miss. 2002).

Therefore, for the plaintiff to meet her burden of proof at the trial in this matter, Ms. Griffin must have produced testimony through a medical expert that North Mississippi Medical Center deviated from the standard of care and that the deviation or breach proximately caused the death of Gracie Stephens. At the conclusion of her case in chief, Ms. Griffin met this burden.

- B. Under the applicable standard of review, with all facts and reasonable inferences interpreted in favor of the plaintiff, Ms. Griffin presented sufficient evidence to overcome North Mississippi Medical Center’s motion for directed verdict.

This Court has held that “[w]here a motion for directed verdict is made in a medical malpractice action, [it will] review the evidence by the same standard as applied by the trial court.” *Hudson v. Parvin*, 582 So.2d 403, 408 (Miss. 1991). The Court is “required to consider the evidence in a light most favorable to the plaintiff, considering the testimony in behalf of the plaintiff to be true along with all reasonable inferences that may be

drawn therefrom, and evidence of contradiction thereof must not be considered.” *Robinson v. Hawkins*, 541 So. 2d 1048,1050 (Miss. 1989). See also *Hudson v. Parvin*, 582 So. 2d at 408; *Ladner v. Campbell*, 515 So. 2d 882, 887 (Miss. 1987); *Hardy v. Brantley*, 471 So. 2d 358 (Miss. 1985); *Hall v. Hilbun*, 466 So. 2d 856 (Miss. 1985); *Pharr v. Anderson*, 436 So. 2d 1357,1361 (Miss. 1983). The Court has gone on to state that “[u]nless the plaintiff’s evidence is so lacking that no reasonable juror could find for plaintiff, the motion must be denied. *Hammond v. Grissom*, 470 So. 2d 1049, 1053 (Miss. 1985). Thus, only that testimony and evidence which is favorable to a plaintiff’s case should be considered. *Fennell v. Stewart*, 807 So. 2d 1262 (Miss. App. 2001).

In reversing a directed verdict to the defendant in *Fennell*, the Court of Appeals concluded that based on the plaintiff’s facts and the reasonable inferences therefrom, the facts clearly showed that the defendant physician failed to advise the decedent of the precancerous condition of his throat and that he failed to advise the decedent of the necessity of a follow up. *Id.* at 1265. The Court of Appeals concluded that given the standard of review, taking the facts in the light most favorable to the plaintiff (i.e. that defendant failed to advise the decedent properly), the plaintiff established a prima facie case of medical negligence. *Id.*

Here, the trial court's decision to grant the directed verdict was based on a limited finding. Specifically, the trial court determined that:

there was nothing in the testimony of Dr. Truly, Nurse Ross, or anyone else of the chances of sparing the life of Ms. Stephens had Nurse Crenshaw – had Nurse Crenshaw's care of Ms. Stephens had been exactly as Nurse Ross and Dr. Truly think it should have been. Without this evidence, the plaintiff has failed to make a prima facie case, and therefore, the defendant's motion for a directed verdict shall be and is hereby granted[. . .]

(T. at 334-35).

Therefore, the question in the matter sub judice is whether, taking the facts and reasonable inferences in the light most favorable to the plaintiff, Ms. Griffin established that the nurses at North Mississippi Medical Center failed to properly monitor and seek intervention for Ms. Stephens's bleeding and that in the absence of such failures, Ms. Stephens would not have bled to death. The answer is yes.

The testimony from Nurse Ross clearly established that the nurses at North Mississippi Medical Center, especially Nurse Crenshaw, had a responsibility to bring to the appropriate physician's attention what was apparent and what she should have known from the medical records and her observation--that Gracie Stephens was bleeding to death (T. at 161, 178-79). From a nursing standpoint, Nurse Ross, duly qualified as a nursing expert by the trial court, explained that the failures by the nursing staff at North

Mississippi Medical Center constituted a breach of the applicable standard of care. Further, the testimony from Dr. Truly established that Ms. Stephens bled to death as a result of profound hypotension over a period of a couple of hours with no intervention. (T. at 237). More specifically, Dr. Truly stated that the breaches, as elaborated by Nurse Ross, were the proximate cause of Ms. Stephens's death, absent the surgical intervention to repair the blood loss. (T. at 265-267).

Q: Dr. Truly, do you have an opinion as to whether or not failures or omissions of North Mississippi Medical Center caused or contributed to Ms. Stephens' death?

A: Yes.

Q: Please share that opinion with the jury.

A: My opinion is that the – that the negligence on behalf of the hospital contributed and proximately caused her death by the mere fact that there was – one, there was a failure to recognize the significance of a failing blood pressure, couple with a falling hematocrit, couple with a patient who is uncooperative and restless, coupled with the change in her status, coupled with air hunger.

So there was a failure of the hospital to respond to these changes of a falling blood pressure and a falling hematocrit or hemoglobin.

(T. at 272).

Therefore, pursuant to the applicable standard of review, it must be concluded that Plaintiff established a prima facie case of medical negligence.

- C. The argument that Ms. Griffin was required to present evidence of “loss of chance” is illusory; Mississippi law does not always require such in medical negligence cases and it was not necessary here.

The trial court below construed the motion for directed verdict in favor of North Mississippi Medical Center, determining that Ms. Griffin, in her case in chief, did not establish that there was a greater than fifty percent chance of a better recovery for the decedent, Ms. Stephens, had the nurses at North Mississippi Medical Center acted within the applicable standard of care. The suggestion appeared to be that under Mississippi law, there was a requirement that Ms. Griffin quantify the loss of chance of recovery through expert testimony. However, because this case was not pled as a loss of chance case, and the evidence showed that the cause of action was that the death of Gracie Stephens was proximately caused by the negligence of the nursing staff at North Mississippi Medical Center, the requirement of any testimony regarding an alleged “loss of chance” is wholly unnecessary here.

1. The cases regarding “loss of chance” should be limited to their particular facts.

The trial court relied solely on *Harris v. Shields*, 568 So. 2d 269 (Miss. 1990), to conclude that Ms. Griffin failed to establish a prima facie case of medical malpractice. However, a close reading of *Harris* reveals that the discussion of the need for testimony regarding a fifty percent or greater

chance of recovery was made in the context of discussion of proper jury instructions - after a matter has been submitted to the jury at the close of evidence. Going back to *Clayton v. Thompson*, 475 So. 2d 439 (Miss. 1985), the *Harris* court examined the need for a plaintiff to establish that recovery is predicated on proof of a better result being more likely than not probable. However, none of the cases cited in *Harris* mentioned an expert having to specifically quantify in testimony a particular percentage greater than fifty percent of a better outcome. In fact, the *Harris* court relied on another Supreme Court case, *Boyd v. Lynch*, in which it concluded that the court affirmed a directed verdict against the plaintiff because the plaintiff failed to provide evidence that the defendant's failures caused or contributed to the child's death - not that the plaintiff failed to state the percentage of a better outcome.

Somehow the reference to the need for evidence to meet the more likely than not standard has been morphed into the illusory requirement that the testimony from an expert must be that a fifty percent or better percentage of a better outcome is present. It is submitted to the Court that the true genesis of the fifty percent or better standard lies in the totality of the evidence presented being sufficient for the jury to conclude that it is more likely than not (fifty percent plus one) that a breach led to the injury alleged.

As is demonstrated further infra, it is antithetic to Mississippi law to require such rote recitation of standards as a proxy for evaluation of the actual testimony and evidence.

The effect of *Harris v. Shields* is further tempered by the testimony from an expert in that case that what occurred to the plaintiff would have happened anyway, regardless of the negligence alleged. *See Harris*, 568 So. 2d at 275-76. Indeed, the *Harris* Court specifically asked whether the plaintiff had produced any evidence to rebut the apparently unchallenged testimony from that particular expert. The Court concluded that there was insufficient testimony that the decedent would not have lost her life specifically in light of the uncontradicted testimony regarding the cause of death, to which the plaintiff's expert could not speak. *Id.* at 276.

Such testimony was not presented here. There was no testimony that Ms. Stephens would have died regardless of the nurses' actions or inactions. North Mississippi Medical Center did not even challenge Dr. Truly on the stand as to whether he could reach the conclusion, probably hoping to ensnare his testimony within the legal snafu from which this appeal attempts to extricate this case.

As stated previously, Dr. Truly, quite unequivocally, stated that the breaches by the nurses led to the bleeding which ultimately proximately

caused Ms. Stephens's death. While North Mississippi Medical Center challenged Dr. Truly's conclusion by trying to establish that other physicians involved in Ms. Stephens's treatment conveniently thought her death was related to sepsis—despite the death certificate prepared which attributed her death to bleeding—it never suggested in cross-examination that Ms. Stephens's death was inevitable. (T. 283-286).

Similarly, *Hubbard v. Wansley*, 954 So. 2d 951 (Miss. 2007), referenced by North Mississippi Medical Center at trial but not specifically relied upon by the trial court, should be viewed with skepticism when applied to this case. The facts of the *Hubbard* case indicated that the plaintiff's expert, during his deposition, not only was reluctant to state whether the absence of the alleged breach would have resulted in a substantial improvement to the plaintiff's condition, but also admitted that the injury could have resulted anyway. *Id.* at 955. This is clearly distinguishable from the case sub judice.

No such testimony or evidence was presented during the plaintiff's case in chief in the instant case. Dr. Truly did not admit that Ms. Stephens would have died even if the negligence had not occurred. Dr. Truly showed no reluctance in stating that the alleged breaches were the cause of Ms. Stephens's death. Accordingly, this appeal, viewed in the light most

favorable to Ms. Griffin, clearly must be resolved in favor of Ms. Griffin, given that the sole medical expert witness established that the breach proximately caused the fatal condition of the decedent. *Cf. Young v. University of Mississippi Medical Center*, 914 So. 2d 1272 (Miss. App. 2005)(affirming verdict in favor of defendant hospital where plaintiff did not provide expert testimony that alleged breach proximately caused fatal condition).

Plaintiffs are required to meet their burden of proof in medical negligence cases, **but they are not required to disprove all potentially negative inferences which are not raised by defendants.** In other words, a plaintiff has no affirmative burden to prove matters beyond what the elements of a cause of action require, unless there is evidence presented to challenge the proof of those matters. At that point, the plaintiff is then obligated to provide such evidence to satisfy its burden.

North Mississippi Medical Center suggests that Ms. Griffin had to go beyond the elements of a typical medical negligence cause of action to say that not only was a breach of the standard of care causative of the decedent's death, but also, but for the negligence Ms. Stephens had a specifically quantified chance of some outcome other than death. However, as stated previously, this is not a so-called "loss of chance" case. There was no

evidence presented at trial that Ms. Stephens would have inevitably died. North Mississippi Medical Center did not ask Dr. Truly to quantify the chance of an alternative outcome, nor did it suggest that Ms. Stephens would have died anyway. Accordingly, North Mississippi Medical Center is asking the court to require the plaintiff to prove something that is not an issue in the case.

It was certainly within the purview of the defendant to cross-examine Dr. Truly as to the lengths to which plaintiff's theory of causation extended. However, once the plaintiff has established the elements of its cause of action *prima facie*, the burden shifts then to the defendant to establish evidence that the plaintiff did not satisfy her burden. Here, the defendant hospital merely suggested to the court outside the presence of the jury that the plaintiff could not prove a *prima facie* case, without actually presenting evidence of such alternative outcomes, and the burden is not upon the plaintiff to presumptively rebut such evidence. To require this would require the plaintiff to establish a "super" *prima facie* case, which is not required under Mississippi law.

2. The requirement of the specific "loss of chance" language is contradictory to well-established Mississippi law.

This Court does not require magical language in an expert's answers, as long as the import of the testimony is apparent. *West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714, 720 (Miss. 1995) (citing *Kelley v. Frederic*, 573 So. 2d 1385, 1389 (Miss. 1990). See also *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790 (Miss. 1995) (reversing summary judgment granted to defendant in medical negligence case and determining that sufficient testimony presented a jury question even though plaintiff's expert was not able to most clearly explain the causal connection between breach and injury). The Supreme Court has long ago recognized that reviewing of the entirety of the testimony is required and not magical words or incantations to determine if adequate proof has been put forth. In *Catchings v. State*, 684 So. 2d 591, 597 (Miss. 1986), this Court quoted the following from *Schultz v. Celotex Corp.*, 992 F. 2d 204 (3rd Cir. 1981) with approval:

One commentator has explained that "there is, nevertheless, an undercurrent that the expert in federal court express some basis for both the competence with which his conclusion is formed, and the probability that his conclusion is accurate." To that extent, the phrase "with a reasonable degree of medical certainty" is a useful shorthand expression that is helpful in forestalling challenges to the admissibility of expert testimony. Care must be taken, however, to see that the incantation does not become a semantic trap and the failure to voice it is not used as a basis for exclusion without analysis of the testimony itself.

(citations omitted).

Although the “loss of chance” language has been addressed by this Court in other cases, such as *Hubbard v. Wansley*, it is misapplied to the instant case because its use achieves exactly what this Court warned of in *Catchings v. State* – it has become a semantic trap used as a basis for eliminating the plaintiff’s cause of action here. In this simple wrongful death action, “loss of chance” simply is not applicable. See *Causey v. Sanders*, 998 So. 2d 393, 410 (Miss. 2008)(noting that “loss of chance of recovery” instructions are usually submitted in medical negligence cases where the cause of action alleges that the medical provider’s actions did not cause injury or death, but merely hindered the patient from achieving reasonably probable recovery from the negligence).

A review of Dr. Truly’s testimony reveals that the entirety of his testimony is that the breach of the standard of care by the nurses at North Mississippi Medical Center proximately caused Gracie Stephens to bleed to death. North Mississippi Medical Center would have the case turn on the presence of so-called “magical language” to the exclusion of the overall tenor of the expert testimony in this matter. Such an outcome is not contemplated by Mississippi jurisprudence.

- D. Assuming *arguendo* that the “loss of chance” language was required here, Ms. Griffin still established facts and reasonable inferences sufficient to overcome the motion for directed verdict and to submit this matter to a jury for resolution.

Even assuming for the purposes of argument that Ms. Griffin had to provide evidence regarding Ms. Stephens’s loss of chance of recovery, it is submitted that there were sufficiently adduced facts and reasonable inferences such that reasonable jurors could conclude that Ms. Griffin could prove her case by a preponderance of the evidence.

In *Hammond v. Grissom*, 477 So. 2d at 1049, the Supreme Court, in reversing a directed verdict for physician, found that a pathologist’s testimony suggesting continuous intracranial bleeding unchecked for hours was major factor causing death was sufficient to survive directed verdict. In *Hubbard v. Wesley*, this Court expressly confirmed that the *Hammond v. Grissom* scenario could be replayed in certain circumstances where the link is patently obvious: “Expert testimony helped to show that the inaction of the medical personnel contributed substantially to Hammond’s deterioration and eventual death.” *Hubbard*, 954 So. 2d at 964.

Even with the absence of such “magical language” as North Mississippi Medical Center would suggest is necessary, it is patently obvious that Dr. Truly causally linked the negligence of the nurses with the

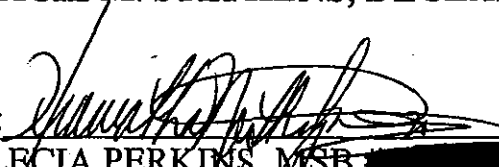


CONCLUSION

It is submitted for the reasons stated herein that Ms. Griffin met the appropriate burden to establish a prima facie case of medical negligence against North Mississippi Medical Center, through expert testimony and documentary evidence. Accordingly, taking all facts and reasonable inferences therefrom in the light most favorable to the plaintiff, Ms. Griffin, it is submitted that a directed verdict in favor of North Mississippi Medical Center was not appropriate in this case.

It is respectfully submitted that the circuit court below erred in granting a directed verdict to the Appellee, North Mississippi Medical Center. Accordingly, this Court should REVERSE the decision of the circuit court below, and REMAND this matter to the Circuit Court of Lee County for retrial by jury.

RESPECTFULLY SUBMITTED,

**MANDA GRIFFIN, INDIVIDUALLY AND AS
A WRONGFUL DEATH BENEFICIARY,
AND ON BEHALF OF ALL OTHER
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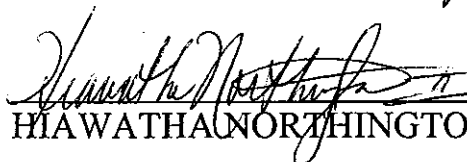
CERTIFICATE OF SERVICE

I, Hiawatha Northington II, hereby certify that I have this day caused to be mailed by United States mail, postage pre-paid, a true and correct copy of the above and foregoing instrument to the following:

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Hon. Paul Funderburk
Circuit Court of Lee County
P.O. Drawer 1100
Tupelo, MS 38802

SO CERTIFIED this 8 day of January, 2010.



HIAWATHA NORTHINGTON II