IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2009-CA-00981

SCOTT and MONA HARRISON — APPELLANTS

VS.

MAYOR AND BOARD OF ALDERMEN OF CITY OF BATESVILLE, MISSISSIPPI — APPELLEES

and

MEMPHIS STONE AND GRAVEL COMPANY — INTERVENOR

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

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

BENJAMIN E. GRIFFITH, MB NO[redacted]
LAUREN WEBB CARR, MB NO[redacted]
GRIFFITH & GRIFFITH, ATTORNEYS
Post Office Drawer 1680
Cleveland, MS 38732
Telephone: 662-843-6100
Facsimile: 662-843-8153
Attorney for Appellees,
Mayor and Board of Aldermen
of City of Batesville

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellees 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.

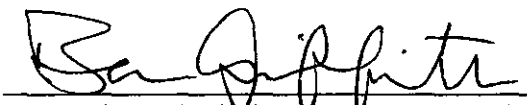
1. Scott and Mona Harrison, Appellants;
2. City of Batesville, Mississippi, Appellee;
3. Mayor Jerry Autrey, City of Batesville, Mississippi;
4. Alderman Bill Dugger, City of Batesville, Mississippi;
5. Alderman Ted Stewart, City of Batesville, Mississippi;
6. Alderman Stan Harrison, City of Batesville, Mississippi;
7. Alderman Teddy Morrow, City of Batesville, Mississippi;
8. Alderman Eddie Nabors, City of Batesville, Mississippi;

9. Alderman Rufus Manley, City of Batesville, Mississippi;

10. Paul B. Watkins, Jr., Esq.
Pope S. Mallette, Esq.
MAYO MALLETTE, PLLC, Attorneys for Appellants Scott and Mona Harrison

11. Benjamin E. Griffith, Esq.
Lauren Webb Carr, Esq.
GRIFFITH & GRIFFITH, Attorneys for Appellees Mayor and Board of Aldermen of the City of Batesville, Mississippi.

CERTIFIED this 20th day of January, 2010.



Benjamin E. Griffith, MS Bar No. 8366
Attorney for Appellees Mayor and Board of Aldermen of the City of Batesville, Mississippi

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BRIEF OF APPELLEES

I. Statement of the Issues

(1) Whether the variance granted to Memphis Stone and Gravel to expand a portion of its mining operation into city limits constituted "sport zoning," or a temporary exception to the zoning restrictions for which there was a public need.

(2) Whether the variance granted by the City to Memphis Stone and Gravel Company was "fairly debatable" and supported by substantial evidence.

II. Statement of the Case

On July 1, 2008, the Mayor and Board of Aldermen of the City of Batesville, Mississippi, ("City") granted a variance to Memphis Stone and Gravel ("MS&G") to permit its current sand and gravel operations to be extended into City-zoned property. The City based its decision on the unanimous approval of the Batesville City Planning Commission's ("Planning Commission") and

requisite public hearing. The variance allowed what was already a functioning sand and gravel operation on adjoining land to be temporarily expanded from onto City land zoned R-1 (single-family residential) and C-2 (commercial district). Following the Planning Commission's approval, the City again heard from proponents and opponents and amended the variance to include a number of protective conditions, to which MS&G agreed, including a two-and-one-half (2 ½) year time frame for the variance. Appellants, Scott and Mona Harrison ("Harrisons"), aggrieved by this decision, appealed. Pursuant to MISS. CODE ANN. § 11-51-75 (1972), the Harrisons filed a *Bill of Exceptions* and thereafter, an *Amended Bill of Exceptions*. From the affirmance of the Circuit Court, the subject appeal ensued.

III. Statement of Relevant Facts

In May 2003, Panola County granted MS&G a special exception to operate a wash plant and mining operation known as the "Brassell Mine" (*Amended Bill of Exceptions*, Exhibit "A"). In order to temporarily expand this operation and make use of potential local aggregate for area growth and construction, MS&G leased an additional 65 acres known as the "Seale-Haire Lease." *Id.* This proposed site was directly north of the existing Brassell Mine and included 18 acres that fell within Batesville City limits. *Id.*

On April 7, 2008, MS&G applied for a variance request to mine sand and gravel on the 18 acres falling within the City limits. *Id.* On May 19, 2008, the Planning Commission met to consider the request (*Amended Bill of Exceptions*, Exhibit "B"). MS&G representative Alan Parks gave a presentation on the proposed operation to the Planning Commission, after which the Planning Commission unanimously approved the variance request. *Id.*

On May 19, 2008, the Planning Commission assembled to consider the request *(Bill of Exceptions*, Exhibit "B"). Following MS&G representative Alan Parks' presentation, the Planning

Commission unanimously approved the variance request. *Id.* Relying on the Planning Commission's approval, the City unanimously adopted an Order to set the matter for public hearing on June 17, 2008, at 3:00 p.m. (*Amended Bill of Exceptions*, Exhibit "C"). Notice of the hearing was published in The Panolian, a Batesville paper of general circulation. *Id.* The hearing was held on said date, as reflected in the City's official minutes; the City provided proper notice and publication as required by law. (*Amended Bill of Exceptions*, Exhibit "D"). Proponents, Alan Parks and Bill Kelly of MS&G, were present and spoke in favor of the request, and opponents, the Harrisons and Bill Joiner, spoke against this request. The City then voted to take the matter under advisement until its regular meeting on July 1, 2008. *Id.*

At its regular meeting on July 1, 2008, the City again heard from Alan Parks, who spoke for and answered questions on behalf of MS&G. (*Amended Bill of Exceptions*, Exhibit "E"). Scott Harrison, one of the Appellants herein, was also present. Mr. Harrison had an opportunity to be heard and was heard. The City voted 3-2 in favor of granting the request. *Id.*

IV. Summary of the Argument

The City's zoning decision was "fairly debatable." Any and all interested parties had a full and fair opportunity to present their respective sides of the issue. No procedural issues are contemplated in this appeal, rather, the Appellants boldly ask this Court to second-guess and to upset the City's well-reasoned decision. Controlling authority provides a sound and substantiated basis for leaving the City's decision intact.

Throughout this process, the City followed all applicable statutes and procedural safeguards to ensure a well-reasoned, thoughtful and fair outcome. The record shows that the City based its decision on substantial evidence and that its decision was fairly debatable. Interested parties had ample opportunity to make their arguments and submit evidence to the City regarding the issuance

of the variance. The City took deliberate action to ensure that competing opinions were fairly considered. The City even went so far as to incorporate conditions on the granted variance, thereby establishing safeguards to protect the City's interest. Mississippi law distinguishes matters of zoning and re-zoning as legislative functions which the courts of our State do not have authority to disturb where the decision is fairly debatable. *Briarwood, Inc. v. City of Clarksdale*, 766 So. 2d 73, 80 (Miss. 2000). It is clear that the City based its decision on substantial evidence. Further, the decision, which was fairly debatable, was indeed fairly debated.

V. Argument

1. Standard of Review

The standard of review employed by both this court and the circuit court is well established. The circuit court acts as an appellate court in reviewing zoning cases and not as trier of fact. *Board of Alderman v. Conerly*, 509 So. 2d 877, 885 (Miss. 1987). "The circuit court has no authority to intervene unless the Commission's decision is arbitrary and capricious, a standard equated with the substantial evidence rule limiting the scope of review of trial court findings of evidentiary and ultimate fact." *Childs v. Hancock County Bd. of Supervisors*, 1 So. 3d 855, 861 (Miss. 2009) (quoting *Mississippi Real Estate Comm'n v. Anding*, 732 So. 2d 192, 196 (Miss. 1999)).

If the Board's decision is founded upon substantial evidence, then it is binding upon an appellate court. *Id.* (quoting *Perez v. Garden Isle Cmty. Ass'n*, 822 So. 2d 217, 220 (Miss. 2004). The appellate court may not set aside the order of a municipality's governing body if its validity is "fairly debatable," and such order may not be set aside by a reviewing court unless it is clearly shown to be arbitrary, capricious, discriminatory, or is illegal or without substantial evidential basis. *Sanderson v. City of Hattiesburg*, 249 Miss. 656, 163 So. 2d 739 (Miss. 1964). "Like the circuit

Court, this Court's review ... is limited to the record created by the bill of exceptions." *Lange v. City of Batesville*, 832 So. 2d 1236, 1237 (Miss. App. 2002), citing *Ladner v. Harrison County Bd. of Supervisors*, 793 So. 2d 637, 639 (Miss. 2001).

The Court does not act as a "superzoning authority," and its review does not extend to an evaluation of the prudence or wisdom of the City's judgment. *Caver v. Jackson County Bd. of Supervisors*, 947 So. 2d 351, 353 (Miss. App. 2007); see also *Falco Lime*, 836 at 722 ("It is not the function of the Circuit Court on appeal from an administrative agency to determine whether the action of the agency is right or wrong, correct or incorrect, wise or unwise, advisable or best fitted to the situation involved.")(quoting *County Bd. of Educ. of Alcorn County v. Parents & Custodians of Students at Rienzi Sch. Attendance Ctr.*, 168 So. 2d 814, 819 (Miss. 1964)).

If the Board's decision granting a variance is founded upon substantial evidence, then it is binding upon an appellate court. *Barnes v. Bd. of Supervisors*, 553 So. 2d 508, 511 (Miss. 1989); see also *Wilkinson County Bd. of Supervisors v. Quality Farms, Inc.*, 767 So. 2d 1007, 1010 (Miss. 2000). According to the Mississippi Supreme Court, substantial evidence is defined as "relevant evidence that reasonable minds might accept as satisfactory to support a conclusion, or stated otherwise, that which constitutes "more than a mere scintilla of evidence." *Beasley v. Neely*, 911 So. 2d 603, 607 (Miss. App. 2005)(quoting *Hooks v. George County*, 748 So. 2d 678, 680 (Miss. 1999)). As this Court has articulated, as an appellate court, its task "is to determine whether the circuit court erred in its judicial review of whether the Board's decision to rezone was arbitrary and unsupported by substantial evidence." *Edwards v. Harrison County Bd. of Supervisors*, 22 So. 3d 268, 279 (Miss. 2009)(quoting *Childs*, 1 So.3d at 860). The Court has described its responsibility as follows: "to verify the existence of substantial evidence, not reweigh the evidence." *Id.* at 861. Given the sufficiency of the record as reflected in the *Amended Bill of Exceptions*, as noted above,

Appellees do not believe that oral argument would facilitate appellate review, and therefore refrains from requesting the same.

2. The City's Decision Does Not Constitute Spot Zoning.

Mississippi courts have consistently defined "spot zoning" as the arbitrary and unreasonable reclassification of a small area within the zoning district to a use which is inconsistent with the surrounding district. Where a public need exists, zoning may be distinguished from spot zoning and held to be valid. *Cockrell v. Panola County*, 950 So. 2d 1086, 1097 (Miss. App. 2007). The term "spot zoning" describes a zoning amendment which is not in harmony with the comprehensive or well-considered land use plan of a municipality. *Kuluz v. City of D'Iberville*, 890 So. 2d 938, 944 (Miss. App. 2004). However, **"the mere fact that the use for which a piece of property is re-zoned will be inconsistent with the previous zoning classification, or even with some of the other uses of nearby property, does not necessarily make a re-zoning decision spot zoning."** *Id.* (emphasis added).

There is a precise distinction between a validly enacted amendatory zoning ordinance and a "spot zoning" ordinance. Not all amendments which change or alter the character of a use district fall within the category of "spot zoning" as we generally understand the term. "[S]pot zoning involves amendments to existing zoning ordinances singling out a small area for a use classification which is different - whether more or less restrictive- from that of the surrounding area." *Cockrell* at 1096 (quoting Rohan ZONING AND LAND USE CONTROLS, § 38A.01[1](2006). "In the narrow sense of the term, spot zoning is the arbitrary and unreasonable reclassification of a small area within a zoning district to a use which is inconsistent with the surrounding district, where the rezoning does not conform to a comprehensive plan, serves no public purpose and is solely for private gain." *Id.* Moreover, "the mere fact that an area is small and is zoned at the request of a single owner and is

of greater benefit to him than to others does not make out a case of spot zoning if there is a public need for it or a compelling reason for it." *Cockrell* at 1097.

This principle has been articulated on many occasions by the Mississippi Supreme Court in cases involving charges of spot zoning, a term that:

> is ordinarily used where a zoning ordinance is amended reclassifying one or more tracts or lots for a use prohibited by the original zoning ordinance and out of harmony therewith. **Whether such an amendment will be held void depends upon the circumstances of each case.** The one constant in the cases, as stated by the textwriter, where zoning ordinances have been invalidated due to "spot zoning" is that they were designed "to favor" someone. See 1 Yokley, ZONING LAW AND PRACTICE §§ 8-1 to 8-3 (3rd ed. 1965).

McKibben v. City of Jackson, 193 So. 2d 741, 744 (Miss. 1967).

In *McKibben*, the court relied on this definition of spot zoning, originally provided by the Mississippi Supreme Court in *Cockrell v. Panola County*, 950 So. 2d 1986, and further noted that several issues were involved in determining if spot zoning has occurred, "such as the size and character of the land, and the private versus public purpose of re-zoning." *Id.*

The City Planning Commission in the instant case understood that not all lands are suitable for a single use and that unforeseen changes in City plans may occur, justifying the issuance of variances in the City's Zoning Ordinance § 1204(5), which provides in part:

> Upon recommendation of the planning commission, to vary or modify the application of **any** of the regulations or provisions of the ordinance where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of this ordinance, so that the spirit of this ordinance shall be observed, public welfare and safety secured and substantial justice done. (*Appellant's Brief,* Appendix "A").

Under Mississippi law, MS&G in submitting its application for a variance was only required to show by a preponderance of the evidence that the requirements or factors justifying its issuance have been satisfied. *Drews v. City of Hattiesburg*, 904 So. 2d at 142 (citing *Barnes v. Board of Supervisors*, 553 So. 2d 508, 510, 511 (Miss. 1989)); *Nichols v. Madison County Board of*

Supervisors, 953 So. 2d 1128 (Miss. App. 2006).

The City validly exercised its authority in granting the requested variance to MS&G. The property at issue is 18 acres of a 65-acre tract of land that is directly North of the existing Brassell mine. (*Amended Bill of Exceptions*, Exhibit "A"). MS&G states, in the variance request Operations Narrative provided to the Planning Committee that there is a public need for a good source of local aggregate and that the project would be a good asset for the local economy that will likely be lost to future residential development if not managed as a resource for construction material. (*Amended Bill of Exceptions*, Exhibit "A". Appellants cite the Narrative in their appeal. (*Appellants' Brief*, pp. 2-3). Based on the nature of the property, the location of the current identical mining operation directly to the South, the location of the operation on the border of the City limit line, the economic evidence provided by MS&G, and the temporary nature of the variance, the City granted MS&G's request.

Moreover, the City exhausted procedural safeguards to ensure the need for and appropriateness of the variance. On April 7, 2008, MS&G submitted a letter to Pam Comer, the Administrator of the City's Code Enforcement, detailing the property, providing maps of the proposal, pictures from previous mining sites and photos of reclaimed land. (*Amended Bill of Exceptions*, Exhibit "A"). The Operations Narrative provided on May 1, 2008, gave a detailed explanation of the proposed project. (*Amended Bill of Exceptions*, Exhibit "A"). On May 19, 2008, the Planning Commission considered the variance. Following MS&G's presentation, the Planning Commission voted unanimously to approve the variance request (*Amended Bill of Exceptions*, Exhibit "B"). After this the City conducted a public hearing on June 17, 2008, where both proponents and opponents were heard regarding the variance. (*Amended Bill of Exceptions*, Exhibit "D"). The July 1, 2008, Board meeting followed, at which time both sides were heard and MS&G answered questions posed by the Board. (*Amended Bill of Exceptions*, Exhibit "E"). Following open

discussion in which those present, including Appellants and their counsel, had an opportunity to be heard, the City voted 3-2 to grant the variance. *Id.*

Finally, on July 15, 2008, in response to a motion to rescind it, the Board revisited the variance. At this time the Board entertained further dialogue and debate with Harrisons, their attorney Paul Watkins, MS&G President Hal Williford, and attorney for MS&G Patrick Lancaster. After multiple hearings and detailed proposals, the City voted to amend the variance to include certain conditions previously detailed. Included among these conditions was a time limit on the variance of two-and-one-half years. *Id.*

The City, relying on its authority under the City's Zoning Ordinance § 1204(5), permitted MS&G to modify any of the existing regulations to prevent practical difficulties, recognized the justification for granting the variance to MS&G. The decision by the City to grant the variance to MS&G, moreover, was based on extensive information provided, and was well within the City's authority. *Cockrell* makes it clear that the mere fact that a variance request to temporarily permit a use not previously considered by the Planning Commission made by a single owner is of greater benefit to him than to others does not make this granted request spot zoning if there is a public need for it or a compelling reason for it. *Cockrell v. Panola County*, 950 So. 2d 1086 (Miss. App. 2007). It is not for the Court to act as a "super zoning" board and weigh the need, but to rely on the City Planning Commission and the City Board, who heard extensive arguments, asked questions throughout the process, applied conditional safeguards, believed it was in the City's best interest to have a local source of aggregate, and that this would benefit the local economy. *Caver v. Jackson County Bd. of Supervisors*, 947 So. 2d 351, 353 (Miss. App. 2007).

Appellants rely on *Drews v. City of Hattiesburg*, 905 So. 2d 719, 722 (Miss. 2004), where a court found that six variances requested to build permanent medical buildings in a residential area

amounted to spot zoning, as they were so dramatic and constituted a re-zoning. The Mississippi Supreme Court in *Drews* relied on Yokely's zoning treatise to support the principle that whether such amendments will be held void depends upon the circumstances of each case. 904 So. 2d 138, 141 (Miss. 2005). In its holding, the court stated that the proposed variances were not minor departures from the scope and intent of the zoning classification. *Id.* at 142. The variance granted in the current case is clearly distinguishable from *Drews*, a case that involved a developer seeking six separate variances in order to build a large scale medical facility on residential property, which ultimately amounted to a re-zoning. In the instant case, however, the variance requested was a temporary exception to the zoning restrictions and evidenced by a demonstration of public need.

It has never been the intent of the City to re-zone the subject 18 acres. On the contrary, MS&G consistently presented the subject zoning variance as a temporary project, with the intent to restore the land to its original state. This change was never intended to be permanent. Recognizing that this use was not considered by the Planning Commission at the time the Zoning Ordinance was enacted, and that the use of this tract by MS&G was merely an extension of an operation directly adjacent to this land, a use and activity that provides the City with a good source of local aggregate and benefits the local economy, that this project is temporary in nature and that several protective conditions were agreed to and put in place, the City believed this was precisely what the Planning Commission had in mind when it drafted the Zoning Ordinance § 1204(5), permitting it to enact variances, should the need arise. Furthermore, MS&G has presented evidence to the Planning Commission and to the Board of other mining projects that have been fully restored to their previous nature (*Amended Bill of Exceptions*, Exhibit "A").

Appellants also rely on *Westminster Presbyterian Church v. City of Jackson*, 253 Miss. 495, 176 So. 2d 267 (1965). However, *Westminster* was a re-zoning case and never addressed the issue

or prerequisites of spot zoning. *Id. Westminster* dealt with a church wanting a zoning change to erect a permanent structure, in that case a filling station. *Id. Westminster* is clearly distinguishable from the case at bar, as the instant case concerns a variance request for a temporary project that will not permanently change the nature of the land.

Whether a variance amounts to a zoning change, as well as whether a zoning change amounts to "sport zoning" are issues that must be evaluated on a case by case basis. In the instant case, substantial evidence was proffered to the City, and the City, considering the nature of the surrounding land, the variance language contained in the ordinance, as well as the temporary nature of the variance, made the decision to grant the variance to MS&G. Based on this the Court should affirm the well-reasoned decision made by the City and the Circuit Court's affirmation thereof.

3. The Record Contains Substantial Evidence to Support the City's Decision, which was "Fairly Debatable."

Once an applicant has proven by a preponderance of the evidence the need for a variance, if the Board's decision granting a variance is founded upon substantial evidence, then it is binding upon an appellate court. *Barnes v. DeSoto County Board of Supervisors*, 553 So. 2d 508, 511 (Miss. 1989); see also *Wilkinson County Board of Supervisors v. Quality Farms, Inc.*, 767 So. 2d 1007, 1010 (Miss. 2000). In *Barnes*, the Mississippi Supreme Court contemplated a comparable case with a similar outcome. *Barnes* arose in and also involved MS&G. Its facts mirror the case at bar. In *Barnes*, MS&G requested a conditional use permit to mine gravel and relocate a wash plant. *Id.* All procedural due process requirements were met, including a public hearing, and at the DeSoto County Board meeting, the permit was granted after several conditions were put in place, including a project time limit, restricting hours of operation, and the construction of berms. *Id.*

The Mississippi Supreme Court affirmed the Circuit Court ruling in *Barnes* which upheld

the granting of the permit. In so holding the Court reasoned that the action of the Board of Supervisors was clearly legal, proper and well within its legislative function, stating: A full and complete hearing was awarded to each side, with full and complete sue process right afforded and therefore the action of the Board was not arbitrary, capricious, unreasonable or illegal." *Id.* at 512.

In determining the factual issues in rezoning, the City could consider not only the information obtained at the public hearing, but also their own common knowledge and familiarity with the ordinance. *Board of Aldermen of Town of Bay Springs v. Jenkins*, 423 So. 2d 1323 (Miss. 1982). Further, hearsay evidence may be admitted and considered by the City in making its decision. *Faircloth v. Lyles*, 592 So. 2d 941, 943 (Miss. 1991).

There is a presumption of validity of a governing body's enactment or amendment of a zoning ordinance, and the burden of proof is on the party asserting its invalidity *Drews v. City of Hattiesburg*, 904 So. 2d 138, 141 (Miss. 2005) (citing *Perez v. Garden Isle Community Association*, 882 So. 2d 217, 219 (Miss. 2004); *Carpenter v. City of Petal*, 699 So. 2d 928, 932 (Miss. 1997)). The Harrisons fail to overcome the presumption that the City's decision was neither arbitrary nor capricious nor supported by substantial evidence. Accordingly, the order of a governing body of a municipality may not be set aside if its validity is fairly debatable, and such order may not be set aside by a reviewing court unless it is clearly shown to be arbitrary, capricious, discriminatory or is illegal or without substantial evidential basis. *Sanderson v. City of Hattiesburg*, 249 Miss. 656, 163 So. 2d 739 (Miss. 1964). Where the point at issue is "fairly debatable," this may not disturb a zoning authority's action. *Drews v. City of Hattiesburg*, 904 So. 2d 138, 141 (Miss. 2005) (citing *Perez v. Garden Isle Community Association*, 882 So. 2d 217, 219 (Miss. 2004); *Carpenter v. City of Petal*, 699 So. 2d 928, 932 (Miss. 1997)).

MS&G provided extensive research and multiple presentations outlining the project, the need

for the project, the benefit to the City, and examples of previous projects. As noted, all procedural safeguards were followed, and all parties were given unfettered opportunity to air any and all grievances. The City carefully weighed these considerations prior to granting the variance to MS&G. Moreover, the City's decision to grant the variance was supported by substantial evidence.

It is likewise clear from the facts of the instant case that multiple opportunities to be heard were afforded to all parties and that the City carefully weighed all the issues in making the decision to grant the variance. Its decision was based on substantial evidence and was fairly debatable. Accordingly, the City's decision should be upheld by this Court.

VI. Conclusion

The Planning Commission and the City validly exercised their authority in weighing and considering the evidence before each body to grant the temporary variance requested by MS&G, and MS&G presented substantial evidence in support of the necessary elements to warrant the City's issuance of the requested variance. For the above reasons, the judgment of the Circuit Court affirming the City's decision to grant a variance to MS&G should be affirmed and judgment rendered for Appellees, the Mayor and the Board of Aldermen of the City of Batesville, Mississippi.

RESPECTFULLY SUBMITTED this 20th day of January, 2010.

MAYOR AND BOARD OF ALDERMEN OF THE CITY OF BATESVILLE, MISSISSIPPI, Appellees

By: _____
Benjamin E. Griffith, MSB No. [redacted]

By: _____
Lauren Webb Carr, MSB No. [redacted]

Of Counsel:

GRIFFITH & GRIFFITH
123 South Court Street
P. O. Drawer 1680
Cleveland, MS 38732
Telephone: 662-843-6100
Facsimile: 662-843-8153

CERTIFICATE OF SERVICE

I, Benjamin E. Griffith, attorney of record for Appellees, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing ***Brief of Appellees*** to:

Honorable Andrew C. Baker
P. O. Drawer 368
Charleston, MS 38921-0368

Pope S. Mallette, Esq.
Paul B. Watkins, Jr., Esq.
MAYO MALLETTE, PLLC
P. O. Box 1456
Oxford, MS 38655-1456
Attorneys for Appellants

SO CERTIFIED this 20th day of January, 2010.

Benjamin E. Griffith