IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2009-CA-01602

KEVIN BUCKEL — PLAINTIFF-APPELLANT

V.

INSURANCE COMMISSIONER MIKE CHANEY — DEFENDANT-APPELLEE

On Appeal from the Chancery Court of Hinds County, Mississippi

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BRIEF OF DEFENDANT-APPELLEE
(ORAL ARGUMENT NOT REQUESTED)

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

1. The Honorable Dwayne Thomas, Chancellor, Chancery Court of Hinds County
2. Insurance Commissioner Mike Chaney, Appellee
3. Hon. Jim Hood, Attorney General for the State of Mississippi, by and through, Lisa Colonias and L. Christopher Lomax, Special Assistant Attorneys General, Attorneys for the Appellee
4. Kevin Buckel, Appellant
5. Edward Gibson, Esq., Hawkins, Stracener & Gibson, PPLC, Attorney for Appellant

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STATEMENT OF THE CASE

A. Scope of the Request.

Appellant ("Buckel") sent a request to the Mississippi Department of Insurance ("MID") requesting data concerning homeowner claims for damages due to Hurricane Katrina. R.1:000013. Buckel's January 4, 2009 Public Records Request sought the following:

> This is to request any data in the possession of MID concerning homeowner insurance claims as a result of Hurricane Katrina, excluding Wind Pool and Flood Claims. Specifically, I would like to know the (1) total number of homeowner claims filed after the storm; (2) the total insured amount claimed filed by homeowners after the storm; (3) the total amount paid out on those homeowner claim after the storm; (4) the total amount not paid on the homeowner claims after the storm. If this information is not available, I respectfully request your office compile this information for public consumption from the insurance companies that received homeowner claims regulated by MID as a result of Hurricane Katrina.

Id. On January 16, 2009, Buckel wrote again to MID in which he stated his desire to appeal the Commissioner's decision not to respond by what he believed to be the deadline for such a response, January 18, 2009 (which had yet to occur). R.1:000010. The actual deadline for a response to Buckel's request was January 26, 2009. R.1:000007.

In accordance with their own regulations, MID conducted a diligent search for the information requested. R.1:000008; *and* R.1:000064-65. On January 26, 2009 (the day the Commissioner was required to respond), the Commissioner, through senior counsel, responded to Buckel's request by letter and indicated that the search of MID records and files had been undertaken. R.1:000007. The file materials requested, however, were not maintained by MID and were not within their possession. R.1:000008. Further, the Commissioner's response noted that the Mississippi Public Records Act did not contemplate the creation of new records or documents as was requested by Buckel's January 4th request. Id. Buckel has since conceded as

much.[1] Finally, in an attempt to provide Buckel with some helpful data, the Commissioner directed Buckel to a website which contained data and claims figures current to October 15, 2006 compiled by the National Association of Insurance Commissioners.[2] Id.

As a matter of statutory right, Buckel filed this action for judicial review of his request. R.1:000004-06. However, as part of his complaint in Chancery Court, Buckel included additional requests for documents that were not part of his original public records request. Buckel, for the first time, requested information relating to State Farm Special Audit Examination, seeking copies of "claim information used by the examination team," and "documentation used by [former] Commissioner Dale that resulted in the information published in this press release and news story." R.1:000006. The press releases referred to by Buckel were all released by former Insurance Commissioner George Dale and were dated January 30, 2006 and November 21, 2005. R.1:000005-06. The news story was published on June 22, 2006 in the Stone County Newspaper and quoted Commissioner Dale. R.1:000006. The sole evidence relating to Commissioner Chaney was his release of findings from a State Farm Conduct Exam that began under Commissioner Dale. R.1:000005. That report was released on October, 29, 2008. Id. That was the extent of Buckel's evidence.

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[1]Buckel has acknowledged that his request was "overreaching" as there is no requirement that MID compile information, only release records it has in their possession. Br. Appellant p.10.

[2]The National Association of Insurance Commissioners, or NAIC, is MID's sole source of insurance claims information. The data provided by NAIC was used by MID on their website and in press releases updating the public on claims related matters following hurricane Katrina.

B. Procedural Posture.

Afterwards Buckel filed a *pro se* request for judicial review in the Chancery Court of Harrison County, Buckel v. Chaney, Cause No. C2401-09-00373-2. R.1:000004-06. The Commissioner answered and plead his affirmative defenses. R.1:000023-28. The Commissioner then filed a Motion for Summary Judgment. R.1:000033-61. Buckel responded and the Commissioner filed a rebuttal. R.1:000063-137 (Buckel's Response); R.1:0000139-147 (Commissioner's Rebuttal). The parties agreed venue was proper in Hinds County Chancery Court and venue was transferred by agreed order. R.2:000162-164. Subsequently, the Honorable Chancellor DeWayne Thomas conducted a summary judgment hearing. R.3:1-24 (Hearing Transcript). At the hearing, the Commissioner, through counsel, presented two arguments for summary judgment: (1) MID was not in possession of the requested documents from Buckel's initial public records request; and (2) that the initial public records request did not include a specific request for documents underlying the "Market Conduct Report" and, even so, those documents were exempt from disclosure by Miss. Code Ann. § 83-5-201(7). R.3:3-5.

As to the first argument, the Commissioner produced uncontroverted and unimpeached testimony of MID employee Donna Cromeans in the form of an affidavit. R.3:3-4. Cromeans testified with personal knowledge as to the diligent search performed by MID and to the determination that MID was not in possession of the requested documents. R.1:000036. Buckel raised two issues before the Chancery Court at the summary judgment hearing: (1) that the information derived from the two press releases and one news story was "very detailed information" about "claims filed and paid in the state after [Hurricane Katrina], thus, MID was "obviously" compiling the information and is in possession of that information to turn over under his initial public records request; and (2) that the Market Conduct Exam and report mentioned

43,000 files that were subpoenaed by Commissioner Dale must indicate that MID was in possession of those files as well. R.3:9. In turn, Buckel produced only the two press releases, one news story, and Market Conduct Report as evidence attempting to controvert Cromeans sworn testimony that MID was not in possession of the documents originally requested. R.3:7-8; *and* R.1:000064-65. However, nowhere in any of his proffered evidence was there a positive indication the sought after material was in possession of MID as Buckel claimed, and still claims. No other evidence of MID's possession of the sought after documents was offered by Buckel.

Summary judgment was granted by the Trial Court from the bench. R.3:22. In its entered order, the Court found first that Buckel failed to generate any genuine issue of material fact and the Commissioner was entitled to judgment as a matter of law. R.2:000165. Further, the Court found that the Commissioner and MID were not in possession of the data requested by Buckel as evidenced by Donna Cromeans uncontroverted affidavit. Id. Finally, the Court determined that the documents underlying the Market Conduct Examination and Report were never the subject of a proper public request; and regardless, all examination material was "wholly exempt from disclosure according to [the] legislative mandate" of Miss. Code Ann. § 83-5-209(7). R.2:000166; *see* Miss. Code Ann. § 83-5-209(7) (stating in part, "[a]ll [records] produced by obtained by or disclosed to the commissioner or any other person in the course of examination...may be held by the commissioner as a record not required to be made public under the Mississippi Public Records Act.). Buckel, aggrieved, appeals to this Court.

SUMMARY OF THE ARGUMENT

Any request by Buckel for documents underlying the Market Conduct Report are statutorily exempt. In the case of any other documents sought by Buckel, the Commissioner and MID simply do not possess them. Buckel seems to be making one of two arguments on this appeal: the documents requested by Buckel are (1) only those documents underlying the Market Conduct Report; or (2) all of the documents underlying the Market Conduct report ***and*** all other documents encompassed by his original public records request. Though it is not entirely clear which argument Buckel is making, under both scenarios, he can find no relief in this court.

If Buckel has taken the position that the only documents he is requesting are those underlying the Market Conduct Report, every one of those documents is exempt from disclosure by Miss. Code Ann. § 83-5-209(7); that section states

> All working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the commissioner or any other person in the course of an examination made under Sections 83-5-201 through 83-5-217 may be held by the commissioner as a record not required to be made public under the Mississippi Public Records Act.

By requesting documents underlying the Market Conduct Report, Buckel is seeking all of those documents underlying the Market Conduct Report that were compiled "under Sections 83-5-201 through 83-5-217." Those documents were not included in Buckel's original records request and the Chancellor agreed. In that case, any judicial review of a non-request is not ripe for this Court to entertain. Regardless, the plain language of § 83-5-209(7) would exempt every and all of those documents had Buckel's original request included them and the Commissioner possessed them, which he has not stated that he does. Consequently, under this position, Buckel could not find the requested relief.

If Buckel has taken the position that the documents he is seeking are those underlying the

Market Conduct Report ***and*** all other documents encompassed by his original public records request, there too he would fail to find relief. First, as stated directly above, any documents underlying the Market Conduct Report are exempt from disclosure. Moreover, any other documents that he is requesting were already determined not to be within MID's possession following a diligent search. This fact is evidenced by uncontroverted testimony of Donna Cromeans. Mississippi Code Annotated § 25-61-3(b) states in pertinent part, "'Public records' shall mean [records] ***possessed or retained*** for use in the conduct, transaction, [etc.]...by any public body." (emphasis added). Thus, because the documents are not possessed by MID, those records can not be disclosed. Nor does MID have a duty to compile those records, a fact that Buckel has since acknowledged. Here again, Buckel would not find relief.

The Chancellor was correct in finding that the material sought by Buckel is exempt from disclosure, even if it were determined Buckel's original request had included specific documents underlying the Market Conduct Report. Buckel's argument that the statutory exception for non-disclosure in Miss. Code Ann. § 83-5-209(7) is negated by the Public Records Act is not well taken. Further, the exception provided by § 83-5-209(7) does not offend the public policy underlying the Public Records Act. The plain language of that Act provides that the act is not to "conflict with, amend, repeal or supersede any...statutory law...of this state...at the time of this chapter is effective or thereafter." Miss. Code Ann. § 25-61-11. Thus, it was the intent and policy of the Public Records Act that any previous or subsequent act of the legislature was not to be overridden by this act in any manner. Any argument that a previous act of the legislature can nullify future acts of the legislature or that the legislature must use "magic words" in crafting future legislation in order to be effective is simply nonsensical.

Even if the two statutes are found to be in conflict, statutory construction is proper and

further leads to the conclusion that § 83-5-209(7) does not offend the legislative intent of either part of the Mississippi Code. The statutes can easily be read in harmony to give effect to each since they both address the same subject, Public Records Act exceptions. Additionally, the discretional language of § 83-5-209(7) granting the Commissioner the right to withhold examination records overrides the mandatory language of § 25-61-11 as § 83-5-209(7) is a specific statute, was passed later in time, and makes reference to the Public Records Act - thus, indicating the Legislature's intent to give the Commissioner discretion in disclosing examination records. Consequently, the records requested by Buckel regarding the Market Conduct Report would be protected, even if MID was in possession of the material and Buckel had indeed requested such documents. As to any argument that § 83-5-209(7) only creates an exception by construction, the plain language and meaning on the face of the statute clearly rebut that argument.

Secondly, Buckel claims that his original public records request included the material that was the basis of MID's Market Conduct Exam. The Chancellor was correct in finding that such a request had "never been the subject of a proper public records request[.]" R.000166. Buckel's original request was for "any data in the possession of MID concerning homeowner insurance claims as a result of Hurricane Katrina....If this information is not available, I respectfully request your office compile this information[.]" R.000013. Though he specifically requests information as to certain data, nowhere does he point MID in the direction of where such material may be found. Furthermore, he does not mention any Market Conduct Report within his Public Records Request.[3] The law and rules are again clear, that requests should "reasonably describe the

[3]Buckel's appeal brief is disingenuous on several points as to his request for information regarding the Market Conduct Report. Notably, in footnote 3 of the Appellant's brief, Buckel

desired record" and "[w]here possible, specific information regarding the dates, files, titles, file designation, etc. should be supplied." MSOI 83-1.4(b). If Buckel was originally requesting documents related to the Market Conduct Report, he should have mentioned the Market Conduct Report. Nevertheless, he did not do so in either his original request on January 4th nor his subsequent follow up to MID on January 16th. His request is markedly void of such a specific request. Instead, his original request was merely a request for MID to compile general information regarding homeowner insurance claims surrounding Hurricane Katrina.

Finally, the Chancery Court correctly held that Buckel failed to generate any genuine issue of material fact in his contention that MID had in its possession the material he sought pursuant to the Mississippi Public Records Act. The law is clear that when one side provides sworn testimony and the other side presents no credible evidence in opposition, the sworn testimony stands uncontroverted and a Motion for Summary Judgement is properly granted. The Commissioner produced a sworn, uncontroverted, and unimpeached affidavit which declared with certainty that the documents requested were not in possession of MID. Following a hearing on the sufficiency of the evidence, the Chancellor correctly found the only evidence produced by Buckel was based on mere conjecture, was unsubstantiated, and was without personal knowledge.

Though Buckel continues to contend that he "knows" MID is in possession of the

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claims that the issue of whether documents underlying the Market Conduct Report were originally requested was not "addressed by any party in either the Court papers or in the hearing[.]" Br. Appellant p.9, n.3. However, the Commissioner did discuss that specific issue in both the Motion for Summary Judgment and at the hearing. *See* R.1:000057 (Memorandum in Support of Summary Judgment, Part B. "Buckel's New Request Specifies Examination Materials Protected and Exempt From Disclosure under Statutory Authority); *and* R.3:3 (Hearing Transcript lines 7-14, discussing Buckel's new request cannot come under judicial review).

documents, he has yet to introduce any affidavit, admissible evidence, or other credible, specific, and material facts showing as much.[4] The only evidence continuously produced by Buckel are two press releases, a news article, and a Market Conduct Exam. Nowhere in any of the four pieces of "evidence," or in any other place, does it show MID possesses any document requested by Buckel. Indeed, all Buckel's arguments are based on inferences from insufficient factual specificity and baseless accusations of credibility of the Commissioner, MID, and its employees.

The law is clear that mere general allegations or denials are insufficient to overcome a sworn and credible evidence in rebutting a motion for summary judgment. Moreover, Buckel cannot attack the sufficiency of the Commissioner's affiant as he never made a motion to strike the affiant at the trial court level. Even if his objections are entertained, an interested affiant can be considered and is sufficient evidence to warrant summary judgment when the opposing party has offered no specific and material evidence to controvert the affidavit. Such is the case here. Therefore, the Chancellor was correct in granting summary judgment in favor of the Commissioner.

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[4]Though Buckel continues to assert he has "knowledge" that MID is in possession of the requested documents, his knowledge must be grounded in new information rather than the evidence he has proffered. Br. Appellant p.3, 10. In his Public Records Request, Buckel candidly remarked "[i]f this information is not available, I respectfully request your office compile this information[.]" R. 000013. Buckel has allegedly relied on the same press releases, article, and Market Conduct Exam from the beginning, as is stated in the Buckel's appeal brief, section II. Thus, at the time of his original request, having the same knowledge and information and producing no additional knowledge or information, Buckel admitted that MID may not have the information requested. Thus, if Buckel has knowledge, other than the material he has continuously based his claim on, he should inform MID and the Court, so that MID can properly fulfil his request, subject to any exemptions of material.

Argument

I. The Chancellor Was Correct in Finding that the Documents Sought by Buckel in Connection with the Market Conduct Report and Examination Are Wholly Exempt From Disclosure According to Miss. Code Ann. Sections 25-61-11 and 85-5-209(7) and Were Never Sought in His Underlying Public Records Request.

A. Buckel Now Seeks Documents That Are Wholly Exempt From Disclosure by the Plain Meaning of Mississippi Statutory Law, Regardless of Possession.

Even if MID were in possession of Buckel's requested documents, any and all documents and materials sought by Buckel are wholly exempt from disclosure pursuant to Miss. Code Ann. § 25-61-11 and § 85-5-209(7).[5] Here, Buckel's argument stands squarely on Miss. Code Ann. § 25-61-11 which reads,

> The provisions of ***this chapter shall not be construed to conflict with, amend, repeal or supersede any constitutional or statutory law*** or decision of a court of this state or the United States ***which*** at the time of this chapter is effective or ***thereafter specifically declares a public record to be confidential or privileged, or provides that a public record shall be exempt from the provisions of this chapter.***

(emphasis added). Buckel correctly reads the plain meaning of this statute when he states "[t]he Act as created by the legislature permits the records to be withheld ***only by statute*** of this state, or the United States." Br. Appellant p.13 (emphasis added). In other words, the Public Records Act, as represented by § 25-61-11, will not be construed to conflict with, amend, repeal or supersede a duly enacted statute excepting disclosures of documents as defined in any existing

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[5]Buckel has admitted that any documents he sought in connection with his underlying public records request that would have to be compiled was improper. Now on appeal, he has specified for the first time that the documents he seeks are those underlying the Market Conduct Report. The Commissioner objects that he had originally requested those specific documents and addresses Buckel's contention that the documents were part of his original request in part I:B. The Commissioner further maintains that he is not in possession of the documents requested as is discussed in part II. Regardless, all documents have either been recognized by Buckel as not being required to compile, or are exempt from disclosure because they were examination documents as discussed in part I:A-B.

statute or, at such time when the legislature determines it appropriate, any subsequent statute . With this in mind, Miss. Code Ann. § 83-5-209(7) states

> All working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the commissioner or any other person in the course of an examination made under Sections 83-5-201 through 83-5-217 ***may be held by the commissioner as a record not required to be made public under the Mississippi Public Records Act.***

(emphasis added). Clearly this is a statute which specifically declares certain material as excluded from disclosure by the insurance commissioner in light of the Mississippi Public Records Act. Thus, the Public Records Act would not adversely affect § 83-5-209(7) in that it is a statute which specifically attempts to exclude examination material from being disclosed under the Mississippi Public Records Act.

The attempt by Buckel to read around or constructively repeal a duly enacted law of the Mississippi Legislature is not well taken. It is well established that "[t]he most fundamental rule of statutory construction is the plain meaning rule, which provides that if ***a statute*** is not ambiguous, then this Court must apply the statute according to its terms." State ex rel. Hood v. Madison Co. Bd. of Supervisors, 873 So. 2d 85, 90 (Miss. 2004) (emphasis added). Here both §§ 25-61-11 and 85-5-209(7) are clear on their face as to their plain meaning. Therefore, if after review, the Court finds that the meaning of the two statutes are clear, "the Court may not enlarge ***or restrict*** [that] statute." Gilmer v. State, 955 So. 2d 829, 833 (Miss. 2007) (emphasis added). However, further statutory construction is proper when two statutes are plain on their face but read together the intent of the legislature is conflicting or becomes ambiguous. At that point, the plain meaning rule gives way to other established principles of statutory construction, as will be discussed in part I:B.

When each of these two duly enacted sections of separate parts of the Mississippi Code

are read separate from each other, the plain meaning of each section is obvious. Section 25-61-11 is clear that the legislature wished to save previously enacted exceptions to confidential, privileged, and excepted documents from being repealed by the Public Records Act. Moreover, it did not wish to foreclose the Legislature's ability to make new exceptions, privileges, and determinations of confidentiality of documents in the future. Section 83-5-209(7) is clear in that the insurance commissioner has discretion on whether to hold records produced, obtained or disclosed pursuant to examinations under that statutory scheme as those that are not required to make public. Clearly, the Legislature wished to give the insurance commissioner discretion in the case of examination documents as to whether they should be disclosed.

Consequently, how the Legislature determines exemptions to the Public Records Act, and the logic of such exemptions, are left up to the Legislature, not the courts. The Mississippi Courts are clear

> [t]he preferred policy of disclosing public records must cede to the legislatively-mandated exemptions thereto as "the wisdom or folly of the pertinent legislation is strictly within the constitutional power of the Legislature[.]" Any disagreements with those directives are best aimed toward the Legislature.

Miss. State Univ. v. People for Ethical Treatment of Animals, 992 So. 2d 595, 610 (Miss. 2008) (quoting Gannett River States Publ'g Co. v. Entergy Miss., Inc. 940 So. 2d 221, 224 (Miss. 2006)). The Courts may examine the plain meaning in interpreting these statutes and the plain meaning is clear. The legislature wished to keep open their ability to create more exceptions to the Public Records Act and they wished to exercise that ability to create an exception for examination documents requested by the insurance commissioner. While Buckel may not agree with the Legislature, it is the Legislature who must take away the insurance commissioner's discretion as they are the body that gave him that discretion. However, any discrepancy

highlighted by Buckel in his appeal brief would force the Court to look outside the plain meaning of the statutes and apply well established rules of statutory construction, though that too would lead back to the same conclusion.

B. Well Established Rules of Statutory Construction Require That The Mandatory Language of Section 25-61-11 Does Not Negate the Discretionary Language of Section 83-5-209(7).

Buckel argues that § 83-5-209(7) does not create an exception to the Public Records Act because the Legislature did not include "magic mandatory language" in crafting the statute. At best, his argument is that the Legislature ***tried*** to make an exception to the Public Records Act ***and failed*** when they did not include the "magic mandatory language." The idea that the Legislature must use "magic language" in the creation of a new exception is indeed novel, but Buckel does not offer any authority supporting such a conclusion. Equally as novel, is his argument that a subsequent sitting legislative body is bound by previous legislative enactments. However, it is well established that a subsequent sitting legislative body is free to make, amend, and repeal statutes on the same subject. Yet again he includes no authority to support his conclusion.

In his appeal brief, Buckel contends that "Miss. Code Ann. § 83-5-209(7) describes a discretionary function" that "is clearly not envisioned, anticipated or permitted by the Public Records Act." Br. Appellant p.13. Buckel makes this assertion after examining the mandatory language of § 25-61-11 that states previous or subsequent statutes must "provide[] that a public record ***shall be exempt*** from the provisions of this chapter." He compares that mandatory language with the discretionary language of § 83-5-209(7) that reads, documents "***may be held*** by the commissioner as a record not required to be made public under the Public Records Act." It is that discrepancy that Buckel has determined prevents the records he seeks, which are not in

MID's possession, from being exempt under the Public Records Act because, as he claims, "laws, not the ministers of the government determine when records may be withheld [according to § 25-61-11]."[6] Br. Appellant p.13. However, applying well established rules of statutory construction, his argument is incomplete and unsupported by any rational reading of §§ 25-61-11 and 83-5-209(7).

This Court in examining another section of the Mississippi Public Records Act stated, "[s]tatutes on the same subject, although in apparent conflict, should if possible be construed in harmony with each other to give effect to each." Roberts v. Mississippi Republican Party State Exec. Committee, 465 So. 2d 1050, 1052 (Miss. 1985). "In construing statutes the Court will give effect to the intent of the legislature." Id. Moreover, when two statutes are "found in different chapters of our Code, and although not in clear conflict, are surely ambiguous as to the intent of the legislature....we look to the rules of statutory construction for guidance." Tunica County v. Hampton Co. Nat'l Surety, LLC, 27 So. 3d 1128, 1133 (Miss. 2009).

Here, the plain language of each of the statutes is clear, but Buckel has cast questions over the differing mandatory and discretionary language between the two statutes. Buckel contends that the language of these statutes can be construed to be in conflict, thus making the intent of the legislature ambiguous: did the Legislature intend for only mandatory exceptions to the Public Record Act, or is there room for discretionary exceptions? Therefore, the Court looks to statutory construction to determine the legislature's intent. One "longstanding rule of statutory construction" is "that the terms of a specific statute control the terms of a general statute."

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[6]It should be pointed out that it is a ***law*** that gives the commissioner the discretion in releasing examination documents. Here, it seems as if Buckel's argument is missing the forest for the trees.

Lenoir v. Madison County, 641 So. 2d 1124, 1128 (Miss. 1994). But, as stated above, when statutes cover the same subject, the statutes should try to be harmonized. Roberts, 465 So. 2d at 1052. However, if it is determined that the two "statutory provisions are in irreconcilable conflict, the more recently enacted and more specific controls over the more general statute." Parkerson v. Smith, 817 So. 2d 529, 533 (Miss. 2002).

Comparing the two present statutes, they are easily harmonized giving effect to each without either infringing on the other. The legislative intent of each, looking to the text of each statute, seems clear. The Court should easily read § 25-61-11 as the legislature reserving unto itself a broad general right to create new statutory exceptions to the Public Records Act. Such a construction would also be non-detrimental to § 83-5-209(7) that simply creates a new exception to the Public Records Act, as the plain language clearly intends. Any other reading would not harmonize the two acts and would be detrimental to § 83-5-209(7). Because the legislature makes reference to the Public Relations Act, it clearly had knowledge of the mandatory language in that act, which was passed in 1983, when they passed § 83-5-209(7) in 1992. Even with that knowledge, the legislature still granted deferential power to the commissioner when dealing with examination documents. An interpretation that the mandatory language controls would make § 83-5-209(7) a dead letter law and not harmonize the statutes giving effect to each.

Furthermore, § 25-61-11 should be considered a general statute which is controlled by the more specific § 83-5-209(7). The former, found in the Public Records Act, is a general statute because it creates a general exception to that Act and prevents that Act from conflicting, amending, repealing or superceding ***any*** constitutional or statutory law or decision of a court of this state or the United States. On the other hand, § 83-5-209(7) is a specific statute which deals exclusively with examination documents that are "produced by, obtained by or disclosed to the

commissioner or any other person" under that statutory scheme. Furthermore, it specifically dictates how those documents are supposed to be treated in regards to the Public Records Act. Therefore, the discretionary language of § 83-5-209(7) should control the mandatory language of the § 25-61-11. But, if the Court were to find the two statutes were irreconcilable, § 83-5-209(7) and its discretionary language would control because it was enacted later in time.

Finally, as to whether § 83-5-209(7) created an exception, it seems awfully obvious that it does. However, Buckel takes exception to the painfully clear language of the statute. In his appeal brief he correctly states the law as:

> An exception cannot be created by construction, when none is necessary to effectuate the legislative intention. Ordinarily, an exception must appear plainly from the express words or necessary intendment of the statute. Where no exception in positive words is made, the presumption is the legislature intended to make none.

Br. Appellant p.12 (citing State v. Heard, 151 So. 2d 417, 420 (Miss. 1963). When it comes to the creation of an exception, make no mistake, the Commissioner looks only to the plain language of the statute. Section 83-5-209(7) states in pertinent part that examination materials "may be held by the commissioner as a record ***not required to be made public under the Mississippi Public Records Act.***" No construction is needed to see that the language there expressly and plainly intends to make an exception to the Public Records Act.

Therefore, if the Court finds ambiguity in the plain language of § 83-5-209(7) and § 25-61-11, clearly that ambiguity can be wiped away through established statutory construction principles. The two statutes at issue are easily harmonized. Also, the more specific and more recently enacted statute controls over the earlier general one, especially when that specific statute relates back to the general act. Thus, the Court can easily give the intended legislative effect to both statutes and the discretionary language would control the more general mandatory language.

Finally, the exception created by § 83-5-209(7) is clear from the plain and express language of the act, not created by statutory construction, and is properly applied to any and all documents requested by Buckel.

C. Buckel Requested Documents Underlying the Market Conduct Report for the First Time in His Complaint Seeking Judicial Review.

As has been shown above in parts I:A-B, even if this Court determines that Buckel's original records request was inclusive and included the Market Conduct Exam, those documents are exempt from disclosure. Buckel accurately states the policy of the Act as memorialized in Miss. Code Ann. § 25-61-2 that public records "shall be available" and that it is the "duty of each public body" to provide access to those records. However, the Act also provides that access to records is not unlimited and unfettered. As discussed above, the access to records is limited in many instances by exemption of those records by the Public Records Act and other statutes and judicial decisions. But, the access to records is also limited by procedure.

Mississippi Code Annotated § 25-61-5, Public access to records; form and retention of denials, provides in part

> Except as otherwise provided by Sections 25-61-9 and 25-61-11, all public records are hereby declared to be public property, and any person shall have the right to inspect, copy or mechanically reproduce or obtain a reproduction of any public record of a public body ***in accordance with reasonable written procedures*** adopted by the public body concerning the cost, time, place and ***method of access***[.]

(emphasis added). The insurance commissioner has interpreted the Mississippi Public Records Act and adopted regulations in conformity to that Act through Mississippi Department of Insurance Regulation 83-1 (MDOI). Regulation 83-1.4(b) states

> A request should reasonably describe the desired record. Where possible, specific information regarding dates, files, titles, file designation, etc. should be supplied.

Therefore, though Buckel has a right to disclosure of public records, he has no right to propound

a over generic request of "all" records concerning a particular topic.

In his appellate brief, Buckel states that he "made a request upon the MID for ***any*** records relevant to his inquiry which sought information regarding claims made, the claims paid and the portion of claims unpaid. Br. Appellant p.10 (citing R.1:000013) (emphasis supplied). His initial request for records stated in whole

> This is to request any data in the possession of MID concerning homeowner insurance claims as a result of Hurricane Katrina, excluding Wind Pool and Flood Claims. Specifically, I would like to know the (1) total number of homeowner claims filed after the storm; (2) the total insured amount claimed filed by homeowners after the storm; (3) the total amount paid out on those homeowner claim after the storm; (4) the total amount not paid on the homeowner claims after the storm. If this information is not available, I respectfully request your office compile this information for public consumption from the insurance companies that received homeowner claims regulated by MID as a result of Hurricane Katrina.

R.1:0000013. Again, a request for ***any relevant records*** is not one that reasonably describes a desired record. Moreover, as much as Buckel wishes that his catch all "any records" request is inclusive of the Market Conduct Report, that simply is not the case.

If Buckel wanted to request the materials underlying the Market Conduct Report, he should have specifically identified those records. Though a request for those documents would have been exempted from disclosure anyway, he failed to request the Market Conduct documents in his initial records request on January 4, 2009 ***and*** in his subsequent follow-up request on January 16, 2009. The first time Buckel specifically mentions the Market Conduct Report is in his Complaint on judicial review.

His general request was not a reasonably specific request for documents but was a request for MID to compile a record for him - which is something Buckel has acknowledged MID has no duty to do. Therefore, because Buckel did not specify in his original request, or his subsequent follow-up, that he was requesting documents underlying the Market Conduct Report, the Court

cannot find his "any documents" request was inclusive of that more specific request. The first time Buckel requested these documents was on judicial review and that is not proper. The Court cannot judicially review a non-request as the matter is not yet ripe for review. Further, a request for Market Conduct Report documents is simultaneously moot as those documents are exempt from disclosure as discussed above. Accordingly, the Chancellor was correct in finding that Buckel never included the specific request for Market Conduct Report documents in his initial request and those documents were nevertheless exempt from disclosure by Miss. Code Ann. § 83-5-209(7).

II. The Chancellor Was Correct in Finding Buckel Had Failed to Generate a Genuine Issue of Material Fact to Controvert the Sworn Credible Evidence Offered by the Commissioner.

A. Buckel's Failure to File a Motion to Strike the Commissioner's Supporting Affidavit at the Trial Level Constitutes a Wavier of Any Objection to the Sufficiency of that Affidavit.

As a preliminary matter, Buckel objects to the Commissioner's supporting affidavit for the first time on appeal. Buckel contends "the Chancellor clearly awarded some credence to the affidavit of the Commissioner, finding that MID was not in possession of the information which Buckel sought." Br. Appellant at p.9. Further, he claims that the Commissioner's supporting affidavit was not sufficient because "the Commissioner relied solely on a self-serving affidavit of MID employee to substantiate its claim that the records sought by Buckel did not exist." Id. Though this argument lacks merit as will be discussed herein in part II:C, Buckel cannot object to a supporting affidavit for the first time on appeal. His failure to make a motion to strike the affidavit of Donna Cromeans at the trial level equates to a waiver of such an objection on appeal.

The Mississippi Court of Appeals just recently addressed this exact issue in Moore v. M & M Logging, Inc., — So. 3d —, 2010 WL 1685782 (Miss. Ct. App. 2010). In Moore, Charlotte

Moore argued on appeal that her husband John's affidavit in support of M & M Logging, a company he owned, "was not sufficient as it was conclusory and self serving." Id. The Court of Appeals found the following:

> If a nonmoving party in a summary judgment action 'wishes to attack one or more of the affidavits upon which the motion is based, he must file in the trial court a motion to strike the affidavit.' Hare v. State, 733, So. 2d 277, 285 (Miss. 1999). The failure to do so 'constitutes waiver of any objection to the affidavit." Continental Ins. Co. v. Transamerica Rental Fin. Corp., 748 So. 2d 725, 731 (Miss. 1999). Although Charlotte addressed the issue of insufficiency of John's affidavit in her response to the motion for summary judgement, at no time did she file a motion to strike John's affidavit. Therefore, we agree that Charlotte waived her right to object on this basis.

Id.

In the present case, Buckel did not file a motion to strike the affidavit of Donna Cromeans in the trial court at the time of summary judgment. In fact, unlike Charlotte Moore who at least raised the insufficiency of the affidavit in her response pleadings, Buckel's objections to the Commissioner's supporting affidavits first made an appearance in his appellate brief. Consequently, Buckel's objections to the Chancellor's treatment of the Commissioner's affidavit were waived and cannot be addressed by this Court.

B. There Is No Genuine Issue of Material Fact to be Decided By the Court.

Under Rule 56 of the M.R.C.P., summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. McLemore v. Mississippi Transp. Comm'n, 992 So. 2d 1107, 1109 (Miss. 2008). Although *pro se* complaints are construed liberally, this Court has held "pro se parties should be held to the same rules of procedure and substantive law as represented by parties." Dethlefs v. Beau Maison Development Corp., 511 So. 2d 112, 118 (Miss. 1987). The Mississippi Court of Appeals has further opined that mere allegations and conclusions, even by *pro se* litigants, cannot avoid a

motion for summary judgment:

> We simply may not rely upon unsupported, conclusory allegations to defeat a motion for summary judgment where there are no issues of material fact. *See* Richardson v. Oldham, 12 F.3d 1373, 1378-79 (5th Cir. 1994) (affidavits in opposition to summary judgment that contain conclusions or conjecture not based on personal knowledge and insufficient factual specificity are not competent summary judgment evidence); Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir. 1994) (unsubstantiated assertions are not competent summary judgment evidence); Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1449 (5th Cir. 1993) (if the nonmoving party rests merely on conclusory allegations, improbable inferences and unsupported speculation, summary judgment may be appropriate).

Jacox v. Circus Circus Mississippi, Inc., 908 So.2d 181, 184 (Miss. Ct. App. 2005) (internal quotations omitted).

Buckel's action arises out of the denial of his Mississippi Public Records Request. Public Records are defined in Miss. Code Ann. § 25-61-3(b):

> "Public records" shall mean all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics, having been used, being in use, or prepared, ***possessed or retained*** for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body, or required to be maintained by any public body.

(emphasis added). In denying his request, MID informed Buckel that after a search of the records and files, the material sought by his request was not possessed by MID. Consequently, there were no records to access at MID and his request was thereby denied.[7]

Buckel, obviously aggrieved, brought this action to force the Commissioner to turn over documents that MID had clearly stated it did not possess. The Commissioner filed a Motion for

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[7]That his request was "denied" seems harsh, but his request was not "denied" in the sense that there were records and files at MID, only Buckel was not given access to those materials. A better explanation of his request was that it simply could not be filled, only because there were no material to fill his request. In fact, in the Commissioner's response to Buckel, MID attempted to point him in the direction of the department's website that did have some numbers and figures that may help answer some of his questions, despite not being in possession of any requested documents.

Summary Judgment because it was clear that MID did not possess the requested material. The Commissioner provided uncontroverted evidence of such. In a sworn affidavit, Donna Cromeans stated that she "undertook and supervised a diligent search of the files and records held by MID." R. 000036. Moreover, "the Affiant swears and attests that MID does not maintain the file materials related to Buckel's request." Id.

Conversely, Buckel's "knowledge" of the existence of the documents is based on two press releases, a newspaper article, and a Market Conduct Report which he claims taken together create an inference and support a conclusion that MID is in possession of the material they have sworn not to be in their possession. Buckel's inferential "evidence" becomes even more improbable in that the three news items he proffered as evidence had been issued by or quoted George Dale, the ***former*** Insurance Commissioner (who is not party to this action) - ***not*** Mike Chaney, the ***current*** Commissioner. Moreover, the press releases had been issued as early as November 21, 2005 and January 30, 2006. R. 000065. Besides the fact that neither of the press releases positively state that MID is in possession of the files, another inference can be drawn that if MID was ever in possession of such files in late 2005 and early 2006 those files have since been returned, moved, lost, or misplaced. However, that is the type of inference, conclusion, and conjecture that Mississippi courts have continuously discouraged. Moreover, it is not for the Court to guess or imagine what, if any, information former Commissioner Dale may have been referencing when he made statements to a Stone County newspaper on June 22, 2006, especially when he is not a party to this action.

A more likely explanation is that the Commissioner and MID were simply translating numbers provided by the National Association of Insurance Commissioners, NAIC, into press releases and quotes for newspapers. Buckel claims that his inferences are "reasonable" because

"[t]he figures [provided in the press releases and quoted by commissioner Dale] are quoted with such accuracy - citing, in one instance, the billions of dollars paid to the precise dollar (R. 1:000131) - that...the data [he] sought was available to the former Commissioner when the statements were made." Br. Appellant p.9. However, like the data received from the NAIC posted to MID's website, which the Commissioner pointed out to Buckel in his public records denial, those numbers were also quoted with great accuracy. That was made possible because the NAIC sent MID those numbers. MID did not generate those numbers. Hence, MID was not in possession of any underlying documentation or files of website or press release numbers.

Finally, Buckel's references to the Market Conduct Report are just as baseless as evidence that MID is, or ever was, in possession of materials he is seeking in his Public Records Request.[8] Again, nowhere in the Market Conduct Report does it state that MID is in possession of documents, files, or any other material related to that report. In fact, the report states

> This examination ***was performed by examiners, adjusters and attorneys*** appointed by the Commissioner of Insurance and in accordance with his statutory authority[.]

R. 000089 (emphasis added). The Market Conduct Report ***was <u>not</u> performed by MID***.[9] While

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[8]Even if MID were to be in possession of any materials related to the Market Conduct Report, which it maintains that it is not, any material disclosed to the examiners or MID in relation to the Market Conduct Report is exempt from disclosure via the Mississippi Public Records Act as discussed in Part I:A-B.

[9]Buckel, in his appeal brief, states "[t]he Market Conduct Exam specifically stated that the data [he] sought had been 'requested' by the MID and had been 'provided' by State Farm. R. 1:000096" The section of the Market Conduct Report quoted by Buckel in fact states, in whole, "***[t]he examination team requested*** a complete list of homeowner claims filed with any State Farm company between August 29, 2005, and October 31, 2006, by policy holders residing in the lower six counties of Mississippi (Hancock, Harrison, Jackson, Pearl River, Stone and George). The Company provided a list of 43,054 claims." R.000096 (emphasis added). Further, in his appellate brief, Buckel states that the examiner in charge, Jimmy Blissett, was an MID employee, Br. Appellant p.3. This simply is not a true statement. Jimmy Blissett contracted to lead the Market Conduct Exam as is required by statute. He was not a MID employee. Appellant's

the examination team was appointed by the Commissioner, the report does not indicate they stored the files with, handed the files over to, or in any other way made MID in possession of the underlying data.

Throughout the process, Buckel has continued to rely on his limited "evidence" and read into that evidence facts that just simply do not exist.[10] The "evidence" that Buckel continues to offer as proof that MID is essentially lying to him, and to this Court, is exactly the type of conjecture that this Court has stated cannot defeat summary judgment. At this late point in a long administrative and judicial process, Buckel has still not offered any personal knowledge of the requested material as being possessed by MID. In fact, in his initial request, Buckel admitted that MID may not have the material and requested that the department compile it for him. In reality, the totality of Buckel's evidence is nothing more than unsupported, conclusory allegations; conjecture not based on personal knowledge and insufficient factual specificity; unsubstantiated assertions; and/or merely conclusory allegations, improbable inferences and unsupported speculation. Consequently, the Chancellor made no error in finding that Buckel

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quotations of the record could thus be misleading in that MID and its employee Jimmy Blissett, not the examination team, requested and received the list of claims. Also, if it could be construed that the examiners are MID, the documents are still exempt from disclosure. Mississippi Code Annotated § 83-5-209(7) exempts those document "produced by, obtained by or disclosed to the commissioner ***or any other person in the course of an examination***."

[10]Mississippi Rule of Civil Procedure 56(f) states "[s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affadavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order that is just." Buckel had available to him the option to make further inquiries into MID's possession via discovery, depositions, etc., however, he chose to stand on the limited evidence he had presented. Thus, Buckel is forced to stand on his limited evidence and has lost his chance at any further discovery through Rule 56(f). *See* Morton v. City of Shelby, 984 So. 2d 323, 342 (Miss.App. 2007) ("Rule 56(f) clearly contemplates that the motion [for continuance] should be filed prior to the trial court's grant of summary judgment.").

failed to generate any genuine issue of material fact. Summary judgment was properly granted.

C. Donna Cromeans', the Commissioner's Affiant, Sworn Testimony Stands Uncontroverted and Unimpeached and Thus Can Properly Anchor a Grant of Summary Judgment.

Donna Cromeans has given uncontroverted testimony through her affidavit that MID does not possess the documents Buckel requested in his January 2009 letter. In order to overcome summary judgment, Buckel must provide by affidavit or other admissible evidence, credible, specific material facts in opposition to the evidence provided by the Commissioner (that MID does not possess these documents), which he cannot do. *See* Palmer v. Biloxi Regional Medical Center, Inc., 564 So. 2d 1346 (Miss. 1990) (the affiant must be sworn, have personal knowledge, and be competent to testify as to the elements of the claim). Instead, Buckel attempts to advance a standard for summary judgment that requires nothing of the nonmoving party. While Buckel is correct that summary judgment must be granted with great caution, 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 which the party will bear the burden at trial.'" Smith ex rel. Smith v. Gilmore Memorial Hosp., Inc., 952 So. 2d 177, 180 (Miss. 2007) (quoting Brown v. J.J. Ferguson Sand & Gravel Co., 858 So. 2d 129, 130 (Miss. 2003)).

As to a motion for summary judgment, Buckel would bear the burden of proving that MID possesses the sought after material. Buckel, as illustrated directly above, has produced no evidence other than mere conjecture and unsupported allegations. This Court has required more to overcome summary judgment. "In order to avoid an entry of summary judgment, a party must be diligent and not rest upon mere allegations or denials in the pleadings." Stuckey v. The Provident Bank, 912 So. 2d 859, 868 (Miss. 2005) (quoting Moore v. Mem'l Hosp. of Gulfport, 825 So. 2d 658, 663 (Miss. 2002)). "Mere general allegations which do not reveal ***detailed and***

precise facts will not prevent the award of summary judgment." Brown v. Credit Center, Inc., 444 So. 2d 358, 364 (Miss. 1983) (quoting Liberty Leasing Co. v. Hillsum Sales Corp., 380 F.2d 1013, 1015 (5th Cir. 1968)). Moreover, "[t]he party opposing the motion is required to bring forward ***significant probative evidence*** demonstrating the existence of the triable issue of fact." Id. (citing Union Planters National Leasing, Inc. v Woods, 687 F.2d 117, 119 (5th Cir. 1982). Buckel's attempt to cast aspersions on Cromeans' affidavit is fatally flawed because he cannot show one specific fact controverting Cromeans sworn statement of personal knowledge.

Buckel does cite the United States Supreme Court's holding in Reeves v. Sanderson Plumbing Products, Inc. to cast more aspersions to the credibility of Donna Cromeans' sworn statement by labeling her as an interested party whose testimony is not deserving of credibility with the Court. In Reeves the Court held that courts "should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, ***at least to the extent that the evidence comes from disinterested witnesses***'" when making summary judgment determinations. Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 150-51 (2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 300 (1986)).

However, the application of the Reeves language quoted by Buckel has almost exclusively been cited in context of employment discrimination; the context in which Reeves itself was decided - and clearly not at issue here. Even within that context, the circuits, including the Fifth Circuit, have backed away from a strict application of the Reeves disinterested witness requirement and this Court has yet to cite Reeves as precedent regarding Mississippi's Rule 56 of

Civil Procedure.[11] The Fifth Circuit wrote in Sanstad v. CB Richard Ellis, Inc.

> "[t]he definition of an interested witness cannot be so broad as to require us to disregard testimony from a company's agents regarding the company's reasons for discharging an employee. As the Seventh Circuit noted in Traylor v. Brown, et al., 295 F.3d 783 (7th Cir. 2002), to so hold would foreclose the possibility of summary judgment for employers, who ***almost invariably must rely on testimony of their agents*** to explain why the disputed action was taken.

309 F.3d 893, 898 (5th Cir. 2002) (emphasis added). The Fifth Circuit has not detailed exactly how broad the definition of an interested person is construed, but it has held that a "decision maker" is not an interested person under Fifth Circuit precedent "without further evidence" of the witness' interest. Wiley v. American Elec. Power Service Corp., 287 Fed. Appx. 335, 339 (5th Cir. 2008).

Though Sanstad was an employment discrimination case, nevertheless, the logic easily applies to the case at bar. In fact, the Commissioner must rely on his agents to testify as to the availability of documents at MID. Thus, it begs the question, how else could MID, or any other agency, prove to a citizen making a public records request that it is not in possession of the requested documents? MID could be forced to hire auditors to do the same work, but the auditors would be paid by MID and one can already envision the next argument by an aggrieved citizen: that the auditors too were interested persons. In that case, the dog would never catch his tail. Anything short of the Commissioner letting any and all citizens rifle through agency

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[11]Other circuits and district courts have rejected Buckel's reading of Reeves "distinterested witness" language. *See* LeFrenier v. Kinirey, 550 F.3d 166 (1st Cir. 2008) ("LeFrenier reads Reeves as precluding summary judgment where the movant relies on testimony of interested witnesses. We have rejected that reading of Reeves in this circuit."); *accord* Lauren W. ex rel. Jean W. v. DeFlaminis, 480 F.3d 259, 271-72 (3rd Cir. 2007); Luh v. J.M. Huber Corp., 211 F.Appx. 143, 146 (4th Cir. 2006); Stratienko v. Cordis Corp., 429 F.3d 592, 597-98 (6th Cir. 2005); *and* Coe v. Northern Pipe Products, Inc., 589 F.Supp.2d 1055, 1074-75 (N.D.Iowa 2008); Jackson v. Winn-Dixie, Inc., 2009 WL 256092, *3-4 (S.D.Ala. 2009).

documents would be considered insufficient to prove documents were not possessed by MID.

Moreover, the logic from Sanstad and Wiley finds harmony within Mississippi Supreme Court precedent construing its own rules. In MST, Inc. v. Mississippi Chemical Corp., the Supreme Court held that a court must take as true an affidavit provided by one party when no sworn evidence in opposition is presented to rebut it. 610 So. 2d 299, 304 (Miss. 1992). Further, in Moore v. M & M Logging, Inc., the Court of Appeals reinforced that principle and further found that an affidavit is sufficient for summary judgment even if it "does contain certain 'conclusory' or 'self-serving' statements" when "it also supports [the] statements with facts." 2010 WL 1685782. Therefore, adopting Buckel's reading of Reeves would overturn established Mississippi precedent.

Here, if this Court were to follow the persuasive precedent of Reeves, the scenario presently before the Court should warrant a finding that Donna Cromeans is ***not*** an interested party and her testimony has ***not*** been opposed by any sworn evidence in rebuttal, thus making her affidavit a sufficient basis for summary judgment. Also, as a matter of policy, a strict reading of the Reeves holding would create an absurd scenario where parties could never rely on the testimony of their employees to rebut baseless accusations and avoid the full burden of litigation through summary judgment. The Commissioner urges the Court to consider following the more practical reading of Reeves outlined by the Fifth Circuit in Sanstadt and Wiley and find that an interested witness requires more than mere allegations of interest, but requires evidence of such interest. Such a holding would be consistent and within the bounds of current federal trends and Mississippi procedure, and honor the procedural benefits of Rule 56 summary judgment:

avoiding full scale litigation in the face of baseless accusations.[12]

The Commissioner was granted summary judgment in this action at the trial level based on his sworn affidavit of Donna Cromeans, who had personal knowledge of MID's search for Buckel's requested documents and MID's finding that it was not in possession of those documents. To rebut the Commissioner's sworn affidavit, Buckel has offered nothing to the court but mere allegations and denials as to the documents presence at MID, much less significant and probative evidence showing detailed and precise facts as has been required by Mississippi Courts in defeating a motion for summary judgment. Thus, because Buckel has not presented any sworn evidence to rebut Cromeans affidavit, the Chancellor was correct in taking her testimony as true. Moreover, though it may be argued that her testimony is "self-serving," the affidavit is grounded in facts. A finding that Cromeans is not an interested person also jibes with the Fifth Circuit's decision in Wiley in which the Court found that the movant was not an interested person despite being a decision maker without more evidence indicating otherwise. Here, Cromeans is not a decision maker, she is a mere employee at MID, meaning she has no say as to what documents can be released or not. That duty lies solely with the Commissioner. Miss. Code Ann. § 83-5-209(7) ("All [records]..may be held by the commissioner as a record not required to be made public under the Mississippi Public Records Act."). If a decision maker in Wiley was not found to be interested without more, it is certain that a mere employee could not be found interested within the Reeves framework - especially when such a claim is based solely on mere allegations that she is interested.

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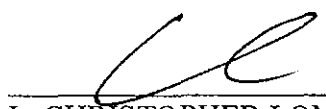
[12]The comment to Miss. R. Civ. Pro. 56 states that "[t]he purpose of Rule 56 is to expedite the determination of actions on their merits and eliminate unmeritorious claims or defenses without the necessity of a full trial."

Conclusion

For the reasons presented, the Commissioner respectfully requests that the Court affirm the Chancellor's order for summary judgment in the underlying case. The Commissioner requests this Court find as a matter of law that Buckel's new targeted request for documents, requesting specifically the documents used in the Market Conduct Report, are fully exempt from public records requests by Miss. Code Ann. §§ 25-61-11 and 83-5-209(7) and any other documents requested from Buckel's original records request are not within the possession of MID as shown by the uncontroverted testimony provided by Donna Cromeans.

APPELLEE, MIKE CHANEY
INSURANCE COMMISSIONER,
STATE OF MISSISSIPPI

BY: 

L. CHRISTOPHER LOMAX

CERTIFICATE OF SERVICE

This is to certify that I, L. Christopher Lomax, Special Assistant Attorney General for the State of Mississippi, have this date mailed via United States mail, postage prepaid, a true and correct copy of the foregoing ***Brief of Appellee*** to the following:

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This the 28th day of May, 2010.

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