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As noted in Appellant's opening Brief this case presents a novel issue. Specifically, the most subjectively injurious conduct which Sue Smith complained of at trial was Billy Smith's casino gambling. Sue repeatedly claimed that she would have returned to the marriage if Billy had stopped gambling and gotten treatment for gambling addiction. Although casino gambling cannot warrant a divorce under Mississippi law, the Chancellor nevertheless granted a divorce based on habitual cruel and inhuman treatment and constructive desertion.

There was no evidence introduced in the Trial Court to meet the stringent standard for a divorce based on habitual cruel and inhuman treatment or constructive desertion. The Chancellor's grant of divorce was inextricably tied to allegations of habitual gambling. Oral argument would be helpful to discuss the dearth of record evidence in this case bearing on the issue of habitual cruel and inhuman treatment and constructive desertion. Oral argument should be granted to discuss whether the Trial Court erred by, in effect, granting a divorce based on nothing more than gambling.

REPLY ARGUMENT I.

THE RECORD IS DEVOID OF EVIDENCE RISING TO THE LEVEL OF HABITUAL CRUEL AND INHUMAN TREATMENT OR CONSTRUCTIVE DESERTION.

Most of Sue's Brief is tellingly devoted to irrelevant facts regarding the marriage and her claim that she was kept in the dark about the marital finances and businesses. If the Court accepts as true each of Sue's allegations in the Record, there is nevertheless woefully insufficient proof necessary for a divorce based on habitual cruel and inhuman treatment or constructive desertion. Affirming the divorce in this case will require greatly expanding the nature of habitual cruel and inhuman treatment or will require the Legislature to add "habitual gambling" as a ground for divorce.

A. Gambling Was the Most Subjectively Injurious Conduct and it is Insufficient for Divorce.

Sue does not, because she cannot, dispute that she left the marital home solely because of Billy's gambling and that she frequently claimed she would return if Billy would stop gambling. (*See, e.g.,* C.P. p. 108; T. p. 293, 646-48). Sue's testimony established that gambling was the most injurious conduct in which Billy engaged and that the marriage could continue if he stopped and got counseling. (*See Id.*). Sue explained:

> Q: Let me ask it this way. During this last year, from March of '06 to March of '07, if he had sincerely told you that he was going to quit his gambling, would you have gone back?
>
> A: If he had quit?
>
> Q: Yes ma'am.
>
> A: And sought counseling, yes.

(T. p. 293).

Sue cannot claim that any other conduct was endangering her life or limb, or was so unnatural and infamous as to make the marriage revolting, since she readily confesses that she would have returned to the marriage but-for Billy's gambling. Further, Billy's gambling was the only continuous misconduct of which Sue presented evidence at trial.

The Court employs a subjective standard in evaluating whether conduct justifies a divorce. *Holladay v. Holladay*, 776 So. 2d 662, 677 (Miss. 2000). As discussed at length in Billy's opening Brief, the conduct which was subjectively most injurious to Sue, and the only "routine and continuous" conduct in this case, simply cannot justify a divorce under Mississippi law. The Mississippi Courts have repeatedly held that gambling does not justify a divorce. *Criswell v. Criswell*, 182 So. 2d 587 (Miss. 1966); *Curtis v. Curtis*, 796 So. 2d 1044, 1047 (Miss. Ct. App. 2001). The Legislature recently refused to amend the statute to add compulsive gambling as a ground. *See* H.B. 412, Reg. Sess. (Miss. 2010).

Sue attempts an end-run around the law by arguing that it was Billy's absences from home while he was gambling, his secrecy with finances and his wasting of money which could justify the divorce. Of course, this is simply gambling by another name. Billy's use of money to gamble and his absences from home while he engaged in gambling no more justify a divorce than does his habitual gambling under Mississippi law. None of this conduct rises to the stringent standard for a divorce based on either habitual cruel and inhuman treatment or the related ground of constructive desertion.

Since the most injurious conduct in this case is conduct which cannot, as a matter of law, support a divorce it necessarily follows that none of Billy's less injurious conduct could support a divorce. Further, in order to rise to the level of habitual cruel and inhuman treatment any other conduct would have to have been "routine and continuous" rather than isolated. *Moore v.*

Moore, 757 So. 2d 1043, 1047 (Miss. Ct. App. 2000); *Parker v. Parker*, 519 So. 2d 1232, 1234 (Miss. 1988). Sue can point to no evidence of any routine or continuous misconduct other than gambling.

Simply put, habitual gambling, however severe, is not grounds for a divorce under Mississippi law. The Chancellor erred in concluding otherwise. Sue admitted that Billy's gambling was the most severe misconduct he committed and it was the only routine and continuous conduct proven at trial. Accordingly, since habitual gambling cannot support the divorce alone, the grant of divorce should be reversed and rendered.

B. No Adverse Impact on Sue.

In order to affirm the divorce in this case, there must also be evidence in the Record that Billy Smith engaged in a course of misconduct which had a sufficiently negative effect on Sue Smith. *See Kergosien v. Kergosien*, 471 So. 2d 1206, 1210 (Miss. 1985). The *Kergosien* Court held that a divorce could not be granted where there was no evidence of a sufficient adverse effect:

> The proof in this case is insufficient to prove habitual cruel and inhuman treatment. There is evidence of incompatibility, and occasional acts of deceit, some of which occurred after the separation. However, there is no proof that Mrs. Kergosien's mismanagement of family funds, disappearances, or alleged mistreatment of the children rendered continuance of cohabitation impossible, except at the risk of life, limb, or health on the part of Mr. Kergosien. Nowhere in the testimony is there anything indicating that the appellee's health was even slightly impaired, as in Wires. Mr. Kergosien testified that he was embarrassed and ashamed when his wife left the dinnertable at the restaurant, but another member of the dinner party testified that he recalled no "scene" or any statements that upset him.

Kergosien, 471 So. 2d at 1210.

In stark contrast to cases in which the Mississippi Courts have affirmed a divorce based on habitual cruel and inhuman treatment, Sue presented no evidence whatsoever of any

significant psychological or physical impact caused by any conduct which she characterized as cruel or inhuman.

Sue merely claimed that she "lost sleep" worrying about Billy's gambling and that she "felt depressed." (*See, e.g.,* T. p. 374, 646). Sue never had any serious psychological or physical problems. (*See, e.g.,* T. p. 374, 646). There is no evidence in the Record of any medical treatment, counseling, weight loss or any other effect from any of Billy's misconduct. No treating physicians, psychologists, psychiatrists or other such professionals or experts testified at trial.

Ostensibly because of this, Sue mentions an incident where Billy called Sue after the separation and left a message stating that something had happened to their son, Billy, Jr. (Brief of Appellee at 11). Sue's brother, William Yielding, testified that he had to "go up there and calm her down because of what Billy said." (T. p. 708). Sue's brother testified that because of Billy's "harassing and gambling" after the separation Sue became "nervous, about to have a breakdown." (T. p. 709). Sue's brother testified that Sue "couldn't even breath [sic]." *(Id.)*. Sue was so upset that someone called an ambulance. (T. p. 710). However, Sue was not taken to the hospital by the ambulance. (T. p. 711). Sue did not get any medical treatment for any of the alleged episodes in which she managed to narrowly escape a nervous breakdown.

As noted in Billy's principal Brief, Sue's allegations are exactly what the Mississippi Courts have held to be insufficient evidence of a negative impact. *See, e.g., Potts v. Potts*, 700 So. 2d 321, 323 (Miss. 1997); *Reed v. Reed*, 839 So. 2d 565, 572 (Miss. Ct. App. 2003); *Tedford v. Tedford*, 856 So. 2d 753, 757 (Miss. Ct. App. 2003). In *Reed*, for instance, the Court recounted the facts as follows:

> Gloria testified that she "almost" had a nervous breakdown due to the stress endured during the last two months of her marriage. However, she never indicated

> that she received any treatment. She also testified that she was unhealthy due to high blood pressure and a "bad heart;" yet, she submitted no medical evidence that these alleged health problems arose due to Matthew mistreating her.

Reed, 839 So. 2d at 571. The *Reed* Court clearly held that such lay testimony that someone "almost" had a nervous breakdown is insufficient. *Id.* Based on this lack of evidence the Court in *Reed* reversed and rendered a divorce granted on grounds of habitual cruel and inhuman treatment. *Id.*

This case is marked similar to *Reed.* In this case, even crediting Sue's claims as true, Sue was "depressed," she lost sleep and "almost" had a nervous breakdown, just like the wife in *Reed.* However, just as in *Reed*, Sue never received any medical treatment. Not one medical record was introduced in the Trial Court. No physician or therapist testified as to Sue's condition. The best evidence Sue can muster is that, after her separation from Billy, she became upset and her family called an ambulance, after which she received no treatment and was not transported to the hospital.

There is no evidence of any sufficient physical or psychological impact on Sue to justify a divorce. More is required to meet the stringent standard of habitual cruel and inhuman treatment. Sue could have produced evidence of actual psychological harm, in the form of testimony from witnesses who observed physical effects, from treating providers or at least medical records, but she did not. Because Sue produced no evidence of sufficient negative effect, the divorce should likewise be reversed and rendered on this basis.

C. Self-Serving Claims of Sexual Misconduct Not Grounds for Divorce.

The facts in the Record are a far cry from those alleged in Sue's Brief in this regard. First of all, Sue testified in one breath that Billy was impotent from the last half of 2005 until she

moved out in March 2006. (T. p. 426-27). Much later in the proceedings below, Sue testified that Billy had "attempted anal rape" in the fall of 2005.[1] (T. p. 671).

Even Sue does not claim that Billy attempted to force himself on her. *(Id.)*. Rather, Sue claims that Billy attempted to have anal sex. *(Id.)*. However, Sue claimed that she refused Billy. *(Id.)*. Sue claims she said no and Billy just "stared and said nothing." *(See Id.;* Brief of Appellee at 10*)*. Sue never testified that Billy attempted to force himself on her. Rather, Sue testified that Billy attempted anal sex but she refused and the incident was over. *(Id.)*.

Billy vehemently denies Sue's false accusations in this regard. Notably, the Chancellor obviously did not believe Sue's last-minute claims either. The Chancellor did not find that Billy attempted "anal rape" or any other sexual misconduct and no evidence in the Record could support such a finding.

However, in any event, even based on Sue's testimony Billy never attempted anal rape, as Sue claims in her brief. At most, Sue claims Billy attempted to engage in sex, Sue refused and the incident ended. This is not grounds for divorce.

This Court no longer requires that a single specific act must be the proximate cause of the separation in order to support a divorce based on habitual cruel and inhuman treatment. *See Peters v. Peters*, 906 So. 2d 64, 69 (Miss. Ct. App. 2004). However, as discussed above, there must be evidence that the allegedly cruel act proximately caused harm to the health or physical well being of the other spouse. *Rakestraw v. Rakestraw*, 717 So. 2d 1284, 1288 (Miss. Ct. App. 1998). The complaining spouse must prove the requisite impact of the behavior before a divorce can be affirmed. *Rakestraw*, 717 So. 2d at 1288.

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[1] Sue never made any claims of sexual misconduct until late in the trial. (T. p. 729, 731). Sue testified that she "didn't tell all the facts" previously because she was embarrassed. (*Id.*).

As discussed previously, Sue did not present evidence of a sufficient impact caused by any of Billy's alleged conduct sufficient for a divorce. Further, Sue's repeated testimony that she would have returned to Billy as late as March 2006 if he had stopped gambling and sought counseling again undercuts her arguments in this regard. Based on Sue's own testimony either the alleged events of late 2005 had no effect on her (or at least far less than gambling) or her claims are just false. In either event, there was no evidence of any effect on Sue and Sue would have gladly returned and continued the marriage after the incidents if Billy had stopped gambling.

Because of these facts, even Sue's false allegations fail to adequately support her claim. Since there was no evidence of the effect on Sue, and Sue would have returned home subsequently but-for Billy's gambling, the conduct is necessarily insufficient for a divorce.

D. Sue's Remaining Evidence is Insufficient for Divorce as a Matter of Law.

Sue also makes passing references to Billy carrying another woman to Tunica, Mississippi, another woman being seen riding in Billy's vehicle and Billy chatting with women on Internet websites. (Brief of Appellee at 12).

Sue did not claim adultery at trial. Billy vehemently denied that he had ever engaged in adultery. The Chancellor did not grant a divorce based on adultery and there is absolutely no evidence of such in the record. Sue's references to dubious claims that Billy was around other women are red herrings. There is no evidence whatsoever that Billy engaged in any affair with any other women. The Record does not even identify any woman whom Sue claims Billy had a relationship with. The recitation of these facts, which have nothing to do with any issue before the Court, further reveals the paucity of evidence in this case.

Sue also repeatedly charges that Billy "forged" her signature to get a loan secured by the marital home in 2002 and 2003, and subsequently listed himself as a single person to get a loan. Billy explained that the house was put up as collateral on a line of credit on one occasion without either his or Sue's knowledge. (T. p. 909). On a second occasion the house was used as collateral for a loan and Billy made no effort to hide this from Sue. (T. p. 911). Billy explained:

> A: Sir, that line of credit statement came to my house every month for all this time. She [Sue] got the mail every day. She would bring it in the home, in the house, and I would look at it at night, and she's going to sit here now and tell me she doesn't know what was – she never questioned what was in that envelope.
>
> Q: Did she know that the house was up as collateral? She didn't know that, did she?
>
> A: She had to the second time. The first time, I didn't even know.

(T. p. 911).

Sue's claim that Billy obtained a loan by listing himself as unmarried is likewise disingenuous. Billy explained that he and Sue dealt with a local banker who knew both Billy and Sue well. (T. p. 909). Billy explained that "[t]he banker knows my wife." (T. p. 910). The reference to Billy as unmarried was simply an error and clearly does not amount to misconduct by Billy.

Of course, these incidents were many years before the marital discord even began and had nothing to do with the separation. (T. p. 243, 647-648). Sue claimed that the couple did not begin having marital problems until 2005. (T. p. 241, 441; C.P. p. 107). Sue dredges up these unrelated claims in an attempt to bolster her insufficient evidence for a divorce.

Finally, Sue repeatedly mischaracterizes the Court's decision in *Jones v. Jones*, 43 So. 3d 465 (Miss. Ct. App. 2009). Unabashedly, Sue claims that "Billy's conduct mirrored Steven Jones' conduct except Billy lost considerably more money gambling than Steven Jones." (Brf.

of Appellee at 28). As to the effect of the conduct discussed in *Jones*, Sue asserts that "Sue had the same problems Rachel Jones had." (Brf. of Appellee at 29). Neither of these statements is even close to the truth.

In *Jones*, the husband, Steven Jones, was diagnosed with sex addiction, constantly demanded sex from his wife and punished his wife when she refused. *Jones*, 43 So. 3d at 473-74. Steven Jones bathed with the couple's children when they were aged ten (10), six (6) and five (5) until a guardian *ad litem* told him to stop the behavior. *Id.* at 476. Steven was then hospitalized for gambling addiction and various inappropriate sexual behaviors. *Id.* at 477. After his discharge from in-patient hospitalization, Steven shaved his pubic hair and attempted to force his ten (10) year old son to take a bath with him. *Id.* at 476-77. His wife, Rachel, was able to intervene and get the child away from Steven. *Id.*

Sue's claim that Billy engaged in conduct that "mirrors" that of Steven Jones is absurd. The only similarity between *Jones* and this case is gambling. The *Jones* opinion did not rely on casino gambling to affirm the grant of the divorce. Rather, *Jones* focused on the husband's sexual addiction and his repugnant acts with the minor children. *Jones* is dissimilar from this case is every important aspect.

Next, of crucial importance, was the evidence in *Jones* regarding the injurious effects on Rachel Jones. Contrary to Sue's claim, she did not claim to have "every problem Rachel Jones had." The Court in *Jones* noted that Rachel's therapist, Dr. Ruth Glaze, testified regarding the effect of the husband's repugnant behaviors on Rachel. *Id.* at 475. The Court noted that the evidence established that Steven's behaviors caused Rachel to suffer both physically and emotionally. *Id.* The Court explained "[p]hysically, Steven's combined offending behaviors caused Rachel to suffer hair loss, weight loss, and stomach ailments, including diarrhea." *Id.*

There is no evidence of any adverse effect in the Record in this case which compares to the evidence in *Jones*. No therapist or any other medical care provider testified in this case, since Sue never received any such treatment. Sue never claimed, much less produced evidence, that she suffered from hair loss, weight loss, a stomach ailment or anything else. Sue claimed that she "lost sleep" and felt depressed. Sue had no evidence of any physical effect whatsoever. This is a far cry from what Rachel Jones proved. Again in this regard, the evidence in *Jones* is entirely dissimilar to the evidence presented in this case. Rather, as discussed above, this case is far more similar to *Reed* and *Tedford* in that there was no evidence at all of any adverse effect on Sue. Mississippi law firmly establishes that in the absence of such evidence of an adverse effect the grant of divorce must be reversed and rendered.

The evidence in this case was insufficient for a divorce based on habitual cruel and inhuman treatment or constructive desertion. Accordingly, the Trial Court's decision should be reversed and rendered.

REPLY ARGUMENT II.

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT BILLY SMITH LOST $314,000 GAMBLING AND THE CHANCELLOR'S RULING IS INEQUITABLE.

The Trial Court concluded that Billy had lost $314,000 gambling over the course of the marriage. From all of the evidence in the Record, this figure ostensibly comes from Sue's calculation which showed withdrawals at casinos of $314,950.

The finding is erroneous because: 1) it erroneously assumes that 100% of withdrawals were losses with no accounting for winnings; 2) it ignores the undisputed evidence that Billy Smith gave his son $121,000 of this sum; and 3) it inappropriately punishes Billy for all money he lost gambling during the marriage without regard for Sue's participation.

Notably, Billy was unable to fully defend against Sue's dubious calculation at trial because pertinent financial documents were missing before trial. (*See, e.g.,* R. p. 868). Billy Smith testified:

> A: You've got records. I don't have records, my personal records. You've got them. I can't defend myself on a lot of this stuff because you've got my records.

(T. p. 868). While Sue denied she had kept the financial records from Billy during most of the proceedings, after the conclusion of trial Sue admitted she had many of Billy's records. (T. p. 1317-21). Billy could not disprove Sue's claims without his records. (*See* T. p. 868).

Sue next claims that there was "no credible proof" that Billy had given Billy, Jr. $121,000 of gambling proceeds. However, both Billy and Billy, Jr. testified to the fact. (*See, e.g.,* T. p. 679, 688). Billy, Jr. testified that both Billy and Sue were involved in giving him the $121,000. (T. p. 679).

Sue did not deny that Billy gave Billy, Jr. $121,000. In fact, not only is there credible proof of these payments to Billy, Jr., the payments are in-fact undisputed in the Record.

It was error for the Court to find that every dollar Billy Smith lost gambling, whether Sue participated or not and regardless of when the gambling occurred, was a wasteful dissipation of marital assets. At a minimum, the Chancellor should have reduced a proper calculation of Billy's gambling losses by $121,000.

Next, there were many cash deposits into FRP from Billy's gambling winnings. (*See, e.g.,* T. p. 505). Further, Billy gave Sue cash on many occasions which he related were from his gambling winnings. (T. p. 505). Sue conveniently ignores any amount of gambling winnings so that she can claim entitlement to half of Billy's casino withdrawals as gambling losses. However, this defies logic.

Finally, Sue largely ignores Billy's argument that the penalty of $157,000 will inequitably deprive Billy of any share of the marital estate. The effect of the $157,000 payment punishes Billy and rewards Sue. A finding of a wasteful dissipation of assets is improper when it takes on a "punitive aspect." *Dunaway v. Dunaway*, 749 So. 2d 1112 (Miss. Ct. App. 1999).

The Court's order that Billy compensate Sue $157,000 from his share of the marital estate is the product of a clear error in calculating the gambling losses, erroneously fails to consider winnings and the cash gifts to Billy, Jr., and inequitably punishes Billy to deprive him of any share of the marital estate. Accordingly, this finding should likewise be reversed.

REPLY ARGUMENT III.

SINCE BILLY WILL ACQUIRE TWENTY-FIVE PERCENT OF FRP AFTER THE DIVORCE AND AFTER THE TEMPORARY ORDER, THIS INTEREST IS SEPARATE PROPERTY.

As to this issue Sue essentially argues that it is within a Chancellor's discretion to find that an asset is marital property regardless of when the asset is acquired. Sue claims the Court properly divided all of FRP in its equitable distribution even though only seventy-five percent (75%) of the business was marital property. This is not the law.

Property acquired after the date of divorce, or after the entry of a temporary support order, is the separate property of the acquiring spouse. *Pittman v. Pittman*, 791 So. 2d 857, 863-64 (Miss. Ct. App. 2001); *Hemsley v. Hemsley*, 639 So. 2d 909, 915 (Miss. 1994).

It is undisputed in this case that when FRP was formed Billy owned fifty percent (50%), Sue owned twenty five percent (25%) and Billy, Jr. owned twenty five percent (25%). Billy concedes that his and Sue's interest, which totals seventy five percent (75%) of FRP, was properly considered marital property.

Sue claims that "[t]he Chancellor was free to divide the property regardless of whose name it was in." (Brief of Appellee at 34). Of course, that would be true if the property were owned by either spouse during the marriage. Sue's statement, however, is not true where the property is in the name of and owned by a third-party. Such is the case here. Billy Smith, Jr. owned twenty-five percent of FRP until after the entry of the temporary order. The Chancellor is not free to treat property acquired after a temporary order or after the divorce as marital property.

The mere fact that Billy and Sue collectively owned 75% of FRP does not mean that Billy's subsequent acquisition of 25% of the business is marital property. Sue does not dispute that Billy first began to acquire Billy, Jr.'s 25% after the date of the temporary order in this case and will not finally obtain the 25% interest until well after the date of the divorce. Billy did not acquire any of the 25% interest from Billy, Jr. until after the temporary order in this case.

Accordingly, it is beyond dispute that the 25% interest in FRP is Billy's separate property. Nothing urged by Sue could produce a different result.

This Court should reverse the Trial Court's distribution of FRP and remand for the Court to determine the value of Billy Smith's separate interest in FRP. Billy Smith is entitled to twenty-five percent of FRP as his separate property.

CONCLUSION

It is undisputed on this Record that the reason Billy and Sue Smith separated was Billy's casino gambling. It is likewise beyond dispute that this was the most subjectively injurious conduct to Sue and is the only routine and continuous conduct of which Sue complained of at trial. The very conduct which Sue claimed was the most injurious is conduct which cannot support a divorce under Mississippi law. Affirming the divorce in this case will require the

Court to do what the Mississippi Legislature recently refused to do by adding compulsive gambling as the thirteenth ground for divorce.

In addition to this, Sue also failed to present any evidence of an adverse impact caused by any of Billy's alleged behaviors. There was no evidence of an adverse effect on Sue other than her testimony that she felt depressed and lost sleep. The Mississippi Courts have repeatedly reversed divorces without proof of actual physical or psychological harm. The divorce in this case should likewise be reversed on this basis.

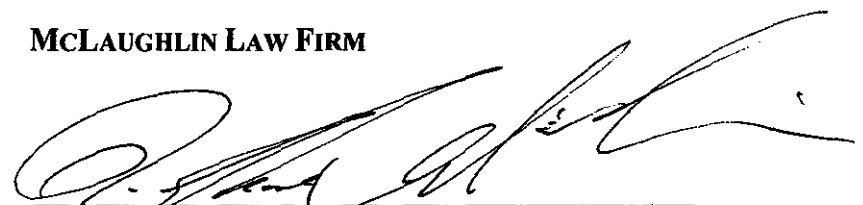
The Court should reverse and render the Chancellor's grant of a divorce based on habitual cruel and inhuman treatment and constructive desertion. The Court need go no further than this to resolve this appeal.

Even if the Court affirmed the divorce, the Court should reverse the Chancellor's decision as to Billy's gambling losses and the requirement that he pay Sue for them from his share of the marital estate. The Court's calculation of the gambling loss was clearly erroneous and produces a punitive and inequitable result.

Finally, even if the divorce could stand, the Court likewise erred in finding that Billy had no separate interest in FRP. It is, and remains, undisputed that Billy acquired twenty-five percent of FRP from his son after the date of the temporary order and after the divorce in this case. Thus, the twenty-five percent interest is Billy's separate property not subject to equitable distribution.

RESPECTFULLY SUBMITTED, this the 16th day of February, 2011.

MCLAUGHLIN LAW FIRM

By: 

R. Shane McLaughlin (Miss. Bar No. [redacted])
Nicole H. McLaughlin (Miss. Bar No. [redacted])
338 North Spring Street Suite 2
P.O. Box 200
Tupelo, Mississippi 38802
Telephone: (662) 840-5042
Facsimile: (662) 840-5043
E-mail: rsm@mclaughlinlawfirm.com

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant / Cross-Appellee in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Reply Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

Jak M. Smith
Attorney at Law
Post Office Box 7213
Tupelo, Mississippi 38802

Hon. Jacqueline Estes Mask
Chancellor
Post Office Box 7395
Tupelo, Mississippi 38802

This the 16th day of February, 2011.

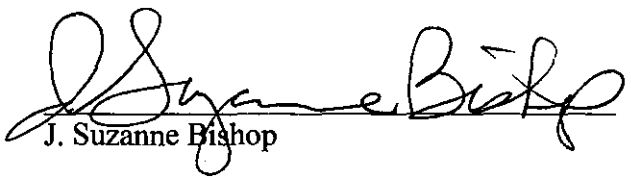
R. Shane McLaughlin

CERTIFICATE OF FILING

I, J. Suzanne Bishop, paralegal for McLaughlin Law Firm do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Reply Brief of Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

This, the 16th day of February, 2011.



J. Suzanne Bishop