IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01

Dr. MELISSA WHITING — APPELLANT

V.

UNIVERSITY OF SOUTHERN MISSISSIPPI, DR. SHELBY THAMES officially and individually, DR. DANA THAMES officially and individually, and DR. CARL MARTRAY officially and individually, BOARD OF TRUSTEES FOR INSTITUTIONS OF HIGHER LEARNING — APPELLEES

BRIEF FOR THE APPELLANT
DR. MELISSA WHITING

ON APPEAL FROM THE CIRCUIT COURT OF FORREST COUNTY

ORAL ARGUMENT REQUESTED

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NO. 2009-TS-01807

Melissa Whiting v. University of Southern Mississippi, et al

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 Court may evaluate possible disqualification or recusal.

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STATEMENT OF CASE AND FACTS

Dr. Whiting was a professor in the Department of Curriculum, Instruction, and Special Education at the University of Southern Mississippi [USM]. She had written contracts that provided her distinct contractual rights. These contracts were supplemented by an extensive Faculty Handbook that "guaranteed" her numerous other entitlements and benefits.

Amongst those entitlements was ***"CONTRACTUAL DUE PROCESS".*** Her Faculty Handbook **"guaranteed"** her **Due Process. [RE 4] [CP 449, 564] [FACULTY HANDBOOK; Exhibit 1 [XI-1].**[1]

Dr. Whiting respectfully appears in this Court predominantly regarding her written contractual rights. Since she was contractually guaranteed due process, she should have been provided that contractual obligation, right, and entitlement. She was not.

As a proximate result she was deprived of the procedures and due process she was guaranteed. She was deprived of numerous entitlements emanating from her written contract and Faculty Handbook.

Dr. Whiting respectfully disagrees with the Circuit Judge's ruling. Furthermore, a written contract is never constrained by the Mississippi Tort Claims Act [MCTA]. The lower court, it appears, believed a written contract is controlled by the MTCA. Again Dr. Whiting respectfully disagrees.

Dr. Whiting's position is substantiated by considerable discovery, documents, and testimony [approximately 2000 pages contained in the Record]. Dr. Whiting spent

[1] The Handbook will be referred extensively. The entire Handbook was offered in opposition to the Motion For Summary Judgment. Please note page references of Handbook. For example, here, the page number is "XI-1". ***"Exhibit"*** refers to particular exhibits offered in opposition to Defendants' Motion for Summary Judgment.

her entire professional life teaching students how to become effective teachers themselves. Once her own educational endeavors are combined with her work as a teacher or professor, she has thirty years at stake and invested in this litigation.

The Circuit Judge entered a summary judgment in this matter on September 17, 2008. Ultimately, he denied her motion for reconsideration on October 6, 2009. Dr. Whiting filed a timely Notice of Appeal on November 3, 2009. Now, she appears in this Court respectfully seeking relief.

The Defendants at their depositions acknowledged that Dr. Whiting was actually guaranteed employment for a period of at least six years and as long as seven years so that the guidelines in the Handbook, regarding tenure and promotion, could be satisfied. Dr. Dana Thames, Dr. Whiting's Chair [and daughter of the President at that time, Dr. Shelby Thames] testified that she [Dana] had written a memorandum stating that Dr. Whiting "has until the end of her seventh year to acquire tenure . . .". [CP 606], **Exhibit 2 (DT [Dana Thames] depo, p. 151)**. The other defendants, at their respective depositions, also agreed with this point. [CP 661] For example, please see **Exhibit 3 (ST [Shelby Thames] depo pp. 125-126)** [CP 661].

However, Dana's father, Shelby, buried Dr. Whiting's file, dossier, and career at USM, and he did nothing regarding the matter for three and a half months **AFTER the Provost, the Chief Academic Officer at USM, *had recommended Dr. Whiting* for both tenure and promotion.** This action did not comply with the guidelines in the Handbook. In point of fact, he allowed her dossier and tenure and promotion package to languish until he had been sued by her. By then, he was clearly prejudiced and biased against her.

Shelby Thames never provided Dr. Whiting a hearing – the very Due Process Hearing and Notice of Hearing she was entitled. If the Defendants contend otherwise, this is certainly a genuinely contested factual issue of material fact. Summary Judgment should never have been granted for this reason alone.

According to the Handbook, it is "normal" for the "AFFECTED PARTY" [DR. WHITING] to be informed by May 1 as to a decision by the President. [CP 449, 589] **[Exhibit 1,]** It is not disputed that she was not informed until some time in September. The letter written her, firing her, is not dated until August 30. By the time she received the letter, she had already been replaced many weeks prior. Her classes had been taken over by another. She had not received the *guaranteed contractual due process* she was entitled. She never received a hearing by the decision maker, Dr. Shelby Thames or by the Board.

According to the Handbook, she "MUST" have been informed by September 1, 2001 of any non-renewal. [CP 449, 561] **[Exhibit 1]** In other words, the Defendants were over a year late in informing her. This breach had the effect of providing her the right to a terminal contract that was timely and, therefore, she should have been employed for at least two more years.

The reason for "terminal contracts" is not contested. In the Academic World, Professors, particularly Tenure Track Professors, such as Dr. Whiting, need and are entitled to considerable notice of their not being employed at USM so that they can look for other employment elsewhere in the Academic World. Positions are difficult to come by. There are only a few jobs available, and the job search entails considerable effort. Time is essential.

Not only was Dr. Whiting deprived of due process and the requisite notice and hearings due process entails, she also never received the terminal contract she was entitled pursuant to the Faculty Handbook. Furthermore, she never received the benefit and entitlement of the critical deadlines contained in the Faculty Handbook.

Again, if any of the foregoing factual points are contested, summary judgment should not have been granted. Although the Defendants' position is chameleonesque, they contest Dr. Whiting's presentation of the material facts. Thus, of course, summary judgment is not appropriate.

It is a certainty, however, that a "terminal contract" was never contained in Defendants' exhibits, and it is just as certain, Dr. Whiting was never presented a terminal contract. The Defendants, instead, argued to the Circuit Judge that they "contemplated" a terminal contract. That mystical "contemplation", as we all know, is not evidence. Please recall that her contract and Handbook stated that she "MUST" be provided the terminal contract. However, she was not provided the critical terminal contract.

Shelby Thames testified, words to the effect, he may have only actually looked at Dr. Whiting's file until ***AFTER SUIT HAD BEEN FILED*** against him regarding his misconduct. Suit had been filed on August 6. [CP 661] **Exhibit 3**, **(ST depo,p. 17)** - almost four months past the critical deadline of May 1. Shelby Thames acknowledged the importance of the date of May 1. He knew that the date was critical. [CP 661] **Exhibit 3, (ST depo, p. 146)**.

Dr. Shelby Thames finally wrote Dr. Whiting on August 23, 2002. Then, he fired her some time in September upon her receiving his letter firing her that was not even dated until August 30, 2002. He provided and knew of no reason for her being fired.

Indeed, he testified he had not taken one note regarding her file. [CP 661] **Exhibit 3, (ST depo, p.16, p. 29)**. He did not know, according his testimony, of any reason for her firing.

Dr. Shelby Thames did not dispute the accuracy of Dr. Whiting's Annual Evaluations that were virtually perfect. [CP 661] **Exhibit 3, (ST depo, p. 29;63)**. He agreed the Annual Evaluations are the "guidance" for Dr. Whiting. [CP 661] **Exhibit 3, (ST depo, p. 37)**. He acknowledged the numerous awards Dr. Whiting had received. [CP 661] **Exhibit 3, (ST depo, p. 104)**.

Shelby Thames **agreed that the Handbooks should be relied upon by Dr. Whiting. [CP 661] Exhibit 3, (ST depo, p. 141)**. The Annual Evaluations emanate from this Handbook and are required by it. In effect, the Annual Evaluations are part and parcel of Dr. Whiting's written contract.

It is evident that this accomplished, virtually perfect professor, who had been recommended for tenure and promotion throughout USM, never received a hearing or due process by Dr. Shelby Thames who fired her and replaced her without adhering to the foregoing contractual entitlements. Her contract was breached. She is deserving of a due process trial in the Circuit Court of Forrest County so that a Jury of her peers can determine if she is entitled to relief or not.

Please note that there was no Board action until November -- well after the school year had begun. According to Dr. Thames, the Board did nothing until November 2002. [CP 661] **Exhibit 3, (ST depo, p.145)**. Even then, the Board did not provide Due Process. The Board did not review the matter or provide a hearing to Dr. Whiting.

The school year began in early August. Dr. Whiting with left with no contract and no position and no due process. All of this occurred even though her contract entitled her to all of the foregoing.

Dr. Whiting was terminated without the "guaranteed Contractual Due Process" she was entitled. This occurred in spite of the fact that both the Provost, the Chief Academic Officer at USM, and the University Advisory Committee, recommended that Dr. Whiting be tenured and promoted. They concluded she had satisfied the criteria for being tenured and promoted.

Dr. Shelby Thames ignored the Provost. He ignored the University Advisory Committee.

The most salient language in the contract and Handbook that permeates this entire case is the following language found in the Handbook at [RE 4][CP 449; CP 564] **Exhibit 1,** Here, in large, bold black language Dr. Whiting, and other professors, were "guaranteed" "**PROCEDURE AND CONTRACTUAL DUE PROCESS**". Then, upon discussing these procedures, it is clearly stated, ***"These procedures collectively constitute contractual due process***—*the sum total of the procedural* ***guarantees, explicit and implicit****, afforded by a* ***contracting employer [USM]*** *to a* ***contracting employee [Dr. Whiting]*** *for the regulation and enforcement of the substantive terms of employment." [RE 4]* ***[CP 564].***

Dr. Whiting never received the foregoing. **She never received what her contract guaranteed her**.

From both a factual and legal perspective, the Handbook supplemented Dr. Whiting's written contracts with Defendants. She was entitled, *according to the Defendants*, [CP 661] **Exhibit 3, (ST depo p. 141)** to rely upon the Handbook, and she

did in fact rely upon them. In spite of the fact she kept her end of the bargain, the Defendants did not keep theirs.

The Defendants repeatedly wrote her telling her she had satisfied the criteria for tenure and promotion. Indeed, the Defendants, in particular, Dr. Dana Thames, the Chair of Dr. Whiting's Department, stated in Dr. Whiting's Annual Evaluations that Dr. Whiting, "Far exceeded expectations". [CP 714] **(Annual Evaluations, Exhibit 5)**. Also, the previous Chairman wrote Dr. Whiting telling her she had satisfied the criteria. [CP 714] **(Annual Evaluations at Exhibit 5)** The Defendants repeatedly acknowledged that the annual evaluations are the document used, *pursuant to the Handbook*, to inform a professor as to whether she is satisfying the criteria. [CP 727] **Exhibit 6 (CM [Carl Martray] depo, p. 93)**; [CP 661] **Exhibit 3 (ST depo, p. 37)**. The annual evaluations stated that Dr. Whiting was not only meeting the criteria but that *she "far exceeded expectations"* in regard to all three areas of Teaching, Research, and Service. [CP 720-726]. Again, it is not disputed that the Annual Evaluations also emanate and are required by the Faculty Handbook.

Dr. Whiting was also provided, pursuant to the Handbook, an "absolute" endorsement of her credentials in her "Third Year Review" of her credentials. The effect of this review, according to the Handbook, was to assure her of "an absolute . . . departmental vote of confidence." [CP449, 579] **(Exhibit 1) [CP 761] (Exhibit 7).**

Upon perusing her last Annual Evaluation, dated March 27, 2001, **Dr. Whiting *literally received the highest rating possible*** *in all three categories because her work was superb and "far exceeded expectations" regarding the issues of tenure and promotion. [CP 714] (Exhibit 5).*

The "mandated faculty evaluation" is, without question according to the Handbook, the key ingredient to honestly evaluating a professor at USM. [CP 449;565] **(Exhibit 1, p. XI-2 to XI-3).** Indeed, according to the Handbook, ***"Academic staff members are thus protected against arbitrary and capricious personnel actions, objective standards of evaluation constituting an essential component of contractual due process."***

In spite of the critical importance of: the Handbook, the Handbook's required Annual Evaluations, and the Handbook's required honest and truthful Third Year Review, all of these entitlements, written promises, and written rights were discarded by Dr. Shelby Thames. He simply, arbitrarily, and capriciously discarded them, ignored them, and violated the contractual rights of Dr. Whiting.

It is also pertinent that Defendants Martray [Dean] and Dana Thames either agreed that Dr. Whiting was literally perfect in her performance or concurred upon reviewing them. Neither denied the accuracy of these Annual Evaluations at their respective depositions. Indeed, they acknowledged the accuracy of them. [CP 606] **Exhibit 2 (DT depo pp. 26-28).** Yet, they allowed, ratified, and encouraged the mistreatment and contractual breaches.

The Provost, the Chief Academic Officer at USM, and the Supervisor of Dean Martray, wrote both Shelby Thames and Dr. Whiting that Dr. Whiting had satisfied the criteria for tenure and promotion. [CP 764] **(Exhibit 8).**

Additionally, as can be seen from **Exhibit 8,** Dr. Donald Cotton, the Vice President for Research and Graduate Dean, also agreed that Dr. Whiting satisfied the criteria regarding tenure.

The University Advisory Council, a large group of tenured and promoted Professors held a hearing regarding the credentials of Dr. Whiting and concluded that she should be tenured because she satisfied the criteria. [CP 765] **(Exhibit 9)**.

Especially since Dr. Shelby Thames provided no reason at his deposition or at the time he fired Dr. Whiting for firing her, the decisions of the Provost, the decisions of Dr. Thames' own advisory committee, the Third Year Review result, and the Annual Evaluations all establish that Dr. Whiting was not provided due process and was treated arbitrarily and capriciously.

So, why? Why did this happen? Although Dr. Whiting is not required to prove motive, it happened because Dana Thames had done all she could, along with her friend Dr. Reeves, to sabotage Dr. Whiting's tenureship and promotion. Dana and her friend intentionally contaminated and besmirched the reputation of Dr. Whiting. What occurred, at the hands of Defendants, occurred because the Defendants wanted to harm Dr. Whiting because she had opposed them and criticized them.

Dana Thames and Reeves undisputedly collaborated on several academic projects for many years and were close friends. [CP 606] **Exhibit 2 (DT depo 217, 223) (DT38-39)**. Please bear in mind that Dr. Dana Thames is also "very close", of course, to her father. [CP 606] **Exhibit 2 (DT depo p.42)**. Yet, Dr. Reeves and Dr. Whiting do not speak. [CP 768] **Exhibit 12 (MW [Melissa Whiting] depo, p. 156)**.

Dr. Dana Thames and Dr. Whiting, to say the least, are not friendly. Dana Thames and Reeves also personally attacked Dr. Whiting at the College Advisory Council and at the University Advisory Council. None of these factual points are disputed.

At one point Dana told Dr. Whiting NOT to place certain important research materials in her dossier. [CP 768] **Exhibit 12, (MW depo, p. 66)**. This, of course,

harmed Dr. Whiting because her file did not contain even more of her accomplishments. Dr. Whiting obeyed Dana because Dana Thames was her direct supervisor. As Dr. Whiting testified regarding this conduct, "I don't think she wanted me to succeed." [CP 768] **Exhibit 12, (MW depo, p.67)**. It was a matter of "professional jealousy". [CP 768] **[Exhibit 12, (MW depo p. 67]** Basically, Dr. Dana Thames and Dean Martray tried to convince Dr. Whiting to "withdraw" her dossier. [CP 768] **Exhibit 12, (MW depo, p.72, p. 74)**.

The Department had formed allegiances. Dr. Reeves and Dr. Dana Thames were in one camp, and Dr. Whiting was in another. Dr. Whiting testified, "I was not in their group." [CP 768] **Exhibit 12, (MW depo, p.158)**. There were differences of opinion pertaining to a number of issues between the "group" of Reeves and Thames versus the group, if you will, Dr. Whiting was in. [CP 768] **Exhibit 12, (MW, depo, p.148)**. For example, Dr. Thames was not pleased with decisions Dr. Whiting had made regarding the "Radar Committee" which dealt with issues regarding the rights of students to appeal decisions. [CP 768] **Exhibit 12, (MW depo, pp.148-149)**.

Dana's treatment of Dr. Whiting was so inappropriate that it included Dr. Whiting being, literally, segregated from the other faculty members and placed in a separate building across campus. [CP 768] **Exhibit 12, (MW depo, p.150-151)** in an attempt to "isolate" Dr. Whiting. [CP 768], **(Exhibit 12, p.150).**

On one occasion, Dr. Whiting showed Dean Martray the materials Dr. Dana Thames had instructed her NOT to place in her dossier. The Dean asked why they were not in there, and Dr. Whiting told him the truth: Dana Thames had directed her not to include them. Dr. Martray lowered his head, and said, "This is great stuff." [CP 768] **Exhibit 12, (MW depo, p.176)**. Martray told and admitted to Dr. Whiting, "This is great

stuff Melissa. Why didn't you include this?" Dr. Whiting told him, "I was told specifically by Dr. [Dana]Thames not to." [CP 768] **Exhibit 12, (p. 176)**. Martray shook his head while lowering it. Yet, he did nothing. He told nobody. He proceeded to ratify the conduct of Thames and allowed her free rein to harm Dr. Whiting all the while knowing Dr. Whiting was being mistreated.

As stated previously, Dr. Whiting is not required to prove motive for the contractual breaches here. However, the foregoing establishes why these breaches occurred as well as the malevolence that accompanied the breaches of the contract.

- **BACKGROUND:**

Originally, this case was filed in Forrest County Circuit Court and then removed to federal court. Ultimately, in federal court the constitutional claims were denied, but the state claims were not. They were remanded back to state court.

Indeed, the federal district judge found that **the issue regarding Dr. Whiting's contractual contentions *should be resolved by a jury.*** [CP898] (T34).

The federal district judge held there *"seems to be some . . . **different interpretations of the facts** that might lend itself to a weighing of the evidence and* **something for a jury to decide**." [CP 908] (T44).

The federal district judge said, "It's interesting that you argued no agreement, **but it *seems as if the employment contract that she did have was supplemented by the handbook, the faculty handbook. And it appears as if the Board's bylaws in the handbook impose some obligations on the university that extend beyond the nine month period of the employment contract." [then he proceeds to provide some of the examples]. [CP 904]***

At another point the federal district judge admonished counsel for the Defendants, **"Your argument on this and whether or not she's abandoned her job or what have you, it seems –I mean, *it perhaps maybe* creates an issue of fact for a jury to decide *on the issue of breach of contract claims."*** [CP 898;T34]

In fact **counsel opposite agreed with the district judge** that the Handbook "creates certain obligations between the university and the faculty." [CP 906]

The district judge also found, [speaking to this counsel] ***"You may be right on the contract issue***." "Some different interpretations of the facts that might lend itself to a weighing of the evidence and **something for a jury to decide**." [CP 908]] (T44).

His findings and opinions in this regard are supported by *Robinson v. Board of Trustees*, 477 So. 2d 1352 (Miss. 1985) and other cases that will be discussed *infra*. However, when *Robinson* was alluded to in oral argument, the **district judge stated, "I agree with you on that point**." [CP 913], (T49).

The district judge also found that **Dr. Whiting had "received nothing but the highest ratings on evaluations, and her record is virtually free of demerit."** [CP 944 (T50).

The district judge found that even the Defendants have conceded that Dr. Whiting satisfied the criteria for the areas of teaching and service. "Evidence generally indicates that Dr. Whiting satisfied the criteria for tenure in the areas of teaching and service." [CP948] (T54). He based this holding upon: the depositions of President Shelby Thames, Dr. Eric Luce, Dr. Gloria Slick, the decisions of the department, the decisions of the University Advisory Committee, and the annual reviews. [CP 948] (T54).

Consequently, after it is all said and done, the federal courts viewed this matter as a contractual concern and not a constitutional one. Those courts regarded it as a state matter. **Furthermore, it is evident, based upon the district judge's holdings and rulings, that the federal court considers this matter appropriate for a jury to resolve.**

In *Whiting v. University of Southern Mississippi, Dr. Shelby Thames, Dr. Dana Thames, and Dr. Carl Martray* 451 F. 3d 339 (Fifth Cir. 2006) Dr. Whiting was not allowed constitutional relief. Based upon the federal district judge's rulings, it is evident the federal sector saw this case as more contractual than constitutional in nature and, thus, allowed and, indeed, encouraged the State Judiciary to address the evident contractual concerns.

SUMMARY OF ARGUMENT:

Dr. Melissa Whiting seeks relief in this Court regarding her contractual rights with USM. Her written contract and Faculty Handbook literally "guaranteed" Dr. Whiting **"Contractual Due Process"**. The specific contractual agreement, contained in the Faculty Manual, promised her and contractually entitled her to the following, among other rights and entitlements:

*"**These procedures collectively constitute contractual due process**—the sum total of the procedural **guarantees, explicit and implicit**, afforded by a **contracting employer [USM]** to a **contracting employee [Dr. Whiting]** for the regulation and enforcement of the substantive terms of employment." [RE 4][CP 564].*

Here, USM "contractually" bound itself to provide due process. USM "guaranteed" her "contractual due process". She did not receive what she was contractually entitled. The "Statement of the Case and Fact" section of this Brief demonstrates this truth with extensive specificity.

Of course, as this High Court well knows, If the material facts are genuinely disputed, Summary Judgment should not have been allowed. If they are not disputed, Dr. Whiting was entitled to summary judgment. However, the Defendants are not entitled to summary judgment. The facts alone, as well as the federal district judge's findings, make this evident.

The Defendants, in their Annual Evaluations, assured Dr. Whiting, for six consecutive years that she "far exceeded" standards for being tenured and promoted. The Defendants admitted in their depositions that the Annual Evaluations are the most important document that USM uses to inform a Professor as to whether she or he has met and satisfied the criteria regarding tenure and promotion.

In spite of the foregoing, the President of USM effectively terminated Dr. Whiting's employment and denied Dr. Whiting tenure and promotion in late August 2002. He did not provide her a hearing. He arbitrarily denied her the contractual due process she was entitled.

It should be emphasized that Dr. Whiting was not guaranteed tenure, but she was guaranteed due process because the Faculty Manual "explicitly and implicitly" provided her precisely that entitlement and benefit of her contract . The entitlement, as expressed in the Faculty Handbook is explicit and implicit. The words expressing this entitlement were prepared by the Defendants and/or their lawyers and representatives.

Shelby Thames provided no rationale for his decision. He referred to not one iota of some deficiency regarding Dr. Whiting's performance. Indeed, there was no deficiency, but, even if there were, Dr. Whiting relied upon the Annual Evaluations that emanated from the Faculty Handbook. These evaluations assured her that there was no deficiency to rectify.

The Provost, the chief of academics at USM, recommended in writing directly to Dr. Shelby Thames that Dr. Whiting be tenured and promoted. The University's highest committee, the University Academic Affairs Committee, also endorsed her credentials and recommended her to be tenured.

The only "wrong" committed by Dr. Whiting is that she made an enemy of Dr. Dana Thames and her father, Dr. Shelby Thames.

ARGUMENT

ISSUE I.

THE MISSISSIPPI TORT CLAIMS ACT [MTCA] DOES NOT CONSTRAIN OR CONTROL EXPRESS WRITTEN CONTRACTS IN MISSISSIPPI:

The lower court appeared to believe that the MTCA has some bearing upon this case even though this case is not a tort case. It is a written contract case. The Circuit Judge's view is not supported by the law emanating from this Court.

In *Gulfside Casino Partnership v. Miss. State Port Authority*, 757 So. 2d 250, 255-56 (Miss. 2000) it was accentuated by the Supreme Court that, when there is an express contract, such as here, **"the State necessarily waives its immunity from suit for a breach of contract."**

Indeed, in *City of Grenada v. Whitten Aviation, Inc.*, 755 So 2d 1208, 1213 (Miss. 1999), the Supreme Court held that "the provisions of the **M.T.C.A.** have **no application** to a **pure breach of contract action** as is the subject of the case at bar." (Emphasis Supplied)

> "Where the state has lawfully entered into a business contract with an individual, the obligations and duties of the contract should be mutually binding and reciprocal. ***There is no mutuality or fairness where a state or county can enter into an advantageous contract and accept its benefits but refuse to perform its obligations." Id. At p 1214.***

The Court held in *City of Grenada, supra*, that "breach of contract claims are **clearly unaffected** by the provisions of M.T.C.A., [and] the notice required under §11-46-11 was **not applicable**." (Emphasis Supplied) at p. 1214.

In *University of Mississippi Med. Ctr. v. Hughes*, 765 So 2d 528, 534 (Miss. 2000) it was held there is "little doubt . . . that the student – university relationship is

contractual in nature and that the **terms of the contract may be derived from a student handbook, catalog, or other statement of university policy**." (emphasis supplied). Again, there was no sovereign immunity or MTCA impediment.

In *University of Southern Mississippi et al v. Williams*, 891 So. 2d 160,174 (Miss. 2004), the Supreme Court rejected USM's attempts to ward off liability or constrain its liability and found "mental anguish and emotional distress for the breach of **contract** to be both foreseeable and recoverable. However, Williams's right to recover damages from USM for mental anguish and emotional distress **"springs only from the breach of contract, not from the tortious conduct of Stamper."**

"We hold that there was a valid **contract** between USM and Williams and that USM **breached the contract** and is, therefore, liable for damages arising from that breach." *Id.* At p. 176.

The foregoing establishes that **express breach of contract claims**, such as this claim **are "CLEARLY UNAFFECTED BY THE PROVISIONS OF THE MTCA".**

Furthermore, the foregoing establishes that the contractual language emanating from handbooks and policies are contractual and lay the groundwork for relief that is not constrained or limited by the MTCA.

In *SW Miss. Reg. Med. Center v. Lawrence*, 684 So.2d 1257, 1264 (Miss. 1996) the Supreme Court found [while referring to *Bobbitt v. The Orchard, Ltd.,* 603 So.2d 356 (Miss.1992)] that a Handbook's written obligations must be followed and that contractual obligations were created. The MTCA did not prevent relief.

In *Robinson v. Board of Trustees*, 477 So. 2d 1352-53 (Miss. 1985), the Mississippi Supreme Court held that an employee's handbook and manual are part of one's contract of employment. The Supreme Court held that the Board of Trustees

involved in that case is "bound by the terms and provisions contained therein [in the Handbook] because of their use and dissemination of the publications, and the terms of the contract entered into by the parties." *Id.* Sovereign immunity did not prevent relief.

Here, we have an express written contract, and we have an express written Handbook that fleshes out the written contract. As already shown, the federal district judge agreed with this point. As can be seen *supra*, in these circumstances, sovereign immunity and the MTCA do not prevent relief from being provided.

Relief in this case was sought pursuant to the express written employment contract of Dr. Whiting as well as 42 U.S.C. §1983. The federal courts denied relief regarding §1983 but expressly opined that a jury should resolve the issue of contractual entitlements. That is precisely why this aspect of the case was remanded to state court.

The foregoing cases establish that breach of contract cases are not forestalled by the MTCA. Express breach of contract contentions are **"unaffected"** by the MTCA.

The Circuit Court referred to *City of Jackson v. Sutton,* 797 So. 2d 977 (Miss. 2001) in its Opinion and Order. In *Sutton, supra,* the facts of that case were completely based in tort. As the Court knows, that case involved two car accidents and a claim against a police officer. Essentially, a police officer had allegedly been negligent because he did not effectively prevent a second car accident [by the same driver on the same day] that subsequently occurred after the officer had information about the driver that arguably should have kept the driver off the road and prevented the second accident. *Id.* At pp.978-79.

Even though *Sutton* is clearly a tort case, the plaintiff's attorney brought it pursuant to Mississippi's constitution. Since it was obviously a tort case, the Court found that the MTCA was the exclusive remedy. *Sutton* had nothing to do with express

written contracts. It was a tort case that was treated as such. Clearly, the Court knew it was a tort case and concluded the MTCA should have been complied.

The "**Tort** Claims Act", of course, applies to torts. §11-46-3 *Miss. Code. Ann.* The Court was dealing with an obvious tort case and concluded that the Tort Claims Act had to be complied. The Court in *Sutton* never contradicted the foregoing mountain of cases regarding the inapplicability of the MTCA to express contract issues.

Otherwise, for example, one could have a written contract with the State where one is entitled to millions of dollars pursuant to an express written contract, but, upon breach by the State, one could only receive $500,000 [ceiling on MTCA relief] even if the State clearly breached its contract. Also, the innocent contracting person who had the contract with the State would be deprived of his constitutional right to a jury.

Here, as the federal district judge found, Dr. Whiting seeks having her written contract complied and effected along with the "university policies" and "handbooks" the Supreme Court has ruled are part of her written contract. *See, supra: Bobbitt, Robinson, Hughes, Miss. State Port Authority, Southwest Regional Medical Center,* and *City of Grenada,* She respectfully asks for relief pursuant to her express written contract and its implementational, written procedures contained in her Faculty Handbook that USM prepared.

ISSUE II:

INJUNCTIVE RELIEF IS ALSO NOT CONSTRAINED BY THE MTCA:

This Court has also made it unequivocally clear that injunctive relief is unaffected by the MTCA. In ***Greyhound Welfare v. Mississippi State Univ.*, 736 So. 2d 1048-49 (Miss. 1999),** this Court held that equitable relief, to include injunctive relief, is not constrained or affected by sovereign immunity or the MTCA:

> "The Chancellor's interpretation of the Mississippi Tort Claims Act was incorrect, and **the order of dismissal entered in the lower court, which is based solely on sovereign immunity, was erroneous**. The broad reading given by the lower court **would unduly restrict the rights of citizens to challenge the allegedly improper acts of the State and extend the doctrine of sovereign immunity far beyond its traditional common law scope and beyond the intent of the Legislature**.
>
> *CONCLUSION*
>
> **The judgment by the lower court erroneously extended the doctrine of sovereign immunity beyond its intended scope** and restricted the rights of citizens to challenge allegedly improper acts of the State. For these reasons, we reverse the Chancellor's order of dismissal and remand this case for further proceedings consistent with this opinion."

Here, Dr. Whiting has asked for Injunctive Relief so that the Defendants will be mandatorily enjoined to provide their compliance with the Handbook provisions she has described in her Amended Complaint and her Response to Motion for Summary Judgment and other pleadings and memoranda.

Dr. Whiting has asked and respectfully asks again that an unbiased decision maker make a decision regarding her credentials and provide her the due process hearing she is contractually entitled pursuant to the Faculty Handbook. She enumerated numerous other breaches in the Circuit Court. She wants the Defendants to do what they are obligated to do under the aegis of her contract and Faculty

Handbook. She continues to ask that the Defendants be enjoined to comply with the Faculty Handbook that they prepared and that she relied upon.

The foregoing law makes it evident that the MTCA is not applicable to the providing of injunctive relief. The injunctive relief sought was and well known to the Defendants. However, the Defendants have adamantly refused to provide it.

ISSUE III:

SINCE DR. WHITING'S WRITTEN CONTRACT AND FACULTY HANDBOOK LITERALLY "GUARANTEED" HER DUE PROCESS, SHE WAS, *A FORTIORI*, CONTRACTUALLY ENTITLED TO DUE PROCESS:

Since it is undisputed that Dr. Whiting is literally "guaranteed" ***CONTRACTUAL DUE PROCESS***, she is entitled to due process, in a contractual context, and all of the entitlements and benefits contained in the Faculty Handbook. Again, it is worthy of repeating that this Handbook is particularly unique because of the "**guarantee of Due Process" - "both procedurally and substantively."** This fact simplifies this case immensely.

This Court has established unequivocally that, in these circumstances, the Mississippi courts will "hold the employer to its word." *Bobbitt v. The Orchard Dev. Co.*, 603 So. 2d 356,361 (Miss. 1992). The Handbook in *Bobbitt* became part of the contract and did create obligations regarding that employee. *Id.*

The impact of employee handbooks is pervasive. It does not matter whether an employee is employed at a University or as a ditch digger for a plumbing company. When an employer makes representations in a Handbook that the employer prepared and provided, the employer will be held to its word as to the entitlements in the Handbook. *Id.* The "rank" of the employee is not pertinent. It makes no difference, for example, whether the professor or employee for the plumbing company, is "tenured". The employer will be held to his word - as contained in the Handbook.

In *Robinson v. Board of Trustees,* 477 So. 2d 1352-53 (Miss. 1985), this Court held that an employee's handbook and manual are part of one's contract of employment. The Supreme Court held that the ***Board of Trustees is "bound by the***

terms and provisions contained therein [in the Handbook] because of their use and dissemination of the publications, and the terms of the contract entered into by the parties." Id.

Of course, here, the federal district court has also held that, in this very case, the employer, USM should be bound by the terms and conditions it prepared regarding Dr. Whiting. Indeed, the federal district judge held there *"seems to be some . . .* ***different interpretations of the facts*** *that might lend itself to a weighing of the evidence and* **something for a jury to decide**." [CP 908] (T44).

The federal district judge said,

> "It's interesting that you argued no agreement, **but it *seems as if the employment contract that she did have was supplemented by the handbook, the faculty handbook. And it appears as if the Board's bylaws in the handbook impose some obligations on the university that extend beyond the nine month period of the employment contract." [then he proceeds to provide some of the examples]. [CP 904].***

Please recall that counsel opposite agreed with the Federal District Judge. [CP906].

Furthermore, the Defendants themselves testified, time and time again, that Dr. Whiting was entitled to rely upon the representations made in the Handbooks regarding tenure and promotion. [CP 661] **Exhibit 3, (ST depo, p.141)**. Here, Dr. Whiting has been promised and contracted "**Contractual Due Process**". [CP661] **Exhibit 3, (ST depo, p.147)**. [CP449] **(Exhibit 1).** As shown, *supra,* all of the Defendants acknowledged Dr. Whiting's contractual entitlement to due Process.

Since she was contractually entitled to due process, she was, of course, entitled to a meaningful notice of a hearing and a hearing by the decision maker, Dr. Shelby Thames. *See e.g., Lynch v. Household finance*, 405 US 528 (1972). The minimum due

process requirements are: 1. Written notice of the reason for termination, and 2. an effective opportunity to rebut those reasons. *Russell v. Harrison*, 736 F. 2d 283, 289 (5th Cir. 1984). Dr. Whiting did not receive either prong.

We have demonstrated definitively, *supra,* that this case is replete with arbitrariness and capriciousness which is anathema in a due process context. Indeed, especially in the context of a Motion for Summary Judgment, there is considerable evidence indicating that Dr. Shelby Thames did not provide Due Process rights. He did not provide a hearing or notice of a hearing. He did not provide compliance with the Faculty Handbook. If fact, he did nothing regarding her case until she brought a civil action against his daughter and him and USM. Furthermore, he arbitrarily sided with his daughter who, as established *supra*, was "professionally jealous" of Dr. Whiting.

Additionally, based upon the foregoing facts, Shelby Thames and his daughter were not unbiased - to say the least. When the person or entity making a decision is either prejudiced or biased, that itself violates Due Process. *Valley v. Rapides Parish School Board,* 118 F. 3d 1047 (5th Cir. 1997). Here, both Dana Thames and Shelby Thames, in addition to the other evidence of prejudice against Dr. Whiting, had been sued by Dr. Whiting. They were hardly unbiased towards her. Certainly, Shelby Thames should have deferred to the Provost or passed the matter to another or, at a minimum, passed the matter to the Board.

According to her contract and Handbook, Dr. Whiting was entitled **to "procedural guarantees explicit and implicit"**. She was entitled to deadlines that "MUST" be adhered. She was entitled to the benefits of a positive Third Year Review. She was entitled to rely upon accurate annual evaluations. She was entitled to the benefits the federal district judge described above. Most importantly, she is entitled to

due process. She is entitled to a meaningful notice of a hearing and a meaningful hearing. She did not receive any of those entitlements. She did not receive the benefit of the contract that was prepared by the Defendants and admitted by the Defendants to be binding and effective.

The Defendants testified, as established *supra*, that **Dr. Whiting was entitled to a minimum of a six to seven year period of employment to satisfy criteria for tenure and** promotion. She did not receive this entitlement either.

Even the Defendants concede that Dr. Whiting was entitled to a terminal contract. She did not receive that either.

The United States Supreme Court has held that a public agency, when dealing with a public employee such as Dr. Whiting "must be rigorously held to the standards by which it professes its action be judged." *Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959) (Frankfurter, J., concur and dissent). **A public entity's written procedures must be "scrupulously observed."** ***Id.***

These Defendants have not complied with this standard and, indeed, seek to ignore what they have entitled and "guaranteed" Dr. Whiting. Also, they have not complied with the standards established by this Court in *Bobbitt, supra*, and *Robinson, supra.*

In addition to the foregoing case law, the Fifth Circuit accentuated in *Sammuel v. Holmes*, 138 F. 3d 173 (5th Cir. 1998) that nontenured probationary employees have a protected property interest or entitlement in their employment where the school district, which employed him, had adopted a procedure requiring a specific process for termination. That employee was entitled to the process and for it to function fairly and completely. So is Dr. Whiting.

It goes without saying that the result of the deprivation here terminated the employment of Dr. Whiting. Even though she was entering into her sixth year and entitled to, at a minimum, two more years of employment, she was never provided a contract for these two remaining years. These losses occurred without the due process she was entitled.

Consequently, summary judgment was inappropriate herein. The underlying material facts are genuinely disputed. The applicable law favors Dr. Whiting – not the Defendants.

ISSUE IV:

DR. WHITING IS CONTRACTUALLY ENTITLED TO "PROCEDURAL AND CONTRACTUAL DUE PROCESS". THIS INCLUDES *BOTH* PROCEDURAL AND SUBSTANTIVE DUE PROCESS:

In addition to the procedural due process Dr. Whiting was contractually entitled, she was also entitled to substantive due process.

Substantive due process is both explicit and implicit. A public entity cannot act arbitrarily even if the procedures used are deemed to be appropriate. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

As the Supreme Court held in *Zinermon v. Burch*, 494 U.S. 113, 125 (1990), the substantive due process issue boils down to the issue of "arbitrariness":

> The Due Process Clause contains **a substantive component** that bars certain arbitrary, wrongful actions 'regardless of the fairness of the procedures used to implement them' . . .as to [that claim] the constitutional violation actionable under **§1983 is complete when the wrongful action is taken."** ***Id.***

A review of the applicable cases makes it evident that the decisions in this regard are, of course, determined by the applicable facts. For example, in *Harrington v. Harris*, 108 F. 3d 598 (5th Cir. 1997) the Fifth Circuit held that it could be a substantive due process violation to discriminatorily prevent pay increases to professors. Planting false evidence is also a substantive due process violation. *Riley v. City of Montgomery, Ala.*, 104 F. 3d 1247 (11th Cir. 1997).

Here, in essence, Dr. Whiting has adduced evidence that establishes her supervisors wrote her official verification, using the only document that is authorized (her annual evaluations), informing her she far exceeded the criteria for tenure and promotion. In her Third Year Review she was unanimously assured in writing that she was satisfying the criteria for tenure and promotion. The Defendants admitted she was

entitled to rely upon the Handbook and the written Annual Evaluations triggered by the Handbook.

Then, untruths were spread by her immediate supervisor, Dana Thames. The Defendants either participated in or ratified the planting of false evidence in the file of Dr. Whiting regarding academic fraud. This is an additional contractual due process breach. *See e.g., Riley v. City of Montgomery, Ala.,* 104 F. 3d 1247 (11th Cir. 1997).

Here, the Defendants chose, not only to deny Dr. Whiting substantive and procedural Due Process, they chose to characterize her as someone who was dishonest in her academic pursuits. It was a complete fabrication, but the individual defendants perpetrated and/or ratified a course of action which had the effect of having Dr. Whiting labeled as one who misused academic data she collected. Indeed, academic fraud was intimated by Dana, but it was never proven because it did not exist. [CP 914]; [CP 432]. As described in the "Fact" section of this Brief, Dana Thames disliked Dr. Whiting and harmed her because of jealousy and dislike. Dr. Whiting was so accomplished, however, her actual credentials could not be attacked. So, behind the scenes, as described above and earlier in this Brief, is where the harm was done and, ultimately, her father, Shelby, protected his daughter – not Dr. Whiting.

Later, after Shelby Thames and his daughter are criticized by Dr. Whiting and sued, he "decides" after holding her case far past the deadline, to terminate her, deprive her of her right to at least two years future employment, and deny her what she satisfied, as evidenced by her evaluations, which were the criteria for tenure and promotion.

There is no difference in planting false evidence and spreading false evidence. It was a substantive due process violation in *Riley, supra,* and it is a violation here.

This wrongful conduct of Dana and her friends should have been investigated by Shelby Thames or whomever was President at the time. Unfortunately for Dr. Whiting, Dana's father was President.

However, Shelby Thames did not investigate. Instead, he chose to ignore his own Provost and his own University Advisory Committee – both of whom had countermanded the actions of Dana Thames by finding in Dr. Whiting's favor regarding tenure. The Provost also found that Dr. Whiting should be promoted. Then, with the planted, false evidence sitting in her file, Dr. Shelby ignored the Provost and UAC, and endorsed his daughter's handiwork.

Shelby Thames knew what his "very close" daughter was positioning to do to Dr. Whiting. He had the opportunity to see in the dossier evidence of the attacks upon Dr. Whiting by his daughter and his daughter's best friend and chief collaborator, Dr. Reeves.

The reason for Shelby Thames' misconduct is evident. Certainly it is a genuinely disputed factual issue. However, it is evident he wanted to assist his daughter. That is, at a minimum, a logical inference.

Of course, it is equally undisputed that the Board of Trustees also never provided Dr. Whiting a hearing. The Board did nothing to provide due process or rectify what had occurred at USM.

All of the foregoing establishes the very arbitrariness and capriciousness that is anathema to the substantive due process contractual rights that Dr. Whiting was and is contractually entitled. *See Daniels, supra, and Zinermon, supra.*

An additional word needs to be said about the Annual Evaluations and the Third Year Review. [CP 714; 761] [Exhibits 5 and 7] We have definitively and

correctly described them above. The district court agreed that Dr. Whiting's record was virtually perfect. [CP 865] **[Exhibit 15, T 51]** ["Dr. Whiting received the highest marks in all three areas of evaluation." [per District Judge]. What is especially saddening and legally impermissible is that on March 27, 2001 Dr. Whiting was informed by Dr. Dana Thames and her Dean, both Defendants herein, that Dr. Whiting is "excellent" and "far exceeds" the criteria in all three areas, Teaching, Research/Creativity, and Service; yet, literally a few weeks later, Dr. Dana Thames begins her attack in writing against Dr. Whiting. This attack joined forces with her father, the President of USM, resulting in anything but contractual due process.

The Fifth Circuit has held that the foregoing is not permissible. In *Russell v. McKinney Hospital Venture,* 235 F. 3d 219 (5th Cir. 2000), a case involving discrimination, the Fifth Circuit found that it is evidence of pretext to provide one a "very favorable evaluation" only two months prior to termination and, then, later contend the employee was not meeting standards. *Id.* at p. 224-25. Clearly, in a contractual context, the same principle applies.

Dr. Whiting was entitled to rely upon the representations contained in the evaluations and third year review. *See e.g., Covington v. Page*, 456 So. 2d 739, 741 (Miss. 1984); *PMZ Oil Co. v. Lucroy* 449 So. 2d 201 (Miss.1984). Again, Mississippi is very strong about an entity or person keeping their word. When there is a representation, reliance, a change of position, and detriment suffered, one is entitled to relief. *Id.* Here, Dr. Whiting was entitled to know, if something was amiss, with regard to meeting the criteria. She was entitled to know if there was anything to rectify or not. The way it was handled; she had no chance with the Defendants.

ISSUE V:

THE CONTRACTUALLY REQUIRED "GOOD FAITH" HAS NOT BEEN PROVIDED BY DEFENDANTS:

The Supreme Court has consistently insisted that every contract contains an implied covenant of good faith and fair dealing in performance and enforcement. *Morris v. Macione,* 546 So.2d 969, 971 (Miss.1989).

> "Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness, or reasonableness." *Cenac v. Murry,* 609 So.2d 1257, 1272 (Miss.1992).

Bad faith, in turn, requires a showing of more than bad judgment or negligence; rather, "bad faith" implies some conscious wrongdoing "because of dishonest purpose or moral obliquity." *Bailey v. Bailey,* 724 So.2d 335, 338 (Miss.1998). [the foregoing is quoted from *U.S.M. et al v. Williams,* 891 So. 2d 160, 171 (Miss. 2005).

Here, there has been a breach of good faith by Defendants. They have engaged, as described above, in trickery, underhandedness, disingenuousness, intrigue, conspicuous, conscious wrongdoing because of dishonest purpose or moral obliquity. Consequently, for this additional reason, Dr. Whiting is entitled to present her case to a jury – just as the federal district judge opined.

- **NEPOTISM:**

Of course the Board of Trustees did in fact appoint and "employ" Dr. Shelby Thames as an "officer" who is paid out of public funds. Furthermore, he is related "by blood" well within the third degree to his daughter, Dr. Dana Thames. Furthermore, the

same Board of Trustees approves the annual contracts of Dr. Dana Thames AS WELL AS SHELBY THAMES.

Although there is no separate "nepotism" civil action here, nepotism clearly led directly to the contractual violations involved here. The relationship between Dr. Shelby Thames and his daughter, Dr. Dana Thames has literally squeezed the contractual rights out of Dr. Whiting.

The Handbook prohibits nepotism. [CP 449,140]. The Defendants do not dispute that, of course, nepotism in a State agency is prohibited. Nepotism is part of the contractual violation since it violates both the Board policies and USM's Faculty Handbook which is part of Dr. Whiting's contract.

Consequently, Dr. Shelby Thames violated the handbook provision regarding nepotism by not deferring to the Board of Trustees as the USM faculty handbook states. As has been emphasized, *supra*, Dr. Shelby Thames' conduct violated Dr. Whiting's contractually guaranteed due process rights because his dual, complicit entanglement here with his daughter prevented a fair and impartial hearing that Dr. Whiting was contractually entitled. His "very close" relationship with his daughter, who was his employee, is certainly a relevant consideration for the finder of fact regarding this matter.

We have previously referred to *Robinson v. Board of Trustees*, 477 So 2d 1352, 1353, where the Mississippi Supreme Court held that an employee's handbook is part of one's contract of employment. The Defendants are "bound by the terms and provisions contained therein [in the handbook] because of their use and decimation of the publications, in the terms of the contract entered into by the parties". *Id. See also, Conley v. Board of Trustees of Grenada College*, 707 F. 2d 175 (5th Cir. 1983).

Thus, especially since the Defendants and Dr. Whiting agree as to the importance of the faculty handbooks, the "terms and conditions" of the contract of employment are binding on all parties. This includes, of course, the prohibition against nepotism.

ISSUE VI:

THE EMPHASIS IN THIS CASE IS NOT UPON A GUARANTEE OF FUTURE EMPLOYMENT BUT UPON THE *GUARANTEE* OF DUE PROCESS AND A *GUARANTEE OF* THE PROCEDURES CONTAINED IN THE FACULTY HANDBOOK AND CONTRACT:

It is respectfully emphasized that this case is about the written guarantees contained in the Faculty Handbook and written contract. It is not about a guarantee of tenure. It is genuinely contested as to whether Dr. Whiting was entitled to at least two more years of employment as described *supra*. Furthermore, it cannot be denied that she was guaranteed due process. The Faculty Handbook could not be more explicit.

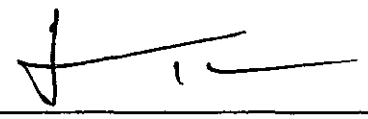
In addition to *Bobbitt, Robinson, Vitarelli,* and *Holmes*, cited *supra*, In *Blackburn v. City of Marshall*, the Fifth Circuit held that "Property rights are not created by the Constitution; rather, they stem from independent sources such as state statutes, local ordinances, existing rules, ***contractual provisions*** **or mutually explicit understandings**." 42 F.3d 925, 936-37 (1995). When the affected individual identifies a valid source of the property interest, the law will protect that interest. *Paul, 424 U.S.* at 710; *Blackburn v. City of Marshall,* 42 F.3d at 936-37.

We respectfully request that Dr. Whiting's contractual interest be protected here. She should, at a minimum, be allowed to present her robust evidence to a Jury of her peers.

CONCLUSION

It is respectfully submitted that this civil action is replete with numerous genuine disputes regarding material facts. Moreover, in actuality, the applicable law favors Dr. Whiting. Consequently, this matter should be remanded to the Circuit Judge so that a full, due process trial may be held.

RESPECTFULLY SUBMITTED this the 6th day of April 2010.



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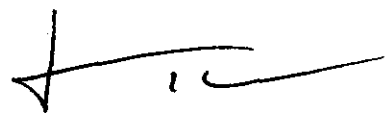
CERTIFICATE OF SERVICE

I, the undersigned counsel of record for the Appellant herein do certify that I have this day caused to be mailed by United States first class mail with postage prepaid the original and three copies of the Brief for the Appellant along with a CD-Rom containing a PDF of the Brief of the Appellant for filing to Kathy Gillis, Clerk, Supreme Court of the State of Mississippi, at P.O. Box 249, Jackson, Mississippi 39205-0249; and have also this day caused to be mailed by United States first class mail with postage prepaid a true and correct copy of the Brief for the Appellant to the following persons at their regular business addresses:

Honorable Robert B. Helfrich
FORREST CO. CIRCUIT JUDGE
P.O. Box 309
Hattiesburg, MS 39401

Mr. John S. Hooks,Esq.
ADAMS & REESE
P.O. Box 24297
Jackson, MS 39225-4297

This the 6th day of April, 2010.



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