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STATEMENT REGARDING ORAL ARGUMENT

As noted in Appellant's principal Brief, this case involves a question of first impression as to whether an employer may recover wages that were paid to an employee for the employee's alleged failure to perform certain job duties in addition to recovering actual damages sustained by the employer.

Appellee's Brief concedes that oral argument is proper. The Court should grant oral argument to further discuss this novel and important issue.

REPLY ARGUMENT I.

APPELLANT'S ARGUMENTS REGARDING THE UNJUST ENRICHMENT CLAIM AND DAMAGES WERE RAISED IN THE TRIAL COURT.

Rehab Solutions claims that because Mignon's trial counsel did not object to instruction C-12, dealing with unjust enrichment, Appellant has waived all issues regarding unjust enrichment. This is incorrect.

Mignon preserved this argument since she argued this precise issue before the Trial Court. Most notably, Mignon argued that the doctrine of unjust enrichment was inapplicable and that this claim should be dismissed in moving for a directed verdict at the close of Plaintiff's case-in-chief. (T. p. 494-96). Mignon's trial counsel argued as follows regarding this issue:

> Judge, I feel like, too, on the other claims I could probably summarize on quantum meruit, unjust enrichment, things like that. Your Honor, it just appeals to me that this is a case of negligence. You know, we're in a position and our proof is going to show there is not going to be much question on that when Ms. Willis testifies. I mean, I'm not seriously contesting the damage, fees of the accountants. You know, here again, it just looks like all these acts, they damaged -- you know, if there was anything, there was negligence. And, you know, it would have been -- we can argue over the 13,000, over the 11,000 a little bit, I can argue my contributory negligence, things like that. But it looks to me like that's what has occurred here. You know, I know the negligence issue has got to go to the jury. I mean, I see that – I do see that myself. But, you know, I feel that's the appropriate claim. Kind of going back, too, on our breach of contract arguments and at-will employee arguments, I mean, to me, you know, the idea of a contract, each time that Ms. Willis was paid, you know, in contract there is the agreement, consideration, performance, satisfaction. You know, we say once those contracts were done, her work was tendered, payment was done, that that constituted a contract, it was satisfied. You move on to, you know, the next hour, the next pay period. I mean, she was literally employed by the hour. You know, I don't see a breach of contract action here lying because the performance was routinely completed throughout that five years.
>
> Your Honor, I believe that's the two -- quantum meruit we discussed about. I don't think the plaintiffs had any expectation of consideration of payment to them that they could have expected from Ms. Willis. I think – and rightly so. I think Mr. Dillard's claims, the plaintiff's claims are going to be one more of her performance, did she make mistakes, was she negligent. I think that's the

> appropriate issue, if anything, that would go to the jury. The other claims, I just don't see them lying in this case, Your Honor. We move all the others be dismissed. If the jury needs to consider negligence, then they need to consider negligence. Thank you, Your Honor.

(T. p. 494-96). Mignon's trial counsel further argued:

> Now, the employee can quit at any time. That's the nature of that relationship. That's the nature of that contract. . . . ***I don't see any statute, case, authority, common law, case law that applies to breach of contracts or other types of remedies to an hourly at-will employee. I just think in the absence of that authority, Judge, that that's not a viable claim in this state.***

(T. p. 501) (emphasis added).

In arguing against directed verdict, Rehab asserted:

> The theory of unjust enrichment, Mr. Griffie mentioned the quantum meruit claim. Your Honor allowed us to amend the Complaint to substitute the unjust enrichment claim. That's the current claim. And as the Court is well aware, the theory behind that is if someone receives money or a benefit that they're not entitled to or did not earn, they should not be allowed to keep that.

(T. p. 498).

Simply put, Mignon argued against an unjust enrichment claim going to the jury and Rehab Solutions argued the opposite. (*See, e.g.,* T. p. 494-96, p. 502). The Trial Court noted that, as to some of Mignon's arguments, granting a directed verdict was "very tempting" but ultimately denied the Motion and allowed all claims to proceed. (T. p. 503). The Trial Court erred in this ruling.

Aside from the motion for directed verdict Mignon also advanced the following argument in a Motion to Dismiss:

> For damages, the court has no written contract to consider or any express agreement. If there had been a written contract, the court could look to its terms regarding breach, or look to the four corners of the document for answers. Likewise, if there was a written provision for liquidated damages, then such provision could be enforced. None of that exists here.

> Next we look at the relationship between the parties. Plaintiffs in paragraph IV of their complaint expressly state that "In exchange for these services, Rehab paid defendant wages in the sum of $30 per hour." By Plaintiff's own admission in their pleadings, the Defendant was an hourly employee who was to provide services by the hour. It cannot seriously be argued that the Defendant was anything other than an at will, hourly employee, for an indefinite term. And if property or contractual rights do not arise in an at will position, then there is no contractual right to breach. Thus, no damage could result to the employer.
>
> In the case before the Court, the agreement between the parties was literally by the hour. About the only way an employee could breach such an agreement would be to not show up for work. If an employee doesn't show up, the remedies available to the Employer would be to not pay the employee or to terminate her. There is no damage that occurs to the employer under such a scenario. There is no statute that provides any other remedy. Likewise there is no case law or common law that provides any other remedy. The Plaintiffs could have terminated the defendant for any reason or no reason at any time. That was their remedy under this type of Employer/Employee arrangement and they did not exercise it.

(C.P. p. 67-68) (internal citations omitted).

An issue not raised before the lower court is deemed waived and is procedurally barred on appeal. *Brown v. Miss. Dep't of Empl. Sec.*, 29 So. 3d 766, 771 (Miss. 2010). However, when an issue is raised in the Trial Court the issue is properly preserved for appellate review. *See CitiFinancial, Inc. v. Moody*, 910 So. 2d 553, 556 (Miss. 2005).

Mignon raised the issues of whether Rehab Solutions could recover under the various theories other than negligence, and recover damages such as wage disgorgement. Mignon expressly argued that all claims, other than negligence, be dismissed as they were inapplicable to this case. Mignon, correctly, argued that there were no statutes or case law which provided a remedy other than Rehab Solutions firing Mignon, or even recovering for her negligence. That is precisely what Mignon is arguing before this Court. The claims Rehab Solutions advanced in the Trial Court were inapplicable and the damages it recovered were not properly recoverable against Mignon.

Mignon did not claim in the Trial Court, and does not argue before this Court, that instruction C-12 is not a correct statement of the law of unjust enrichment. However, Mignon did argue in the Trial Court, and argues now before this Court, that this claim is inapplicable to this case. There was no defect with the jury instruction. The defect was in allowing the claim to proceed. This issue was argued below and is thus properly before this Court.

REPLY ARGUMENT II.

NO EVIDENCE IN THE RECORD SUPPORTS AN AWARD BASED ON UNJUST ENRICHMENT.

As Rehab Solutions concedes in its Brief, no Mississippi case has ever held what it is urging here – that an employer may recover wages paid to an employee based on the employee shirking job duties. This is a question of first impression under Mississippi law. As argued in Mignon's opening Brief, this Court should answer this question in the negative, as other jurisdictions have, based on strong public policy considerations. Any other ruling exposes every employee in the State to a suit to disgorge wages based on a mere claim that the employee failed to do all of their job duties. This result is untenable. At most, an employee can be held liable for damages actually caused by the employee's negligence. This adequately protects employers and exposes employees only to damages they actually cause. This Court should not allow employees to stand liable to repay their wages to their bosses for not doing a good enough job.

However, even if this Court held that an employer could recover wages based on unjust enrichment, this judgment against Mignon must nevertheless be reversed. The doctrine of unjust enrichment prevents a party from enriching himself unjustly at the expense of another. *1704 21st Ave., Ltd. v. City of Gulfport*, 988 So. 2d 412, 416 (Miss. Ct. App. 2009). Even if unjust enrichment could apply to employees disgorging wages to employers, at least there must be some element of "unjustness" such as receiving compensation for hours not worked.

There is not one shred of evidence in the record suggesting that Mignon did not earn her compensation by working the hours for which she was paid. Mignon was an hourly employee and was paid for the hours she worked. Rehab Solutions can point to no evidence showing that Mignon Willis was paid for any hour in which she did not work.

At best, Rehab Solutions claims Mignon failed to do many of her assigned job duties. This, standing alone, could not render Mignon receiving compensation "unjust." As long as Mignon worked the hours for which she was paid her compensation was owed to her.

Rehab Solutions suggests in its Brief a hypothetical in which a painter is hired to paint a house, but intentionally fails to do so after having been fully paid. (Appellee's Brf. at 10 n. 10). Rehab Solutions argues that the painter could be held liable to refund a portion of his pay under an unjust enrichment theory.[1] By analogy, Rehab Solutions suggests that Mignon Willis could also be liable under such an unjust enrichment theory.[2]

However, this example is inapposite in this case. The proper hypothetical would be for the painter to have been hired to paint the house at an hourly rate of compensation. The painter could work several hours on the house, be compensated for those hours, yet nevertheless fail to fully and correctly paint the house. The painter's failure to paint the house might well cause the homeowner to suffer damage. However, the painter would not be liable to the homeowner to refund wages he earned under a theory of unjust enrichment. Even if the doctrine could otherwise be applicable to these facts, the painter was not unjustly enriched since he worked the

[1] This contention, standing alone, is doubtful. The doctrine of unjust enrichment only applies where there is no contract between the parties. *Powell v. Campbell*, 912 So. 2d 978, 982 (Miss. 2005). Since there would be a contract between the painter and the homeowner the proper claim would be breach of contract, not a claim for unjust enrichment. Rehab Solutions' Brief does not address the inapplicability of unjust enrichment due to the contract between the Parties in this case. For this reason as well, as argued in Mignon's principal Brief, the doctrine is inapplicable in this case.

[2] Rehab Solutions presented this same flawed hypothetical to the Trial Court arguing in support of its unjust enrichment claim. (T. p. 502).

hours for which he was paid. Rather, the painter could be held liable for actual damages which his negligent actions caused. This is the result compelled in this case. The doctrine of unjust enrichment is a square peg which Rehab Solutions attempts to force into a round hole in an effort to maximize its recoverable damages.

Rehab Solutions failed to introduce any evidence that Mignon's compensation was "unjust" enrichment by failing to show that she was paid for hours she did not work. Even if unjust enrichment could apply in this case, Rehab Solutions failed to prove the elements of the claim. Thus, on this basis as well, the judgment should be reversed.

REPLY ARGUMENT III.

REHAB SOLUTIONS DID NOT PRESENT ANY EVIDENCE OF DAMAGES OTHER THAN LOSSES OF $24,803.77.

In response to Mignon's argument Rehab Solutions presents a red herring by arguing that perhaps the jury's award of $133,543.17 was for its claim for damages to business reputation rather than what it actually argued for in the form of disgorgement of Mignon's wages.

However, this too is unavailing since Rehab Solutions presented no evidence that any such damages were actually sustained.

The proof in this regard was limited to the fact that one t-shirt vendor required Rehab Solutions to pay for one-half of its future orders up front for a time due to slow payment. (T. p. 281). The other vendor referenced in Rehab Solutions' Brief, Barry Drury of Duratech, did not testify that his employer refused to do business with Rehab Solutions because of any action or inaction by Mignon. (T. p. 430-32; 435-36). Rather, Drury testified that his business, Duratech, continued to do business with Rehab Solutions until Duratech got out of the physical therapy equipment supply business. (T. p. 435-36). Drury actually testified as follows:

> Q. Okay. All right. From the period -- if I tell you Ms. Willis left in January of '08, did you do business with the Willises after she left?
>
> A. Yes, up until November of 2009.
>
> Q. 2009. Okay. So it wasn't -- this situation wasn't anything that stopped you from doing business with them completely. Is that a fair statement?
>
> A. Yes.

(T. p. 436).

Damages must be proven with "reasonable certainty." *Stewart v. Prudential Life Ins. Co. of Am.*, 44 So. 3d 953, 959 (Miss. 2010). Where damages are not proven with reasonable certainty a judgment must be reversed. *Chevron Oil Co. v. Snellgrove*, 175 So. 2d 471, 476 (Miss. 1965). Once a plaintiff proves that damages were reasonably certain to have been sustained, the amount of damages need not be proven precisely as the fact finder may estimate the amount of the damages. *Cain v. Mid-South Pump Co.*, 458 So. 2d 1048, 1050 (Miss. 1984). *Cain* explained:

> Where it is reasonably certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery or prevent a jury decision awarding damages. This view has been sustained where, from the nature of the case, the extent of the injury and the amount of damage are not capable of exact and accurate proof. Under such circumstances, all that can be required is that the evidence - with such certainty as the nature of the particular case may permit - lay a foundation which will enable the trier of facts to make a fair and reasonable estimate of the amount of damage. The plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss.

Cain, 458 So. 2d at 1050 (citing 22 Am.Jur.2d Damages § 25 (1965)).

In this case there is no evidence that Rehab Solutions sustained damages from harm to its business reputation. This allegation of damage was not proven with any evidence, much less "reasonable certainty." Rehab Solutions did not introduce any evidence that either of the occurrences it points to in its Brief damaged the business at all. For instance, Rehab Solutions

did not show that it was unable to pre-pay for one-half of its t-shirt orders and had to pay more for t-shirts elsewhere. Merely having to pay for one-half of its occasional t-shirt orders before delivery caused Rehab Solutions no damage whatsoever. Similarly, Rehab Solutions did not show any damages regarding its relationship with Duratech, and in fact continued to enjoy a business relationship with that vendor until the vendor went out of the business. Rehab Solutions did not show that it had to change vendors or that it received increased costs as a result of some harm to its reputation.

Rehab Solutions did not present one iota of proof as to damages it sustained to its "business reputation." The law requires more than a plaintiff simply claiming damage. Rehab Solutions bore the burden of proving some damages at trial. Rehab Solutions did not meet this burden. There is no evidence whatsoever on which to base a $133,543.17 verdict based on some phantom harm to Rehab Solutions' business reputation.

Rehab Solutions argues that this general verdict could be based on "wages paid to Appellant, for damage to the business reputation of Rehab, or a combination of the two." There are myriad problems with that reasoning. First of all, "wages paid to Appellant" is no proof at all of damages suffered by Rehab. The wages paid to Mignon for hours she worked could not be a proper measure of damages. Secondly, as discussed, there was simply no evidence of any damage whatsoever suffered to Rehab Solutions' business reputation.

As discussed above, Rehab Solutions relies on *Cain* for the general proposition that "[w]here it is reasonably certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery or prevent a jury decision awarding damages." *Cain,* 58 So. 2d at 1050. That principle, however, has no application in this case. It is by no means "reasonably certain" that Rehab Solutions suffered actual damages to its reputation or that it

suffered any damages at all other than the $24,803.77 proven at trial. Rehab Solutions did not prove some other certain damage, of an unliquidated amount, which would allow the jury to make a fair estimate of harm. Rather, Rehab Solutions proved no damages at all, other than the sum of $24,803.77.

Thus, at most, the Record supported a verdict for compensatory damages of $24,803.77. Even if the Court rejects Mignon's arguments below regarding the statute of limitations, the judgment should be reversed and rendered for this sum.

REPLY ARGUMENT IV.

THE DISCOVERY RULE IS INAPPLICABLE TO THE STATUTE OF LIMITATIONS ISSUE IN THIS CASE.

Rehab Solutions urges that the discovery rule should apply to toll the statute of limitations in this case but offers no response to the recent decision in *Fulkerson v. Odom*, 53 So. 3d 849, 852 (Miss. Ct. App. 2011). As discussed in Mignon's principal Brief, the reasoning of *Fulkerson* is on-point in this case and prohibits application of the discovery rule.

Rehab Solutions' claims are not subject to the discovery rule simply because they are not the product of "latent injuries" which were inherently undiscoverable by Chad and Rene Willis. Rehab Solutions states in its Brief that Mignon "carefully concealed her failure to perform her assumed job duties . . ." (Appellee's Brf. At 14). However, Rehab Solutions omits discussion of the fact that Mignon was merely its employee whom it was charged with supervising. The owners of Rehab Solutions had access to its employee's office and its contents. Either Chad or Rene Willis could have demanded an inspection at any time. Both Chad and Rene had access to the business's incoming mail, including bills and bank statements, and could have reviewed them. Mignon was not even an authorized signer on the business's checking account such that either Chad or Rene had to sign all of the business's checks.

The actions in this case, even assuming all of Rehab Solutions' allegations as true, do not as a matter of law meet the criteria for application of the discovery rule explained in *PPG Architectural Finishes, Inc. v. Lowery*, 909 So. 2d 47, 50 (Miss. 2005). This is hardly the sort of harm that owners of Rehab Solutions were precluded from discovering. Neither was it unrealistic to expect the owners to discover Mignon's alleged shortcomings. It is not unrealistic to expect a business owner to suspect that bills are unpaid when the owner signs all the checks for the business. Similarly, it is far from unrealistic for a business owner to realize a tax return was not filed when the owner well knows he did not sign the return. An employee's job performance is not "inherently undiscoverable" to an employer who owns the business. It is not "unrealistic" to expect a business to have an idea of the actions of its employees and its own day-to-day finances. Thus, the injuries in this case cannot amount to latent injuries justifying the application of the discovery rule.

Application of the discovery rule in this case would usurp the requirement of a latent injury codified in Miss. Code Ann. § 15-1-49. The discovery rule cannot, as a matter of law, apply to Mignon's actions as an employee in handling her employer's finances. The Trial Court erred in concluding otherwise.

REPLY ARGUMENT V.

MIGNON PROPERLY PRESERVED HER ARGUMENTS REGARDING THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Rehab Solutions argues that Mignon waived the issue regarding Rehab Solutions claim of breach of the covenant of good faith and fair dealing by failing to object to instruction C-14.

However, again here, Mignon adequately preserved this issue since she raised it in the Trial Court. As noted above regarding the unjust enrichment instruction, Mignon had repeatedly requested that this claim, and all claims other than negligence, be dismissed as inapplicable to

this case. In fact, Mignon filed a written Motion in the Trial Court dedicated to arguing that she owed no covenant of good faith and fair dealing since she was an employee at-will. (*See* C.P. p. 60-61). Mignon's Motion in the Trial Court made the exact argument which Mignon now makes in this appeal. (C.P. p. 61). Mignon expressly argued in the trial Court that "[A]t-will employment relationships are not governed by a covenant of good faith and fair dealing which gives rise to a cause of action for wrongful termination." (C.P. p. 61) (quoting *Miranda v. Wesley Health Sys.*, LLC, 949 So. 2d 63, 68 (Miss. Ct. App. 2006)). The Trial Court denied Mignon's Motion. (T. p. 68).

As noted above, an issue not raised before the lower court is deemed waived and is procedurally barred on appeal. *Brown,* 29 So. 3d at 771. However, when an issue is raised in the Trial Court, such as in a written motion, the issue is properly preserved for appellate review. *See Moody*, 910 So. 2d 553, 556 (Miss. 2005). In *Moody* the Supreme Court expressly held that an issue is necessarily preserved for appellate review where it is the subject of a motion filed in the Trial Court, even if the point urged on appeal was not orally argued to the Trial Court. *Moody*, 910 So. 2d 556.

It is beyond dispute that Mignon raised the precise issue she is arguing before this Court. Mignon appropriately argued to the Trial Court that a claim based on the covenant of good faith and fair dealing was inapplicable. Mignon filed a Motion to Dismiss arguing that the implied covenant of good faith and fair dealing did not apply and that this claim should be dismissed. Accordingly, this issue is likewise properly before this Court.

As to the merits of this issue, Rehab Solutions attempts to distinguish the controlling cases by arguing that while there is no implied covenant of good faith owed by employers to employees, the reverse is not true. Rehab Solutions argues that, somehow, this case does not

involve the employment-at-will relationship between Mignon and Rehab Solutions and Mignon owed a covenant of good faith to her employer.

No Mississippi case supports Rehab Solutions argument. The Mississippi Courts have repeatedly held that "[A]t-will employment relationships are not governed by a covenant of good faith and fair dealing which gives rise to a cause of action for wrongful termination." *Miranda*, 949 So. 2d at 68. Mignon was, undisputedly, an at-will employee. Neither party owed a covenant of good faith and fair dealing to the other. Accordingly, Rehab Solutions could not recover on this claim. This claim should not have been submitted to the jury.

ARGUMENT VI.

THE RECORD DOES NOT CONTAIN EVIDENCE THAT COULD SUPPORT A PUNTIVE DAMAGES AWARD.

As noted in Mignon's opening Brief, in order for an award of punitive damages to stand there must be clear and convincing evidence of actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or actual fraud. MISS. CODE ANN. § 11-1-65. Simple negligence is not sufficient evidence to support an award of punitive damages. *Choctaw Maid Farms v. Hailey*, 822 So. 2d 911, 924 (Miss. 2002).

There is insufficient evidence in the Record to support the award of punitive damages. The only evidence Rehab Solutions can muster is testimony from its accountant, Amanda Angle, that Mignon's failures were so glaring that they must have been intentional. This should be ruled insufficient as a matter of law. A witness's mere supposition that the conduct must have been intentional, standing alone, does not amount to clear and convincing evidence of malice or fraud.

In order to support an award of punitive damages, Rehab Solutions should have at least shown some basis as to why Mignon would act with such malice or fraud or an intent to harm Rehab Solutions. Rehab Solutions should have presented some evidence that Mignon acted with

more culpability than a merely negligence employee. However, at trial Rehab Solutions conceded that Mignon did not steal any money or receive personal gain from her alleged failures. At most, crediting all of Rehab Solutions' proof, Mignon simply neglected her duties. Punitive damages are not properly awarded based on such mere negligence.

This conduct does not support an award of $50,000 in punitive damages as a matter of law. This portion of the judgment should be reversed and rendered.

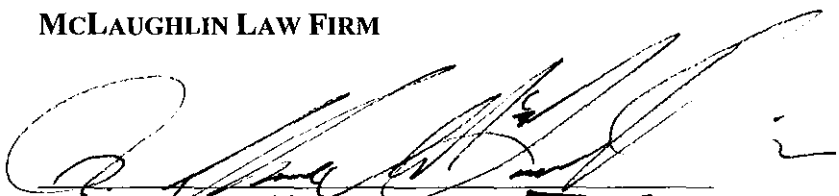
CONCLUSION

The judgment awarding damages in favor of Rehab Solutions should be reversed. As to Rehab Solutions' claim for unjust enrichment, the judgment should be reversed and judgment rendered as to this claim. Similarly, the Trial Court's ruling as to the claim for breach of the duty of good faith and fair dealing should be reversed and rendered. The judgment for punitive damages should likewise be reversed and rendered.

The Trial Court's decision as to the statute of limitations should be reversed and this issue remanded for further proceedings to determine what recoverable damages, if any, Rehab Solutions suffered that are not barred by the statute of limitations.

RESPECTFULLY SUBMITTED, this the 26th day of May, 2011.

MCLAUGHLIN LAW FIRM

By: 

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CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant 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:

Hon. James L. Roberts, Jr.
Circuit Court Judge
Post Office Box 1100
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Mitchell, McNutt & Sams, P.A.
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This the 26th day of May, 2011.

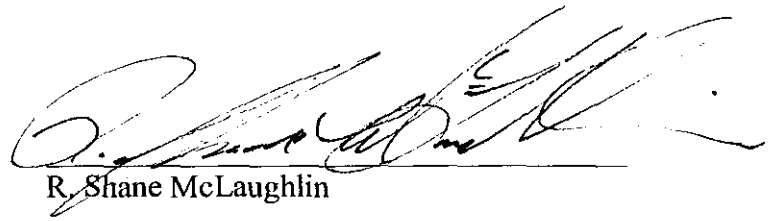
R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, 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:

Kathy Gillis
Supreme Court Clerk
P.O. Box 249
Jackson, MS 39205

This, the 26th day of May, 2011.



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