

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**ARTHUR LEE BROWN and
LINDA JACKSON BROWN**

APPELLANTS

v.

No. 2010-CA-01827

**JAMES ANDERSON, JR. and
LAURA ANDERSON**

APPELLEES

**PRINCIPAL BRIEF OF
APPELLANTS**

ORAL ARGUMENT REQUESTED

On Appeal from the
Circuit Court of Hinds County, Miss., First Judicial District
No. 251-03-155

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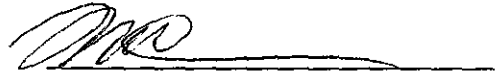
CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Arthur Lee Brown and Linda Jackson Brown, *Appellants*
2. David Neil McCarty, *Trial & Appellate Counsel for Appellants*
3. Drew McLemore Martin, *Trial Counsel for Appellants*
4. James Anderson, Jr., and Laura Anderson, *Appellees*
5. Pieter Teeuwissen and Lara Gill, *Trial Counsel for Appellees*
6. The Honorable S. Malcolm O. Harrison, *Former Circuit Judge, Hinds County*

So CERTIFIED, this the 8th day of June, 2011.

Respectfully submitted,



David Neil McCarty

Miss. Bar No. [REDACTED]

Attorney for Appellants

Table of Contents

| | |
|---|-----|
| Certificate of Interested Persons | i |
| Table of Contents..... | ii |
| Table of Authorities | iii |
| Statement of the Issues..... | 1 |
| Statement Regarding Oral Argument..... | 1 |
| Statement of the Case..... | 1 |
| Facts and Procedural History | 2 |
| Summary of the Argument..... | 4 |
| Standard of Review | 5 |
| Argument | 5 |
| I. The Brown Family Did Not Release the Andersons from Breach of Contract .. | 6 |
| A. The Release Cannot Legally Benefit the Andersons | 7 |
| B. A Jury Must Resolve Mr. Brown's Testimony Regarding the Release.. | 8 |
| C. The Release Cannot Affect the Claims of Mrs. Brown Because She Did Not Sign It.. | 10 |
| II. The Evidence Proved That the Breaches Were Intentional..... | 11 |
| Conclusion | 13 |
| Certificate of Service | 14 |

TABLE OF AUTHORITIES

Mississippi Supreme Court Cases

| | |
|--|------|
| <i>Estate of Davis v. O'Neill</i> , 42 So.3d 520 (Miss. 2010)..... | 10 |
| <i>Hales v. State</i> , 933 So.2d 962 (Miss. 2006)..... | 9 |
| <i>Holland v. Mayfield</i> , 826 So.2d 664 (Miss. 1999)..... | 7 |
| <i>McClain v. State</i> , 625 So.2d 774 (Miss. 1993)..... | 9 |
| <i>McFarland v. Entergy Mississippi, Inc.</i> , 919 So.2d 894 (Miss. 2005)..... | 9 |
| <i>Robinson Property Group, L.P. v. Mitchell</i> , 7 So. 3d 240 (Miss. 2009) | 9 |
| <i>Warwick v. Matheney</i> , 603 So.2d 330 (Miss. 1992) | 6 |
| <i>Whitaker v. T & M Foods, Ltd.</i> , 7 So.3d 893 (Miss. 2009) | 7, 8 |
| <i>White v. Stewman</i> , 932 So.2d 27 (Miss. 2006) | 5 |

Mississippi Court of Appeals Cases

| | |
|--|----|
| <i>Frye v. Southern Farm Bureau Cas. Ins. Co.</i> , 915 So.2d 486 (Miss. Ct. App. 2005)..... | 11 |
| <i>Ryals v. Bertucci</i> , 26 So.3d 1090 (Miss. Ct. App. 2009)..... | 5 |
| <i>Trinity Mission of Clinton, LLC v. Barber</i> , 988 So.2d 910 (Miss. Ct. App. 2007) | 10 |

Federal Cases

| | |
|--|----|
| <i>Noble Drilling Services, Inc. v. Certex USA, Inc.</i> , 620 F.3d 469 (5th Cir. 2010)..... | 10 |
| <i>Preferred Risk Mut. Ins. Co. v. Collier</i> , 712 F.Supp. 96 (S.D.Miss. 1989)..... | 7 |

Rule

| | |
|--------------|---|
| MRE 607..... | 9 |
|--------------|---|

Statement of the Issues Presented for Review

- I. Did the trial court commit error by granting a directed verdict to the breach of contract claim?
- II. Did the trial court commit error by granting a directed verdict to the tortious breach of contract claim?

Statement Regarding Oral Argument

Pursuant to MRAP 34(b), oral argument would assist the Court in resolving this case in two main ways. First, oral argument would clarify that the Appellants did not waive breaches of contract by signing a release prior to the breach. Second, oral argument would assist the Court in determining that there was sufficient testimony to support the submission of this case to a jury.

Statement of the Case

This is a case where a family sought to recover losses they suffered after purchasing a poorly maintained and repaired home.

The family purchased the home with the understanding that it was in good working order. However, after moving in, they discovered the house was riddled with dangerous and expensive defects, including faulty wiring, malfunctioning appliances, and broken air-conditioning.

The family filed suit against the sellers, arguing that the house was in such poor shape that it amounted to a tort and a breach of the contract. The sellers did not dispute the poor condition of the house, but argued that the family had not actually incurred any losses.

The trial court ruled that the family had released the sellers from liability, and directed a verdict before the case made it to a jury. The family appeals that ruling in order to proceed to a resolution of their case by jury trial.

Facts and Procedural History

The Brown Family is Arthur and Linda Brown. In 2002, they purchased a house from James and Linda Anderson, which was located in Jackson, Mississippi. R. 2:208.¹

On the Andersons' seller's disclosure statement, they offered that the air conditioner, heater, and oven were being repaired. R.E. 14 (at bottom); Ex. 2 in Exhibit Packet. The repair of those three systems was noted three times throughout the seller's disclosure. R.E. 14-15.

On the contract for the sale of the home, the following was further handwritten into the document: "SPECIAL PROVISIONS & CONTINGENCIES: All plumbing, electric, hot water heater, appliance, central heat, and central air in good working order at closing." R.E. 18; Ex. 1 in Exhibit Packet.

Mrs. Brown testified she thought the house was "beautiful." R. 7:75. At the closing for the house, she recalled that Mr. Anderson had told her "congratulations, you just bought you a good house, that everything in the kitchen was brand new." R. 7:77.

After executing the contract and moving into the home, the Brown Family quickly realized it was in horrific shape.

Mr. Brown testified that the electrical systems were in total disrepair and would cause electric fires. R. 7:148. Outlets would smoke and catch fire and when used would shut off power to the whole house. R. 7:148-49. The lights in the house would also go off without warning. R. 7:149-50. Mr. Brown was worried about his family because of the poor shape of the electrical system. R. 7:150. According to Mr. Brown, the plumbing to the house was also broken, and would shoot out of the bathtub taps. R. 8:152. Mr. Brown also testified that despite the Andersons' representations there was no hot water in the house. R. 7:150.

¹ The cites in this brief are of two types: cites to the Record Excerpts and the Record itself. The Record Excerpts are cited as R.E. [page]. The Record cites are cited as R. [volume]:[page].

Mrs. Brown testified even though the Andersons had represented that the hot water heater would be new that there was no hot water. R. 7:78. She further testified that the air conditioning did not work. R. 7:79. Mrs. Brown noted that if she tried to use the oven and the stove at the same time then the power would go off. R. 7:80.

The Browns' son, Michael Jackson, corroborated the dire condition of the home. He testified that the air conditioner leaked so badly from the attic it filled up a light fixture with water. R. 8:221. The heating in the house was so bad the family had to use space heaters. R. 8:221. Yet the use of the space heaters triggered the electrical problems of the house, which caused the family to live "under the fear that [the house] would actually catch on fire." R. 8:222. Michael was especially concerned about the possibility of fire in his infant sister's bedroom. R. 8:222.

After the Brown Family's testimony, a home inspector named Eric Eades spoke. Mr. Eades had inspected about 200 homes a year after becoming an inspector in 1992. R. 8:229. He did not inspect the Brown Family's home until after they had moved in, but then compiled a report with his findings. R. 8:262-63. The home inspector repeatedly found "unsafe conditions" throughout the house. R. 8:263. He reported that the electrical systems in the house were dangerous. R.8:265-67, 279-81. He further described how the air conditioning system was in poor repair. R. 8:282, 289-92. Mr. Eades detailed how the plumbing and hot water heater systems were broken. R. 8:284-85. Specifically, the hot water heater was tagged by the utility company as unsafe. R. 8:286-88.

The home inspector specifically noted that many damaged parts of the house "had to take a long period of time" to develop. R. 9:305. Specifically, the loose wiring, plumbing leaks, water heater, and air conditioning duct work had all been damaged for a long time. R. 9:305.

Mr. Eades summarized all the damage to the home in a Home Inspection report entered as an Exhibit at the trial. Ex. 7 in Exhibit Packet.

Prior to purchasing the home, Mr. Brown visited the home, and afterwards signed a release in favor of the Andersons' realty company. R.E. 22; Ex. 6 in the Exhibit Packet. The release was a boilerplate form titled "Walk-Thru Inspection Release" which was addressed "To Whom It May Concern." R.E. 22. It set out that the buyer had "found the following items, evidenced by a check mark, to be in good working ORDER and or normal condition and relieve RUTH EPPS REALTY, INC. from any further liability and responsibility now or in the future in regards to this property." R.E. 22. Check marks are by items such as the heating unit, the air conditioner, water heater, the plumbing, and electrical systems. R.E. 22.

However, Mr. Brown testified at trial that he did not perform a thorough walkthrough of the house, and declared that he "didn't do a thorough check of all this," and that he "didn't check all that." R. 8:212. He repeated "No way possible I checked all that." R. 8:212.

The Brown Family filed suit against the Andersons for breach of contract and tortious breach of contract. R. 2:204. At trial, the Andersons orally requested a directed verdict, arguing that the Brown Family had failed to prove their case. R. 9:314-335.

The trial court granted the motion for directed verdict. R.E. 11. The trial court ruled that the Brown Family did not submit sufficient evidence to proceed to jury on the intentional breach of contract claim. R.E. 12. Further, the trial court ruled that by signing the Release, Mr. Brown had accepted the breaches of contract. R.E. 13.

The Brown Family timely appealed the grant of directed verdict.

Summary of the Argument

For two main reasons the directed verdict must be reversed. First, the Brown Family did not release the Andersons from their breaches of contract by virtue of the Release. The Release

did not benefit the Andersons, but rather their realty company; a jury should have weighed whether Mr. Brown waived the breaches of contract by signing the Release; and Mrs. Brown was not a signatory, and so cannot be bound by the Release.

Second, the Brown Family presented abundant testimony to support a claim of tortious breach of contract.

Standard of Review

Because the trial court failed to apply the correct standard of law, this Court must review the pleadings and make a new determination using the de novo standard. The standard of review of “a directed verdict is de novo, and we apply the same criteria as that of the trial court” *White v. Stewman*, 932 So.2d 27, 32 (Miss. 2006). The evidence must be construed “in the light most favorable to the appellee [nonmovant], giving that party the benefit of all favorable inference [sic] that may be reasonably drawn from the evidence.” *Id.* (all alterations in original) (internal quotations and citations omitted).

The Court of Appeals has held that “[i]n conducting such a review, we must decide whether the facts presented, together with any reasonable inferences, considered in the light most favorable to the nonmoving party, point so overwhelmingly in favor of the movant that reasonable jurors could not have returned a verdict for the plaintiff.” *Ryals v. Bertucci*, 26 So.3d 1090, 1094 (Miss. Ct. App. 2009) (internal quotations omitted).

In other words, all evidence must be drawn in favor of the Brown Family, and this Court can only affirm if there was no reasonable way for them to prevail at trial.

Argument

For two primary reasons the trial court’s grant of a directed verdict must be reversed and this case submitted to a jury. First, because the Brown Family did not release the Andersons

from liability for breaches of the contract. Second, because there was ample testimony that supported the Brown Family's claim of tortious breach of contract.

I. The Brown Family Did Not Release the Andersons from Breach of Contract.

Reviewing the evidence in the light most favorable to the Brown Family, they did not release the Andersons from their breaches of contract by signing a Release that the house was in "good working condition."

For three reasons, the Release does not relieve the Andersons of their breaches of contract. First, because the Release only had legal effect as to the Andersons' realtor. Second, because Mr. Brown's statements regarding the Release should be weighed by a jury. Last, because even if Mr. Brown released his claims against the Andersons, his wife's claims are still viable. As a result, the directed verdict must be reversed.

"In any suit for a breach of contract, the plaintiff has the burden of proving by a preponderance of the evidence: 1. the existence of a valid and binding contract; and 2. that the defendant has broken, or breached it; and 3. that he has been thereby damaged monetarily." *Warwick v. Matheney*, 603 So.2d 330, 336 (Miss. 1992).

The trial court ruled that the Brown Family had proven there was a contract to sell the house under part one. However, it ruled as to the second requirement that Mr. Brown had signed the Release, which somehow absolved the Andersons of any breach.

Specifically, the trial court ruled in its Final Judgment that:

... the Plaintiff, Arthur Brown, was and is bound by the Release in which he represented that: (1) he had inspected the property; (2) he was accepting the subject items as being in "good working condition"; and, (3) he was releasing Ruth Epp's Realty, Inc., the Anderson's agent, from any liability. Thus, the Plaintiffs are bound by those representations which defeat their breach of contract claim.

R.E. 13. The trial court did not reach whether the Brown Family had been damaged monetarily under the third prong.

The Release was a boilerplate form which was addressed “To Whom It May Concern.” R.E. 22. It set out that the buyer had “found the following items, evidenced by a check mark, to be in good working ORDER and or normal condition and relieve RUTH EPPS REALTY, INC. from any further liability and responsibility now or in the future in regards to this property.” R.E. 22. Check marks are by items such as the heating unit, the air conditioner, water heater, the plumbing, and electrical systems. R.E. 22.

A. The Release Cannot Legally Benefit the Andersons.

Regardless of the language of the Release, it cannot benefit or apply to the Andersons, as they were not the beneficiary of it.

Generally speaking, once a party releases another party they may not later sue the releasing party. See *Preferred Risk Mut. Ins. Co. v. Collier*, 712 F.Supp. 96, 98 (S.D.Miss. 1989). When there are multiple parties, “[t]he law in Mississippi is that for a release of one joint tort-feasor to release other joint tort-feasors, the satisfaction received by the injured party must be intended to be and must be accepted as full and total compensation for damages sustained.” *Holland v. Mayfield*, 826 So.2d 664, 669 (Miss. 1999) (internal quotations omitted). Further, “an injured party executing a release incident to a settlement with one tortfeasor releases others by whom or on whose behalf no considerations have been given *only where the intent to release the others is manifest.*” *Id.* (emphasis added).

In one recent Mississippi Supreme Court case, a party had “released only one specific party to the litigation” through a release, and it did not release two other parties. *Whitaker v. T & M Foods, Ltd.*, 7 So.3d 893, 900 (Miss. 2009). Accordingly, the Court ruled that the party could continue to maintain suit against the non-released parties. *Id.*

Mr. Brown signed a Release with Ruth Epps Realty, *not* the Andersons. While Ruth Epps Realty was therefore released from liability (and indeed was not a defendant at trial), the

Andersons do not enjoy that same status. Like the *Whitaker* case, the release of one party does not equate to releasing *all* parties. Nor is there anything in the Release that demonstrates that it serves as a release for the Andersons as well, or any proof that the Brown Family had intent to release the Andersons. The Brown Family simply did not release the Andersons through the release of Ruth Epps Realty.

In and of itself, holding that the Release benefited the Andersons is unavoidably contrary to the standard of review to examine all the evidence in the light most favorable to the Brown Family, and warrants reversal and remand.

In the alternative, this issue should be reversed and remanded for a determination by the trial court if the Release actually relieves the Andersons of their breaches. At no time did the Andersons actually request the trial court to direct the verdict based upon the Release. See Tr. 8:314-20, 330-35. Nor was this issue briefed by the parties. The legal theory that the Release voided the Andersons' breaches of contracts was solely that of the trial court, raised *sua sponte* in its oral ruling on directed verdict. Tr. at 9:336.

As a result, the Record is not developed on this point, and the parties did not submit law to the Court regarding it. The trial court simply ruled that the Release precluded any breach by the Andersons.

This is not Mississippi law, and is contrary to the scrutiny granted a motion for directed verdict. As a result, the directed verdict must be reversed and this matter remanded for a new trial.

B. A Jury Must Resolve Mr. Brown's Testimony Regarding the Release.

Because it is for a jury to resolve Mr. Brown's testimony as a matter of fact, and not a judge to resolve as a matter of law, the directed verdict must be reversed.

It is a basic rule of court and common law that “[t]he credibility of a witness may be attacked by any party, including the party calling him.” MRE 607; *see generally Robinson Property Group, L.P. v. Mitchell*, 7 So. 3d 240, 245 (Miss. 2009) (describing impeachment of a witness under Rule 607). Further, the testimony of a witness is for a jury to weigh. *See McClain v. State*, 625 So.2d 774, 778 (Miss. 1993) (“Matters regarding the weight and credibility of the evidence are to be resolved by the jury”).

If there is a conflict or inconsistency in testimony, the Court has made clear that the jury is who determines the facts, since “[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed.” *Id.* at 781; *see also McFarland v. Entergy Mississippi, Inc.*, 919 So.2d 894, 908 (Miss. 2005) (Randolph, J., concurring in part and dissenting in part) (“It is clearly the jury’s prerogative, indeed duty, to weigh all witness testimony, and to accept or reject all or part, in order to reach its verdict”).

When there is a dispute in testimony or allegations, “juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the appellate courts] do not intend to invade the province and prerogative of the jury.” *Hales v. State*, 933 So.2d 962, 968 (Miss. 2006) (internal quotations and citations omitted).

At trial Mr. Brown admitted that he had signed the Release form. Tr. 8:212. However, referring to the Release, he testified that he “didn’t do a thorough check of all this,” and that he “didn’t check all that.” Tr. 8:212. He repeated “No way possible I checked all that.” Tr. 8:212.

The trial court held that by signing the Release Mr. Brown released the Andersons from liability. Yet Mr. Brown testified that contrary to the language of the Release that he had not actually inspected all of the house. It is for a jury to take these contradictory statements into consideration. Applying the standard of review, a reasonable juror might find the Andersons

breached the contract even though Mr. Brown signed the Release. The jury is free to weigh whether Mr. Brown actually inspected the house as indicated on the Release or “didn’t do a thorough check,” as he testified.

The trial court should have allowed a jury to weigh the boilerplate of the Release against the testimony of Mr. Brown. Because a reasonable juror could have found that the Release did not relieve the Andersons of liability, the directed verdict must be reversed, and this case remanded for a new trial.

C. The Release Cannot Affect the Claims of Mrs. Brown Because She Did Not Sign It.

In the alternative, even if the Release affects the claims of Mr. Brown with regards to the Andersons, it does not legally effect the rights and claims of Mrs. Brown, as she was not a signatory to the Release.

A non-signatory may be bound by a contract by a concept called “direct benefits estoppel.” *Noble Drilling Services, Inc. v. Certex USA, Inc.*, 620 F.3d 469, 473 (5th Cir. 2010). Under that doctrine, a person can become bound by a contract in two ways: (1) by knowingly seeking and obtaining ‘direct benefits’ from that contract; or (2) by seeking to enforce the terms of that contract or asserting claims that must be determined by reference to that contract.” *Id.*; see also *Trinity Mission of Clinton, LLC v. Barber*, 988 So.2d 910, 918 (Miss. Ct. App. 2007) (third party might be bound to contract for arbitration when they are a beneficiary of the contract).

The Release does not reach Mrs. Brown in four ways. First, the Release does not itself meet the requirements of a contract, as there was no consideration. See *Estate of Davis v. O’Neill*, 42 So.3d 520, 527 (Miss. 2010) (detailing the six requirements of a contract).

Second, Mrs. Brown never sought or obtained any “direct benefits” from the Release—nor were there any for her to receive, as the Release only benefits the realty company. Third,

Mrs. Brown has never sought to enforce the terms of the Release. Fourth, she received no benefit from the Release in any fashion.

Accordingly, Mrs. Brown was not bound by the Release, and the directed verdict must be reversed and this case remanded for a new trial. As noted above, this issue was not developed by the parties or briefing at the trial court level, but introduced *sua sponte* by the trial court. In the alternative, this Court could order remand for briefing or development of this issue at the trial court.

Conclusion of Issue I

For three reasons, the Release did not relieve the Andersons of their breaches of contract. First, because the Release only had legal effect as to the Andersons' realtor, and does not apply to them under Mississippi law.

Second, because Mr. Brown's contradictory statements regarding the Release are issues of fact that should be weighed by a jury.

Last, because Mrs. Brown's claims against the Andersons are not affected by the Release, the directed verdict was improper.

As a result, the directed verdict must be reversed, and this case reversed and remanded for a new trial.

II. The Evidence Proved That the Breaches Were Intentional.

Reviewing the evidence in the light most favorable to the Brown Family, there was ample testimony showing that the Anderson tortiously breached the contract.

"Tortious breach of contract requires, in addition to a breach of contract, some intentional wrong, insult, abuse, or negligence so gross as to constitute an independent tort." *Frye v. Southern Farm Bureau Cas. Ins. Co.*, 915 So.2d 486, 492 (Miss. Ct. App. 2005) (internal quotations omitted).

The trial court ruled that the Brown Family “failed to submit or produce any evidence that would supports Plaintiffs’ proposition that the Andersons’ actions constitute an intentional wrong, insult, abuse, or negligence so gross as to constitute an independent tort.” R.E. 12. In light of the standard of review to examine all evidence in the light most favorable to the Brown Family, this ruling is flatly incorrect.

The Brown Family called four witnesses: Mr. and Mrs. Brown, son Michael, and licensed home inspector Eric Eades, who had previously inspected the home. Each of these witnesses repeatedly testified to the shockingly poor condition of the house.

There are four specific reasons why a reasonable juror could find the Andersons intentionally breached the contract. First, home inspector Rick Eades testified that the damaged condition of the home had existed for some time, indicating that the Andersons would have had to have known about the damage to the house.

Second, in contrast to the home inspector’s testimony, Mrs. Brown testified at the closing for the house Mr. Anderson had told her “congratulations, you just bought you a good house, that everything in the kitchen was brand new.” R. 7:77. The testimony of the Brown Family and the home inspector at trial showed that this statement was false. Their uncontradicted testimony was that the hot water in the house did not work, that the house was “unsafe,” and that electrical fires could start with the flick of a switch.

Third and fourth, the Andersons specifically represented on their seller’s disclosure and the contract for the home that the house was under repair and was being sold subject to the repair of the damaged parts of the house. This demonstrates that they had prior knowledge that the house needed repair. Yet in light of the testimony of the home inspector and the Brown Family, the house could *not* have been repaired due to its damaged status.

The trial court should have weighed this evidence in the light most favorable to the Brown Family. In that light, a reasonable juror could find that the Andersons had committed a wrong so gross as to rise to an intentional breach. For this reason, the order granting the directed verdict must be reversed and this case remanded for a trial on the merits of the intentional breach of contract claim.

CONCLUSION

For two main reasons the directed verdict must be reversed. First, the Brown Family did not release the Andersons from their breaches of contract by virtue of the Release. The Release did not benefit the Andersons, but rather their realty company; a jury should have weighed whether Mr. Brown waived the breaches of contract by signing the Release; and Mrs. Brown was not a signatory, and so cannot be bound by the Release.

Second, the Brown Family presented abundant testimony to support a claim of tortious breach of contract.

Accordingly, the directed verdict must be REVERSED and this case REMANDED for a jury trial on the breach of contract and intentional breach of contract claims.

Filed this the 8th day of June, 2011,

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have served by United States mail, postage prepaid, or via hand delivery if specified, a true and correct copy of the above and foregoing document, to the following persons at these addresses:

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THIS, the 8th day of June, 2011.



DAVID NEIL McCARTY, ESQ.