SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2010-CA-02098

W. C. FORE d/b/a W. C. FORE TRUCKING, INC. — APPELLANT

VERSUS

MISSISSIPPI DEPARTMENT OF REVENUE f/k/a MISSISSIPPI STATE TAX COMMISSION, MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY AND MISSISSIPPI COMMISSION ON ENVIRONMENTAL QUALITY — APPELLEES

REPLY BRIEF OF APPELLANT

APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

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COMES NOW W. C. Fore, d/b/a W. C. Fore Trucking, Inc. (hereinafter referred to as "Fore") and submits this the "Reply Brief of Appellant".

A. The Delancey and LoBouy Sites Were Not Commercial Nonhazardous Solid Waste Management Facilities Subject to the Requirements of Miss. Code Ann. § 17-17-219.

1(a). These Sites Were Emergency Disposal Sites Not Commercial Nonhazardous Solid Waste Management Facilities.

MDEQ and MSTC go through an analysis of the statutory provisions which apply to "permitted" commercial operations. This approach completely ignores the facts of this case in that these emergency disposal sites were not permitted commercial sites. This was an emergency situation which called for extreme measures. One of those measures was the removal, transportation and disposal of hurricane debris. The contract with Harrison County specifically stated as follows:

. . .

> Whereas, the speedy and efficient removal of such debris from public right-of-ways and such other areas as may be

> designated in writing, by the County, is of paramount importance in order to protect and preserve the general health, safety, and welfare of the inhabitants of the County, and such removal is of the utmost importance; and
>
> . . .
>
> [See Ex. 40]

The foregoing clearly demonstrates how important it was to clean-up and dispose of hurricane debris. This was a major health and safety issue and was one of the reasons for the Governor issuing his Resolution directing the Executive Director of MDEQ to issue the Emergency Order which suspended normal statutory and regulatory requirements for debris disposal.

The Emergency Order is what MDEQ relied upon in establishing these sites. This Order specifically concluded that the normal regulatory and proprietary requirements for debris disposal sites did not apply [See Ex. 84, Section 7(b)]. Additionally, the Emergency Management Law (Miss. Code Ann. § 33-15-31(b)) provided that the emergency orders carried the full force and effect of law and any law, ordinance, rule and regulation inconsistent with the Emergency Order was suspended during the period of time covered by the emergency. No where in the Emergency Order or any of the guidelines issued by MDEQ does it refer to emergency disposal sites as being "commercial disposal sites" or that they would be subject to any fees.

It has been Fore's position throughout this litigation that both MDEQ and MSTC were uncertain or confused about whether the fees should be imposed on these emergency operations. In its brief MDEQ and MSTC assert that this argument mischaracterizes the evidence in this case. However, if there was no confusion over same,

why would MDEQ and MSTC be having discussions about whether emergency sites were subject to the fee? Why would the MSTC waive the fees for one emergency site operator because that site operator had not received notice that the fees were due?

It is also interesting to note that MSTC and MDEQ rely on the testimony of Mark Williams in his capacity as Administrator of the Solid Waste Policy, Planning and Grants Branch of the MDEQ, who testified "...there was no question to him that emergency sites that landfill waste for compensation were subject to the fee, but there was some question in the beginning about whether some of the other types of emergency sites were subject to the fee." [R. 303-308][Appellees' Br. p. 15] However, this is not what Mark Williams stated in the 30(b)(6) deposition of MDEQ. When asked specifically about Exhibit 85 and the questions around whether the fee would be imposed, he testified as follows:

. . .

Q. (By Mr. Long) I'm handing you what's been marked as Exhibit 16 and ask you have you seen this before?[1]

A. I possibly have seen this before. I think so. It doesn't ring a bell for me specifically. But, yes. But I mean, I - - the information, I'm fairly aware of, and I may - - I may have actually done this, but - - done some of this, but I don't recall this exact memorandum, or whatever this is.

Q. Well, obviously, it relates to a conversation that somebody had with you. The first bullet point, it says, "DEQ did not formally notify sites that they would be subject to a dollar per ton fee. They told some verbally at the time they were not exactly - - they were not sure exactly how they would be classified and were not sure the dollar fee would be charges."

Is that correct?

---

[1] The document referred to as Exhibit 16 is Exhibit No. 85 in the record.

A. I think the Agency could take that position. I was convinced, but - - personally, that the fee was due from day one.

Q. Did you represent that in a conversation you had with Billy Klauser?

A. No, because I was speaking on behalf of the Agency, and I said, there are - - you know, there were some at the Agency that were not - - you know, were not certain of this, and they didn't feel like that was our role to make that determination. We don't collect fees. We don't advise them of any of the taxes that they may pay. You know, somebody signs a hundred - - you know, a contract worth thousands of dollars, they have an obligation to find out what fees they owe.

Q. My question, again, just so long as we're clear, are the comments that's contained in Paragraph 1 accurate?

A. I mean, I can speak to the first couple of sentences are accurate. I think that there was some question at the Agency, and there was some deliberation about whether the - - you know, whether the fee would be charged. So . . .

. . .

It is obvious that everybody was confused, MDEQ, MSTC and the emergency site operators. The emergency site operators were confused because none of the guidelines provided to them made any reference to them being categorized as Commercial Nonhazardous Solid Waste Management Facilities or to the payment of the fee. However, they were even more confused by the fact that not one time since the fee was enacted in 1991 had emergency disposal sites been treated as Commercial Nonhazardous Solid Waste Management Facilities or required to pay the fee.

MDEQ and MSTC now argue that an agency's failure to enforce a law does not make the law inapplicable or relieve an agency from the responsibility to enforce the law

in the future. Nevertheless, where an agency has historically construed a statute in a certain manner it is usually binding on them or their successors, as the public relies on such construction. Barr v. Delta and Pine Land Company, 199 So.2d 269, 272 (Ms. 1967). Contrary to the argument of MDEQ and MSTC, the evidence does support the conclusion that the fees were not collected on any emergency disposal site since the passage of the statute imposing the fee in 1991.

1(b). Fore Relied on The Governor's Declaration of Disaster in Submitting Bid.

MDEQ and MSTC argue that Fore did not rely on the Governor's Resolution and MDEQ's Emergency Order when he submitted his bid to Harrison County. However, the contract itself provides the following:

I. PURPOSES:

> The purpose of this Contract is to provide debris removal from certain public property and such other areas as may be designated, in writing, by the County as defined herein as a result of Hurricane Katrina which occurred on August 29, 2005. This Contract is also entered into under the provisions of Section 33-15-17 Mississippi Code of 1972, and pursuant to the Governor's Declaration of Disaster as provided by Section 33-15-31, Mississippi Code of 1972, as well as the President's Declaration of Disaster.

[Ex. 40]

Obviously, Fore was relying on the emergency Declarations and the manner by which he had conducted business with the County for prior storms in submitting his bid. Specifically, he testified as follows:

> Q. Do you know about when you entered into your contract with Harrison County?
>
> A. It was either September 10th or September 16, 2005.

Q. Did you submit a bid for this work?

A. Yes.

Q. How did you arrive at your bid price?

A. You know, as usual, you would go out on the road and look at the type of debris, the size of debris. If you have as much experience as I do, you can figure out how many yards of debris is out there. Remember that. I can do that.

That is how I arrived at my bid. I put my loading tegether, my transportation, how many loads a truck would make a day, and put all of that together to arrive at my bid.

Q. In arriving at your bid price, Mr. Fore, did you take into consideration this fee?

A. No, I did not. I did not have a knowledge of that fee.

Q. Would your bid price have been different had you known of that fee?

A. Yes.

[R. 119]

It is interesting to note that MDEQ and MSTC argue that Fore and his expert had access to the laws and regulations governing solid waste disposal and should have known of the fee. The argument fails to consider the fact that nowhere in the laws, rules or regulations or the guidelines submitted to emergency site operators, does it state that emergency site operators are deemed to be Commercial Nonhazardous Solid Waste Facilities and subject to the fees imposed by Miss. Code Ann. § 17-17-219.

1(c). Emergency Site Operators Should Have Received Notice of the Fees.

MDEQ and MSTC argue that they were under no obligation to notify Fore and the other emergency site operators of the requirements of Miss. Code. Ann. § 17-17-219, when

they authorized them to dispose of hurricane debris. Such a position seems to be at odds with the circumstances which existed at that time. This was the most devastating natural disaster in our nation's history. There was massive amounts of hurricane debris which posed major health and safety risks. The President issued a Disaster Declaration. The Governor invoked the provisions of Emergency Management Law, Miss. Code Ann. § 33-15-1, et. seq. Pursuant to that authority, the Executive Director of MDEQ issued an Emergency Order which served as relief for the duration of the Order from the regulatory and proprietary requirements of MDEQ. The MDEQ issued guidelines to be followed by emergency site operators. The County entered into contracts for debris removal specifically noting, that the same were being entered into under the Emergency Management Law. None of these documents made any reference to emergency sites being deemed to be "Commercial Nonhazardous Solid Waste Management Facilities" or being subject to Miss. Code Ann. § 17-17-219. Based on the foregoing it would be reasonable to conclude that Fore, and the other emergency site operators who have never operated or qualified to operate a Commercial Nonhazardous Solid Waste Management Facility, would be notified about all of the requirements for disposing of hurricane debris when the sites were approved. In fact, the Chairman of MSTC specifically found in an e-mail that the operators should be notified, but they were not. [Ex. 4-13, R. at 193] Also, the MSTC even waived all fees for one emergency site operator because he did not receive notice. Obviously, these emergency site operators should have been notified.

MDEQ and MSTC also argue that Fore agreed to comply with MDEQ rules, regulations and laws. The problem with this argument is that none of the rules, regulations and laws provide that emergency site operators are deemed to be "Commercial

Nonhazardous Solid Waste Facilities" or subject to the requirements of Miss. Code Ann. § 17-17-219. Fore did, in fact, comply with all the policies and guidelines set forth in his authorization letters.

2(d). Fore Is Not Seeking an Exemption from the Fee Imposed by Miss. Code Ann. § 17-17-219.

MDEQ and MSTC argue that Fore is seeking an exemption from the fee and thereby any reasonable doubts as to same are resolved against the exemption. However, Fore is not seeking an exemption but instead is arguing that an emergency disposal site created pursuant to the Mississippi Emergency Management Law is not a "Commercial Nonhazardous Solid Waste Management Facility" and subject to the fees imposed by Miss. Code Ann. § 17-17-219. If there is any question or doubt as to whether he qualifies as a "Commercial Nonhazardous Solid Waste Facility", that doubt is construed in favor of Fore. See A. C. Lambert, Sr., Chairman, Mississippi State Tax Commission v. Mississippi Limestone Corporation, 405 So.2d 131, 132 (Miss. 1981).

(e). The Delancey and LoBouy Road Sites Were Created and Controlled by the Emergency Management Law.

There was no specific statute or regulation which addressed emergency disposal sites. These sites were created through the provision of the Emergency Management Law and the MDEQ Emergency Order and guidelines issued thereunder. None of these documents made any reference to emergency disposal sites being considered or subject to the requirements of a "Commercial Nonhazardous Solid Waste Management Facility. MDEQ and MSTC argue that the Emergency Order did temporarily suspend some of the regulatory and proprietary requirements for disposal sites, but it could not have legally suspended the provisions of Miss. Code Ann. § 17-17-219. In essence, MDEQ and the

MSTC are arguing that you should read the Emergency Management Law together with Miss, Code Ann. § 17-17-219 (in *pari materia*) to arrive at the legislative intent. However, this is contrary to the decision in Bolivar County v. Wal-Mart Stores, Inc., 797 So.2d 790 (Miss. 1999). The Emergency Management Law deals specifically with the emergency situations and it cannot be read in *pari materia* with other statutes.

(f) MDEQ SW-2 Regulations Do Not Set Forth Guidelines For Emergency Disposal Sites.

MDEQ and MSTC contend on page 25 of their Brief that ". . . the Emergency Order did temporarily suspend some of the regulatory and proprietary requirements imposed by MDEQ, ..."; however, on on Page 23 of their Brief, they argue, "MDEQ utilized the authority found in Section 11.0 of the SW-2 Regulations when granting emergency authorization for emergency disposal site...". These assertions appear to be in direct conflict. Nevertheless, regardless as to which authority was relied upon, the bottom line is that none of the guidelines adopted and submitted to the emergency site operators made any reference to them being subject to the requirements of a Commercial Nonhazardous Solid Waste Management Facility. These guidelines issued by MDEQ and contained in the authorization letters of the emergency site operators, were the only "stipulated conditions" given by MDEQ.

(g). As Previously Noted, Fore is Not Claiming A Tax Exemption.

As previously addressed in this Reply Brief, and in Fore's Brief, Fore is not claiming a tax exemption, but instead argues that an emergency disposal site is not a Commercial Nonhazardous Solid Waste Management Facility.

C. MSTC's Unequal Treatment of Fore Was Arbitrary and Capricious and in Violation of 14th Amendment Equal Protection Rights and is Without Merit.

MDEQ and MSTC recognize that the test for a "class of one" equal protection claim is that set forth in Village of Willowbrook v. Olech, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). Under this test, Fore is required to establish that he was intentionally treated differently from others similarly situated and that there is no rational basis for that difference.

1. Fore Was Similarly Situated to Other Emergency Site Operators.

In order to satisfy this part of the "rational basis" test, Fore must have established that he was *prima facie* identical in all relevant respects to others and that he was treated differently. MDEQ and MSTC argue that Fore did not satisfy this test because of the following: 1) Fore had previous interaction with MDEQ and other operators may not; 2) Fore had access to an expert, 3) Fore had weight scales; 4) Fore's contract required him to pay taxes and fees; 5) how other sites were being operated and communication they may have had with MDEQ or MSTC; and 6) almost all emergency site operators filed returns for 2005 prior to MSTC's issuance of one against them. None of the foregoing are relevant or material in determining whether someone should be assessed with a tax. In identifying those individuals who are similarly situated, does it really matter whether they interacted with MDEQ before being authorized to have an emergency disposal site? Does it really matter that they may have retained the services of a professional engineer, who in Fore's case testified that he was unaware of a fee being imposed in emergency situations? [R. 234-235] Does it matter that they may have had access to weight scales?

The answer to the foregoing as well as the other items identified is no. None of these factors are material in determining whether Fore and the other emergency site operators are similarly situated. If we were talking about residential property taxes being imposed unequally, would it matter if one property owner communicated with the Tax Assessor or had retained the services of an appraiser? The answer is no. The real issue is whether the taxes are being imposed in an equal manner on all residential property owners. In the case *sub Judice*, the issue is whether Fore was treated differently from other emergency site operators.

In Village of Willowbrook, *supra*, the Court found that a viable equal protection claim existed where the similarly situated individuals were those who were required to give an easement as a condition of connecting their property to municipal water. In the City of Indianapolis, et al. v. Armour, et al., 918 N.E. 2d 401 (Ind. App. 2009), the Court found that the similarly situated individuals for equal protection analysis were all property owners who were assessed the tax. The same is true in this case. In identifying those individuals who were similarly situated for equal protection analysis, it would be all emergency site operators who were subject to the fees.

2. Fore was Obviously Treated Differently from Other Emergency Site Operators Without a Rational Basis.

The examples given in Appellants brief in chief clearly support the concept that other emergency site operators were given preferential treatment. MDEQ and MSTC try to demonstrate that they had a rational basis for the unequal treatment. However, their attempts were unsuccessful. For example, Operator No. 1 (identified as Exhibit 45 in Appellant's brief in chief) reported 158,517 tons of debris in 2005 and 27,707 tons of debris

in 2006. The fees were imposed on the 27,707 tons for 2006, but not the 158,517 tons for 2005. MDEQ and MSTC argue that the evidence supports the concept that this emergency site operator did not conduct any activity in 2005 that triggered the levying of the tax. According to MSTC's representative the debris was merely being staged at that site and therefore not subject to the fee. However, when Ms. Tillman was asked specifically whether the operator provided any information to the MSTC about staging debris at that site in 2005, she answered "No, he did not". [R. 270] Additionally, when asked why, she responded in part as follows:

. . .

> As I understand it, because this is not my expertise, it's just piles and they staged it before they disposed of it. Because Hancock County sites were doing this, DEQ gave them the option of paying the tax in 2005 or 2006.[2]
>
> [R. 268] **[emphasis added]**

. . .

What an option! The emergency site operator could decide to pay $27,707.00 or $158,517.00. Not surprisingly, the emergency site operator agreed to pay the $27,707.00 and all fees due for 2005 were waived. It should also be noted that there was no testimony indicating that his operation was any different in 2005 than in 2006. Also, after January of 2006, the site was conveyed to a new emergency site operator who reported disposing of 117,500 tons at the site in 2006 [Exh. 45(f)), R. at 193]. There is no documentation indicating the new emergency site operator was staging any debris.

---

[2] The Court should also note that this testimony clearly demonstrates that MDEQ and not the MSTC was making decisions about who was required to pay the fee and who was not. Throughout this litigation, both MDEQ and the MSTC asserted that as between the two entities, MSTC decided who was to pay the fee and not MDEQ. This was clearly not the case.

The justification given for the disparate treatment for the above emergency site operator, as well as all the other operators discussed in MDEQ's and MSTC's brief, does not establish a rational basis for such treatment. [See Fore's brief in chief]. In most of the examples, MSTC argues that there was a breakdown in communication between MDEQ and MSTC or that the MSTC was actively pursuing the collection of the tax. The problem with this argument is the MSTC was not even pursuing most of these emergency site operators until after Fore amended his lawsuit to include an equal protection claim and filed a Motion to require the production of these records. By that time Fore's constitutional rights had been violated. In Oleck (528 U.S. at 563), the United States Supreme Court found that Plaintiff had properly stated an equal protection claim even though the Village had relented and agreed to treat the Plaintiff similar to other property owners after a three month delay. By the time the Village relented, the violation had already occurred.

3. Operator No. 9 is a Perfect Example for Establishing that Fore's Constitutional Rights Were Violated and the Arbitrary Matter in Which Fees Were Being Imposed.

First of all, MDEQ and MSTC argue that the fees for Operator No. 9 (identified in Letter Ruling [Exh. 4-49(d), R. at 191] were only waived for the year 2005, this statement is not accurate. The fees were also waived for the period of January 2006 through February 8, 2006. [Exh. 49(d)]. The fees incurred for this period of time was $55,027.00. Additionally, MDEQ and MSTC seemed to take the position that it is okay to waive taxes for one individual but not others. Back to the prior example relating to a property tax assessment. Is it okay to waive the property tax for one resident in the neighborhood because he says he was not notified of the tax? This is exactly what the MSTC did in this

case. It should also be noted that this was not merely an error or an oversight by the MSTC but instead an informed decision (by way of a letter ruling) to waive these fees because the emergency site operator did not receive notice of the fee prior to February 8, 2006. As previously discussed in Fore's brief in chief, Fore also did not receive notice and it is arbitrary and in violation of his constitutional rights not to receive the same treatment.[3]

D. Fore was Not the Operator of That Portion of the Delancey Site Where the City of Gulfport's Debris Was Placed.

The operator of that portion of the Delancey site where the City of Gulfport's debris was placed was P & J, not Fore. If there is any fee due for the disposal of this debris, it would have been the responsibility of P & J. As discussed in Fore's initial brief, Miss. Code Ann. § 17-17-219 imposes the fee on the operator who is actually managing operations at the site. MDEQ's own regulations defines the operator as:

> "Operator means the person who directly supervises and is personally responsible for the daily operation and maintenance of a Commercial Nonhazardous Solid Waste Management Facility."[4]
>
> [Exh. 20, Regulations for the Operator's of Solid Waste Facility, Section 11, p.3]

The testimony at trial clearly established that Fore's operations and P & J's

---

[3] MDEQ's and MSTC's argument that to accept Fore's argument is akin to a law enforcement officer pulling over some but not all speeders is without merit. This example is a true case of selective enforcement which, as discussed in Fore's brief in chief, has a different standard than that for imposing taxes.

[4] Throughout its brief, MDEQ and MSTC argue that MDEQ administers the statutes in question and its interpretation is entitled to deference. However, MSTC and MDEQ now assert that MDEQ's regulation defining "operator" of a Commercial Nonhazardous Solid Waste Management Facility is not applicable but offers no explanation why. [See Appellee's brief footnote 14, p. 40] Fore asserts that the regulation clarifies the definition found in Miss. Code Ann. § 17-17-205(e) and supports the concept that the fee should only be imposed on the person who directly supervises the operation on a daily basis for which he receives a fee.

operations were separated by a road. P & J provided its own employees and equipment. Fore never managed or supervised the disposal of the debris placed at the site by P & J. Fore had an arrangement with the property owner for utilizing the site. P & J paid Fore $1.00 per yard for use of the site and Fore in turn paid the property owner $0.40 per yard. At that time the customary fee paid to property owners was $1.00 per yard for use of their property; however, in those situations the property owners were not managing or supervising operations at the site and were not responsible for any fees. This is exactly what Fore did in this case.

Fore did receive emergency authorization to accept and dispose of hurricane debris; however, the authorization letter does not identify Fore as the operator. [Exh. 65] In fact, in discussing the guidelines to be followed, the letter recognizes that someone other than the person receiving the authorization may be the operator. For example, the letter provides the following:

. . .

6. The site operator shall maintain a 100 foot setback distance between the disposal area and the nearest property line.

7. The site operator shall maintain a 300 foot setback distance between the disposal area and the nearest inhabited dwelling.

8. The site operator shall maintain a 100 foot setback distance between the disposal area and the nearest state water body (e.g. lakes, rivers, creeks, streams, etc.)

In addition to the foregoing requirements, MDEQ strongly recommends that the following practices be followed:

1. Where feasible, the site operator is encouraged to separate potential recyclables including metals, concrete and clean vegetative and wood wastes for ultimate recycling, reuse or volume reduction.

2. The site operator should take steps to prevent placement of unauthorized emergency debris at the site. To the extent possible wastes such as household garbage, household chemicals and food wastes should be separated and redirected to an appropriate permitted disposal facility.

3. The site operator should remove and properly dispose of any unauthorized, inadvertently disposed waste at the site, where such actions are practical.

4. Where feasible, special wastes such as regulated asbestos, lighting ballasts and lamps, thermostats and other similar types of structural debris should be segregated and stored separately for ultimate disposal at a municipal solid waste landfill or other appropriate facility.

5. The site operator should not dispose of solid wastes in standing water or in flood prone areas.

6. Where feasible, the site operator is encouraged to place an intermediate earthen cover over the waste mass once per month to prevent nuisance conditions and fire hazards.

. . .

[Exh. 65, p. 2][**emphasis added**]

No where in this authorization letter does it refer to Fore as being the actual operator or prohibits him from allowing another operator to use a portion of the site. Additionally, the authorization letters make no reference to this being a Commercial Nonhazardous Solid Waste Disposal Facility or that Fore will be responsible for the payment of any fees.

It should also be noted that it was P & J who followed the above referenced guidelines for the placing of the debris at that portion of the site it managed, not Fore. In fact, as previously discussed in Fore's brief in chief, MDEQ specifically recognized P & J as the operator in correspondence and in official reports including a report to the MSTC identifying emergency site operators who they contend were subject to the fees. [Exh. 4-

24, R. at 191, Exh. 4-27, Appendix, Table A-3, under Harrison County, R. at 191; and Exh. 29, R. at 192]

The evidence in this case clearly established that it was P & J who actually operated and managed the disposal of debris at that portion of the site. As a result, any fees due would be their responsibility.

CONCLUSION

To say that circumstances were difficult after Hurricane Katrine would be an understatement. MDEQ had its hands full in trying to address all the critical issues of the day. As a result, maybe they were primarily focused on the removal and disposal of the debris and did not even consider whether the emergency sites were "Commercial Nonhazardous Solid Waste Facilities" or subject to the fee imposed pursuant to Miss. Code Ann. § 17-17-219. Obviously, had it considered that to be the case, MDEQ would have placed that in the guidelines or at least would have notified the emergency site operators of that requirement; however, this did not happen until long after the contracts were entered into and the majority of the debris had been picked-up. MDEQ made the rules for these emergency site operations at the beginning of the game and should not be allowed to change the rules in the fourth quarter to the detriment of the emergency site operators such as Fore.

Based on the facts and the law, Fore requests this Court find that the Order entered by the MSTC was "arbitrary and capricious", was not supported by substantial evidence, was contrary to law, and was in violation of Fore's constitutional rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution and the lower court was in error to conclude otherwise. As a result, Fore is entitled to a refund plus

CERTIFICATE

Pursuant to M.R.A.P. 25(a), I hereby certify that on this date, October 25th, 2011, I deposited in the United States Mail, first class postage prepaid, the original and three copies of the foregoing Brief of the Appellant addressed to:

Betty W. Sephton, Clerk
Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
P.O. Box 249
Jackson, MS 39205-0249

Honorable Eugene Fair
10th Chancery District
P.O. Box 872
Hattiesburg, MS 39403

I further certify that I have deposited in the United States Mail, first class postage prepaid, one copy of the Brief of the Appellant to the following:

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This, the 25th day of October, 2011.

BOBBY R. LONG