

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**2010-KM-01654-COA**

*T*

**JILINDA BAKER**

**PLAINTIFF/APPELLANT**

**VS.**

**STATE OF MISSISSIPPI**

**DEFENDANT/APPELLEE**

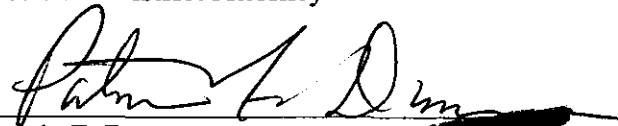
---

**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 Justice of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Jilinda Baker, Defendant Appellant
2. Hon. Lamar Pickard, Circuit Court Judge
3. Patricia F. Dunmore, Esq., Counsel for Defendant/Appellant
4. Alexander Martin Esq., District Attorney
5. Lamar Arrington, Esq., Assistant District Attorney

  
Patricia F. Dunmore (MSB NO. [REDACTED])  
Attorney of Record for Jilinda Baker, Appellant

## **TABLE OF CONTENTS**

<u>CERTIFICATE OF INTERESTED PERSONS</u> .....	i
TABLE OF CONTENTS.....	ii
<u>TABLE OF AUTHORITIES</u> .....	iii
<u>STATEMENT OF THE ISSUES</u> .....	1
<u>STATE OF THE CASE</u> .....	1
COURSE OF PROCEEDINGS AND DISPOSITION BELOW.....	1
<u>SUMMARY OF THE ARGUMENT</u> .....	2
ARGUMENT.....	3
<u>CONCLUSION</u> .....	4
<u>CERTIFICATE OF SERVICE</u> .....	5
<u>ADDENDUM</u> .....	6

**TABLE OF AUTHORITIES**

2009 WL 927991 (Miss. A.G.).....	3
1998 WL 831818 (Miss. A.G.).....	3

## **STATEMENT OF THE ISSUES**

Whether the Department of Public Safety ruling that nonadjudication was unavailable to a minor who refuses the intoxilyzer but tested .05% blood alcohol level on the Alco sensor is error?

## **STATEMENT OF THE CASE**

### **COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

Jilinda Baker was born August 19, 1990. She was arrested and charged with first offense DUI on June 19, 2010. R. Vol. 1 p. 2. She submitted to a breath test on Alco-sensor. The result showed an alcohol concentration of four one hundredths percent (.05) %. R. Vol. 1 p. 8. Later at the Sheriff's Office when she attempted to blow into the intoxlyer 8,000 however she was unsuccessful and the machine registered test refusal. R. Vol. 1 p. 8, 11.

Jilinda Baker filed a motion in Justice Court for non adjudication of the first offence DUI on July 8, 2010. R. Vol. 1 p. 2. The Justice Court of Jefferson County, Mississippi granted non-adjudication in the cause on July 8, 2010 by Order of non-adjudication. R. Vo. 1 p. 4.

The Department of Public Safety by letter of July 13, 2010 advised the Justice Court Judge that the non adjudication was improper because a driver who refuses to render a sufficient sample of his or her breath or refuse submitting to test shall not be eligible for non-adjudication. R. Vol. 1 p. 1.

A Petition to Reverse ruling of Commissioner of Public Safety was filed in the Circuit Court of Jefferson County, Mississippi on July 15, 2010. An evidentiary hearing was held in Circuit Court. The Circuit Court found that Defendant did refuse the breathalyzer test on the intoxilizer 8,000. R. Vol. 1 p. 6. The Circuit Court denied the Defendants Motion for Reconsideration and it is from this ruling that the Defendant appeals.

Obviously the Department of Public Safety ignored the filing and finding of facts by the Justice Court Judge. The Justice Court found that the minor had a blood alcohol concentration of .02% or more but lower than .08%. That finding was obviously based on the Alco-sensor reading of 05% R. Vol. 1 p. 4-8.

### **SUMMARY OF THE ARGUMENT**

The Zero Tolerance for Minor's Act clearly allows a judge within his discretion to nonadjudicate a driver under twenty-one (21) years of age whose blood alcohol level is between .02% and .08%. The law does not specify the source of the blood alcohol level reading. Blood alcohol level can be determined from a number of sources. The only time a minor is excluded from a possible nonadjudication is when there is no blood alcohol level reading. Generally speaking if the driver refuses to take the intoxilizer there is no blood level alcohol reading. However if a blood alcohol reading is ascertained from another source and is not excluded by the court but is used to determine blood alcohol level reading then the Zero Tolerance for Minor's Act may apply. Clearly in this case, the Zero Tolerance for Minor's Act applies because of the .05% blood alcohol level reading taken by the Mississippi Highway Patrol, on the Alco sensor.

## ARGUMENT

The applicable statute is called Zero Tolerance for Minor's Act, 63-11-30 (3) (a),  
63-11-30 (3) (g),  
The applicable statute is called Zero Tolerance for Minor's Act,  
63-11-30 (3)(a)

This subsection shall be known and may be cited as Zero Tolerance for Minors. The provisions of this subsection shall apply only when a person under the age of twenty-one (21) years has a blood alcohol concentration two one-hundredths percent (.02%) or more, but lower than eight one-hundredths percent (.08%). If such person's blood alcohol concentration is eight one-hundredths percent (.08%) or more, the provisions of subsection (2) shall apply.

63-11-30 (3) (g)  
The court shall have the discretion to rule that a first offense of this subsection by a person under the age of twenty-one (21) years shall be nonadjudicated. Such person shall be eligible for nonadjudication only once. The Department of Public Safety shall maintain a confidential registry of all cases which are nonadjudicated as provided in this paragraph. A judge who rules that a case is nonadjudicated shall forward such ruling to the Department of Public Safety. Judges and prosecutors involved in implied consent violations shall have access to the confidential registry for the purpose of determining nonadjudication eligibility. A record of a person who has been nonadjudicated shall be maintained for five (5) years or until such person reaches the age of twenty-one (21) years. Any person whose confidential record has been disclosed in violation of this paragraph shall have a civil cause of action against the person and/or agency responsible for such disclosure.

The office of the Attorney General has opinioned at 1998 W 831818 (Miss A.G.)

Therefore, if a person refuses to take the intoxilizer and there is no blood alcohol level reading, the zero tolerance for minors section does not apply. However in this case

there is a blood alcohol level reading of .05%, the office of the Attorney General has opined at 2009 WL 927991 (Miss. A.G.). Whether or not a minor has a blood alcohol concentration of .02% or more but lower than .08% is a question of fact to be determined by the trier of fact.

The Justice Court Judge was trier of fact in this case and determined that the blood alcohol was .05%. The question is whether the alcohol concentration reading on Alco sensor of .05% is sufficient evidence for a court to determine whether the minor's alcohol concentration qualifies the minor for non-adjudication.

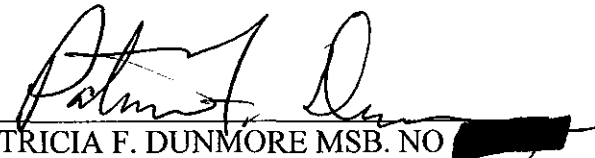
The Justice Court found that the minor registered between .02% and .08% alcohol concentration and granted a non-adjudication. The Department of Public Safety based its position solely on the fact that the minor has an insufficient sample or test refusal on the intoxilizer eight thousand. The Department of Public Safety seems to totally ignore the Alco sensor reading. The Circuit Court refused to override the Department of Public Safety position and thereby seemingly ignoring the Alco sensor reading of .05% and the Justice Court finding of non-adjudication.

### **CONCLUSION**

The Circuit Judge affirmed the ruling of the Commissioner of Public Safety to suspend the driving privileges of Jilinda Baker for breath test refusal. His order did not address whether the Appellant should be allowed a nonadjudication in spite of the test refusal on the intoxilyzer with a blood alcohol reading of .05% on the Alco sensor. This

matter should be reversed and remanded for the determination of whether nonadjudication granted by the Justice Court should stand based on the Alco sensor reading of .05%.

BY:

  
PATRICIA F. DUNMORE MSB. NO [REDACTED]  
POST OFFICE BOX 256  
NATCHEZ, MS 39121  
TELEPHONE: 601-445-5577  
FACSIMILE: 601-442-5400

**Attorney for Plaintiff/Appellant**

**CERTIFICATE OF SERVICE**

I, **PATRICIA F. DUNMORE**, attorney for Appellant Jilinda Baker, have this day mailed a true and correct copy of the foregoing **Brief of Appellant Jilinda Baker** to the following:

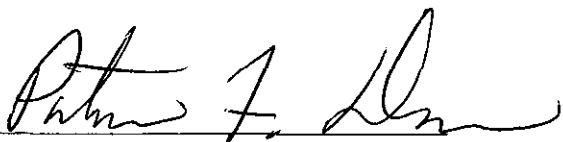
**Hon. Lamar Pickard  
P. O. Box 310  
Hazlehurst, MS 39083**

**Hon. Alexander Martin  
P. O. Drawer 767  
Hazlehurst, MS 39083**

**Hon. Lamar Arrington  
P. O. Drawer 767  
Hazlehurst, MS 39083**

**Hon. Scott Stuart  
Special Assistant Attorney General  
550 High St. 13<sup>th</sup> Floor  
Jackson, MS 39205**

This the 1 day of June, 2011.

  
PATRICIA F. DUNMORE