IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI,
ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST
JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES — APPELLANT

VS. — CAUSE NO. 2010-SA-01036

SCOTTIE WILSON — APPELLEE

REPLY BRIEF OF APPELLANT, MISSISSIPPI DEPARTMENT OF HUMAN SERVICES

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

ARGUMENT

As Plaintiff correctly states in his brief, there is but one "issue of law" remaining to be decided in this appeal from the Circuit Court's Final Judgment entered on remand. That issue is whether the unambiguous language of § 11-46-15 of the *Miss.Code*, and its applicable damage cap, should be construed as written. Defendant argues that Plaintiff's claims for damages, as alleged in his single suit filed against this Defendant, and regardless of the number of theories of recovery alleged, are aggregately subject to one damages cap. The remaining issues in this appeal surround the findings of fact made by the Circuit Court.

In determining whether the Circuit Judge's award of damages is excessive, the standard of review is whether substantial evidence supports the award. *Odom v. Roberts*, 606 So.2d 114, 118 (Miss. 1992). To be excessive, damages "must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable, and outrageous, and . . . to have been actuated by passion, partiality, prejudice, or corruption." *Id.* The amount of *physical injury, mental and physical pain, present and future, temporary and permanent disability, medical expenses, loss of wages and wage-earning capacity, sex, age and health of the injured plaintiff*, are all variables to be considered by the fact-finder in determining the amount of damages to be awarded. *Woods v. Nichols*, 416 So.2d 659, 671 (Miss. 1982) (emphasis added). This Defendant argues that the only evidence presented in support of an award for damages was Plaintiff's own vague testimony concerning his anger and his sense of self-worth. There was no evidence presented to establish past or future medical expenses for treatment or therapy, physical manifestation of an emotional or mental injury, loss of wage earning capacity, disability, etc. Without some enlightenment as to the trial court's basis for its $50,000.00-per-breach award, and despite Plaintiff's

attempt in its brief to explain the trial court's ruling, this Defendant can only argue that the award is the result of guesswork, conjecture and speculation, is grossly excessive and cannot be sustained. *University of Southern Mississippi v. Williams,* 891 So.2d 160, 175-176 (Miss. 2004). The amount of the trial court's award is, therefore, unreasonably high in comparison to the evidence submitted. Moreover, due to the lack of explanation for the amount of the award, it appears to be based on mere passion and sympathy and should be reduced accordingly.

I. WILSON FAILED TO PROVE DAMAGES AT TRIAL.

To succeed on a claim for negligence against this Defendant, Plaintiff was required to prove, by a preponderance of the evidence, that this Defendant breached a duty owed to him and that the breach subsequently and proximately caused some specific damage. *Foster v. Bass,* 575 So.2d 967, 972 (Miss. 1990); *Paz v. Brush Engineered Materials, Inc.*, 949 So.2d 1 (Miss. 2007) (quoting *Miss. Dept. Of Mental Health v. Hall*, 936 So.2d 917, 922 (Miss. 2006)). The question before this Court is not whether Plaintiff was abused by Williams or Howard, or even whether this Defendant was negligent in its supervision of Plaintiff or in the investigation of the reports of abuse. Rather, one of the questions before this Court today is whether Plaintiff proved, by a preponderance of the evidence, that he suffered damages as a result of this Defendant's actions or omissions and if so, to what extent. Nonetheless, in what can only be seen as an attempt to incite passion and sympathy, Plaintiff goes to great lengths in his brief to recite the duties owed by the Defendant, and the respective breaches of those duties. (Brief of Appellee at 8-32). However, that determination has already been made by the Court of Appeals when they remanded the case for a new trial on damages only. (Appellee's R.E. at 1-17). At any rate, in this case, Defendant

simply did not satisfy his burden with regard to proof of damages, and is accordingly entitled to nothing more than nominal damages.

At trial, the only damages alleged to have been suffered by Defendant included feelings of anger and low self-worth. Despite Plaintiff's contention, the only evidence in support of those damages was the self-serving testimony of Plaintiff, himself, to that effect. Under Mississippi law, even if a Plaintiff demonstrates *some* physical or mental manifestation of his injuries, a Plaintiff then only recover damages for "*substantial* emotional distress, not necessarily rising to the dignity of a diagnosable mental disorder, *but surely approaching such.*" *Lancaster v. Stevens*, 961 So.2d 768, 773 (¶ 18) (Ct. App. Miss. 2007) (emphasis added) (citing *Singleton v. Stegall*, 580 So.2d 1242, 1247 (Miss. 1991)). See also *Paz*, 949 So.2d at 4 (stating that "in the absence of physical injury accompanying the negligent conduct" a Plaintiff can only recover damages for emotional distress, "if there is a resulting physical illness or assault upon the mind, personality or nervous system of the plaintiff which is medically cognizable and which requires or necessitates treatment by the medical profession).

Here, Plaintiff simply failed to come forward with any evidence at trial to support an award of damages. The evidence presented at trial and stipulated to by all parties established nothing more than that Plaintiff (1) had sex with men when he needed money, (2) was sexually assaulted by two male cousins when he was seven years old, (3) was physically abused throughout his entire life by his mother, (4) was in and out of DHS's system *before* he was placed in CCDU or SNIPS, (5) exhibited numerous behavioral problems *prior* to placement in CCDU or SNIPS, and (6) suffered some form of emotional distress as a result of his alleged sexual encounters with Williams and Howard. There was no evidence presented which would establish that Plaintiff suffered any physical injury, physical pain, disability, medical expenses, loss

of wages or wage-earning capacity. In fact, no physical evidence of sexual activity was presented which would corroborate Plaintiff's testimony that sexual activity actually occurred. There was also no evidence of a mental injury approaching in level of severity a diagnosable mental disorder, as is required for the recovery of emotional distress damages. Despite Plaintiff's passion and sympathy arousing argument that "[c]ommon life experience teaches that months of sustained, secretive, aggressive, homosexual abuse by adult predators of minor...will presumptively cause damage to the child victim,"[1] Plaintiff has come forth with nothing more than a sweeping reference to a criminal statute as support for this allegation, and asks this Court to infer that Defendant's damages should be inherent due to the nature of the acts. However, again, no testimony was offered in support of any of Plaintiff's claims except his own self-serving and vague testimony regarding his anger. In fact, Plaintiff essentially admits in his brief that his testimony was insufficient to sustain his alleged damages. (Brief of Appellee at 16). Further, Plaintiff points to the evidence that was presented at trial as evidence of what "likely" would have happened if certain duties had been fulfilled. *Id.* at 19, n.14. Moreover, Plaintiff makes the sweeping argument, without any support, that the alleged damages to Plaintiff were forseeable by DHS. *Id.* at 32-37. However, nothing in the Record establishes that Plaintiff proved that his alleged emotional distress was an inherent or reasonably forseeable result of any Defendant's alleged omission. Rather, Plaintiff simply relies on his compassion and sympathy arousing recitation of his version of the facts to bootstrap his argument on the issue of forseeability and inherent damages. Like the trial court's ruling, Plaintiff's argument and attempted explanation of the trial court's ruling, is based nothing more than mere speculation. Therefore, Plaintiff's testimony at trial is

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[1] See Brief of Appellee at 15.

insufficient to sustain an award for damages under Mississippi law and nothing more than nominal damages should have been awarded against the Defendant in this case.

II. THE AMOUNT OF DAMAGES AWARDED TO WILSON WAS EXCESSIVE AND BASED ON PURE SPECULATION.

If Plaintiff was, in fact, entitled to an award of damages, the amount of damages awarded to Plaintiff by the trial court is outrageous and speculative. Essentially, the trial court found that *each* of the Defendant's neglected face-to-face visits with the Plaintiff caused the Plaintiff $50,000.00 worth of damages. In other words, it was the opinion of the trial court that each neglected face-to-face visit caused the Plaintiff just as much *additional* damage as the previous neglected visit. Additionally, the trial court's award reflects that each neglected visit caused the Plaintiff just as much damage as the Defendant's inadequate investigation of the abuse allegation and also just as much damage as the Defendant's failure to provide sufficient counseling to the Plaintiff upon his return home. As a factual, legal and practical matter, however, this simply cannot be the case, as the Plaintiff did not, under any view of the evidence, establish that he suffered a separate injury valued at $50,000.00 for *each* of the Defendant's breaches.

Because Plaintiff failed to establish that he did, indeed, suffer any damages as a result of the acts/omissions of the Defendant and due to the complete lack of evidence presented in support of his damages at trial, this Defendant's argument that the award is excessive is, to say the least, a difficult one to articulate. However, without some explanation as to the trial court's basis for its $50,000.00-per-breach award, the Defendant is left to simply argue that the award is the result of passion and sympathy on the part of the trier of fact, and that it is based on guesswork, conjecture and speculation, is grossly excessive and cannot be sustained. *University of Southern Mississippi v. Williams,* 891 So.2d 160, 175-176 (citing

Frierson v. Delta Outdoor, Inc., 794 So.2d 220, 225 (Miss. 2001)) (stating that the law limits speculation and conjecture and imposes duties of mitigation to the injured party and that damages may only be recovered when the evidence presented at trial removes their quantum from the realm of speculation and conjecture and transports it through the twilight zone and into the daylight of reasonable certainty). Because the trial court has offered no insight as to the basis of this award, and because Plaintiff put forth no evidence of damages at trial other than his own testimony regarding his anger and feelings of self-worth, the award of damages cannot be sustained.

Furthermore, the total award in this case of $500,000.00 is outrageous and extravagant in light of the insufficient evidence presented at trial. Under Mississippi law, where an award of damages such as the one awarded to Plaintiff by the trial court is "so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous" and is apparently, with all due respect, "actuated by passion, partiality, prejudice or corruption," a remittitur is proper. *Jackson Public School District v. Smith*, 875 So.2d 1100, 1104 (¶ 19) (Ct. App. Miss. 2004). In determining whether an award is excessive, this Honorable Court should consider "[t]he amount of physical injury, mental and physical pain, present and future, temporary and permanent disability, medical expenses, loss of wages and wage-earning capacity and sex, age and health of the injured plaintiff." *Id.* Where evidence of the same is absent or grossly inadequate, the amount of the damages award should reflect the evidentiary deficiency.

In an attempt to garner support for his argument, Plaintiff points to the recent case of *Miss. State Fed. of Colored Women's Club Housing for the Elderly v. L.R.*, 2010 WL 5173604 (Miss. 2010). In that case, an 11-year-old girl was statutorily raped and gave birth to a child. *Id.* at 354. However, unlike the instant case, the *L.R.*.case was tried to a jury. *Id.* Moreover, in support of her damages, the minor

L.R. presented medical bills totaling $14,453.53 and expert testimony of $50,000.00 in needed future psychiatric care. *Id.* at 357. Based on those proven damages, the jury returned a verdict in the amount of $200,000.00. *Id.* at 358. Accordingly, the instant Plaintiff's reliance on this case is unfounded and its facts could not be any more dissimilar to the case at bar. Unlike the instant case, the *L.R.* case was tried to a jury with alleged damages that were supported by medical bills and expert testimony. As such, the only explanation for the Plaintiff's inclusion of this case in his brief is simply to place before this Honorable Court a case involving a minor done wrong and the Mississippi Supreme Court's sustaining a verdict with a large number.

Plaintiff also cites to the case of *City of Greenwood, Mississippi v. Valerie Streeter, by and through her Next Friend, Patricia Westbrook*, Supreme Court Case No. 2009-CA-00024-SCT as a MTCA case upholding a $500,000.00 verdict. (See Appendix to Brief of Appellee). There, Streeter was a 35 year-old mentally handicapped female who was the victim of a sexual assault by male prisoners that were under the supervision of the City of Greenwood at the time of the assualt. (*Id.*, Tab 1 of Appendix to Brief of Appellee at Page 3). The *Streeter* court was faced with a set of facts that included an employee of the City of Greenwood knowingly allowing and assisting the prisoners to carry out these acts. *See generally, id.* Moreover, the *Streeter* court viewed the facts presented to it under the purview of *Miss. Code Ann.* § 97-3-95(1)(b), which makes it unlawful for anyone to engage in sexual penetration with a mentally incapacitated person such as Streeter. *Id.* at 3. Unlike the instant Plaintiff, in support of her claim for damages, *Streeter* produced expert testimony as to her psychological damages, and the trial court also found that her injuries were likely to continue in the future. *Id.* at 9. As such, the trial court in *Streeter* awarded the Plaintiff $500,000.00, which was the damages cap for the time period of the incident involving

Streeter. *See Miss. Code Ann.* § 11-46-15(1)(c) ("liability shall not exceed...for claims or causes of action arising from acts or omissions occurring on or after July 1, 2001, the sum of...($500,000.00)). Here, though we are dealing with a Plaintiff that was a minor at the time of the alleged incident, Plaintiff is certainly not a mentally incapacitated person. Further, unlike the *Streeter* plaintiff, the instant Plaintiff produced no expert testimony to support his claim for damages and the trial court made no finding as to the likely continuation of any alleged damages. As such, the only explanation for the Plaintiff's inclusion of this case in his brief is simply to place before this Honorable Court a case sustaining a verdict with a large number. Again, in the instant case, there was no evidence presented to establish past or future medical expenses for treatment or therapy, physical manifestation of an emotional or mental injury, loss of wage earning capacity, disability, etc. Therefore, in contrast to both cases cited by Plaintiff, the amount of the trial court's award is unreasonably high in comparison to the evidence submitted and should be reduced accordingly.

Perhaps most importantly, the trial court's factual basis for the award of such damages is in complete contrast to the undisputed evidence presented at trial. In its *Opinion and Order*, the trial court found that DHS was required to make three face-to-face contacts with Wilson from October 4, 1996 through June 6, 1997, but made only one. (R. at 132-134.) However, contrary to the findings of the trial court and as correctly pointed out by the Mississippi Court of Appeals in their 2007 opinion in this case, DHS did, in fact, make two face-to-face contacts with Wilson - one on April 25, 2007 and June 6, 2007. (R. at 1126, 1128.). Additionally, however, a third visit did, in fact, occur when a DHS worker transported Plaintiff from CCDU to SNIPS on October 31, 1996. (R. at 1172.) Accordingly, the trial court's finding that the Defendant only made one of three quarterly required face-to-face visits is in clear contradiction to the Court of Appeals' 2007 opinion, and the evidence presented at trial.

Additionally, in its *Opinion and Order*, the trial court found that DHS was required to make six face-to-face contacts with the Plaintiff from July 1, 1997 through December 11, 1997, but made none. Again, as previously stated and contrary to the findings of the trial court, the Defendant did, in fact, make at least five face-to-face contacts with Plaintiff. Despite Plaintiff's assertion that there was no live testimony to authenticate documents, according to the record, face-to-face visits during that time period actually occurred with Plaintiff on July 7, 1997; August 20, 1997; September 4, 1997; September 7, 1997; and November 6, 1997. (R. at 875, 820, 1135, 1138.) Moreover, at least six attempts to make face-to-face contact with Plaintiff occurred in the same time period, but were not made since Plaintiff was absent at the time of the scheduled in-home meetings, despite being advised of the appointments. (R. at 872, 876, 1132, 1136-1138.) Because the Defendant actually visited with Plaintiff on at least five occasions and attempted at least six more visits, the trial court's finding that zero visits occurred during this time period was clearly made with a blatant disregard to the evidence presented.

Plaintiff could have offered evidence of psychological treatment or therapy, an expert medical opinion as to the effect of the Defendant's alleged actions on his psyche, a decrease in his overall quality of life, disability, etc. However, at trial, Plaintiff established nothing more than the fact that he was angry and distressed. Such testimony, alone, is insufficient to establish *any award* of damages, much less an award of $50,000.00 *per breach* of duty. As previously stated, even if the evidence presented did warrant an award of damages in this case, it is clear that the amount of the award was nothing more than a guess as to the amount of damages suffered by Plaintiff. Moreover, the award was grossly excessive in light of the particular facts of the case and the evidence presented at trial. Accordingly, a remittitur was proper and the trial court erred in failing to amend the judgment.

III. THE MTCA LIMITS WILSON'S TOTAL AWARD IN THIS CASE TO NO MORE THAN $50,000.00.

The pertinent portion of the Mississippi Tort Claims Act ("MTCA") regarding the damages cap and which is applicable to the instant case reads as follows:

> (1) In any claim or suit for damages against a governmental entity or its employee brought under the provisions of this chapter, the liability shall not exceed the following for ***all claims*** arising out of a single occurrence for all damages permitted under this chapter:
>
> (a) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1993, but before July 1, 1997, the sum of Fifty Thousand Dollars ($50,000.00); [and]
>
> (b) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1997 but before July 1, 2001, the sum of Two Hundred Fifty Thousand Dollars ($250,000.00)[.]
>
> . . .
>
> (3) . . . [I]f the verdict which is returned . . . would exceed the maximum dollar amount of liability provided in subsection (1) of this section, the court shall reduce the verdict accordingly and enter judgment in an amount not to exceed the maximum dollar amount of liability provided in subsection (1) of this section.

Miss. Code. Ann. § 11-46-15. In the instant case, as stated *supra*, the trial court awarded the Plaintiff $50,000.00 for each allegedly neglected face-to-face contact, $50,000.00 for DHS's inadequate investigation of Plaintiff's mother's allegations of inappropriate behavior and also $50,000.00 for DHS's failure to provide adequate counseling upon Plaintiff's re-placement in his own home, for a grand total of $500,000.00. The trial court contends as stated in its *Opinion and Order*, and Plaintiff conveniently agrees, that each of the neglected contacts, the inadequate investigation and the failure to provide

counseling each constitute 10 separate occurrences[2] - with two of the neglected face-to-face contacts occurring prior to July 1, 1997 and being subject to the $50,000.00 cap and the other 6 neglected contacts, the inadequate investigation and the failure to provide counseling each occurring after July 1, 2007 and being subject to the $250,000.00 cap. Respectfully, however, contrary to the trial court's ruling and Plaintiff's argument, all of Plaintiff's claims in this case against the Defendant constitute one single occurrence for the purposes of the MTCA and are therefore subject to one single cap on damages.

Where the language of a statute is unambiguous, the terms within the statute will be given their plain meaning. *Mississippi Department of Transportation v. Allred*, 928 So.2d 152, 154 (Miss. 2006) (quoting *City of Natchez v. Sullivan*, 612 So.2d 1087, 1089 (Miss. 1992)). Here, the language of § 11-46-15 is unambiguous and should therefore, be construed as written. The statute states unequivocally that "in any... suit... liability shall not exceed the following for all claims" and sets forth the pertinent amount. Accordingly, it cannot be disputed that, as explicitly set forth in the statute, all of Plaintiff's claims for damages, as brought forth together in one single suit and regardless of the number of theories of recovery, are aggregately subject to one damages cap.

As set forth in the cases both Plaintiff and Defendant cite to support their argument, the purpose of the MTCA is to limit the liability of the State's governmental entities and has been consistently interpreted by this Honorable Court in favor of governmental immunity as opposed to waiver thereof. See *Allred v. Yarborough*, 843 So.2d 727 (Miss. 2003) (holding that holding that the MTCA provides for one maximum

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[2] Again, the trial court's finding that DHS failed to make 8 of the 9 required face-to-face contacts is simply wrong and should have been amended to reflect that no more than 1 of the required visits was missed.

dollar amount of liability, regardless of the number of claimants) and *MDOT v. Allred, supra* (2006) (holding that the MTCA provides for one maximum dollar amount of liability, regardless of the number of governmental entities sued). However, Plaintiff avers that each of the ten different failures in the trial court's findings constitute a separate "single occurrence" for purposes of the MCTA. Set against the backdrop that "per occurrence" does not mean "per claimant," this does not make logical sense. Consider the possible scenario where this Defendant's alleged failures would constitute a "single occurrence" of negligence, but occurring with multiple plaintiffs being wronged. Would each plaintiff be entitled to a separate damage "cap?" The Mississippi Supreme Court, in *Allred* and *MDOT*, made it clear they would not. How then is it different that each alleged failure of this Defendant is to be considered a separate "single occurrence" of negligence which would entitle the Plaintiff to the possibility of being awarded the "cap" for each alleged omission or failure of this Defendant? It is not, and Plaintiff cites to no specific authority other than their saying it is so. To so interpret the statute would be an absurd result and would undermine the legislative intent of enacting the MTCA to allow for a somewhat predictable limitation of liability of the State's governmental entities.

Plaintiff is correct that the case of *City of Jackson v. Stewart* is a case which involved the Court's preclusion of double recovery by a Plaintiff under separate theories of tort and breach of contract. *City of Jackson v. Stewart*, 908 So.2d 703 (Miss. 2005). However, the Mississippi Supreme Court's ruling is nonetheless applicable and instructive in the instant case. In *City of Jackson*, the Court held that where a Plaintiff's numerous claims arise out of the same set of operative facts and allege the same damages, the Plaintiff cannot recover separately under multiple, separate theories of recovery, "as there can be but one satisfaction of the amount due the plaintiff for his damages." *City of Jackson*, 908 So.2d at 711-712 (¶

41) (Miss. 2005) (holding that a plaintiff cannot avoid the limitation of liability under the MTCA by recovering the separate damages for the same harm under separate theories of recovery). In other words, where the facts of a claim or claims operate together to cause the same harm, the facts will constitute one single occurrence for the purposes of recovery. In the instant case, Plaintiff sought recovery for the alleged negligence of the Defendant which spanned over the course of a 14-month period beginning October, 1996 and ending December, 1997. Plaintiff vaguely alleged damages which resulted from the cumulative actions of the Defendant over that entire time period. Because Plaintiff did not allege or establish any specific, separate injury resulting from each of the separate theories of recovery against the Defendant at trial, it must be assumed that his alleged damages were the result of the cumulative effect of the Defendant's alleged acts/omissions occurring over the course of the entire 14-month period. The acts would therefore logically constitute a single occurrence for the purposes of the MTCA and one single cap would apply to limit the total amount of Plaintiff's alleged damages in this case, if any. Moreover, this Defendant would submit that, because Wilson was first exposed to the alleged wrongful act or omissions of DHS prior to July 1, 1997, the maximum amount recoverable by Plaintiff in this case is $50,000.00.

Alternatively, without waiver of the previous argument, this Defendant would submit that since the subject "occurrence" arose from acts or omissions occurring on or after July 1, 1997, but prior to July 1, 2001. Therefore, since the Plaintiff's alleged damages are the cumulative effect of the actions of the Defendant spanning over the course of October, 1996 to December, 1997, the maximum amount recoverable by the Plaintiff in this case is $250,000.00.

CONCLUSION

Because the Plaintiff has failed to establish an entitlement to any damages whatsoever in this case, the judgment rendered by this Court should be amended to reflect an award of only nominal damages against DHS. However, should this Court find that Plaintiff is entitled to more than nominal damages, he is not, under any circumstances, entitled to more than $50,000.00, the maximum amount recoverable under the MTCA. Alternatively, should this Court find that the $250,000.00-damages cap applies to Plaintiff's claims, Plaintiff is not entitled to any more than that amount.

WHEREFORE, PREMISES CONSIDERED, the Appellant, Mississippi Department of Human Services, respectfully requests that this Honorable Court **reverse** the final judgment of the trial court and **render** a judgment in the amount of nominal damages only. Alternatively, Mississippi Department of Human Services requests that this Honorable Court **reverse** the final judgment of the trial court and **render** a judgment not exceeding the amount of $50,000.00. Alternatively, DHS requests that this Honorable Court **reverse** the final judgment of the trial court and **render** a judgment not exceeding the amount of $250,000.00. The Appellant further requests any different and additional relief that this Honorable Court deems necessary and just.

RESPECTFULLY submitted this the 7th day of September, 2011.

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES

BY: 

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CERTIFICATE OF SERVICE

I, Wade G. Manor, one of the counsel of record for Appellant, Mississippi Department of Human Services, do hereby certify that I have this date caused to be delivered, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief* to the following:

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THIS the 7th day of September, 2011.

WADE G. MANOR