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

**RYNE RANKIN** **APPELLANT**

**V.** **CASE NO. 2015-TS-00553**

**KENNETH MATTHEWS AND HEATHER MATTHEWS** **APPELLEES**

**APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI**

# BRIEF OF APPELLEES KENNETH MATTHEWS AND HEATHER MATTHEWS

**ORAL ARGUMENT IS REQUESTED**

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## 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 justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

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   ***Plaintiff/Appellant***

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4. Kenneth Matthews
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   ***Defendants/Appellees***

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6. Honorable M. James Chaney
   ***Warren County Circuit Judge***

By: /s/J. Seth McCoy

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## STATEMENT OF THE CASE

This appeal arises out of a decision by the Circuit Court of Warren County, Mississippi in which it granted summary judgment in favor of the Appellees, Kenneth and Heather Matthews ("the Matthews"). The trial court found that Appellant, Ryne Rankin ("Rankin"), who, although he was injured at the Matthews' residence, failed to establish that there were genuine issues of material fact entitling him to proceed to trial on his premises liability claim.

### *A. Course of Proceedings in the Trial Court*

Rankin filed his Complaint on February 11, 2014 in the Circuit Court of Warren County, Mississippi against Kenneth and Heather Matthews. **R. 6-10.** In his Complaint, Rankin asserted a premises liability claim against the Matthews alleging they were liable to him for injuries he received after being assaulted by Jeremy Carroll while at their residence.[1] The Matthews answered the Complaint admitting that Jeremy Carroll assaulted Rankin while on their property but denying any liability to Rankin as a result of the incident. **R. 13-17.**

An Agreed Scheduling Order was entered on April 9, 2014 setting a discovery deadline of December 1, 2014 and a motion deadline of January 1, 2015. **R. 3/R.E. 3.** The parties engaged in discovery, which included written discovery as well as the depositions of Heather Matthews, Kenneth Matthews and Rankin. At the conclusion of the discovery period, the Matthews filed their Motion for Summary Judgment, Memorandum in Support and Itemization of Undisputed Facts on December 23, 2014. **R. 67-149/R.E. 6-88.** Rankin's Response to the Motion, Response to the

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[1] Contrary to the assertion Rankin makes in his brief, he did not allege negligence per se in his Complaint. Under Rule 8(a) of the Mississippi Rules of Civil Procedure, " A pleading which sets forth a clam for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief." The pleadings must, at the least, provide sufficient notice to the defendant of the claims and grounds upon which relief is sought. *Magnum v. Mississippi Parole Bd.*, 76 So. 3d 762, 767 (Miss. Ct. App. 2011).

Itemization and Memorandum were filed on February 9, 2015. **R. 221-342/R.E. 89-210.** A Rebuttal was filed on February 17, 2015. **R. 343-355/R.E. 211-223.** Warren County Circuit Judge James Chaney, Jr. heard the motion on February 19, 2015. **Tr. 1-29**.

On March 4th, the trial court entered its Opinion and Order granting summary judgment in favor of the Matthews. **R. 361-366/R.E. 224-229.** In its Opinion and Order, the Court held that Rankin was a licensee and not an invitee. **R. 364/R.E. 227.** As the trial court correctly noted, there was no competent evidence that a mutual advantage existed between Rankin and the Matthews or that the Matthews had received any tangible benefit from Rankin. **R. 364/R.E. 227.** Further according to the court, there was no evidence of any active ongoing business concern or active negligence that would implicate the *Hoffman* exception rarely bestowed on certain licensees. **R. 364-365/R.E. 227-28.**

The court found that even if Rankin could somehow be classified as an invitee, there was no competent evidence that the altercation between Rankin and Jeremy Carroll was forseeable and no evidence that the Matthews knew or should have known of any atmosphere of violence. **R. 365/R.E. 228.** Lastly, as to Rankin's suggestion that alcohol may have been consumed by unidentified minors, the court found that there was no proper evidence that alcohol was consumed prior to the incident or that it played in role in the altercation. **R. 365/R.E. 228.**

A Rule 54(b) Final Judgment was filed on March 10, 2015. **R. 367-373/R.E. 230.** The present appeal followed. **R. 374-375.**

***B. Statement of Facts***

The Matthews live in Vicksburg, Mississippi. **R. 75, 88, 99/R.E. 14, 27, 38.** Their son, Connor Matthews, who also lived with them was a member of several area bands. **R. 88, 92/R.E.**

**27, 31**. At various times, a group of bands would come together in venues such as Jackson, Clinton and Vicksburg for a show where each band would play a set of songs generally lasting twenty (20) to forty (40) minutes. **R. 76, 92, 116/R.E. 15, 31, 55.**

In June 2012, Connor asked his parents if the carport at their home could be used for an upcoming show. **R. 76, 90/R.E. 15, 29.** The Matthews agreed the bands could use the carport for a show on June 22, 2012. **R. 76, 90, 108/R.E. 15, 29, 47.** The Matthews had hosted shows at their home two (2) to three (3) times without incident. **R. 76, 90/R.E. 15, 29.** Rankin was a member of a band named "Common Goals." **R. 116/R.E. 55**. His band was invited by Jeremy Carroll to participate in the June 22, 2012 show, and he was present on the Matthews' property with their permission on that date. **R. 104, 121/R.E. 43, 60.**

For Rankin, the show at the Matthews' home was just an opportunity for his band to play in front of small audience. **R.122/R.E. 61.** He neither paid nor received any compensation for his appearance. **R. 121-22/R.E. 60-61.** However, as was customarily done, $5.00 was collected from attendees which was then used to pay for gas for the bands that traveled from out-of-town. **R. 77, R. 90-91, 108, 119/R.E. 16, 29-30, 47, 58.** This fund was not a cover charge or a means of compensating the Matthews for allowing the bands to play. **R. 90, 94, 108/R.E. 29, 33, 47.** Rankin's band was not given any gas money and did not ask for any money collected to pay for gas. **R. 120, 122/R.E. 59, 61.**

After Rankin's band, "Common Goals," completed its set, he watched one or two bands play. **R. 123/R.E. 62.** Someone tapped him on the shoulder and said that Jeremy Carroll wanted to talk to him. **R. 123/R.E. 62.** Rankin went to Carroll and asked Carroll if he wanted to talk to him. **R. 123/R.E. 62.** Carroll accused him of talking about him. **R. 123/R.E. 62.** An altercation occurred,

and Carroll struck Rankin in the mouth causing injuries. **R. 123, 125/R.E. 62, 64.**

Neither Rankin nor the Matthews observed anyone with alcohol at the show, and there isn't any evidence that Jeremy Carroll was using alcohol that night. **R. 78, 95, 121, 122/R.E. 17, 34, 60, 61**. Other than one noise complaint during a practice session, the Matthews had not previously had any issues related to allowing bands to play on their property. **R. 78, 91/R.E. 17, 30.**

## SUMMARY OF THE ARGUMENT

In his complaint, Rankin asserted a claim based on premises liability contending that he held the status of an invitee while present at the Matthews' home. He further alleged that as an invitee, the Matthews owed him a duty of reasonable care to provide a safe environment, to supervise their guests, and to maintain the premises in a reasonably safe condition. Further, in response to the Matthews' motion for summary judgment, Rankin claimed that even if he was a mere licensee, the *Hoffman* exception should be applied to this case entitling him to a duty of reasonable care.

Throughout the litigation, the Matthews have asserted that Rankin held the status of a licensee inasmuch as he was a social guest at their home, and they did not receive any tangible benefit from his presence. Further, a mutual advantage did not exist between the Matthews and Rankin. As a licensee, the Matthews had a duty to refrain from willfully and wantonly injuring Rankin.

Rankin failed to produce any credible evidence that he was an invitee while present on the Matthews' property. He did not convey any tangible benefit to the Matthews. Further, the credible evidence before the court did not support even an inference that the Matthews had willfully and wantonly injured Rankin. Moreover, the record established that the Matthews were not engaged in an ongoing business at their Vicksburg home and did not engage in any active negligence. Consequently, the *Hoffman* exception was inapplicable.

Based on the evidentiary record, the Warren County Circuit Court properly granted summary judgment on Rankin's premises liability claim against the Matthews. Rankin failed to present a legally sufficient evidentiary basis to support his claim that he was an invitee or that as a licensee he was entitled to rely on the *Hoffman* exception, an exception which is reserved only for those cases involving an ongoing business and active negligence by the property owner. Therefore, the court's decision granting summary judgment in favor of the Matthews was correct and should be affirmed by this appellate court.

## ARGUMENT

### I. Standard of Review

The Mississippi Supreme Court has held that where the trial court's judgment involves the interpretation of legal principles, this Court will conduct a *de novo*, or plenary review of its interpretation and reverse only where it finds the trial court in error. *Long v. Memorial Hospital at Gulfport*, 969 So. 2d 35, 38 (Miss. 2007) (citing *Bennett v. McCaffrey*, 937 So. 2d 11, 14 (Miss. 2006)). In considering a trial court's grant of a motion for summary judgment, the appellate court examines all the evidentiary matters before it- admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. *City of Jackson v. Sutton*, 797 So. 2d 977, 979 (¶7) (Miss. 2001).

The Mississippi Supreme Court has clarified the summary judgment standard, stating that "the movant bears the burden of persuading the trial judge that: (1) no genuine issue of material fact exists, and (2) on the basis of the facts established, he is entitled to a judgment as a matter of law." *Karpinsky v. American Nat'l Ins. Co.*, 109 So. 3d 84, 88 (¶ 11) (Miss. 2013) (citation omitted).

While defendants carry the initial burden of persuading the trial judge that no issue of material facts exists and that they are entitled to summary judgment based on the established facts, the plaintiff carries the burden of producing sufficient evidence of the essential elements of her claim

at the summary judgment stage as she would carry the burden of production at trial. *Karpinsky*, 109 So. 3d at 88 (¶13) (Miss. 2013).

In order to survive a motion for summary judgment, the party opposing the motion must present sufficient proof to establish each element of each claim. *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 684 (Miss. 1987). Further, a party opposing summary judgment must present more than a scintilla of colorable evidence to support his claims. *Luvene v. Waldrup*, 903 So. 2d 745, 748 (¶10) (Miss. 2005). The evidence must be sufficient that a fair-minded jury could return a favorable verdict. *Id.* at (¶ 13). The mere presence of fact issues in the record does not per se entitle a party to avoid summary judgment. The court must be convinced that the fact issue is a "material" one, one that matters in an outcome determinative sense. *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985).

**II. Mississippi Premises Liability Law**

Mississippi law is well settled that in a premises liability case, as in all negligence actions, the plaintiff must prove four elements: (1) duty; (2) breach of duty; (3) a causal connection between the breach and the damages; and (4) damages. *Double Quik, Inc. v. Lymas*, 50 So.3d 292, 298 (Miss. 2011). When a person is injured on the premises of another, the duty owed varies depending on the legal status of the individual at the time of the injury, and an initial determination of whether the person is an invitee, licensee or trespasser is made. *Otts v. Lynn*, 955 So.2d 934, 939 (Miss. Ct. App. 2007). The injured person's status is the threshold inquiry in any premises liability action. *Nunez v. Spino*, 14 So.3d 82, 84 (Miss. Ct. App. 2009).

As to status, someone who enters the property of another for his own convenience, pleasure or benefit pursuant to the license or implied permission of the premises owner is classified as a licensee. *Evans v. Hodge*, 2 So.3d 683, 686 (Miss. Ct. App. 2009). An invitee is one who enters the

premises of another in answer to the express or implied invitation of the owner or occupant for their mutual advantage. *Otts*, 955 So.2d at 939.

In order to hold the status of an invitee, both the owner and the visitor must receive mutual benefits. *Leffler v. Sharp*, 891 So.2d 152, 157 (Miss. 2004). The distinction in status between an invitee and licensee focuses on whether the landowner actually receives an advantage as is necessary for an invitee or simply permits the person's presence in the case of a licensee. *Daulton v. Miller*, 815 So.2d 1237, 1239 (Miss. Ct. App. 2001).

## III. The Warren County Circuit Court properly found that Kenneth and Heather Matthews did not collect or require the collection of money; did not receive any tangible benefit; and, did not obtain a tangible benefit by virtue of their son's performance.

In his brief, Rankin contends that the Warren County Circuit Court made three statements that amount to factual determinations that were erroneously resolved in favor of the Matthews: (1) that there is no competent evidence that the Matthews collected any money or told anyone to collect money; (2) that there is no evidence that the parents received any tangible benefit; and, (3) that the exposure the Matthews' son received was not a tangible benefit. Further, Rankin claims that the trial court then made improper legal determinations based on these factual determinations and failed to draw all inferences in favor of the non-moving party.

Taking each of Rankin's claims one by one, the credible evidence before the trial court and before this Court clearly confirms the findings and decisions reached by the trial court: (1) the Matthews did not collect or tell anyone to collect money; (2) the Matthews did not receive a tangible benefit; and (3) the exposure the Matthews' son received was not a tangible benefit to the Matthews.

### *A. All competent evidence supports the trial court's finding that Kenneth and Heather Matthews did not collect or require the collection of money, and therefore, he was a licensee.*

In order to hold the status of an invitee, the plaintiff must show that a mutual advantage between the property owners and the visitor existed. *Otts*, 955 So.2d at 939. As to the issue of mutual advantage, Rankin argues that the trial court made an erroneous factual determination in favor of the Matthews when it found that there was no competent evidence that the Matthews had collected any money or told anyone else to collect anyone. However, all of the competent summary judgment evidence including Rankin's own sworn testimony, supports the court's finding. Indeed, the evidence is so clear that the Matthews did not collect or receive any money that an inference to the contrary cannot be drawn.

Had the Matthews received any compensation from Rankin or anyone else to attend the show, Rankin's claim to invitee status would, at least, be plausible. However, both Heather and Kennth Matthews testified that they were not the ones who collected the money or benefitted from the money collected. In her deposition, Heather Matthews testified as follows:

> Q. Were you aware of the fact that a fee or a cover charge or some money was charged to - to attend the show on June 22nd, 2012?
>
> A. I knew that they took money to pay out-of-town bands for gas.
>
> Q. Okay. Are you aware of how much they charged each person?
>
> A. Maybe $5.
>
> Q. Okay.
>
> A. I'm guessing.
>
> Q. Do you recall who collected that money?
>
> A. I have no idea who collected the money.
>
> Q. Okay. Are you aware that that fee, so to speak, was charged in the past with some of the shows at your house?

A. I knew that at most shows, even when my son would attend a show, he had to pay –

Q. Okay.

A. – a fee always to pay out-of-town bands' gas. That's totally what it was for, was to pay the touring bands' or traveling bands' gas money.

**R. 77/R.E. 16.**

Similarly, Kenneth Matthews testified as follows concerning the money collected:

Q. Okay. Were you aware there was going to be a cover charge to attend the party?

A. No, I didn't know of any cover charge.

Q. Okay. Is that something that had occurred to your knowledge in the past with any of the past parties?

A. I had heard that they charged money to pay gas for the bands that were from out of town -

Q. Okay.

A. – but I don't even know how much they charged or what they did . I had heard that they had done that.

Q. Okay. Do you know who collected the –

A. No, I don't.

Q. – the cover charge?

A. I don't.

Q. Okay. So is it fair to say it's your understanding that the money was - was disbursed to the bands that were coming in -

A. Yes.

Q. – from out of town?

A. Right.

Q. Okay. But are you aware of how much was charged at any of these parties –

A. No, I wasn't.

Q. – per head, so to speak?

A. Not at all.

**R.90-91/R.E. 29-30.**

The Matthews' sworn testimony is that the money was not a cover charge to compensate them for allowing the bands to play. Based on this credible evidence, an inference cannot be made that would favor Rankin.

Even according to Rankin's sworn testimony, the money did not go for any other purpose other than to provide gas money for the out-of-town bands. **R. 119/R.E. 58.** Although money was collected to pay for gas for the out-of-town bands, Rankin's band was not given any gas money and did not ask for any money collected to pay for gas. **R. 122/R.E.61.** His band was not given any kind of incentive to come perform.

Rankin urges this Court to infer that Heather Matthews asked or allowed funds to be collected because his affidavit as well as the affidavit of Levi Crotwell states that a $5.00 cover charge per person was collected and because he observed Heather Matthews viewing the bands's performance. Neither Rankin nor Crotwell stated in their affidavits that the Matthews collected any money only that money was collected. Rankin testified that he guessed that Jeremy determined who got the gas money. The Matthews' sworn testimony evidences that they did not ask that money be collected. Even if they allowed money to be collected, the parties' testimony clearly establishes that it was for the benefit of out of town band members and not for the Matthews.

Under these undisputed facts, there cannot be any inference that the Matthews somehow

benefitted monetarily from allowing these bands to play sets in their carport.

***B. All competent evidence supports the trial court's finding that Kenneth and Heather Matthews did not collect or receive money from attendees. Additionally, there is no credible evidence that, had money not been collected from the attendees, the Matthews would have reimbursed the bands for their gasoline expenses.***

It is Rankin's position that the Matthews' undisputed facts do not specifically state that the Matthews did not collect the money or ask that it be collected and, therefore, the Court should infer that the Matthews received some sort of benefit from collecting funds or having the funds collected. Rankin speculates that the Court should infer that without the collection of gas money, the Matthews would have been compensating the out of town bands.

The following itemized fact is contained in the Itemization of Undisputed Facts in Support of the Motion for Summary Judgment.

> 5. The shows were held at various locations around the area. It was the custom, regardless of location, for approximately $5.00 to be collected from attendees to pay for gas for the bands that traveled from out-of-town. The money was not a cover charge to compensate the Matthews for allowing the bands to play. (emphasis added)

Moreover, the Mississippi appellate courts have previously held that where the relevant excerpts from the pleadings, discovery and depositions, and memorandum of authorities describe the undisputed facts, the party moving for summary judgment has met its requirement to identify undisputed facts in support of the motion for summary judgment. *Otts v. Lynn*, 955 So. 2d 934, 942 (Miss. Ct. App. 2007). The facts contained in the record and outlined herein clearly demonstrate that the Matthews did not collect or receive any money from the show. *See supra, "Statement of Facts."*

Further, it was the custom and practice, regardless of where the show took place, that attendees pay a nominal amount of money to compensate the out-of-town bands for their gasoline expenses. **R. 77, R. 90-91, 108, 119/R.E. 16, 29-30, 47, 58.** This was not something unique to the

Matthews, and there is no evidence to even insinuate that the Matthews would have been obligated to compensate the bands for gasoline expenses.

### *C. All competent evidence supports the trial court's finding that Kenneth and Heather Matthews did not receive a tangible benefit, and therefore, he was a licensee.*

Rankin also claims that the itemization does not contain a statement that the Matthews received no benefit from these funds or from their son's exposure at the event. Rankin's brief then quotes No. 5 of the itemized facts but omitting the last sentence which states: The money was not a cover charge to compensate the Matthews for allowing the bands to play. (emphasis added) Thus it is clear that the Matthews did not receive compensation (a benefit) for allowing the bands to play. Moreover, the sworn testimony of Heather and Kenneth Matthews directly affirms that the Matthews did not receive any monetary benefit from the collected funds. **R. 77, 90-91/R.E. 16, 29-30.**

Lastly, Rankin claims that the itemization is deficient because it does not contain a statement that they did not receive a benefit from their son's exposure at the event. Even assuming that "exposure" is a benefit, it is a benefit that would accrue to the son and not to the Matthews. Further, as is discussed below, a benefit must be tangible, and "exposure" is not a tangible benefit. Rankin's claim that the Matthews benefitted because of their son's exposure is simply speculation. A benefit must be more than a psychological advantage to transport a guest from the status of a licensee to the status of an invitee. Based on the record before the Court which consists of pleadings, depositions and other evidence, there is no credible evidence that establishes or infers that the Matthews received any form of tangible benefit from their son's performance on the night in question.

## IV. The Warren County Circuit Court correctly determined that viewing a show for pleasure or enjoyment is not a tangible benefit and that the Hoffman exception is inapplicable in this case.

### *A. The Warren County Circuit Court correctly decided that Rankin was a licensee and that the benefit and pleasure of viewing the show is not a tangible benefit.*

According to Rankin, the Court should have characterized him as an invitee because the Matthews received the benefit and pleasure of viewing the show for pleasure and entertainment. When considering the premises owner's benefit, however, the benefit must have been received from the injured party. *Doe v. Jameson Inn,* 56 So.3d 549, 555 (Miss. 2011). The record neither establishes nor infers that the Matthews received any benefit by virtue of Rankin's presence on their property.

In *Daulton v. Miller*, 815 So.2d 1237, 1239 (Miss. Ct. App. 2001), the Court noted that the differences in status between an invitee, a licensee or a trespasser focus on the owner and whether that person has received an advantage, just permits the person's presence or opposes that presence. The advantage or benefit must be more than psychological satisfaction. *Daulton*, 815 So.2d at 1239. Mississippi law does not recognize personal satisfaction as the type of mutual benefit that is required to confer the status of invitee.

The Court in *Daulton* likened the property owner's advantage to something that is tangible consideration. "Tangible" is defined in Black's Law Dictionary as follows:

> Having or possessing physical form. Capable of being touched or seen; perceptible to the touch; tactile; palpable; capable of being possessed or realized; readily apprehensible by the mind; real; substantial.

BLACK'S LAW DICTIONARY 1456 (6th ed. 1990).

Moreover, Rankin's claim that the Matthews received a benefit because they were able to view the show for their own pleasure and entertainment is pure speculation and insufficient to establish a tangible benefit. See *Sharlow v. Raybourn*, 135 So.3d 238, 242 (Miss. Ct. App. 2014) (holding that speculation regarding "free advertisement" insufficient to confer benefit).

***B. The Hoffman exception does not apply in this case because the Matthews did not engage in affirmative or active negligence in the operation or control of a business.***

The *Hoffman* exception was first announced in *Hoffman v. Planters Gin Co*., 358 So.2d 1013 (Miss. 1978), a case in which the Mississippi Supreme Court applied the standard of reasonable and ordinary care to a licensee. In *Hoffman*, the Court held that the higher standard of care applies to a licensee where the injury is proximately caused by the premises owner's affirmative or active negligence in the operation or control of a business which subjects a licensee to unusual danger or increases the hazard to the licensee when the presence of the licensee is known. *Hoffman*, 358 So.2d at 1013.

In order to fall within the *Hoffman* exception, the landowner must be aware of the licensee's presence upon the premises, the landowner must engage in affirmative or active negligence in the operation or control of a business, the landowners' conduct must subject the licensee or invitee to unusual danger or increase the hazard to him, and the landowner's active or affirmative negligence must have proximately caused the plaintiff's injury. *Little v. Bell*, 719 So.2d 757, 761 (Miss. 1998).

In this case, the *Hoffman* exception fails because there is no credible evidence that the Matthews were engaged in the operation or control of a business on their property. The show was an isolated activity and not an ongoing commercial endeavor.

Further, the Hoffman exception only comes into play where a property owner was guilty of active negligence. Passive negligence is defined by Mississippi Courts as the failure to do something that should have been done. *Doe v. Jameson Inn,* 56 So.3d at 555. Plaintiff's brief alleges that the Matthews failed to have any safety or security measures in place and failed to assist Rankin following the assault. Such allegations could be the very definition of passive negligence and therefore, the *Hoffman* exception does not apply.

## CONCLUSION

Based on the record before the Warren County Circuit Court, Ryne Rankin was properly

classified as a licensee for whom Heather and Kenneth Matthews owed a duty not to willfully or wantonly injure. The evidence does not support any other conclusion. Therefore, Heather and Kenneth Matthews respectfully requests that the judgment of the Warren County Circuit Court granting them summary judgment and dismissing Ryne Rankin's claims against them with prejudice be AFFIRMED.

This the 11th day of November, 2015.

Respectfully submitted,

By: /s/ J. Seth McCoy

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## CERTIFICATE OF SERVICE

I, J. Seth McCoy, the undersigned counsel of record hereby certify that I have this day electronically filed the foregoing pleading with the Clerk of Court using the MEC system which sent notification of such filing to the following:

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Further, I hereby certify that I have mailed by United States Mail, the document to the following:

The Honorable M. James Chaney
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This the 11th day of November, 2015.

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