IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2016-CA-01637

BEVERLY IRWIN- GILES **APPELLANT**

VS.

PANOLA COUNTY, MISSISSIPPI **APPELLEE**

BRIEF OF APPELLANT

APPEALED FROM THE CIRCUIT COURT
OF PANOLA COUNTY, MISSISSIPPI
CIVIL ACTION 2015-257SMP2

Ralph E. Chapman, Esq.
Dana J. Swan, Esq.
Sara B. Russo, Esq.
CHAPMAN, LEWIS & SWAN
Post Office Box 428
Clarksdale, MS 38614
Telephone: (662) 627-4105
sara@chapman-lewis-swan.com

Larry O. Lewis, Esq.
Law Offices of Larry O. Lewis
P. O. Box 209
Marks, MS 38646
Telephone: (662) 326-4223
larrylewislaw@bellsouth.net

Attorneys for Appellant

ORAL ARGUMENT 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 this Court may evaluate potential disqualifications or refusal.

1. The Honorable Smith Murphey, V, Circuit Court Judge
2. S. Ray Hill, III, Esq. and David O'Donnell, Esq. of Clayton O'Donnell, PLLC
3. Larry O. Lewis, Esq.
4. Ralph E. Chapman, Esq., Dana J. Swan, Esq. and Sara B. Russo, Esq. of Chapman, Lewis & Swan PLLC.

So certified, this the 11th day of April, 2017.

Sara B. Russo, Esq.
CHAPMAN, LEWIS & SWAN
Attorney for Appellants
Post Office Box 428
Clarksdale, MS 38614

s/Sara B. Russo
Sara B. Russo, MSB No. 101440

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STATEMENT OF POSITION REGARDING ORAL ARGUMENT

The Appellant respectfully requests oral argument. This appeal presents complicated facts and legal issues, and an oral argument would be beneficial to this Court and to the parties. The Appellant therefore respectfully submits that oral argument would be appropriate in this case.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF APPELLANT

COMES NOW, the Plaintiff/Appellant, Beverly Irwin-Giles, by and through counsel, and files this her Brief of Appellant. The Appellant would state unto the Court that factual issues remain which must be resolved by the trier of fact. Therefore, the granting of summary judgment was improper.

STATEMENT OF ISSUE

Did the trial court err in granting the motion for summary judgment filed by the Defendant/Appellee Panola County, Mississippi (hereinafter "Panola County"). The standard of review is de novo. See *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1209-10 (Miss. 2001).

STATEMENT OF THE CASE

After notice was given pursuant to Miss Code Ann. § 11-46-11, on or about November 12, 2015, the Plaintiff/Appellant, Beverly Irwin-Giles, filed suit in the Circuit Court of Panola County, Mississippi against Defendants/Appellees Panola County, Mississippi; Panola County Sheriff's Department and Terry Smith. R. 5-10. This suit arose out of a motor vehicle accident which occurred on or about July 21, 2015, when the Plaintiff's/Appellant's parents, William and Lynda Irwin, were fatally injured when a Panola County Sheriff's Department employee struck the Irwin's vehicle. R. 6-7.

Defendants/Appellees filed their answer on or about January 8, 2016. R. 11-15. On January 11, 2016, Defendants Panola County Sheriff's Department and Terry Smith filed a Motion to Dismiss for Failure to State a Claim. R. 2. A Joint Stipulation of Dismissal of Defendants Panola County Sheriff's Department and Terry Smith was filed on Janaury 12, 2016. R. 2. On May 11,

2016, Defendant Panola County, Mississippi moved for summary judgment. R. 1-7. A hearing on this motion was held on August 26, 2016. The motion was granted in favor of Defendant Panola County, Mississippi on or about October 27, 2016. R. 172-189. The Plaintiff timely perfected this appeal. R. 2-3.

STATEMENT OF FACTS

On July 21, 2015, Lynda Irwin was operating her 2006 Buick Rainier in a westerly direction on and along US Highway 278. R. 6. William Irwin was riding as a front seat passenger. R. 6. Panola County Sheriff's Deputy Terry Smith, who was acting in the course and scope of his employment at the time of the accident, was operating a 2015 Chevrolet Silverado pickup belonging to the Defendant, Panola County, Mississippi, in a northerly direction in the crossover at Terza Road, when he accelerated and ran through a stop sign and stop bar line and entered the path of William and Lynda Irwin's vehicle, and struck the Irwin's vehicle, all of which resulted in severe injuries and ultimately culminated in the deaths of both William Irwin and Lynda Irwin. R. 6-7. According to the accident report and the computer download from the Chevrolet Silverado, Deputy Smith failed to yield the right of way. R. 7. Further, he did not have his siren on or lights flashing, nor did Deputy Smith decrease his speed when he entered the intersection or stop at the stop sign at the intersection or the stop line/bar either. R. 7, 77, 118. In fact, scientific evidence reflects that while he ran through the stop sign that he was continuing to accelerate. R. 118. The Irwin vehicle was in a position which would be clearly visible with no obstructions whatsoever. R. 119, 122-23. Deputy Smith was not in pursuit of another vehicle nor answering an emergency. R. 127-28. Instead, he was merely returning to the sheriff's office. R. 127-28.

At the time of the accident, Terry Smith acted with reckless disregard for the safety of William and Lynda Irwin when entering the crossover and the lane occupied by Plaintiff's decedents

while appreciating the unnecessary risk involved in his actions.

SUMMARY OF THE ARGUMENT

Summary judgment was not proper since factual questions remained as to whether or not Defendant had acted with reckless disregard for the safety of the deceased, William and Lynda Irwin. The Appellant, Beverly Irwin-Giles, demonstrated to the trial court facts sufficient to withstand Defendant's Motion for Summary Judgment and for her claim for reckless disregard be presented in a non-jury trial. It is well-established law that immunity under the Mississippi Tort Claims Act will not be afforded if "the employee acted in reckless disregard of the safety, and well-being of any person not engaged in criminal activity at the time of the injury." Miss. Code Ann. § 11-46-9(1)(c). The acts of Deputy Smith constitute reckless disregard as a matter of law. Alternatively, it is a factual question as to whether or not it constitutes reckless disregard.

On a motion for summary judgment, a court cannot try issues of fact; it can only determine if there are issues to be tried. *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1210 (Miss. 2001) (citing *Baptiste v. Jitney Jungle Stores of Am., Inc.*, 651 So. 2d 1063, 1065 (Miss. 1995)).

ARGUMENT

The trial court committed reversible error when it granted Defendant Panola County's motion for summary judgment. The Appellant demonstrated facts sufficient to withstand Defendant's Motion for Summary Judgment and for her claim for reckless disregard to be presented in a non-jury trial. It is well-established law that immunity under the Mississippi Tort Claims Act will not be afforded if "the employee acted in reckless disregard of the safety, and well-being of any person not engaged in criminal activity at the time of the injury." Miss. Code Ann. § 11-46-9(1)(c). The acts of Deputy Smith constitute reckless disregard as a matter of law. Alternatively, it is a

factual question as to whether or not it constitutes reckless disregard. These are the bullet points that the trial court ignored which mandate reversal. These facts will be discussed in detail below.

1. The sheriff's deputy ran the stop sign.
2. The download of the ACM from the deputy's truck by Plaintiff's/Appellant's expert, Tim Corbitt, and not refuted or mentioned by Defendant's/Appellee's, witness, Brady McMillan establishes:
   a. the deputy's truck could not and did not stop at the stop sign;
   b. the deputy's truck could not and did not stop at the stop line of the median;
   c. the deputy's truck accelerated through the intersection;
   d. there were no obstructions of the deputy's view of the oncoming traffic which had the right of way;
   e. if the deputy had looked, he could have seen the Irwins' vehicle.
3. The deputy had no sirens turned on;
4. The deputy was not in pursuant of anyone or in response to a call;
5. The deputy acted in total and reckless disregard.

I. Evidence must be viewed in light most favorable to the Plaintiff/Appellant

The Appellant demonstrated sufficient facts to establish that Appellee's employee, Deputy Smith, not only failed to stop at the stop sign at the intersection of Lawrence Brothers Road and US Highway 278, but accelerated and moved forward through the intersection, failed again to stop at the stop line on the median and continued to move forward into the Irwins' lane of travel accelerating his vehicle and traveling at an excessive rate of speed, and the deputy did so with reckless disregard. He failed to observe the Irwin vehicle and failed to look for the vehicle. The relevant issue before the trial court was "whether Smith's actions . . . would be considered reckless

disregard". R. 186-87. The facts being viewed in the light most favorable to the Plaintiff precluded a finding of summary judgment, and as such, the trial court's October 27, 2016 Order should be reversed.

A. Failure to Stop at Stop Sign at Lawrence Brothers Road and US Highway 278

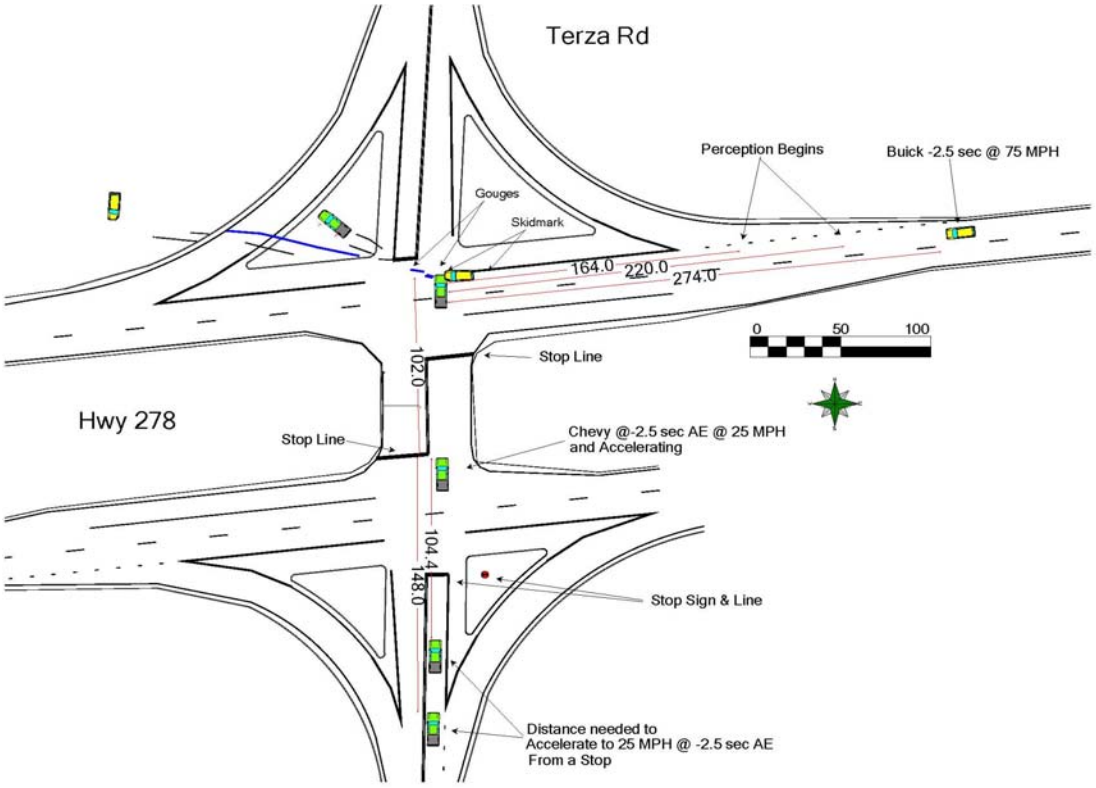
The most glaring deficiency in the trial court's Order is the failure to recognize that the Deputy failed to stop twice in the events leading up to this accident, which under Mississippi law constitutes reckless disregard. Both vehicles were equipped with an airbag control module (ACM) which records certain data in the event of an airbag deployment and some non-deployment events. The ACM records certain vehicle data when the airbags deploy during a crash or when there is a non-deployment event that "wakes up" the system in the anticipation of a deployment of the airbags. The ACM in the deputy's truck recorded data including the accelerator pedal position, vehicle speed (MPH), engine speed (RPM), percent throttle and brake switch circuit state. Data for this truck began recording 2.5 seconds prior to the system "wake-up". This data was downloaded by both the Appellant/Plaintiff and Appellee/Defendant. Appellant's expert, Tim Corbitt, downloaded this information. R. 112-14. Utilizing the information from the download, Mr. Corbitt was able to conclude the following:

- For the 2.5 seconds prior to system wake-up, the deputy's truck increased in speed from 25 mph to 30 mph. This information along with the distance traveled by the truck, establishes that Deputy Smith passed the Stop Line on the north side of center crossover/median without stopping and crossing on into the westbound lanes into the path of William and Lynda Irwin's vehicle.
- Additionally, the accelerator pedal position increases during this time from 25% to 45% and this data coupled with the vehicle speed recorded, places the deputy's truck

35-79 feet south of the stop sign at the Lawrence Brothers Road and US Highway 278 intersection. Deputy Smith drove through the stop sign at the south end of the intersection as well as the stop line at the westbound lanes for US Highway 278.

R. 118-19.

Below is a diagram that provides a visual depiction of these measurements and the minimal distance from the stop sign the deputy's truck was located to accelerate to 25 mph from a stop. R. 123.



T

he accident report even cites the deputy for "Failure to Yield Right of Way". R. 77.

In their motion and the hearing before the trial court, the Appellee/Defendant ignored the

obvious data and failed to make any reference to the ACM download from the deputy's truck and how it established the deputy failed to stop at the stop sign and continued on through the median and never stopped at the stop line, but instead, continued to accelerate.

B. The deputy never saw the Buick vehicle driven by Lynda Irwin

Deputy Smith admits that he did not at any time, prior to or during the accident, observe the Buick vehicle driven by Lynda Irwin.

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Q. And then at what point did you see the Irwins' vehicle, which is the other vehicle involved in this accident?
A. I never saw another vehicle.
Q. Did you see any vehicle traveling westbound on Highway 6?
A. I don't recall if I waited how long for traffic to clear.

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Q. So you don't recall if you waited for traffic to clear going westbound on Highway 6?
A. I recall stopping and waiting for traffic to be clear. I don't recall how long I waited or if there was other vehicles that cleared first.
Q. Okay. I guess I'm confused here. So you don't recall whether or not you had to wait for vehicles to clear on Highway 6 westbound?
A. Yes, I don't recall how long I had to wait for traffic to be clear to safely cross the highway, no.
Q. Or if there was any traffic to clear?
A. I do not remember if there was any traffic.
Q. Okay.
A. Or how long I waited for the traffic to clear.
Q. Okay. So the first time you saw the Irwin vehicle is when you impacted it?
A. I don't remember seeing the vehicle at impact.

R. 128.

The Buick vehicle driven by Lynda Irwin also had an ACM that was downloaded by Appellant's/Plaintiff's expert, Tim Corbitt. R. 116-17. Five seconds prior to the collision, the

Buick was traveling 76 mph with the percent throttle at 15%. R. 116. The data for the Buick is only sampled every one second. Four seconds prior to the collision, the Buick had decreased to 75 mph, and at one second, the throttle position had decreased to zero percent with the engine rpm decreasing as well. R. 116. This information indicates that Lynda Irwin has released the accelerator pedal. The longitudinal delta V data contained in the download is reported in milliseconds. This data indicates that between 50/40 milliseconds to 20 milliseconds prior to system wake-up, the Buick has decreased in speed by 6 mph. R. 116. Based on this data, Lynda Irwin did perceive the impending collision and engaged in emergency braking. Furthermore, contrary to Appellee/Defendant finding no evidence of braking by Mrs. Irwin on the roadway, Appellant's/Plaintiff's expert, Tim Corbitt, did find a skidmark beginning in the right westbound lane of US Highway 278.

> A single skidmark is seen beginning in the right westbound lane near the Fog Line and crossing the Fog Line. This mark has similar characteristics to the tires on the Buick and is at a similar angle to the impact and departure of the Buick.

R. 115.

Miss. Code Ann. § 11-46-9(c) is referred to as the law enforcement exception. This statute does not provide immunity to the Appellee/Defendant Panola County if "the employee acted in reckless disregard for the safety and well-being of any person not engaged in criminal activity at the time of the injury."

The deputy broke the law and violated Miss. Code Ann. §63-3-805. He has violated a criminal statute in Mississippi. He did so by failing to stop at the stop sign, the stop line, by accelerating into the Irwin vehicle's path and by not looking to see that which could so easily and obviously have and should have been seen. What else is necessary to show reckless disregard? The purpose of traffic violation statutes is to keep the public safe. To disregard these traffic violations is to disregard the public safety. This is reckless disregard.

In *City of Jackson v. Lipsey*, 834 So. 2d 687, 693 (Miss. 2003), this Court affirmed a trial court's finding of reckless disregard where an officer collided with a vehicle while responding to an emergency dispatch, but failed to use his sirens or lights. In *Lipsey*, this Court held that "wanton and reckless disregard are just a step below specific intent." *Id.* at 692. This Court has found several instances of a governmental entity waiving its immunity under the Mississippi Torts Claim Act by acting in a reckless disregard.

In *City of Jackson v. Perry*, 764 So. 2d 373 (Miss. 2000), a police officer's conduct was held to be a reckless disregard of the safety and well-being of others when he was speeding without using his sirens or blue lights on the way to dinner–not responding to an emergency call. In *Maye v. Pearl River County*, 758 So. 2d 391 (Miss. 1999), a sheriff's deputy was found to have acted with a conscious indifference to the consequences of his actions and those actions rose to reckless disregard when the deputy backed his car up an incline to the entrance of a parking lot and he collided with another driver. This Court held that the plaintiff was not required to show that the sheriff intended to hit the vehicle when he backed out of the parking lot. *Id.* at 395.

The Panola County Deputy knowingly ran the stop sign through a major intersection with a US Highway. He was not responding to an emergency, and he was not required to be in a hurry to return to the Sheriff's Department. Like the deputy in *Maye*, Deputy Smith acted with "a conscious indifference to the consequence of his actions", and this indifference resulted in the fatal injuries of William and Lynda Irwin. This Court has repeatedly upheld that this type conduct constitutes reckless disregard of the safety and well-being of others. The failure to stop at a stop sign at an intersection of a major highway constitutes reckless driving under Miss. Code Ann. §63-3-1201. US Highway 278 is a through highway under Miss. Code Ann. §63-3-1001. William and Lynda Irwin had the right of way, and the deputy acted in reckless disregard by running the stop

sign. The Irwins had the right of way pursuant to Miss. Code Ann. §63-3-802.

The trial court erroneously held that Deputy Smith was not acting in a reckless disregard by stating the deputy was not driving a 100 mph, not pursuing anyone, his view was not blocked or the accident occurred at a dangerous intersection, and on this basis, the trial court granted Panola County's motion for summary judgment. Nowhere in the litany of cases cited in the order, did this Court or the Court of Appeals hold that these are the only ways to act in a reckless disregard. The standard for reckless disregard is clear as noted by this Court in *Lipsey*. Reckless disregard is "just a step below specific intent". The facts of the present case are very similar to the facts in *Perry* and in *May*e, where the court found the officers to act with reckless disregard when they disregarded the safety of others and had a conscious indifference to the consequences of his actions. Neither of these officers were driving 100 mph, nor responding to an emergency call, nor had a blocked view, and this Court found that they acted with a reckless disregard.

The trial court cited several cases in its Order. Several of these cases did involve traffic accidents caused by a deputy or police officer. In *Vo v. Hancock County,* 989 So. 2d 414 (Miss. App. 2008), the officer was slowly backing out of a parking space and had a low impact collision with the plaintiff at a speed of 5 mph. There is nothing reckless about his actions since the officer did not recklessly collide with the plaintiff in a "parking lot" type accident.

In *Reynolds v. County of Wilkinson*, 936 So. 2d 395, 398 (Miss. App. 2006), the Court of Appeals found the deputy was not acting with reckless disregard when the deputy "stopped at the intersection, saw nothing to his left, and drove slowly as he turned right onto the crossing street". These facts are contrary to the actions of Deputy Smith where facts establish that he failed to stop two times as he was crossing 4-lanes of traffic and his speed was increasing. These actions by Deputy Smith support a finding that he was acting consciously indifferent to the consequences of

his actions. The facts of *Kelley v. Grenada County*, 859 So. 2d 1049 (Miss. App. 2003) are almost identical to the facts in *Reynolds*. The deputy in *Kelley*, was cautiously trying to avoid the slowing truck when the deputy crossed over the double solid lines on the highway, and the deputy could not see the plaintiff's vehicle due to a blind spot. Facts like these are not what we have in the present case. Deputy Smith never looked to see the Irwin's vehicle.

In *Maldonado v. Kelly*, 768 So. 2d 906 (Miss. 2000), this Court held that a deputy sheriff's actions proceeding into an intersection did not rise to a reckless disregard since the deputy obeyed all traffic laws and came to a complete stop at the intersection. Contrary to the facts in the present matter, wherein, there is factual evidence that Deputy Smith did not stop at the intersection and did violate the traffic laws. Deputy Smith's own self-serving statement is the only proof Defendant/Appellee cited to in support of his stopping at the stop sign and not increasing his speed through this major intersection. The credibility of this statement is seriously in doubt.

II. The speed of Irwins' vehicle does not constitute criminal activity under the law enforcement exception

Defendant/Appellee attempted to place the blame for this accident on Lynda Irwin who had the right of way and was traveling in her proper lane of travel at the time of the accident. This Court has previously addressed this specific issue in *Miss. Dep't of Public Safety v. Durn*, 861 So. 2d 990 (Miss. 2003). In *Durn*, this Court held that the plaintiff's improper left turn did not constitute criminal activity. *Id.* at 998. This Court stated "[i]t would defy common sense and natural justice for us to hold that Durn's alleged improper left turn constituted criminal activity which entitled the Department to immunity." *Id.*

> [The statute] is not designed to protect grossly negligent or intentional tortfeasors from liability where the fact that the victim in engaged in criminal activity is merely fortuitous and has no relation to the transaction out of which the liability would arise. It would be

> anomalous to suggest, for example, that a reckless negligent officer who runs down a pedestrian on the sidewalk, escapes liability on a showing that the pedestrian was then and there in possession of untaxed whiskey.

Id.

Under the *Durn* standard, Lynda Irwin's speed prior to the collision has no casual link with Deputy Smith running a stop sign and barreling through the intersection with US Highway 278. As such, it cannot justify the application of the criminal activity exception. The trial court did recognize in its Order that "Panola County has not presented enough proof for this Court to determine whether or not there was a nexus between the speeding and the wreck"; therefore, the trial court did not further address this issue. R. 186. The trial court also recognized that any speeding by Mrs. Irwin would not be imputed to William Irwin, since he was simply a passenger in the vehicle. *Id.*

III. Credibility determination is made by the trier of fact and is not appropriate for summary judgment

The only version of the events which are favorable to Defendant/Appellee is through the deputy's own self-serving testimony in his deposition. When viewed in the light most favorable to the non-movant, the apparent bias and motive should be considered and the deputy's testimony should be disregarded. His own expert totally failed to even address the deputy's actions as proven by the ACM download. There was nothing his expert could say. Even if the defense presented certain undisputed facts, "summary judgment is inappropriate where there are undisputed facts which are susceptible to more than one interpretation." *Canizaro v. Mobile Comms. Corp. of Am.*, 655 So. 2d 25, 28 (Miss. 1995).

CONCLUSION

Factual questions existed which precluded the granting of summary judgment. Appellee/Defendant Panola County is liable for the fatal injuries incurred by William and Lynda Irwin. The Appellant would respectfully request that this cause be reversed and remanded for a trial on the merits.

RESPECTFULLY SUBMITTED, this the 11th day of April, 2017.

PLAINTIFF/APPELLANT

By: s/ Sara B. Russo
Sara B. Russo, Esq. MSB#101440
Ralph E. Chapman, Esq.MSB# 5962
Dana J. Swan, Esq. MSB# 8088
CHAPMAN, LEWIS & SWAN
501 First Street
P. O. Box 428
Clarksdale, MS 38614
Telephone: (662) 627-4105
sara@chapman-lewis-swan.com

OF COUNSEL:

Larry O. Lewis, Esq.
MSB # 1237
Law Offices of Larry O. Lewis
P. O. Box 209
Marks, MS 38646
(662) 326-4223 telephone

CERTIFICATE OF SERVICE

I, the undersigned attorney of record, do hereby certify that I have this the 11th day of April, 2017 field with the Clerk of the Court using the MEC system, which will deliver copies to all counsel of record:

S. Ray Hill, III, Esq.
David O'Donnell, Esq.
Clayton O'Donnell, PLLC
1300 Access Road, Suite 200
P.O. Drawer 676
Oxford, MS 38655

Attorneys for Defendant/Appellee

and that I have caused a true and correct copy of the foregoing to be delivered to the following by United States Mail, first-class postage prepaid:

Hon. Smith Murphey, V
Circuit Court Judge
P. O. Box 481
Batesville, MS 38606-0481

s/Sara B. Russo
Sara B. Russo
An Attorney for Plaintiff/Appellant