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IN THE SUPREME COURT OF MISSISSIPPI

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ELIZABETH DUNNAM — APPELLANT

VERSUS

CAUSE NO.: 111-0009
NO. 2012-~~TS~~-00457

CT

DARRIN ABNEY AND
HOPE ABNEY — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

BRIEF OF APPELLANT

Oral Argument Not Requested

Respectfully submitted,

ELIZABETH DUNNAM, APPELLANT

BY: GAMMILL MONTGOMERY MALATESTA, PLLC

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DARRIN ABNEY AND
HOPE ABNEY — **APPELLEES**

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 may evaluate possible disqualification or recusal:

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4. Darrin Abney, Plaintiff/Appellee

5. Hope Abney, Defendant/Cross Claimant/Appellee

6. Elizabeth Dunnam, Defendant/Appellant

7. Honorable Eddie Bowen

Circuit Court Judge, Jasper County, Mississippi

Respectfully submitted,

ELIZABETH DUNNHAM, APPELLANT

BY: GAMMILL MONTGOMERY MALATESTA, PLLC

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TABLE OF AUTHORITIES

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IN THE SUPREME COURT OF MISSISSIPPI

ELIZABETH DUNNAM **APPELLANT**

VERSUS **CAUSE NO.: 111-0009**
NO. 2012-TS-00457

DARRIN ABNEY AND
HOPE ABNEY **APPELLEES**

BRIEF OF THE APPELLANT

COMES NOW Appellant, by and through counsel of record, Toby J. Gammill and William D. Montgomery of Gammill Montgomery Malatesta, PLLC, and files the Appellant's Brief, pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Appellate Procedure, and respectfully requests that this Court reverse the verdict entered in the Circuit Court of Jasper County and remand this case for a new trial on the merits.

I. STATEMENT OF THE ISSUES

A. WHETHER THE TRIAL COURT ERRED WHEN IT 1) INSTRUCTED THE JURY TO FIND FOR THE PLAINTIFF, DARRIN ABNEY, AGAINST THE DEFENDANT, ELIZABETH DUNNAM 2) INSTRUCTED THE JURY TO FIND FOR THE CROSS-CLAIMANT, HOPE ABNEY, AGAINST THE CROSS-DEFENDANT, ELIZABETH DUNNAM 3) INSTRUCTED THE JURY TO FIND FOR THE DEFENDANT, HOPE ABNEY, AS TO THE COMPLAINT OF DARRIN ABNEY, AND 4) PRECLUDED THE JURY FROM CONSIDERING APPORTIONMENT OF FAULT

II. STATEMENT OF THE CASE

The underlying lawsuit arose out of an automobile accident that occurred on January 28, 2010, in Jasper County, Mississippi. On the date of the accident, a car driven by Defendant/Appellant, Elizabeth Dunnam, was struck by a car occupied by Darrin Abney, Plaintiff, and driven by his wife Hope Abney, Defendant/Cross-Claimant. As a result of the accident, Darrin Abney sued Hope Abney and Elizabeth Dunnam in the First Judicial District of

Jasper County, Mississippi, alleging the negligent acts and omissions of Hope Abney and Elizabeth Dunnam were the proximate cause of injury. Hope Abney subsequently filed a cross-claim against Elizabeth Dunnam alleging the negligent acts and omissions of Elizabeth Dunnam were the proximate cause of injury.

The case was tried before a jury on February 8, 2012, in the First Judicial District of Jasper County, Mississippi, Judge Eddie Bowen presiding. At the close of evidence, the trial court granted jury instructions P-1 and P-8 over objection and instructed the jury to find for the Plaintiff, Darrin Abney, against the Defendant, Elizabeth Dunnam. (R. at 150-151). The trial court also granted jury instructions CC-1, CC-1-A, and CC-6 over objection which instructed the jury to find for the Cross-Claimant, Hope Abney, against the Cross-Defendant, Elizabeth Dunnam, and instructed the jury to find for the Defendant, Hope Abney, as to the Complaint of Darrin Abney. (R. at 123-125). The trial court then precluded the jury from considering apportionment of fault and refused jury instruction D-6. (R. at 157).

The jury awarded Darrin Abney ten thousand dollars ($10,000.00) and awarded Hope Abney seventy-five thousand dollars ($75,000.00). Final Judgment was entered on February 22, 2012, and the Defendant/Appellant, Elizabeth Dunnam filed a Notice of Appeal on March 7, 2012.

III. STATEMENT OF RELEVANT FACTS

On January 28, 2010, an automobile driven by Elizabeth Dunnam approached the intersection of Ellisville Boulevard and Jefferson Street in Laurel, Jones County, Mississippi. (Tr. at 70-71). The conditions were reported as clear and dry. (Tr. at 70). Elizabeth Dunnam was travelling westbound on Jefferson Street, came to a complete stop at the 2-way stop sign at the intersection of Ellisville Boulevard and Jefferson Street, and looked both ways for oncoming

traffic. (Tr. at 71). Due to ongoing construction in Laurel and the angle of the intersection, Dunnam's ability to see vehicles approaching from her right was impaired. *Id.* After looking both ways, Dunnam proceeded through the intersection at a speed less than five miles per hour. (Tr. at 72). As she proceeded through the intersection, Dunnam's automobile was struck on the right side by a vehicle driven by Hope Abney and occupied by Darrin Abney. (Tr. at 72-73).

At trial, Hope Abney testified that 1) she saw Dunnam make a complete stop at the intersection in question 2) she watched Dunnam attempt to cross Ellisville Boulevard 3) the front grill of Abney's car collided with the middle of Dunnam's car in the right lane of traffic and 4) she (Hope Abney) was driving less than twenty miles per hour as she approached the intersection in question. (Tr. at 87). It is undisputed that Dunnam was in clear view at all times but Hope Abney made no attempt to avoid the accident such as swerving or applying her brakes. (Tr. at 75 and 87).

IV. SUMMARY OF THE ARGUMENT

The trial court erred when it instructed the jury that the negligence of Elizabeth Dunnam was the sole proximate cause of the injuries alleged by Darrin Abney and Hope Abney. At the close of evidence, a genuine issue of material fact existed as to the negligence of Elizabeth Dunnam and contributory negligence of Hope Abney. These issues were questions of fact that should have been determined by the jury. The trial court therefore erred when it 1) instructed the jury to find for the Plaintiff, Darrin Abney, against the Defendant, Elizabeth Dunnam 2) instructed the jury to find for the Cross-Claimant, Hope Abney, against the Cross-Defendant, Elizabeth Dunnam 3) instructed the jury to find for the Defendant, Hope Abney, as to the Complaint of Darrin Abney, and 4) precluded the jury from considering apportionment of fault. The trial court's instructions to the jury constitute reversible error, and the Appellant respectfully

requests that the jury verdict be reversed and this matter be remanded to the trial court for a new trial.

V. ARGUMENT

Standard of Review

In determining whether reversible error lies in the granting or refusal of various instructions, the Mississippi Supreme Court must consider all the instructions actually given as a whole. *Busick v. St. John*, 856 So.2d 304, 310 (Miss.2003). When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found. *Id.* citing *Coleman v. State,* 697 So.2d 777, 782 (Miss. 1997); *Collins v. State,* 691 So.2d 918, 922 (Miss. 1997). The Supreme Court has clearly articulated the standard it is to follow when assessing whether there has been a submission of legally erroneous instruction:

> On appellate review, we do not isolate the individual instruction attacked, but rather we read all of the instructions as a whole. Defects in a specific instruction do not require reversal where all instructions taken as a whole fairly--although not perfectly--announce the applicable primary rules of law . . . Where it may be fairly charged that one or more instructions may have been confusingly worded, we should not reverse if other instructions clear up the confusing points.

Smith v. Payne, 839 So.2d 482, 488 (Miss. 2002)

However, if the jury instructions do not fairly or adequately instruct the jury, the Supreme Court can and will reverse. *Burton by Bradford v. Barnett,* 615 So.2d 580, 583 (Miss. 1993).

A. THE TRIAL COURT ERRED WHEN IT 1) INSTRUCTED THE JURY TO FIND FOR THE PLAINTIFF, DARRIN ABNEY, AGAINST THE DEFENDANT, ELIZABETH DUNNAM 2) INSTRUCTED THE JURY TO FIND FOR THE CROSS-CLAIMANT, HOPE ABNEY, AGAINST THE CROSS-DEFENDANT, ELIZABETH DUNNAM 3) INSTRUCTED THE JURY TO FIND FOR THE DEFENDANT, HOPE ABNEY, AS TO THE COMPLAINT OF DARRIN ABNEY, AND 4) PRECLUDED THE JURY FROM CONSIDERING APPORTIONMENT OF FAULT

At the close of evidence, the trial court erroneously determined questions of fact that should have been left for the jury. Despite substantial evidence to the contrary, the court granted jury instructions that directed a verdict in favor of Darrin Abney and Hope Abney and did not allow for apportionment of fault. The jury was therefore precluded from making a determination as to the negligence of Elizabeth Dunnam and/or the comparative fault of Hope Abney. The jury instructions granted by the trial court failed to fairly announce the law of the case and constitute reversible error. The Appellant therefore respectfully requests that the jury verdict be reversed and this matter be remanded for a new trial.

As stated above, this case involves an intersectional car wreck and claims of general negligence against Elizabeth Dunnam and Hope Abney. The case was initiated by a complaint filed by Darrin Abney against Elizabeth Dunnam and Hope Abney. Hope Abney subsequently filed a cross-claim against Elizabeth Dunnam. During trial, the jury was presented with evidence that an automobile driven by Elizabeth Dunnam approached the intersection of Ellisville Boulevard and Jefferson Street in Laurel, Jones County, Mississippi. (Tr. at 70-71). The conditions were reported as clear and dry. (Tr. at 70). Elizabeth Dunnam came to a complete stop at the 2-way stop sign at the intersection of Ellisville Boulevard and Jefferson Street, and looked both ways for oncoming traffic. (Tr. at 71). Due to ongoing construction in Laurel and the angle of the intersection, Dunnam's ability to see vehicles approaching from her right was impaired. *Id.* After looking both ways, Dunnam proceeded through the intersection at a speed less than five miles per hour. (Tr. at 72). As she proceeded through the intersection, Dunnam's automobile was struck on the right side by a vehicle driven by Hope Abney and occupied by Darrin Abney. (Tr. at 72-73).

Hope Abney further testified that 1) she saw Dunnam make a complete stop at the intersection in question 2) she watched Dunnam attempt to cross Ellisville Boulevard 3) the front grill of Abney's car collided with the middle of Dunnam's car in the right lane of traffic and 4) she (Hope Abney) was driving less than twenty miles per hour as she approached the intersection in question. (Tr. at 87). It is undisputed that Dunnam was in clear view at all times but Abney made no attempt to avoid the accident such as swerving or applying her brakes. (Tr. at 75 and 87).

Mississippi Code Annotated § 85-5-7 states "in actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault." MISS. CODE. ANN. § 85-5-7 (2011). In interpreting § 85-5-7, the Mississippi Supreme Court has held that defendants shall not be deprived of an opportunity to present their version of a case and persuade a jury that fault for a given accident lies elsewhere. *Estate of Hunter v. Gen. Motors Corp.*, 729 So.2d 1264, 1274 (Miss. 1999). Based on the foregoing, counsel for Elizabeth Dunnam offered jury instruction D-6. (R. at 150). The proposed instruction tasked the jury to determine negligence by a preponderance of the evidence, apportion fault accordingly, and assess damages. This instruction was refused by the trial court. The Court then granted instructions CC-1, CC-1-A, CC-6, P-1, and P-8 which in essence directed a verdict in favor of Darrin Abney and Hope Abney and precluded apportionment of fault. (R. at 123-125; 150-151). The court's determination was improper and warrants reversal and remand.

In *Hill v. Dunaway,* 487 So.2d 807, 809 (Miss. 1986), the Mississippi Supreme Court set forth its rule as to when a fact question may be taken away from the jury. It stated as follows:

> The refusal of a timely requested and correctly phrased jury instruction on a genuine issue of material fact is proper, only if the trial court--and this Court on appeal--can say, taking the evidence in the light most favorable to the party requesting the instruction, and considering all reasonable favorable inferences

> which may be drawn from the evidence in favor of the requesting party, that no hypothetical, reasonable jury could find the facts in accordance with the theory of the requested instruction.

Id. See also Church v. Massey, 697 So.2d 407, 410 (Miss. 1997).

At the close of evidence a question of fact existed as to the negligence of Elizabeth Dunnam and the comparative fault of Hope Abney. A hypothetical juror could certainly have found that Elizabeth Dunnam was not negligent or that Hope Abney was comparatively negligent. This is illustrated most clearly by the analogous cases of *Callahan v. Ledbetter*, 992 So.2d 1220 (Miss. App. 2008) and *Thompson ex. rel Thompson v. Lee County School District*, 925 So.2d 57 (Miss. 2006).

Callahan involved a bench trial over a car accident that was substantially similar to the case at bar. The circumstances of the Callahan accident are as follows:

> Callahan was traveling north on the Natchez Trace Parkway (the Trace) on the way to Tupelo. As she neared County Road 261, Callahan noticed a school bus (driven by Ledbetter) stopped at the intersection waiting to cross the Trace. The bus pulled out; Callahan was unable to avoid it; and a collision occurred. Callahan testified that there was a detour from the Trace as a result of construction. Less than a mile after she turned back on to the Trace, she approached County Road 261 and saw Ledbetter's bus to her left, stopped at a stop sign. She stated that there was nothing that could have blocked Ledbetter's vision and described the area as "a flat piece of land with no trees around" for one-half of a mile to a mile back. Callahan testified that she was traveling at no more than fifty miles per hour, and because she was a cautious driver, she raised her foot off the accelerator when she saw the bus, but she did not apply the brakes. She further stated that at the moment of impact her best guess as to the bus's speed was five miles per hour. As Callahan came within two car lengths of the motionless bus, the bus pulled out in an effort to cross the Trace and continue on County Road 261. Callahan testified that " all [she] could do was slam on [her] brakes." However, Callahan stated she slid six to ten feet before colliding with the mid-to-front portion of the bus. Callahan claimed that she heard her brakes squeal as she slid toward the bus. Callahan further testified that after the wreck, she remembered Ledbetter saying that "I seen [sic] the red truck go by" and " I thought I looked."

> Ledbetter's deposition testimony was read into the record. At the time of the accident, she had been a school bus driver for seventeen to eighteen years. Ledbetter stated that prior to the accident, she had finished her route, but she still had students on the bus. While at the intersection of the Trace and County Road 261, Ledbetter attempted to determine where the remaining students were supposed to have gotten off the bus. She stated that the area surrounding the intersection was clear and flat and that she could see approximately one mile down the Trace. She testified that the north bound side of the Trace was closed because of construction, but when she stopped, she looked to her right and left and did not see anything coming from the south, including Callahan's vehicle or any vehicle preceding it. After south-bound traffic cleared, Ledbetter proceeded across the Trace. She testified that at this point, she turned her head to the right and saw Callahan's vehicle through the bus's door approximately twenty-five to thirty feet from the bus. Ledbetter testified that the only thing she could have done to avoid the accident was look up and down the Trace a second time. Ledbetter testified that the bus's door had passed the center line of the Trace and that the Callahan vehicle struck the bus just behind the door. Ledbetter estimated that it took her two seconds to get from the stop sign to the point of collision. She stated that she did not hear any squeal from either the bus or Callahan's vehicle, but she did believe that she hit her brakes.

Callahan, 992 So.2d at 1225-1226.

The trial court, sitting as the trier of fact, found that Callahan shared in the responsibility for the collision to the tune of 35% fault. *Id.* at 1226. In support of its order, the trial court stated that:

> [t]he school bus was extremely large, bright yellow, and required some time to travel the distance to the scene of the collision. This Court in its role as fact-finder, considers this to be evidence of Mrs. Callahan's failure to maintain a proper lookout, especially when considered in view of the fact that the driver, Mrs. Callahan, failed to apply her brakes with sufficient force to bring the vehicle under control. Her testimony was that she saw the bus as she approached and that it, the bus, moved into her lane when she was too close to avoid the accident. She further testified that she "skidded" six to ten feet before impact.

Id. at 1225.

On appeal, Callahan argued that the record lacked substantial evidence to show that she shared in the negligence that caused the accident; thus, the trial court erred in assigning her a

portion of fault. *Id.* The Court of Appeals affirmed the trial court's ruling on apportionment of fault, holding there was substantial evidence to support such a ruling. *Id.* at 1229.

Similarly, in the case of *Thompson ex. rel Thompson v. Lee County School District*, 925 So.2d 57 (Miss. 2006), the following fact pattern was presented to the trial court during a bench trial:

> In late 1998, Thompson was traveling on Romie Hill Road in Lee County, a two-lane road. As Thompson neared the intersection of Romie Hill Road and County Road 300, a Lee County school bus driven by Gregory pulled out in an attempt to cross the road, and a collision occurred. The evidence describing the conditions of the day is as follows: The accident occurred on a clear day; the roads were dry; and driver visibility for vehicles both on Romie Hill Road and County Road 300 was virtually unobstructed due to the clear weather, the road conditions and the terrain in the area of the accident. Thompson was driving his 1999 Chevrolet truck in a northerly direction on Romie Hill Road, and Gregory was driving his 1994 International school bus eastbound on County Road 300 in Shannon. Both Thompson and Gregory had a clear and unobstructed view of the intersection of Romie Hill Road and County Road 300 as they approached this intersection. Unquestionably, Thompson had the right-of-way because he had no stop signs or traffic lights which would require him to stop his vehicle or otherwise reduce his speed. On the other hand, Gregory had a stop sign which he was required to honor as he approached Romie Hill Road traveling east on County Road 300.

Thompson, 925 So.2d at 59, 65-66 (¶¶ 2, 12-13).

> Gregory testified that he came to a complete stop at the stop sign. This testimony is unrebutted in the record and corroborated by Officer Gwin's testimony.... Thompson does not contest that Gregory stopped at the stop sign, but instead focuses on the fact that while Gregory was stopped at the stop sign, his attention had been diverted from looking to his right, where he would have seen Thompson's vehicle, because Gregory was looking to his left and observing a southbound vehicle on Romie Hill Road. According to Gregory, he was waiting at the stop sign for the southbound vehicle to pass through the intersection, but instead, this vehicle gave a turn signal and turned into a store parking lot prior to entering the intersection; once that vehicle turned, he looked in both directions, determined the road was clear, and proceeded slowly through the intersection. Thompson's theory is that Gregory's attention was diverted by the southbound vehicle on Romie Hill Road, that Gregory entered the intersection without looking

> back to his right to observe Thompson's northbound vehicle, and that Gregory's inattention was the sole proximate cause of the accident. Gregory admitted he never saw Thompson's vehicle until after the collision. However, Gregory firmly asserted throughout the hearing that he looked both to his right and to his left before entering the intersection stating that after he observed the southbound vehicle turn into the store parking lot, he looked back to the right for northbound traffic, and, observing none, he slowly entered the intersection.

Thompson, 925 So.2d at 65-66 (¶¶ 12-13).

The *Thompson* trial court assessed 50% fault to both parties. The Supreme Court found the trial court's findings were supported by substantial evidence and affirmed. *Id.* at 71 (¶ 20). The trial court in *Thompson* concluded that the accident occurred in Thompson's lane after the school bus had crossed over the center line of Romie Hill Road. *Id.* at 67 (¶ 14). Upon review, the Mississippi Supreme court stated "this evidence would certainly go to the issue of whether Thompson was contributorily negligent." *Id.* Specifically, the Supreme Court stated:

> Gregory testified he came to a complete stop at the stop sign on County Road 300. This fact was corroborated by the testimony of Officer Gwin. Gregory testified that he looked both ways for oncoming traffic on Romie Hill Road before entering the intersection, and saw no oncoming northbound traffic on Romie Hill Road. Upon deciding to enter the intersection, Gregory had to start his school bus from a dead stop and he was traveling between five to seven miles per hour at the time of the collision, which occurred in Thompson's lane of travel. In referring to the photographs of the accident scene, both Gregory and Gwin testified that not only Gregory, but also Thompson, had a clear unobstructed view of the intersection as they approached the intersection from their respective directions. The trial judge found that Gregory's school bus was hit by Thompson's truck " apparently in a fairly head-on circumstance," thus indicating a lack of evasive action on the part of Thompson.

Id.

In support of its finding that Thompson was contributorily negligent, the Supreme Court relied heavily on Mississippi Code Annotated § 63-3-805 (2011) which states as follows:

> **§ 63-3-805. Vehicle entering through highway**

> The driver of a vehicle shall stop as required by this chapter at the entrance to a through highway and shall yield the right-of-way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute an immediate hazard. However, said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right-of-way to the vehicle so proceeding into or across the through highway.
>
> The driver of a vehicle shall likewise stop in obedience to a stop sign as required by this chapter at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway and shall proceed cautiously, yielding to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, but may then proceed.

MISS. CODE. ANN. § 63-3-805 (2011).

In *Thompson*, the Supreme Court went on to state: If a person is adhering to the statutory mandate of Section 63-3-805 when operating a motor vehicle on the roads and highways of this state, that person is engaging in an exercise of common sense. *Thompson,* 925 So.2d at 71 (¶¶ 20-21). Just because a person may be driving on a through highway with the lawful right-of-way to proceed through an intersection with another road where there are located stop signs, does not mean that person may approach and enter the intersection with impunity and without exercising caution. *Id.* The trial judge in today's case [*Thompson*] had to make such determinations from the record as to (1) whether any vehicles traveling on Romie Hill Road constituted an immediate hazard at the time Gregory entered the intersection; (2) whether Gregory proceeded cautiously through the intersection; and, (3) whether Thompson was under a statutory duty to yield the right-of-way to Gregory after Gregory entered the intersection. *Id.* at 71 (¶ ¶ 20-21).

The fact patterns of *Callahan* and *Thompson* are substantially similar to the case at bar. All three cases involve a driver who stopped at a stop sign, looked both ways, and attempted to cross a through-road at an approximate speed of five miles per hour. All three cases also involve

a Plaintiff driver who saw a car attempting to cross the roadway and failed to take evasive action to avoid the collision. The Supreme Court holdings in *Callahan* and *Thompson* are clear. In this situation, determination of fault and/or apportionment of fault are questions that must be determined by the finder of fact. In this case, the trial court took these questions away from the jury and instructed the jury that Elizabeth Dunnam was negligent, and Dunnam's negligence was the sole proximate cause of damages alleged by Darrin Abney and Hope Abney. The instructions granted by the trial court did not fairly present the jury with the law of the case and constitute reversible error. The cases of *Callahan* and *Thompson* clearly indicate that a hypothetical, reasonable juror could find, at the very least, that Hope Abney was contributorily negligent. The jury instructions granted by the trial court precluded the jury from making such a determination, and the Appellant therefore respectfully requests that the verdict be reversed and this matter be remanded for a new trial.

VI. CONCLUSION

The jury instructions granted by the trial court did not fairly present the jury with the law of the case. The trial court made a unilateral determination as to the negligence of Elizabeth Dunnam and Hope Abney, both of which were questions of fact that should have been determined by the jury. The court's instructions constitute reversible error, and the Appellant respectfully requests that the verdict be reversed and this case be remanded for a new trial.

RESPECTFULLY SUBMITTED, this the 1st day of November, 2012.

ELIZABETH DUNNHAM, APPELLANT

BY: GAMMILL MONTGOMERY MALATESTA, PLLC

BY: _____

TOBY J. GAMMILL (MSB #[redacted]

WILLIAM D. MONTGOMERY (MSB[redacted]

CERTIFICATE OF SERVICE

I, William D. Montgomery, attorney for Appellant, Elizabeth Dunnam, do hereby by certify that I have mailed, via U.S. mail postage prepaid, a true and correct copy of the foregoing Brief to the following:

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Judge Eddie Bowen
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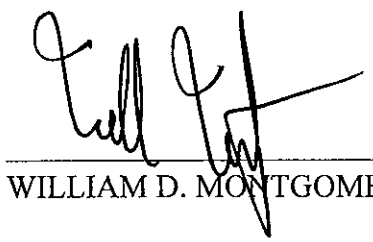
So certified, this the 1st day of November, 2012.



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