

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO.2015-CA-00710-COA

CITY OF MERIDIAN

APPELLANT

VERSUS

2015-CA-00710-COA

\$104,960.00 U.S. CURRENCY ET AL

APPELLEE

AMENDED BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons may have an interest in the outcome of this case. These representations are made in order that the Justices of the Court may evaluate possible disqualification or recusal.

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Respectfully submitted this the 25 day of September, 2015.

BY: /S/ANDY DAVIS
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II. Second Issue: The County Court should have given en (10) days Notice of hearing after converting Motion to Dismiss into summary judgment Motion.	
III. Third Issue: The County Court and the Circuit Court committed reversible error and violated M.R.C.P. 12(b)(6) by clearly considering pleadings and facts outside of the complaint when the existence of matters outside of the complaint dictated treatment of the dispute as one for summary judgment under Rule 56 of the Mississippi Rules of Civil Procedure.	
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STATEMENT OF THE ISSUES

- I. Whether the Court erred in making findings of fact and rulings of law outside of the pleadings thus converting Catalan's Rule 12(b)(6) Motions to Dismiss to Rule 56 Summary Judgment motions without notice to City of Meridian, and without a hearing and deprive the Plaintiff of a reasonable opportunity to present all matters relevant to the issues.
- II. The County Court should have given ten (10) days Notice of hearing to the plaintiff after converting Motion to Dismiss into summary judgment Motion.
- III. The Complaint stated a claim upon which relief could be granted.
- IV. The trial court committed reversible error by basing its "Order on Motion to Dismiss" on findings of fact that were not alleged in the complaint.
- V. Whether the County Court and Circuit Court erred in ruling that the Complaint did not state a claim against upon which relief may be granted.
- VI. The Circuit Court committed reversible error in affirming the County Court's Order of Dismissal.

STATEMENT OF THE CASE

I. Nature of the Case

This case is a civil forfeiture action, commenced by the City of Meridian Ex Rel East Mississippi Drug Task Force against certain personal property found in the possession of Maria I Valle Catalan, pursuant to the forfeiture provisions of Mississippi's Uniform Controlled Substances Law. (County Court Record 1-7).

II. Course of the Proceedings

On or about the 2nd day of June 2012 the City of Meridian Police Department conducted a traffic stop on a 2003 Ford F-150 Supercab Truck VIN #1FTRX17213NB65899 for traffic violations. A subsequent consensual search of the vehicle revealed \$104,690.00 in United states Currency hidden in a compartment inside the firewall. (County Court Record 21-22). The plaintiff initiated this civil action on or about the 20th day of June 2012 pursuant to the authority of Sections §41-29-101 et. seq. of the Mississippi Code of 1972, as amended. (County Court Record 1-7). The defendant/claimant filed her Answer on or about the 16th day of July 2012. (County Court Record 8-9).

The plaintiff filed/served it's First Set of Interrogatories, Requests for Admissions, and Request for Production of Documents Propounded to Claimant, Maria Catalan on or about August 13, 2012. (County Court Record 15-20). The claimant filed/served her Responses to Requests for Admissions on or about the 20th day of August 2012. (County Court Record 21-22). The plaintiff filed it's first Motion to Compel on or about the 25th of February 2013. (County Court Record 26-28). The claimant filed/served her Response

to First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions on or about March 5, 2013. (County Court Record 29-34). The claimant asserted her 5th Amendment rights as to all Interrogatories and Requests for Production of Documents refusing to answer any of the same. (County Court Record 29-34). The plaintiff then filed it's Second Motion to Compel on or about the 22nd day of March 2013. (County Court Record 35-37). The Trial Court entered it's interlocutory order Ruling on Plaintiff's Motion to Compel on or about the 6th of June 2013. The Court denied the plaintiff's Motion to Compel and ruled “ ***the defendant has the right to assert Fifth Amendment Privileges in Criminal as well as Civil Proceedings***” (County Court Record 38).

The claimant filed her Motion to Dismiss on or about the 14th day of August 2013. (County Court Record 39-41). The claimant's Motion to Dismiss was brought pursuant to Rule 12(b)(6) and did not attach any affidavits, pleadings or other documents supporting same. Additionally, the Motion to Dismiss failed to reference any supporting affidavits, pleadings or any supporting documentation. (County Court Record 39-41) The plaintiff filed it's Motion in Limine (County Court Record 42-45) and Response to Motion to Dismiss on or about the 25th day of September 2013. (County Court Record 46-48). The Notices of Hearing attached to the Motion in Limine and Response to Motion to Dismiss each indicate that a hearing was to take place at 1:30 p.m. on the 13th day of November 2013 (County Court Record 45,48) however court record does not indicate when or where said hearing took place and there was no court reporter present nor were any proceedings recorded or transcribed. However, the trial court made specific findings of facts and ruled

on issues of law.

On September 5, 2014 the plaintiff filed and served upon the attorney for the claimant it's Notice of Deposition and Request for Production of Documents. (County Court Record 52).

III. Disposition in the Court Below

The Trial Court entered it's interlocutory order Ruling on Plaintiff's Motion to Compel on or about the 6th of June 2013. The Court denied the plaintiff's Motion to Compel and ruled "***the defendant has the right to assert Fifth Amendment Privileges in Criminal as well as Civil Proceedings***" (County Court Record 38). The trial court clearly stated in it's Order on Motion to Dismiss that it considered matters outside of the Complaint to determine the motion, and made factual findings that could only have been made in reliance on the submissions presented by the Defendant.

On September 10, 2014 the Court entered it's Order on Motion to Dismiss making numerous findings of fact and rulings of Law and Ordered the immediate return of the property that is subject to this matter to the defendant. (County Court Record 54). The Court made rulings on matters outside the pleadings without an evidentiary hearing, no witnesses were called to testify and no evidence was presented to the Court. The Court Order stated "The Court read the pleadings and heard oral argument from both parties". The Court clearly relied on matters outside of the complaint and committed reversible error. The Court made rulings on legal issues as to probable cause, the legality of the search, the lack of a legal nexus of the money found to criminal activity among other matters by reviewing the pleadings and listening to oral argument. (County Court Record 54-55).

The Plaintiff filed its appeal to the Lauderdale County Circuit Court. The Circuit Court committed reversible error by affirming the trial court. (Circuit Court Record p.36-44)

IV. Statement of Facts

The plaintiff initiated this civil action pursuant to the authority of Sections §41-29-101 et. seq. of the Mississippi Code of 1972, as amended. (County Court Record 1-7).

As this case was dismissed pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure, the record contains no facts, transcript or evidence. The case was dismissed on procedural grounds without applying any legal standard and facts relating to the case have not been developed and are not part of the record.

The Court dismissed the matter pursuant to Rule 12(b)(6) based on the pleadings alone. The Record consists of approximately 78 pages of documents. The claimant filed her Motion to Dismiss on or about the 14th day of August 2013. (County Court Record 39-41). The claimant's Motion to Dismiss was brought pursuant to Rule 12(b)(6) and did not attach any affidavits, pleadings or other documents supporting same. Additionally, the Motion to Dismiss failed to reference any supporting affidavits, pleadings or any supporting documentation. (County Court Record 39-41). However, both the County Court and the Circuit Court made findings of fact that were based on allegations outside of the complaint.

STANDARD OF REVIEW

In the Mississippi Supreme Court case of Ralph Walker, Inc. v. Gallagher, 926 So.2d 890 (Miss. 2006), the Court stated that [t]he standard of review in reviewing Rule 12(b)(6) motions to dismiss, we are actually not required to defer to the trial court's judgment or ruling. Roberts v. New Albany Separate School Dist., 813 So.2d 729, 730-31

(Miss.2002). Instead, we sit in the same position the trial court did. *Id.* Additionally, it is clear that our standard here is de novo, and not abuse of discretion. See, e.g., Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507, 513 (Miss.2005); Roberts, 813 So.2d at 730-31; Arnona v. Smith, 749 So.2d 63, 65-66 (Miss.1999). A motion for dismissal under Miss. R. Civ. P. 12(b)(6) raises an issue of law, and we unquestionably review questions of law under a de novo standard of review. Lowe v. Lowndes County Bldg. Inspection Dept., 760 So.2d 711, 712 (Miss.2000). See also Donald v. Amoco Prod. Co., 735 So.2d 161, 165 (Miss.1999); Tucker v. Hinds County, 558 So.2d 869, 872 (Miss.1990). We have said, “[n]otwithstanding our respect for and deference to the trial judge, on matters of law it is our job to get it right. That the trial judge may have come close is not good enough.” UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc., 525 So.2d 746, 754 (Miss.1987). Under a de novo standard of review, we will affirm only if the moving party can show beyond doubt that the plaintiff failed “to state a claim upon which relief can be granted.” Miss. R. Civ. P. 12(b)(6). In order for us to affirm a grant, or reverse a denial, of a Rule 12(b)(6) motion to dismiss, it must be such that no set of facts would entitle the opposing party to relief. Lowe, 760 So.2d at 712. Ralph Walker, Inc. 926 So.2d at 893.

A motion to dismiss based upon Rule 12(b)(6) of the Mississippi Rules of Civil Procedure, granted or denied by the lower court, is reviewed by the appellate court de novo. Jordan v. Wilson, 5 So. 3d 442 (Miss.2008) (citing Hartford Cas. Ins. Co. v. Halliburton Co., 826 So. 2d 1206, 1211(Miss. 2001)(citing City of Tupelo v. Martin, 747 So. 2d 822, 829(Miss. 1999); Harris v. Miss. Valley State Univ., 873 So. 2d 970, 988 (Miss. 2004)). Such a standard of review is logical, given that within this context, there was no evidence proffered by either party.

The trial court did, however, abuse his discretion, was manifestly wrong and applied an erroneous legal standard. Mississippi Dept. of Human Services v. S.W., 974 So. 2d 253, 257 (Miss. Ct. App. 2007)(citing Jones v. Mississippi Transp. Com'n, 920 So. 2d 516, 518(Miss. 2003). The Court in it's Order on Motion to Dismiss (County Court Record 54). Failed to state what legal basis the court intended to substantiate its granting of said motion, it is abundantly clear that the trial court simply intended to dismiss said action, regardless of whether the legal justification therefor was manifestly wrong or clearly erroneous.

SUMMARY OF ARGUMENT

The trial court committed reversible error by making numerous finding of fact and rulings on issues at law without any evidence. The trial court stated that it had read the pleadings and heard oral argument. (County Court Record 54). These findings are clearly erroneous and constitute an abuse of discretion and this mater should be reversed and retained by this Court for final adjudication on the merits.

The County Court should have given ten (10) days Notice of hearing to plaintiff after converting Motion to Dismiss into Summary Judgment Motion.

Plaintiff's Petition For Forfeiture plainly stated a cause of action upon which relief could be granted and complied with Miss. Code Ann. § 41-29-177, 41-29-181 and 41-29-179. The trial court committed reversible error by dismissing the Plaintiff's petition pursuant to M.R.C.P. 12(b)(6). The Circuit Court sitting as the appellate Court also committed reversible error in affirming the trial court.

Therefore, this Court should reverse the lower court's dismissal of Plaintiff's petition to allow Plaintiff's case to be tried on the merits since the Plaintiff's Petition stated a claim

upon which relief can be granted and complied with all of the requirements of Miss. Code Ann. § 41-29-181, 41-29-177 and 41-29-179.

ARGUMENT

The trial court committed reversible error in granting the Motion to Dismiss. The trial court failed to cite what legal basis for dismissing the Petition for Forfeiture and applied the incorrect legal standard in doing same. The trial court erred in Granting Catalan's motion to dismiss for failure to state a claim. The City of Meridian's Petition/Complaint, did state a claim as the Complaint's factual allegation state a cause of action pursuant to Mississippi Code Annotated Section 41-29-179, 41-29-181 and 41-29-177. (County Court Record 1-7). In order to affirm the trial court's granting of Catalan's Rule 12(b)(6) motion to dismiss, the court must be able to be able to say, with certainty, that the City of Meridian cannot prove any set of facts to support the Petition for Forfeiture. See Little v. Miss. Dep't of Human Servs., 835 So.2d 9, 11 (Miss.2002); M.R.C.P. 12(b)(6).

There is a vast difference between the pleading burden necessary to survive a Rule 12(b)(6) motion to dismiss and the evidentiary requirements necessary to survive a motion for summary judgment under Mississippi Rule of Civil Procedure 56. A motion to dismiss under Rule 12(b)(6), as opposed to other devices in civil law, contemplates a high degree of speculation by the reviewing court.

While the two rules provide for dismissal of actions, their bases are completely different. Accordingly, a Rule 12(b)(6) motion tests legal sufficiency, and in applying this rule 'a motion to dismiss should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of the claim.' Missala Marine Services, Inc. v. Odom, 861 So.2d 290, 294 (Miss.2003). Quite differently,

Rule 56 tests the notion of well-pled facts and requires a party to present probative evidence demonstrating triable issues of fact.

The trial Court failed to address the legal standard in granting the Motion to Dismiss. The Mississippi Supreme Court has stated that “Our inquiry on a Rule 12(b)(6) motion to dismiss is not limited to the specific allegations in Robert's complaint, which we must accept as true. Poindexter v. S. United Fire Ins. Co., 838 So.2d 964, 966 (Miss.2003). We are charged to consider only whether any set of facts could support Robert's action for alienation of affections against CMG. Cook v. Brown, 909 So.2d 1075, 1078 (Miss.2005). In the case at bar, the trial court was charged with determining that any set of facts could support the city of Meridian's Petition. The trial court erred as a matter of law and this case should be reversed. Likewise the Circuit court erred in affirming the trial court and this matter should be reversed and remanded for trial on the merits.

Additionally, Mississippi is a Notice Pleading state. In Bedford Health Prop. v. Estate of Williams, 946 So.2d 335 (Miss. 2006), the Supreme Court held: Mississippi is a notice pleading state. Estate of Stevens v. Wetzel, 762 So.2d 293, 295 (Miss.2000). M.R.C.P. 8 governs general pleadings. The Court in Wetzel held: While M.R.C.P. 8 has eliminated the technical forms of pleadings required in years past, notice pleadings are still required to place the opposing party on notice of the claim being asserted. No magic words are required by the Rules of Civil Procedure; however, this Court has previously stated: Under Rule 8 of the Mississippi Rules of Civil Procedure, it is only necessary that the pleadings provide sufficient notice to the defendant of the claims and grounds upon which relief which is sought. Wetzel, 762 So.2d at 295. Mississippi is a “notice-pleadings” state, which means that the plaintiff is not required to plead the specific

wrongful conduct; rather, at the pleading stage, he is required only to place the defendant on reasonable notice of the claims against it and to demonstrate that he has alleged a recognized cause of action upon which, under some set of facts, he might prevail. Rules Civ.Proc., Rule 8

The Appellant, City of Meridian, complied with any and all statutory pleading requirements as well as those required by the Mississippi Rules of Civil Procedure for the Petition for Forfeiture to survive a M.R.C.P. 12(b)(6) motion and this court should reverse the trial court accordingly. The allegation set forth in the Petition for forfeiture adequately stated a claim upon which relief could be granted. (County Court Record p. 2-4)

The lower court committed reversible error in failing to apply the correct legal standard in granting the Motion to Dismiss of Appellee. In making such a decision, the pleaded allegations of the complaint must be taken as true, and a dismissal should not be granted unless it appears to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim. See Children's Medical Group, P. A. v. Phillips, 940 So. 2d 931, 933 (Miss. 2006), citing and quoting, in part, M.R.C.P. 12(b)(6). The City of Meridian alleged facts sufficient in it's Petition (County Court Record 1-7) pursuant to the applicable statutes. The City of Meridian is entitled to final hearing on the merits and can substantiate its claim by the evidence to be introduced at trial in reference to the complaint. Thus, Appellant respectfully requests this Court reverse the dismissal, and remand the case to the lower court, with instruction to proceed with an adjudication upon its merits.

The Circuit Court committed reversible error in affirming the trial court. The Plaintiff's Petition (County Court Record p. 2-4) adequately informed the claimant that the

money and vehicle were suspected of being used or intended for use in violation of the Mississippi Uniform Controlled Substances Act. The claimant was placed on notice in conformity with the statute and Rule 8 of the Mississippi Rules of Civil Procedure. When considering whether alleged drug money is subject to forfeiture, the court must decide whether, given all of the evidence considered together, a rational trier of fact may have found by a preponderance of the evidence that the funds were the product of or instrumentalities of violations of this state's controlled substances act. West's A.M.C. § 41-29-153(a)(5, 7).

THE COURT ERRED IN CONSIDERING MATTERS NOT IN THE COMPLAINT

It is clear from a review of the trial court's Order of dismissal that the Motion was converted to one for summary judgment. (County Court Record 54-55) In Palmer v. Biloxi Regional Medical Center, 649 So.2d 179 (Miss.1994), the Court stated:

Whenever a motion to dismiss under Rule 12(b)(6) is converted into a motion for summary judgment, the requirements of Rule 56 become operable. It is important that the court give the parties notice of the changed status of the motion and a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56" Accordingly, before this Court can determine on appellate review if the non-moving party has had a reasonable time in which to file documentation in opposition to a Rule 12(b)(6) motion that has been converted to a Rule 56 motion for summary judgment, we must determine if the non-moving party has been afforded ten days notice of the court's intention to conduct a summary judgment hearing on a date certain.

Id. at 182-83 (citation omitted). Whenever a trial judge converts a Rule 12(b)(6) motion to dismiss into one for summary judgment by considering matters outside the pleadings, the

judge must give all parties ten days' notice that he is converting the motion. *Id.* at 183 (citation omitted). "Regardless of how baseless [a plaintiff's] claim [appears] to the trial court, our rules require that she be given 10 days' notice once a motion to dismiss is converted into a motion for summary judgment." *Jones v. Regency Toyota, Inc.*, 798 So.2d 474, 476 (Miss.2001) (emphasis added).

THE COMPLAINT STATED A CLAIM UPON WHICH RELIEF COULD BE GRANTED

The plaintiff's complaint stated a claim upon which relief could be granted. The Complaint complied with the pleading requirements under Mississippi law. (County Court record p. 2-4) Regarding the allegations that must be contained in the complaint, Mississippi is a "notice-pleadings" state, which means:

[U]nder our rules, [the plaintiff] is not required to plead the specific wrongful conduct. At the pleading stage, he is required only to place [the defendant] on reasonable notice of the claims against it and to demonstrate that he has alleged a recognized cause of action upon which, under some set of facts, he might prevail. *Children's Med. Grp., P.A. v. Phillips*, 940 So.2d 931, 935 (Miss.2006). M.R.C.P. 8.

THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN AFFIRMING THE COUNTY COURT'S ORDER OF DISMISSAL

The circuit court committed reversible error in its misplaced reliance on and misapplication of *Cannon V. State*, 918 so.2d 734, 744 (miss. App. 2005) (rev'd and rem'd solely on the issue of criminal sentencing). (Circuit Court Record p. 36-44) In the *Cannon* case the Mississippi Bureau of Narcotics failed to describe one of the pieces of property it was seeking forfeiture of. The State completely left out the description of the property. The Cannon's raised the issue as an affirmative defense but the State amended the

pleadings at trial. Cannon 918 So.2d at 744-745. The Court of Appeals stated that the State's complaint ***with regards to the real property*** did not meet the requirements of the Rules of Civil Procedure. *Id.* In the case at bar the City of Meridian's Petition adequately describes the property and correctly alleges that it was used or intended for use in violation of the Mississippi Controlled Substances law. (County Court Record p.2-4) The plaintiff is entitled to prove the allegations at a trial. The circuit court denied the plaintiff the opportunity to present evidence at trial.

The Mississippi Supreme Court has held that the burden is on the State to prove forfeiture by a preponderance of the evidence. Jones v. State, ex rel. Mississippi DPS, 607 So.2d 23, 29 (Miss.1991). This Court approved the forfeiture of \$219,000.00 in currency in Reed v. State ex rel. Mississippi Bureau of Narcotics, 460 So.2d 115 (Miss.1984). Reed argued that he had not been involved in any illegal activity. The Court said that although forfeitures are not favored, in that forfeiture action "all the State need prove is that the seized items were possessed by Mr. Reed with intent to be used in connection with an illegal smuggling conspiracy." Reed, 460 So.2d at 118.

The Circuit Court ruled that Mississippi law in reference to forfeiture cases is a pleading standard of "*The relevant ruling in Cannon stands for this principal-without stating the reasons why a particular item is subject to forfeiture, a petition for forfeiture will fail to state a claim under Miss. R. Civ. P. 8. In applying the logic and precedent found in Cannon to the case at bar, it is clear that Appellant's Petition for forfeiture of Ms. Catalan's cash and automobile should have included specific reasons why those items were subject to forfeiture under Miss. Code Ann. §§ 41-29-153 subsections (a)(5) and (a)(7).*" (Circuit Court Record p. 36-44, Circuit Court Order p. 7). The Circuit Court erred in its manufacturing of a standard inconsistent with Mississippi law and Rule 8 of the Mississippi

Rules of Civil Procedure. The court applied an erroneous standard and burden of pleadings that does not exist under Mississippi.

Under Mississippi Code Annotated section 41-29-153(a)(5) and (7) (Supp. 2008), money is subject to forfeiture if it has been “used, or intended for use, in violation” of the Uniform Controlled Substances Law and having been found in close proximity to forfeitable drug manufacturing or distributing paraphernalia. The Court must decide “whether, given all of the evidence considered together, a rational trier of fact may have found by a preponderance of the evidence that [the] funds were the product of or instrumentalities of violations of this state's controlled substances act.” Hickman v. State, 592 So. 2d 44, 48 (Miss. 1991). The trier of fact may act on circumstantial evidence and inferences as well as direct evidence. *Id.* at 46.

The Circuit Court also committed reversible error when it found that the claimant owned the “cash and automobile”. (Circuit Court Record p. 36-44, Circuit Court Order p. 7). A review of the claimant’s Answer (County Court Record p. 8) indicates that the claimant Admitted that may have an interest in the subject property. There is absolutely no proof or allegation that claimant owned the vehicle or United States Currency yet the Circuit Court found that she was the owner.

CONCLUSION

A review of the Plaintiff’s Petition (County Court Record 1-7)for forfeiture clearly shows that it states a claim upon which relief can be granted. The Trial Court committed reversible error by converting the Motion to Dismiss in to Motion for Summary Judgment without providing notice to the plaintiff. A review of the Circuit Court’s Order clearly show the Court also committed reversible error in affirming the trial court. The trial court committed reversible error by applying an erroneous legal standard for granting the

Claimant's Motion to Dismiss. The lower court erred by dismissing the Plaintiff's Petition. Therefore, this Court should reverse Circuit Court's affirmation of the lower court's dismissal and remand for a trial.

RESPECTFULLY SUBMITTED, this the 28TH day of SEPTEMBER, 2015.

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APPELLEE

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that on this date I served a true and correct copy of the within and foregoing upon non mec participants Honorable Lester F. Williamson, Honorable Veldore Young by mailing the same by U.S. Mail, postage prepaid, to said attorneys at P.O. Box 86, Meridian, MS 39302, and P.O. Box 2009, Meridian, MS 39302-2009 to said individuals usual and last known business and mailing address.

This the 28th day of September, 2015.

 /s/ANDY DAVIS
ANDY DAVIS

CERTIFICATE OF SERVICE

I do hereby certify that on this date I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:
Attorney for Appellee: Hon. J. Stewart Parrish.

SO CERTIFIED on this the 28th day of September, 2015.

 s/Andy Davis
ANDY DAVIS, Attorney for Appellant