

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2016-CC-01121

**LEONARD ALPERT, IZABELLA ALPERT,
AND THUY LAND PAWN SHOP, INC.**

APPELLANTS

VERSUS

CITY OF BILOXI, MISSISSIPPI

APPELLEE

**APPEAL
FROM THE CIRCUIT COURT OF
HARRISON COUNTY, SECOND JUDICIAL DISTRICT, MISSISSIPPI**

BRIEF FOR APPELLANTS

**WAYNE L. HENGEN
HENGEN & HENGEN
ATTORNEYS AT LAW
979 HOWARD AVENUE
BILOXI, MISSISSIPPI 39530
(228) 374-7844
MISS. BAR #2289**

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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 Circuit Court Judge may evaluate possible disqualification or recusal, to-wit:

1. Leonard Alpert
2. Izabella Alpert
3. Thuy Land Pawn Shop, Inc.
4. City of Biloxi, Mississippi
5. Gerald H. Blessey, Esq.
6. Boyd Gaming Corporation
7. IP Casino Resort and Spa
8. Duncan McKenzie
9. Michael F. Cavanaugh, Esq.

10. Nancy Depreo
11. Seymour Engineering, PLLC

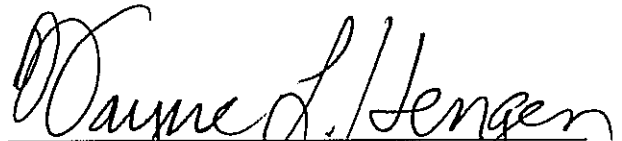

WAYNE L. HENGEN, Attorney of Record
for Leonard Alpert, Izabella Alpert, and
Thuy Land Pawn Shop, Inc., Appellants

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STATEMENT OF THE ISSUE

Was the RESOLUTION of the CITY OF BILOXI to approve the request of BOYD GAMING CORPORATION for vacation of the northern portion of Fayard Street unsupported by substantial evidence, arbitrary or capricious, beyond the power of the CITY, or violative of any rights to which the ALPERTS are entitled?

STATEMENT OF ASSIGNMENT

This case has not been assigned as of the filing of the BRIEF OF APPELLANTS.

STATEMENT OF THE CASE

Nature of the Case

This is a city street vacation case.

Course of Proceedings

The following sets out the proceedings from the beginning, it being noted that the AGREED BILL OF EXCEPTIONS (Commission Clerk's Papers: 1-12) sets out same in much greater detail:

- a. On or about July 1, 2015, BOYD GAMING CORPORATION submitted a Planning Commission Application whereby it sought, (1) to vacate the northern portion of Fayard Street, a Biloxi public right-of-way and, (2) to install and dedicate a new public right-of-way to the immediate west.
- b. After an August 6, 2015, Planning Commission hearing which was continued after only a few questions, on August 20, 2015, the Planning Commission heard the presentation of MICHAEL CAVANAUGH, attorney, and NANCY DEPREO with SEYMOUR ENGINEERING for BOYD GAMING. Objections were heard from the undersigned representing the ALPERTS and their business, together with other objectors. BOYD explained that the ALPERTS would get a fifteen (15) foot strip of the vacated Fayard Street adjacent to and along its west side with access from Bayview Avenue. The Planning Commission approved the Application as submitted on a vote of 8 to 4.
- c. On September 15, 2015, the Biloxi City Council considered the report and findings of the Planning Commission. MICHAEL CAVANAUGH and NANCY DEPREO made

their presentations for BOYD. The undersigned, representing the ALPERTS as objectors, requested a public hearing. Following discussion, the Council voted 5 to 2, adopting the report and findings of the Planning Commission.

- d. On September 22, 2015, the undersigned appeared before the City Council and requested reconsideration, but no action was taken.
- e. On September 23, 2015, the undersigned filed a NOTICE OF APPEAL and a MOTION FOR TIME TO FILE BILL OF EXCEPTIONS.
- f. On September 30, 2015, the City Council held a special meeting to consider a RESOLUTION TO AMEND the RESOLUTION that was passed on September 15, 2015, to provide that the east fifteen (15) feet of Fayard Street remain a public right of way up to the fifteen (15) foot strip at the ALPERT'S property with a curb cut on Fayard at the beginning of the realignment. Following various statements by Council Members, an attempt was made to amend the RESOLUTION TO AMEND to not vacate any part of the north end of Fayard Street. That failed by a vote of 3 to 4, after which the RESOLUTION TO AMEND RESOLUTION was tabled by a vote of 4 to 3.
- g. On December 16, 2015, an AGREED BILL OF EXCEPTIONS was filed with this Court.

Disposition in the Biloxi City Council

By vote of 5 to 2 on September 15, 2015, the City Council adopted the report and findings of the Planning Commission and approved the requested vacation of the northern portion of Fayard Street together with the installation of a new public right-of-way to the immediate west.

Statement of Facts

BOYD GAMING CORPORATION submitted an Application to the Biloxi Planning Commission seeking to vacate the northern portion of Fayard Street (a north/south right-of-way) where it intersects Bayview Avenue (an east/west right-of-way) and to install a new public right-of-way to the immediate west. (CCP: 16-27, 48-63.) BOYD GAMING abuts Fayard Street on the west of the northern portion of Fayard Street and is also the abutting property owner to a portion on the east side of Fayard Street. BOYD GAMING also is the property owner of property north of Bayview Avenue at Fayard Street and is the abutting property owner to the ALPERTS on the south. (CCP: 50.)

The ALPERTS are the owners of the property at the southeast corner of the intersection of Fayard Street and Bayview Avenue. (CCP: 50.) The ALPERTS have owned and occupied the subject property for over fifteen years. THUY LAND PAWN SHOP, INC., was incorporated on June 13, 2000, and has been issued a Privilege License by the CITY OF BILOXI to conduct a pawn shop business every year since occupancy. A copy of the Privilege License issued September 1, 2015, is a part of the record. (CCP: 199 and 200.)

The ALPERTS reside at their shop and park their only vehicle on the concrete pad at the south of their building on the northern portion of Fayard Street. The building and the pad take up their entire property. (CCP: 50, and the photos on CCP: 54.)

The ALPERTS operate their shop with two employees, each of whom drives to work and parks on the northern portion of Fayard Street. Their customers park on the northern portion of Fayard Street. The pawn shop is the only business conducted on the property. The ALPERTS depend on their customers in order to make the business successful. The ALPERTS also reside at the shop.

Fayard Street is a twenty-six foot wide improved right-of-way dedicated to the public.
(CCP: 13.)

The ALPERTS are the most recent in a long list of businesses to occupy the subject property beginning prior to 1952. (CCP: 46.)

The ALPERTS, their employees, and their customers all park on the northern portion of Fayard Street which has been used for public parking for decades without objection by the CITY OF BILOXI. (CCP: 46.) There is no parking on Bayview Avenue or on the new right-of-way which is the realigned Fayard Street. (CCP: 50.)

The City Council voted 5 to 2 to adopt the report and findings of the Planning Commission and approved the requested vacation. (CCP: 70-73 and 151; RE: 17-20.) It approved the vacation of Fayard Street down to a point over thirty-six feet south of the ALPERT'S property. The ALPERTS, their employees, and their customers are now left with no access to their property, and if the fifteen (15) foot strip is to be accessed from Bayview Avenue, the public is left with a seriously dangerous intersection.

SUMMARY OF THE ARGUMENT

The record shows that the ALPERTS have been denied access to their property which is both their business and their home. BOYD is the owner of the property to the east of the ALPERTS. BOYD is the owner of the property to the south of the ALPERTS as a result of the vacation. BOYD is also the owner of the property to west of the ALPERTS subject only to utility and other easements. To the north of ALPERTS is Bayview Avenue, a five (5) lane thoroughfare on which there is no parking.

The CITY has stated in the record that there is no access to the ALPERT'S fifteen (15) foot strip from Bayview Avenue because it is too close to the realigned Fayard Street intersection with Bayview Avenue and the pedestrian crosswalk. BOYD has stated that there is no access from the south because the property between the ALPERT'S fifteen (15) foot strip south to the realigned Fayard Street is water, sewer and other utilities as well as landscaping. It is also owned by BOYD with no provision for the ALPERTS to cross. It is now completely impossible for the ALPERTS, their employees, and their customers to access the property. Neither the CITY nor BOYD has a right to deny access.

There is nothing in the record that shows that the northern portion of Fayard Street must be closed in order for the realignment for Fayard Street to be placed to the west to line up with the entrance of BOYD'S property, IP CASINO AND RESORT, on the north side of Bayview Avenue. That realignment can take place without the vacation of Fayard Street.

If the CITY'S position is correct and the ALPERTS, their employees, and their customers must trespass across BOYD property from the realigned Fayard Street up to the ALPERT'S fifteen (15) foot strip, then the last vehicle in is the only one not trapped. To exit, one would have to reverse out onto the realigned Fayard Street.

If BOYD'S position is correct, then a dangerous, if not deadly, intersection has been created because the ALPERT'S fifteen (15) foot strip and the realigned Fayard Street both intersect Bayview Avenue within eleven (11) feet of each other, in between which is a pedestrian crosswalk across the five (5) lanes of Bayview Avenue. The last vehicle in is the only one not trapped. To exit, one would have to reverse out onto Bayview Avenue into the pedestrian crosswalk and at the realigned Fayard Street.

The vacation of the northern portion of Fayard Street is not supported by any evidence, much less substantial evidence. It is also clear that it was done at pleasure, without reasoned judgment, and with disregard for the surrounding facts and circumstances, and thus arbitrary and capricious. It was also beyond the power of the CITY to so do by favoring BOYD in such a way, and it violated the ALPERT'S right to access.

The problem can easily be solved by reversing the decision made to vacate the northern portion of Fayard Street as this Court has a statutory right to do and blocking off Fayard Street at Bayview, but otherwise leaving the street open and not vacated. The realigned Fayard Street can flow as intended, and the original northern portion of Fayard Street can remain as is and as it has been for many, many years allowing room for more than one vehicle, room to park, room to turn around and drive back out onto realigned Fayard Street. That way, the danger of the two vehicle intersections surrounding a pedestrian walkway all within eleven (11) feet is addressed and the ALPERTS are not denied access to their business and home.

ARGUMENT

Standard of Review

1. The proper standard of review is to determine whether the decision of the municipality: (1) was unsupported by substantial evidence; (2) was arbitrary or capricious; (3) was beyond the power of the municipality to make; or (4) violated some statutory or constitutional right of the complaining party. *Mill Creek Properties v. City of Columbia*, 944 So.2d 67, 69 (Miss. App. 2006).

Analysis

2. It is submitted by the ALPERTS that the CITY'S RESOLUTION vacating the northern portion of Fayard Street on which their property abuts was unsupported by substantial evidence, was arbitrary and capricious, was beyond its power, and violated their rights.

Access Denied

3. The record shows that by vacating the northern portion of Fayard Street the CITY has denied the ALPERT'S access to their property. The ALPERTS are abutting landowners to Fayard Street. Upon vacation of the northern portion of Fayard, they are to be given a fifteen (15) foot wide strip adjacent to their property on the west. (Commission Clerk's Papers: 052.)

4. Regarding utilization of and access to the fifteen (15) foot strip, the following exchange took place between MR. WASHER, a Planning Commission member, and MS. DEPREO with BOYD at the Biloxi Planning Commission Meeting on August 6, 2015:

"MR. WASHER:

If I might ask, since you need more time to work on something, looking at the drawings and all that was provided for the hearing we were going to hold today, with the realignment, it would appear to me that the neighbor there, the only neighbor you got on that side of the street, is probably going to have a curb cut right there unless you propose to sidewalk over that to get into that portion of property. To me that seems mighty close to the new entrance and exits. Has there been any conversation with the neighbor?

MS. DEPREO:

There has been conversation with the neighbor. A curb cut was not brought up or suggested from the neighbor. The additional 15-foot right-of-way he would be granted on the vacation of Fayard Street was discussed. The curb cut in that area was not. There are existing utilities there, which IP is willing to give the city an easement over this where the utilities are located for the FEMA project. That has been discussed. That area is proposed to be landscaped.

MR. WASHER:

Is the neighbor aware that the existing curb cut would go away?

MS. DEPRIO:

Yes, he is. He is aware. I'm also in the FEMA project, and since this project, the realignment, will allow currently the FEMA plan shows the sidewalk stopping at the pawn shop location. There is not room to bus up to the right-of-way. This proposed layout will allow residents to be able to walk all the way up Fayard to Bayview Street. It will allow for a sidewalk. So in removing the curb cut you are getting a sidewalk, so pedestrians won't be walking out in the street. It is a safety issue." (CCP: 92.)

[IP is IP CASINO AND RESORT owned by BOYD.]

5. At that same meeting, the following exchange took place between MR. CARRON, a Planning Commission member, and MS. DEPRIO with BOYD:

"MR. CARRON:

Do you have the road that the pawn shop will be getting to utilize that anyway he wants?

MS. DEPRO:

Yes, sir. He could use it for parking or whatever he wishes to use it for." (CCP: 93.)

6. At the August 20, 2015, meeting of the Biloxi Planning Commission, the following exchange took place between MR. STANOVICH, a Planning Commission member, and MS. DEPREO with BOYD:

"MR. STANOVICH:

I got one. You said that the property is being vacated with the pawn shop and you could use it as parking; did you say that?

MS. DEPREO:

Yes, sir.

MR. STANOVICH:

What is the ingress and egress of that?

MS. DEPREO:

Let me go back to that slide. We actually have 15 feet, which I will blow it up here. There is 15 feet across the frontage here. Can we do a curb cut here? No, because we have landscaping. We have water and sewer under there. Could we possibly put a curb cut on the FEMA project? It's a possibility. We are having meetings with FEMA now. This is something that we probably need to address with them and let them know that there needs to be a curb cut there.

MR. STANOVICH:

So the access would be on Bayview?

MS. DEPREO:

Bayview. Yes. Thank you. (CCP: 100.)

7. Notwithstanding the clear position of BOYD set out in these exchanges, at the presentation of the arguments before the Circuit Court, the CITY through its attorney referenced two (2) documents that he represented clearly shows no access to Bayview Avenue from the subject fifteen (15) foot strip. (CCP: 53 and 61; T: 13-14.)

8. The attorney for the CITY then stated that there is a curb cut at the southern end of the vacated portion of Fayard Street to allow access by the ALPERTS from the south and states that access to their property is not cut off. (CCP: 53 and 61; T: 15.) Contrary to the representation, no curb cut is shown.

9. However, the area that the CITY says is ALPERT'S access is the area that BOYD says is a utility easement to accommodate FEMA water and sewer mains already installed. (CCP: 50, 53, and 55.) Additionally, it is an area for landscaping as pointed out by MS. DEPREO at the Biloxi Planning Commission meeting. She represents that there can be no curb cut except at Bayview. (CCP: 92 and 100.)

10. An additional problem with the CITY'S position is that the property south of the fifteen (15) foot strip is the property of BOYD by virtue of the vacation. BOYD is the owner on the east and BOYD is the owner on the west of the vacant part of Fayard Street. Upon vacation, BOYD receives all of Fayard Street from the south end of the ALPERT fifteen (15) foot strip all the way down to the realigned Fayard Street. Accordingly, a curb cut on the realigned Fayard Street does not give access to the ALPERT'S property without trespassing on BOYD'S private property. It is completely impossible for the ALPERTS, their employees, or their customers to access the business. The ALPERTS are effectively blocked in with BOYD'S private property on the east, BOYD'S private property, utility easements, and landscaping on the west, BOYD'S private property, utility easements, and landscaping on the south, and Bayview Avenue on the north which is a five (5) lane thoroughfare with no parking. That BOYD says that its parking lot which is east, west, and south of the ALPERTS is unrestricted is of no consequence. There is no written agreement or resolution providing for that. BOYD represents that the ALPERTS can just, "count on the good faith representation . . ." it makes that they are going to be able to park in the lot. (CCP: 187.) That, of course, is simply unacceptable.

11. The RESOLUTON passed by the CITY does not address the matter. (CCP: 70-73; RE: 17-20.) The only portion of the RESOLUTION that speaks to the ALPERTS at all is as follows:

"WHEREAS, it should be explained that several individuals expressed concern with this project as presented, noting in particular significant accessibility and parking concerns related to the Pawn Shop business at the corner of Fayard Street and Bayview Avenue;"

12. With the CITY'S argument that there is no access from Bayview and the record showing that there is no curb cut much less any access through BOYD'S private property from the south, the ALPERT'S right of access has been altered to an extent that it has made access not just more difficult, but completely impossible for them, their employees, and their customers. The

ALPERT'S access rights were taken, not merely diverted, and no route of access was substituted. That simply cannot be done.

13. Consider *Mississippi State Highway Commission v. Ray*, 215 So.2d 569 (Miss. 1968). While it is an eminent domain case, the law is applicable here. There, the physical aspect of an existing road immediately in front of a commercial establishment had been changed making it more difficult for owners and customers to get to the business from the existing road.

14. The Court found that the business could recover from any damage the limited access caused in the value of the property. It stated that the existing access rights had been taken, not merely diverted, and more circuitous routes were substituted. *Id.* at 571. The Supreme Court affirmed the decision of the trial court in part due to the taking of the right of direct access.

15. Here, the ALPERT'S right of access has been taken by vacation just as if it was eminent domain. And it is not just direct access, it is all access. It is not more difficult, it is virtually impossible to access their business which is also their home. Their employees have no access. Their customers have no access. Delivery trucks have no access. No one has access but BOYD.

16. The vacation of Fayard Street which denies the ALPERTS access to their business and home is unsupported by substantial evidence. Substantial evidence is defined as such relevant evidence as adequate to support a conclusion. It is more than a mere scintilla or suspicion. *Miss. Dept. of Public Safety v. Raybon*, 138 So.3d 220, 227 (Miss. App. 2014). There may be voluminous evidence, but there is absolutely no substantial evidence supporting the decision of the CITY to vacate any portion of Fayard Street and thereby deny access of abutting owners to their property.

17. The ALPERTS take issue with only the vacation, not the realignment of Fayard Street. There is no substantial evidence that supports the notion that the realignment cannot be done

unless the northern portion of Fayard Street is vacated. But, the decision was made to vacate anyway.

18. It is clear that the CITY is very tired of dealing with BOYD in its efforts to have it “improve, beautify, and make safe” this area. (CCP: 47 and 169.) The CITY’S real position is summed up by the Council when it states that BOYD is paying for all of the realignment improvements which benefits the CITY, and the pawn shop is paying for nothing. (CCP: 176.)

19. Even without substantial evidence to support the request to vacate Fayard Street, the CITY made it clear that it wanted to grant BOYD’S requests and voted to grant both realignment and vacation. Such an act is arbitrary and capricious by its very nature. It is arbitrary and capricious when it is “done at pleasure, without reasoned judgment, or with disregard for the surrounding facts and circumstances.” *Hopkins v. City of Mendenhall*, 116 So.3d 166 (Miss. App. 2013). The above shows that the CITY vacated Fayard Street without reasoned judgment and with complete disregard for the surrounding facts and circumstances.

20. The facts of this case are similar to the facts in the *Laurel Improvement* case. That case involved the closing of Post Street between East and Pine Street. Laurel owned the land abutting on the north side of the street. Rowell owned the land on the south. The City not only closed Post Street, it gave the street to Laurel which then built a fence around it and erected buildings on it. The Court found that the only reason the street was closed was to give it to Laurel. It held that the action was outside the City’s power and was intolerable. The Court ruled that public roads should never be closed except when it is for the public good and the government compensates the abutting landowner. *Laurel Improvement Co. v. Rowell*, 36 So. 543, 543-44 (Miss. 1904.)

21. The similarity is that in both cases, a street was closed (vacated) in favor of only one of two abutting landowners. Granted, the ALPERTS would be given fifteen feet of Fayard Street

for the length its property abuts it, but this fifteen feet is not accessible. There is no evidence, much less substantial evidence, that supports vacation being in the public good. So doing was both beyond the power of the CITY, and it violated the ALPERT'S right to access. *Mill Creek*, 944 So.2d at 69.

Dangerous Intersection

22. When the CITY adopted the recommendation of the Planning Commission, it supposedly adopted the representations of BOYD that the ALPERTS would be granted a fifteen (15) foot strip of that portion of Fayard Street being vacated that is adjacent to their property and that access to that strip would be from Bayview Avenue. The record shows that the realigned Fayard Street would intersect with Bayview Avenue less than eleven (11) feet to the west of the ALPERT'S fifteen (15) foot strip. (CCP: 52.) The record also shows that a pedestrian crosswalk across the five (5) lanes of Bayview Avenue is in between the ALPERT'S fifteen (15) strip and the realigned Fayard Street. (CCP: 50.) In other words, before, there was only one vehicle intersection and a pedestrian crosswalk. Now, within less than eleven (11) feet, there are two (2) vehicle intersections in between which there is a pedestrian crosswalk. Also of note, is the fact that if someone could actually drive a vehicle into the ALPERT'S fifteen (15) foot strip from Bayview Avenue, that person must back out onto Bayview Avenue into the pedestrian crosswalk, the realigned Fayard Street, and Bayview Avenue traffic. The CITY has actually doubled the vehicle intersections at this point, created seriously dangerous intersections, and placed pedestrian traffic right in the middle. The notion that such is safer is unsupported by substantial evidence on its very face. (CCP: 96-98, 134-137.)

23. There should be no question that the CITY'S decision was without reasoned judgment and with total disregard for the surrounding facts and circumstances, the very essence of arbitrary and capricious and defined by law. *Hopkins*, 116 So.3d at 169.

Resolving the Problem

24. BOYD'S Application was for both vacation and for realignment of Fayard Street. The CITY approved BOYD'S Application and realigned that northern portion of Fayard Street to the west to line up with the entrance of BOYD'S property, IP CASINO AND RESORT, on the north side of Bayview Avenue.

25. The CITY also vacated the northern portion of the original Fayard Street. While the records does deal with the realignment and also deals with landscaping and other issues, the vacation is unsupported by substantial evidence, is arbitrary and capricious, and arguably done for the benefit of BOYD in violation of the ALPERT'S rights.

26. It is apparent that the CITY recognized that it had a problem in allowing access to the fifteen (15) foot strip from Bayview and discussed amending the RESOLUTION to provide access from the south with a curb cut and leaving the east fifteen (15) feet of Fayard Street south of the ALPERT'S fifteen (15) strip open and not vacated. There was also an attempt to amend that RESOLUTION to leave all of the original Fayard Street open, not vacated and blocked from Bayview, but that amendment failed, and the RESOLUTION to provide access to the ALPERT'S fifteen (15) foot strip from the south was tabled. The CITY almost got it right, but there was much confusion, and the CITY was just tired of dealing with BOYD.

27. If, as claimed by the CITY and BOYD, the intent was to eliminate the intersection of the original Fayard Street with Bayview Avenue for safety reasons, then why leave access to the

ALPERT'S fifteen (15) foot strip accessible from Bayview? The better question is: Where is the evidence that supports the vacation of the entire northern portion of Fayard Street?

28. The conundrum the CITY faces can be resolved by blocking off Fayard Street at Bayview and otherwise leaving the street open and not vacated. That way, the danger of the two (2) vehicle intersections surrounding the pedestrian walkway is addressed and the ALPERTS are not denied access to their business and home. The northern portion of Fayard Street can then remain as an improved public right-of-way as the record indicates it has been for many, many years. Also, by not vacating any portion of Fayard Street, there is, in addition to access, room for more than one vehicle, there is room to park, and there is room to turn around to drive back out onto the realigned Fayard Street.

CONCLUSION

It is respectfully requested that this Court reverse the CITY and render a judgment in favor of the ALPERTS leaving Fayard Street as it was, not vacated or taken, but closed at Bayview Avenue which would allow the ALPERTS, their employees, and their customers to enter from the south, park, turn around and drive out to the south. Fayard Street would remain a dedicated private street for use by anyone. Such would be an acceptable way to eliminate the danger at Bayview and prevent the violation of the right of access suffered by of the ALPERTS. Such is as provided by Miss. Code Ann., §11-51-75 which states that the Court,

“. . . shall affirm or reverse the judgment. If the judgment be reversed, the circuit court shall render such judgment as the . . . municipal authorities ought to have rendered, and certify the same to the . . . municipal authorities.” See *Mayor of Prentiss v. Jefferson Davis County*, 874 So.2d 962, 966 (Miss. 2004), and *Lee County Drys v. Anderson*, 95 So.2d 224, 227 (Miss. 1957).

CERTIFICATE OF SERVICE

I, WAYNE L. HENGEN, do hereby certify that I have this day filed the foregoing BRIEF FOR APPELLANTS with the Clerk of Court using the MEC system which sends notification of such filing to the following:

David A. Wheeler, Esq.

Michael F. Cavanaugh, Esq.

Further, I hereby certify that I have mailed by United States Postal Service the BRIEF FOR APPELLANTS to the following:

Hon. Lawrence P. Bourgeois, Jr.
Circuit Court Judge
P.O. Drawer 1461
Gulfport, Mississippi 39502

This the 13th day of February, 2017.


WAYNE L. HENGEN