

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TARINIKA SMITH, INDIVIDUALLY AND ON
BEHALF OF KAYDEN JOHNSON, DECEASED, SHELENA
AUSTIN PREWITT, NATURAL MOTHER AND
NEXT FRIEND OF XAVIER AUSTIN, a minor
JAKILA MARTIN, a minor, MARLO WATKINS
a minor and HELEN YANCY, a minor,
LINDA CUNNINGHAM, GENERAL
GUARDIAN AND NEXT FRIEND OF
TREVIN MAYS, a minor, and JERKISHA MAYS,
a minor, CHRISTINE MAGEE, NATURAL MOTHER
AND NEXT FRIEND OF MONSHANNA WESTON,
BRENDA WOODARD, NATURAL MOTHER AND
NEXT FRIEND OF BRENDAE WOODARD, a minor
ANGELA CRAFT, NATURAL MOTHER AND
NEXT FRIEND OF DEARYELL CRAFT, a minor
KAYTANA DILLARD, NATURAL MOTHER AND
NEXT FRIEND OF RONISHA DILLARD, a minor
JERMAINE DILLARD, a minor, and QUASHOUNTA
DILLARD, a minor

APPELLANTS

vs.

CAUSE NO. 2016-IA-1060

CHURCH MUTUAL INSURANCE COMPANY
AND ADLAI JOHNSON

APPELLEES

BRIEF OF THE APPELLANTS

Appealed from the Circuit Court of Marshall County, Mississippi. This

brief is filed by:

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Oral Argument Requested

CERTIFICATE OF INTERESTED PERSONS

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TARINIKA SMITH, et al

APPELLANTS

VS.

2016-IA-01060

CHURCH MUTUAL INSURANCE COMPANY, et al

APPELLEES

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

1. Tarinika Smith¹, Appellant.
2. Shelena Austin Prewitt², Appellant.
3. Linda Cunningham³, Appellant.
4. Christine Magee⁴, Appellant
5. Brenda Woodard⁵, Appellant
6. Angela Craft⁶, Appellant
7. Kaytana Dillard⁷, Appellant

¹ Tarinika Smith asserted two claims. One claim was for her individual personal injuries sustained as a proximate result of the April 28, 2013 accident. The other claim is in her capacity as heir at law and wrongful death beneficiary of her deceased quick fetus, Kayden Johnson.

² Shelena Austin Prewitt is the natural mother of the minors, Xavier Austin, Jakila Martin, Marlo Watkins, and Helen Yancy.

³ Linda Cunningham is the General Guardian of the minors, Trevin Mays, and Jerkisha Mays.

⁴ Christine Magee is the natural mother of the minor, Monshanna Weston.

⁵ Brenda Woodard is the natural mother of the minor, Brenea Woodard.

⁶ Angela Craft is the natural mother of the then minor Dearyll Craft

⁷ Kaytana Dillard is the natural mother of the minors, Ronisha Dillard, Jermaine Dillard, and Quosshounta Dillard.

8. Mt. Vernon M. B. Church
9. Drayton D. Berkley, Attorney of Record for the Appellants
10. Matthew McCaw of McDonald Kuhn, Attorneys of record for Tarinika Smith

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11. Church Mutual Insurance Company, Appellee
12. Adlai Johnson, Appellee
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15. D. Reid Wamble, Attorney of Record for Adlai Johnson and Erica Johnson⁸.

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STATEMENT OF ISSUES

1. Whether Mississippi substantive tort law applies to determine fault and damages for the April 28, 2013 motor vehicle accident in Marshall County, Mississippi.
2. Whether Adlai Johnson’s failure to claim his mail constitutes willful evasion of process pursuant to federal law.
3. Whether Tarinika Smith⁹ is entitled to an an extension of time to serve process upon Adlai Johnson.
4. Whether the October 24, 2016 Order, R426, is limited to Tarinika Smith’s individual personal injury claims¹⁰.

STATEMENT OF THE ASSIGNMENT

The Appellants respectfully urge the Mississippi Supreme Court to retain this appeal as it involves major issues of first impression.

STATEMENT OF THE CASE

This case arises out of a motor vehicle accident that occurred on April 28, 2013 in Marshall County, Mississippi. R1, 74, 154-163.

On June 15, 2015, Appellants, all minors except Tarinika Smith, (“collectively referred to as the Smith Plaintiffs”) filed a civil action bearing cause No. 2015-139 in the

⁹ This issue is moot as to the other Appellants.

¹⁰ Mississippi wrongful death claims cannot be split. *Estate of Davis v. Blaylock*, 212 So. 3d 775, 759 (Miss. 2017). Any wrongful death claim filed while another one is already pending is moot and a nullity. *Id.*

Circuit Court of Marshall County, Mississippi (“Smith lawsuit”) and caused summons to be issued to Adlai Johnson, Jr. and Church Mutual Insurance that same day. R1-5

On August 20, 2015, Church Mutual Insurance Company filed its answer in the Smith lawsuit. R23-30.

On January 14, 2016, Johnson and the rest of his family (collectively the “Johnsons”) filed a lawsuit in Marshall County, Mississippi against Tarinika Smith, and her church in civil action no. 2016-021 (“Johnson lawsuit”). R96-101, 315-320.

On July 7, 2016, the trial court granted Church Mutual’s motion declare Tennessee substantive law controlling as to all issues in the case, except rules of the road. R197-198.

On July 11, 2016, the trial court granted Johnson’s motion to dismiss for failure to perfect service within 120 days consistent with Rule 4(h) of the Mississippi Rules of Civil Procedure. R214-215.

On October 24, 2016, the trial court granted Church Mutual’s motion for summary judgment dismissing the Smith Plaintiff’s uninsured or underinsured motorist claims without prejudice¹¹. R301-302.

On October 26, 2016, the trial court entered an order dismissing Tarinika Smith’s individual personal injury counter-claim. R426.

On November 3, 2016, the Smith Plaintiffs filed a motion to alter or amend the October 24, 2016 summary judgment. R307-314.

On January 3, 2017, the trial court consolidated the Smith lawsuit and the Johnson lawsuit.

¹¹ The trial court also denied the Smith Plaintiffs’ Motion to Revise, Motion to Strike Exhibits, and Motion for a continuance. R305-306.

On January 23, 2017, the Mississippi Supreme Court granted interlocutory appeal, stayed the Smith lawsuit and the Johnson lawsuit and deemed the notice of appeal to be filed¹². R460-461.

STATEMENT OF THE FACTS

On January 20, 2013, Church Mutual Insurance Company issued and delivered a business automobile policy to Mount Vernon Missionary Baptist Church in Rossville, Tennessee. R164-173. The policy provided uninsured or underinsured motorist benefits to the Smith Plaintiffs. R164-173

On April 28, 2013, Smith Plaintiffs and the Johnsons were involved in a motor vehicle accident in Marshall County, Mississippi. R1, 74, 154-63.

The Smith Plaintiffs and the Johnsons are all Tennessee residents. R1, 74, 154-163.

Tarinika Smith was the only adult in her vehicle and was pregnant with a quick fetus. Id.

Smith was the operator of her vehicle. Id.

On June 16, 2015, Smith Plaintiffs attempted to serve Adlai Johnson with process via certified mail in compliance with Rule 4(c)(5) of the Mississippi Rules of Civil Procedure. R86.

On August 11, 2015, Adlai Johnson failed to claim the process and the US Postal

service returned it to undersigned counsel as endorsed as “unclaimed”. R87.

¹² This bought the matter here. Moreover, since the Smith Plaintiffs’ timely filed the November 3, 2016 Rule 59 Motion, the Smith Plaintiffs’ time to file a Rule 4 appeal in the Smith lawsuit has never commenced to run because there is no order denying the November 3, 2016 motion. *Beamer v. Beamer*, 22 So. 3d 430 (Miss. App. 2009)

The United States Postal Service Domestic Mail Manual (DMM) defines the endorsement “Unclaimed” as addressee abandoned or failed to call for mail.

DMM, Section 507 1.4.1. R185

On March 14, 2016, Smith Plaintiffs caused the alias summons to be issued and same was served upon Johnson on March 28, 2016. R35,37.

On May 25, 2016, Tarinika Smith filed a compulsory counter-claim for her individual personal injury claim against Adlai Johnson in the Johnson lawsuit. R366.

On October 21, 2016, the trial court entered an order dismissing Tarinika Smith’s individual personal injury counter-claim. R426.

SUMMARY OF THE ARGUMENT

Mississippi substantive tort law applies to determine fault and damages. Tarinika Smith is entitled to an extension of time to serve process on Adlai Johnson for her wrongful death claims in the Smith litigation.

ARGUMENT

A. The Standard of Review¹³

The Mississippi Supreme Court has held that the construction of statutes was an issue of law which the Court reviews *de novo*¹⁴. The Mississippi Supreme Court has that the construction of contracts was an issue of law which the Court reviews *de novo*¹⁵. The

¹³ This is the standard of review that applies to each issue before the Court. The Court must first determine whether the trial court applied the correct legal standard even when reviewing for abuse of discretion. *In Re Guardianship of Roshto*, 134 So.3d 739, 747 (Miss. 2014).

¹⁴ *Arceo v. Tolliver*, 19 So. 3d 67, 69-70 (Miss. 2009)

¹⁵ *Northeast Mental Health -Mental Retardation Comm’n*, 187 So. 3d 601, 604 (Miss. 2016)

recognition of the correct legal standard¹⁶, the application of law to fact¹⁷, and conclusions of law¹⁸ are issues of law that are reviewed *de novo*.

B. Mississippi substantive tort law applies to determine fault and damages for the April 28, 2013 motor vehicle accident in Marshall County, Mississippi.

1. Tennessee substantive uninsured motorist provisions incorporate Tennessee choice of law principles.

Substantive Tennessee UM principles apply to policies issued in Tennessee¹⁹.

Insurance policies are construed in the same manner as any other contract²⁰. The policy incorporates the existing substantive²¹ law on the date of issuance²². Existing law includes statutes, regulations, and caselaw²³. Existing substantive law includes choice of law principles²⁴. In *Hathaway v. McKinley*, 830 S.W.3d 53, 59-60 (Tenn. 1992), the Tennessee Supreme Court adopted the most significant relationship test to determine the relevant substantive law to apply to tort issues. This is the same choice of law test applied by Mississippi. See 6. Below. The *Hathaway* court instructed that law of the place of injury would apply in most cases and in close cases. *Id.*

¹⁶ *Citizens National Bank v. Dixieland Forest Products, LLC*, 935 So.2d 1004, 1008 (Miss. 2006). *Mallard v. Burkhart*, 95 So.3d 1264 (Miss. 2012).

¹⁷ *Deere & Co., v. First National Bank of Clarksdale*, 12 So.3d 516, 520 (Miss. 2009).

¹⁸ *Estate of McLemore v. McLemore* 63 So.3d 955 (Miss. 2011).

¹⁹ *Fleming v. Yi*, 982 S.W.2d 868, 870 (Tenn. Ct. App. 1998).

²⁰ *US Bank v. Tennessee Farmer's Mutual Ins. Co.*, 277 S.W.3d 381, 386 (Tenn. 2009)

²¹ *Dick Broadcasting Co. Inc., of Tennessee v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 668 (Tenn. 2013). The law of the forum is controlling regarding to remedial and procedural issues. *Sherwin Williams v. Morris*, 156 S.W.3d 350, 352 (Tenn. Ct. App. 1941); *In re Stalup's Cup Estate*, 627 S.W.2d 364, 368 (Tenn. Ct. App. 1981)

²² January 20, 2013.

²³ *Dick Broadcasting Co., Inc.*, at 668.

²⁴ *Lemons v. Cloer*, 206 S.W.3d 60, 65-70 (Tenn. Ct. App. 2006).

2. Mississippi applies its own remedial and procedural law

Mississippi applies its own remedial rules²⁵. Mississippi also applies its own procedural rules²⁶. Tennessee also holds that the law of the forum applies regarding remedial law²⁷. Tennessee also holds that the law of the forum applies regarding procedural law²⁸. Thus, Mississippi law applies regarding remedial and procedural issues.

3. Tenn. Code Ann § 56-7-1206 is a remedial statute

In *Lipscomb v. Doe*, 32 S.W.3d 840, 847 (Tenn. 2000) and *Hutchinson v. Tennessee Farmers Mut. Ins. Co.*, 652 S.W.2d 904, 906-907 (Tenn. Ct. App. 1983), the Tennessee Supreme Court and the Tennessee Court of Appeals found that the Tennessee UM service statute found at Tenn. Code Ann. § 56-7-1206 was remedial²⁹. In a word, Tenn. Code Ann. § 56-7-1206 is remedial and does not have extra-territorial effect. *Id.* at 906-907. Thus, Tennessee has clearly identified this statute as remedial and has no application to an action filed in this forum.

4. Smith Plaintiffs can maintain a direct action against Church Mutual Insurance Company

Tennessee courts look to the forum state to determine if direct actions are proper against uninsured motorist carriers. *Hutchinson* at 906-907. In *Hearthcock v. State Farm Mutual Ins. Co.*, 248 So. 2d 456, 460-61 (Miss. 1971), the Mississippi Supreme Court that direct actions were proper against uninsured motorist carriers. Moreover, in

²⁵ *Sentinel Industrial Contracting Corp. v. Kimmons Industrial Service Corp.*, 743 So.2d 954, 960 (Miss. 1999).

²⁶ *Zurich American Ins., v. Goodwin*, 920 So. 2d 427, 433 (Miss. 2006).

²⁷ *Sherwin Williams v. Morris*, 156 S.W. 2d 350, 352 (Tenn. Ct. App. 1941).

²⁸ *In re Stalup's Cup Estate*, 627 S.W.2d 364, 368 (Tenn. Ct. App. 1981).

²⁹ Judicial constructions of statutes become part of the statute. *Blank v. Olsen*, 662 S.W.2d 324, 326 (Tenn. 1983); *Hill v. City of Germantown*, 31 S.W.3d 234, 239-240 (Tenn. 2000).

Morris, 156 S.W.2d at 352 (Tenn. Ct. App. 1941), the Tennessee Court of Appeals identified the form of remedy, statute of limitations, rules of pleading, and measure of damages as remedial which followed the law of the forum.

5. Application of Tennessee choice of law provisions

Applying *Hathaway* to the facts before this court, Mississippi substantive tort law applies to determine fault and damages for the April 28, 2013³⁰ accident. The relationship of the parties is centered where the automobile accident occurred, Marshall County, Mississippi³¹. In turn, the injuries occurred in Mississippi and the conduct causing the injury occurred in Mississippi. It is only fortuitous that the Smith Plaintiffs and the Johnsons are from Shelby County, Tennessee. This is the same MSA as Marshall County, Mississippi.

6. Mississippi substantive tort law choice of law principles

In *Church v. Massey*, 697 So.2d 407, 410 (Miss. 1997), the Mississippi Supreme Court held that the factors to determine the relevant substantive tort law are (a) where the injury occurred (b) where the conduct causing the injured (c) the domicile or

³⁰ In *Slutsky v. City of Chattanooga*, 34 S.W.3d 467, 469-70 (Tenn. Ct. App. 2000), the Tennessee Court of Appeals held that an insured's rights to his or her uninsured motorist benefits accrue on the day of the accident. Moreover, in *Medders v. USF & G*, 623 So.2d 979, (Miss. 1993), the Mississippi Supreme Court held that an insured's entitlement to uninsured motorist benefits are determined at the time of the injury. In other words, on the day of the accident. Thus, there is no conflict of law on this point. In *Collazo v. Haas*, 2011 WL 6351865, Slip. Op. at 4-6, (Tenn. Ct. App. December 15, 2011), the Tennessee Court of Appeals held that an insured is legally entitled to recover UM benefits if he or she can prove damages and fault of the uninsured motorist driver. *Collazo* is a binding construction of the requirements to receive UM benefits. n.21, *infra*. The Smith Plaintiffs are legally entitled to recover uninsured motorist benefits by providing proof [testimony] of Johnson's fault and their damages.

³¹ There is no pre-existing relationship in Shelby County, Tennessee to center the relationship there. In *Hathaway*, the pre-existing relationship was scuba diving class. *Hathaway*, at 60. Likewise in *McDaniel v. Ritter*, the preexisting relationship was a pilot passenger relationship. *McDaniel v. Ritter*, 556 So.2d 303, 311 (Miss. 1989)

residence of the parties (d) where the relationship between the parties is centered. In *Mitchell v. Craft*, 211 So. 2d 509, 512-515 (Miss. 1968), the Mississippi Supreme Court adopted the most significant relationship test to resolve choice of law issues but also found that Mississippi disfavors application of a rule of law repugnant to Mississippi substantive law and all doubts are resolved in favor of the application of Mississippi law. In *Mitchell*, although the accident occurred in Louisiana, the Court found controlling that the case was filed in Mississippi and Louisiana contributory negligence principles were repugnant to Mississippi pure comparative fault principles. *Id.*

7. Application of Mississippi substantive tort choice of law principles

Applying *Massey* and *Mitchell* to the case at bar, Mississippi substantive tort law applies to determine fault and damages for the April 28, 2013 accident. The relationship of the parties is centered where the automobile accident occurred, Marshall County, Mississippi. In turn, the injuries occurred in Mississippi and the conduct causing the injury occurred in Mississippi. It is only fortuitous that the Smith Plaintiffs and the Johnsons are all from Shelby County, Tennessee. This is the same MSA as Marshall County, Mississippi.

Moreover, two aspects of Tennessee substantive tort law are repugnant to Mississippi substantive tort law and militate that Mississippi substantive tort law apply: (a) comparative fault principles and (b) the ability to maintain an action for an unborn fetus. Tennessee follows a modified comparative fault scheme³² which is repugnant to Mississippi's pure comparative fault scheme. Mississippi authorizes recovery for the

³² *McIntyre v. Balentine*, 833 S.W.2d 55, 57 (Tenn. 1992) and its progeny. The *McDaniel* court has already instructed that Mississippi pure comparative fault should be applied under these circumstances. *McDaniel*, 316-17.

wrongful death of a quick³³ fetus while Tennessee limits these claims to a viable³⁴ fetus. Thus, Mississippi substantive tort law applies under *Mitchell* to determine fault and damages.

8. All choice of law analysis militates that Mississippi substantive tort law applies regarding fault and damages.

In sum, under Mississippi choice of law principles or Tennessee choice of law principles, Mississippi substantive tort law should apply to determine fault and damages. The Court should reverse the trial court's July 7, 2016 Order and remand this matter with instructions to apply Mississippi substantive tort law regarding fault and damages.

C. Adlai Johnson failure to claim his mail constitutes willful evasion of process pursuant to federal law.

1. Mississippi Construction Principles

The rules of statutory construction apply to construction of rules of civil procedure³⁵. These rules of construction also apply with equal force to regulations³⁶. Clear and unambiguous rules and regulations like clear and unambiguous statutes should be enforced as written³⁷. In *Lewis v. Hinds County Circuit Court*, 158 So.3d 1117, 1121-1126 (Miss. 2016), the Mississippi Supreme Court held that plain and unambiguous

³³ 66 *Federal Credit Union v. Tucker*, 853 So.2d 104 (Miss. 2003). In *Shortie v. George*, 2015-CA-00944, paragraph 24 (Miss. App. May 23, 2017), the Mississippi Court of appeals ruled that Mississippi law determines negligence and that ability to recover for a fatal motor vehicle accident.

³⁴ *Miller v. Dacus*, 231 S.W.3d 903, n2 (Tenn. 2007).

³⁵ See *Diogenes Editions, Inc. v. State of Mississippi*, 700 So.2d 316, 320 (Miss. 1997) (specific rules govern over general rules).

³⁶ *Columbia Gas Transmission v. Barr*, 194 So. 2d 890, 894-5 (Miss. 1967).

³⁷ See *In re AB*, 663 So.2d 580, 581 (Miss. 1995). (clear and unambiguous statute enforced as written).

statutes, and thus rules and regulations, are enforced as written. In *Tellus Operating Group v. Maxwell Energy*, 156 So.3d 255, 261 (Miss. 2015), Mississippi Supreme Court held that statutes, and thus rules and regulations, dealing with the same subject matter should be interpreted *in pari materia*. Moreover, specific statutory provisions, and thus rules and regulations, control over conflicting general provisions³⁸. Finally, in *Winder v. State*, 640 So.2d 893, 905 (Miss. 1994), the Mississippi Supreme Court held that its construction of a statute would be deemed part of the statute, and thus a rule or regulation, if the Legislature failed to amend the statute.

39 CFR §111.1-111.5 incorporates the contents of the DMM as binding federal postal regulations. In *United States v. Bolton*, 781 F.2d 528 (6th Cir. 1985), the United States Court of Appeals for the Sixth Circuit construed the “unclaimed” endorsement to constitute willful evasion of service of process on the part of the addressee.

In *Tesoro Hawaii Corp. v. U.S.*, 405 F.3d 1339, 1346 (Fed. Cir. 2005) and *Resnick v. Swartz*, 303 F.3d 147, 152 (2nd Cir. 2002), the Federal Circuit Court of Appeals and the Second Circuit Court of Appeals instructed that regulations are construed in the same manner as statutes.

In *Rivers v. Roadway Express, Inc.*, 511 US 298, 312-314 (1994), the United States Supreme Court held that a judicial construction of a federal statute is part of the statute. In *Chevron USA Inc. v. Natural Resources Defense Council*, 467 US 837, 843-846 (1984), the United States Supreme Court held that federal regulations are entitled to same treatment as federal statutes. All of these federal actions necessary preempt state

³⁸ *Lenoir v. Madison County*, 641 So.2d 1124, 1128-29 (Miss. 1994).

law. *Mobility Medical Inc. v. Miss. Dept. of Revenue*, 119 So.3d 1002, 1004 n.6 (Miss. 2013). It follows that *Bolton* is a persuasive construction of the postal regulation that should be construed as part of the regulation. Thus, a USPS endorsement of “unclaimed” mail constitutes willful evasion of service of process as a matter of federal law on the part of the addressee.

2. Application of Principles

Applied to the facts of our case, Johnson willfully evaded service of process by certified mail by abandoning it or failing to call for the mail as a matter of settled federal law. The USPS endorsed the return receipt “unclaimed”.

D. *Tarinika Smith is entitled to an Order granting her an extension of time to serve process upon Adlai Johnson.*

Due to Johnson’s willful evasion, see C above, Tarinkia Smith is entitled to an extension pursuant to Rule 4(h) consistent with *Collins v. Westbrook*, 2013-CT-000408, paragraph 20-23 (Miss. February 11, 2016) and *Jenkins v. Oswald*, 3 So.3d 746, 749-751 (Miss. 2009).

E. *The October 26, 2016 Order was limited to Tarinika Smith’s individual personal injury claims.*

1. Wrongful Death Claim Principles

Mississippi wrongful death claims cannot be split³⁹. There is only one wrongful death claim at a time⁴⁰. When subsequent wrongful death claim is alleged while the first

³⁹ *Estate of Davis v. Blaylock*, 212 So.3d 775, 759 (Miss. 2017).

⁴⁰ *Long v. McKinney*, 897 So.2d 160, 171-172 (Miss. 2004).

wrongful death claim is pending, then the second wrongful death claim is a legal nullity and of no effect⁴¹.

2. Application of Principles

Applying the foregoing principles, it is clear that the October 24, 2016 could have no effect upon a pending wrongful death claim. A Mississippi wrongful death claim cannot be split and thus there is claim-splitting cannot apply.

CONCLUSION

The Appellants respectfully urges the Court to reverse the trial court and find that Mississippi substantive tort law should be applied to determine fault and damages upon remand. Moreover, the Court should find that Adlai Johnson willfully evaded service of process as a matter of law and Tarinika Smith was entitled to an extension of time to serve process upon Adlai Johnson for her individual personal injury claims.

Respectfully submitted,

/s/Drayton D. Berkley
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CERTIFICATE OF SERVICE

The undersigned hereby certifies a copy of the foregoing has been served upon counsel for the defendants via ECF, e-mail, and U.S. Mail, first class postage paid and properly addressed to:

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⁴¹ *Id* at 171-74.

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Attn: Kathy Sturdivant
Circuit Court Judge
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This the 19th day of July 2017.

/s/Drayton D. Berkley
DRAYTON D. BERKLEY, ESQ.