



AlaFile E-Notice

31-CV-2001-000832.00

Judge:

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

SABRINA ABERNATHY, ET AL VS MONSANTO COMPANY, ET ALS
31-CV-2001-000832.00

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IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

ABERNATHY SABRINA,)	
Plaintiff,)	
)	
V.)	Case No.: CV-2001-000832.00
)	
MONSANTO COMPANY,)	
MAYAUSKY JACK % MONSANTO)	
COMPANY,)	
Defendants.)	

ORDER

I. Jurisdiction

The question before the Court is whether the two orders entered in this case area final orders or interlocutory orders subject to revision. On September 10, 2003, Circuit Judge R. Joel Laird, Jr. issued an order approving the \$300 million settlement agreement between Plaintiffs and Defendants entered on September 9, 2003. On December 15, 2004, Judge Laird issued an order approving the \$15 million in expenses awarded to the attorneys, with a footnote stating that the attorney fees were reasonable. The Defendants argue the Court is without jurisdiction to review this case due to the previous orders being final orders. The Interveners argue that the Court has jurisdiction to review this case due to the orders being non-final orders.

Due to a transfer of venue of this case to the Circuit Court of Etowah County, the Chief Justice of the Alabama Supreme Court appointed the original trial judge, Calhoun County Circuit Judge, R. Joel Laird, Jr. as circuit judge of Etowah County to preside over this case. On March 23, 2011, the Chief Justice appointed the undersigned to preside as

circuit judge of Etowah County in all matters concerning this case with said authority continuing until a final disposition of this case.

The question of whether a judgment is final for appeal purposes is a jurisdictional question. If the order is final a litigant may file a complaint in the Alabama Court of Civil Appeals within the time allowed by law. If the order is not final a litigant may file a complaint in the Circuit Court during the pendency of the case. An appeal can only be brought from a final judgment. Section 12-22-2, (Ala. Code 1975) clearly states as follows: “From any final judgment of the circuit or probate court, an appeal lies to the appropriate appellate court as a matter of right by either party, or their personal representatives, within the time and in the manner prescribed by the Alabama Rules of Appellate Procedure.”

The Alabama Rules of Civil Procedure, Rule 54 (b) states that:

“When more than one claim for relief is presented in an action...the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. Except where judgment is entered as to defendants who have been served pursuant to Rule 4(f), in the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to

revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”

An analysis of the committee comments provides insight into suits involving multiple parties as well as a suit involving multiple claims. According to the committee comments:

“This rule adopts the equity practice of “split judgment”. See Equity Rule 69. The rule provides that, in the absence of affirmative action by the judge, no decision is final until the entire case has been adjudicated. The one exception is that where the court has completely disposed of one of a number of claims, or one of multiple parties, and has made an express determination that there is no just reason for delay, the court may direct the entry of judgment on that claim or as to that party. The judgment so entered is a final judgment in all respects, and may be appealed, even though prior to the adoption of these rules it might not have been possible to enter final judgment in such a situation until all the claims, or the rights and liabilities of all the parties, had been adjudicated.”

A judgment is not final unless all the claims, rights, and liabilities of all the parties have been determined. Greenwood v. Lindsay Harbor, LLC, 976 So. 2d 1024 (Ala.Civ.App. 2007). When the issue of future damages has been reserved for future resolution, the judgment is not final. The Alabama Supreme Court held in Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 361-62 (Ala. 2004):

“Where the amount of damages is an issue, ... the recognized rule of law in Alabama is that no appeal will lie from a judgment which does not adjudicate that issue by ascertainment of the amount of those damages.” Moody v. State ex rel. Payne, 351 So.2d 547, 551 (Ala. 1977). “That a judgment is not final when the amount of damages has not been fixed by it is unquestionable.” “Automatic” Sprinkler Corp. of America v. B.F. Goodrich Co., 351 So.2d 555, 557 (Ala. 1977) recitation of the Rule 54(b) [Ala. R. Civ. P.] formula was ineffective to render appealable a judgment that resolved liability, but reserved the issue of damages for future resolution).” FN1

The duty of the Court is to dismiss the appeal *ex mero motu* when it is determined that an order appealed from is not a final judgment. Arvin North American Automotive, Inc. 2011 WL 1334384 (Ala. Civ. App., April 8, 2011)(Ala. Court of Civil Appeals dismissed the appeal because the judgment was nonfinal as medical benefits were unspecified). Tatum v. Freeman, 858 So. 2d 979, 980 (Ala. Civ. App. 2003). Powell v. Republic Nat'l Life Ins. Co., 293 Ala. 101, 102, 300 So. 2d 359, 360 (1974).

The well established principal of law in this state is that the test of the finality of judgment to support an appeal is not whether the case remains *in fieri* in some respects, in the court awaiting further proceedings necessary to entitle the parties to the full measure of the rights it has been declared they have, but whether the judgment which has been entered ascertains and declares these rights. If these are ascertained and adjudged, the judgment is final and will support an appeal. McCulloch v. Roberts, 290 Ala. 303, 276

So. 2d 425 (1973).

The law is well settled in Alabama that a court retains jurisdiction over a settlement agreement and its enforcement has jurisdiction over matters that relate to the settlement. Ex parte Liberty National Insurance Co., No. 1021173, 2003 WL 23025634 (Ala. Dec. 30, 2003). In this particular case, the Alabama Supreme Court ruled that this Court “retained jurisdiction over the matter for the purpose of enforcing the Settlement Agreement and this Judgment.” Pharmacia Corp. v. McGowan, No. 1031016, 2004 WL 2849485, at #1 (Ala. Dec. 10, 2004).

Therefore, based on the applicable law, the pleadings, the April 27, 2011 hearing, and the facts of this case, the Court makes the following findings of fact:

1. This Court finds that the property claims between the Litigants and the Defendants have been ascertained and adjudged and the agreed upon amounts have been disbursed to the Plaintiffs.

2. This Court finds that the personal injury claims between the Plaintiffs and the Defendants have been ascertained and adjudged and the agreed upon amounts have been disbursed to the Plaintiffs.

3. This Court finds that the funds paid and funds to be paid into the Abernathy Trust Fund have been ascertained and adjudged.

4. This Court finds that the Plaintiffs’ claims for payments and the denial of claims for payments from the Abernathy Trust Fund have not been determined by the Court and in fact are being determined on an ongoing basis by the Abernathy Trust Fund Board.

This Court finds that the determinations of the Abernathy Trust Board are not final judgments and are subject to review by this Court.

It is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

1. The property settlement portion of the previous orders entered in this case is a final judgment and the appeal time has expired.

2. The personal injury portion of the previous orders entered in this case is a final judgment and the appeal time has expired.

3. The Trust Fund portion of the previous orders entered in this case is a final judgment and the appeal time has expired.

4. The awards or denial of awards from the Abernathy Trust Fund are not final judgments. Any Plaintiff may file a motion for judicial review of his or her award or denial of award from the Trust Fund Board.

5. A hearing regarding the matter of the method of allocation used by the Abernathy Trust Fund Board in determining the granting or denying of claims shall be held on September 9, 2011 at 1:30 p.m. in courtroom 250. The purpose of the hearing is for the Court to be educated on the formula used to issue awards and the process of the same. Plaintiffs' counsel shall present testimony and documentation in support of their method of allocation.

II. Jurisdiction to Review Reasonableness of Attorney Fees

The Court has both equitable and legal authority to inquire into the reasonableness of contingent fee agreements between Plaintiffs and their attorneys. The Court has an

equitable authority to oversee the administration of this global settlement. The federal courts have consistently held that a settlement is subject to the court's "imposition of fiduciary standards to ensure fair treatment to all parties and counsel regarding fees and expenses." In re Vioxx Products Liability Litigation, 574 F. Supp. 2d 606 (E.D. LA. 2008); In re Zyprexa Products Liability Litigation, 424 F.Supp. 2d 488, 491 (E.D.N.Y. 2006); In re Guidant Corporation Implantable Defibrillators Products Liability Litigation, MDL No. 05-1708, 2008 WL 682174.

In addition to the equitable authority over the settlement, the federal courts have also held that the court has, "the inherent authority and concomitant duty to exercise ethical supervision over the parties." In re Vioxx Products Liability Litigation, 574 F. Supp. 2d 606 (E.D. LA. 2008); In re Zyprexa Products Liability Litigation, 424 F.Supp. 2d 488, 491 (E.D.N.Y. 2006); In re Guidant Corporation Implantable Defibrillators Products Liability Litigation, MDL No. 05-1708, 2008 WL 682174. Regarding the issue of reasonableness of attorney fees, the Court further stated that, "As for the representative counsel involved, Plaintiffs' counsel have a built-in conflict of interest that is directly opposed to that of their clients." In re Guidant Corporation Implantable Defibrillators Products Liability Litigation, MDL No. 05-1708, 2008 WL 682174 at *18.

In Pharmacia Corp. v. McGowen, 915 So.2d 549 (Ala. 2004), the Supreme Court of Alabama reversed the previous Court's order awarding attorney fees regarding the guardian ad litem and the minor children and deceased adults in this case. The attorney was the guardian ad litem who represented the minors and the deceased adults in the case

currently before the Court. The Court awarded \$284,000.00 in attorney fees and \$2,777.68 in expenses. The Court awarded the guardian ad litem \$500.00 per case for attorney fees. The Supreme Court stated the award could not be made without consideration for time spent representing the ward or hourly rate of services performed. The Supreme Court reversed the ruling stating “An attorney fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.”

The law in Alabama is clearly established that the Court must consider 12 criteria when determining the reasonableness of an attorney fee:

- 1.) nature and value of subject matter of employment;
- 2.) learning, skill, and labor requisite to its proper discharge;
- 3.) time consumed;
- 4.) professional experience and reputation of attorney;
- 5.) weight of his responsibilities;
- 6.) measure of success achieved;
- 7.) reasonable expenses incurred;
- 8.) whether a fee is fixed or contingent;
- 9.) nature, length of a professional relationship;
- 10.) fee customarily charged in locality for similar legal services; likelihood that a particular employment may preclude other employment;
- 11.) time limitations imposed by the client or by circumstances.

Van Schaack v. AmSouth Bank, N.A., 530 So.2s 740, 749 (Ala. 1988). The Court also stated this was not an exhaustive list.

Contrary to the standard set forth in Van Schaack v. AmSouth Bank, N.A., in the case at bar, the Court issued an order approving the attorney fees and the expenses. The September 10, 2003 order stated in paragraph two, “The terms and conditions of the

Global Settlement Agreement and the Settlement Agreement are fair and reasonable, including the payment of attorneys' fees and expenses as set forth in the Settlement Agreement." In paragraph six, the order stated, "In accordance with paragraph 3.b of the Settlement Agreement, the Court hereby assesses fifteen million dollars (\$15,000,000.00) in costs against the defendants to be paid to plaintiffs' counsel in accordance with the terms and conditions of the Settlement Agreement." The order was issued without the benefit of a hearing on the reasonableness of attorney fees and the expenses.

When a Plaintiff, Ms. Avery, allegedly threatened to file a class action to contest the manner in which the attorney fees were deducted and the expenses awarded, the Court issued an order on October 29, 2004 stating: "Any Plaintiff who has executed a settlement statement acknowledging that he/she had been informed of the principal terms of the settlement agreement, including the amount of the settlement allocable to her, the amount of costs assessed to Plaintiff's counsel, and the amount of attorney's fees awarded to Plaintiff's counsel, may only contest the reasonableness of the amount of his/her settlement, the amount of costs assessed to Plaintiff's counsel before, or the amount of attorneys' fees, given, among other things before this Court by motion." This order enjoined any plaintiff that executed a settlement statement from suing in any court over attorney fees and costs and settlement amounts, limiting the suits to this court only. The Court ultimately ruled that the appeal time had run to challenge the expenses taxed to the settlement.

The amended order dated December 15, 2004 (paragraph 3, p. 15) expressly provided

that the Court had continuing jurisdiction to review attorney fees and to enforce the settlement agreement between the parties:

“This Court finds that its [sic] has jurisdiction over the claims made by Ms. Avery and finds that they directly relate to the Settlement Agreement that was approved by this Court. The Settlement Agreement expressly provided for the payments of counsel fees and expenses, in addition to the payments to Plaintiffs, and thus any disputes relating to those fees and expenses are subject to this Court’s continuing jurisdiction. Further, the Alabama Supreme Court has already recognized that this Court “retained jurisdiction over the matter ‘for the purpose of enforcing the Settlement Agreement and this Judgment.’” *Pharmacia Corp. v. McGowen*, No. 1031016, 2004 WL 2849485, at *1(Ala. Dec. 10, 2004).

On Nov. 22, 2004, the Court held a hearing on Ms. Avery/Plaintiff’s motion that the attorneys had improperly “double dipped” from the settlement by deducting 40% in attorney’s fees and then an additional 40% from each person’s award. The Plaintiff did not contest the reasonableness of the attorney’s fees. The Court addressed the reasonableness or excessiveness of attorney fees regarding the attorney fee award in a footnote in the December 15, 2004 order:

“Ms. Avery is not claiming that a 40% contingent fee was unreasonable or excessive. Even though Ms. Avery is not making this claim, this Court finds that a 40% contingent fee was reasonable because (1) this cases [sic] was legally, factually, and logistically complex; (2) Stewart and Kasowitz possessed

the learning, skill and expertise to effectively prosecute this case; (3) the case lasted over seven years and consumed the majority of Stewart and Kasowitz's practices; (4) Stewart and Kasowitz have exemplary professional reputations; (5) Stewart and Kasowitz had to bear great risk and uncertainty as well as the stress and anxiety of knowing that the Anniston community was dependent upon them; (6) Stewart and Kasowitz achieved the same 300 million dollar settlement for their 3,500 clients that was obtained by counsel for the 18,000 *Tolbert* plaintiffs, (7) 15 million dollars in expenses for seven years of complex, sophisticated, an[sic] expert intensive litigation is fair and reasonable; (8) the fee was contingent; (9) the representation has lasted eight years and will last an additional nine years; (10) a 40% fee is customary; (11) this representation substantially affected Stewart and Kasowitz's ability to represent other clients; and (12) this case virtually subsumed the lives of Stewart and Kasowitz and affected their personal lives. *See Pharmacia Corp. v. McGowan*, No. 1081036, 2004 WL 2849485, at #3 (Ala. Dec. 10, 2004).

Although the Court entered the above stated order, the issue of the reasonableness of attorney fees was not before the Court and the parties' rights in this regard were not litigated. Although the Court may raise the issue on its own motion, the Court did not afford the parties a hearing on the merits. The hearing was on the issue of the reasonableness of the \$15 million dollar expenses. There was no evidence presented, and no opportunity for cross examination, on the issue of the reasonableness of the attorney

fee. Only one Plaintiff was a party and she did not raise the issue of the reasonableness of the attorney fee.

In Vioxx Products Liability Litigation, 574 F. Supp. 2d 606 (Louisiana 2008), the Court stated the importance of the Courts reviewing attorney fees contingency contracts in mass tort litigations:

“In addressing contingent fees, the Court is mindful that tort litigation- and particularly mass tort litigation- has a dual role in our society: (1) to compensate people who are harmed; and (2) to prevent future injuries by deterring harmful conduct. See Contingent Fees in Mass Tort Litigation, 42 Tort Trial and Insurance Practice, L. J. 105, 19-10 (2006). These are laudable goals and ones which should be encouraged. Under compensating attorneys who handle such litigation would result in too few meritorious private suits being brought and less competent representation in the cases that are brought. Id. Overcompensating attorneys, however, would also be harmful, as it would encourage frivolous lawsuits and result in unfair recovery for injured litigants. Id. The courts must, therefore, endeavor to strike a fair balance between these two opposing policy concerns. 574 F. Supp. 2d 606.”

The Vioxx Court also stated, “Contingent fees may be disallowed as between attorney and client in spite of contingent fee retainer agreements, where the amount becomes large enough to be out of all proportion to the value of the professional services rendered.” Id. At 610, 611. (citing Gair v. Peck, 6 N.Y. 2d 97, 188 N.Y.S.2d 491, 160 N.E.2d 43, 48

(N.Y.1959).

Therefore, after hearing and after reviewing all pleadings, all court orders, the court file, and after considering all applicable law, this Court makes the following findings of fact:

1. The Court has equitable and inherent authority over the global settlement and over the parties and attorneys.
2. The Court has equitable and inherent authority to review the contingency fee contracts of the Plaintiffs and the attorneys.
3. The Court has retained jurisdiction over this case for the purpose of the enforcement of the settlement agreement and the judgment.
4. The Court finds that the interveners allegations contained in the request for relief regarding the reasonableness of attorney fees to be extraordinary and exceptional circumstances, which if proven would be an extreme injustice.
5. The Court finds that the interveners request for relief should be treated as a request for relief from judgment under the Alabama Rules of Civil Procedure, Rule 60 (b) (6).
6. The Court finds that each Plaintiff should be served with notification of this action and given an opportunity to be heard, with or without counsel, or to waive their right to participate in said hearing.

It is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

1. The attorneys shall each submit to the Court for review a proposed notification

- of right to hearing and a waiver of right to hearing on the issue of reasonableness of attorney fees to be served to all plaintiffs. Said submission shall be filed on September 9, 2011.
2. The Plaintiffs' attorneys shall submit any known address changes to the list of all plaintiffs and addresses previously filed on September 16, 2003 for service of said notification to the Circuit Clerk of Etowah County. Said submission shall be filed on September 9, 2011.
 3. The Clerk of Court of Etowah County shall cause the notification to be served to all last known addresses on file of each Plaintiff.
 4. The costs of said notification shall be paid from the Abernathy Trust Fund pending further orders of the Court. Costs shall include postage, supplies, and temporary staff, if necessary, to accomplish the assignment.
 5. A hearing date shall be set by separate order upon completion of service of all Plaintiffs.

III. Accounting

The courts must be the guardians of justice in all cases and particularly in mass tort litigation. The Vioxx Court further stated, "As these global settlements occur more frequently... and as the public consciousness focuses more closely on the outcome of mass tort litigations there will also be a growing need to protect the public's trust in the judicial process." Id.

Since the mass tort litigation and settlement of this case, there have been numerous

and repeated complaints for information and for an accounting. There is a case currently pending before the Alabama Supreme Court involving other Plaintiffs over jurisdictional issues. There have been numerous public protests, picketing and marching, and news reports which have resulted in a heightened degree of public scrutiny of this settlement and the integrity of the judicial process.

The public's perception of the integrity of the judicial process in this case is clouded in suspicion and lack of trust. Just as the people and the land of this community have been damaged and polluted by the toxins made the basis of this mass tort case, the toxins appear to have polluted the minds of some people regarding the judicial process. The Court must balance the right of privacy of the Plaintiff's in this case with the need to protect and to restore the Plaintiffs' trust and the public's trust in the judicial process. Transparency in government and in the judicial process ensures truth and justice. Transparency counters mistrust by the public and malfeasance by those placed in a position of trust. The Court finds that there was not a confidentiality clause in the settlement agreement. After review of the accounting the Court finds that there is not any reason for the accounting to be kept confidential from the Plaintiffs. Therefore, the Court finds that a public record of the accounting is highly beneficial to the Plaintiffs and to the public.

It is hereby **ORDERED, ADJUDGED, AND DECREED** that the accounting provided to the Court after the April 27, 2011 hearing shall be made available to the attorneys for the interveners and to the Clerk of Court to be made a part of this order. For

good cause and in accordance with the law, the Plaintiffs' attorneys are required to redact the minors' names and substitute the names with initials. The Plaintiffs' attorneys shall provide the accounting to the Circuit Clerk of Etowah County in a mutually agreeable format so that the Clerk shall publish the accounting as Exhibit A to this order no later than September 9, 2011.

IV. Audit

This case involves a \$300 million dollar global settlement (\$275 million as an initial payment and \$25 million paid in ten annual installments of 2.5 million per year for ten years). The Settlement agreement expressly divided the \$275 million initial payments as follows:

- A. \$90,000,000 to adult plaintiffs who owned or resided in affected properties. (Settlement agreement, section 3(f)(ii));
- B. \$45,000,000 to plaintiffs without any restrictions (id. Section 3(g)(ii));
- C. \$21,000,000 to Trust (id. Section (g)(ii));
- D. \$15,000,000 to Plaintiffs' attorneys for costs (id. Section 3(e)); and
- E. \$104,000,000 payable to Plaintiffs' attorneys (representing 40% of the \$275,000,000 initial payment less the \$15,000,000 in expenses) (id. Section 3(d)(i), 3(f)(i) and 3(g)(i)).

The Court finds that since the settlement of this case, there has not been a formal audit performed by a certified public accountant. The Court further finds the interests of justice would be served by ordering an audit.

It is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

1. The attorneys shall submit a name, address, and telephone number of a certified auditor who is willing to perform the audit and the amount of the services to be performed for consideration by the Court. The information shall be submitted by September 9, 2011.
2. The costs of said audit shall be paid from the Abernathy Trust.
3. The auditor shall be named and the audit shall be ordered by separate order.

VI. Liens against Abernathy Trust

The attorneys for the Trust informed the Court at the April 27, 2011 hearing that the United States Government (Medicaid/Medicare) had placed a lien against the trust. The Court finds that the interests of justice require a hearing to inform the Court and the Plaintiffs regarding the liens against the trust.

It is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

A hearing shall be held on September 9, 2011 at 1:30 p.m. in courtroom 250. The purpose of the hearing is to inform the Court regarding the amounts of the liens placed upon the trust, the reasons the liens were placed upon the trust, and the efforts to resolve the liens. The Court seeks information in light of the federal court ruling in US v. Stricker, 2010 WL 6599489 (N.D. Ala. Sept. 30, 2010) regarding the liens possibly being re-filed once the annual installments are deposited into the Abernathy Trust.

VI. Removal of Trustee, Constructive Trust,

Freezing of Trust Assets, and Appointment of Special Master

1. The Court finds that the Interveners' request for freezing of the trust assets is appropriate pending the completion of the audit and the hearing on the reasonableness of the attorney fees. Therefore, there is no need for a constructive trust.

2. The Court finds that the Interveners' request for removal of Donald Stewart as trust administrator is without any evidence that Mr. Stewart has mishandled the trust.

3. The Court finds that there is no need for a Special Master as the Court shall hear all matters necessary.

It is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

1. The Interveners' request for removal of Donald Stewart from the administration of the Trust is hereby denied.
2. The assets of the Abernathy Trust are hereby frozen. The Court orders all payments to minors to continue as scheduled, if any, and any unscheduled payments shall not be made until further orders of this Court.
3. The deposits expected no later than August 26, 2011, including amounts allocated for attorney fees, shall be deposited and shall not be distributed until further orders of this Court.
4. The Interveners' requests for an appointment of a Special Master and creation of a constructive trust are hereby denied.

GENERAL

1. The petition to intervene filed by Kathy Faye Wynn is hereby dismissed as she was not a plaintiff in this case and lacks standing.
2. Regarding the Interveners' claims that this mass tort litigation required mandatory class certification, that motion was withdrawn and not filed again in this Court. Therefore, the Court does not have jurisdiction to address these issues.
3. Regarding the Alabama Legal Services Liability Act arguments made by counsel, there are no claims of legal liability before this Court. Therefore, the Court is without jurisdiction to rule on any issues regarding statutes of limitations.
4. Regarding the HIPAA arguments made by counsel, there are no medical records of any plaintiffs in the court file or in the accounting and none shall be made available to the public.
5. All other requests for relief filed by either party not specifically addressed herein are hereby denied.

DONE this 22nd day of August, 2011.

/s/ DEBRA H JONES
CIRCUIT JUDGE