

**MISSISSIPPI SUPREME COURT
NO. 2023-M-00282-SCT**

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION DEFENDANT/PETITIONER

VS.

BARNEY LEE FARRAR PLAINTIFF/RESPONDENT

APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

**RESPONDENT'S ANSWER IN OPPOSITION TO PETITIONER'S PETITION FOR
INTERLOCUTORY APPEAL AND REQUEST FOR EXPEDITED PROCEEDINGS**

**JIM WAIDE, MSB NO. 6857
WAIDE & ASSOCIATES, P.A.
332 NORTH SPRING STREET
POST OFFICE BOX 1357
TUPELO, MS 38802-1357
(662) 842-7324 / TELEPHONE
(662) 842-8056 / FACSIMILE
EMAIL: waide@waidelaw.com**

**JOHN BRUSTER (BRUSE) LOYD, *Pro Hac*
Vice
JONES, GILLASPIA & LOYD, L.L.P.
4400 POST OAK PARKWAY, SUITE 2360
HOUSTON, TX 77027-3440
(713) 225-9000 / Telephone
(713) 225-6126 / Facsimile
EMAIL: bruse@jgl-law.com**

ATTORNEYS FOR PLAINTIFF/RESPONDENT

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INTRODUCTION

This case is before the Court on the request for an interlocutory appeal by Defendant/Petitioner National Collegiate Athletic Association (“NCAA”). The NCAA wants this Court to reverse portions of an order on summary judgment. Rather than “materially advanc[ing] termination of the litigation, . . .” Petition for Interlocutory Appeal (“Petition”), p. 6, granting this interlocutory appeal would cause substantial delay and would not terminate the litigation.

STATEMENT OF FACTS¹

Defendant National Collegiate Athletic Association (“NCAA”) is a private association with a monopoly on regulating sports in Division I. *See Nat'l Collegiate Athletic Ass'n v. Alston*, ___ U.S. ___, 141 S. Ct. 2141, 2151 (2021) (quoting district court finding that “the NCAA enjoys ‘near complete dominance of, and exercise[s] monopsony power in, the relevant market’. . . .”). In order to play Division I sports at the intercollegiate level, a university must be a member of the NCAA. Deposition of Michael Sheridan², p. 19.

The NCAA has an “infractions program” which levies penalties for rule violations based upon rules which the NCAA has enacted. Defendant’s Motion for Summary Judgment, Exhibit C-1 thereto.

The NCAA’s enforcement staff investigates alleged rule violations and prosecutes alleged violations before an adjudicator, known as the “Committee on Infractions” (“COI”). Defendant’s Motion for Summary Judgment, Exhibit C-1 thereto.

¹ The Statement of Facts is taken from the facts which Plaintiff/Respondent Barney Farrar submitted in responding to Petitioner’s motion for summary judgment below.

² Michael Sheridan was the chief investigator/prosecutor for the NCAA.

When the NCAA's enforcement staff files a formal charge (called a Notice of Allegations), the NCAA combines all charges against all defendants into a single document upon which there is a single hearing that usually lasts one to two (2) days. Complaint, ¶ 13; Expert Opinion of B. David Ridpath, Ed.D., p. 10.

Although coaches are not members of the NCAA, the NCAA punishments can affect the ability of defendant coaches (non-members of the NCAA) to earn money. Deposition of Michael Sheridan, pp. 62-63.

The only persons allowed to be present at NCAA infractions hearings are the prosecutors (the enforcement staff), the accused coaches, representatives of universities, and the parties' attorneys. Deposition of Michael Sheridan, pp. 20-24. Only the COI (the judges) may ask questions. Deposition of Michael Sheridan, p. 25. The accused are not permitted to examine witnesses or call witnesses. Cross-examination of the defendant coaches or their attorneys is not permitted. Deposition of Michael Sheridan, pp. 30-32. The judges (the COI) "run the show, and they make that abundantly clear." Deposition of Michael Sheridan, p. 32. Witnesses with personal knowledge are not allowed at NCAA hearings. Deposition of Michael Sheridan, p. 50. The enforcement staff serves as both the witnesses and prosecutors at NCAA hearings. The enforcement staff relates to the COI the information which the enforcement staff claims staff members were told by witnesses. Deposition of Michael Sheridan, pp. 32, 50.

On or about February 22, 2017, the NCAA's enforcement staff issued a Notice of Allegations against the University of Mississippi, its head coach (Hugh Freeze), and multiple assistant coaches and staff members, including Farrar, who was then employed as Assistant Director of Athletics for football at the University of Mississippi. The charges against Farrar were as follows:

- A. NCAA Allegation 9: That Farrar had arranged free merchandise for the University of Mississippi football recruits from Rebel Rags, a UM booster;
- B. NCAA Allegation 14: That Farrar had arranged for boosters to provide transportation and hotel lodging so that the University of Mississippi recruits could visit the University of Mississippi;
- C. NCAA Allegation 16: That Farrar had arranged for two (2) boosters to make cash payments in one lump sum of \$10,000.00, and several other cash payments to the University of Mississippi recruit Leo Lewis; and
- D. NCAA Allegation 17: That Farrar had been guilty of unethical conduct because he denied the charges.

Complaint, pp. 6-7.

The most serious charges, those of arranging cash payments to Leo Lewis and of arranging for free merchandise from Rebel Rags for recruits, related mostly to Leo Lewis. Leo Lewis is a former Mississippi State University football player.

Before the NCAA hearing, the NCAA enforcement staff repeatedly interviewed Lewis based on claims that University of Mississippi boosters had paid Lewis in order to induce him to attend the University of Mississippi. In the course of these interviews, the NCAA learned that Lewis had, in fact, been paid by a booster of Mississippi State University to attend that institution. Deposition of Michael Sheridan, pp. 39-41, 65-66. Sheridan testified, however, that NCAA bylaws do not allow such exculpatory information to be given to the individual defendants, such as Farrar. According to Sheridan, exculpatory information may be given to only defendant institutions, but even the institutions cannot be told about another institution's paying a student athlete. Deposition of Michael Sheridan, pp. 39-40.

According to Sheridan, the "heart" of the allegations against Farrar were about Leo Lewis. Deposition of Michael Sheridan, pp. 44-45. Contrary to usual procedures, the NCAA had Lewis

personally present at the hearing. Lewis was questioned by the Committee on Infractions. Deposition of Michael Sheridan, p. 42. At the NCAA hearing, Lewis claimed that he had received money from University of Mississippi Booster Attorney R. Allen Smith and Smith's paralegal. The NCAA then claimed Farrar had arranged the payments by Smith. Deposition of Michael Sheridan, p. 65.

On the other hand, Farrar described any claim that he was involved in paying any money to Leo Lewis as "bull," and stated that the paying of money was something he would not "touch [] with a 10-foot pole." Deposition of Barney Farrar, pp. 127, 148.

Bruse Loyd, Farrar's attorney at the NCAA hearing, tried to corroborate Farrar's denials by offering into evidence a tape recording of Farrar's talking with Lewis' mother about payments that other schools were offering and Farrar's warning that neither she nor Lewis should accept any money. The NCAA refused to allow Loyd to play the tape recording at the hearing. Deposition of Bruse Loyd, p. 61.

Farrar also denied facilitating potential athletes' obtaining free merchandise from Rebel Rags. According to Farrar, Terry Warren, the owner of Rebel Rags, "would not give you anything free," and described the "Rebel Rags deal [as] a farce. . . ." Deposition of Barney Farrar, pp. 184-85.

Although Farrar contested the findings of the most serious charges – that of arranging the bribing of Leo Lewis and that of assisting sending recruits to Rebel Rags for free merchandise – Farrar admitted other violations. During the first three (3) interviews by the NCAA, Farrar had denied having a "burner" cell phone, which is a phone used by coaches to contact players without creating a record of the contact. Deposition of Barney Farrar, p. 72. These denials were false. Farrar did, in fact, have a burner cell phone, and he told the NCAA about having that phone in his

fourth and final interview, which occurred on December 16, 2016, after the University of Mississippi had suspended him from his employment. Deposition of Barney Farrar, p. 90.

Farrar testified that the NCAA rules allowing only “one call per week” make getting a recruit “absolutely impossible. . . .” Deposition of Barney Farrar, p. 96. Farrar considered this a minor violation since contacting recruits onto campus was a job requirement. Deposition of Barney Farrar, p. 97.

Head Coach Hugh Freeze was a defendant, and claimed he knew nothing about any recruiting violations. Farrar’s attorneys also represented Freeze.

Prior to the NCAA hearing, Farrar’s attorney, Loyd, wrote a demand letter to the Walter “W.G.” Watkins law firm accusing the firm of having a conflict of interest since it had represented both Head Coach Hugh Freeze and Farrar. On Farrar’s behalf, Loyd demanded a settlement of Farrar’s conflict of interest claim against the Watkins law firm. The Watkins’ law firm refused to negotiate any settlement. Instead, the Watkins law firm sent Loyd’s letter to the NCAA enforcement staff, which caused the letter to be forwarded to the NCAA office, and to a COI panel member. This panel member misconstrued Loyd’s letter demand as a demand for hush money. Deposition of Bruse Loyd, pp. 60-64. Thus, Farrar was prejudiced at the hearing by *ex parte* communication falsely claiming Farrar had demanded money to be silent.

Loyd testified that the lack of cross-examination was particularly harmful since cross-examination is the “life of a case.” Deposition of Bruse Loyd, pp. 86-87. Contrary to normal NCAA procedures, the NCAA had Lewis at the NCAA hearing. However, Farrar’s attorney, Loyd, was not allowed to cross-examine Lewis. Deposition of Bruse Loyd, p. 87. Being unable to cross-examine Lewis, Loyd asked a member of the infractions committee, Myers (the same person who falsified

the contents of Loyd's demand letter), to ask Lewis certain questions, but COI Panelist Myers refused. Deposition of Bruse Loyd, p. 88.

Farrar's evidence of the unfairness of the NCAA procedures, as developed in discovery in this case, is supplemented by Dr. David Ridpath's expert opinion.

Dr. Ridpath noted that in 2018, the Rice Commission had found that the "NCAA's investigative and enforcement processes require a complete overhaul." Expert Opinion of B. David Ridpath, Ed.D., p. 13. Further, according to Dr. Ridpath, "it is irrational to believe that someone can present a case and prepare a rebuttal without seeing all of the evidence against them and the ability to confront their accusers." Expert Opinion of B. David Ridpath, Ed.D., p. 13. Dr. Ridpath describes occasions when rival schools "push rumors based on little evidence. . . ." Expert Opinion of B. David Ridpath, Ed.D., p. 13.

"[C]ramming all of this information and several individuals into a compressed hearing predisposes the COI to believe what the enforcement staff is telling them. . . ." Expert Opinion of B. David Ridpath, Ed.D., p. 14. The "COI is . . . not able to read through and fully understand all of the materials in a major infractions case," since the "materials . . . can number in the thousands of pages and would require weeks of sole focus to fully digest and understand." Expert Opinion of B. David Ridpath, Ed.D., p. 14.

According to Dr. Ridpath: "It is too much to believe this committee can read the materials from one case much less multiple. . . ." cases against various individuals. Expert Opinion of B. David Ridpath, Ed.D., p. 15. According to Dr. Ridpath, the current Dean of the Tulane Law School, Dr. Gary Rogers, has recommended that the NCAA should require "professional full-time jurists.

. . .” to hear the cases, rather than having NCAA members from competitor institutions to hear the cases. Expert Opinion of B. David Ridpath, Ed.D., p. 15.

Dr. Ridpath stated that the NCAA rule book is almost five hundred (500) pages long, with almost one hundred (100) pages devoted to recruiting rules. It is more than challenging to expect a full-time coach to completely read all of the complex NCAA recruiting rules. Expert Opinion of B. David Ridpath, Ed.D., p. 16.

Following the two (2) day September 2017 hearing, the NCAA COI found all of the University of Mississippi employees guilty, including Farrar. Committee on Infractions Enforcement Decision, Exhibit D-3, to Defendant’s Motion for Summary Judgment. Farrar, however received the most harsh punishment. The NCAA directed that Farrar be subjected to a five (5) year “show cause” order, which required all NCAA members to show cause why they should be allowed to hire Farrar in any job involving recruiting. Committee on Infractions Enforcement Decision, Exhibit D-3, p. 61, to Defendant’s Motion for Summary Judgment.

The COI characterized itself as being “confronted with a voluminous case record featuring a significant amount of conflicting information.” Deposition of Michael Sheridan, p. 80.

Farrar testified that the show cause order keeps him from working at a Division I university in football: “You’re not going to apply for a job if you can’t recruit.” Even as a graduate assistant, Farrar had to recruit. Deposition of Barney Farrar, p. 52. Throughout Farrar’s football career, he had only one job that did not involve recruiting and that job lasted for one year. Deposition of Barney Farrar, p. 53.

ORDER OF THE COURT ON SUMMARY JUDGMENT

The Circuit Court of Lafayette County, Kent Smith, J., granted summary judgment on two (2) of the counts in the Complaint and denied summary judgment on two (2) other counts.

The circuit court granted summary judgment on Count 1, which charged negligence, and granted summary judgment on Count 4, which charged the NCAA with usurpation of the judicial function under Article 6, Section 144 of the Mississippi Constitution. The circuit court denied the NCAA's motion for summary judgment on Count 3, which charged a violation of due process in violation of Article 3, Section 14 of the Mississippi Constitution, and denied summary judgment on Count 2, which charged malicious interference with prospective business relations.

ARGUMENTS

I. This Case Does Not Meet the Standards for Grant of an Interlocutory Appeal.

MISSISSIPPI RULE OF APPELLATE PROCEDURE 5(a) allows this Court, in its discretion, to grant an interlocutory appeal

if a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:

- (1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or
- (2) Protect a party from substantial and irreparable injury; or
- (3) Resolve an issue of general importance in the administration of justice.

This Court should not grant an interlocutory appeal. Rather than saving expense or advancing the case, an interlocutory appeal will needlessly delay this litigation. Furthermore, granting an interlocutory appeal will not resolve all of the issues. For example, once a lengthy

appeal is heard, the allegations of negligence will still remain. Farrar intends to cross-appeal the dismissal of the negligence claims.

There is no unusual expense in this case. The NCAA has not retained a single expert witness. This Court's comment to MISS. R. APP. P. 5 states: "While an interlocutory appeal may be sought at any time, the timeliness of the petition decreases as trial approaches." In this case, Petitioner did not file a petition for interlocutory appeal until after the circuit court had ruled upon its motion for summary judgment and set the case for trial. The only significant legal issue is whether the Mississippi Constitution, Article 3, Section 14³, unlike its counterpart in the United States Constitution, Amendment Fourteen, § 1⁴, requires state action in order for Due Process Clause to apply. This legal issue could have been raised when the complaint was filed instead of waiting until after the summary judgment ruling was made and trial was approaching.

Petitioner wants this Court to judicially amend the Mississippi Constitution so that it contains the same state action requirement as does the United States Constitution. Even if this Court had authority to modify the language of the Mississippi Constitution, this would not resolve the case, since the circuit court found there were issues of fact as to whether there was, in fact, state action in this case. Farrar had alleged that University of Mississippi representatives facilitated bringing the charges against him in order to take the blame off of head coach, Hugh Freeze.

Since the circuit court found that there were issues of fact as to whether there was, in fact, state action in this case, a finding that state action is required under the Mississippi Constitution

³ Mississippi Constitution, Article 3, Section 14 states: "No person shall be deprived of life, liberty, or property except by due process of law."

⁴ United States Constitution Amendment Fourteen provides that no "State deprive any person of life, liberty, or property, without due process of law. . . ."

would not finally resolve the case. Thus, even the finding that state action was required would not resolve the case.

Further, the court below found issues of material fact as to whether Petitioner had intentionally, or with malice, interfered with Farrar's employment. Those issues of material fact will not be resolved by this Court's making a determination on interlocutory appeal of the legal issue of whether state action is required by the Mississippi Constitution.

Filing an interlocutory appeal is inconsistent with the comment to MISS. R. APP. P. 5, and with MISS. R. CIV. P. 1, which require that the rules be interpreted so as to provide a "just, speedy. . . determination of every action."

II. An Interlocutory Appeal Is Not Likely to Result in a Reversal of the Circuit Court on the Due Process Issue.

The NCAA makes no claim that due process was afforded. Obviously, a procedure under which cross-examination is disallowed, in which the defense attorneys cannot introduce evidence, in which there is *ex parte* communication between the prosecutor and the adjudicator, and in which witnesses with personal knowledge are not allowed to testify, cannot meet due process requirements. The inability to call witnesses with personal knowledge violates due process since "the claimed right of access to evidence partakes of both procedural and substantive due process." *Harvey v. Horan*, 285 F.3d 298, 318 (4th Cir. 2002) (Luttig, J., concurring). "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

Due process requires the right to be heard "in a meaningful manner." *Mississippi Bd. of Veterinary Med. v. Geotes*, 770 So. 2d 940, 943 (Miss. 2000). A procedure under which

confrontation and cross-examination is disallowed, *ex parte* communication with judges occurs, hearings are so compressed that the voluminous evidence cannot be read, and defendants are denied the right to call witnesses is not a hearing “in a meaningful manner.”

Rather than claiming Farrar was afforded due process, the NCAA claims that there is no right to due process. The NCAA claims due process does not apply because the NCAA is not a “state actor.” This argument rests upon *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988), which held, by a five (5) to four (4) vote, that in the absence of proof of any joint action between the NCAA and a state, that the NCAA’s actions are not “subject to scrutiny under the Amendment's Due Process Clause. . . .”

Tarkanian addresses the Fourteenth Amendment of the United States Constitution, which provides: “No State shall ... deprive any person of life, liberty, or property, without due process of law...’ U.S. Const., Amdt. 14, § 1,” quoted in *Tarkanian*, 488 U.S. at 191, n. 11 (emphasis added). Rather than requiring that “[n]o state shall . . . deprive any person of . . . due process,” the Mississippi Constitution, Art. 3, § 144 provides: “No person shall be deprived of life, liberty, or property except by due process of law.”

The framers of the Mississippi Constitution of 1890 must have been aware of the language of the Fourteenth Amendment to the United States Constitution, since that amendment was ratified four (4) decades earlier, as a condition to entering the Union. This Court should not judicially amend the Mississippi Constitution of 1890, but should honor what the drafters of our Constitution said.

The cases cited by the NCAA for the proposition that the Due Process Clauses of the Mississippi and United States Constitutions should be interpreted similarly are not controlling. Those cases do not address the difference in language between the Mississippi and United States

Constitutions with respect to state action. Instead, all of the cases which the NCAA cites concern other language in the two (2) constitutional provisions. See, for example, *Nat'l Collegiate Athletic Ass'n v. Gillard*, 352 So. 2d 1072, 1081 (Miss. 1977), which discusses the term “property” and the term “due process,” which are contained in both the United States and Mississippi Constitutions. Neither *Gillard* or any other case addresses the issue of whether the Mississippi Constitution requires state action.

Erroneously assuming, however, that this Court could judicially amend the Mississippi Constitution to require state action, *Tarkanian* still would not control. In *Tarkanian*, there was no allegation that the state had participated in the NCAA’s enforcement procedures.

Dr. Ridpath’s affidavit states that:

It is vital to highlight that the NCAA enforcement process is stated to be a cooperative process between the institution and the NCAA. The institution will typically take all measures to protect itself including sacrificing coaches and staff members it deems expendable to curry favor with the enforcement investigators and the Committee on Infractions to lessen penalties.

Expert Opinion of B. David Ridpath, Ed.D., p. 11.

In this case, Farrar testified that when the University of Mississippi administrators and head coach learned of the charges, the University of Mississippi suspended him from his job and top University officials held a press conference blaming only Farrar for NCAA violations. Deposition of Barney Farrar, pp. 157-60. Furthermore, at the NCAA hearing, the NCAA acknowledged the cooperation of University officials and praised them as being “good partners in thoroughly reviewing allegations and bringing factual information to light.” Excerpt From Transcript of Hearing *In the Matter Of University of Mississippi*, Case No. 00561, held September 11, 2017, p. 42. Thus, there was evidence that the NCAA was engaged in joint activity with the University in seeking to blame

Farrar for NCAA violations in order to deflect blame from Head Coach Hugh Freeze, who is the person who benefitted most by Farrar's diligent, successful recruiting.

The leading case, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970), stated the fundamental rule, that “[t]o act ‘under color’ of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents. . . .” Here, there was evidence of joint activity between the University of Mississippi and the NCAA. Thus, the finding that joint action with the state is required even by the Mississippi Constitution would not dispose of the case.

This case is much like *Cohane v. Nat'l Collegiate Athletic Ass'n ex rel. Brand*, 215 F. App'x 13, 15 (2d Cir. 2007), which distinguished *Tarkanian* and stated that since “the complaint alleges that the University forced Cohane's resignation immediately upon learning of the charges in an attempt to placate the NCAA. . . .,” and that this state action could amount to action under color of state law.

Similarly, under the evidence in this case, a reasonable fact-finder could find that the NCAA did act jointly with the University of Mississippi in blaming Farrar for NCAA violations, in order to protect Freeze, thus meeting the joint action with an officer of the state requirement for state action.

Cohane correctly held “it was error for the District Court to interpret *Tarkanian* as holding categorically that the NCAA can never be a state actor when it conducts an investigation of a state school.” *Cohane*, 215 F. App'x at 16.

In this case, there is sufficient evidence from which a fact-finder could find that University officials acted jointly with the NCAA, and the actions taken against Farrar, thus meeting the state action requirement.

In short, this case is not a good case for an interlocutory appeal to determine whether the Mississippi Constitution requires state action. State action may be found in this case even if this Court should amend the Mississippi Constitution so as to require state action.

If the Mississippi Constitution requires joint action, this factual issue should be resolved by a jury. No appeal should be heard by this Court until a jury has made its determination.

III. Even if This Court Should Grant an Interlocutory Appeal, Issues Concerning the Circuit Court's Denying Summary Judgment on the Claim of Lack of Proof of Malice Cannot Be Considered Because Those Issues Were Not Raised Below.

In addition to claiming this Court should grant an interlocutory appeal to decide a due process issue, Petitioner also claims that the Court should hear the interlocutory appeal in order to find that there was no evidence of malice so as to justify an intentional interference claim. However, Petitioner never raised below any claim of lack of evidence on the malice issue. Instead, Petitioner's arguments on the malicious interference claim below were that the "non-interference doctrine and First Amendment Right to associate bar Farrar's claims, and . . . Farrar lacks standing to challenge the NCAA's member-adopted enforcement process." *See* Petitioner's Argument III, contained in its brief below, pp. 12-15. If this Court were to grant an interlocutory appeal, it cannot consider Petitioners' arguments, that there was a lack of evidence of malice, since such arguments were never raised in the court below.

Petitioner did raise below its argument here that the courts may not interfere with the NCAA's internal rules. Of course, what is involved in this case is not any internal rule, but the fact that the NCAA, as a matter of practice, not because of requirements or of any rule, simply denies fundamental rights, such as cross-examination and the right to call witnesses.

Furthermore, any argument that the NCAA is immune from court oversight is obliterated by the decision in *Nat'l Collegiate Athletic Ass'n v. Alston*, ___ U.S. ___, 141 S. Ct. 2141 (2021), which held the NCAA fully subject to this nation's antitrust laws. Just as the NCAA has now been held to be fully subject to the nation's antitrust laws, there is no reason for it not to be subject to state tort laws.

An argument that courts cannot interfere with the NCAA's "internal procedures" is not rational since Farrar is not a member of the NCAA. The fact that the NCAA has rules governing its own procedures does not justify applying those rules against one who is not a member. Cases granting deference to the NCAA because it has the right to adopt its own rules do not foreclose the bringing of this action by a person when who is not a member of the NCAA.

Even if this Court should grant an interlocutory appeal, and regardless of any interlocutory appeal, Farrar would ultimately appeal the dismissal of the negligence claim. For this reason, also, this interlocutory appeal will mean there will be overlapping, duplicate appeals.

CONCLUSION

An interlocutory appeal will result in needless multiple proceedings.

This case should be handled in the usual fashion, by allowing the circuit court and a jury to decide all issues and then allow the aggrieved party to appeal.

It is unlikely this Court would reverse the circuit court if the interlocutory appeal is granted.

The request for an interlocutory appeal should be denied.

RESPECTFULLY SUBMITTED, this the 24th day of March, 2023.

BARNEY LEE FARRAR, Plaintiff/Respondent

By: /s/ Jim Waide

Jim Waide
Mississippi Bar No. 6857
WAIDE & ASSOCIATES, P.A.
332 North Spring Street
Tupelo, MS 38804-3955
Post Office Box 1357
Tupelo, MS 38802-1357
(662) 842-7324 / Telephone
(662) 842-8056 / Facsimile
Email: waide@waidelaw.com

John Bruster (Bruse) Loyd, *Pro Hac Vice*
JONES, GILLASPIA & LOYD, L.L.P.
4400 Post Oak Parkway, Suite 2360
Houston, TX 77027-3440
(713) 225-9000 / Telephone
(713) 225-6126 / Facsimile
EMAIL: bruse@jgl-law.com

ATTORNEYS FOR PLAINTIFF/RESPONDENT

CERTIFICATE OF SERVICE

This will certify that undersigned counsel for Plaintiff/Petitioner has this day served a true and correct copy of the above and foregoing upon all counsel of record via MEC as follows:

J. Cal Mayo, Jr., Esquire
John D. Mayo, Esquire
Kate Mauldin Embry, Esquire
Mayo Mallette PLLC
Post Office Box 1456
Oxford, MS 38655-1456
cmayo@MayoMallette.com
jmayo@mayomallette.com
kembry@mayomallette.com

This will further certify that undersigned counsel for Plaintiff/Petitioner has this day served a true and correct copy of the foregoing pleading or other paper, via email and U.S. Mail, upon the following parties, who are not on the list to receive email notice/service for this case:

Honorable Kent E. Smith
Circuit Court Judge
P.O. Box 670
Holly Springs, MS 38635
judgekentsmith@gmail.com

DATED, this the 24th of March, 2023.

/s/ Jim Waide

Jim Waide