IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

AMANDA J. (GRESSEL) BERMUDEZ SCHMIDT — APPELLANT

VS. — CAUSE NO: 2006-CA-00765

BRIAN S. BERMUDEZ — APPELLEE

SUPPLEMENTAL BRIEF OF APPELLEE, BRIAN S. BERUMUDEZ ON WRIT OF CERTIORARI

SUBMITTED BY:

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VS. **CAUSE NO: 2006-CA-00765**

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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 Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Glenn Alderson
   Chancellor
   P.O. Box 70
   Oxford, MS 38655

2. Brian S. Bermudez, Appellee
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   Lamar, Mississippi

3. Justin S. Cluck, Esq.
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6. Joe Morgan Wilson, Esq.
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7. Stephen T. Bailey, Esq.
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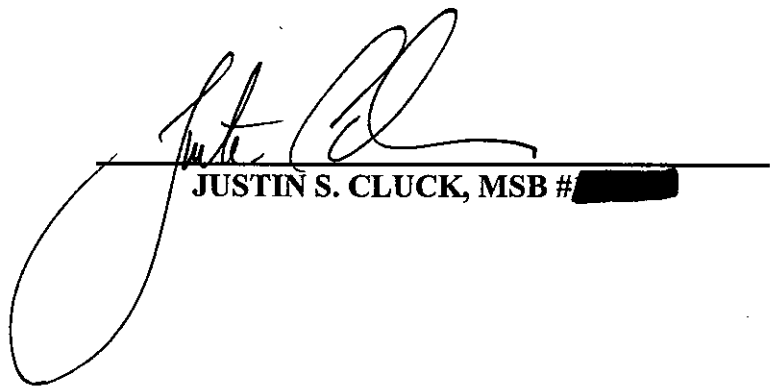

JUSTIN S. CLUCK, MSB #[redacted]

SUPPELEMENTAL ARGUMENT

I. The Appellant was Afforded a Fair and Impartial Trial

In her Motion for Rehearing, the Appellant (hereinafter "Schmidt") attempts to arguer that Chancellor's remarks at trial deprived her of the right to a fair and impartial trial. Contrary to this argument, she was in fact afforded all due process guaranteed to her under the Mississippi and Untied States Constitution. She was given due notice of all civil proceedings against her, she was represented by counsel, she was given the opportunity to call witnesses in her favor and she was permitted to cross examine any witnesses who were adverse. Further, as noted by the Court of Appeals, all of the Chancellors findings, save the issue of visitation, were supported factually by the evidence presented during trial.

In support of the argument contained in her motion for rehearing, Schmidt cites a variety of cases regarding the recusal of a circuit court judge, but cites no precedent which requires a chancellor to recuse when a party is aggrieved by an adverse ruling. First, she cites Jones v. State, 841 S 2d (Miss. 2003) [sic] for the proposition that a criminal defendant has the right to due process and a fair trial. However, the citation to Jones is incomplete and a Westlaw search reveals multiple cases styled Jones v. State. Accordingly, the Appellee (hereinafter "Bermudez") would request that the citation to Jones v. State, be stricken from the record, because there is no way to check the applicability of the cited case to the matter at bar.

Next cited is the case of Jenkins v. State, 570 So.2d 1191 (Miss. 1990), where the Judge sitting on the case was formerly the prosecutor for the Grand Jury indictment.

Jenkins, is clearly not relevant to the case *sub judice* because this was not a criminal trial and the facts are simply not analogous to a child custody case.

Schmidt also cites Collins v. Dixie Transport, 543 So.2d 160 (Miss. 1989) claiming that it is somehow similar to the case at bar. In Collins, the Circuit Court Judge adjudicated a factual dispute regarding a settlement offer allegedly made in his presence. The Court found that because the jury should have decided any factual issue present, the Circuit Judge erred by taking this dispute away from the finder of fact. This is clearly inapposite to a Chancery Court case where the Chancellor ***is*** the finder of fact. Schmidt's reliance on Collins, is therefore misplaced.

In Garrett v. State, 193 So. 452 (Miss. 1940), the Appellant moved to have the Judge recuse himself based on his close personal relations with the prosecutor, which included: rooming in the same house, sharing adjoining offices, the prosecutor was the campaign manager for the Judge, the Judge used his influence to have the Governor appoint the prosecutor to his position, etc. However, none of these relationships are present herein, thereby rendering the facts of Garrett, entirely distinguishable.

The next series of cases cited by Schmidt, Berger v. United States, 255 U.S. 22, 41 S. Ct. 230, 65 L.Ed. 481 (1921) and Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983), were decided upon the interpretation of a federal statute regarding the recusal of federal judicial officers, which clearly is not applicable in Mississippi state court. Further, in Hall v. Small Business Administration, the Federal Judge's law clerk was a member of an employment law class action before she accepted her position with the Federal Judge, thus requiring the Judge to recuse. There has been no allegation made

in the instant case that the Chancellor was associated with either party before this action began.

Bermudez would also show that all of the case law cited by Schmidt was decided after one critical step was taken by the Appellee during each respective trial; the appealing party made a timely objection or motion for recusal after the alleged bias or prejudice was evidenced by the trial judge. However, the record in the case at bar is completely devoid from any such motion or objection by Schmidt made at any time during the proceedings. It is axiomatic that in order to raise an issue on appeal, that issue must first be raised at trial. See Dorrough v. Wilkes, 817 So.2d 567, 577 (Miss.2002) (quoting Walker v. State, 671 So.2d 581, 597 (Miss.1995); Hill v. State, 432 So.2d 427, 439 (Miss.1983)). "If no contemporaneous objections are made then 'the error, if any, is waived." Id.

Accordingly, Bermudez would respectfully submit that Schmidt received a constitutionally fair trial in every manner and respect as she was afforded all due process enumerated in both the Mississippi and United States Constitution. Bermudez would further show that even if there were any issues as to whether the Chancellor should have recused himself at trial because of some perceived bias or prejudice, Schmidt's failure to object or move for recusal waived this issue on appeal.

II. The Chancellor Applied the Correct Legal Standard for Modifying Custody

In determining that a material change in circumstances had occurred, the Chancellor relied upon all evidence elicited by the parties at trial. First, to determine if the modification of a child custody agreement is necessary, the chancellor should determine if a material change in circumstances has occurred. "A chancellor's findings

should be affirmed when they are supported by credible evidence in the record." Rogers v. Morin, 791 So.2d 815, 826 (Miss.2001). The chancellor is in the best position to weigh the evidence presented by the witnesses. Id.

Despite the evidence in the record, Schmidt erroneously argues that the Chancellor based his decision to change custody by considering her move to Colorado as the only material change. As was made clear by the Court of Appeals, the record contains specific evidence that the material change in circumstances was due to the minor child's severe psychiatric problems which were caused by Schmidt's demented mental state. Specifically, the evidence at trial showed that while the minor child was in the custody of Schmidt he became wild and violent, he was placed on psychiatric drugs, he was not permitted to be alone with his younger half-sister for fear of violence and was diagnosed with post-traumatic stress disorder. This was all caused, based both upon the testifying expert's opinion and the guardian *ad litem's* report, by Schmidt's own psychiatric problems which posed a clear danger to the minor's health and well-being. "[P]arental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change." Giannaris v. Giannaris, 960 So.2d 462, 467 (Miss. 2007). Therefore, the Chancellor's decision to award custody to Bermudez was based not on a simple change in geographic location, but upon a serious threat to the minor's physical and mental well-being, caused solely by the mother. Further, the evidence presented at trial, and the evidence upon which the Chancellor based his decision, showed that the best interests of the child (indeed his life depended on it), required that he immediately be taken out of Schmidt's custody.

CONCLUSION

For the foregoing reasons, the Appellee respectfully requests that this Honorable Court affirm the decision of the Chancery Court of Marshall County, Mississippi in its entirety.

RESPECTFULLY SUBMITTED, this the 30 day of September, 2008

BRIAN S. BERMUDEZ, Appellee

By: _____

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CERTIFICATE OF SERVICE

This will certify that the undersigned attorney for Smith Whaley, PLLC, that I have this date delivered a true and correct copy of the above and foregoing *Supplemental Brief of Appellee, Brian S. Bermudez, on Writ of Certiorari* to all counsel of record by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed as follows:

Honorable Glenn Alderson
Chancellor
P.O. Box 70
Oxford, MS 38655

Hon. Joe Morgan Wilson
Attorney at Law
210 West Main Street
Senatobia, MS 38668

THIS, the 29 day of September 2008.

JUSTIN S. CLUCK