

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN PATRICK BENAL

APPELLANT

V.

NO. 2008-CA-01181-SCT

ANGELA JEAN BENAL

APPELLEE

APPEAL FROM THE CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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BRIEF OF APPELLEE
CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualification or refusal:

1. John Patrick Benal, Plaintiff-Appellant;
2. Angela Jean Benal, Appellee;
3. E. Michael Marks and Julie Ann Epps, Counsel for Appellant on appeal;
4. E. Michael Marks, Counsel for Appellant at trial;
5. F. Andrew Howell, Counsel for Appellee at trial and on appeal;
6. Cynthia Brewer, Chancellor.

THIS the 7th day of May, 2009.

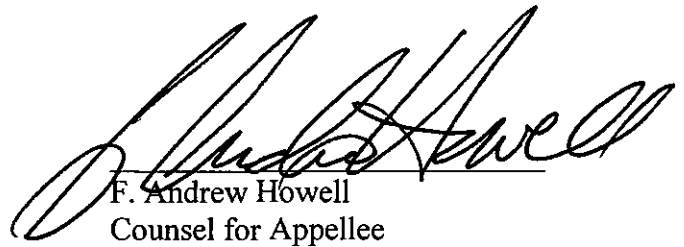

F. Andrew Howell
Counsel for Appellee

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF ISSUES.....	1
STATEMENT OF THE CASE.....	1
(i) Course of the Proceedings and Dispositions in the Court Below.....	1
(ii) Statement of the Facts.....	3
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT.....	5
I. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN EVALUATING THE CREDIBILITY OF JOHN AND HIS WITNESSES.....	6
II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN FAILING TO AWARD JOHN PHYSICAL AND LEGAL CUSTODY OF THE MINOR CHILDREN.....	8
III. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN FINDING THAT SHE LACKED AUTHORITY TO ORDER VISITATION.....	12
CONCLUSION.....	13
CERTIFICATE.....	14

TABLE OF AUTHORITIES

CASES

<i>Albright v. Albright</i> , 437 So.2d 1003.....	4, 12
<i>Cassibry v. Cassibry</i> , 742 So.2d 1121 (Miss. 1999).....	12
<i>Crow v. Crow</i> , 622 So.2d 1226, 1229 (Miss. 1993).....	9
<i>Fields v. Fields</i> , 830 So.2d 1266, 1268 (Miss. App. 2002).....	9
<i>Greer v. Greer</i> , 175 N.C. App. 464, 62 S.E.2d 423 (2006).....	9
<i>Hammers v. Hammers</i> , 890 So.2d 944 (1994).....	8
<i>Johnson v. Johnson</i> , 650 So.2d 1281, 1285 (Miss. 1994).....	6
<i>Jordan v. Jordan</i> , 963 So.2d 1235, 1239 (Miss. 2007).....	8, 10
<i>Lee v. Lee</i> , 798 So.2d 1284, 1291 (Miss. 2001).....	10
<i>Newsom v. Newsom</i> , 557 So.2d 511, 5134 (Miss. 1990).....	6
<i>Parker v. South</i> , 913 So.2d 339, 348 (Miss. 2001).....	9
<i>Perkins v. Perkins</i> , 787 So.2d 1256, 1264 (Miss. 2001).....	5
<i>Pullis v. Pullis</i> , 753 So.2d 480 (Miss. 1999).....	9
<i>Sandlin v. Sandlin</i> , 699 So.2d 1198, 1203 (Miss. 1997).....	5

STATUTES

Miss. Code Ann. §93-5-2(3).....	5
Miss. Code Ann. §93-5-23.....	12

BRIEF OF APPELLEE

STATEMENT OF ISSUES

1. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN EVALUATING THE CREDIBILITY OF JOHN AND HIS WITNESSES
2. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN FAILING TO AWARD JOHN PHYSICAL AND LEGAL CUSTODY OF THE MINOR CHILDREN.
3. ALTERNATIVELY, THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN NOT ADJUDICATING SPECIFIC VISITATION RIGHTS FOR JOHN AS PART OF THE CUSTODY DECREE.

STATEMENT OF THE CASE

(i) Nature of the Case and Course of the Proceedings and Dispositions in the Court Below

This action is an appeal from the Chancery County of Madison County, Mississippi, whereas the parties were the Plaintiff, John Patrick Benal (hereinafter "John"), Appellant herein, and the Defendant, Angela Jean Benal (hereinafter "Angela"), Appellee herein. Chancellor Cynthia Brewer heard the case at hand on May 23, 2008.

John and Angela were married on March 23, 1991, in Cedar County, Nebraska. (R. 1) There were three children born to the marriage, namely: Sarah Rose Benal, female, born August 26, 1993; Katherine Anna Benal, female, born October 14, 1996, and, Erin Renata Benal, female, born April 4, 2000. (R. 2) In April of 2007, John moved to Madison County, Mississippi, as a result of obtaining a position with Cellular South in Ridgeland, Mississippi. (R. 1, T. 11) Angela, a stay-at-home mother during the marriage, remained in Nebraska with the three minor children until the school year had ended in Nebraska. (T. 13) In the summer of 2007, Angela followed John to Ridgeland, Mississippi, wherein they purchased a home and lived at 109 West

Willow Court, Ridgeland, Mississippi. (R. 1, T. 12) In December of 2007, John and Angela refinanced the marital home located in Ridgeland, Mississippi. (T. 12)

On December 26, 2007, John filed his Complaint for Divorce in the Chancery Court of Madison County, Mississippi, Cause No. 2007-1150-B. (R. 1) On December 27, 2007, Angela was served with process of the Complaint, (R. 7) and subsequently, returned to her residence in Nebraska with the three minor children. (R. 10) Angela then filed for a Legal Separation in the District Court of Lancaster County, Nebraska. (R. 10) However, the Nebraska court ruled that they did not maintain jurisdiction of Angela's legal separation due to the pending action filed in the State of Mississippi.

On May 23, 2008, John filed a Motion to Withdraw Fault Grounds, (R. 39) and subsequently, Chancellor Brewer entered an Order to Withdraw Fault Grounds (R. 40), and a Voluntary Consent to Irreconcilable Differences Divorce. (R. 41)

A trial of this matter was heard on May 23, 2008, and after hearing the evidence and testimony of all of the witnesses, the Chancellor awarded a divorce to the parties on the grounds of irreconcilable differences, with Angela having sole physical and legal custody of the minor children and John to pay child support and maintenance to Angela. (R. 43) The Chancellor stated in her Opinion and Final Judgment:

"That "the family lived in Nebraska for ten years prior to moving to Mississippi in 2007. Therefore, the children have spent the majority, if not all, of their lives in Nebraska. Many of their mother's and father's relatives live in or near the state of Nebraska. All three girls are good students and involved in numerous extra-curricular activities. Because of the strong ties to the state of Nebraska, this factor strongly favors Angela." (R. 45, 46)

On July 9, 2008, John filed an appeal. (R. 52)

(ii) Statement of the Facts

As per the Opinion and Final Judgment ((R. 42-51) entered by the Chancellor, the trial on this matter submitted the following issues before the Court:

I. *Jurisdiction;*

II. *Issues Submitted to the Court;*

- A) Custody of the Three Minor Children along with Child Support and Maintenance;*
- B) Division of Marital Assets and Liability of Payment of Marital Debts; and,*
- C) Use of Marital Home and Furnishings.*

John's appeal herein arises from his argument that he should be awarded custody of the minor children. John testified that he did most of the housework, including preparation of evening meals, meals for family and holiday occasions. John's mother and brother testified in great lengths everything that John had done for the family and for the home while Angela made no contributions to the household. This testimony raised suspicion in the Chancellor as to the credibility of the witnesses. (R., 43)

Up until the summer of 2007 when John accepted a job in Mississippi, the entire family lived in Nebraska. Both John and Angela have strong family ties to Nebraska. (R., 46) Angela testified before the Chancellor that she had been a stay-at-home mother during the marriage, only working on occasion outside of the marital home, while raising the parties' three minor children. The children were good students and were involved in numerous extra-curricular activities. (R. 46)

Angela also testified that in October of 2006, while still living in Nebraska, John had taken all of her access to the joint checking account, as well as taking her checkbook and debit card out of her wallet, giving her no access to money. (T. 73) Additionally, Angela testified that in November of 2006, the parties were having an argument in which John got a long meat-slicing knife and held it to his neck in front of Angela and two of the minor children, Katherine, age 9,

and Erin, age 6. Angela locked herself and the two children in the master bedroom to call 911, all the while John is pounding on the door, and Katherine went out the bedroom window and ran to the neighbor's house. (R. 46, T. 75) The neighbor, Diane, came over to the house and called 911, in which law enforcement arrived and took John into custody and incarcerated him for three days. John further admitted to the Court in his testimony that he was taken into protective custody following the incident. (R. 46, T. 36) John also admitted that this domestic violence situation occurred in front of the children. (T. 43)

Angela further testified that preceding the incident in November of 2006, that John had been living on and off with his sister while she stayed in the martial home with the children. She testified that in October of 2006, she called the police to report that John had taken his handgun out of the home and that she, along with his sister and brother, were concerned. (T. 76) After the police located John that same night and brought him back to the home, Angela testified that John had admitted to her that he had "held the gun to his head." (T. 77) Therefore, during her testimony at trial, Angela stated that she should have custody of the parties' minor children because she has a stable, good life, and that they are with their family and friends in Nebraska, while John "is a little scary sometimes." (T. 80)

SUMMARY OF THE ARGUMENT

The Chancellor's determination that Angela should have sole physical and legal custody of the minor children was supported by the testimony and credible evidence presented at the trial. The Chancellor's sound ruling was supported by the fact that the children had lived the majority, if not all, of their lives with their mother in Nebraska. The children attended school and lived near family and friends, as well as having communal roots in Nebraska. John failed to submit to the Court credible proof that he was a more constant factor in the children's daily lives than Angela. The Chancellor appropriately applied the *Albright* factors and specifically made

findings as to each factor. The Chancellor did not commit reversible error in discrediting John, and the testimony of his witnesses, about his role as principal housekeeper for the family and caretaker of the children, nor did she commit reversible error in granting sole physical and legal custody of the minor children to Angela.

The Chancellor's determination that Angela should have sole legal and physical custody is supported by Miss. Code Ann. §93-5-2(3), which states:

“No divorce shall be granted pursuant to this subsection until all matters involving custody and maintenance of any children of the marriage and property rights between the parties raised by the pleadings have either been adjudicated by the court or agreed upon by the parties and found to be adequate and sufficient by the court and included in the judgment of divorce.”

The Chancellor went on to state that since visitation with the non-custodial parent was not a delineated issue, this Court can only decide the issues jointly submitted unto it. *Perkins v. Perkins*, 787 So.2d 1256, 1264 (Miss. 2001). The Chancellor lacked the authority to order specific visitation at this time because there was no evidence of any problems that prevented John or his family from exercising visitation whenever requested. (R. 47) The unanimous testimony was that the children are currently visiting with their father and his family members when they requested it. (R. 47) Therefore, the Chancellor did not commit reversible error in finding that she lacked authority to order visitation.

ARGUMENT

The standard of review for a Chancellor in domestic relations cases is very clear and well settled as the Mississippi Supreme Court has ruled. Chancellors are vested with broad discretion, and this Court will not disturb the Chancellor's findings unless the Chancellor's actions were manifestly wrong, the Chancellor abused its discretion, or the Chancellor applied an erroneous legal standard. *Sandlin v. Sandlin*, 699 So.2d 1198, 1203 (Miss. 1997) This Court is required to

respect the findings of fact made by a Chancellor which are supported by credible evidence and not manifestly wrong. *Newsom v. Newsom*, 557 So.2d 511, 5134 (Miss. 1990); *Johnson v. Johnson*, 650 So.2d 1281, 1285 (Miss. 1994).

I. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN EVALUATING THE CREDIBILITY OF JOHN AND HIS WITNESSES

John finds error in the Chancellor's one statement in her opinion wherein he claims her finding was based on an erroneous interpretation of his witnesses' testimony. However, John confirms that he and his witnesses clearly attempted to assert that he does much more than Angela, which was the Chancellor's opinion from their testimony.

There is **clearly** a difference in Angela's version of what she does to contribute toward the family than John. (T. 72) Angela would get up in the morning at 6:30 a.m. and make two separate trips to get two of the children to school. Angela would return home and do housework, look for employment on the home computer, and numerous other daily chores for a household consisting of two adults and three minor children. (T. 72)

Angela testified that she cooked the evening meals for the entire family, (T. 72) and spent every afternoon with the children when they came home from school. She also testified that she spent time teaching each of her daughters to sew, would swim at the pool, and shuffle them to soccer practice and games.

Clearly, John and his witnesses attempted in their testimony to make Angela "appear" to be very lacking in her family duties. John testified to the following:

Q: Now, you testified just then about when you would come home and everybody was tired and Mrs. Benal was tired. Does that sound accurate?

(T. p. 31, lines 28, 29)

A: Yes, it does.

Q: Okay. And I think you testified that you did all the cooking; is that correct?

A: I did a very large majority of the cooking. Yes.

Q: Okay. Well, your testimony sounded like you did all the cooking. But that's not true, is it?

A: My testimony is that I did a large majority of the cooking.

Q: You cooked on Saturday mornings. Is that about right?

A: No, it's not right.

Q: And who washed the dishes?

A: Myself.

Q: Mrs. Benal didn't help you wash the dishes, or she didn't wash the dishes?

A: Very, very rarely did I ever see her wash the dishes.

Q: Okay. And who washed the clothes?

A: It was about fifty-fifty.

Q: So she did half of the clothes washing; is that right?

A: Maybe a little less.

Q: Who did the vacuuming and the cleaning up in the house?

A: I did a fair share of it. I had the children do their rooms. Like I said, their rooms were their rooms. They were responsible for the cleaning, the upkeep, and the neatness.

Q: And the rest of it Mrs. Benal did; is that correct?

A: I don't see what the rest of it was. Such as?

(T. p. 32, lines 1-29)

Q: Picking up things, putting things away. Did they just do it by themselves, or did you do all of that too?

A: Either I did it or the children did it.

Q: Oh, she didn't do anything?

A: I didn't see it.

(T. p. 33, lines 1-4)

The Chancellor determined that John's credibility and his witnesses' credibility was a primary issue in her opinion. This Court has stated that it will not reweigh the evidence or reconsider the credibility of the witness. The Chancellor is in a "better position than this Court to judge the veracity of witnesses and credibility of evidence, *Hammers v. Hammers*, 890 So.2d 944 (Miss. 2005).

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN FAILING TO AWARD JOHN PHYSICAL AND LEGAL CUSTODY OF THE MINOR CHILDREN

In citing *Jordan v. Jordan*, 963 So.2d 1235, 1239 (Miss. 2007):

[T]he polestar consideration in child custody cases is the best interest and welfare of the child. The age of the child is subordinated to that rule and is but one factor to be considered. Age should carry no greater weight than other factors to be considered, such as: health, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship.

Of the twelve factors, the Chancellor found five factors to be neutral, two inapplicable, one favored John, and the remaining four factors favor Angela.

A. Age, Health and Sex of the Child

John attempts to argue that the Chancellor applied the "tender years doctrine" in favoring Angela on this factor. This was not the opinion of the trial court. (R. 44)

John further argues that the Chancellor applied an erroneous legal standard.

The Chancellor cited *Parker v. South*, 913 So.2d 339, 348 (Miss. 2001), as precedent for finding that this factor favored Angela. John cites the case of *Fields v. Fields*, 830 So.2d 1266, 1268 (Miss. App. 2002), which reversed a Chancellor's finding regarding visitation, not custody. However, this decision hinged on the interpretation of a written report, not testimony.

As John states in his Brief, "The Chancellor's misinterpretation of John's testimony and that of his mother and brother preclude the Chancellor from discounting their credibility."

If the Chancellor is not permitted to make credibility determinations of witness testimony, then the Appellant becomes the trial Court. **This is not the law.** As this Court has decided in numerous decisions.

"The chancellor was in the best position to determine the credibility of the witnesses and their respective testimony and proof regarding the matter at issue. As is well established, the chancellor is vested with assessment of witness credibility, and "the interpretation of evidence where it is capable of more than one reasonable interpretation..." Pullis at 484, citing Crow v. Crow, 622 So.2d 1226, 1229 (Miss. 1993).

The case of *Greer v. Greer*, 175 N.C. App. 464, 62 S.E.2d 423 (2006), a North Carolina case, is not applicable since the Court did not apply a "tender years" presumption of custody.

The Chancellor correctly found that this factor favored Angela.

B. Continuity of Care

John argues in his brief that his voluntary separation to move to Mississippi without the children should not be weighed against him in the Chancellor's consideration in this factor. However, the Chancellor notes that John failed to visit the children but once since Angela's move back to Nebraska. (R. 44) However, John admitted that Angela had been a stay-at-home mom for the past fourteen (14) years since Sarah was born. (T. 29)

John fails to explain why he did not remain in Nebraska and seek employment there. (T. 11, 12) John further failed to seek temporary relief from the Court regarding visitation, when he had an opportunity when he filed his Complaint for Divorce . (R. 41)

The Chancellor properly found this factor strongly favored Angela.

C. Parenting Skills

Angela contests John's argument that the Chancellor should have found this factor strongly favored him.

It is the Chancellor's duty to weigh the evidence, and she is in a better position than this Court to judge the veracity of witnesses and credibility of evidence. *Lee v. Lee*, 798 So.2d 1284, 1291 (Miss. 2001).

In the case *sub judice*, the Chancellor correctly found this factor slightly favored John.

D. Willingness and Capacity to Provide Primary Care

No evidence or testimony was submitted at trial to support John's position that Angela's home was not suitable. It is not precedent that because a parent is earning a greater income, they are entitled to a preference in a custody dispute based solely on that consideration. *Jordan v. Jordan*, 872 So.2d 92, 95 (Miss. Ct. App. 2004)

The Chancellor correctly found this factor favored neither parent.

E. Employment Responsibilities and Stability of Employment

John argues that this factor should favor him.

John held two separate jobs from April, 2006, until April, 2007. (T. 36) John worked for Telex from April, 2006, to July, 2006, until he was relocated. (T. 37) John was employed at \$8.25 per hour with a public school until taking the job at Cellular South and moving to Mississippi in 2007. (T. 40)

After being a stay-at-home mother for many years, Angela began working in July, 2006, until moving to Mississippi in 2007. (T. 73, 74)

The Chancellor was correct in finding that the factor favored neither party.

F. Age and Physical and Mental Health of Parents

The Chancellor was correct in her opinion that this factor favors neither parent.

G. Emotional Ties of Parent and Child

The Chancellor was correct in her opinion that this factor favors neither parent.

H. Moral Fitness of the Parent

The Chancellor was correct in her opinion that this factor favors neither parent.

I. Home, School and Community Record of the Child

John voluntarily came to Mississippi in April, 2007, for employment. (T. 11) No evidence was offered by John to prove that it was not in the children's best interest not to remain in Nebraska, where they had resided since their birth. The children attended school in Nebraska all of their lives, with the exception of one semester spent in Mississippi. (T. 65, 66)

John admitted that most of the children's relatives and friends reside in Nebraska. (T. 40) The children have always attended church and the eleven year old child, Katherine, received confirmation in Nebraska. (T. 78) The youngest child, Erin, had First Communion in April, 2008, in Nebraska (T. 78)

The Chancellor was correct in her opinion that this factor strongly favored Angela.

J. Preference of the Child

The Chancellor was correct in finding this factor was not applicable.

K. Stability of Home Environment

John presented no proof that Angela placed the children at any risk to be harmed by relatives.

The Chancellor was correct to find this factor favored Angela.

M. Other Relevant Factors

The Chancellor noted the concern regarding John's behavior pulling a knife and holding it against his wrist as if to threaten suicide. This behavior was done in the presence of the children. (T. 46) John even admitted to have been taken into protective custody for three days as a result. (T. 36)

The Chancellor was correct in her findings on this factor.

Again, the Chancellor specifically made a finding of each of the *Albright* factors in her Opinion that was supported by the credible evidence and testimony. This Court should affirm the award of custody to Angela.

III. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN FINDING THAT SHE LACKED AUTHORITY TO ORDER VISITATION

The Chancellor was well founded in her decision not to award specific visitation rights based on the testimony and evidence submitted at trial.

John cites Miss. Code §93-5-23, to support his position that the Chancellor erred by not awarding specific visitation. However, the statute specifically states "the Court may, in its discretion...make all order touching the care, custody and maintenance of the children..." Therefore, the Chancellor used her discretion by not awarding specific visitation due to the testimony that reflected that John and his family members had exercised it upon their request. (R. 47) John's own testimony confirmed that his family exercised visitation with the children. (R. 40)

This Court has clearly stated that a provision of the parties voluntary consent must specifically set forth issues upon which parties are unable to agree. *Cassibry v. Cassibry*, 742

So.2d 1121 (Miss. 1999). The voluntary consent to Irreconcilable Differences divorce submitted by the parties failed to address visitation as a contested issue. (R. 41)

CONCLUSION

The Chancellor's decision to award custody of the minor children to Angela is supported by substantial evidence and is supported by law. The Chancellor's decision that she lacked authority to order visitation is supported by substantial evidence and is supported by law. Therefore, this Court should not render judgment in favor of John.

THIS the 7th day of May, 2009.

Respectfully submitted,

Angela Jean Benal, Appellee

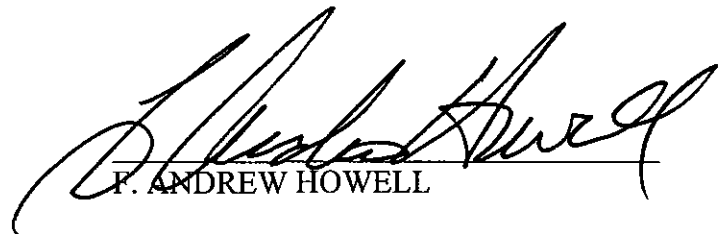
BY:


F. ANDREW HOWELL

CERTIFICATE

I, F. Andrew Howell, Attorney for Appellee, do hereby certify that I have this date mailed, by United States Mail, first class postage prepaid, the original and three (3) copies of the foregoing to the Clerk of this Court at Post Office Box 249, Jackson, Mississippi 39205-0249, and a true and correct copy to E. Michael Marks, Suite 730, Plaza Building, 120 North Congress Street, Jackson, Mississippi 39201, and to Julie Ann Epps, 504 E. Peace Street, Canton, Mississippi 39046.

THIS the 7th day of May, 2009.


F. ANDREW HOWELL

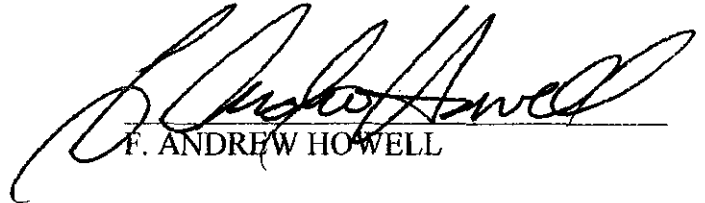
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AMENDED CERTIFICATE

I, F. Andrew Howell, Attorney for Appellee, do hereby certify that I have this date mailed, by United States Mail, first class postage prepaid, the original and three (3) copies of the foregoing to the Clerk of this Court at Post Office Box 249, Jackson, Mississippi 39205-0249, and a true and correct copy to E. Michael Marks, Suite 730, Plaza Building, 120 North Congress Street, Jackson, Mississippi 39201, Julie Ann Epps, 504 E. Peace Street, Canton, Mississippi 39046, and to Honorable Cynthia Brewer, Chancellor, P.O. Box 404, Canton, Mississippi, 39046.

THIS the 8th day of May, 2009.


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