IN THE SUPREME COURT

OF

THE STATE OF MISSISSIPPI

IN RE: CONSERVATORSHIP OF RUBY CHISM ELLIS

BOBBIE L. ELLIS **APPELLANT**

VS. **NO. 2008-CA-01993**

STEPHANIE C. TURNER **APPELLEE**

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Appellant, Bobbie L. Ellis, does hereby certify that the following listed persons have an interest in the outcome of this case as follows, to-wit:

1. Bobbie L. Ellis, 167 CR 1389, Saltillo, MS 38866;
2. Stephanie C. Turner, 119 Horseshoe Lake Rd., Saltillo, MS 38866;
3. Ruby Chism Ellis, c/o Golden Living Ctrs., 1215 Earl Frye, Amory, MS 38821;
4. Rhett R. Russell, Attorney for Appellant, P.O. Box 27, Tupelo, MS 38802;
5. Thomas M. McElroy, Attorney for Appellee; P.O. Box 1450, Tupelo, MS 38802;
6. Jonathan W. Martin, Guardian Ad Litem, P.O. Box 6, Tupelo, MS 38802.

RHETT R. RUSSELL

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STATEMENT OF THE ISSUES

The following issues are presented upon this appeal.

1. Whether or not the lower court erred in establishing a conservatorship and appointing Ms. Ellis's granddaughter as a conservator of the person and estate of Mrs. Ellis who at such time had in place a valid durable power of attorney and a valid healthcare directive each duly executed in 2002 when she was competent.

2. Whether or not the lower court's judgment appointing Mrs. Ellis's granddaughter as conservator of her person and estate is invalid as a result of failure to adhere to the requirement that the husband, a next of kin or other descendant be given prior notice by personal service of the time and place for the hearing.

3. Alternatively, if the appointment of a conservator is deemed reasonably necessary then whether or not her granddaughter should be discharged as conservator due to her perjury,

unlawful entry into Mr. Ellis's residence, unlawful conversion of Mr. Ellis's funds, failure to adhere to statutory requirements, failure to give inventory and accounting as specifically directed by the court on two (2) occasions and her other abuses of powers under color of law while substituting Mrs. Ellis's spouse who, prior to the interruptions by the granddaughter, had been exclusively handling his wife's health decisions and financial affairs.

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STATEMENT OF THE CASE

Comes now, Bobbie L. Ellis, pursuant to Rule 28(a)(4) of the Mississippi Rules of Appellate Procedure and submits herewith his statement of the case.

Nature of the Case, Course of Proceedings and Disposition by Lower Court

This appeal is pursued by Bobbie L. Ellis (hereinafter referred to as "Mr. Ellis") seeking relief from 2008 judgments of the Chancery Court of Lee County, Mississippi, which appointed and then refused to remove or substitute Stephanie C. Turner (hereinafter referred to as "granddaughter") as conservator of the estate and person of his wife, Ruby Chism Ellis (hereinafter referred to as "Mrs. Ellis").

Mrs. Ellis is seventy-five (75) years of age, has been unable to comprehend for over three

(3) years and has been a patient in a nursing home since June, 2006. (T 75-76). Her heirs at law are her adult son and her husband, Mr. Ellis. (T 127). Without either heir or other relative receiving any notice as to the day and time of the hearing, the granddaughter proceeded before the lower court on the 8th day of July, 2008. Mrs. Ellis's son was not present and did not participate in this or any subsequent hearing. (T 127). The record demonstrates that neither the son nor Mr. Ellis had any notice whatsoever of the time and day of the hearing. [On the 19th day of April, 2008, the son did sign a "Joinder" (R 14); however, the order establishing the day and time of the hearing was not dated and entered until the 30th day of June, 2008. (R 8).]

During the July 8th hearing while under direct examination and again in response to the chancellor's inquiry the granddaughter twice lied under oath by stating that Mr. Ellis had prior notice that the hearing would be had on July 8th and that he had been made aware by her. (T 9-10). [However, in open court under oath on the 20th day of October, 2008, the granddaughter admitted that she had not given any prior notice whatsoever to Mr. Ellis of the July 8, 2008, hearing. (T 130).] Based in part upon her lies under oath the granddaughter was appointed conservator with Letters of Conservatorship issuing.

Mr. Ellis did not become aware of the July 8th hearing until July 19, 2008, when the granddaughter went to his marital home, waived in his face Letters of Conservatorship and demanded that he immediately vacate his residence (T 34-35, T 130-131) which she later admitted to have broken into and entered with a non-family member without permission. (T 38, T 82).

Mr. Ellis requested that the appointment of the granddaughter be set aside in that there was no need for a conservatorship due to the existence of Mrs. Ellis's durable power of attorney and healthcare directive, each executed when she was competent allowing her husband or her granddaughter to act as her agent and further due to no heirs at law or other descendants of Mrs. Ellis receiving any notice of the day and time of the hearing. (R 19-25). Alternatively, Mr. Ellis asserts that should the court deem a conservatorship in order that he should be substituted as conservator in that he had been handling her medical decisions and financial affairs exclusively for over three (3) years until the appointment of the granddaughter as conservator. (T 75-76, R 19-25).

A guardian ad litem was appointed who reported: "I do not find that Mr. Ellis has grossly misspent the assets of Ruby over the last year. He did timely pay (the nursing home) and he delivered toiletries and disposable undergarments. He spent in maintaining the residential home. But in terms of the accusation that he grossly misspent her assets, I do not find ... ." (T 164).

The granddaughter stated that her sole reason for petitioning the court for appointment of conservator was that Mr. Ellis was not caring for Mrs. Ellis (T 39) but then admitted that Mrs. Ellis was being properly cared for in the nursing home. (T 40).

The docket and record show that on the 10th day of April, 2008, the granddaughter caused to be filed her Complaint for Appointment of Conservator in which she did not disclose that Mrs. Ellis's sole heirs at law were Mrs. Ellis's son and husband. Mrs. Ellis's son did sign a Joinder on

the 19th day of April, 2009, however, the July 8, 2008, hearing was not set until the entry of a June 30, 2008, order. (R 14, R 8) The record depicts no notice or summons being directed to Mrs. Ellis's son of the date and time of the hearing. No summons or notice whatsoever of the hearing day and time were directed to Mrs. Ellis's spouse. Hearing was had on the allotted July 8, 2008, setting. The granddaughter testified under oath in open court on the 8th day of July, 2008, that Mrs. Ellis's husband had "been made aware of these proceedings" and "knew this is going on." (T 9). She further stated under oath on July 8, 2008, upon questioning by the chancellor that Mrs. Ellis's husband had prior notice of the July 8th hearing in that she "told him about it." (T 10). However, in open court under oath on the 20th day of October, 2008, when asked, "Isn't it true that when you got appointed as conservator, you didn't give any notice to Mr. Ellis?" to which she responded under oath, "I did not - no, I did not give him any notice." (T 130).

By Order dated October 28, 2008, the lower court denied the relief requested by the husband and on November 12, 2008, made Findings of Facts and Conclusions of Law.

Statement of Relevant Facts

On June 11, 2002, while competent Mrs. Ellis executed both a durable power of attorney and a healthcare directive appointing her husband and granddaughter as her agents to act jointly or severally in her behalf. (Exhibits 2 and 8). Said durable power of attorney was recorded as

public record at the Office of the Lee County Chancery Clerk on November 11, 2007, and the granddaughter was aware of the durable power of attorney. (T 39, Exhibits 2 and 8).

Mr. and Mrs. Ellis were married on July 29, 2000. (T 75). She has been in a nursing home since June of 2006. (T 75). Mrs. Ellis is seventy-five (75) years of age and Mr. Ellis is seventy (70) years of age. (T 75). Until June, 2006, when Mrs. Ellis became a patient in a nursing home Mr. and Mrs. Ellis resided together in their marital home in Lee County, Mississippi, which is still occupied by Mr. Ellis. (T 75 T 82-83). Mrs. Ellis has not been able to comprehend for the last three (3) years, and for the last two (2) years she has not been able to recognize anyone. (T 76). Prior to Mrs. Ellis's admission to the nursing home and at all times thereafter until the appointment of the conservator Mr. Ellis has been exclusively handling the financial affairs of Mrs. Ellis as well as her health care decisions. (T 76-77). He has been satisfying nursing home and medical bills, supervising her account with Medicaid and taking her personal effects at the nursing home. (T 77-79). Mr. Ellis has visited his wife at the nursing home once per week since she has been a patient. (T 76-77).

Mr. Ellis had no notice or knowledge whatsoever of the July 8, 2008, hearing until July 18, 2008, at which time the granddaughter waived her Letters of Conservatorship in his face while demanding that he immediately vacate his residence. (T 34-35, T 130-131).

In addition to committing perjury, the granddaughter as conservator, with a friend she invited, broke into and entered the residential home of Mr. Ellis. (T 38, T 82).

Without permission she copied years of checks of Mr. Ellis and closed out his bank account causing numerous checks and automatic withdrawals to be dishonored. (T 35-37). Additionally, she has wholly failed and refused to return under oath an inventory as required by statute. She has been ordered to return an inventory and accounting twice by the chancellor but fails and refuses to do so. (R 52, R 59).

Mrs. Ellis has a valid durable power of attorney and healthcare directive in place allowing the granddaughter and Mr. Ellis to act jointly or severally. By means of a joint bank account maintained by himself and his wife he has dealt with his wife's finances with no problems until the interference of the granddaughter. There was and is no necessity for a court-appointed conservator, the consumption of judicial time, the cost of the parties and the cost to Mrs. Ellis for court costs, conservator fees and the fee of a guardian ad litem who reported to the lower court that the husband's past expenditures of funds of the joint bank account he maintained with his wife were not out of line.

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SUMMARY OF THE ARGUMENT

There was no compelling need or necessity for the lower court to initiate a conservatorship proceeding and to appoint a non-heir at law of Mrs. Ellis as conservator. Mrs. Ellis executed both a durable power of attorney and a healthcare directive on June 11, 2002, while she was competent. By the durable power of attorney Mrs. Ellis appointed her husband and her granddaughter to act jointly or severally so as to conduct her affairs once Mrs. Ellis became incompetent so as to eliminate the time, expense and public disclosure arising out of a judicial conservatorship proceeding. Evidence shows that Mrs. Ellis was being properly taken care of by her husband who was seeing to and satisfying her medical and personal related expenses through a jointly maintained bank account which was established when Mrs. Ellis was competent. No basis existed for the establishment of a conservatorship regardless of who was chosen to serve in such

fiduciary capacity.

Proper summons requirements were not adhered to prior to the July 8, 2008, hearing resulting in the appointment of the granddaughter as conservator. The hearing was set by Order dated June 20, 2008. The record is undisputed that Mrs. Ellis's son did not receive notice or summons on or after the June 30, 2008, order setting the July 8, 2008, hearing. It is undisputed that Mrs. Ellis's spouse had no knowledge of the July 8, 2008, hearing until July 18, 2008, when the granddaughter as conservator waived the Letters of Conservatorship in his face and demanded that he promptly vacate his residence. A conservatorship is not necessary. The appointment of the granddaughter as conservator is invalid.

Mrs. Ellis's durable power of attorney and healthcare directive were and still are in full force and effect so as to allow for the handling of her legal business, property affairs and the making of medical decisions. Such instruments avoid the time, expense and embarrassment involved in a conservatorship.

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ARGUMENT

I.

WHETHER OR NOT THE LOWER COURT ERRED IN ESTABLISHING A CONSERVATORSHIP AND APPOINTING MRS. ELLIS'S GRANDDAUGHTER AS CONSERVATOR OF THE PERSON AND ESTATE OF MRS. ELLIS WHO AT SUCH TIME HAD IN PLACE A VALID DURABLE POWER OF ATTORNEY AND A VALID HEALTHCARE DIRECTIVE EACH DULY EXECUTED IN 2002 WHEN SHE WAS COMPETENT.

Mrs. Ellis as of July, 2008, was incompetent to manage her estate and herself as verified by affidavits of two (2) doctors. (R 9-10). However, on July 11, 2002, Mrs. Ellis was competent and she then executed a durable power of attorney appointing her husband and her granddaughter to act jointly or severally as her agent. (Exhibits 2 and 8). Such instrument was executed pursuant to and conformed with the Uniform Durable Power of Attorney Act, §§ 87-3-101 *et seq.* MCA.

Further, Mrs. Ellis has an advanced healthcare directive which she executed while competent pursuant to § 41-41-209 MCA. (Exhibit 8). No conservatorship was needed to be established so as to make either financial or healthcare decisions on behalf of Mrs. Ellis.

A durable power of attorney is defined under § 83-3-105 MCA as a power of attorney by which a principal designates another as attorney in fact in writing which becomes effective upon the disability or incapacity of the principal. Mrs. Ellis has been incapacitated for over three (3) years. The durable power of attorney is unquestionably in full force and effect. Each agent appointed by Mrs. Ellis by this instrument was bestowed with mass powers. The instrument allowed the granddaughter to act unilaterally. She had no reason to apply for appointment as conservator. "Acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal ... as if the principal were competent and not disabled." § 87-3-107 MCA. The granddaughter and the public had notice of such instrument in that it was recorded in the office of the Chancery Clerk of Lee County, Mississippi, on November 11, 2007, under instrument number 2007018834. She admitted that she was aware of such power of attorney and her ability to exercise powers thereunder; however, she stated that she still intended to go forward in the lower court in being appointed conservator. (T 39, T 130).

Mississippi was but one of numerous states to adopt the Uniform Durable Power of Attorney Act. (See table of jurisdictions where the Uniform Act has been enacted immediately

preceding § 87-3-101 MCA.) "A durable power of attorney is a means by which the family members could help a potentially disabled or incompetent person in handling that person's legal business and property affairs. This law has the beneficial effect of avoiding the time, expense and embarrassment involved in having to establish guardianships (or conservatorships) for incompetent persons." Estate of Schriver, 441 So.2d 1105, 1106 (Fla. App. 1983)."The official comment to the Uniform (Durable Power of Attorney) Act states that '... It is not the purpose of the Act to encourage resort to court for a fiduciary appointment that should be largely unnecessary when an alternate regime has been provided via a durable power of attorney.' Quite simply, a guardianship (conservatorship) is usually not needed if a durable power of attorney was executed prior to the incompetency of the grantor." Guardianship of Savell, 856 So.2d 378, 384, § 33 (Miss. App. 2001)

Neither the durable power of attorney nor the healthcare directive have been revoked. It is not in the best interest that Mrs. Ellis's funds be expended towards duplication of years of bank records (T 41-42), court costs, attorney fees, conservator fees and guardian ad litem fees of One Thousand Six Hundred Twenty-Five Dollars ($1,625.00) as of October 28, 2008. (R 52, R 59). Additionally, when the spouse was handling Mrs. Ellis's Medicaid affairs extra funds were being paid and were utilized for her sanitary supplies, toiletries and such with the granddaughter's appointment resulting in all Medicaid funds being paid to and retained by the nursing home with the granddaughter's response being, "I am aware of that, and that's fine." (T 69-70) There is simply no need for a conservatorship.

II.

WHETHER OR NOT THE LOWER COURT'S JUDGMENT APPOINTING MRS. ELLIS'S GRANDDAUGHTER AS CONSERVATOR OF HER PERSON AND ESTATE IS INVALID AS A RESULT OF FAILURE TO ADHERE TO THE REQUIREMENT THAT THE HUSBAND, A NEXT OF KIN OR OTHER DESCENDANT BE GIVEN PRIOR NOTICE BY PERSONAL SERVICE OF THE TIME AND PLACE FOR THE HEARING.

There are strict notice requirements under a conservatorship. § 93-13-253 MCA requires: "Upon the filing of such petition, the clerk of the court shall set a time and place for hearing and shall cause not less than five (5) days notice thereof to ... be given to the husband ..., or an ascendant, or next of kin for whom the conservator is to be appointed ... it being the intention of the legislature to require personal service on the person for whom the conservator is to be appointed and one relative." § 93-13-253 MCA requires notice to someone other than the petitioner. At least three (3) people - the petitioner, the person for whom the conservator is to be appointed and one other relative must be given notice of the time and place for the hearing or else the order appointing a descendant conservator is invalid. Smith v. King, 942 So.2d 1290, 1292 §§ 6-8 (Miss. 2006) and Armstrong v. Estate of Thames, 958 So.2d 1258, 1260 § 7 (Miss. 2007). In the case sub juris the record depicts that Mrs. Ellis was the only person served with process, and no other relative, except the granddaughter, received prior notice of the time and place for the hearing. The granddaughter's appointment as conservator is invalid.

The record reflects that neither the son of Mrs. Ellis nor Mr. Ellis or any other relative of Mrs. Ellis except her granddaughter had notice of the time and place of the hearing as required by

§ 93-13-253 MCA. The knowledge of Mrs. Ellis's son that a complaint for appointment of conservator had been filed as evidenced by his joinder is immaterial and does not meet the statutory notice requirement in that his joinder was dated April 19, 2008, and the July 8th hearing was not set until the June 30, 2008, order was entered. (R 8, R 14). The son was not served with summons of the hearing, never attended any court proceeding in this matter (T 127), and never received notice of the time and day as required by statute. Actual knowledge of pendency of a conservatorship proceeding is immaterial "unless there has been a legal summons or a legal appearance." Conservatorship of Brantley, 865 So.2d 1126, 1133 ¶ 23 (Miss. 2002) quoting Brown v. Riley, 280 So.2d 1234, 1237 (Miss. 1991).

"It goes without saying that the most important safeguard involving any person ... is prior notice. This gives the recipient an opportunity to prepare himself and be heard. Notice, therefore by far is the paramount factor and purpose of all process. Certain formalities attend every process ... (even) actual knowledge ... of pendency of a suit ... is immaterial unless there has been a legal summons or a legal appearance." Brown v. Riley, *Supra.* at 1237.

Mr. Ellis received no notice whatsoever of the July 8th hearing until July 18, 2008, at which time the granddaughter was waiving her Letters of Conservatorship in his face and demanding that he immediately vacate his marital home. (T 34-35, T 130-131). No notice of the time and place of the July 8, 2008, hearing was given to the husband, another descendant, an ascendant or next of kin of the person for whom the conservator was appointed. The granddaughter failed to meet the notice requirements of § 93-13-253 MCA and her appointment

as conservator is invalid. Conservatorship of Brantley, *Supra.* at ¶¶ 22-23; Brown v. Riley, *Supra.*

Further, the July 8th appointment of the granddaughter as conservator resulted in part from the perjury committed by the granddaughter. At such hearing she stated under oath during direct examination and again directly in response to the chancellor's inquiry that Mr. Ellis had prior notice of the hearing and had been made aware of the July 8th proceeding by her. (T 9-10). In open court under oath on the 20th day of October, 2008, the granddaughter admitted that she had not given any notice whatsoever to Mr. Ellis of the July 8th hearing. (T 130). Of course, Mr. Ellis was not present at the July 8th proceeding to hear the granddaughter's false testimony and did not become aware of such until the July 8th proceedings were transcribed for purposes of this appeal. The granddaughter perpetrated fraud upon the lower court.

III.

ALTERNATIVELY, IF THE APPOINTMENT OF A CONSERVATOR IS DEEMED REASONABLY NECESSARY THEN WHETHER OR NOT HER GRANDDAUGHTER SHOULD BE DISCHARGED AS CONSERVATOR DUE TO HER PERJURY, UNLAWFUL ENTRY INTO MR. ELLIS'S RESIDENCE, UNLAWFUL CONVERSION OF MR. ELLIS'S FUNDS, FAILURE TO ADHERE TO STATUTORY REQUIREMENTS, FAILURE TO GIVE INVENTORY AND ACCOUNTING AS SPECIFICALLY DIRECTED BY THE COURT ON TWO (2) OCCASIONS AND HER OTHER ABUSES OF POWERS UNDER COLOR OF LAW WHILE SUBSTITUTING MRS. ELLIS'S SPOUSE WHO, PRIOR TO THE INTERRUPTIONS BY THE GRANDDAUGHTER, HAD BEEN EXCLUSIVELY HANDLING HIS WIFE'S HEALTH DECISIONS AND FINANCIAL AFFAIRS.

The granddaughter is guilty of willful perjury (T 9-10, T 130). The Clean Hands Doctrine is applicable. Griffith, Mississippi Chancery Practice, 2000 Edition, § 42.

The granddaughter had only visited Mrs. Ellis maybe five (5) times during the twenty-seven (27) month period prior to the July 8, 2008, hearing. (T 34). She had never been to her grandmother's house prior to being appointed as conservator. (T 38). Once she became appointed conservator the granddaughter committed trespass by unlawfully entering with her friend Mr. Ellis's residential home. (T 38, T 73, T 82). She "went into his residential home without any notice whatsoever to him and plowed around and took photographs all over the place." (T 38, T 82).

On July 19, 2008, the granddaughter for the first time gave Mr. Ellis notice of the conservatorship proceeding by waiving Letters of Conservatorship in his face at his residential home and demanding that he immediately vacate. (T 34-35, T 130-131). She acted unlawfully under color of law while ignoring his marital and homestead rights.

The granddaughter as conservator has wholly failed and refused to return to the court under oath within three (3) months of her appointment a true and perfect inventory of the estate, real and personal, and of all money or other things which she may have received as property of Mrs. Ellis as required by § 93-13-33 MCA being applicable to the conservatorship by virtue of § 93-13-259 MCA. Further, the chancellor by judgment dated October 28, 2008, directed the granddaughter to file an inventory with the clerk of the court within thirty (30) days. (R 52). Again by judgment dated November 12, 2008, the chancellor directed the granddaughter to make an accounting and inventory within thirty (30) days. (R 59). The granddaughter as conservator fails and refuses to comply with the directives of the court.

Mr. and Mrs. Ellis maintained a joint account with Renasant Bank into which each made deposits and each wrote checks. Without any notice to Mr. Ellis the granddaughter as conservator closed the account on August 1, 2008. (T 35-36, T 81, R 56-57, R 59). Four (4) of Mr. Ellis's checks bounced as a result thereof. (T 37). The electrical bill for the residence was to be paid through an electronic withdrawal from this account as was the insurance premium of an insurance company with both withdrawals refused as a result of closing the account resulting in Mr. Ellis receiving a notice of disconnect from the power company. (T 37).

Mr. Ellis has visited his wife at the nursing home once per week since she has been a patient. (T 76-77). The granddaughter admitted that Mrs. Ellis was receiving proper care at the nursing home. (T 40). Prior to Mrs. Ellis's admission to the nursing home and at all times thereafter until the appointment of the conservator Mr. Ellis has been exclusively handling the financial affairs of Mrs. Ellis and making her medical decisions. (T 72, T 76-77). He has been satisfying nursing home and medical bills, supervising her account with Medicaid and taking her personal effects at the nursing home. (T 77-79). All of Mr. Ellis's actions for and on behalf of Mrs. Ellis were accomplished without need for a conservatorship. If there is a need for a conservatorship then he is the fit and proper person to serve in such fiduciary capacity.

CONCLUSION

There is absolutely no need for a conservatorship in that Mrs. Ellis while competent executed a durable power of attorney and a healthcare directive naming her granddaughter and her husband as agents with either to act severally. A conservatorship is an unnecessary expenditure of time and cost and is not in the best interest of Mrs. Ellis.

The lower court's July 8, 2008, appointment of the granddaughter as conservator of the person and estate of Mrs. Ellis is invalid. Statutory notice requirements were not met. The judgment was handed down in part based upon false statements sworn to by the granddaughter.

If a conservatorship were a reasonable necessity and in the best interest of Mrs. Ellis then a fit and proper person to serve as conservator is Mrs. Ellis's spouse who has exclusively handled all of her financial affairs and medical decisions from the time of their marriage until the interruption created by the granddaughter.

The lower court's appointment of the conservator should be declared invalid, and this matter should be remanded back to the lower court to require the granddaughter to make full accounting and inventory and for assessment of all costs, including a reasonable attorney fee, against the granddaughter as well as punishment being handed out to the granddaughter as may be deemed appropriate for the granddaughter's perjury and illegal acts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Rhett R. Russell, attorney for Appellant, have this day mailed, postage prepaid, by U.S. Postal Service, a true and correct copy of the above and foregoing Brief of the Appellant to each of the following:

Honorable Jacqueline Estes Mask
Trial Court Judge
P.O. Box 7395
Tupelo, MS 38802

Thomas M. McElroy
Attorney for Appellee
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Jonathan W. Martin
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Tupelo, MS 38802

SO CERTIFIED, on this the 24th day of March, 2009.

RHETT R. RUSSELL