

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

**THE GREEN ACRES TRUST
RAY BAZZILL, TRUSTEE**

APPELLANT

VS.

CAUSE NO. 2009-CA-00564

DAN WELLS AND ANN WELLS

APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby 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.

Chancellor: The Honorable Kenneth Burns

Appellant: Green Acres Trust
Starkville, Mississippi

Ray Bazzill
Starkville, Mississippi

Rick Bazzill
Peachtree City, Georgia

Mitch Bazzill
Starkville, Mississippi

Stan Bazzill
Starkville, Mississippi

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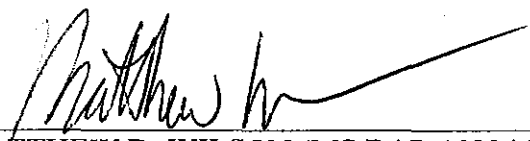
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STATEMENT OF ISSUES

- ISSUE #1: DID THE CHANCELLOR COMMIT MANIFEST ERROR WHEN HE FOUND THAT THE PRIVACY FENCE SERVED NO USEFUL PURPOSE AND WAS THEREFORE DEEMED A "SPITE FENCE" EVEN THOUGH THE RECORD DEMONSTRATES THAT THE PRIVACY FENCE WAS CONSTRUCTED IN RESPONSE TO MR. WELLS' THREATS AGAINST THE LIFE AND PERSON OF MR. RAY BAZZILL, AN EIGHTY YEAR OLD MAN?
- ISSUE #2: DID THE CHANCELLOR ABUSE HIS DISCRETION WHEN HE DISREGARDED MR. WELLS' UNCLEAN HANDS IN THIS MATTER?

[T. = Transcript; R. = Record; R.E. = Record Excerpt.]

STATEMENT OF THE CASE

I. Procedural History

On February 1, 2008, Dan and Ann Wells (hereinafter “the Wellses”) filed their Petition for Injunctive Relief in the Chancery Court of Oktibbeha County, Mississippi seeking injunctive relief and damages from Ray Bazzill and Rick Bazzill (hereinafter “the Bazzills”). Therein, the Wellses allege that the Bazzills, without cause or justification, (1) installed speed bumps along the Wellses’ driveway easement, (2) installed a locked gate across the driveway easement, (3) constructed a rock wall, or berm, along the border separating the Wells and Bazzill property, and (4) constructed a fence on top of the berm, blocking the Wellses’ view of the surrounding area. [R.E. at 14-20; R. at 2-8.]

On February 19, 2008, the Bazzills filed their Answer, Affirmative Defenses, and Counterclaim. Therein, the Bazzills allege that Mr. Wells, among other things, leveled threats against the person and property of Mr. Ray Bazzill, and voiced defamatory comments about Mr. Bazzill to the latter’s business relations. The Bazzills assert that Mr. Wells’ behavior demonstrates his unclean hands. Mr. Bazzill further alleges four counter-claims against Mr. Wells, to-wit: (1) slander, (2) libel, (3) intentional interference with business relations, and (4) intentional infliction of emotional distress. [R.E. at 21-30; R. at 9-18.]

Trial was held on January 14, 2009. At trial, the Green Acres Trust (hereinafter “Green Acres”), the legal owner of the Bazzill family property, was substituted for the Bazzills as respondents. [T. at 2.] After presenting their respective cases, the Chancellor requested that the parties submit proposed findings of fact and conclusions of law. [T. at 156.] After receiving briefs from the parties, the esteemed Chancellor rendered his Judgment on Wednesday, March 4, 2009, and the same was entered by the Clerk of the Court on Friday, March 6, 2009. One week later, on Friday, March 13, 2009, the Chancery Clerk sent a certified copy of the Judgment to

counsel for the parties.¹ [R.E. at 13; R. at 76] Therein, the Chancellor decrees that the speed bumps, the berm, and the locked gate shall remain in place, but the fence must be removed. Moreover, the Chancellor dismisses each of Mr. Bazzill's counterclaims. [R.E. at 12-13; R. at 75-76.]

Feeling aggrieved by the decision of the Chancery Court in this case, Green Acres perfected its appeal on Monday, April 6, 2009, and now presents this case to be reviewed by this Honorable Court.² [R.E. at 33; R. at 61.] Incidentally, the Welles never filed a Notice of Cross-Appeal. [R.E. at 1; R. at 1.] Therefore, the only issues before this Court relate to whether the privacy fence should be removed.

II. Statement of the Facts

Green Acres, which is administered by the Bazzills (in particular Ray Bazzill, who acts as trustee), owns certain real property located off of Miss. Hwy 182, just west of Starkville, Mississippi. Adjacent thereto is property owned by Mr. and Mrs. Dan Wells, the Appellees herein. The Wells property is land-locked; as such they have access to an easement across the Bazzill property for ingress and egress. The Wellses have enjoyed this easement since they purchased the property in 1989. [R.E. at 3; R. at 66.]

From 1998 (when Ray Bazzill moved back to the property) to about 2006, the Bazzills and the Wellses had cordial, even collegial relations. In fact, Mr. Bazzill, who is an ordained minister, performed a wedding on the deck of the Well's house. Moreover, on other occasions,

¹ Because the Clerk waited until Friday, March 13, 2009 (seven days after the date of entry) to mail a certified copy of the Judgment to the parties as per the Judgment's express mandate, the undersigned counsel did not receive notice of the Judgment until at least Monday, March 16, 2009, the tenth day after entry of the Judgment. [R.E. at 13; R. at 76.] As such, the undersigned counsel was deprived of the opportunity to file a timely Motion for New Trial under the absolute time limit set forth in Rule 59(e) of the *Mississippi Rules of Civil Procedure*.

² This Court should take judicial notice that the 30th day following the entry of the Judgment fell on a Sunday. Therefore, pursuant to Rule 26(a) of the *Mississippi Rules of Appellant Procedure*, the deadline for filing the Notice of Appeal was extended to the following day.

Mr. Bazzill would have frequent neighborly visits with Mr. Wells as he approached the Wells property on his daily walkabouts. [R.E. at 3, 54-56; R. at 66; T. at 109-11.]

In 2000, a gate limiting access to the Bazzill property was erected in response to a rash of thefts. These thefts were not caused by any party to this action. Nevertheless, the Bazzills believed this gate was necessary to prevent unauthorized vehicles from driving across the property. The gate also limits access to the Wells property. [R.E. at 3, 54-56; R. at 66; T. at 109-11.]

At some point after the gate was constructed, Mr. Mitch Bazzill, a beneficiary of the Trust who lives on the Bazzill family property, observed that cars going to and from the Wells house were going too fast. This concern was augmented when a meter reader ran over his pet dog. Out of concern for his safety, the safety of his animals, and the safety of the young children who also live on the property, Mitch suggested to his father, Ray Bazzill, that speed bumps be erected along the easement, as well as along other roads to the property. [R.E. at 50; T. at 87.]

After the speed bumps were installed, Mr. Wells took umbrage at their placement and poured gasoline on one speed bump, which was located in close proximity to 500-gallon diesel tank, and lit a match. [R.E. at 35, 37-38, 51-52, 60-62; T. at 41, 49-50, 88-89, 115-17.] By his own admission, Mr. Wells took the law into his own hands when he set fire to the speed bump. [R.E. at 45; T. at 59.] When Ray Bazzill came to put the fire out, Mr. Wells threatened to burn his house down the next time. [R.E. at 62; T. at 117.]

At some point, Mr. Wells suffered a personal injury at work. As a result, Mr. Wells began taking prescription pain-killers that altered his mood. On one occasion, after previously confronting the Bazzills with an expletive charged tirade, Mr. Wells apologized to the Bazzills for his behavior, stating that his wife had said that he was acting berserk as a result of the

medication. [R.E. at 52-53, 58; T. at 89-90, 113.] At trial, Mrs. Wells admitted on cross examination that her husband could be violent. [R.E. at 63-64; T. at 154-55.]

Mr. Bazzill continued to make his daily walks, just as he had been doing throughout the previous decade. [R.E. at 55; T. at 110.] As he would approach the Wells property, Mr. Wells would yell angry threats at Mr. Bazzill. [R.E. at 58-59; T. 113-14] On one occasion, while Mr. Bazzill was in the presence of Ms. Avis Hall, Mr. Wells even threatened to shoot Mr. Bazzill. [R.E. at 46-49; T. at 78-81.]

Subsequently, and with the intention of isolating himself from these threats, Mr. Bazzill began construction of a fence. [R.E. at 59-60; T. at 114-15.] Prior to the fence being constructed, Mr. Bazzill had built a small rock wall (or a berm) to create structural support for the fence. [R.E. at 39; T. at 52.] As the berm was being built, Mr. Wells confronted the Bazzills and told them to "build a real tall fence" to separate him from the Bazzills "right here" on the berm. [R.E. at 36; T. at 45.] The Bazzills obliged his request. Subsequently, the threats to Mr. Bazzill diminished significantly, but not entirely; after filing the Petition for Injunctive Relief, Mr. Wells threatened to throw Mr. Bazzill into his sewage lagoon. [R.E. at 48, 57; T. at 80, 112.]

Trial was held on January 14, 2009. The esteemed Chancellor rendered his Judgment on March 4, 2009, and the same was entered by the Clerk of the Court on March 6, 2009. Therein, the Chancellor decrees that the speed bumps, the berm, and the locked gate shall remain in place, but the fence must be removed. The Chancellor also dismisses each of Mr. Bazzill's counterclaims. [R.E. at 12-13; R. at 75-76.]

SUMMARY OF THE ARGUMENT

Green Acres disagrees with the Chancellor's determination that the privacy fence "serves no benefit to [the Bazzills] or their property and was erected solely to annoy the Wells [family]." With the utmost respect afforded to the Chancellor, Green Acres contends—and the record would show—that the fence serves an important, useful purpose for which Mr. Bazzill derives a distinct benefit: It insulates Ray Bazzill from Dan Wells' malicious threats to his person and property. This reason alone justifies the construction and continued maintenance of the fence.

Beyond this, the duplicitous nature of the Petition for Injunctive Relief, when juxtaposed against Mr. Wells' willful misconduct and inequity throughout this matter—such as (1) his burning of Green Acres' speed bump, (2) his taunts and threats toward the life and property of Mr. Bazzill, which continued even after the Petition was filed, and (3) his admittedly wrongful communication with Mr. Bazzill's business relations—was sufficient cause for the Chancellor to dismiss the Petition for Injunctive Relief altogether. However, by selecting not to dismiss the Petition for Injunctive Relief, the esteemed Chancellor abused his discretion.

ARGUMENT

I. Standard of Review

The factual findings of a chancellor, when supported by substantial evidence, may be disturbed if it is reasonably apparent “that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard.” Biglane v. Under the Hill Corp., 949 So.2d 9, 13-14 (Miss. 2007).

With respect to the esteemed Chancellor, Green Acres contends that the lower court was manifestly wrong about the purpose of the fence in question, and that the lower court abused its discretion when it selected to overlook Mr. Wells’ unclean hands.

II. The Chancellor Committed Manifest Error When He Found That The Privacy Fence Served No Useful Purpose And Was Therefore A “Spite Fence” Even Though The Record Demonstrates That The Privacy Fence Was Constructed In Response To Mr. Wells’ Threats Against The Life And Person Of Mr. Ray Bazzill, An Eighty Year Old Man

In the Judgment, the esteemed Chancellor notes that this case is one of first impression since the parties could locate no Mississippi authority concerning so-called “spite fences.” Having no direct Mississippi authority on the subject, the Chancellor adopts the definition for “spite fences” as set forth in Powell on Real Property, § 62.05:

[A spite fence is] a structure of no beneficial use to the erecting owner or occupant of the premises, but erected or maintained by him solely for the purpose of annoying the owner or occupier of the adjoining property. ... When the fence serves a useful purpose, there is general agreement that the motive for erecting a fence or similar structure is immaterial, even where injury is caused to a neighbor by cutting off his light and air and obstructing his view.

[R.E. at 6; R. at 69.]

Green Acres agrees with this definition and does not object to the Chancellor's adoption of this rule as it is in accord with the holding in Leaf River Forest Prods., Inc. v. Ferguson, 662 So.2d 648, 662 (Miss. 1995), with respect to private nuisances:

A private nuisance is a nontrespassory invasion of another's interest in the use and enjoyment of his property. ... One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Since erecting a fence with beneficial use for the sole purpose of annoying a neighbor would be "intentional and unreasonable," the Chancellor's selection of Professor Powell's definition certainly aligns with prior appellate rulings on private nuisances.

Nevertheless, Green Acres disagrees with the Chancellor's factual determination that the fence "serves no benefit to [the Bazzills] or their property and was erected solely to annoy the Wells [family]." [R.E. at 6; R. at 69] With the utmost respect afforded to the Chancellor, Green Acres contends—and the record would show—that the fence serves an important, useful purpose for which Mr. Bazzill derives a distinct benefit: It insulates Ray Bazzill from Mr. Wells' malicious threats to his person and property. [R.E. at 46-49, 55-60; T. at 78-81, 110-15.] At trial, Mr. Bazzill testified as follows:

Q. Okay. Now we've talked some about the threats. Did you ever report these threats to law enforcement?

A. Yes, sir.

Q. Okay. About how many times?

A. Two or three. I don't remember.

Q. Okay. In addition to calling the law, did you do anything to insulate yourself from his threats?

A. That was when the fence was designed.

Q. Okay.

A. Because every time he would see me walking around the property, he'd start calling me names.

Q. Uh-hmm. (Yes.)

A. Primarily, it was a dirty SOB. That was the primary name. A little SOB.

Q. Okay.

A. And during that time, he would make threats, I'm going to get you, you better watch your back and all these things.

Q. Did those threats concern you?

A. Yes, sir.

[R.E. at 58-59; T. at 113-14.]

Ms. Avis Hall, who had personally observed Mr. Wells' threatening behavior toward the elderly Mr. Bazzill, confirmed Mr. Bazzill's account:

Q. Please describe to the Court what Mr. Wells said to you and Mr. Bazzill before the fence was put up.

A. Okay. At different times when we would walk, he would come out and holler at a distance from – to us. He would holler – to Mr. Bazzill, he would holler things like, You dirty old man, you better watch your back. And we would usually just keep walking. And he would holler again. There's times he's hollered, You dirty SOB, only he used the whole thing. He didn't say "SOB." And he would say, I'm going to shoot you in the back, you better watch it, I'm going to get you, I'm going to get you when you least expect it, just saying things like that, continued until we'd get out of earshot.

Q. Would you, please, describe Mr. Wells' behavior when he made these comments?

A. He seemed to be angry.

Q. Okay. How did you feel about the comments or actions that you heard?

A. Scared. It was a little spooky.

Q. Now, let's move ahead of time. After the fence was put up –

A. Um-hmm. (Yes)

Q. – please describe what Mr. Wells said to you and Mr. Bazzill after the fence was put up.

A. Well, we would hear him holler sometimes when we would go by there, but it's been a lot less since the fence has been up. But he would holler, Hey, you old man, you know, basically the same things. He would holler that again, just telling him to watch it. I'm going to get you.

Q. Could you observe his behavior when he made these comments?

A. Just from the sound of his voice, you could hear – I mean, it just sounded, to me, like it was an angry person that was hollering.

Q. And so just to make sure we're clear here, the frequency of these statements diminished or decreased after the fence was put up. Is this what you said?

A. Correct. Yes. Yes.

Q. Now, how did you feel about these comments after Mr. Wells put the fence – I mean after – I'm sorry – Mr. Bazzill put the fence up?

A. Well, you don't feel quite as afraid because, you know, you do have that protection a little bit, feel a little bit protected.

[R.E. at 47-48; T. at 79-80.]

Opposing counsel cross-examined Ms. Hall, but her testimony was not refuted by the Wellses. [T at 81-84.] Although Mr. Wells had previously denied making threats upon the life of Mr. Bazzill during cross examination [T at 59-60], no subsequent testimony from Mr. Wells—or from any other person—was offered to refute Ms. Hall's direct testimony that she witnessed Mr. Wells' threats upon the life and property of Mr. Bazzill. [T. at 1(i), 84-156.] The Chancellor, with due respect, should have placed more credence in Ms. Hall's testimony. Had the lower court done so, Green Acres believes that the fence would have been deemed both "useful" and "reasonable" since it was designed for self-protection. See id.; see also Powell, § 62.05.

The rule by which the esteemed Chancellor has selected to resolve this dispute turns on whether the privacy fence served a useful purpose. See id. (“When the fence serves a useful purpose, there is general agreement that the motive for erecting a fence or similar structure is immaterial.”) Green Acres has demonstrated that the fence was constructed to insulate the octogenarian Ray Bazzill from the verbalized threats of Dan Wells—a man who had recklessly set fire to Green Acres’ speed bump even though a fuel tank was situated dangerously close thereto. [R.E. at 37-38, 51-52, 58-59; T. at 49-50; 88-89; 113-14.] Green Acres respectfully contends that the purpose for the fence—the protection of Ray Bazzill’s person and property—is both useful and reasonable. Ergo, the privacy fence should not have been deemed a “spite fence,” and as such, the Chancellor’s order should be reversed to the extent that it mandates its destruction.

III. The Chancellor Abused His Discretion When He Disregarded Mr. Wells’ Unclean Hands In This Matter.

The Wellses have invoked the equity jurisdiction of lower court by seeking injunctive relief from the actions taken by Mr. Bazzill on behalf of the Green Acres Trust. [R.E. at 14-17; R. at 2-5.] Although the lower court had exclusive jurisdiction over this matter, the esteemed Chancellor’s authority was nevertheless bounded by the ancient maxims of equity. Pursuant to the Supreme Court’s holding in Calcote v. Calcote, 583 So.2d 197, 200 (Miss. 1991), chancellors must always be mindful of the clean hands doctrine: “He who comes to equity must come with clean hands.” Quoting from Griffith’s Mississippi Chancery Practice, the Calcote Court describes this doctrine as follows:

It is the meaning and purpose of this maxim to declare that no person as a complaining party can have the aid of a court of equity when his conduct with respect to the transaction in question has been characterized by wilful inequity, or illegality.... It may be described as such wilful misconduct, inequity or fraud with

respect to the immediate transaction as would be condemned and pronounced wrongful by honest and fair minded men.

Id. (citing V.A. Griffith, Mississippi Chancery Practice § 42 (1950)). Although only an excerpt from Professor Griffith's treatise is quoted by the Supreme Court, the learned scholar elaborates further: "Courts of equity do not countenance iniquity nor give it sanctuary." Griffith, § 42. See also Richards v. Muselman, 267 S.E.2d 164, 166 (Va. 1980) ("Equity will not give relief to one seeking to restrain or enjoin a tortuous act where he has himself been guilty of fraud, illegality, tortuous conduct or the like in respect of the same matter in litigation.")

Interestingly enough, this Court does not have to seek the opinions of honest or fair minded men to ascertain whether Mr. Wells' actions were wrongful. Instead, this Court can rely upon the testimony of Mr. Wells himself, who admitted on cross examination that he wrongfully burned the speed bump belonging to Mr. Bazzill [R.E. at 58-59; T. at 113-14] and that he wrongfully contacted the business associates of Mr. Bazzill in reaction to the fence in question. [R.E. at 40-45; T. at 54-59.]

Mr. Wells acted inequitably and without regard for the interests of Mr. Bazzill. He knew from more than a decade of personal observation that Mr. Bazzill enjoyed daily walks on the Green Acres' property. [R.E. at 54-55; T. at 109-10.] Nevertheless, Mr. Wells willfully and maliciously attempted to deprive Mr. Bazzill of the quiet use and enjoyment of the Green Acres' property (to which he was legally entitled to enjoy) by harassing Mr. Bazzill with taunts and threats to his life in clear and direct violation of the law. [R.E. at 58-59; T. at 113-14.] See Miss. Code Ann. 97-35-3 (1) (b)³.

³ "Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby ... insults or makes rude or obscene remarks or gestures, or uses profane language, or physical acts, or indecent proposals to or toward another or others, or disturbs or obstructs or interferes with another or others ... shall be guilty of disorderly conduct, which is made a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars (\$200.00), or imprisonment in the county jail for not more than four (4) months, or by both such fine and imprisonment."

Hypocritically, Mr. Wells now seeks virtually identical relief from the Court. In his Petition for Injunctive Relief, Mr. Wells claims that Mr. Bazzill has deprived him of the quiet use and enjoyment of his property by, among other things, constructing a fence that blocks his view. [R.E. at 14-17; R. at 2-5.] However, Mr. Wells' problems *vis-a-vis* the fence are the result of his own reprehensible actions, as Green Acres erected the fence merely to insulate Mr. Ray Bazzill from Mr. Wells' unlawful harassment. [R.E. at 58-59; T. at 113-14.] See id. As such, Mr. Wells has petitioned the lower court to remedy a problem that he created by his own misconduct, evincing his own unclean hands. See Calcote, 583 So.2d at 200; see also Richards, 267 S.E.2d at 166. Mr. Wells asked the lower court to afford him privileges that he has not been willing to afford to Mr. Bazzill. Moreover, Mr. Wells has petitioned that the fence be removed even though he told the Bazzills to "put a fence, a real tall fence, right here." [R.E. at 36; T. at 45.]

The duplicitous nature of the Petition for Injunctive Relief, when juxtaposed against Mr. Wells' willful misconduct and inequity throughout this matter—such as (1) his burning of the speed bump, (2) his taunts and threats toward the life and property of Mr. Bazzill, which continued even after the Petition was filed, and (3) his admittedly wrongful communication with Mr. Bazzill's business relations—was sufficient cause for the Chancellor to dismiss the Petition for Injunctive Relief altogether. [R.E. at 37-38, 40-45, 51-52, 57-59; T. at 49-50; 54-59; 88-89; 112-14.] However, by selecting not to dismiss the Petition for Injunctive Relief, the esteemed Chancellor abused his discretion. See Cline v. Berg, 639 S.E.2d 231 (Va. 2007) (where the Supreme Court of Virginia reversed the lower court on the grounds of unclean hands, holding that the construction of a 32-foot high, 200-foot long unsightly fence by the defendants was not a private nuisance because it was constructed to insulate the defendants from the wrongful actions of the plaintiff.)

Wherefore, Green Acres respectfully submits that, due to the unclean hands of Dan Wells, the Chancellor's order should be reversed to the extent that it mandates the destruction of the privacy fence.

CONCLUSION


WHEREFORE, PREMISES CONSIDERED, The. Green Acres Trust, the Appellant, respectfully requests that this Honorable Court, after a review of both parties' briefs, and the record in this case, reverse the Chancellor's Judgment to the extent that it orders that the privacy fence adjoining the properties of Green Acres Trust and Dan and Ann Wells be removed because (1) the Chancellor committed manifest error when he found that the privacy fence served no useful purpose and was therefore a "spite fence" even though the record demonstrates that the privacy fence was constructed in response to Mr. Wells' threats against the life and person of Mr. Ray Bazzill, and/or because (2) the Chancellor abused his discretion when he disregarded the unclean hands of Mr. Wells with respect to this litigation. The Appellant prays that all other aspects of the Chancellor's Judgment remain in full force and effect.

Moreover, the Appellant requests general relief, whether legal or equitable, that this Court may deem meet and proper in the premises.

Respectfully submitted, this the 9th day of October 2009.

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CERTIFICATE OF SERVICE

I, Matthew D. Wilson, counsel for The Green Acres Trust, do hereby certify that I have on this date filed a bound original and three (3) bound copies of this Brief of Appellant with the Clerk of the Supreme Court.

I further certify that I have filed with the Clerk an electronic copy of the Brief of Appellant on CD-ROM.

I further certify that I have filed with the Clerk a four (4) copies of the Appellant's Record Excerpts, containing selected portions of the Clerk's Papers, including the Chancery Clerk's docket and the Order under review; said Appellant's Record Excerpts is properly paginated and has a Table of Contents.

I further certify that I have on this date sent a copy of the Brief of Appellant and the Appellant's Record Excerpts to the following persons via first-class mail, postage prepaid, and/or Federal Express:

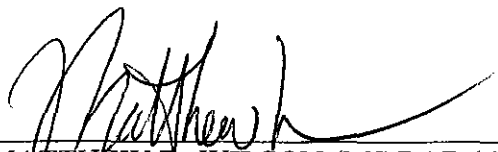
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Respectfully submitted, this the 9th day of October 2009.

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