

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2009-CA-00660**

MICHAEL WHALEN

APPELLANT

VERSUS

**GREGORY BISTES, JR. AND
GAY BISTES PALMISANO**

APPELLEES

**APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

**BRIEF OF APPELLANT
MICHAEL WHALEN**

ORAL ARGUMENT REQUESTED

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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 the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Michael Whalen, Appellant;
2. Gregory Bistes, Jr. and Gay Bistes Palmisano, Appellees;
3. Honorable James Persons, Chancellor;
4. Wes Teel Counsel for Appellees;
5. D. Scott Gibson, Attorney for the Appellant;
5. Edward O. Miller, Attorney for Appellees;

So certified on this the 13th day of October, 2009.



D. SCOTT GIBSON

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STATEMENT OF THE ISSUES

- I. THE CHANCELLOR ERRED WHEN ON THE SUMMARY JUDGMENT MOTION OF THE DEFENDANT'S HE RULED THAT THERE WAS NO DELIVERY OF THE CONTRACT TO THE BUYER AND THUS NO ENFORCEABLE CONTRACT EXISTED**

STATEMENT OF THE CASE

This present appeal arises out of the sale and purchase of a parcel of property located in Long Beach, Mississippi, Lot 29-2, located on Klondike Road, under the terms of an Agreement to Purchase and Sell, "Purchase Agreement, or Agreement," between the defendants, Gregory Bistes, Jr. and Gay Bistes Palmisano, as "Sellers" and the Bradshaw Family Limited Partnership as "Purchaser." The interests of the Bradshaw Family Limited Partnership in the contract were assigned to Michael Whalen, the plaintiff below and the appellant here, in this Court.

The Purchase Agreement was signed by the owners of the property, the Bisteses, on April 25, 2003. The Purchase Agreement was signed by the Purchaser, Bradshaw, on April 30, 2003. Consistent with the Purchase Agreement, the Purchaser, Bradshaw, deposited a \$5,000.00 Promissory Note with the Seller through the Seller's agent on April 30, 2003.

On May 21, 2009 the Purchaser advised the Sellers in writing that it was ready, willing and able to proceed with the closing of the sale as set forth in the Purchase Agreement and set the closing for June 27, 2003. By certified letter dated June 24, 2003 the Sellers through their counsel advised the Purchaser that they did not believe the Purchase Agreement signed by the parties in April 2003 was binding, and that the Sellers were in the process of securing a loan with the property as collateral.

The closing did not take place on June 27, 2003. The Purchaser, Bradshaw, assigned all the rights and obligations of the Purchaser in the Purchase Agreement to Michael Whalen, the plaintiff.

The Plaintiff/Appellant, Michael Whalen, filed a Complaint for Specific Performance and breach of contract against Gregory Bistes, Jr., and Gay Bistes Palmisano. As defendant's

Gregory Bistes, Jr., and Gay Bistes Palmisano filed an Answer denying the essential allegations of the complaint and filed a counterclaim.

On July 14, 2006 the Sellers filed a Motion for Summary Judgment with supporting affidavits. On April 2, 2007 the assignee of the Agreement, Michael Whalen, responded to the Motion for Summary with a supporting affidavit.

Thereafter, on April 16, 2008 the deposition of Michael Whalen was taken by the Bisteses and the depositions of the Bisteses were taken by Michael Whalen.

On January 12, 2009 the Sellers filed their Supplemental Motion for Summary Judgment with supporting documents. Michael Whalen filed a response and supporting affidavits to the Sellers' Supplemental Motion For Summary Judgment.

In support of their Motion for Summary Judgment the Sellers argued that the Purchase Agreement was not delivered to Gregory Bistes for the Sellers, by May 1, 2003 but was delivered to him on May 10, 2003. Therefore, relying on the affidavits and deposition testimony of the parties, the defendants argued before the trial court that there was no valid contact between the parties. In response, Michael Whalen relied on portions of the deposition of Gregory Bistes, Seller and the deposition of Michael Whalen, along with the affidavit of Michael Whalen.

After a hearing on the Sellers' Motion for Summary Judgment, the Court ruled that delivery of the contract [Purchase Agreement] to Mr. Whalen by the seller was not delivery to the buyers. Therefore there was not an enforceable contract. The Court further ruled that because Mr. Whalen's real estate license was inactive at the time of the transaction, he was not entitled to equitable relief from the Court. A Judgment was entered dismissing the complaint of Michael Whalen. This appeal ensued.

Gregory Bistes and Gayle Bistes Palmisano are the Sellers under the terms of a contract for the purchase and sale of real property that is the subject of this action. They were made defendants in this action. The Purchaser under the terms of the contract at issue was the Bradshaw Family Limited Partnership.

Michael Whalen was the agent of both parties to this contract. After agreeing per the terms of the Agreement to sell the property to the Purchaser, the Sellers subsequently refused to sell the property. The Purchaser, Bradshaw Family Limited Partnership, then assigned its rights in the contract to Michael Whalen.(R.21) After the assignment, Michael Whalen as plaintiff filed this action to specifically enforce the contract or alternatively for damages against the Sellers for breach of contract. (R.1).

On April 25, 2003, Michael Whalen approached Gregory Bistes, Jr. one of the owners of a the parcel of land located in Long Beach, Mississippi, at issue, inquiring if he would be interested in selling the parcel to the Bradshaw Family Limited Partnership. During this conversation, Michael Whalen presented Gregory Bistes, Jr. with a document entitled "Agreement to Purchase and Sell, " the Purchase Agreement at issue. *Exhibit A to Defendant's Supplemental Motion for Summary Judgment, (R. 80-83.)* On the same day, April 25, 2009, Gregory Bistes, Jr., signed that Purchase Agreement for himself individually and for his sister, Gayle Bistes Palmisano, offering to sell the subject parcel to the Bradshaw Family Limited Partnership, "Purchaser," under the terms of the Purchase Agreement. *Excerpts, Deposition of Christian G. Bistes, Jr., pp. 39, 43-45, 52; (R.194,198-200, 201).*

Both parties agree that at the time that the Purchase Agreement, the offer, was made by the Sellers, Michael Whalen was the agent for the Sellers. *Excerpts, Deposition of Christian G.*

Bistes, Jr., p. 68; (R. 204); Excerpts, Deposition of Michael Whalen, pp. 15, 17, 20. (R. 86,88-89).

After the Sellers signed the Purchase Agreement on April 25, 2003, Michael Whalen, delivered it to the Purchaser, Bradshaw Family Limited Partnership. The Purchase Agreement was signed by Tom Bradshaw on behalf of the Purchaser on April 30, 2009. On the same day, in compliance with the Agreement a Promissory Note in the amount of \$5,000.00 made payable to the Sellers was delivered to Michael Whalen, by the Purchasers. *Excerpts, Deposition of Christian G. Bistes, Jr., p. 57; (R. 102); Excerpts, Deposition of Michael Whalen, pp. 22-23, 26 (R. 207-208, 211). Affidavit of Mike Whalen In Support of Mike Whalen's Response to Defendant's Motion for Summary Judgment. (R.47-66)* A copy of the Promissory Note is attached as part of Exhibit A to the Affidavit of Michael Whalen. *(R.56)* Michael Whalen was the agent for the Sellers. *Excerpts, Deposition of Christian G. Bistes, Jr., p. 68; (R. 204); Excerpts, Deposition of Michael Whalen, p. 76 (R. 96).* Michael Whalen held this Note on behalf of the Sellers thereafter. *Affidavit of Mike Whalen In Support of Mike Whalen's Response to Defendant's Motion for Summary Judgment. (R.47-66).*

Michael Whalen contacted Gregory Bistes sometime on or around May 10, 2003 at Boyce Honda regarding the Purchase Agreement. At that time Greg Bistes Jr. told Michael Whalen that there was no contract, no agreement, because he, Greg, did not receive the signed contract or Promissory Note by May 1, 2003. *Excerpts, Deposition of Christian G. Bistes, Jr., pp. 54-58; (R. 99-104)*

On May 21, 2003 by certified letter, the attorney representing the Purchaser, the Bradshaw Family Limited Partnership notified the Sellers that it was ready willing and able to

proceed to closing. The closing was set for June 27, 2003. *Affidavit of Mike Whalen in Support of Mike Whalen's Response to Defendant's Motion for Summary Judgment, Exhibit B. (R.62-63)* Greg Bistes received this letter. *Excerpts, Deposition of Christian G. Bistes, Jr., p. 54; (R. 99)* The Sellers did nothing to comply with the letter, did not attend the closing and did not sell the property to the Purchaser. *Id.*

Greg Bistes testified in his deposition that he felt that there was no contractual agreement between the parties for the sale of the property because he did not receive a copy of the signed Purchase Agreement and the Promissory Note by May 1, 2003. *Excerpts, Deposition of Christian G. Bistes, Jr., p. 68; (R. 204)*

However, again, Greg Bistes did admit that Michael Whalen was acting as their, the Sellers' agent in this transaction. Michael Whalen received both the signed Purchase Agreement and the Promissory Note from the Purchaser, Bradshaw, on April 30, 2003. Upon his receipt of the Purchase Agreement and the Promissory Note signed by the Purchaser, Bradshaw, on April 30, 2009 a valid and enforceable contract was created between the parties.

The Purchaser tendered performance on June 27, 2003. The Sellers refused to perform. The Purchaser assigned its rights under the Purchase Agreement to enforcement of the Agreement to Michael Whalen. Michael Whalen filed his complaint for specific performance and for breach of contract.

On the motion for summary judgment the Chancellor ruled that delivery of the contract to Mr. Whalen by the sellers, Gregory Bistes and Gay Bistes, Palmisano, was not delivery to the buyers because of Mr. Whalen's undisclosed dual agency; there was no delivery of the signed contract and therefore there was no valid enforceable contract. *(R.214)*

Michael Whalen would show that delivery occurred at the time Tom Bradshaw signed the Purchase Agreement and gave it to Michael Whalen with the Promissory Note on April 30, 2009. Michael received notice of performance as agent for the Sellers, Gregory Bistes and Gayle Bistes Palmisano on April 30, 2003. Michael Whalen requests the Court reverse the Chancellor's ruling and remand the matter back to the trial court for further proceedings.

SUMMARY OF THE ARGUMENT

I. THE CHANCELLOR ERRED WHEN HE RULED THAT DELIVERY OF THE CONTRACT DID NOT OCCUR BECAUSE OF MICHAEL WHALEN'S UNDISCLOSED DUAL AGENCY.

It is not disputed that Gregory Bistes and Gay Bistes Palmisano agreed to sell a parcel of property to Bradshaw Family Limited Partnership by signing the contract titled Agreement to Purchase and Sell on April 25, 2003. It is not disputed that Michael Whalen was acting as agent for the sellers, Greg Bistes and Gay Bistes Palmisano in this sales transaction. The sellers, the defendants, admit that Michael Whalen was acting as their agent for this land sale transaction. It is not disputed that the Sellers, the defendants, delivered the signed Agreement to Purchase and Sell to Michael Whalen on April 25, 2003. The agreement by its terms was to be signed, "accepted," by the Purchasers on or before May 1, 2003. A Promissory Note in the amount of \$5,000.00 was to be delivered to the Sellers on or before May 1, 2003. On April 30, 2003 the Agreement to Purchase and Sell was signed by the Purchaser, The Bradshaw Family Limited Partnership, and delivered to Michael Whalen, agent for the Sellers, along with the required Promissory Note. A valid and enforceable contract existed between the parties, the Bisteses as Sellers and the Partnership and Purchaser, and was not rendered void because of the undisclosed dual agency of Michael Whalen. Failure of Michael Whalen to disclose his dual agency relationship did not render the contract invalid. As assignee of the Agreement, Michael Whalen has the right to enforce performance and seek redress for its breach.

ARGUMENT

THE CHANCELLOR ERRED WHEN HE RULED THAT DELIVERY OF THE CONTRACT DID NOT OCCUR BECAUSE OF MICHAEL WHALEN'S UNDISCLOSED DUAL AGENCY.

This appeal arises out of a Complaint for Specific Performance and Breach of Contract filed by the plaintiff, Michael Whalen, against the defendants, Greg Bistes, Jr., and Gay Bistes Palmisano relating to purchase and sale of a parcel of non-residential real property in Long Beach, Mississippi.

On or about April 25, 2003 Michael Whalen presented a document entitled Agreement to Purchase and Sell to Greg Bistes, Jr. at his office at Boyce Honda in Slidell, Louisiana. On that date, Greg Bistes, Jr. individually and on with full authority on behalf of his sister, Gay Bistes Palmisano signed the Agreement To Purchase and Sell creating and making an offer to sell their property. Greg Bistes was authorized by his sister to make this offer on her behalf. *Excerpts, Deposition of Christian G. Bistes, Jr., pp. 39, 43-45, 52; (R.194,198-200, 201).*

Under the terms of the written Agreement, an offer was made by the Sellers to the Bradshaw Family Limited Trust as Purchaser, to sell the parcel of property they owned, Lot 29-2 located on Klondyke Road in Long Beach, Mississippi for the sum of \$ 84,800.00. The terms of acceptance required that upon acceptance by the Purchaser, it would deposit a \$5,000.00 Promissory Note with the Seller (Seller's agent). The Sellers' offer was open to acceptance by the Purchaser until May 1, 2003.

Michael Whalen was acting as the Sellers' agent in this transaction. Greg Bistes, Jr. one of the defendants testified in his deposition that he agreed to pay Michael Whalen an agency fee to be he and his sister's agent in this sales transaction. *Excerpts, Deposition of Christian G.*

Bistes, Jr., pp. 68; (R. 204).

On April 30, 2003 the Purchaser, the Bradshaw Family Limited Partnership, accepted the offer made by the Sellers, Greg Bistes, Jr. and Gay Bistes. This acceptance was ratified by Tom Bradshaw's signature on the Agreement to Purchase and Sell dated April 30, 2003 and by the delivery of the Promissory Note of \$ 5,000.00 to Michael Whalen as agent for the Sellers. It is not disputed by the Sellers that the Purchase Agreement was signed by Tom Bradshaw on April 30, 2009. Nor is it disputed that the Promissory Note was tendered as required by the Purchase Agreement to Michael Whalen on April 30, 2009.

The defendants argued in support of their Motion for Summary Judgment that because Michael Whalen, admittedly their agent, did not deliver the signed Purchase Agreement and Promissory Note to Greg Bistes by May 1, 2003, the offer expired and no valid and enforceable contract existed between the parties.

The plaintiff, Michael Whalen admitted in his deposition that he was acting as a dual agent in this transaction, an agent for the Purchaser and as an agent for the Sellers. Michael Whalen conceded that he did not have a dual agency disclosure form executed by the Sellers.

On the defendant's motions for summary judgment, the Court ruled that delivery of the contract did not occur because, " delivery of the contract to Mr. Whalen by the seller was not delivery to the buyers because of Mr. Whalen's undisclosed dual agency." *(R.214)* The plaintiff, Michael Whalen, respectfully submits that the Chancellor was in error both as to whether a genuine issue existed as to the validity of the contract based on the agency relationship and in ruling as a matter of law that the notice to Michael Whalen, the agent for the Sellers, of acceptance by the Purchaser on April 30, 2003, was not notice to the Sellers, his principals.

A. SUMMARY JUDGMENT

This Court has repeatedly stated that, “[s]ummary judgment is a powerful tool which “should be used wisely and sparingly.” *Martin v. Simmons*, 571 So.2d 254, 258 (Miss.1990). It should only be granted when “there is no genuine issue as to any material fact.” M.R.C.P. 56(c). When reviewing a decision to grant summary judgment, this Court will review the case de novo. *Crain v. Cleveland Lodge*, 1532, 641 So.2d 1186, 1188 (Miss.1994). All evidentiary matters are viewed in a light most favorable to the non-movant. *Id. Miller v. Shell Oil Co.*, 783 S0. 2d 724, 726 (Miss. Ct. App. May 30, 2000 *cert. denied*)

If this Court finds that the evidence favorable to the non-moving party and the reasonable inferences drawn therefrom present a genuine issue of fact, the motion should not be granted. *Lane v. A.J.M. Oustalet*, 873 So. 2d 92, 95 (Miss. 2004).

B. THE ASSIGNMENT

It is undisputed that the Purchaser, the Bradshaw Family Limited Partnership, assigned all of its rights and interest in and to the Agreement to Purchase and Sell related to Lot 29-2 to the plaintiff Michael Whalen. As assignee of the Purchase Agreement Michael Whalen stands in the shoes of the Purchaser under to the Purchase Agreement. *Great Southern Nat’l Bank v. McCullough Environmental Services, Inc.*, 595 So. 2d 1282 (Miss. 1992).

Mississippi law permits an assignment of contractual rights. *Board of Trustees of State Institutions of Higher Learning v. Peoples Bank of Miss.*, 538 So.2d 361, 366 (Miss.1989); *see also Merchants & Farmers Bank of Meridian v. McClendon*, 220 So.2d 815, 821 (Miss.1969) (“The general rule is that the right to receive money due or to become due under an existing contract may be assigned.”) (citing Restatement of Contracts § 151 (1932)). Assigned contractual

rights may be enforced by the assignee---who essentially "stands in the shoes" of the assignor and who "takes no rights other than those" which the assignor had possessed. *Indian Lumbermen's Mut. Ins. Co. v. Curtis Mathes Manufacturing Co.*, 456 So.2d 750, 755 (Miss.1984); *see also International Harvester Co. v. Peoples Bank & Trust Co.*, 402 So.2d 856, 861 (Miss.1981) ("It has long been held that a valid assignment of a debt or contract conveys the entire interest of the assignor to the assignee, and thereafter the assignor has no interest therein."); 6A C.J.S. *Assignments* § 73, at 710-12 ("As a general rule, a valid and unqualified assignment operates to transfer to the assignee all the right, title, or interest of the assignor in the thing assigned, but not to confer upon the assignee any greater right or interest than that possessed by the assignor.") *Great Southern Nat'l Bank v. McCullough Environmental Services, Inc.*, 595 So. 2d 1282, 1287 (Miss. 1992).

Michael Whalen as assignee of the Purchase Agreement, upon the assignment gained all the rights that the Purchaser, Bradshaw Family Limited Partnership acquired in the Purchase Agreement at its acceptance on April 30, 2003 by Tom Bradshaw, including the right to enforce its performance and seek relief for its breach.

C. THE SIGNED AND ACCEPTED PURCHASE AGREEMENT WAS DELIVERED TO THE SELLERS

Michael Whalen would respectfully show that it is not disputed that the offer made by Greg Bistes and Gay Bistes Palmisano on April 25, 2003 by their signatures to the Agreement to Purchase and Sell was accepted by the Purchaser on April 30, 2003 within the time frame of the offer.

The issue made by the Sellers is that the Purchase Agreement was not delivered to Greg Bistes by May 1, 2003 the deadline for the offer to be open, ; That is was sometime after May 1,

2003, on or about May 10, 2003 that he was advised by his agent Michael Whalen, of the acceptance of the offer within the terms and time frame of their offer contained in the Purchase Agreement. The Sellers' argument is that despite the acceptance of their offer within the terms of their offer, by May 1, 2003, that the acceptance was not communicated to them by Michael Whalen and thus the contract was not accepted by May 1, 2003. This argument is contrary to the law of agency.

Again the parties to this litigation all agree that Michael Whalen was acting as an agent for the Sellers. He was also acting as an agent for the Purchasers, in a dual agency capacity, but nonetheless he was an agent for the Sellers, Greg Bistes and Gay Bistes Palmisano, with respect to the Purchase Agreement.

Under the law of agency, knowledge acquired by an agent when transacting his principal's business is be imputed to his principal even though it is not communicated to the principal, in the absence of a limitation on the agent's authority to the contrary, known to the person with whom the agent deals. *Pittman v. Home Indemnity Co.*, 411 So. 2d 87, 89 (Miss. 1982) *citing* 165 Miss. at 796, 144 So. at 863. *Lane v. A.J.M. Oustalet*, 873 So. 2d 92 (Miss. 2004).

In the case of *Lane v. A.J.M. Oustalet*, this Court was asked to make an exception to the above stated rule of imputed knowledge in cases where as here, the agent is acts in a dual capacity for two principals. *Lane v. A.J.M. Oustalet*, 873 So. 2d at 96.

This Court considered the purpose of the imputed knowledge rule in the context of business practices and reviewed various opinions from other jurisdictions in connection with its decision that it would not establish a bright line for all cases as to whether knowledge held by a dual agent is to be imputed to either or both principals, leaving that question as a question of fact

for trier of fact. *Id* at 97.

In *Lane* the Court realized as in the present case, that in a dual agency situation two distinct agencies are vested in the agent with separate duties and responsibilities as to each principal. *Id*. In the present case, as to the Sellers, Mike Whalen's duties were to present their offer, the Agreement to Purchase and Sell as made by them to the Purchaser within the time frame of their offer. It is undisputed that Michael Whalen did this. The Purchaser accepted the offer of the Sellers as evidenced by the signature and delivery of the Promissory Note in the amount of \$5,000.00 to Michael Whalen, Sellers agent, on April 30, 2003. Additionally Michael Whalen, was under a duty to notify the Sellers of the acceptance of their offer, not under the terms of the Purchase Agreement, but merely in a reasonable manner consistent with his duties as the Sellers' agent. It is undisputed that he also notified the Sellers of the Purchaser's acceptance.

The fact that notice of Purchasers acceptance was not given by Michael Whalen until after May 1, 2003 has no effect upon the validity of the acceptance.

Further, the Sellers had full knowledge of the Purchaser's acceptance. This knowledge was imputed to them through their agent, Michael Whalen's, knowledge, on April 30, 2003 when acceptance occurred.

Pursuant to the foregoing, at the very least, the Chancellor should have denied the Seller's Motion for Summary Judgment in favor of developing the issue of whether Michael Whalen's notice the acceptance of the offer to his principals was timely and reasonable under the circumstances.

D. MICHAEL WHALEN'S FAILURE TO DISCLOSE THE AGENCY RELATIONSHIP DOES NOT ABROGATE THE COMMON LAW OF AGENCY

Essentially the Chancellor ruled that because the plaintiff Michael Whalen did not disclose his dual agency role to the Sellers, notice to him of the Purchasers timely acceptance of the contract could not be imputed to the Sellers, i.e. delivery of the contract to Mr. Whalen by the Sellers was not delivery to the Buyers. (R. 214)

Michael Whalen would respectfully submit that this ruling is contrary to the statement and policy of the Mississippi Real Estate Licence Law as set forth in its Rules and Regulations. Section IV. **Conducting Business**, , paragraph E. **Agency Relationship Disclosure** 1. Purpose:, states as follows:

Consumers shall be fully informed of the agency relationships in real estate transactions identified in Section 73-35-3. This rule places specific requirements on Brokers to disclose their agency relationship. ***This does not abrogate the law of agency as recognized under common law....*** Compliance will be necessary in order to protect licensees from impositions of sanctions against their license by the Mississippi Real Estate Commission.

Mississippi Real Estate Law, Rules and Regulations, Section IV. E. 1. (*emphasis added*)(R.141-42)


With respect to the present appeal, the common law of agency is applicable to the facts of this case. Michael Whalen was the agent for the Sellers. His knowledge that the Purchaser timely and properly accepted the offer of the Sellers under the Purchase Agreement on April 23, 2003 is imputed to the Sellers. The offer of the Sellers embodied in their Agreement to Purchase and Sell was timely accepted by the Purchasers on April 30, 2003 by its assent thereto by signature and deposit of the Promissory Note.

CONCLUSION

Michael Whalen would respectfully show that the Chancellor erred when he ruled that Summary Judgment was appropriate in this case. The Sellers' offer embodied in their Purchase Agreement signed by them on April 25, 2003 had three requirements for proper acceptance by the Purchaser : 1. Assent by the Purchaser by signature on the Purchase Agreement;; 2. The deposit of a \$5,000.00 Promissory Note with them; 3. That the first two requirements be completed no later than May 1, 2003.

It is not disputed that the Purchaser completed these requirements on April 30, 2003 and delivered them to Michael Whalen, agent for the Sellers. Michael Whalen's knowledge of the Purchaser's acceptance was the Seller's knowledge of acceptance. The current dispute centers around the reasonableness of Michael Whalen's notice to the Sellers his principals. This issue presents a question of fact to be fully developed at the trial of this action. This Court should and the appellant request that the ruling of the Chancellor in this matter be reversed and this case be remanded to the trial Court for further proceedings.

Respectfully submitted, this the 13th day of October, 2009.

MICHAEL WHALEN, APPELLANT
BY: 
D. SCOTT GIBSON, ATTORNEY
FOR APPELLANT

CERTIFICATE OF SERVICE


I, D. Scott Gibson, do certify that I have mailed the foregoing Brief of Appellant, Michael

Whalen to the following by United States Mail, Postage fully prepaid:

Edward O. Miller,
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Honorable James Persons, Chancellor
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This the 13th day of October, 2009.


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