IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CA-00564-COA

THE GREEN ACRES TRUST **APPELLANT**

v.

DAN WELLS AND ANN WELLS **APPELLEES**

DATE OF JUDGMENT:	03/04/2009
TRIAL JUDGE:	HON. KENNETH M. BURNS
COURT FROM WHICH APPEALED:	OKTIBBEHA COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	MATTHEW DANIEL WILSON
ATTORNEYS FOR APPELLEES:	ANN WELLS (PRO SE) DAN WELLS (PRO SE)
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
TRIAL COURT DISPOSITION:	ORDERED GREEN ACRES TRUST TO REMOVE A FENCE, DENIED THE WELLSES' REQUEST FOR REMOVAL OF SPEED BUMPS, AND DISMISSED COUNTERCLAIM
DISPOSITION:	AFFIRMED - 07/20/2010
MOTION FOR REHEARING FILED:	07/26/2010 - DENIED; AFFIRMED - 02/22/2011
MANDATE ISSUED:	

EN BANC.

LEE, P.J., FOR THE COURT:

MODIFIED OPINION ON MOTION FOR REHEARING

¶1. The appellant's motion for rehearing is denied. The original opinion is withdrawn, and this opinion is substituted therefor.

PROCEDURAL HISTORY

¶2. On February 1, 2008, Dan and Ann Wells (collectively, the Wellses) filed a petition in the Oktibbeha County Chancery Court against Ray Bazzill and Rick Bazzill (collectively, the Bazzills) seeking injunctive relief and damages. The Wellses alleged that the Bazzills installed speed bumps along the Wellses' driveway easement, installed a locked gate across the driveway easement, constructed a rock wall or berm along the border separating the Wellses' and Bazzills' properties, and constructed a fence along the property border. The Bazzills filed an answer and a counterclaim. The counterclaim alleged slander, libel, intentional interference with business relations, and intentional infliction of emotional distress. A trial was held on January 14, 2009. At trial, The Green Acres Trust, the legal owner of the Bazzill family property, was substituted for the Bazzills.

¶3. The chancellor ordered the speed bumps, the berm, and the locked gate to remain in place, but he ordered the fence removed. The chancellor dismissed all of Green Acres' counterclaims.

¶4. Green Acres appeals, asserting the following issues: (1) the chancellor erred in ordering the fence removed, and (2) the chancellor erred in disregarding Dan's actions. Finding no error, we affirm.

FACTS

¶5. On February 28, 1989, the Wellses purchased three acres of land in Oktibbeha County, Mississippi. The only access to the Wellses' property from Highway 182 was by a twenty-foot easement across Green Acres' property. Green Acres' property surrounds the Wellses' property on several sides. In 2000, the Bazzills erected a gate limiting access to

Green Acres' property. In order to deter speeding visitors, the Bazzills installed speed bumps along the roads to Green Acres' property, including the easement. By his own admission, Dan set one of the speed bumps on fire but stated that he did so because the particular speed bump was on his right of way.

¶6. After issues between the Bazzills and the Wellses intensified, the Bazzills erected a wire-mesh fence on the part of their property that abuts the Wellses' property. The fence was approximately fourteen-feet high and had green slats running through it. The fence borders several sides of the Wellses' property and completely obstructs the Wellses' view of a lake. A space was left in the north/northwest side of the fence, which affords the Wellses a view of a sewage lagoon. There were issues regarding the drainage of rainwater from the Wellses' property after the berm and fence were installed. According to Ann, the fence blocks their view; and the drainage problems caused flooding in their backyard.

STANDARD OF REVIEW

¶7. This Court gives deference to the findings of a chancellor and will not disturb those findings unless they are manifestly wrong, unsupported by substantial evidence, or were the result of the application of an erroneous legal standard. *Keener Props., L.L.C. v. Wilson*, 912 So. 2d 954, 956 (¶3) (Miss. 2005). However, this Court will review questions of law under a de novo standard. *Id.*

DISCUSSION

¶8. We first note that the Wellses have failed to file a brief in this matter; therefore, we have two options before us. The first option is to take the Wellses' failure to file a brief as a confession of error and reverse, which should be done when the record is complicated or

of large volume, and "the case has been thoroughly briefed by [the] appellant with a clear statement of the facts, and with apt and applicable citation of authorities, so that the brief makes out an apparent case of error[.]" *May v. May*, 297 So. 2d 912, 913 (Miss. 1974). The second option is to disregard the Wellses' error and affirm, which should be done when the record can be conveniently examined and such examination reveals a "sound and unmistakable basis or ground upon which the judgment may be safely affirmed[.]" *Id.* In this instance, we follow the latter course.

I. THE FENCE

¶9. In its first issue on appeal, Green Acres argues that the chancellor erred in ordering the fence removed. In his opinion, the chancellor determined that the fence erected by the Bazzills "serve[d] no benefit to them or their property and was erected solely to annoy the Wells[es] and [was], therefore, a 'spite fence'." The chancellor, finding no Mississippi authority concerning "spite fences," relied upon 9 Powell on Real Property § 62.05 (Wolf ed. 2000), which defines the term as ". . . 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 adjoining property." The chancellor noted that if the fence serves a useful purpose then according to Powell, "the motive for erecting a fence or similar structure is immaterial." *Id*.

¶10. In determining that the Bazzills erected a spite fence, the chancellor relied upon the following: the Bazzills admitted that the fence served no useful purpose other than to limit their contact with Dan; although five families lived around the property, the Bazzills only erected the fence around the Wellses' property; the fence borders the north and west sides

of the Wellses' property; the Bazzills left a small opening in the fence allowing the Wellses a view of the septic tank; and the fence was fourteen-feet high with green slats running through it.

¶11. The dissent focuses on Dan's supposed threatening behavior, implying that Dan threatened to shoot Ray. However, there was never any testimony that Dan made any threats to Ray while holding a gun. The dissent neglects to mention that when Dan confronted the Bazzills and told them to "build a real tall fence" on the berm, some of the fence posts had already been set. Dan testified that he saw the berm and the fence posts, became frustrated at the lack of communication between himself and the Bazzills, and yelled at the Bazzills to build the fence. There was other testimony that the Bazzills had threatened the Wellses; and Mitchell, Ray's son, yelled obscenities at Ann. Clearly, there was animosity between both parties, which was a direct result of the Bazzills' decision to install the gate, speed bumps, berm, and fence without consulting the Wellses.

¶12. Mindful of our deferential standard of review, we find a sound basis upon which the chancellor's decision may be safely affirmed. This issue is without merit.

II. UNCLEAN HANDS

¶13. The Bazzills argue that as the complaining party, the Wellses entered into the suit with unclean hands. "The clean[-]hands doctrine prevents a complaining party from obtaining equitable relief in court when he is guilty of willful misconduct in the transaction at issue." *Bailey v. Bailey*, 724 So. 2d 335, 337 (¶6) (Miss. 1998).

¶14. Specifically, the Bazzills complain that: Dan wrongfully contacted Ray's business associates; Dan taunted and threatened Ray, thereby intentionally inflicting emotional

distress; and Dan unlawfully burned a speed bump belonging to Ray. In regard to whether Dan wrongfully contacted Ray's business associates, there was insufficient evidence to support this claim. In regard to Dan's alleged taunts and threats, we find the evidence is likewise insufficient to rise to the level required to prove intentional infliction of emotional distress. *See Riley v. F.A. Richard & Assocs., Inc.*, 16 So. 3d 708, 719 (¶33) (Miss. Ct. App. 2009). In regard to the burned speed bump, we note that the Bazzills did not specifically request that the speed bump be repaired. This issue is without merit.

¶15. **THE JUDGMENT OF THE OKTIBBEHA COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

KING, C.J., MYERS, P.J., IRVING AND ISHEE, JJ., CONCUR. GRIFFIS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BARNES, ROBERTS, CARLTON AND MAXWELL, JJ.

GRIFFIS, J., DISSENTING:

¶16. Having considered Dan and Ann Wellses' failure to file a brief and after a thorough examination of the record, I cannot conclude that there is a "sound and unmistakable basis or ground upon which the judgment may be safely affirmed." *May v. May*, 297 So. 2d 912, 913 (Miss. 1974). Therefore, I respectfully dissent.

¶17. The chancellor determined that the Green Acres Trust built a spite fence and ordered that it be removed because it served no benefit except to annoy the Wellses. The majority concludes that there is no Mississippi authority concerning spite fences. Yet, the majority affirms the chancellor's judgment and adopts the chancellor's definition for spite fences from 9 Powell on Real Property, §62.05 (Wolf ed. 2000), which states:

[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.

¶18. I cannot join the majority's decision to affirm the chancellor's judgment, which grants relief for a claim or cause of action that has no authority or precedent under Mississippi jurisprudence. The appropriate claim or cause of action is whether the fence was a private nuisance. In *Leaf River Forest Products, Inc. v. Ferguson*, 662 So. 2d 648, 662 (Miss. 1995), the court held:

> 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.

¶19. The distinction between these is relatively minor. Under the Powell definition, the question is whether the fence serves "a useful purpose." Under *Ferguson*, the question is whether the nontrespassory invasion was reasonable. Under either definition, the conclusion should be the same.

¶20. 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] . . ." is not supported by the evidence. Instead, Green Acres presented evidence to establish that the fence served an important, useful purpose for which Ray (Green Acres) derives a distinct benefit: It insulates Ray from Dan's malicious threats to his person and property.

¶21. For a number of years Ray and the Wellses were cordial neighbors. Ray and Dan

would have neighborly visits when Ray approached the Wellses' property on his daily walks. In 2000, the Bazzills erected a gate to prevent unauthorized vehicles from driving across the property. Also, due to concerns about the high rate of speed of the cars using the road, Ray erected speed bumps on the road for the safety of young children who also live on the property. Dan objected, and he set one of the speed bumps on fire. When Ray came to put out the fire, Dan threatened to burn down his house the next time.

¶22. The evidence also revealed that Dan was injured at work. As a result, Dan began taking prescription painkillers that altered his mood. On one occasion, after previously confronting the Bazzills with an expletive-charged tirade, Dan apologized to the Bazzills for his behavior, stating that his wife had said that he was acting berserk as a result of the medication. Ann admitted on cross-examination that her husband could be violent.

¶23. Ray continued to make his daily walks, just as he had been doing throughout the previous decade. When Ray approached the Wellses' property, Dan would yell angry threats. Avis Hall testified that she witnessed an incident when Dan even threatened to shoot Ray.

¶24. After these incidents, Ray began the construction of a fence. Prior to its completion, Ray was building a small rock wall (or a berm) to create structural support for the fence. During its construction, Dan confronted the Bazzills and told them to "build a real tall fence" to separate him from the Bazzills "right here" on the berm. Dan admitted that it was his voice on the tape saying these words. The Bazzills did just that and erected a fence. Thereafter, the threats to Ray diminished significantly. After the petition was filed, Dan threatened to throw Ray into his sewage lagoon.

¶25. Hall testified about Dan's threatening behavior toward the elderly Ray, and she confirmed Ray's account of the following exchange:

> 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 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['s] 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.

¶26. Dan denied making threats but he did not refute Hall's testimony. Clearly, Hall's testimony confirmed Green Acres' claim that the fence should have been deemed both "useful" and "reasonable" since it was designed for protection from Dan's verbal abuse and threats. I find that the evidence supported only a finding that the fence served a useful purpose, and its erection was reasonable.

¶27. Accordingly, I find that the chancellor's findings were manifestly wrong and were not supported by substantial evidence. Thus, I would reverse and render the chancellor's judgment directing Green Acres to remove the fence. I respectfully dissent.

BARNES, ROBERTS, CARLTON AND MAXWELL, JJ., JOIN THIS OPINION.