

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARTIN HOWARD JR.

APPELLANT

VS.

NO. 2006-CA-00350

TERESA HOWARD

APPELLEE

APPEAL FROM THE CHANCERY COURT OF PIKE COUNTY, MISSISSIPPI
HONORABLE DEBBRA K. HALFORD, PRESIDING

BRIEF OF APPELLEE
ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record, in accordance with Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Martin Howard Jr., Appellant

John R. Reeves and J. Justin King, Attorneys for Appellant

Teresa Howard, Appellee

Wayne Smith, Attorney for Appellee

A handwritten signature in cursive script, appearing to read 'Wayne Smith', is written over a horizontal line.

WAYNE SMITH

Attorney for Appellee

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STATEMENT OF THE ISSUES

1. Did the chancellor abuse her discretionary power?
2. Is Martin Howard, Jr. in willful contempt of the prior orders of the chancery court?
3. Did the court err in denying Martin Howard, Jr. a modification of its prior decrees?
4. Did the court err in granting attorney fees for Teresa Howard?
5. Should the supreme court grant statutory penalties and attorney fees related to the appeal of this case?
6. Did Martin Howard, Jr. violate the clean hands doctrine?

STATEMENT OF THE CASE

This is a cause of action that has arisen due to a Petition for Modification filed by Martin Howard, Jr. in January 2003. However, the petition is not a part of the designated record. That the parties hereto were previously divorced by Final Decree of Divorce of the Pike County Chancery Court dated November 2, 1995. There have been numerous proceedings concerning this cause of action, the last of which Dr. Howard had successfully appealed his case to the Mississippi Appellate Court and said case was remanded to the Pike County Chancery Court by order from the appellate court dated May 10, 2005.

That a hearing was duly completed and a Final Order was entered in this case by the Pike County Chancery Court in a thirty-three page decision, said order being dated February 14, 2006, and noted in the court record (CP. 294-326).

In reviewing Dr. Howard's statement of the case, there are numerous references to the deposition and testimony of Dr. Lucas. There was a hearing in the original cause of action in October 2001 with a letter opinion in November 2001. That an order was entered on or about December 3, 2001, and no appeal was taken from this order. That the testimony of Dr. Lucas was introduced by way of deposition during said hearing. That the testimony of Dr. Lucas was not admitted into evidence during the course of the trial which was completed on or about December 16, 2005.

The trials of October 21, 2005 and December 16, 2005, involved

several issues. The main issue dealt with a modification of the support due and payable from Martin Howard, Jr. The previous order of this Court, which is subject of the remand, found that Dr. Howard did not show a substantial and material change in circumstances subsequent to the November 2001 hearing and the order of December 3, 2001.

The appellate court of the State of Mississippi remanded this cause of action and stated on page 16 of its opinion as follows:

"While Martin is precluded from relitigating any claim which was or could have been presented in his original motion to modify support obligations, he is not precluded from showing a material change in circumstances occurring subsequent to the November 2001 opinion." (CP. 22)

Dr. Howard bases his case on the opinion of two physicians. Physician one being Dr. Frederick N. Meyer, and physician two being Dr. Joseph Farina. That during a trial of this cause of action, the depositions of Dr. Frederick Meyer and Dr. Joseph Farina were taken and introduced subject to certain objections being raised on the record and by motion in limine (T. 2-5)(CP. 245-250).

The testimony of Dr. Frederick Meyer was that Martin Howard, Jr. had developed problems before, during and immediately following his surgery which undisputedly occurred during the month of November 2000. The condition Dr. Howard complained of was one that occurred before the hearing of October 2001 and the Final Order of December 2001. There was also an additional objection to the testimony of Dr. Frederick Meyer in that counsel for Martin Howard, Jr. had failed to provide the appropriate medical records that were

requested during discovery in this cause of action. There is a record which indicates that discovery was delivered to counsel for plaintiff on or about the September 9, 2005, and was duly filed on September 12, 2005. However, after a careful review of the responses to the request for production of documents, the response clearly states that, "The defendant produced to plaintiff's counsel records of Dr. Frederick Meyer at his deposition." The requests were served on July 26, 2005. An Order was entered on August 3, 2005 requiring discovery to be timely produced. No medical records of Dr. Howard were produced except those produced on the date of the deposition, being September 16, 2005. It is Teresa Howard's contention that the medical records of Dr. Meyer were not delivered to her counsel until the date of Dr. Meyer's deposition. Further, that Dr. Meyer's deposition should not be allowed in that defendant's counsel failed to timely produce the appropriate information to plaintiff's counsel. The objections are duly noted in the transcript (T. 2-4).

The deposition of Dr. Meyer further indicates that all symptoms from which Martin Howard, Jr. suffered developed before, during and immediately after his surgery during the month of November 2000.

There was a motion in limine concerning the testimony of Dr. Joseph Farina. The motion clearly states that Dr. Farina's name was mentioned on page 15 and page 17 of the transcript of the hearing of October 30, 2001 (CP. 248). Dr. Farina was also listed

as a witness on the pre-trial order before the October 30, 2001. Further, Dr. Farina testified in his deposition that Dr. Howard's conditions existed sometime during 1996, several years before the hearing of October 2001.

Based upon the testimony of each doctor and the objections, the Chancellor found that the testimony of these two physicians involved the same condition complained of in the October 2001 hearing. Further, the lower court applied the four prong test to determine if the case should be dismissed on the grounds of res judicata. The court applied said test and ruled that the issues were previously litigated and were res judicata.

During the course of the cross examination of Dr. Howard, military retirement documents were entered into evidence (Ex. 21). That said documents indicate that Dr. Howard retired and was relieved as a "field surgeon".

That during the course of the trial, there was an exhibit introduced into evidence dealing with a case that had been filed by Martin Howard, Jr. against Provident Life and Accident Insurance Company. This cause of action was filed alleging that Martin Howard, Jr. was entitled to disability payments due to his carpal tunnel condition. The suit requested general compensatory damages and punitive damages (Ex. 12). That a judgment was rendered on November 19, 2003, thereby dismissing said cause of action and ruling in favor of the defendant. Said judgment required Martin Howard, Jr. to return \$20,000 with costs taxed as paid. There was

no evidence produced showing why this cause of action was dismissed. However, it is evident that Dr. Howard failed to prove to the federal court that he was, in fact, disabled.

It is interesting to note that, in the initial hearing in this cause of action held in April 2003, Dr. Howard introduced a financial statement which was represented as being a true and correct document. In the April 2003 hearing, said document was introduced as Exhibit 5. This document was introduced as Exhibit 15 in the hearing of October 21, 2005. Said financial statement indicated a single income in the amount of \$2,804.38 per month with a net income of \$2,214.35. Further, that there was no indication of any rent or mortgage payments to be made on behalf of Dr. Howard. Dr. Howard then admitted an exhibit, being Exhibit 5 of the hearing of October 21, 2005, which was for the purpose of projecting his income of April 2003. It is interesting to note that Dr. Howard has now listed \$921.40 as a military income. There was also a statement for a rent or mortgage payment in the amount of \$1,350.00. This information was provided for the same time period at two separate hearings. Exhibit 15 was originally presented to the appellate court as being a true and correct statement on the previous appeal from the April 2003 hearing.

The remaining issue in this cause of action deals with Dr. Howard's ability to pay. It is evident that, in his presentation of April 2003, Dr. Howard failed to present to the Court his proper income. Further, the burden of proof was on Dr. Howard to show

that he was incapable of paying the previously ordered child support.

During the course of the hearing on October 21, 2005, evidence was presented to show that Dr. Howard had cashed in a whole life insurance policy. That the cash value of the contract was \$35,000 and his net check was \$28,885.93 (Ex. 18). It is interesting to note that this life insurance policy was a court ordered policy. Dr. Howard was to provide a policy for the use and benefit of his minor children in the amount of \$725,000. Dr. Howard testified that he no longer has a policy in force and effect insuring his life with his children as beneficiaries. This is clearly in violation of prior court orders. That sometime during the year 2003, Dr. Howard received \$20,000 from Provident Life and Accident Insurance Company for whatever reason. That this item was not noted and/or presented on any financial statement provided by Dr. Howard.

Dr. Howard further represented to the Court that he had cashed in over \$78,000 from a Morgan Keeghan or Prudential retirement account. The Chancery Court, on January 17, 2003, ordered that Martin Howard, Jr. was to provide an accounting of these funds. No accounting was presented to the Court. These accounts, according to the testimony were cashed in after the October 2001 hearing.

That after numerous attempts at discovery, a document was subpoenaed and produced for the October 21, 2005 hearing. That said document, being his financial statement, was introduced as

Exhibit 22. That said financial statement was completed by Martin Howard, Jr. to purchase a home on the Gulf Coast. The exhibit indicates on the second page that there are two accounts with a market value in excess of \$100,000 each. One account is the Morgan Keeghan account. The other is an account with AmSouth Bank valued at \$100,000. This money has never been accounted for and Dr. Howard testified that he does not know where the \$100,000 is located. However, the financial statement of May 15, 2000 is a clear indication that a separate \$100,000 account exists which has not been produced to the Court.

The record is clear that Dr. Howard had the capability to pay his support and to enter the court with clean hands in this case. That Dr. Howard has refused to do so and, therefore, has voluntarily reduced his income and failed to keep the child support current. Testimony indicates that Dr. Howard willfully and contemptuously refused to pay the child support when he knew that it was due and owing. That the Court in this case made an appropriate ruling and that Dr. Howard was in willful contempt of the prior decrees of this Court. Further, that as of the date of the hearing, Dr. Howard's income had increased to an amount in excess of \$125,000 per year which did not include bonuses he would receive.

In carefully reviewing the appeal file, Martin Howard, Jr. failed to designate his original complaint for modification as a part of the record. This will not allow the appellate court to

fully review the entire case file. Based upon this failure by the appellant, the plaintiff, Teresa Howard, has filed a motion to dismiss the appeal which should be considered by this Honorable Court.

That the plaintiff has, by way of motion, requested attorney fees in that she is not financially able to compensate her attorney for his services in this matter.

That the Chancellor's "Findings of Fact and Conclusions of Law" gives a complete summary of this case. That said order is appropriate and should be affirmed.

SUMMARY OF THE ARGUMENT

This case involves an appeal by Martin Howard, Jr. dealing with his request for modification, a finding of contempt and the award of attorney fees.

That upon careful review of each doctor's deposition, both Frederick M. Meyer and Joseph Farina testified to a condition that had developed more than one year prior to the Order entered on December 3, 2001. Each doctor testified that Dr. Howard's condition was related to carpal tunnel syndrome which was exactly the testimony presented by Dr. Lucas during the hearing in October 2001 and was subject of the order of December 3, 2001.

That Dr. Howard has entered into Court with unclean hands. That based upon his testimony, Dr. Howard failed and refused to pay child support beginning with January 2003. That the initial court hearing provided that this child support would be brought current. However, at the time of the initial hearing, Dr. Howard had wilfully refused to pay child support for the months of January, February, March and April, 2003. Further, that Dr. Howard has wilfully and contemptuously refused to pay his full child support up to the date of this hearing and Final Order entered on February 14, 2006.

That based upon the Chancellor's findings concerning the modification, Dr. Howard has been and continues to be in willful contempt of the prior orders of this Court and that the arrearages were specifically proven and accepted by the Chancellor in this

cause of action.

That Martin Howard, Jr., as of the date of the filing of his petition for modification which is not part of the Court record, had the full capability to continue payments of child support. This is evidenced by the whole life policy, retirement account, and additional monies that have appeared on financial statements and not accounted for in any court proceeding.

That based upon the Chancellor's findings and upon the facts presented, Martin Howard, Jr. made a specific decision in his life to reduce his income. That this decision was of his own accord and that, by making the decision to terminate his surgical practice, purposely placed himself in a position that voluntarily reduced his income. That within the Chancellor's "Findings of Fact and Conclusions of Law", there are specific findings as to different occasions in which Martin Howard, Jr. has voluntarily reduced his income.

That the attorney fees submitted by counsel for Teresa Howard were duly presented before the Court. That the billing is itemized as to the time expended and the date of same. There is a brief explanation of each billable hour. Said bill was presented to plaintiff, Teresa Howard, who indicated that an agreement was in place, billing her \$125 per hour for her attorney's time and effort and for all expenses. That said attorney bill was introduced into evidence as Exhibit 32.

That the findings by the learned Chancellor, were made by

"Findings of Facts and Conclusions of Law" and that the Chancellor's decision should not be overturned.

That there is an additional argument as to the dismissal of this cause of action due to the failure by Martin Howard, Jr. to designate the entire record.

That there is an additional issue concerning attorney fees for Teresa Howard for defending the appeal.

ARGUMENT

1. Did the Chancellor abuse her discretionary powers?

The testimony in this cause of action indicate that Martin Howard, Jr. had an income in October 2001 of just over \$2,000 per month. That his income as of the date of the final hearing in this matter in December 2005 indicated a potential income of \$144,000 and he was actually being paid \$125,000 per year plus incentives. Further, Dr. Howard failed to properly disclose his appropriate income in the previous hearing of April 2003. Based upon this fact, the Chancellor ruled that Dr. Howard's financial condition had actually improved from the previous order of December 2001 until the hearing in October 2005.

The Court further found that the testimony of Dr. Farina and Dr. Meyer concerned a condition that was previously litigated in the October 2001 hearing. This condition was carpal tunnel syndrome and subsequent surgery was performed on Dr. Howard in November 2000. Objections were raised concerning the testimony of each doctor by way of motion in limine and additional objections on the record (CP. 245-250) (T. 2-5). The Court considered the four prong test in the case of Mississippi Department of Human Services v. Eric Malcolm Shelby 802 So.2d 89 (Miss 2001). The Court found that all elements were applicable to this case and that the testimony of both Dr. Meyer and Dr. Farina would be barred by res judicata (CP. 309-311).

There are numerous cases in which the appellate and/or supreme

court has ruled that the findings of a chancellor will not be disturbed or set aside by this court on appeal unless the decision made by the trial court was manifestly wrong and not supported by substantial credible evidence unless an erroneous legal standard was applied. Pearson v. Pearson 761 So.2d 157 (Miss. 2000).

In the case of Carr v. Carr 480 So.2d 1120 (Miss. 1985), the Court ruled as follows:

"Findings of Fact made by a chancellor may not be set aside or disturbed on appeal unless manifestly wrong, regardless of whether the finding relates to the evidentiary fact questions or to the ultimate fact questions."

It is clear that the chancellor in this cause of action made a careful review of the testimony and exhibits. In fact, the chancellor issued an opinion which is entitled "Findings of Fact and Conclusions of Law" on the Court's decision on issue remanded, citation of contempt and motion for modification (CP. 294).

Therefore, based upon these facts, the chancellor's decision should be upheld. Further, the supreme court should not set aside or disturb the decision of the chancellor unless she was manifestly wrong.

The appellee would show that the chancellor has made a viable ruling. Further, that this ruling is based upon the chancellor's findings and the chancellor made an appropriate and proper decision.

2. Was there a substantial and material change in circumstances from the entry of the December 3, 2001 order until a

final hearing in this cause of action in December 2005?

The supreme court previously reviewed this cause of action.
The court ruled that:

"While Martin is precluded from relitigating any claim which was or could have been presented in his original motion to modify support obligation, he is not precluded from showing a material change in circumstances occurring subsequent to the November 2001 opinion." (CP. 22)

The Court further cited the case of Mississippi Department of Human Services v. Shelby 802 So.2d 89 (Miss. 2001), dealing with the test for res judicata. The Court in this cause of action reviewed the depositions of Dr. Meyer and Dr. Farina. Each doctor testified that the condition from which Dr. Howard complained of was one that had manifested itself long before the hearing in October 2001 and before the ruling of November 2001. The trial court, in its "Findings of Fact and Conclusions of Law", applied the four prong test noted within the Shelby case and made a specific finding as to each criteria. Therefore, the Court ruled that the testimony of Dr. Farina and Dr. Meyer were of the same issue that was presented to the Court in its hearing of October 2001 and was res judicata as to this hearing.

The Court further reviewed the evidence presented, specifically the U.S. military retirement documents that were one of the few items produced during the course of request for production. Said retirement documents of Dr. Howard clearly indicate that he retired from the military service as a "field surgeon" (Ex. 21).

Martin Howard, Jr. would argue that the testimony of the physicians indicate that he is no longer able to continue a surgical practice. In reviewing Dr. Howard's brief, it should be noted that on page 12, the specific testimony is that, "Martin is unable to engage in the practice of surgery and has been unable to do so since at least his surgery". This is a clear indication by Dr. Meyer that Dr. Howard's condition had arisen before, during and immediately following the surgery which was in November 2000. The carpal tunnel syndrome and any problem related thereto existed before the hearing in October 2001.

The fact is that the testimony of each doctor concerns a condition that was presented in his initial case which was tried in October 2001, and a letter opinion issued in November 2001, and a Final Order issued in December 2001. Clearly, this is the same issue.

At the trial level, an objection was raised to Dr. Meyer's deposition in that no medical information was delivered to Teresa Howard as specifically requested within the request for production of documents and things. That the single and only medical information that was delivered to Teresa Howard's attorney occurred during the deposition of Dr. Meyer. Counsel for Martin Howard, Jr. was in control of his case and this information should have been delivered no later than thirty days from the initial request which would have been the 25th day of August, 2005. Based on the failure to comply with discovery, the deposition of Dr. Meyer should be

stricken and not allowed.

3. Did the lower court erroneously find that Martin Howard, Jr. had violated the "clean hands doctrine"?

The record is clear that Dr. Howard made a voluntary change in his circumstances which reduced his income. This has been the finding of two chancellors over three separate hearings. Since the order of December 3, 2001, Dr. Howard has never paid the full child support and/or other obligations due and owing under the prior orders of the Court. There have been numerous petitions for citation for contempt and Dr. Howard has failed to prove at any time that he is incapable of (1) continuing his employment; or (2) paying the support as ordered.

The court found during the course of the two hearings of October 21, 2005, and December 16, 2005, that Martin Howard, Jr., as of the date of his petition in January 2003, had the following monies available to him at the time of the hearing.

- (a) \$20,000 evidently given to Dr. Howard by the disability insurance company.
- (b) \$85,000 that was removed from a retirement account with Morgan Keeghan and/or Prudential.
- (c) \$25,000 he received representing the cash value of a whole life policy that he surrendered and that had been ordered by the Court to be for the use and benefit of his minor children.
- (d) \$100,000 noted on a loan application which allowed Dr.

Howard to purchase a home on the Gulf Coast. That said funds are noted as being located in AmSouth Bank (Ex. 22).

These facts alone show that Dr. Howard, at the time of the filing of his petition, had sufficient funds and ability to pay child support for the use and benefit of his minor children. Further, Dr. Howard had an income in October 2001 of less than \$30,000 per year. His present income through the University of Mississippi Medical Center is \$125,000 plus bonuses and incentives.

The short and long of this is that Dr. Howard has willfully and contemptuously refused to follow the order of this Court.

Dr. Howard has also been found in contempt for the following:

- (a) Non-payment of child support due and owing under the prior orders of this Court.
- (b) Non-payment of obligations that are child support related being due and owing under the prior orders of this Court.
- (c) Failure to provide a \$725,000 life insurance policy for the use and benefit of the minor children, which Dr. Howard readily admits is no longer in existence.
- (d) Failure to pay medical bills due and owing on behalf of the minor children under the prior orders of this Court.
- (e) Failure to pay the educational expenses of the minor children.
- (f) Failure to abide by the prior orders of this Court in supplying an appropriate accounting for any and all funds

derived from the closing of the Morgan Keeghan and/or Prudential account.

Dr. Howard's testimony shows that he has purchased a home with a value of \$198,000 along a golf course and has continued to play golf and is involved in other activities.

The Court, in its opinion, made specific findings of fact concerning Dr. Howard's prior contempt and it is clear that Dr. Howard has appeared before this Court with unclean hands. The appellate court previously quoted several cases concerning the "clean hands doctrine". These cases include Calcote v. Calcote 583 So.2d 197, 199-200 (Miss. 1991), and Bailey v. Bailey 724 So.2d 335 (Miss. 1998). The Court stated as follows:

"[A] husband may not petition for modification of the original decree without showing either that he has performed it or that his performance has been wholly impossible.... However, a husband may exonerate himself from failure to make alimony or child support payments as ordered, because of his inability to pay, but his evidence must be made with particularity and not in general terms."

The supreme court further cited in its previous opinion the case of Lane v. Lane 850 So.2d 122 (Miss. 2002). In Lane, the husband claimed that he had shown an inability to pay. The supreme court found in quoting several cases that a party must show the following elements:

- (a) That he/she show with particularity, that he/she was earning all he/she could.
- (b) That he/she live economically.

- (c) That he/she pay all surplus money above living expenses to the obligation.

Simply put, Martin Howard, Jr., like the husband in Lane failed to show the required elements as stated within the ruling of Lane v. Lane. Basically, Dr. Howard failed to show (1) with particularity, that he was earning all he could; (2) that he lived economically in that he continued his lifestyle and purchased a home along a golf course in Brandon, Mississippi, for \$198,000; and (3) that he paid any surplus money above living expenses toward the obligation.

4. Did the lower court err in finding Martin Howard, Jr. in contempt of court?

The court, in its opinion, found numerous matters of contempt with Martin Howard, Jr. These contempt issues included (1) non-payment of house note; (2) non-payment of private school tuition and expenses, and college tuition and expenses; (3) non-payment of child support in its entirety; (4) failure to provide a life insurance policy in the amount of \$725,000; and non-payment of medical expenses.

It was evident to the trial court that Dr. Howard had wilfully placed himself in a position to earn less money. It was Dr. Howard's ultimate decision to change his profession. Further, that Dr. Howard has been less than truthful with the court on numerous occasions as noted within the Court's opinion and in this brief. The trial court has carefully reviewed these factors and has found that Dr. Howard is in willful contempt of its prior orders.

5. Did the lower court erroneously award attorney fees to Teresa Howard?

The lower court in this cause of action granted attorney fees to Teresa Howard. The fees were granted based on a statement of services dated December 16, 2005, which was billed in quarter hour increments with specific dates and times. The description of the work varies from notations of working on case, review of orders, trial preparation, letters, preparation for depositions, motion preparation, court time, conferences, and itemized expenses. That the itemized billing was presented to Teresa Howard and introduced during her testimony.

Teresa Howard testified that she had an agreement with Wayne Smith as her attorney, to pay \$125 per hour for his services. Additional testimony indicated that Teresa was unable to pay for the attorney's services in this case. Further, that she had reviewed the billing and that said billing was reasonable and necessary.

It appears that the cases noted by Dr. Howard were, in fact, considered by the chancellor. In McKey v. McKey, 218 So.2d 764 (Miss. 1982), there are several factors that the court should consider in granting attorney fees in a case of this nature. It is Teresa Howard's position that the court has considered these factors. The factors are: (1) The parties' relative financial ability; (2) The skill and standing of the attorney; (3) the novelty and difficulty of the questions; (4) the degree of

responsibility involved in management of the case; (5) time and labor; (6) the usual and customary charge in the community; and (7) preclusion of other employment as a result of accepting the case.

In reviewing these factors, it is evident that: (1) Martin has a better relative financial ability than Teresa in that he is a physician; (2) the attorney in this cause of action has been Teresa Howard's attorney since the year 2000 and has dealt with numerous issues concerning this case; (3 and 4) the case at hand was a difficult case to try and had to be managed in such a way as to complete discovery within a short period of time; (5) there was a sufficient amount of time involved in this case as is indicated by the billing; (6) the charge of \$125 is usual and customary within the Pike-Amite County area; and (7) based upon the number of hours expended, it is evident that Teresa's attorney was limited in taking additional cases during this time. Therefore, the factors within the McKey case have been met.

There are also two additional cases that would require review in a case of this nature. The first case is Mabus v. Mabus, 910 So.2d 486 (Miss. 2005), wherein the supreme court ruled as follows:

"In contempt actions, attorney fees are awarded to make the plaintiff whole. Further, where a party's intentional misconduct causes the opposing party to expend time and money needlessly, then attorney fees and expenses should be awarded to the wronged party."

The Court had previously ruled in the second case of Gregg v. Montgomery, 587 So.2d 928 (Miss. 1991) as follows:

"Wife was entitled to reasonable attorney fee for having

to defend husband's unsuccessful suit to modify child support, even though services were rendered by her employer..."

The Court in the Gregg case ruled that the wife was entitled to reasonable attorney fees for having to defend a husband's unsuccessful claim to modify support. Based on these two cases and the requirements of the McKey case, attorney fees were properly granted. Consideration should be given to allow the statutory penalty of fifteen percent (15%) onto the award of attorney fees by the lower court. Grant v. Grant, 765 So.2d 1263 (Miss. 2000)

6. Should the appellant's case be dismissed?

This cause of action was duly appealed to the supreme court of the State of Mississippi and a designation of the record was made by counsel for Martin Howard, Jr., by Designation of the Record dated March 1, 2006. This designation of record does not include the petition for modification and orders entered before the remand of the case. Therefore, there is no petition for modification before the appellate court. In other words, the very document for which this appeal is based is not located within the record. The appellant is responsible for having all of his necessary documentation to fully present his case to the appellate court. The record as designated as incomplete and, therefore, should be dismissed.

7. Should the appellee be allowed attorney fees?

Teresa Howard, as the appellee in this cause of action, has filed a motion with this Honorable Court to allow attorney fees as

this Honorable Court may deem necessary. The attorney fees being requested deal with the appeal of this case from the Chancery Court of Pike County, Mississippi. Teresa Howard testified that she was unable to pay her attorney fees at the trial court level. The appellee would represent unto this court that she is now unable to pay the attorney fees for the handling of the appeal.

Teresa Howard would respectfully show that she should be awarded attorney fees in accordance with Grant v. Grant, 765 So.2d 1263 (Miss. 2000), and as noted within said case. That the attorney fees in this case were set at one-half. That the court stated:

"This court has generally awarded attorney's fees on appeal in the amount of one-half of what was awarded in the lower court."

Teresa Howard, as the appellee in this case, would respectfully appeal to this Honorable Court that she is entitled to attorney fees in accordance with said case.

CONCLUSION

The appeal, as filed, should be dismissed.

In the event the appeal is not dismissed, this Honorable Court should find that the chancellor made a viable ruling and that her decision should be affirmed.

That attorney fees in this case were appropriate and all requirements to grant said fees were met. That the supreme court should grant the statutory penalty of fifteen percent (15%) on the attorney fees allowed by the lower court. Further, that attorney fees should be granted to the attorney for Teresa Howard for the preparation of the appellee's brief.

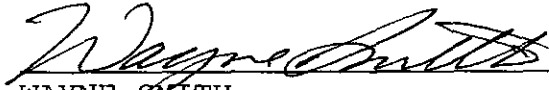
CERTIFICATE OF SERVICE

I, Wayne Smith, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing document to:

Law Offices of John R. Reeves, P.C.
555 Tombigbee St, Ste 107
Jackson Mississippi 39201

Honorable Debbra K. Halford
Chancery Judge Fourth District
Post Office Box 575
Meadville Mississippi 39653

This the 1st day of February, A.D., 2007.



WAYNE SMITH