

IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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PATRICK DOUGLAS ASHBURN

APPELLANT/PLAINTIFF

VS.

NO. 2006-CA-00554

CHRISTINE DALE ASHBURN

APPELLEE/DEFENDANT

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**APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY  
BRIEF OF THE APPELLANT, PATRICK ASHBURN**

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Respectfully Submitted,



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**ORAL ARGUMENT REQUESTED**

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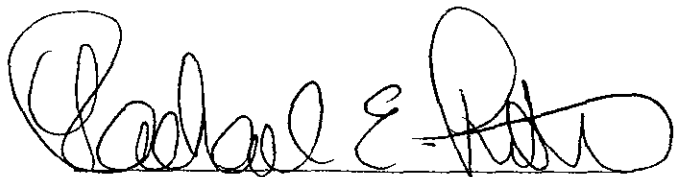
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**I. CERTIFICATE OF INTERESTED PERSONS**

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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 this Court may evaluate possible disqualification or recusal.

1. Mr. Patrick Douglas Ashburn, Appellant
2. Ms. Christine Dale Ashburn, Appellee/*Pro Se*
3. Kay Farese Turner  
Attorney at Law  
530 Oak Court Drive, Suite 155  
Memphis, TN 38117  
(Counsel for Appellant)
4. Honorable Vicki Cobb  
Chancellor, 17<sup>th</sup> Judicial District  
DeSoto County Courthouse  
2535 Highway 51 South  
Hernando, MS 38632
5. Honorable Melvin McClure, Jr.  
Chancellor  
2535 Highway 51 South  
Hernando, MS 38632



Rachael Emily Putnam #21654  
Attorney for Appellant

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#### **IV. STATEMENT OF THE ISSUES**

- A. Whether or not the Chancellor manifestly erred in allowing the Appellee to make a *Motion Ore Tenus* to Dismiss Appellant's Complaint for Divorce immediately preceding the commencement of the trial of this matter, without notice being given to the Appellant, based upon the affirmative defense of condonation when such defense was never plead by the Appellee.
- B. Whether or not the Chancellor manifestly erred in dismissing the Appellant's Complaint for Divorce based upon his finding that the Appellee's Motion to Dismiss was well taken and that the Appellant had condoned the Appellee's habitual and excessive use of drugs through his cohabitation with Appellee.
- C. Whether or not the Chancellor erred in Ordering the Appellant to pay all of the Guardian Ad Litem fees.

#### **V. STATEMENT OF THE CASE**

Throughout this brief, references to the Record Excerpts will be indicated as (RE. p \_\_) and Transcript and Testimony will be indicated as (Tr. V. \_\_ p. \_\_). Exhibits will be indicated as (Ex. No. \_\_). Appellant shall be referred to as "Mr. Ashburn" and Appellee shall be referred to as "Ms. Ashburn."

##### **Procedural History**

This Appeal arises from an original divorce action commenced by Mr. Ashburn on March 26, 2002 with the filing of his Complaint for Divorce in the Desoto County Chancery Court of Mississippi. (Tr. V. 1 p. 9) Mr. Ashburn alleged in his Complaint that he and Ms. Ashburn

physically terminated their marital relationship on March 2, 2002 and continuously lived in a state of separation since such time. (Tr. V.1 p. 10) Mr. Ashburn further alleged that he was entitled to a divorce from Ms. Ashburn due to her habitual and excessive use of drugs and/or due to her habitual cruel and inhumane treatment of him. (Tr. V. 1 p. 10) The case was assigned to Chancellor Melvin McClure, Jr. (Tr. V. 1 p. 9) The parties to the divorce had one minor child born of the union, namely, Patrick Ashburn Jr., born April 4, 1991. (Tr. V. 1 p. 10) Following the filing of Mr. Ashburn's Complaint for Divorce and service being perfected upon Ms. Ashburn, a Motion for Default Judgment was filed due to Ms. Ashburn's failure to file an Answer to the Complaint. (Tr. V. 1 p. 13) On May 9, 2002, Ms. Ashburn filed her Answer to Complaint for Divorce wherein she generally denied that Mr. Ashburn was entitled to a divorce. (Tr. V. 1 p. 17) No Counter-Complaint for divorce was ever filed by Ms. Ashburn nor were any affirmative defenses plead by her in her Answer to the Complaint. (Tr. V. 2 p. 10)

On July 15, 2002, a Temporary Order was entered by the Court *nunc pro tunc* to May 10, 2002, wherein the parties were given temporary joint legal custody of the minor child then age 11, with temporary physical custody to be equally divided by the parties in one week intervals, all of which was to occur in the marital residence. (Tr. V. 1 p. 19) The Order specifically prohibited the use of alcohol or drugs in the presence of the child and ordered that neither party would pay child support to the other with all other matters being reserved for final hearing thereon or further Orders of the Court. (Tr. V.1 p. 19 and 20)

On September 20, 2004, Mr. Ashburn filed a Rule 35 Motion for Physical and Mental Examination of the Defendant, Motion for Appointment of Guardian Ad Litem, Motion to Modify Temporary Order and Grant Plaintiff Temporary Sole Legal and Physical Custody of the minor child and Motion for Exclusive Use of the Residence. (Tr. V. 1 p. 21) Mr. Ashburn also

filed a Petition for Citation of Criminal and Civil Contempt of Court on September 20, 2004, wherein he alleged that Ms. Ashburn had violated the Court's previous Order through her continuous abuse of illegal drugs and prescription narcotics in the presence of the minor child. (Tr. V. 1 p. 28) On October 22, 2004, the parties entered a Consent Order with the Court wherein a Guardian Ad Litem was appointed and certain reciprocal injunctions were implemented. (Tr. V. 1 p. 46) On September 1, 2005, approximately one year from the entry of the Consent Order Appointing Guardian Ad Litem, Mr. Ashburn was again caused to file an Emergency Petition for Temporary Restraining Order and for Designation as Sole Physical and Legal Custodial Parent of the minor child and for Enforcement of Guardian Ad Litem's Recommendations. (Tr. V. 1 p. 52) On October 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup>, 2005, the trial of this matter was held. (Tr. V. 1 p. 60) On October 20, 2005, an Order dismissing Complaint for Divorce Without Prejudice and Order on Custody and Visitation was entered by the Court. (Tr. V. 1 p. 60) Pursuant to the Order, Mr. Ashburn was awarded sole legal and physical custody of the minor child, with Ms. Ashburn being awarded supervised visitation. (Tr. V. 1 p. 60) A Motion to Alter or Amend was timely filed by Mr. Ashburn and summarily denied by Order of the Court entered March 6, 2006. (Tr. V. 1 p. 63 and 69)

#### **Statement of Relevant Facts**

The parties to this divorce action were married on July 27, 1989. They had one child born of their union, namely, Patrick Dale Ashburn, Jr. born April 4, 1991. (Tr. V. 1 p. 9) Ms. Ashburn was employed on a part time basis but became unemployable during the marriage due to her drug addiction. (Tr. V. 2 p. 122) Husband worked at Rexam Beverage Cans throughout the marriage and was the primary breadwinner of the family. (Tr. V. 2 p. 100) Ms. Ashburn had

a child from a previous relationship, namely, Emily Augustine, who Mr. Ashburn reared from infancy. (Tr. V. 2 p. 104)

Ms. Ashburn testified that she developed an addiction to Morphine in 1998 or 1999 and that she was admitted to St. Francis in the early part of 1999 as a result of such addiction. Unfortunately, Ms. Ashburn's rehabilitation was not successful. (Tr. V. 4 p. 430) In fact, Ms. Ashburn's drug abuse worsened over time as she began acquiring multiple prescriptions for narcotic pain killers. (Tr. V. 2 p. 103) Specifically, Ms. Ashburn had prescriptions for oxycontin, xanax, codine, and percocet, all of which prescriptions were written by different doctors, none of whom had knowledge that Ms. Ashburn was under the care of another physician. (Tr. V. 2 p. 103) Ms. Ashburn's habitual and excess use of the narcotic pain medication was mixed with her habitual and excessive use of illegal drugs such as marijuana, cocaine, and methamphetamines. (Tr.V.1 p. 103, Ex. No. 14) Leading up to the filing of the Complaint for Divorce, Ms. Ashburn's conduct worsened. (Tr.V.1 p. 103) Specifically, Ms. Ashburn purposefully wrote checks to the pharmacy, the Medicine Shoppe, for prescription drugs, which checks were drawn from a closed account. (Ex. No. 19) On June 15, 2001, Ms. Ashburn's treating psychiatrist, Dr. Charlotte De Flumere, wrote a letter to Ms. Ashburn advising her that she had failed her last three drug screens and tested positive for Cannabis, Amphetamines/Methamphetamines, Hydrocodone, and Hydromorphone. (Ex. No. 14) Dr. De Flumere went on to state that the psychotropic medications which had been prescribed to Ms Ashburn: Effexor, Elavil, and Klonopin; can no longer be prescribed to her due to her drug abuse. (Ex. No. 14) Lastly, Dr. DeFlumere advised that Ms. Ashburn's opiate would be tapered by twenty (20%) percent. (Ex. No. 14)



Ms. Ashburn's drug addiction however did not decrease following Dr. De Flumere's letter, but rather reached a new level in January and February of 2002 when Ms. Ashburn left to attend a party for a friend and failed to return home for a period of approximately six weeks. (Tr. V. 2 p. 103 and Tr. V. 4 p. 434) Five days preceding the filing of Mr. Ashburn's Complaint for Divorce, Ms. Ashburn executed a relinquishment of custody of her daughter, Emily Augustine, to the child's biological father with whom the child had little, if any, relationship. (Ex. No. 5) Mr. Ashburn filed his Complaint for Divorce in March 2002, and shortly thereafter, Ms. Ashburn entered an in-patient drug rehabilitation treatment facility at St. Francis Hospital in Memphis, Tennessee for approximately six weeks. (Tr. V. 2 p. 103 and Tr. V. 4 p. 434)

Mr. Ashburn requested that he be awarded temporary and permanent legal and physical custody of the minor child due to Ms. Ashburn's drug addiction, however the Trial Court ordered that the parties share custody of the minor child within the marital residence. (Tr. V. 1 p. 9 and 19)

From the date of the entry of the Temporary Order on July 2002 following Ms. Ashburn's release from St. Francis drug rehabilitation center through the date of the trial, Ms. Ashburn was admitted for a third time to an in-patient drug rehabilitation center. (Tr. V. 1 p. 107, Tr. V. 4 p. 434) On one such occasion in January 2004, Ms. Ashburn overdosed while at home with the minor children. (Tr. V. 4 p. 435, Tr. V. 2 p. 108) P.J. called 911 and Ms. Ashburn was rushed to the emergency room, after which she was admitted to Lakeside. (Tr. V. 4 p. 435, Tr. V.2 p. 108 and 109) As a result of Ms. Ashburn's repeated relapses and continued habitual and excess use of drugs, Mr. Ashburn moved back into the marital residence on a full time basis so that he could care for the children. (TR. V. 2 p. 106 and 107) Mr. Ashburn testified that he had done everything he could do before and during the pendency of the divorce to assist his wife in

receiving the necessary treatment for her drug problem and based upon her continued promises that she would stay off drugs, he attempted to keep the marriage together, however, Ms. Ashburn never kept her promises and continued to abuse drugs. (Tr. V. 2 p. 108 and p. 122) Mr. Ashburn further acknowledged that he and Ms. Ashburn had engaged in sexual relations on one occasion in 2003, however, Ms. Ashburn never stopped abusing drugs. (Tr. V. 2 p. 107, 108 and 147) Mr. Ashburn's testimony regarding his failed attempts to reconcile with his wife is supported by the pleadings filed by him in 2004 and 2005. (Tr. V. 1 p. 21, p. 52, Tr. V. 2 p. 142) Specifically, following the entry of the Temporary Order on July 16, 2002, Mr. Ashburn petitioned the Court on two separate occasions for a modification of the Temporary Order to allow him to have sole legal and physical custody of the minor child due to Ms. Ashburn's on-going drug abuse and the detrimental affect it was having on the minor children. (Tr. V. 1 p. 21, p. 52, Tr. V. 2 p. 142) Despite Mr. Ashburn's repeated prayers for relief from the Trial Court, the Temporary Order remained unmodified by the Court. (Tr. V. 2 p. 142) In October 2004, incident to the filing of Mr. Ashburn's Rule 35 Motion for Psychological Evaluation, Motion for Appointment of Guardian Ad Litem etc., the parties agreed to the appointment of a Guardian Ad Litem. (Tr. V. 1 p. 45) Mr. Ashburn filed a Motion for Exclusive use of the marital residence which was pending before the Court at the time the Guardian Ad Litem was appointed. (Tr. V. 1 p. 21) The Guardian Ad Litem recommended that Mr. Ashburn remain in the marital residence in order to maintain as much stability as possible. (Tr. V. 6 p. 666) Accordingly, Mr. Ashburn continued to reside in the residence. (Tr. V. 6 p. 666)

As a direct consequence of Ms. Ashburn's on-going drug abuse during the pendency of the litigation, the daughter of Ms. Ashburn, Emily, failed out of school, became pregnant, suffered a miscarriage because of her drug own use, and eventually moved out of the marital

residence and in with her boyfriend. (Ex. No. 3, Tr. V. 6 p. 662) PJ, the parties' minor child, failed eighth grade, but was allowed to advanced to the ninth grade, was arrested for truancy, and a curfew violation. (Ex. No. 3) In March of 2005, Ms. Ashburn relapsed and went into a manic state, screaming and hollering one minute and sitting on the couch drooling the next. (Tr. V. 6, p. 666) This incident was reported to the Guardian by the minor child. (Tr. V. 6 p. 616) Shortly thereafter in May 2005, the Guardian Ad Litem recommended that Mr. Ashburn and the minor child move out of the marital residence due to it being in a condition in which she deemed unfit for the minor child to continue residing. (Tr. V. 2 p. 60) In June 2005, Mr. Ashburn followed the recommendation of the Guardian Ad Litem and moved out of the marital residence with the minor child. (Tr. V. 2 p. 60) Following Mr. Ashburn moving out of the marital residence, Ms. Ashburn began interfering with PJ's attendance at school by checking him out early, so as to prevent Mr. Ashburn from being able to pick him up at school. (Ex. No. 3) Additionally, PJ reported to his father that on one such occasion when Ms. Ashburn checked him out of school, she was in such an altered state that she was driving 90 miles down the road with PJ in the car. (Tr. V. 2 p. 135, Ex. No. 3) The Guardian Ad Litem also recommended in May of 2005 that Ms. Ashburn's visitation with PJ be supervised at all times by her mother, Ms. Isabell, which supervision was necessary due to Ms. Ashburn's conduct. (Ex. No. 3) Despite Ms. Ashburn's assertion that she had stopped abusing drugs, at the trial of this matter, Officer Bobby Jones of the Olive Branch Police Department testified that he had been to the Ashburn residence on twenty (20) occasions over the past twelve (12) months preceding the trial, and based upon his educational background and training as a narcotics officer, he believed Ms. Ashburn to have been under the influence of drugs on fifteen (15) of those twenty (20) occasions. (Tr. V. 4 p. 435)

## VI. SUMMARY OF THE ARGUMENT

The Trial Court erred in allowing Ms. Ashburn to make an Oral Motion to Dismiss the Complaint for Divorce based upon the affirmative defense of condonation, with no notice being afforded to Mr. Ashburn that such a Motion would be made and in light of the fact that Ms. Ashburn never plead the affirmative defense of condonation. Pursuant to Rule 12 of the Mississippi Rules of Civil Procedure, which states in part that "a Motion to Dismiss for failure to state a claim upon which relief can be granted where matters outside the pleading are presented, the Motion shall be treated as one for Summary Judgment and disposed of as provided in Rule 56." Rule 12(b)(6) further states "all parties shall be given reasonable opportunity to present all material made pertinent to such Motion by Rule 56." Plaintiff would show unto this Honorable Court that pursuant to Rule 56 of the Mississippi Rules of Civil Procedure, the Motion *Ore Tenus* to Dismiss the Complaint for Divorce should have been made at least ten (10) days before the time that such Motion was set for hearing. As such, Mr. Ashburn submits that this Motion was improperly brought before the Court and should not have been considered. Affirmative Defenses must be pled pursuant to Rule 8(c) and (e) of the Mississippi Rules of Civil Procedure or they are considered waived. The affirmative defense of condonation was never pled in Ms. Ashburn's Answer to the Complaint for Divorce nor did she ever Amend her Complaint to include the affirmative defense of condonation. Having never pled the affirmative defense of condonation, Ms. Ashburn should not have been allowed to present proof of such defense due to Mr. Ashburn not having notice that such defense would be raised.

The Chancellor erred in finding that Mr. Ashburn was not entitled to a divorce on the basis that he had condoned Ms. Ashburn's habitual and excessive drug use through his continued cohabitation with her during the pendency of the divorce litigation. The defense of condonation

is applied differently to grounds which are continuous in nature such as habitual and excessive drug abuse compared to the application of the defense as it relates to the charge of adultery. Specifically, when the ground for divorce is continuing in nature, the attempted reconciliation/condonation of past drug use by the offended spouse is conditioned upon their continued good behavior. If the offending spouse resumes such conduct as Ms. Ashburn did, the ground is revived as if such condonation never occurred. As such, Mr. Ashburn should not have been found to have condoned Ms. Ashburn's drug use due to his cohabitation with her and his admission of having sexual intercourse one time in 2003 given that Ms. Ashburn relapsed in 2004, which relapse revives the ground of habitual and excessive drug use. Moreover, Mr. Ashburn's continued cohabitation with Ms. Ashburn should not have been viewed by the Court as condonation in light of §93-5-4 of the Mississippi Code Annotated which specifically states that cohabitation does negate the grounds for divorce.

## **VII. ARGUMENT**

### **1. Appellee's Motion Ore Tenus to Dismiss Complaint for Divorce**

The standard of review in this case requires two separate standards of review. Specifically, in reviewing the Trial Court's ruling that the Complaint for Divorce should be dismissed based upon the Motion *Ore Tenus* to Dismiss made by Ms. Ashburn at the commencement of the trial of this matter, which Motion was based upon the affirmative defense of condonation, this Court's review is *de novo* and all evidence must be reviewed in a light most favorable to the party against whom the motion has been made. *McMillan vs. Rodriguez*, 823 So.2d 1173 (Miss. 2002) The Motion *Ore Tenus* to Dismiss based upon the ground of condonation became a Motion for Summary Judgment due to Ms. Ashburn having never raised

## VI. SUMMARY OF THE ARGUMENT

The Trial Court erred in allowing Ms. Ashburn to make an Oral Motion to Dismiss the Complaint for Divorce based upon the affirmative defense of condonation, with no notice being afforded to Mr. Ashburn that such a Motion would be made and in light of the fact that Ms. Ashburn never plead the affirmative defense of condonation. Pursuant to Rule 12 of the Mississippi Rules of Civil Procedure, which states in part that “a Motion to Dismiss for failure to state a claim upon which relief can be granted where matters outside the pleading are presented, the Motion shall be treated as one for Summary Judgment and disposed of as provided in Rule 56.” Rule 12(b)(6) further states “all parties shall be given reasonable opportunity to present all material made pertinent to such Motion by Rule 56.” Plaintiff would show unto this Honorable Court that pursuant to Rule 56 of the Mississippi Rules of Civil Procedure, the Motion *Ore Tenus* to Dismiss the Complaint for Divorce should have been made at least ten (10) days before the time that such Motion was set for hearing. As such, Mr. Ashburn submits that this Motion was improperly brought before the Court and should not have been considered. Affirmative Defenses must be pled pursuant to Rule 8(c) and (e) of the Mississippi Rules of Civil Procedure or they are considered waived. The affirmative defense of condonation was never pled in Ms. Ashburn’s Answer to the Complaint for Divorce nor did she ever Amend her Complaint to include the affirmative defense of condonation. Having never pled the affirmative defense of condonation, Ms. Ashburn should not have been allowed to present proof of such defense due to Mr. Ashburn not having notice that such defense would be raised.

The Chancellor erred in finding that Mr. Ashburn was not entitled to a divorce on the basis that he had condoned Ms. Ashburn’s habitual and excessive drug use through his continued cohabitation with her during the pendency of the divorce litigation. The defense of condonation

the affirmative defense of condonation in any prior pleading thus necessitating the Court's review of matters outside the pleadings.

Rule 12 of the Mississippi Rules of Civil Procedure governs the procedure under which one must travel in bringing a Motion to Dismiss. Specifically, Rule 12 states "a Motion to Dismiss for failure to state a claim upon which relief can be granted where matters outside the pleading are presented, the Motion shall be treated as one for Summary Judgment and disposed of as provided in Rule 56." Rule 12(b)(6) further states "all parties shall be given reasonable opportunity to present all material made pertinent to such Motion by Rule 56." Mr. Ashburn would show unto this Honorable Court that pursuant to Rule 56 of the Mississippi Rules of Civil Procedure, the Motion *Ore Tenus* to Dismiss the Complaint for Divorce should have been made at least ten (10) days before the time that such Motion was to be heard by the Court. This notice requirement affords the non-moving party the opportunity to investigate any and all materials to be considered outside the pleadings. In the instant case, Mr. Ashburn was given no notice that such a motion would be brought before the Court and further was given no notice of the affirmative defense on which such motion was based until such time as the Motion was made. As such, Mr. Ashburn submits that the Trial Court erred in allowing Ms. Ashburn to make such motion as the same was not properly before the Trial Court, and clearly Mr. Ashburn was disadvantaged as a result of Ms. Ashburn's failure to properly plead the affirmative defense of condonation.

As it relates to the affirmative defense of condonation, such defense is subject to Rule 8(c) and (e) of the Mississippi Rules of Civil Procedure which requires that such defenses to be specifically pled or otherwise the same will be deemed to have been waived. *Goode v. Village of Woodgreen Homeowners Association* 662 So.2d 1064 (Miss. 1995) This Court has held that in

order for a party to rely upon an affirmative defense, the party must affirmatively plead such defense. *Wholey v. Cal-Maine Foods, Inc.*, 530 So.2d 136, 138 (Miss.1998) Moreover, condonation cannot be raised for the first time in a Motion to Dismiss due to condonation being an affirmative defense requiring both pleading and proof. *Id.*<sup>139</sup> Citing *Glass v. Armstrong*, 330 So.2d 57 (Fla. App. 1976). The reason for the rule is based in equity and fairness to the other party in that if one intends to excuse ones' conduct based upon the alleged forgiveness of the other party, that party has the right to know about such defense so as to be afforded the opportunity to study the matter and examine what proof exists to support such defense. *Hertz Commercial Leasing Division v. Morrison*, 567 So2d 832 (Miss. 1990) When an affirmative defense is never plead by the party asserting it, as in the present case, a clear injustice occurs to the non-moving party if the Court allows the moving party to present evidence of the affirmative defense of which evidence the non-moving party was never privy. In *Hertz*, the Supreme Court of Mississippi addressed the issue of how to determine whether or not an assertion by the responding party constitutes an affirmative defense under the catch all provision of Rule 8(c) which states in pertinent part, " In pleading to a preceding pleading, a party shall set forth affirmatively... duress, estoppel, failure of consideration, fraud, illegality, statute of frauds... **and any other matter constituting an avoidance or affirmative defense.** *Id.* The test of whether or not a response to a preceding pleading raises an affirmative defense is that an affirmative defense assumes that the Plaintiff will prove everything that has been alleged and despite such proof the Defendant will still prevail. *Id.* Conversely, if the Defendant's success in the litigation depends upon whether or not the Plaintiff is able to prove all of the allegations set forth in his Complaint the matter was not an avoidance or an affirmative defense. *Id.* In *Hertz*, the Supreme Court reversed and remanded to the trial Court's ruling on the bases that the



Defendant could not for the first time raise an affirmative defense at trial which defense has never been pled. *Id.* 837 To simply deny what has been alleged does not satisfy the requirement that of pleading affirmatively. *Id.* 835

The Chancellor committed reversible error by allowing a Motion to Dismiss to be made Ore Tenus immediately preceding the commencement of the trial of this matter which motion raised for the first time the affirmative Defense of Condonation which defenses had never been pled. Under current Mississippi Law, Mr. Ashburn respectfully, submits that the affirmative defense of condonation was waived when not plead by Mother and therefore the Motion to Dismiss made ore tenus is moot due to the basis for such Motion failing. There exist two distinct procedural errors which constitute reversible error in this case. Specifically, Ms. Ashburn's Motion to Dismiss was not properly brought before the Court due to the fact that no notice was given to the Mr. Ashburn that such motion would be heard. As such, Mr. Ashburn was not provided an opportunity to investigate the basis for such Motion, all of which flies in the face of Rule 12(b)(6) and Rule 5 of the Mississippi Rules of Civil Procedure. Secondly, the substance and basis of the Motion to Dismiss was not available to Ms. Ashburn due to her failure to affirmatively plead the defense of condonation. For these two reasons, the trial Court should have ruled that no such Motion would be entertained and prohibited any proof which Ms. Ashburn intended to offer in support of this affirmative defense.

## **2. Condonation of Habitual and Excessive Drug Use:**

If one ignores the fact that the Appellee failed to plead condonation as an affirmative defense and therefore should not have been able to assert such defense at the trial of this matter one gets to the substance of the defense and its limitations in regards to the ground of habitual and excessive use of opium, morphine or like drug. Specifically, it is important to review the

history of condonation as an affirmative defense to certain grounds for divorce to fully understand its purpose and application. As with most issues of law, the defense of condonation has evolved overtime alongside the law governing the available grounds for divorce.

Originally, condonation was defined only in relation to the ground of adultery as an affirmative defense. Prior to the enactment of §93-5-4 of the Mississippi Code Annotated in 1976, if a party continued to reside in the same residence with their spouse following the discovery of an adulterous relationship, said party could not proceed on the ground of adultery due to the automatic presumption that the offended spouse condoned such behavior as evidenced through his/her continued cohabitation. It became apparent that such a presumption led to an inequitable result. For instance, one does not have to look back too far into the history of our society to see that no so long ago women had no means by which to support themselves independently from their husband's and therefore the law should not place the burden upon a women to move out of the marital residence upon the discovery of her husband's adultery in order to protect her ability to obtain a divorce on the ground of adultery. *Armstrong v. Armstrong*, 32 Miss. 279, 289 (1856). Upon recognizing the flaw in this application of the law, the legislature eventually passed §93-5-4 of the Mississippi Code Annotated wherein it specifically states that "It shall be no impediment to a divorce that the offended spouse did not leave the marital domicile or separate from the offending spouse on account of the conduct of the offending spouse."

While the enactment of §93-5-4 of the Mississippi Code Annotated resolved the inequity which existed in the application of the defense of condonation to the ground of adultery as it related to continued cohabitation, the defense began creating problems in its application to other grounds for divorce that are continuing in nature rather than based upon one specific act such as

adultery. Specifically, the Court's have recognized that certain grounds for divorce such as habitual cruel and inhumane treatment and habitual and excessive use of opium, morphine, or other like drug require the offensive conduct to occur with such frequency that it can be qualified as "habitual". The requirement that bad behavior such as drug abuse be "habitual" in order to establish such the ground as a basis for divorce created a conflict in application of the affirmative defense of condonation in that the ground itself requires that the offended party endure the habitual bad behavior which in turn gave rise to the affirmative defense of condonation under the traditional application of such defense. As a result, the Court established in the case of *Manning v. Manning*, 133 So.673, 674 (Miss. 1931) that the defense of condonation was inapplicable to causes of divorce of continuing nature. Specifically, the Court held that Ms. Manning's cohabitation with her husband after an act of cruelty constituting part of habitually cruel and inhuman treatment cannot be considered condonation. (*Id.*) The Court reasoned that unlike adultery, grounds for divorce which require a habitual course of conduct in turn require a different application of the defense of condonation in that the condonation in that instance is dependent upon the future good behavior of the offending spouse. If such behavior continues the right to proceed on the ground for divorce is revived. *Manning*, 133 So.673,674 (Miss. 1931), *Bias vs. Bias*, 493 So.2d 342 (Miss. 1986), *Cherry vs. Cherry*, 593 So.2d 13 (Miss. 1991) The *Manning* Court went on to say that a spouses endurance of bad behavior in an effort to save the marriage is commendable and should not be allowed to weaken her right to a divorce.

In the case at bar, Mr. Ashburn alleged that he was entitled to a divorce on the ground of habitual and excessive use of opium, morphine, or like substance. The proof presented at trial clearly established that Ms. Ashburn developed an addiction to morphine in 1998, which required her to be admitted to a drug rehabilitation program in 1999. Unfortunately, Ms.

Ashburn's attempted rehabilitation in 1999 failed and she continued to habitually and excessively abuse not only narcotic pain medication, but illegal drugs, as well including cocaine, marijuana, and methamphetamines. Ms. Ashburn's drug abuse continued to worsen and in February 2002, after deserting Mr. Ashburn and the two minor children for a period of six weeks while on a drug binge, Ms. Ashburn overdosed and was admitted for in-patient drug rehabilitation treatment for a second time. Mr. Ashburn filed his Complaint for Divorce in March 2002. While Mr. Ashburn testified that he did in fact try and make things work beginning in August 2002 when he was caused to move back into the marital residence to care for the minor children due to Ms. Ashburn's inability to do so, the proof clearly established that Ms. Ashburn continued to habitually and excessively use drugs from August of 2002 forward. Specifically, Ms. Ashburn overdosed yet again in February of 2004 on which occasion she was at home alone with the two minor children who found their mother in a non-responsive state and called 911. Ms. Ashburn then suffered a relapse in March of 2005, which relapse was reported to the Guardian Ad Litem by the minor child and testified to Mr. Ashburn. During the period of August 2002 through the date of trial in October 2005, Mr. Ashburn filed two separate Petitions/Motions wherein he alleged that due to Ms. Ashburn's ongoing drug abuse, he was in need of an Order awarding him sole custody of the parties' minor child and further that he was in need of an Order granting him exclusive use of the home. The proof further established the upon the Guardian Ad Litem being appointed in this case, it was recommended that Mr. Ashburn remain in the marital residence to maintain stability. Immediately following the Guardian Ad Litem's recommendation in May 2005 to establish a new residence with the minor child, Mr. Ashburn did so. Based upon the totality of the evidence presented and the record in this cause, it is clear that while Mr. Ashburn may have continued to assist and support Ms. Ashburn in trying rehabilitate herself, he

in no way should be precluded from obtaining a divorce on the ground of Ms. Ashburn's habitual and excessive drug use based upon the affirmative defense of condonation. Mr. Ashburn's continued efforts to maintain a stable home for the minor child during the pendency of this divorce, despite Ms. Ashburn's continued abuse of drugs and repeated stays in in-patient rehabilitation facilities should be commended, not used to preclude his obtaining a divorce. Ms. Ashburn alleged as proof of her affirmative defense of condonation that she and Mr. Ashburn continued to have sexual relations three to four times per week up until he and the minor child left the residence. Mr. Ashburn testified that he had sexual relations on one occasion following his filing for divorce which occasion occurred in 2003. Clearly this was an issue of the weight of the evidence and the credibility of parties. Despite the proof at trial establishing that Ms. Ashburn was a liar, a thief, and a drug addict, the Chancellor believed that the parties had engaged in sexual relations on more than one occasion as testified to by Mr. Ashburn. The Chancellor therefore concluded that the act of sexual intercourse condoned all of Ms. Ashburn's behavior and therefore precluded Mr. Ashburn from obtaining a divorce. The Chancellor went further and stated that there was no proof that Ms. Ashburn had habitually and excessively used drugs following Mr. Ashburn and the minor child moving out of the residence in June of 2005 and therefore the ground could not be revived. The Chancellor erroneously failed to remember that Mr. Ashburn and the minor child were directed to leave the residence by the Guardian Ad Litem due to Ms. Ashburn maintaining the marital residence in such a state of filth and disarray that the residence was unfit for the minor child. Moreover, the Chancellor, while on one hand denying Mr. Ashburn a divorce based upon his finding that since June 2005, Ms. Ashburn had not relapsed and did not appear to be abusing drugs any longer, the Chancellor went on to award Ms. Ashburn sole custody of the minor child with Ms. Ashburn being awarded only supervised

visitation. This is a blatant contradiction in the Chancellor's findings in that on one hand Mr. Ashburn cannot have a divorce because Ms. Ashburn had miraculously conquered her drug addiction between June 2005 and October 2005, but on the other hand, Ms. Ashburn was found to need supervision when exercising her visitation with the minor child. Mr. Ashburn respectfully submits that if Ms. Ashburn's state of mind is such that the Chancellor ruled that she cannot be alone with her minor child, clearly, he should not be expected to continue being married to her.

The case of *Lawson v. Lawson*, 821 So.2d. 142 (Miss.Ct.App.2002) is on point factually with the case at bar. Specifically, Mr. Lawson, like Mr. Ashburn, sought a divorce from his Wife based upon her habitual and excessive use of prescription drugs including Darvocet, Lortab, Hydrocodone, and Tylenol/COD #3 which are some of the same drugs Ms. Ashburn abused. Ms. Lawson also had a period of sobriety for nine months preceding the trial of the matter however the Court still refused to grant her custody of the minor child due to the Court noting that Ms. Lawson's drug use spanned five years versus the brief period of nine months in which she had been sober. *Id.* The Court of Appeals upheld the Trial Court's ruling that Mr. Lawson was entitled to a divorce on the ground of habitual drug abuse. Mr. Ashburn submits that he too is entitled to a divorce on such ground, regardless of Ms. Ashburn's alleged sobriety from June 2005 thru October 2005 as found by the Chancellor.

Mr. Ashburn presented sufficient proof at the trial of this matter that at the time he filed the Complaint for Divorce, his wife was a drug addict and that she had habitually and excessively abused drugs for at least five years leading up to the filing of the Complaint and continued the same course of conduct throughout the pendency of the parties' divorce. In light of all of the evidence presented at the trial of this matter, it was a clear abuse of discretion for the Trial Court

to have found that Mr. Ashburn had condoned all drug abuse on the part of Ms. Ashburn throughout the period of August 2002 through June 2005, and was erroneous in his application of the law which requires reversal by this Honorable Court.

### **3. Assessment of Guardian ad Litem Fees:**

The parties agreed to the appointment of a Guardian ad Litem and further agree that all fees incurred by the Guardian would be divided equally between the parties. The Trial Court for some unknown reason assessed all remaining Guardian ad Litem fees to Mr. Ashburn. In light of the evidence presented at the trial of this matter and based upon the entire record in this cause, Mr. Ashburn submits that but for Ms. Ashburn's drug addiction and propensity for committing criminal acts, which at times were assisted by her minor child from a previous relationship, a Guardian ad Litem would not have been necessary. The record reflects that Mr. Ashburn was the party that requested a Guardian ad Litem for the purpose of protecting the best interests of the minor child. However, again, such request would never have been made by Mr. Ashburn, but for Ms. Ashburn's conduct and drug abuse. As such, Mr. Ashburn submits that the Trial Court abused its discretion in assessing all remaining Guardian ad Litem fees which total approximately \$3,000.00 against him and respectfully requests that this Honorable Court reverse the Trial Court's ruling on this issue and assess all such fees against Ms. Ashburn.

## **VIII. CONCLUSION**

The Trial Court committed reversible err in allowing Ms. Ashburn to bring a Motion to Dismiss *Ore Tenus* on the day of the trial given that ten (10) days notice is mandated by Rule 12 of the Mississippi Rules of Civil Procedure, prior to the Court hearing such motion, and no such notice was afforded to Mr. Ashburn. The trial committed reversible error in allowing

Ms. Ashburn to raise the affirmative defense of condonation for the first time on the day of trial in support of her Motion to Dismiss when such affirmative defense was never pled by Ms. Ashburn prior to the trial of this matter. The Trial Court furthered erred in holding that Mr. Ashburn had condoned Ms. Ashburn's drug use and therefore was not entitled to a divorce from Ms. Ashburn. The Trial Court erred in assessing the remaining Guardian ad Litem fees in the approximate amount of \$3,000.00 against Mr. Ashburn given the clear and convincing evidence that Ms. Ashburn's conduct was the sole reason for the appointment of the Guardian ad Litem in the first place.

The ruling of the Trial Court dismissing Mr. Ashburn's Complaint for Divorce and assessing all remaining Guardian ad Litem's fees against Mr. Ashburn should be reversed and a ruling rendered by this Court granting Mr. Ashburn a divorce from Ms. Ashburn on the ground of habitual and excessive drug use and assessing all remaining Guardian ad Litem fees to Ms. Ashburn. Mr. Ashburn further submits that all issues pertaining to an equitable division of the parties' assets and debts should be remanded to the Trial Court for a hearing on the division of assets and debts.



## **IX. PROOF OF SERVICE**


I, the undersigned counsel of record for the Appellant, certify that I have this the 2<sup>nd</sup> day of February 2007 caused to be served by United States, postage prepaid, a copy of the foregoing to the following persons:

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