

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
2006-CA-01237**

THOMAS WILLARD POOL, JR.

APPELLANT

VS.

SHERRY CLAY POOL

APPELLEE

BRIEF FOR THE APPELLANT

**APPEAL FROM THE CHANCERY COURT OF
LAUDERDALE COUNTY, MISSISSIPPI**

(Oral Argument Requested)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of Record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or refusal.

Honorable Judge Sarah Springer
Lauderdale County Chancery Judge (formerly)

Mr. Thomas W. Pool, Jr.
2217 36th Street
Meridian, MS 39305

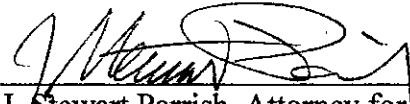
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This the 5th day of March, 2007.



J. Stewart Parrish, Attorney for Appellant

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STATEMENT OF ISSUES

The Chancellor erred in failing to grant Appellant's motion for continuance on the day of trial, which was necessitated by Appellee's failure to properly answer discovery. Appellee had answered discovery and had averred that certain documents would be available for inspection in the office of her attorney. When Appellant appeared to inspect the documents, they were not present. Additionally, one (1) working day before trial, a financial statement pursuant to Rule 8.05 of the Uniform Chancery Court Rules was provided to Appellant and that new 8.05 was substantially different from the prior 8.05, which had been submitted at the temporary hearing. Such error resulted in a trial by ambush and deprived Appellant his right to a fair trial.

The Chancellor erred in failing to grant Appellant a divorce on the grounds of adultery. The uncontroverted evidence was that the Appellee had spent three (3) consecutive nights, entire nights, at the home of a man to whom she was not married. This clearly shows the inclination and opportunity to commit adultery and, as such, the Chancellor's dismissal of the Appellant's Complaint for Divorce on the grounds of adultery was plain error and an abuse of discretion.

The Chancellor erred in granting the Appellee separate maintenance. Appellee never proved that after Appellant left the home, he refused to support her. Further, Appellant left the home at Appellee's direction. Additionally, it was plain error and an abuse of discretion to award separate maintenance to a woman whose actions did not

demonstrate her apparent willingness to resume cohabitation. In fact, Appellee's actions in spending three consecutive nights at the home of a man to whom she was not married evidenced that she does not want to resume living in conjugal bliss with the Appellant and by her own admission, never asked him to return home since the initial separation.

The Chancellor erred in granting the Appellee attorney's fees of \$5,000.00, without making an on-the-record examination of the *McKee* factors and against the weight of the evidence that Mrs. Pool had her own assets, was younger and in better health than her husband, and was still working.

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STATEMENT OF THE CASE

Buddy and Sherry Pool were married for the second time on December 19, 1981 and remained married until their separation on or about November 29, 2003. Earlier in November, 2003, Buddy Pool had told Sherry Pool that he planned on leaving the house because he could not stand to be around her any more due to her constant hen-pecking and criticisms. Mr. Pool had been retired for several years and had taken over the household duties, including a majority of the cleaning and cooking, as well as maintaining the lawn and vehicles. His performance in these tasks was never up to Mrs. Pool's standards, and for that reason, he advised her that he was leaving the residence. According to her testimony, Mrs. Pool then fell to her knees and begged him to stay. He did.

Some two to three weeks later, Mrs. Pool advised Mr. Pool to get out of the house. He did so at her insistence and established a separate domicile. He subsequently then filed for divorce on the grounds of habitual cruel treatment and Mrs. Pool counterclaimed for separate maintenance.

A temporary hearing was held on or about April 14, 2004 at which point, Mr. Pool was represented by Attorney Robert D. Jones. At the temporary hearing, Mrs. Pool was awarded exclusive use and possession of the former marital home, which is paid for; the exclusive use and control of the Mercury Marquis vehicle, which was also paid for; and Mr. Pool was ordered to maintain the former marital home grounds and to pay 75%

of Mrs. Pool's uncovered medical expenses. Both parties filed 8.05s reflected their current income and expenses as of the date of the temporary.

Discovery was propounded by Attorney Jones to Mrs. Pool. She then answered the interrogatories on or about April 25, 2004. Interrogatories and Request for Production of Documents set out that Mrs. Pool had provided certain documentation that evidenced expenditures prior to the separation and that was available for inspection at her attorney's office. The interrogatories expressly set out that they were continuing in nature and needed to be supplemented as the case progressed to trial. No supplementation was ever done by Mrs. Pool.

During the period of time between the temporary hearing and the trial on the merits, Mr. Pool became suspicious of Mrs. Pool's extramarital activities. A private investigator was retained to surveil Mrs. Pool and in November, 2005, the private investigator did video tape Mrs. Pool at the apartment of another man, one Vincent Miller, who was an acquaintance of the Pools during their marriage. The surveillance commenced on a Thursday night, at which point Mrs. Pool was seen unloading clothes and other belongings from the trunk of her car and moving them into the apartment of Vincent Miller. The private investigator stayed all night and verified by periodic recordings that Mrs. Pool vehicle never left until the early morning hours of Friday morning. Mrs. Pool returned on Friday evening and spent the night, leaving mid-morning on Saturday. Mrs. Pool returned again on Saturday night and left near mid-day on Sunday, having spent the entire night in the residence of Vincent Miller. Mrs. Pool admitted as such under oath. No other subject was seen entering or leaving the apartment at there were numerous instances of peeking out by the occupants prior to departing the

premises. At one point, Mr. Miller came out shirtless from his bedroom door and surveilled the parking lot.

At this point, Mr. Pool amended his complaint for divorce to allege the grounds of adultery and a trial was set in that matter on May 31 and June 1 of 2006. No 8.05 had been provided to Mr. Pool, updating Mrs. Pool's financial situation until one (1) working day before the trial. Mrs. Pool had quit her job of twenty-one (21) years and was now re-employed at another job. No supplementation of any discovery had been made. The week prior to trial, counsel for Mr. Pool went to the office of the attorney for Mrs. Pool to inspect the records that had been provided during discovery. No financial information pertinent to this action had been provided. This was contrary to the statements in the interrogatories and request for production of documents which had previously been propounded to Mrs. Pool.

Counsel for Mr. Pool filed a Motion to Continue arguing that failure to provide proof of expenses such as electric bills, car repair bills, etc., would prevent the Court from making an equitable distribution in the case of divorce or for determining the necessity and amount of separate maintenance in the event the Court ordered separate maintenance. Mr. Pool's position was that failure to truthfully answer discovery was an attempt to conduct trial by ambush and avoid the ability of impeaching of Mrs. Pool's untruthful testimony under oath. Counsel for Mrs. Pool argued that because Mr. Pool's counsel relied upon his misleading answers to interrogatories and request for production of documents, that we bore our own risk and that trial should proceed. Mr. Pool agreed that, in the event that a continuance was granted, he would be responsible for back support to the date of the trial. The Chancellor refused the request for continuance and trial commenced.

During the trial, Mrs. Pool admitted to spending three (3) consecutive nights at the home of Vincent Miller, a man to whom she was not married, and alluded that a third party, a woman who had been previously disclosed as a witness twelve (12) days prior to trial by letter and not by supplemental interrogatory response, was her alibi. Over objection, the Chancellor allowed the inclusion of the non-disclosed party, finding that notice by letter was sufficient, although the letter covered several different issues and the name of the additional witness was buried within it. This was yet another discovery violation, which the Court ignored. Mrs. Pool also made numerous changes to her 8.05 from the date of the temporary to the date of the divorce. Included therein was \$272.50 a month in car expense for which she could show no cancelled checks, nor could she show any bills. Likewise, her charitable contributions were not documented, neither were her living expenses, neither were her anticipated yard expenses, neither were her gas and oil expenses, which increased 250% from the date of the temporary until the date of the trial. Because of the lack of discovery, counsel for Mr. Pool was unable to impeach her and the Court apparently accepted her testimony upon its face, although she testified to paying almost every bill in cash and could provide zero (0) documentation. Mrs. Pool also testified on the stand that she did not know why she lied in her deposition and said that her mother was dead. She did admit under oath at trial that her mother was alive and had no explanation why she had previously stated otherwise under oath. Despite this, the Chancellor took her testimony at face value.

Mrs. Pool could show no proof that Mr. Pool had failed to support her after he departed the marital residence. Proof of refusal to support after leaving the marital residence is the second prong of the separate maintenance test and there was no proof at trial regarding refusal to support. On the other hand, Mr. Pool's 8.05 from the temporary

and the trial were virtually identical. Mr. Pool testified that he had seen Mrs. Pool and Vincent Miller together on three (3) occasions and one (1) time they were holding hands walking through the parking lot. The private investigator testified to the facts listed above.

After the close of the evidence, the Chancellor dismissed Mr. Pool's Complaint for Divorce on the grounds of adultery, saying that he had not made a *prima facie* case, even though admitting that spending three (3) consecutive nights at the house of one to whom you were not married was unusual, the Chancellor implied that it did not give rise to the grounds of divorce. Thereafter, the Chancellor granted Mrs. Pool separate maintenance, even though she had not shown by her actions that she wanted to resume the marital relationship, nor had she ever asked Mr. Pool to return to the marital domicile, nor had Mr. Pool ever refused to support her after leaving the marital domicile.

Subsequent to the trial, a Rule 59 Motion was filed by Mr. Pool and a subpoena duces tecum in support of that motion was issued. Mrs. Pool filed a motion to quash the subpoena duces tecum. At a hearing, the Chancellor quashed the subpoena duces tecum, which went to the circumstances regarding Mrs. Pool's termination from her job of twenty-one (21) years. At the trial, Mrs. Pool testified that she was making less money now than she was at the date of the temporary where she was cross-examined on that, and that was shown to be false. However, at the Rule 59 Motion, the Chancellor reviewed the 8.05s and said she was making more money at the time of trial than at the time of the temporary and therefore, the issue was moot. It is interesting to note that at the temporary, Mrs. Pool was given no financial support other than the use of the paid-for home and car and 75% of the medical bills.

After quashing the subpoena, Chancellor went ahead with the motion on the Rule 59 and overruled it on all grounds. The proffer was made by Mr. and Mrs. Pool's daughter, Shelby Slade, who testified that she had gone to various auto repair shops she knew had been frequented by her mother and found that repairs, in fact, had been made, two (2) of which had been made the month prior to trial and for which, Mrs. Pool had paid with a check. These repairs did not amount to \$272.50 a month, which was contrary to Mrs. Pool's trial testimony. It is also contrary to Mrs. Pool's trial testimony that she always paid with cash. In light of the obvious perjured testimony, the Chancellor chose to ignore it and not grant a new trial.

The Chancellor erred in accepting perjured testimony; failing to grant a continuance and thereby, subjecting Mr. Pool to trial by ambush; in dismissing Mr. Pool's Complaint for Divorce in light of the uncontroverted evidence of inclination and opportunity by Mrs. Pool to commit adultery, and by granting Mrs. Pool separate maintenance when her actions did not evidence her agreeability to resume the marital relationship, nor did Mr. Pool ever refuse to support her after leaving the marital domicile, nor did Mrs. Pool ever ask Mr. Pool to return to the marital domicile.

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SUMMARY OF THE ARGUMENT

Despite the fact that it was uncontroverted video evidence of Mrs. Pool spending three (3) consecutive entire nights with a man not her husband and the fact that that man came outside his bedroom in a state of undress, peering about the parking lot, looking for possible surveillance, the Chancellor dismissed Mr. Pool's Complaint for Divorce on the grounds of adultery. The proof of adultery was clear, convincing and overwhelming and showed that Mrs. Pool clearly had the opportunity and inclination to commit adultery. Furthermore, Mr. Pool testified that he had seen Vince Miller and his wife together on three (3) separate occasions and on one (1) occasion, they were holding hands. Despite all this evidence, the Chancellor dismissed his divorce complaint on the grounds of adultery.

Mrs. Pool misleading answered discovery and represented that certain documentary evidence was available, when in fact, it had not been produced. Chancellor found that the burden was on Mr. Pool to find that out and he was not entitled to rely upon sworn statements under oath and other Court filings. This was an abuse of discretion. The Chancellor should have ordered Mrs. Pool to fully answer discovery and could have continued the case to allow that to happen and in the event that support was ordered for separate maintenance or alimony could have made it retroactive to the date of the original trial setting by the Appellants by Mr. Pool's agreement. Therefore, Mr. Pool

was subject to trial by ambush and when Mrs. Pool perjured herself on the stand, he did not have the necessary documentary evidence to impeach her with, because she had not provided it. The fact that she perjured herself was made clear, had the Rule 59 Motion, which was held approximately one (1) month after the trial. At that time, the Chancellor refused to consider the testimony as evidence and the testimony had to be admitted as a proffer. Even after the proffer, when there was no doubt in any reasonable person's mind that the testimony was perjury, the Chancellor refused to set aside the judgment and grant a new trial.

In spite of the overwhelming proof of adultery and the fact that there was no proof that Mr. Pool had ever refused to support Mrs. Pool or that Mrs. Pool had ever invited Mr. Pool to return to the marital domicile and to treat him with conjugal kindness, the Chancellor granted Mrs. Pool separate maintenance. In fact, Mr. Pool initially left the marital domicile at Mrs. Pool's insistence. In order for Mrs. Pool to be entitled to separate maintenance, she must not have been at fault in the separation. That was clearly not the case. Further, Mr. Pool had to refuse to support her and she had to be willing to take him back. It is uncontroverted that that was not the case. Further, Mrs. Pool's actions in spending three (3) consecutive complete nights with a man who is not her husband does not evidence the type of behavior typical of a woman who wishes to be rehabilitated to her husband. It was a misapplication of law and abuse of discretion and plain error for the Chancellor to grant separate maintenance in this case.

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ARGUMENT OF APPELLANT WITH SUPPORTING AUTHORITIES

The purpose of the discovery rules is to prevent trial by ambush. *Nichols v. Tubb*, 609 So.2d 377 (Miss. 1992). Mr. Pool was subject to trial by ambush in this case because of Mrs. Pool's failure to properly answer interrogatories and request for production of documents which had been propounded to her in the discovery process. Mrs. Pool's position is that since counsel for Mr. Pool did not review the discovery responses which had been provided in April of 2005 and after having decided that they were insufficient having then failed to file a motion to compel, she was relieved of any responsibility to fully and truthfully answer the request for production of documents and the interrogatories. (RE p. 36, l. 27 – RE p. 38, l. 6) The documents provided in discovery were pertinent to no relevant time frame in this litigation. (RE p. 39, ll. 13-24) The documents provided all encompassed periods of time prior to the separation as noted in the Chancellor's questioning of Mrs. Pool's attorney. (RE p. 42, ll. 5-17) The cause of action before the Court was for divorce and in the alternative, for separate maintenance for Mrs. Pool. In order to make a just decision as to the proper amount of separate maintenance, it would be necessary for the Court to have reliable information regarding Mrs. Pool's expenses and income. Mrs. Pool's updated 8.05, which was provided pursuant to the Uniform Chancery Court Rules, was given to Mr. Pool's attorney one (1) working day prior to trial. It materially differentiated in many respects from the 8.05 that

was filed at the time of the temporary hearing. (Exhibit 1, Exhibit 3, RE p. 54, ll. 3-22) Because of Mrs. Pool's failure to properly and fully answer interrogatories and request for production of documents, counsel for Mr. Pool was unable to effectively cross-examine Mrs. Pool regarding her expenses.

Pursuant to Rule 26 (f), discovery responses are to be supplemented seasonably. *Bowie v. Montfort Jones Memorial Hospital*, 861 So.2d 1037 (Miss. 2003). A request for production of documents is within the reigns of discoverable material. *Choctaw Maid Farms, Inc. v. Hailey*, 822 So.2d 911 (Miss. 2002). Clearly, according to case law and the rules, Mrs. Pool was under an affirmative duty to timely supplement her interrogatory and request for production of documents responses. Such supplementation would have necessarily included the time period from April, 2005 to April, 2006. That was a relevant time period for the purposes of this suit, as that was during the separation period. The documents provided by Mrs. Pool were irrelevant as they were prior to the separation. Clearly, Mrs. Pool evasively answered interrogatories and request for production of documents in order to deny Mr. Pool an opportunity to effectively cross-examine her. Under oath, Mrs. Pool repeatedly stated she paid cash for major transactions, including \$272.50 a month in car repair bills, \$250.00 a month in gas, as well as charitable contributions for which there was no documentation. (RE p. 73, l. 10 – RE p. 80, l. 5) Mrs. Pool also testified as to lawn expenses that were paid in cash. (RE p. 52, l. 17 – RE p. 53, l. 4) This same non-documented expenditure testimony included almost every expense Mrs. Pool claimed on her 8.05 (RE p. 65, l. 17 – RE p. 66, l. 4, RE p. 68, ll. 5 – 28, RE p. 72, ll. 13-15, RE p. 73, ll. 1-4, RE p. 74, l. 24 – RE p. 75, l. 7, RE p. 76, l. 3 – RE p. 79, l. 29) Mrs. Pool's explanation was that she did not keep receipts or bank statements and that she made these transactions in cash. This testimony was clearly

shown to be perjury and the proffer provided in the Rule 59 Motion by Mrs. Pool's own daughter, who testified that she had found two (2) instances of car repairs which had occurred in the month immediately prior to trial, both of which had been paid for by check. (RE p. 142, l. 9 - RE p. 143, l. 18) There is no affirmative duty on the propounder of the request for admissions or interrogatories to seek to obtain that information through any other means. Even though a party can obtain bank statements by serving the bank with a subpoena, that does not relieve the opposing party from producing the bank statements in his control. *Smith v. Tougaloo College*, 805 So.2d 633 (MCAP 2002). Clearly, in this case, Mrs. Pool attempted to shift the burden of production to Mr. Pool and affirmatively aver in Court that his failure to timely file a motion to compel reasonably subjected him to a trial by ambush. A prime example of the misleading discovery in this case involved Mrs. Pool's "alibi" witness who was supposedly staying in Vince Miller's apartment with Mrs. Pool and Vince on the weekend depicted in Exhibit 7. Mrs. Pool testified that Shirley McKee was with her and Vince. (RE p. 62, ll. 3-6) Attorney for Mrs. Pool stated he "supplemented" discovery a week or so before trial by letter. (RE p. 62, l. 12 - RE p. 64, l. 15) The rules require not only that the body of the interrogatory be listed, but that they be sworn to. Supplemental discovery by letter is not allowed and shows Mrs. Pool's premeditated effort to subject Mr. Pool to trial by ambush.

In fact, such failure to properly cooperate in discovery is subject to sanctions. A party who does not seasonably supplement interrogatories may be subject to sanctions under Rule 37. *Hudson v. Parvin*, 582 So.2d 403 (Miss. 1991). Clearly, once the interrogatories and request for production of documents have been propounded to Mrs. Pool, she was under an affirmative duty to truthfully and fully answer each to the best of

her ability and she had been put on notice that the documents requested, if it had been her practice not to keep them in the past, such as bank statements, canceled checks, etc. should be retained in the future for the purposes of this litigation. Mrs. Pool was asked to document all her living expenses in those interrogatories and she should have, if she wasn't already, kept that information in the future and promptly supplemented both the interrogatories and the request for production of documents. (RE p. 45, ll. 12-21) Her argument that Mr. Pool's failure to file a motion to compel was reasonable and justified, subjecting him to a trial by ambush was improper and the Court committed plain error and abused its discretion in accepting it. There was no prejudice to Mrs. Pool as she was making more money at the time of the trial than at the time of the temporary and at the time of the temporary, she was given no financial temporary support. (RE p. 80, l. 10 – RE p. 81, l. 17, RE p. 132, ll. 1-9) Further, Mr. Pool had admitted that if a continuance was granted and separate maintenance or alimony was given to Mrs. Pool, he would pay the back amount. (RE p. 36, ll. 11-15) Further, the egregiousness of Mrs. Pool's testimony in which she made such patently false statements, as she paid for all significant purchases in cash, did not keep bank statements, and did not keep any utility bills, in light of the proffer of her daughter who testified that in the month prior to trial had she not only had minimal car repair work done, but had paid for it with a check, justifies reversal on the Chancellor's refusal to allowance a continuance on the date of trial for Mrs. Pool's failure to fully, completely, and truthfully answer discovery.

The Chancellor erred in dismissing Mr. Pool's complaint for divorce on the grounds of adultery. It is well settled law in the State of Mississippi that circumstantial evidence may be used to prove a divorce claim on the grounds of adultery. *Mitchell v. Mitchell*, 767 So.2d 1037, (Miss. 2000). The charge of adultery may be established by

showing adulterous inclination, coupled with opportunity to consummate inclination. *Dorman v. Dorman*, 737 So.2d 426 (Miss. 1999). In this case, Mr. Pool produced direct evidence of Mrs. Pool's adulterous inclination and the opportunity to consummate that inclination. Adulterous inclination may be proven by showing either infatuation with a particular person or general adulterous propensity. *Dorman v. Dorman*, 737 So.2d 426 (Miss. 1999). A review of the video tape that was introduced as Exhibit 7 clearly shows infatuation with a particular person, that person being Vincent Miller, (RE p. 91, ll. 6-22) and the opportunity to consummate that inclination. Direct evidence is not required, given the inherently secretive nature of adulterous relationships. *Reynolds v. Reynolds*, 755 So.2d 467 (Miss. 1999). In this case, there was direct evidence. That evidence showed Mrs. Pool removing clothing and household articles from the trunk of her car, with the assistance of Mr. Miller and carrying them into his apartment. (RE p. 88, ll. 20-26) They then spent the entire night at his apartment and Mrs. Pool left at approximately 5:30 in the morning and returned to the former marital residence. The next day Mrs. Pool again spent the entire night at the residence of Vince Miller. The next day, Mrs. Pool again spent the entire night at the residence of Vince Miller and Mr. Miller even came out of his bedroom in a state of undress, that is, without a shirt on, and glanced around the parking lot, as if looking for potential surveillance as Mrs. Pool made her departure. (RE p. 95, ll. 6-17) Clearly, Mr. Pool had met his burden of proof that Mrs. Pool was infatuated with a single individual, Vince Miller, and that she had an opportunity to satisfy that infatuation.

Further, Mr. Pool testified that he had seen Mrs. Pool and Vince Miller together on three (3) separate occasions, one (1) occasion of which, they were holding hands. (RE p. 105, l. 28 – RE p. 107, l. 14) Although the evidence taken in the light most favorable to

the Chancellor's ruling could possibly be deemed as circumstantial, rather than direct, Mr. Pool still met his burden. When accusing spouse relies on circumstantial evidence to support allegations of infidelity, an accuser carries heavy burden of convincing trier of fact of accused adulterous guilt through logical evidence tending to prove allegation that is inconsistent with reasonable theory of innocence. *Dorman, Supra*. Even taking the video tape as circumstantial evidence, the tape combined with Mr. Pool's testimony was sufficient to meet his burden and prove adultery by clear and convincing evidence. Therefore, the Chancellor was in plain error and misapplied the law in determining that Mr. Pool's complaint for divorce on the grounds of adultery should be dismissed. Further, Mrs. Pool initially denied requests for admissions when asked whether she had spent the night with Vince Miller. At the trial, the Trial Judge found that she had falsely answered those request for admissions and denied them, when in fact, they should have been admitted. (Exhibit 6, RE p. 108 l. 21 – RE p. 111, l. 12) She admitted on the stand under oath that she had, in fact, spent the night, the complete night, at Vince Miller's house on those three (3) dates, although she had previously denied them in request for admissions. (RE p. 60, l. 10 – RE p. 61, l. 7) Not only does this go to her veracity as a witness, it goes to her attempt to conceal her infidelity. It was only when confronted with the incontrovertible video evidence that Mrs. Pool told the truth. Adultery may be shown either by evidence or by admissions. *Holden v. Frasher-Holden*, 680 So.2d 795 (Miss. 1996). In this case, not only do we have her own admissions, but we have the video taped evidence of her encounter with Vince Miller and adultery is clearly proved. For this reason, the Chancellor's decision must be reversed.

Separate maintenance is a judicial command to one's spouse to resume co-habitation or to provide support. *Weiss v. Weiss*, 579 So.2d 539, (Miss. 1991). Separate

maintenance can be awarded based on a separation without fault on the wife's part and the willful abandonment by her husband with refusal to support her. *Robinson v. Robinson*, 554 So.2d 300, (Miss. 1989). Mrs. Pool had a counterclaim against Mr. Pool for separate maintenance and after Mr. Pool's divorce complaint for dismissed, separate maintenance was awarded her by the Chancellor. The evidence is undisputed that, although Mr. Pool intended to leave at some point, his ouster from the marital residence was at the insistence of Mrs. Pool. (RE p. 48, ll. 19-20, RE p. 103, ll. 10-20, RE p. 44, ll. 15-16) In fact, before she threw him out of the house, Mrs. Pool removed certain monies from certain accounts, which showed her premeditation. (RE p. 56, ll. 17-20, RE p. 58, ll. 2-5) Clearly, Mrs. Pool was at fault in the separation. She testified not only that she told him to leave, but that she took out the stress from her job upon him. (RE p. 59, ll. 9-16) There was not one scintilla of evidence that Mr. Pool had failed or refused to support his wife. In fact, the testimony was that she had a paid-for car, a paid-for house, and that she was the only working member of the household and was generating her own income. For this reason, the Court erred in granting separate maintenance.

Separate maintenance also requires the wife to meet her obligations of conjugal kindness. *Garland v. Garland*, 50 Miss. 694 (1874). The un-contradicted direct evidence of Mrs. Pool co-habiting with a man not her husband for three (3) consecutive entire nights as seen on Exhibit 7 clearly showed that she was not intending to resume conjugal relations with her husband. Testimony was that she had never asked him to move back into the marital home, (RE p. 103, ll. 21-24) nor had she done anything to indicate that she wished to be reunited with him. (RE p. 104, ll. 9-16) Mrs. Pool's testimony that she loves him and wanted to take care of him in the future was directly contradicted by her actions. Further, Mrs. Pool's veracity is to be questioned to the point that the Chancellor

should have disregarded her entire testimony. Mrs. Pool testified on cross-examination that when she had previously testified at a deposition under oath that her mother was dead, she was nervous. It is unbelievable that one, because of nervousness, would testify under oath that their mother was dead, when, in fact, their mother was alive and living one county north of the county in which Mrs. Pool resides. (RE p. 66, l. 5 – RE p. 67, l. 29) Further, the testimony that she paid for car repairs with cash and did not keep receipts was absolutely contradicted on proffer by her own daughter, who said that immediately prior to trial on two (2) occasions, Mrs. Pool had had her vehicle worked on and paid for it with a check. (RE p. 142, l. 9 – RE p. 143, l. 18)

Mrs. Pool was not entitled to separate maintenance as long as she continues to spend the night with men not her husband, as well as go out with them in public. Such behavior does not evidence a willingness to take her husband back, but merely her intention to remain married to her husband whom she does not love, while he is in failing health.

The Chancellor erred in awarding Mrs. Pool \$5,000.00 in attorney's fees for having to defend, successfully, Mr. Pool's divorce action. Chancellor failed to make an on-the-record examination of the *McKee* factors. (RE p. 21, l. 19 – p. 22, l. 8) Mrs. Pool is younger than Mr. Pool; (RE p. 60, ll. 2-3) she is better health; (RE p. 98, l. 23 – RE p. 99, l. 5) she is still earning; (Exhibit 1) she has substantial assets of her own; (RE p. 55, ll. 18-21) and she had adequate monies with which to pay her attorney. Further, Mr. Pool believes that a reversal of the Chancellor's dismissal of his grounds for divorce would also necessitate the reversal of the award of attorney's fees.

CONCLUSION

It is clear from an examination of the record excerpts provided with this appeal, as well as a careful examination of Exhibit 7 which is attached hereto for your examination, that Mrs. Pool had an infatuation with Vince Miller and had an opportunity to indulge that inclination on the nights in question. Mr. Pool has shown grounds for divorce on the basis of adultery to a clear and convincing level and the Chancellor committed plain error and abused her discretion and misapplied the law in directing a verdict against Mr. Pool on his divorce action.

The Chancellor subjected Mr. Pool to trial by ambush, when Mrs. Pool failed to truthfully and completely answer interrogatories and request for production of documents and also failed to timely supplement them. The burden is on the producing party to comply fully, completely and truthfully answer the discovery requests. There is no burden on the proponent of the discovery to take any extraordinary action, and in fact, the propounding party should be entitled to rest on the assurances of the responding party that they have fully, completely and truthfully answered discovery. Upon finding that the discovery had not been fully, completely and truthfully answered, the remedy was for a continuance, so that Mr. Pool could effectively confront Mrs. Pool on cross-examination.

While it is true that Mr. Pool left the home and did not intend to return, it is equally clear that Mrs. Pool was at fault in the separation and that Mr. Pool had never failed and/or refused to support her. Further, Mrs. Pool's actions in spending the night and socializing in public with Vince Miller did not evidence a desire to rehabilitate her marriage and to treat her husband with conjugal kindness. It is also said that actions speak louder than words and Mrs. Pool's actions clearly show that she does not want to be married to Mr. Pool.


The award of attorney's fees was not supported by the evidence and the Chancellor abused her discretion and made plain error in awarding attorney's fees without an on-the record analysis of the *McKee* factors.

For these reasons and in consideration of the foregoing argument, the judgment of the Chancery Court of Lauderdale County should be reversed and rendered on and Mr. Pool granted a divorce on the grounds of adultery with the case being remanded only for the termination of equitable distribution.

Respectfully submitted, this the 5th day of March, 2007.

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CERTIFICATE OF SERVICE

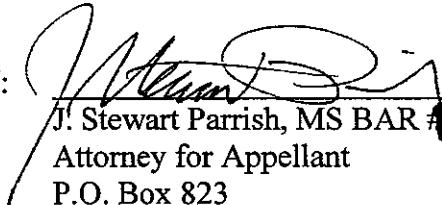
I, J. Stewart Parrish, Attorney for Appellant, do hereby certify that I have delivered by placing a copy of the Brief for the Appellant to the United States Mail, postage prepaid, addressed to the following individuals:

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So certified, this the 5th day of March, 2007.

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