IN THE SUPREME COURT OF MISSISSIPPI
NO. 2006-CA-01493

TRACEY HOLLIDAY — APPELLANT

VS.

CHRISTOPHER THURMAN STOCKMAN — APPELLEE

APPEAL FROM THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of 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 refusal.

1. Tracey Holliday, Appellant
2. Christopher Thurman Stockman, Appellee
3. Gary Street Goodwin, Esq., Attorney for Appellant

So certified, this the 16th day of March, 2007.

GARY STREET GOODWIN,
ATTORNEY FOR APPELLANT
MSB #4900

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WAS THE CHANCELLOR MANIFESTLY IN ERROR IN DETERMINING THE AMOUNT OF THE ARREARAGE OF CHILD SUPPORT DUE FROM THE APPELLEE AS A RESULT OF THE ALLEGED COHABITATION BY THE APPELLANT WITH THE APPELLEE, AND THE CREDIT FOR OTHER ALLEGED PAYMENTS PROFFERED BY THE APPELLEE?

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STATEMENT OF THE CASE

This is an appeal from the Chancery Court of Lowndes County, Mississippi by Tracey Holliday (hereinafter referred to as "Tracey") against Christopher Thurman Stockman (hereinafter referred to as "Christopher") regarding contempt, child support issues and visitation restrictions regarding their minor child, Christopher Montgomery Stockman (hereinafter referred to as "the child").[1]

On November 17, 2003, the Chancery Court of Lowndes County, Mississippi entered a decree of the Court modifying the prior Final Judgment and Decree between Tracey and Christopher. In that judgment, the Court ordered Christopher to pay Tracey $249.00 child support per month. Christopher was also directed to pay Tracey for the medical and dental insurance for the child in the amount of $105.00 per month. The parties were also directed to meet at the Oktibbeha County Sheriff's Office for pick up and delivery of the child for visitation. There are other matters addressed in the judgment that were litigated between the parties in the action presently on appeal, but Tracey only appeals those matters relating to the finding of contempt, the amount of the arrearage, and the restrictions on visitation.

On January 18, 2006, Tracey filed a Complaint against Christopher alleging, *inter alia*, that Christopher had wholly failed to pay child support for the full amount of the monthly obligation beginning December 2003 until present, and calculating the defendant was in arrears the sum of $6,225.00. She also

[1] Because the father and child have the exact same first name, Christopher Montgomery Stockman is referred to as "the child."

alleged that Christopher had wholly failed to pay medical and dental insurance previously ordered by the Court in the amount of $105.00 monthly, beginning November 2003 until present, for a total arrearage of $2,625.00. Tracey asked that Christopher be held in contempt and for attorney's fees and costs. She also alleged that Christopher was a danger to himself and others, as evidenced by his behavior, as reflected by criminal proceedings and judgments of conviction, and therefore, his visitation with the child should be suspended until Christopher underwent psychiatric therapy and/or anger management courses. Tracey requested in the alternative that Christopher's visitation be modified to limit the visits to times when another responsible adult was present, and to change the location for the child to be exchanged at the Lowndes County Sheriff's Office.[2] [R. 7-9; Exhibits, pps. 16-18]

Christopher filed an Answer to the Complaint, admitting that he was in arrears on his child support obligation to Tracey. He also stated that he had recently made efforts to bring support payments current, executing a Stipulated Agreement of Support and Payment Schedule for Delinquent Child Support with the Department of Human Services, on March 14, 2006. He attached a copy of this Stipulated Agreement to his Answer. The Stipulated Agreement showed an arrearage of $7,470.00, and he evidenced a payment of $1,246.00 toward that arrearage, as evidence of his good faith. Further, Christopher denied that such was the full amount, and claimed that he had made other payments to Tracey which were not reflected, and for which he should be given credit. Christopher also alleged that his actions did not warrant any further restrictions on visitation, and counterclaimed to hold Tracey in contempt for denying him his visitation and requested the Court expand the visitation schedule.[3] [R. 23-48; Exhibits pps. 19-30]

A trial was held on April 5, 2006, and the Court entered its Opinion on July 10, 2006, and a Final

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[2] By way of explanation, Tracey submits that at the time of the previous judgment in 2003, Tracey was living in Oktibbeha County, and Christopher was living in Lowndes County. As the Complaint shows, at the time she filed the Complaint, and as will be shown by further matters herein, by January 18, 2005, Tracey had moved to Lowndes County.

[3] Christopher did not cross appeal on any issues.

Judgment was entered by the Court on July 31, 2006. The Court held Christopher in contempt for failure to reimburse Tracey her medical insurance premiums, and awarded her $500.00 in attorney's fees. The Court did not alter the visitation except for specifying a summer visitation schedule, and changing the location of the exchange for the child to be at the Lowndes County Sheriff's Office. The Court also awarded Tracey a child support arrearage judgment in the amount of $1,387.00. Although the exact mathematical calculation for the arrearage of support is not contained in the Opinion of the Court or the Final Judgment, the Court apparently arrived at this amount as follows: Tracey claimed that as of the date of the filing of her Complaint, she was due to be paid $6,225.00. The Court found evidence that Christopher had paid her three checks: one for $400.00, one for $200.00, and one for $1,000.00. This apparently reduced her claim to $4,625.00. The Court then found that Tracey and the child had lived with Christopher for eight months, and gave Christopher a $1,992.00 equitable credit, thereby reducing Tracey's claim to $2,633.00. The Court then applied Christopher's payment to the Department of Human Services, which Tracey ultimately received, in the amount of $1,246.00. This reduced Tracey's Final Judgment to $1,387.00. [R. 60-67; Exhibits pps. 8-15]

Being aggrieved at the judgment of the Court, Tracey timely filed her Notice of Appeal on August 29, 2006. [R. 68]

SUMMARY OF THE ARGUMENT

APPELLANT'S PROPOSITION NO. 1

WAS THE CHANCELLOR MANIFESTLY IN ERROR IN DETERMINING THE AMOUNT OF THE ARREARAGE OF CHILD SUPPORT DUE FROM THE APPELLEE AS A RESULT OF THE ALLEGED COHABITATION BY THE APPELLANT WITH THE APPELLEE, AND THE CREDIT FOR OTHER ALLEGED PAYMENTS PROFFERED BY THE APPELLEE?

Tracey asserts that the Chancellor should not have given Christopher credit for three payments or any equitable credit for eight months of child support due to alleged cohabitation. Tracey contends that this decision was clearly erroneous upon the facts presented, as well as an erroneous application of law. Support payments pursuant to a judgment that have been accrued cannot be relieved. The equitable power to apply the doctrine of unjust enrichment as an estoppel to collection is not present in this case. The overwhelming weight of the evidence makes it clear that Tracey maintained a separate residence at all times, despite admittedly spending the night at Christopher's house approximately 50% of the time. A direct check for clothes, a check for a Mother's Day present and payment for an insurance deductible should not have been credited for child support, and Christopher's proof is insufficient to rise to the level of clear and convincing evidence as to his defenses of payment and unjust enrichment. Further, Christopher was in contempt and had unclean hands.

APPELLANT'S PROPOSITION NO. 2

WAS THE CHANCELLOR MANIFESTLY IN ERROR IN FINDING THAT THE APPELLEE'S VISITATION SHOULD NOT BE FURTHER RESTRICTED BY THE COURT AND/OR DID THE CHANCELLOR FAIL TO APPLY THE CORRECT STANDARD OF LAW IN THE APPLICATION OF § 93-5-24(9)(d) OF THE *MISSISSIPPI CODE OF 1972*, AS AMENDED?

In November 2003, after an incident of domestic violence, the Court ordered the parties to exchange their child at the Oktibbeha County Sheriff's Office. Christopher was convicted of this offense. Tracey then began a relationship with Christopher which resulted in her staying in Columbus with Christopher, beginning

in October 2004 and ending in May 2005. Another incident of domestic violence by Christopher upon Tracey resulted in a charge against Christopher in Lowndes County Justice Court. Christopher had to attend an anger management course as a result. A month prior to the filing of the Complaint, another incident arose out of an exchange of the child and words between the parties. This ugly public spat in front of the child was interrupted by the police only after Christopher, according to him, tried to pull out his weapon, or according to Tracey and her witness, he actually displayed it.

The Court, after hearing this proof, did nothing to restrict Christopher's visitation but, after uncontradicted assent by both parties, did change the location for the child to be exchanged, to the Lowndes County Sheriff' Office. Tracey submits that three incidences of domestic violence are enough. The Court should have utilized § 93-5-24, *Mississippi Code of 1972*, as amended, to impose further restriction upon Christopher's visitation with the child.

ARGUMENT

APPELLANT'S PROPOSITION NO. 1

WAS THE CHANCELLOR MANIFESTLY IN ERROR IN DETERMINING THE AMOUNT OF THE ARREARAGE OF CHILD SUPPORT DUE FROM THE APPELLEE AS A RESULT OF THE ALLEGED COHABITATION BY THE APPELLANT WITH THE APPELLEE, AND THE CREDIT FOR OTHER ALLEGED PAYMENTS PROFFERED BY THE APPELLEE?

Tracey asserts that the Chancellor erred in giving Christopher credit for three payments made to her, as well as an equitable credit for eight months of child support for which the Chancellor found that Tracey cohabited with Christopher. Tracey asserts that this is not only a clearly erroneous decision based upon the facts of the case and the proof adduced at trial, but an erroneous application of law. As set forth above, Tracey claimed in her Complaint that as of the time she filed it in January 2005, Christopher was $6,225.00 in arrears. The Court gave Christopher credit for a $400.00 check, a $200.00 check and a $1,000.00 check as payments. The Court then gave Christopher an equitable credit for eight months of child support at $249.00 a month, or $1,992.00, as well as a payment made to the Department of Human Services after the case was filed, in the amount of $1,246.00. Tracey does not dispute that the payment of $1,246.00 is to be credited, as it was paid by Christopher prior to the entry of the Final Judgment, but after she filed her Complaint. The Final Judgment entered in Tracey's favor was for $1,387.00. Tracey submits that the three credits for payments that were applied, and the equitable credit that was applied were clearly erroneous, and/or constitute a misapplication of law.

Civil liability for support payments under a child support judgment, that have already accrued, cannot be relieved by the Chancery Court. *Tanner v. Roland*, 598 So.2d 783 (Miss. 1992) and *Thurman v. Thurman*, 559 So. 2d 1014 (Miss. 1990). In *Alexander v. Alexander*, 494 So. 2d 365 (Miss. 1986) the Court used its equitable power to find that the doctrine of unjust enrichment could be applied as an estoppel to the collection of child support, since the collecting parent is the fiduciary for the child. In *Alexander*, a collecting

mother filed suit against a paying father for child support that accrued during months that the child lived with the father. Most importantly in that case, it appears that the father had actually paid the child the amount of child support required under the decree. The Court reasoned that since the collecting parent is only a conduit, it would make no sense for the Court to enforce a judgment of child support against the paying father, then to direct the collecting parent to pay that money back to the father for the benefit of the child. In *Tanner v. Roland, supra*, the parties entered into an agreement regarding arrearage of child support between a collecting parent and a paying parent. The agreement was not submitted to the Court for approval. The Chancellor subsequently found that agreement invalid, and the Supreme Court affirmed. The Court ruled that once child support payments are adjudicated by judgment, they cannot be contracted away by the parents, or modified or forgiven by the Court. This Court ultimately held the agreement invalid as a matter of law, and reversed and remanded for a hearing on other grounds as to the *res judicata* aspects of that appeal. Accordingly, as to the collection of a child support arrearage, there appears to be only two defenses: payment or unjust enrichment. Further, no agreement between the parties can result in a defense. An agreement between the parties which results in actual custody by the paying parent can form the basis for an unjust enrichment defense. However, Tracey submits that the facts of this case do not support evidence of the payments nor the imposition of the equitable credit apparently arising from the doctrine of unjust enrichment. In order to examine Tracey's claim, a review of the facts adduced at trial is necessary.

Admittedly, the proof was at variance as to the alleged cohabitation. Tracey testified that until October 2004, she lived in Starkville with the child. She sold her home in Starkville in May 2005 and purchased a home in Columbus. She and the child would stay with Christopher some nights, but it was not every night. From May 2005 until she closed on her house in Columbus, she lived for an approximate five week period with Christopher some of the time, with her mother some of the time, and stayed with her sister some of the time. When her house closed in Columbus, she moved into that house. After Christopher

assaulted her in 2003, he did not attempt to see their son, but began talking to Tracey and indicated that he wanted to get back into his son's life, and she started trying to get the child and Christopher back together in the hope that things would change and a relationship would develop between the child and Christopher. She continued to pay for her residence in Starkville, and spent about half the time in Starkville and half the in Columbus with Christopher. She produced evidence of her utility bills showing that she continued to maintain the residence in Starkville. During that time period, she paid for the child to attend Starkville Christian School until May 2005. She testified that Christopher in no way contributed to any part of the child support, except for writing her a check for $200.00 and told her to make sure that it was all spent toward the child's clothes. The issue of child support between them continued to remain a source of friction. Christopher requested that Tracey stop the Department of Human Services from pursuing him for child support, and promised her that he would begin paying her support, but he never did. Tracey testified that the decision to stay at Christopher's house was a day in and day out proposition. She never had access to his home, and he never gave her a key. As to the $400.00 check in May 2005, Tracey testified that it was for a Mother's Day present. Christopher bought her a "Cowboy Maloney special offer" consisting of a weed eater, a leaf blower and a lawn mower for the $400.00 for Mother's Day, but stated that he wanted the weed eater. The $1,000.00 payment in September 2005 was a voluntary payment by Christopher to repair some damage to Tracey's house in Starkville that occurred due to a lightning strike. Tracey testified that Christopher said he would pay her $1,000.00 if she would let an electrician he knew do the work on her house in Starkville. The electrician was to write an identical bill to Christopher so that he could "claim it", apparently for tax purposes. [T. 82-128; Exhibits pps. 5-11]

Christopher testified that Tracey lived with him from the end of September 2004 until the end of June 2005. He admitted he signed the Stipulation [Exhibit p.1] of the Department of Human Services, and did not request any credit for payments or time that they lived together. He admitted that his checks to

Tracey did not say for "child support." [T. 170-199] Christopher also called another witness, Clint Parish, who stated that he was Christopher's roommate from July 2003 until July 2005. He stated that Tracey would stay over very often, and estimated that she stayed there with the child 85%of the time. [T. 130-140]

Based upon the foregoing, together with the documentary exhibits offered by Tracey, Tracey submits that the greater weight of the proof was that the parties had no agreement about cohabitation negating any responsibility for child support. Further, Christopher did not testify that the parties had any agreement about same.

In *MacIntosh v. Department of Human Services*, 886 So. 2d 721 (Miss. 2004) the Court held that the burden is on the paying parent to show an inability to pay, or other defense, to a contempt action. Such must be proved by clear and convincing evidence, and rise above a simple state of doubtfulness.

Tracey submits that Christopher's proof is insufficient to rise to the level of clear and convincing evidence, and the Chancellor erred in giving him credit for any of the payments totaling $1,600.00, and by giving him an equitable credit for eight months of child support totaling $1,992.00. Tracey continued to maintain a home for Christopher in Starkville, and the 50% of the time that Tracey stayed overnight in Columbus with Christopher was for the child's benefit, as well as Christopher's benefit. Finally, with Christopher unable to show any direct support paid to Tracey for the child, Christopher was in contempt and had unclean hands to begin with, and the Chancellor erred in granting him equitable relief.

For the above reasons, this case should be reversed and rendered and judgment entered here for past due child support for the payments credit of $1,600.00, and for the equitable credit of $1,992.00, the total of which equals $3,592.00.

APPELLANT'S PROPOSITION NO. 2

WAS THE CHANCELLOR MANIFESTLY IN ERROR IN FINDING THAT THE APPELLEE'S VISITATION SHOULD NOT BE FURTHER RESTRICTED BY THE COURT AND/OR DID THE CHANCELLOR FAIL TO APPLY THE CORRECT STANDARD OF LAW IN THE APPLICATION OF § 93-5-24(9)(d) OF THE *MISSISSIPPI CODE OF 1972*, AS AMENDED?

Tracey submits that the Chancellor was in error in not further restricting Christopher's visitation because of his violent temper. Tracey had been previously assaulted by Christopher, which resulted in Christopher's conviction in Justice Court in Oktibbeha County for his assault on Tracey. [T. 41-42] This ultimately resulted in the Court's requirement that the parties exchange the child at the Oktibbeha County Sheriff's Office, when the Court entered its Judgment on November 17, 2003. [R. 2-4]

After Tracey moved to Columbus, and ended her relationship with Christopher, Christopher was charged with domestic violence, second offense, in the Lowndes County Justice Court as a result of another altercation. Christopher testified that the judge told him that she wasn't going to rule on the charge, but after a year, if there had been no further problems, she would retire the case to the files. She asked him to go to an anger management course, and he did. [T. 43-44] Christopher also produced a copy of his certificate of his completion of the anger management course as an exhibit to his Answer and Counterclaim, evidencing he received his certificate of completion on December 15, 2005. [R. 48; Exhibit D-2] It was at this time that what will be referred to as the "Dutch Village" incident occurred. The testimony was somewhat at variance in the case. However, it is undisputed that the parties were going to meet at Dutch Village (a convenience store) in Columbus to exchange the child, after the child had attended a Christmas party for Tracey's family at her house. Tracey came with the child to Dutch Village with her boyfriend, Robert Styron. Mr. Styron remained in the car. Tracey and the child got out of the vehicle, and while waiting for Christopher to arrive, Tracey saw an old friend, Angela Farrell, who is a teacher at New Hope Elementary School. As they were conversing, the child got into the car with Christopher and his girlfriend. Christopher then left. As she was

wrapping up her conversation with Angela Farrell, Tracey and Angela noticed Christopher whip his vehicle back into the parking lot in an angry and aggressive manner. Christopher then asked Tracey where the child's soccer clothes were, as she had promised to bring them. Tracey advised Christopher that she had forgotten them. [T. 45-47, 61-72, 106-111] An argument ensued, and this is where the parties' versions differ. Angela Farrell and Tracey testified that Christopher got argumentative with Tracey about Mr. Styron being her current boyfriend. They testified that he directed some angry words toward Mr. Styron, all of which appear to be fighting words. According to Tracey and Angela's testimony, as this verbal encounter occurred, Christopher produced a gun and displayed it to Robert Styron. At that point, both sets of parties apparently called the 911 operator. Police officers happened to be on the scene, observing some other transaction, and immediately stopped any further altercation between the parties. [T. 61-72, 106-111] Christopher admits bringing the gun, but states he keeps it in his car, and claimed that he purchased the gun because Robert Styron had issued some threats to him through other parties. [T. 45] However, it is abundantly clear that Christopher reached for the gun in the glove box, but claimed he was prevented from grabbing it by his girlfriend. [T. 45, 181] What is also abundantly clear is that Christopher lost his temper at this altercation, and did actually reach for a gun, and premeditatedly brought the gun to an exchange of the child.

The greater weight of the evidence suggests that Angela Farrell was an independent witness who had no reason to tell a falsehood. She testified that she did not see Christopher did not see Christopher point the gun, but saw him display it. [T. 71-72] The display of a firearm at the exchange of visitation for a child is not only injurious to the child, but it evidences an intent to commit violence or threaten violence. Accordingly, this is not an appropriate situation for the child to be found in. In her opinion, the Chancellor reconciles these facts as being a situation where the parties "know how to push each other's buttons" and there is anger between them. However, a review of this record and the logical inferences that flow therefrom, indicates that Christopher has problems reconciling the fact that he will never have a relationship with Tracey. Further,

this has resulted in his willful failure to support the child, unless, at least according to him, the child is living with him, along with Tracey. Tracey, as the custodial parent, should have natural concerns that Christopher's violence toward her is detrimental to the best interest of the child. The Chancellor found her correct in immediately petitioning the Court and withholding visitation from Christopher. The Chancellor found that she was not in contempt for withholding visitation for Christopher until the Court could hear this matter. This incident happened after Christopher had completed his anger management course. Apparently, Christopher still suffers from problems. Tracey was attempting to act in the child's best interest. Christopher had basically never supported his child, unless compelled by the Court. Accordingly, the greater weight of the evidence suggests that the Court should have placed further restrictions on Christopher.

Bill Vaughn was qualified as an expert in counseling. He had counseled with Tracey and the child during December after this incident occurred. Vaughn stated that his opinion was that the child perceived his mother was in danger, and that it would be in the best interest of the child if the mother and father jointly consulted with an independent counselor, along with the child. [T. 8-25]

Tracey submits that the Chancellor abused her discretion in not finding that further restrictions were necessary, and in failing to consider § 93-5-24, *Mississippi Code of 1972*, as amended, which provides in pertinent part as follows:

...

> (d) (i) A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.
>
> (ii) In a visitation order, a court may take any of the following actions:
>
> 1. Order an exchange of the child to occur in a protected setting;
> 2. Order visitation supervised in a manner to be determined by the court;
> 3. Order the perpetrator of domestic or family violence to attend and complete to the satisfaction of the court a program of intervention for perpetrators or other designated counseling as a condition of visitation;
> 4. Order the perpetrator of domestic or family violence to abstain from possession or

consumption of alcohol or controlled substances during the visitation and for twenty-four (24) hours preceding the visitation;
5. Order the perpetrator of domestic or family violence to pay a fee to defray the cost of supervised visitation;
6. Prohibit overnight visitation;
7. Require a bond from the perpetrator of domestic or family violence for the return and safety of the child; or
8. Impose any other condition that is deemed necessary to provide for the safety of the child, the victim of family or domestic violence, or other family or household member.

(iii) Whether or not visitation is allowed, the court may order the address of the child or the victim of family or domestic violence to be kept confidential.

(e) the court may refer but shall not order an adult who is a victim of family or domestic violence to attend counseling relating to the victim's status or behavior as a victim, individually or with the perpetrator of domestic or family violence, as a condition of receiving custody of a child or as a condition of visitation.

(f) if a court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation.

Tracey submits that this matter should be remanded back to the Chancery Court of Lowndes County, Mississippi for imposition of supervised visitation, requiring Christopher to exercise his visitation only in the presence of another responsible adult, until such time that he presents to the Court evidence that he has obtained counseling, and the results thereof.

The first altercation between these parties resulted in the Court's restricting the place of exchange of the child in February 2003. The second altercation between these parties resulted in Christopher having to take an anger management course, as directed by the Justice Court. The third altercation was brought to the Chancellor's attention in the present case. Three incidents of domestic violence is enough. This case should be reversed and remanded.

But, why were they exchanging in Dem-secure place.?

CONCLUSION

For the foregoing reasons, this cause should be reversed and rendered, in part, and reversed and remanded, in part.

Respectfully submitted, this the 16th day of March, 2007.

TRACEY HOLLIDAY, APPELLANT

BY: _____
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HER ATTORNEY

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CERTIFICATE OF SERVICE

This will certify that I, Gary Street Goodwin, have this day mailed via United States mail, postage prepaid, a true and correct copy of the foregoing BRIEF FOR APPELLANT to: Honorable Dorothy W. Colom, Post Office Box 708, Columbus, Mississippi 39703-0708 and to Christopher Thurman Stockman, 24 Pebble Creek, Steens, Mississippi 39766.

So certified, this the 16th day of March, 2007.

_____
GARY STREET GOODWIN