

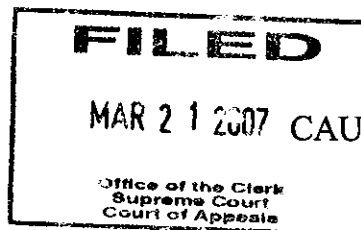
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IN THE SUPREME COURT OF MISSISSIPPI

JAMES B. YELVERTON

VS.

RHONDA H. YELVERTON



APPELLANT

APPELLEE

APPEAL FROM THE CHANCERY COURT OF THE  
FIRST JUDICIAL DISTRICT OF HARRISON COUNTY, MISSISSIPPI

---

BRIEF FOR THE APPELLANT  
JAMES B. YELVERTON

---

ORAL ARGUMENT REQUESTED

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IN THE SUPREME COURT OF MISSISSIPPI

JAMES B. YELVERTON

APPELLANT

VS.

CAUSE NO. 2006-CA-01498

RHONDA H. YELVERTON

APPELLEE

APPEAL FROM THE CHANCERY COURT OF THE  
FIRST JUDICIAL DISTRICT OF HARRISON COUNTY, MISSISSIPPI

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BRIEF FOR THE APPELLANT  
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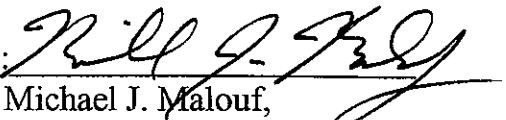
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## CERTIFICATE OF INTERESTED PERSONS

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 recusal:

- |  |                           |
|--|---------------------------|
| 1. James B. Yelverton  | - (Appellant herein)      |
| 2. Michael J. Malouf, Esq.<br>Melissa A. Malouf, Esq.<br>501 E. Capitol Street<br>Jackson, Mississippi 39201 | - (Counsel for Appellant) |
| 3. Rhonda H. Yelverton   | - (Appellee herein)       |
| 4. D. Scott Gibson, Esq.<br>P.O. Box 208<br>Gulfport, Mississippi 39502-0208                                 | - (Counsel for Appellee)  |

RESPECTFULLY SUBMITTED

BY:   
Michael J. Malouf,  
Attorney for Appellant

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### **REQUEST FOR ORAL ARGUMENT**

Jim respectfully submits that oral argument will be of valuable assistance to this Court. Oral argument will ensure a thorough and effective presentation of this appeal to help bring a final conclusion to this matter.

## **STATEMENT OF THE ISSUES**

**The Chancellor Erred in Not Awarding Jim Relief on his Motion for Modification.**

## **STATEMENT OF THE CASE**

A **Judgment of Divorce** was entered in this cause on April 29, 2004, wherein Rhonda H. Yelverton (hereinafter “Rhonda”) was granted a divorce from James B. Yelverton (hereinafter “Jim”), and was awarded custody of the two (2) minor children born of the parties. Jim was required to pay child support in the amount of \$2,500 per month, together with periodic alimony in the amount of \$2,500 per month, and lump-sum alimony in the total amount of \$250,000, payable at \$5,000 per month. (T 23) On July 26, 2004, a **Judgment on Complaint for Contempt** was entered wherein the Chancellor found Jim in arrears on child support and alimony in the amount of \$66,251.61. (RE 2, R 1) On August 12, 2004, Rhonda filed another **Complaint for Contempt and for Other Relief**, but said complaint was never heard. (RE 3, R 4) Thereafter, on or about August 20, 2004, Jim perfected his appeal to the Supreme Court of Mississippi on both the **Judgment of Divorce** and **Judgment on Complaint for Contempt**. That appeal is still pending before the Supreme Court of Mississippi. (No. 2004-CA-01684)

On December 20, 2005, Jim filed his **Motion for Modification** seeking to reduce his child support and periodic alimony payments as a result of his being terminated as general manager of Yelverton Mitsubishi. That motion was tried before the Chancellor on March 27, 2006. (RE 4, R 15) On June 7, 2006, the Chancellor entered a **Judgment on Complaint for Contempt and Motion for Modification**, finding that Jim had shown a material change in circumstances and was entitled to relief, but denied such relief since his hands were “unclean”. (RE 5, R 17) Jim perfects his appeal of said judgment.



## SUMMARY OF THE ARGUMENT

### **The Chancellor Erred in Not Awarding Jim Relief on his Motion for Modification**

The **Judgment of Divorce** entered in this cause required Jim to pay \$10,000 a month in child support and alimony. (T 23) Additionally, Jim was ordered to pay \$66,251.61 plus interest pursuant to the **Judgment on Complaint for Contempt** entered on July 26, 2004. (RE 2, R 1) In October of 2005, Jim was fired from Yelverton Mitsubishi, but was to be paid through December 31, 2005. (T 33, 92, RE 6, Ex 2) Since Jim did not have a high school degree or any other job training or skills, his only option was to seek gainful employment in the same industry. However, due to his ongoing divorce proceedings, he was denied employment with Turan Foley Motors on two separate occasions. (T 99-100) Jim, therefore, began selling used vehicles to individuals, but did not have a used car lot. (T 97) The business grossed \$3,000 - \$4,000 per month. (T 23, 96, RE 5, R 17, Ex 4) Financially unable to comply with the Court's ruling, Jim, in December of 2005, filed a **Motion for Modification**. (RE 4, R15) The Chancellor found that there had been a material change in circumstances, but denied Jim's request stating that Jim had "unclean hands". (RE 5, R 17)

Jim respectfully submits that the Chancellor manifestly abused his discretion in not granting Jim the relief sought.

## **ARGUMENT**

### **The Chancellor Erred in Not Awarding Jim Relief on his Motion for Modification.**

A **Judgment of Divorce** was entered in this cause on or about April 29, 2004, wherein Rhonda was granted a divorce from Jim, and was awarded custody of the two (2) minor children born of the parties. Jim was required to pay child support in the amount of \$2,500 per month, together with periodic alimony in the amount of \$2,500 per month, and lump-sum alimony in the total amount of \$250,000, payable at \$5,000 per month. (T 23) At the time of the divorce, the Chancellor found that Jim was “capable” of earning \$12,000 per month after taxes as general manager of Yelverton Mitsubishi, though his monthly salary was actually \$10,000, with a net of \$6,400. Approximately three months after the **Judgment of Divorce**, the Chancellor on July 26, 2004 entered a **Judgment on Complaint for Contempt** wherein the Chancellor found that Jim was in arrears on child support and alimony payments in the amount of \$66,251.61 plus interest. (RE 2, R 1) Financially unable to comply with the Court’s rulings and becoming more delinquent each month, Jim perfected his appeal to the Supreme Court of Mississippi on both the **Judgment of Divorce** and **Judgment on Complaint for Contempt**. That appeal is still pending before the Supreme Court of Mississippi. (No. 2004-CA-01684)

On or about August 12, 2004, only two weeks after the entry of the **Judgment on Complaint for Contempt**, Rhonda again filed a **Complaint for Contempt and for Other Relief**, alleging in part that Jim was again in contempt of court for failing to pay

the required child support and alimony. (RE 2, R 4) That complaint was not heard until Jim's **Motion for Modification** was tried on March 27, 2006.

In October 2005, without prior notice, Jim was terminated as general manager of Yelverton Mitsubishi. (T 91-92) As a result of that termination, Jim, on December 27, 2005 filed a **Motion for Modification**. (RE 4, R 15) In denying Jim's request for relief, the Chancellor stated:

As to the modification, James has shown a substantial and material change in his employment circumstances since the date of the Judgment of Divorce, in that his income has dropped approximately 60%. **If he had been current on his child support, and alimony, this Court would not hesitate to grant him the relief requested.** Even if not current on his child support, if he had shown a good faith effort to comply with the prior instruction of this Court, he would arguably be entitled to the relief requested. The proof at trial however, indicated that he is substantially in arrears, and has made no effort to correct the deficiency. Most troubling about his behavior to this Court is that James received such a significant tax refund for 2005, 70-75% of which he would attribute to his earnings (or, approximately \$25,000) and did absolutely nothing to assist Rhonda or his children.  
(emphasis added)

(RE 5, R 17)

The Chancellor was correct in finding that Jim's income had substantially decreased and that Jim had shown a material change in circumstances. However, the Chancellor was in error in finding that Jim had not shown good faith in trying to comply with prior instructions of the Court. Prior to his termination, Jim's net wages of \$6,400 were being garnished, and Rhonda was paid \$3,200 per month through such garnishment. (T 22-23, 92) In October of 2005, Jim was fired as general manager of

Yelverton Mitsubishi but was paid through December 31, 2005. (T 33, 92, RE 6, Ex 2)

After notice of his termination, Jim immediately sought other employment. Since he did not have a high school degree or any other job training or skills, his only option was to seek employment in the same industry. He applied for employment with a former partner, Turan Foley Motors, on two separate occasions, but was denied due to his on going divorce proceedings. (T 99-100) He subsequently began selling used vehicles to individuals without the benefit of a used car lot. (T 97) Such business grossed \$3,000-\$4,000 per month. (T 23, 96, RE 5, R 17, Ex 4)

Jim further testified that he owned no house, vehicle, or other asset other than the few older model vehicles he purchased for resale. (T 24, 32, 41, 50, 97, 98, 104, Ex 4) Further, he had no checking, savings, or retirement account or any other such investment. (T 55, 98, 105)

With regards to the tax refund, James testified that he and his current wife, Tracy, received a \$34,000 joint tax refund for 2005 which was in part due to the damage she received from Hurricane Katrina. (T 94-95) James recognized that half of the joint refund belonged to Tracy, which left him approximately \$17,000. *Id.* Of that amount, James paid his attorney \$7,500 for his 2004 appeal to the Supreme Court and used some of the remaining funds for living expenses and to purchase inventory for his used car business. (T 95) He testified that he had approximately \$4,000 left which he offered to pay, and did pay, to Rhonda. (T 100, 111)

The Chancellor was in error in ruling that he could not grant Jim relief since he

was in arrears. The Supreme Court of Mississippi has held that a modification should be granted even if the petitioner has not complied with the former judgment of the court if **performance of said judgment has been wholly impossible.** *Kincaid v. Kincaid*, 57 So.2d 263 (Miss. 1952), and *Cregg v. Montgomery*, 587 So.2d 928 (Miss. 1991). Jim has made a clear showing that he is incapable of paying the amounts the Chancellor previously ordered.

In *Setser vs. Piazza*, 644 So.2d 1211 (Miss. 1994), this Court held that a father should not be held in contempt for failure to pay child support where the father's financial condition changed, and he promptly filed for a modification." In *Setser*, the husband filed for a petition for abatement due to Hurricane Andrew destroying all of his property and limiting his ability to earn income. This Court held that the husband's "proof supported his impossibility of performance ....(and that) the chancellor was manifestly in error in failing to abate his obligation for child support and in finding that he had unclean hands." *Id.*

In *Parker vs. Parker*, 645 So.2d 1327 (Miss. 1994), this Court held that when the payor spouse is terminated from his employment, the loss of income is a substantial change in circumstances which justifies a modification of child support. As in *Setser* and *Parker*, it is impossible for Jim to comply with the Chancellor's ruling.

On the other hand, since the entry of the Judgment of Divorce, Rhonda's financial position has improved substantially. Rhonda received \$70,000 from the sale of the house and lot and is presently earning approximately \$44,000 per year. (T 65, 85) She had

recently purchased a nice home and a \$38,000 Mercedes SUV. (T 65, 71) Further, Blake, their sixteen year old son, was working at Wing Stop approximately 10-20 hours per week at \$10 per hour. (T 117) Such income by Blake should be considered in determining the amount of child support needed for him.

While the Chancellor may have been frustrated with Jim for not complying with his earlier rulings, it was apparent that such failure was not intentional, but due to Jim's inability. The Judgment of Divorce ordered Jim to pay \$10,000 per month, though he only netted \$6,400. (T 23) His wages were being garnished, and approximately \$3,200 a month was being paid to Rhonda. *Id.* It became readily apparent that Jim was going to continue to get further in arrears through no fault of his own, unless he was granted some relief. Jim's arrearage continued to climb \$6,800 a month even while he was employed with Yelverton Mitsubishi. The Chancellor in his **Judgment of Divorce** made it impossible for Jim to comply with the Court's ruling, and left Jim in a vicious circle from which he could not extricate himself. The Chancellor's refusal to grant relief after acknowledging Jim's material change in circumstances was a manifest abuse of discretion.

Though Jim was behind in his payments due to his inability to pay same, the Chancellor could have entered a judgment against him for the arrearages, thereby "cleansing" Jim's hands to pursue the requested relief. The law is well settled in this state that an individual can be granted relief even though he may be in arrears. A judgment "cleanses" hands, and allows the petitioner to present his request for

modification. *Brennan v. Brennan*, 605 So.2d 749 (Miss. 1992), *Lane v. Lane*, 850 So.2d 122 (Miss. App. 2002), *Howard vs. Howard*, 913 So.2d 1030 (Miss. App. 2005). Jim respectfully submits that the Chancellor manifestly abused his discretion in not granting him the requested relief.

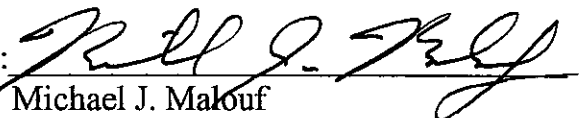
## CONCLUSION

For the above and foregoing reasons, Jim respectfully requests that the judgment of the lower court be reversed.

RESPECTFULLY SUBMITTED this the 21<sup>st</sup> day of March, 2007.

JAMES B. YELVERTON, Appellant

BY:

  
Michael J. Malouf

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**CERTIFICATE OF SERVICE**

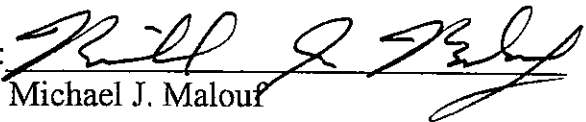
I, Michael J. Malouf, Attorney for Appellant, do hereby certify that I have this day mailed, by U. S. Mail, first-class postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLANT to the following:

Honorable Carter Bise  
Harrison County Chancellor  
P. O. Box 1542  
Gulfport, MS 39502

D. Scott Gibson, Esq.  
P.O. Box 208  
Gulfport, Mississippi 39502-0208

DATED this the 21<sup>st</sup> day of March, 2007.

JAMES B. YELVERTON, Appellant

BY:   
Michael J. Malouf

