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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ANGELA WILBANKS COSSITT

APPELLANT

V.

CASE ~~No.~~ 2006-CA-02087

JOHNNY KEVIN COSSIITT

APPELLEE

FILED

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BRIEF OF APPELLANT

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ANGELA WILBANKS COSSITT

APPELLANT

V.

CASE NO. 2006-TS-02087

JOHNNY KEVIN COSSITT

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

ATTORNEYS:

Charles R. Wilbanks, Sr., P. O. Box 8020, Kossuth, MS 38834, 662-287-5009.
Hon. John Robert White, P. O. Box 824, Ridgeland, MS 39158, 601-605-9811.

PARTIES:

Angela Wilbanks Cossitt, 605 David Street, Clinton, MS 39056, Appellant.
Johnny Kevin Cossitt, Biloxi, MS, Appellee.

CHILDREN:

Molly Ann Cossitt, 608 University Dr., Starkville, MS 39759
Ashley Lauren Cossitt, P. O. Box PH, MSU, MS 39762.

SO CERTIFIED, this the 23rd day of MARCH, 2007.

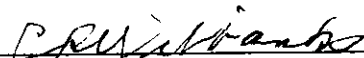

Charles R. Wilbanks, Sr.

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ANGELA WILBANKS COSSITT

PLAINTIFF

V.

Civil Action No. 2006-TS-02087 S/2

JOHNNY KEVIN COSSITT

DEFENDANT

STATEMENT OF THE ISSUES

Angela Wilbanks Cossitt, Appellant hereinafter referred as “Angie” does hereby state the Issues in this action she plans to present on appeal, against the Appellee, Johnny Kevin Cossitt, hereinafter referred to as “Kevin”, are as follows:

1) The Trial Court abused it’s discretion in failing to find Kevin in contempt of Court for failing to report his correct income to the Court as required by the Temporary Order of the Trial Court.

2) The Trial Court abused it’s discretion in failing to find Kevin in contempt of Court for altering his pay check stubs to conceal his refusal to pay child support timely, as the Trial Court’s Order required.

3) The Trial Court abused it’s discretion in failing to find Kevin in contempt of Court for failure to secure full coverage health insurance for his minor children, and abused it’s discretion in failing to enter a Judgment in favor of Angie for the correct amount she had paid for the daughter’s health insurance, due to Kevin’s refusal to secure full coverage health insurance, and further abused its discretion by failing to allow Angie to maintain health insurance on the children, while requiring Kevin to reimburse Angie for the

premiums.

4) The Trial Court abused it's discretion in failing to find Kevin in contempt of Court for interfering with and violating the privacy of Angie as forbidden by the Order of the Trial Court.

5) The Trial Court abused it's discretion in failing to render a judgment against Kevin and in favor of Angie for past college expenses. The Trial Court abused it's discretion by releasing Kevin from any past and future college expenses for his children, or failing to award an increase in child support to assist with college expenses; and, overruling Angie's motion to make the college grades of the daughters, received after the hearing, a part of the record.

6) The Trial Court abused it's discretion in failing to restrict the e-mail communications of Kevin with his children.

7) The Trial Court abused it's discretion by refusing to allow attorney fees against Kevin for Angie's attorney.

8) The Trial Court abused it's discretion by failing to render a judgment against Kevin and in favor of Angie for the cost of the car insurance deductible required to be paid as a result of the damages caused by an accident, to their daughter's car.

Respectfully Submitted,

/s/

Charles R. Wilbanks, Sr.

Attorney for Appellant; Bar No. 7192

P. O. Box 8020

Kossuth, MS 38834

662-287-5009

CERTIFICATE OF SERVICE

I, Charles R. Wilbanks, Sr., do hereby certify that I have this day mailed by U. S. Mail, postage prepaid a true and correct copy of the foregoing Statement of the Issues to: Hon. John Robert White, P. O. Box 824, Ridgeland, MS 39158.

SO CERTIFIED, this the 11th day of December, 2006.

/s/ _____
Charles R. Wilbanks, Sr.

STATEMENT OF THE CASE

This case comes to this Appellate Court after an adverse decision upon a Petition filed by Angela Wilbanks Cossitt, Appellant, (hereinafter referred to as "Angie") seeking to cite Johnny Kevin Cossitt, Appellee, (hereinafter referred to as "Kevin") for contempt of Court for his failure to report his substantial increase in income to the Court, failure to pay child support timely, failure to secure health insurance for his minor children, interfering with and violating the privacy of Angie, failure to pay college expenses for his minor children, seeking a Judgment against Kevin for back child support, health insurance premiums, College expenses for minor children, attorney fees and damages sustained by an automobile accident by one of the minor children and seeking to terminate any of Kevin's future indecent emails to his daughters.

The Chancellor who granted the divorce recused himself for reasons unknown to Counsel and the hearing on the merits was delayed for several months. The case was tried by the substituted Chancellor in the First District, Hinds County, Mississippi. The Chancellor found that Kevin had violated the Trial Court Order four (4) times and even though Kevin made no attempt to explain his violations, the Trial Court did not find Kevin in contempt of Court. The Trial Court did not require Kevin to prove he had in effect Health Insurance for his children and did not render a judgment against Kevin for the full amount of Insurance premiums Angie had paid because of Kevin's failure to secure health insurance. The Trial Court rendered an insufficient judgment against Kevin for college expenses for his children, and released Kevin from the requirement to pay any future college expenses. The Trial Court did not allow Angie's Counsel attorney fees, and referred to Kevin's indecent emails as a joke.

SUMMARY OF THE ARGUMENT

1) FAILURE TO REPORT INCREASE IN WAGES: Kevin was required to report a substantial increase in his wages in excess of his reported adjusted gross income of \$797.00 per month to the Trial Court by the Temporary Order of the Court, prior to the divorce being granted, if such increase occurred prior to the divorce being granted. Kevin failed and/or refused to make the report and the Trial Court should have found him in contempt of court, which the Trial Court failed to do.

2) PAYING CHILD SUPPORT TIMELY: Kevin was required by the Final Judgment to pay twenty-two percent (22%) of his wages as child support on a “monthly” basis and to provide Angie with a copy of his pay check stub. Kevin used the income he received on a bi-weekly basis to pay child support on a semi-monthly basis, applying any third paycheck he received to following months. Kevin fell further and further behind on child support. Angie called his delinquency to his attention, but Kevin responded by putting liquid paper over the deposit date of his check stub, so that Angie could not determine the date of deposit. Kevin did not bring his child support current until a substantial time after the complaint to cite him for contempt was filed and he was served with process. The Trial Court had the discretion to find that Kevin had purged himself by bringing his child support payments current after suit was filed. However, the Trial Court should have found him in contempt for willfully concealing the dates he received his wages.

3) FAILURE TO SECURE FULL COVERAGE HEALTH INSURANCE

COVERAGE FOR THE MINOR CHILDREN: The Final Judgment of Divorce required Kevin to secure Full Coverage Health Insurance for his minor children effective August 1, 2003. Kevin did not do so, and gave as an excuse that he did not know what “unable” meant. After several months without insurance on the children, on March 1, 2004, Angie secured insurance through her employer to cover the children. Kevin was requested to reimburse her for the premiums and, off and on, for a few months, Kevin paid one-half (1/2) of the premiums. As of October 1, 2004, Kevin agreed to reimburse the whole premium for the insurance or provide full coverage. The Trial Court abused it’s discretion by failing to grant Angie a judgment for the full amount of premiums she had paid and would pay in the future and failing to find Kevin in contempt of court for his failure to secure full coverage insurance for his children. The Trial Court also abused it’s discretion by failing to require Kevin to prove that he presently has insurance, and that the insurance, if any, is full coverage.

4) **VIOLATING PRIVACY AND MOLESTING ANGIE:** The final Judgment enjoined both parties from violating the privacy or molesting the other. In emails, Kevin accused Angie of “lying and distorting the truth”, “fraud”, “embezzlement”, “profiterring”, and “misdemeanors”. Kevin told Angie that she had psychological problems and needed help; that she was “bitching, whining and complaining”. Kevin warned Angie “not to go there”, “ choose your words carefully” and Kevin professed that

God was on his side and that Angie did not know God. When Kevin refused to reimburse Angie for one-half (1/2) of the daughters' car tags for approximately seven (7) months, Angie, in frustration called Kevin an a—hole. The Trial Court abused its discretion in equating the actions of both parties and failing to find Kevin in contempt of court.

5) COLLEGE EXPENSE: The Final Judgment provided that the daughters of the parties were required to maintain a 2.0 G.P.A in college. Neither of the daughters attained 2.0 in their first semesters, but, thereafter, did have a 2.0 average. The Trial Court abused its discretion by refusing to sustain Angie's motion to place in the record further grades of the daughters pursuant to Rule 10 (e) and (f) MRCP, after the hearing had concluded. The Trial Court abused its discretion by terminating Kevin's responsibilities for past and future college expenses. The Trial Court should have held that the Final Judgment should be interpreted, that the daughters could not be held to have failed to "maintain" a 2.0 average until they had attained a 2.0 G.P.A., or in the alternative, that Kevin could be relieved of colleges expenses until the daughters had attained a 2.0 GPA, or in a second alternative, increased child support to assist with college expenses.

6) RESTRICTING EMAILS OF KEVIN TO HIS DAUGHTERS— The sending of indecent emails from Kevin to his teenage daughters was justification for the court to require Kevin to send copies of all future emails, sent by Kevin to his daughters, to Angie.

7) ATTORNEY FEES- The Trial Court abused its discretion in failing to allow Angie's counsel reasonable attorney fees.

8) DAMAGES TO A DAUGHTER'S CAR- Kevin only pays one-half (1/2) of the premium for the minimum liability for the daughters' cars. Angie elects to pay the premium for additional liability and the full premium for the collision and comprehensive coverage. Ashley was in an accident in her car and the Insurance Company paid all except \$1000.00 deductible. Kevin paid \$500.00 but refused to pay the remaining \$500.00, all of which would be less than one-half (1/2) of the damages to the car. The Trial Court abused its discretion in refusing to allow Angie to take credit for the Collision Insurance for which she pays the premiums, and require Kevin to pay the \$1000.00 deductible, which is less than one-half (1/2) of the costs of damages to the car.

STATEMENT OF FACTS - FAILURE TO REPORT INCREASE IN INCOME

The Amended Temporary Order entered on February 13, 2003, five (5) months prior to the entry of the Final Judgment of Divorce (July 3, 2003), found that Kevin's adjusted gross income was \$797.50 per month (also see Ex 4), and that the application of the guidelines would be unjust and inappropriate. The Court set the child support at \$400.00 per month or 22% of Kevin's adjusted gross income, whichever was greater. The Trial Court then held that "If Johnny Kevin Cossitt's income increases to a point where he shall increase his monthly child support pursuant to this Temporary Order, he shall be required to immediately report that increase to the Court" (R. p. 1&2).

Kevin testified that he was aware of the requirement to report his increased income to the Court (T. p3, L 15-19), and finally admitted that his two-week check deposited to his account on June 2, 2003 was \$958.66; that his two-week check deposited June 16, 2003

was \$1693.08; and that his two-week check deposited on June 30, 2003 was \$1875.04 and that his income at the time of the divorce was granted on July 3, 2003, was over \$3500.00. (T. p5, L9-28). Kevin reluctantly admitted that he did not report his increase in income to the Court as required by the Court's Amended Temporary Order.(T. p7, L 5-7)

ARGUMENT- FAILURE TO REPORT INCREASE IN INCOME

When Kevin violated the Court's Temporary Order that required him to report a substantial increase in income, a prima facie case of contempt has been established. *McIntosh v. Department of Human Services*, 886 So. 2d 721 (Miss 2004); *Guthrie v. Gurhrie*, 537 So. 2d 886 (Miss 1989). The burden then shifts to Kevin to show by clear and convincing evidence an inability to comply with the Order or other defense. *Shelton v. Shelton*, 653 So. 2d 286; *Watkins v. Watkins*, 2006 So. 2d (2005-CA-00257-COA) (Miss. 2005).

The Trial Court abused it's discretion, when it held that Angie, under the circumstances of this case, had to prove by clear and convincing evidence that Kevin was in willful contempt of court. The secret intentions of Kevin would be impossible to prove. The Trial Court cited *Allred v. Allred*, 753 So. 2d 1064 (Miss 1999) and *Masonite Corp. v. International Woodworkers of Am.*, 206 So. 2d 171 (Miss 1967) for the proposition that "An adjudication of contempt is a serious matter and must, in the case of civil contempt, be proven by clear and convincing evidence." In both cases cited by the Trial Court the questions were:

- 1) What did the Order require or forbid,

- 2) Who was required or forbidden to do the acts; and,
- 3) Did the person covered by the Order violate the Order.

The holdings in the Masonite and Allred cases have no application here. The proof was not merely clear and convincing, but absolute that:

- 1) The Temporary Order required a report of a substantial increase in his wages to the Court.

- 2) Kevin was required to make that report; and,

- 3) Kevin failed to make the report required by the Temporary Order.

Kevin made no effort to prove his inability to make the report to the Court and the Trial Court abused its discretion in failing to find Kevin in contempt for failure to report his substantial increase in wages as required by the Court's Temporary Order. The Trial Court hearing the Divorce, having set the support at \$400.00 per month, being over 50% of Kevin's stated wages, and having found that the guidelines were inappropriate, could have set the support at \$1,000.00, which would have been only 30% of his adjusted gross income, and would have benefited these children greatly.

STATEMENT OF FACTS – CHILD SUPPORT

The Final Judgment of Divorce directed Kevin to pay \$400.00 per month, or 22% of his adjusted gross income, whichever is greater, and with each payment Kevin was directed to include a copy of his pay check stub to Angie as assurance that he was paying the appropriate percentage of his adjusted gross income. (R. p 12). Angie and Kevin in their agreement (which became a part of the Final Judgment of divorce) acknowledged that the support order would only cover a very small percent of the minor children's

living expenses. (R. p 13). The Judgment of Divorce further required Kevin to provide Angie a copy of his paycheck each time he mailed his child support payment to Angie.

On June 15, 2004, Angie sent Kevin an e-mail saying, "you sent me a check stub for pay period ending 5/9/04 deposited 5/17/04. It is my understanding that you are to be sending 22% of your current pay check twice each month".

Kevin admitted that on each paycheck he sent to Angie, there was a deposit date on each until Angie wrote him the e-mail on June 15, 2004, and that, he put liquid paper over the date on all subsequent stubs so that Angie could not determine the date of deposit. (T p 37 L 22 – p 38, L16).

Although, Kevin had represented his income in July 2003 to be \$10,000.00 gross, his income tax returns revealed that his gross income was as follows: 2003 - \$36,086.00; 2004 - \$47,407.00 and 2005 - \$47,248.00. (Ex 25). Although, he had taken Temporary jobs after Katrina, he would be going back to work on August, 29, 2006. (T p 25, L 6-11).

Serious doubt was raised that Kevin was actually paying the correct percent of his income as child support. Kevin had reported to Angie that he received \$199.04 in tips, delivering pizzas for Dominos Pizza, but on his 2004 Income tax return, he showed unreported tips in the amount of \$778.00. Adding both together is \$977.04. His pay check stubs disclosed that he worked 1088.92 hours in 2004, delivering pizzas, and that his tips averages .90c per hour, or it took him 1 hour and 6 minutes to receive a \$1 tip. (T p 152, L 12 – p 153, L 8).

While Kevin was avoiding Full-time work (T 33, L 25 – p34, L28), Angie changed jobs increasing her wages from \$22,000.00 per year to \$38,000, with extra jobs at night and on weekends all to help her girls. Angie agreed that the expenses for the girls at

home had reduced from approximately \$2800.00 per month to approximately \$2000.00 per month. (T p 145 L 19 – p 146 L25). However, with two (2) girls now in college the overall expenses for the daughters had increased \$25,101.75 for the costs of six (6) semesters of college (T p 147, L 22-24). Angie testified that Kevin's failure to pay the full amount of child support, failure to provide health insurance for the daughters, as he had been directed by the Court to do and, his paying only 8% of the daughter's college expenses, had caused her and the girls to suffer financially. (T p 153 L 29 – p 154 L 10)

ARGUMENT- CHILD SUPPORT

We would not bring the Trial Court's decision into question, if the Court had found that Kevin purged himself of contempt, for failure to pay child support timely by bringing his child support payments current after the Complaint was filed. However, to approve Kevin's actions of purposely concealing the deposit dates on his check stubs in defiance of the Court's Final Judgment and defeating the very purpose of the Final Judgment is an abuse of the Trial Court's discretion and sends the wrong message.

When Kevin covered the deposit dates on the check stubs that he sent Angie, there could be no purpose for his actions, except to willfully defeat the purpose of the Final Judgment. Clearly, the Trial Court, by its Final Judgment, required Kevin to send Angie copies of his pay check stubs, so that Angie would know if Kevin was paying the correct amount of child support and to assure that the Final Judgment as to child support would be followed by Kevin. In this instance, even the secret intentions of Kevin are clearly shown.

The cases of McIntosh v. Department of Human Services, *supra*, and Guthrie v. Guthrie, *supra*, hold that a *prima facie* case of contempt has been established, and the

cases of *Shelton v. Shelton*, supra, and *Watkins v. Watkins*, supra, hold that the burden shifts to Kevin to prove by clear and convincing evidence an inability to comply or other reasonable defense, which he did not and could not do.

STATEMENT OF FACTS – FULL COVERAGE HEALTH INSURANCE

The Final Judgment of Divorce entered on July 3, 2003 required Kevin, beginning August 1, 2003, to provide full medical coverage for his daughters, and that “husband will provide wife with a copy of the health insurance policy”. (R. p 7)

Kevin has never provided the policy prior to March 1, 2004, even though Angie Brought his failure to secure the insurance to Kevin’s attention on several occasions. Kevin never said before the hearing in this case that he could not afford the insurance. (T. p158, L 2-14) Because Kevin had failed and refused to provide insurance, and Angie could not have afforded to pay a large medical bill, Angie on March 1, 2004 insured the girls through her employment at a cost of \$204.78 per month. The costs of Insurance had increased to \$275.00 per month, when Angie moved to a new job location, with Hon. Mike Moore. The cost of the insurance was \$5464.72 to the date of the hearing and Kevin had, off and on, paid a total of \$1126.00 (T. p 158, L 21 – p 160, L 7). The Trial Court held that Angie had paid \$3276.48 through July 2005, and entered a judgment against Kevin for that amount, less \$1126.00, for a total of \$2150.48, when the correct amount should have been \$5464.72, less \$1126.00, or \$4338.72. (R. p. 119)

Kevin alleged that he made attempts to get insurance, but not until the Petition in this case was filed (T p. 164, L 5-8), and not until July, 2005. The alleged insurance was supposedly through his new wife’s insurer at her employment at a Louisiana

school. (T. p 160, L 26-29). No Policy was delivered to Angie and Angie raised the questions: If a step mother could insure step children who did not reside with her, and if there was a network that would substantially reduce benefits in the vicinity where the daughter attend school and in the vicinity of their home. Angie was told there was a network, but never received insurance cards, nor an insurance policy. (T p 161, L 3-16). In approximately one month Kevin says he switched the girl's coverage to his employment at Beau Rivage. Angie received insurance cards sometime in October, 2005, but no policy, at which time Kevin advised that the Insurance would expire on December 31, 2005. (T p. 161, L21) Kevin, next says he insured the girls, again, through his wife's Louisiana insurance policy, but again, no cards were delivered, and no policy was delivered, as required by the provisions of the Final Judgment of Divorce. (T p 162 L.13-23). Angie was not sure that there was ever insurance on the girls. If there was she did not know if it was full coverage and, therefore, determined that her interest and the daughter's interest would be best served to maintain her insurance for the girls. (T p 163 L 22-26).

The hearing in this case was heard first on April 3, 2006, and concluded on May 2, 2006, near the end of Kevin's cross examination, (T p 136, L23- p 137, L19), Kevin was asked to provide a copy of the girl's insurance policy, so that there would be proof that the girls were covered and fully covered as required by the Final Judgment of divorce. His reply was that he did not have the policy. At the second hearing on May 2, 2006, Lori Cossitt, step mother of the daughters, presented one (1) page with UnitedHealthcare printed at the top, with Molly and Ashley's name appearing thereon. (Ex 32). The step mother also presented insurance cards with Molly and Ashley's name thereon. (Ex 33).

There remains no delivery of a policy to Angie and thus, no information about the extent of the alleged Coverage, and it is not now known if there is insurance on the daughters, other than Angie's policy, which can be seen as Exhibit 26.

ARGUMENT- FULL COVERAGE HEALTH INSURANCE

Kevin was ordered by the Final Judgment to secure full coverage health insurance effective August 1, 2003 for his children. By March 1, 2004, he had not done so and Angie covered the children at her employment at a cost of \$204.78 per month. Off and on, Kevin paid one-half (1/2) the premiums and agreed to reimburse Angie the full premiums each month on and after October, 1, 2004, or he would cover the children at his employment. Kevin did neither.

After the complaint in this action was filed, Kevin allegedly made efforts to secure Health insurance for his children saying he had his children covered at his wife's employment, then at his employment, and then back at his wife's employment, and now at his employment, but never delivering a policy so that it could be determined that there really was insurance and that it was "full coverage" as required by the Final Judgment.

The Trial Court held that Angie was dissatisfied with Kevin's insurance coverage and she maintained the insurance on the children at her employment, as though it was her choice. The final Judgment had required Kevin to produce a policy, so that it could be determined that there was coverage and that the coverage amounted to full coverage. Kevin never furnished a copy of any alleged policy and Angie had no choice except to maintain the children on her insurance. After Kevin alleges he secured insurance on the children, he was questioned about whether it was full coverage, and after several

inquiries, Kevin admitted that Clinton, where the daughters live, and Starkville, where the daughters attended college was out of the network, but Kevin would never produce documents showing the percent the policy would pay for out-of-network claimants.

The Trial Court only required Kevin to reimburse Angie for the premiums she had paid for the daughter's insurance through July 2005, which is the date Kevin claimed he had secured insurance. The Trial Court did not even require Kevin to reimburse all the premiums Angie had paid after October 1, 2004, as Kevin had agreed, in writing, to do. In addition, the Trial Court failed to find Kevin in contempt of court, although, the Trial Court correctly found that Kevin was required to provide full coverage health insurance for his children; found that Kevin was capable of providing the insurance; and, found that the requirement to provide insurance was not conditioned upon the availability of employment related insurance.

There are ample authorities which require Kevin to reimburse Angie for the premiums she was forced to pay. See: *Langdon v. Langdon*, 2003 2d (2001-CA-01077) (Miss 2003) and *Peters v. Ridgely*, 797 So. 2d 1020 (Miss 2001).

Again, we believe the Trial Court had no choice except to find Kevin in contempt of court because it is not believable that Kevin understood the Final Judgment to give him an option to provide insurance or pay seventy-five percent (75%) of the medical bills. Although, Kevin testified at the hearing that he could not afford insurance on the general market, the Trial Court found differently, and the case of *Varner v. Varner*, 666 So 2d 493 held that if an inability to pay is raised as a defense, the burden is on him to show this with particularity, not just in general terms.

The Trial Court's decision, from which this appeal is taken, requiring Kevin to, again,

deliver a policy to Angie, has no value in solving the lack of assurance that the daughters are covered with health insurance. Where does the Trial Court's Order leave Angie and the daughters? 1) Angie must keep her insurance on the daughters in effect until she can be reasonably satisfied that Kevin has the daughters covered, or run the risk of incurring a medical bill she cannot pay. The record establishes that Angie cannot afford to pay fifty percent (50%) of a medical bill after an Insurance Company has paid between one percent (1%) to eighty (80%) of a medical bill, assuming there is coverage. 2) If Kevin elects not to comply, or if his coverage, if any, is less than full coverage, the effect of this second order requiring that he produce a policy, leaves Angie with her only choice, to file another complaint, which is no choice, at all.

STATEMENT OF FACTS VIOLATING PRIVACY AND MOLESTING ANGIE

The Final Judgment of Divorce provides that "each shall be free from interference, authority, control, direct or indirect, by the other----- the parties shall not molest or interfere with each other----- each party shall respect the privacy of the other."

Kevin sent e-mails to Angie saying: "I Don't trust you", "be careful with the words you use", "what the hell are you talking about, withholding money", choose your words carefully", "whining and complaining", lying and distorting the truth", "faster than a lawyer chases an ambulance", "BS about car tags, your legal team screwed up, I caught it", "stop bitching about it", "God has me where he wants me", "your are desperate, get some help", "lie and distort the truth", "attempted fraud", "fraud, embezzlement and profiteering". (T p 26 L 10 – p. 29 L 9). Angie, on one occasion called Kevin an "a—hole", when he would not pay the costs of the daughter's car tags for several months, and

when Angie was in desperate need of the money. (T p 29 L 9 – p. 31 L 6).

The Trial Court held that both parties had used questionable language and that Kevin should not be held in contempt of court. (R p. 120).

ARGUMENT VIOLATING PRIVACY AND MOLESTING ANGIE

Kevin kept up a constant barrage of harassment, belittlement and accusations of violations of the law. Angie should be given some relief from Kevin's onslaught, and cannot go anywhere for relief, except to the Court. It is not an abuse of discretion to Order Kevin to cease his harassment, and it is an abuse of discretion to fail to do so, under the circumstances of this case. Hill v. Gray, 2004 So. 2d. (2002-CA-02106-SCT)

STATEMENT OF FACTS – COLLEGE EXPENSES

The Final Judgment of Divorce provides that Husband and wife will be responsible for and shall pay one-half (1/2) of all reasonable and necessary costs of a college education----- that each shall maintain full time college status and maintain a 2.0 Grade Point Average. Reasonable and necessary is defined as all tuition, books, the costs of on-campus housing, and such other costs as may be necessary for the minor children's College education. ----- Husband and Wife's obligations shall extend until the child obtains such a degree. (R p. 14).

The Trial Court reduced the costs of college for a year to approximately \$9,000.00, when the estimate from MSU was over \$13,000.00 (Ex 27 & 28) and Angie's costs were just under \$13,000.00. (Ex 29). Although, Angie and the daughters worked to secure as many scholarships as possible, the Trial Court did not allow the daughters to use any of

the proceeds to pay for those things Kevin had refused to pay for and gave Kevin credit for all scholarships and grants.(R p. 122).

In addition, the Trial Court unconditionally released Kevin from payment of any further College expenses for the daughters, because the girls failed to attain a 2.0 average each of their first semesters in college. The Trial Court further failed to condition Kevin's release of obligations to pay college expenses upon the daughter's regaining a 2.0 average, and further failed to increase child support to assist with college expenses. It is not understood how the Trial Court could release Kevin, and put the entire responsibility of college on Angie. (R p 122-123). Including support from Kevin, eighty-seven percent (87%) of Angie's income went to the support of the girls at home and college.

The Trial Court did not consider that both Molly and Ashley had recently gone through their parent's divorce; that they had left home and experienced college for the first time; and, that they had gone to a new and different environment. The Trial Court did not make any allowance that Molly had become depressed, lost her self esteem, had been diagnosed with Attention Deficit Disorder; that she had been to counseling on two occasions; that Kevin refused to support and encourage her and Kevin subpoenaed Molly three (3) months prior to the hearing in this case, disrupting her school. (T p 168 L 17 -- p 169, L 26). The Trial further failed to consider that Molly has raised her GPA, after the fall semester to 2.23 by attending community college.

The Trial Court did not consider that Ashley was a high achiever and had maintained almost a 4.0 GPA at Clinton High School, had been given academic awards and that she was just overwhelmed her first semester in college. (T p. 171, L 26).

The Trial Court denied Angie's motion to allow consideration of the daughter's grades at the end of the semester that was ongoing at the time of the hearing. Ashley had made 3-A's and 1-B. Molly has improved by making 2-A's, 1-C & 1-D. (R p. 126).

ARGUMENT – COLLEGE EXPENSES

When the parties agreed to pay one-half (1/2) of the colleges expenses for their daughters, there is no question that both parties were agreeing to help pay for their daughters college education, if the daughter's had the ability to do college work. Neither girl attained a 2.0 GPA their first semester, but thereafter, did attain and has maintained a 2.0 GPA and above at the time of the hearing. After the hearing was concluded, Angie moved the Trial Court, pursuant of Rule 10 (e) and (f), MRCP to admit into evidence, the grades of the daughters for the semester ending after the hearing was concluded showing that their grades had continued to improve and was in excess of a 2.0 GPA. The Court abused it discretion by refusing to allow their said grades to be made a part of the record.

The Separation Agreement, in stating that the daughters were required to maintain a 2.0 GPA, was merely saying, "if they have the ability and successfully do the work, then the parents obligation would continue". It was certainly not the intentions of the parties to refuse to participate, only upon some letter of the agreement which when read technically might relieve them of their obligation. The Trial Court should have kept in mind that if Kevin were released from his responsibilities, Angie must bear the costs completely. In *Holloman v. Holloman*, 691 So. 2d 897 (Miss 1996), the Court found that in determining the intentions of the parties, the Court would look to the document as a whole. Also, see *Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416 (Miss. 1987).

The Trial Court abused its discretion by ignoring the evidence that these girls had just gone through the divorce of their parents; that Kevin, their father, had discouraged them by refusing to support their college efforts; that the daughters were making a significant transition in their lives by moving away from home and going from high school to a senior college. In addition, technically reading the Agreement of the parties as the Trial Court evidently did, it is impossible to “maintain” a 2.0 GPA until a 2.0 GPA is attained. In fact, “maintain” infers some period of time in which the child has the opportunity to maintain a 2.0 GPA.

The Trial Court could have interpreted the Agreement to say that Kevin had no obligation to provide payment for college expenses so long as the daughters did not have a 2.0 GPA, but if they attained and maintain a 2.0 GPA, then he would again be responsible. Such an interpretation would have been fairer to Angie, and would have promoted the best interest of the children.

Another alternative the Trial Court could have considered, was to modify the Final Judgment and require Kevin to provide the means for a college education for his children. *Pass v. Pass*, 118 So. 2d 769 (Miss 1960), or increase child support to assist with the college expenses, *Fancher v. Pell*, 831 So.2d 1137, (Miss. 2002).

When the Trial Court failed to follow either of the alternatives it had available, and did not look to the best interest of the children, the Trial Court’s discretion was abused.

STATEMENT OF FACTS – INDECENT EMAILS

Kevin sent to his teenage daughters indecent emails (Ex 2), at a time when one (1) daughter was a freshman in college, and the other daughter was in high school, and both

were teenagers. The Trial Court found that the daughters were college age (R p. 124), which implies that they were either adults or near being adults. The Trial Court indicated that the emails were a joke, and refused to place any restriction on Kevin's future emails to his daughters. (R p. 124)

ARGUMENT-INDECENT EMAILS

It is our position that the emails were indecent to have been sent from anyone to anyone else, and it was perverted for a father to send such emails to his teenage daughters. The message sent by Kevin to his daughters was that sex was a game that anyone could play without consequences. Angie only asked the Trial Court to require Kevin to send a copy of any future emails, sent to his daughters, to Angie in order to prevent another occurrence. No harm could come from such a slight restriction. It is our position that the Trial Court should have done what is in the best interests of the children. The case of *Romans v. Fulgham*, 2006 So. 2d (2005-CA-00873-COA), along with many other cases, hold that restricting visitation with the child is primarily a question of the best interest of the child. We believe that the same rule applies to contact with children and that the Trail Court abused it's discretion by failing to restrict, in any manner, Kevin's emails to his Daughters.

STATEMENT OF FACTS – ATTORNEY FEES

The Trial Court based its denial of Attorney fees in favor of Angie on either irrelevant facts or incorrect facts as: Angie was represent by her father, her father had initially chose to represent her without charge, so that Kevin's funds could all benefit the children; that

Angie was able to pay her attorney fee. (R p. 124-125). The only mention that Angie's father would represent her without charge, was when he said he was hopeful that he could do so, but could not because of Kevin and his attorney's failing to cooperate in discover. (R p. 40).

The Trial Court overlooked a factor that was most favorable to attorney fees being allowed to Angie's attorney. The Petition for Citation for Contempt and Modification, (R p. 59 -67) alleged (Para. 5), that Kevin failed to provide health insurance for his daughters. Paragraph 6 alleged Kevin said he could not get full coverage as a part-time employee; that he was financially able to provide insurance; that he had alleged his income to be \$797.50 per month, and at the time of the hearing of the Petition to Modify, he claimed his income to be \$50,000.00. Paragraph 7 provided that Kevin had agreed to pay one-half (1/2) the premiums even though he was required by the Court to pay the entire costs, and that he had agreed to pay the entire costs on and after October 1, 2004. Paragraph 9 alleged that Kevin got paid each 14 days and paid his child support on the 1st and 15th of the month, and that he had used one of his checks to pay for a half month. Paragraph 9 stated that the Final Judgment of Divorce required Kevin to pay ½ the costs for college for his daughters. Paragraph 11 alleged that Kevin had represented his adjusted gross income at the time the divorce was granted to be \$797.50. Paragraph 12 stated that Kevin had failed to provide health insurance for his children; that when Angie got the insurance, Kevin only paid ½ the premium for a while, and agreed to pay all the premium by October 1, 2004. Paragraph 14 stated that Kevin send a picture of himself appearing nude with other indecent communication to his children.

Kevin and his attorney denied all the allegations above, knowing that they were true.

Kevin's attorney made it clear that he had denied those allegations, knowing them to be true and did so for the purpose of increasing Angie's expenses and her attorney's work, time and expenses. (T p.225, L 27 – p.228, L 7).

ARGUMENT – ATTORNEY FEES

In a contempt proceeding, the Trail Court has the discretion to award reasonable attorney fees for the purpose of making the innocent party whole and to require compliance with the Trial Court's Judgment. *Hinds County Bd. of Supervisors v. Common Cause of Mississippi*, 551 So, 2d 107 (Miss 1989). The only factor the Trial Court used in making its determination, that is recognized by the laws of this state, was the ability of the parties to pay their attorney fees. *Dunn v. Dunn*, 609 So 2d 1277 (Miss 1992). Even then, the finding of the Trail Court is against the overwhelming weight of the evidence. The Court found that Angie was represented by her father, which is totally irrelevant; that her attorney initially chose to represent her without charge so that Kevin's funds could totally benefit the children. The statements of Angie's attorney to compromise and settle the case by the Trial Court violates the rule that attempted settlements are inadmissible. Rule 408, Mississippi Rules of Evidence. The Trial Court further found that Angie was capable of paying her own attorney fees, which finding is against the overwhelming weight of the evidence. Even further, the Trial Court held that since Kevin was not found in contempt of Court, Angie could not recover her attorney fees from Kevin, which is not a hard and fast rule, and as has been stated herein, the Trial Court abused its discretion when it did not find Kevin in contempt.

The attorney for Kevin, admitted that he purposely caused Angie's attorney

additional work by creating issues in his pleadings that should have been admitted, and violated Rule 11, MRCP. See second (2d) un-number paragraph under “Comment” of said Rule wherein it is stated: “...only when counsel can in good faith fairly deny all the averments in the adverse pleadings.... may he in good faith enter a general denial.” Every allegation was denied creating unnecessary issues for trial and causing excess discovery.

The Litigation Accountability, Mississippi Code Annotated, Section 11-55-5(1) provides: “..... the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney’s fees and costs against any party or attorney if the court..... finds that an attorney or party..... asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi rules of Civil Procedure.”

STATEMENT OF FACTS – DAMAGE TO DAUGHTER’S CAR

After the hearing of the case was delayed, when the assigned Chancellor recused himself; and after all the pleadings had been amended and were settled, Ashley, one of the daughters damaged her car in an accident. Kevin only pays one-half (1/2) of the cost of the minimum liability insurance on the daughter’s car. Angie pays the balance, including comprehensive and collision and the car is in Angie’s name, as well as the insurance policy. (R p. 15). The damages to Ashley’s car amounted to approximately twenty-six hundred dollars (\$2600.00), and the insurer for Ashley’s car paid all the damages, except one-thousand dollars (\$1,000.00) deductible. Kevin reimbursed Angie \$500.00 for one-half (1/2) the deductible, but refuses to pay one-half (1/2) of the damages to the car or the entire deductible.(T p. 156, L 11 – p157 L 19) Kevin is not entitled to

the benefit of the payment by the insurance company, since he does not contribute to the purchase of the comprehensive and collision insurance. Kevin should be required to pay one-half (1/2) the damages to the car, or at least, the entire deductible.

ARGUMENT – DAMAGES TO DAUGHTER’S CAR

Angie took out the insurance on the daughter’s car for her own protection. Absence of any contract between her and Kevin, Kevin has no interest in the insurance. Fry v. Jordan Auto Co. 80 So 2d 53 (Miss 1955). Also see: McCoy v. Preferred Risk Insurance Company et al, 471 So. 2d 396 (Miss 1985). Kevin should be required to reimburse Angie for one-half the damages to the car, or the entire deductible of one-thousand dollars (\$1,000.00), less the Five hundred dollars (\$500.00) he has already paid.

CONCLUSION

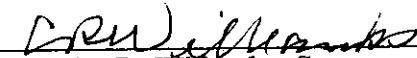

- 1) Kevin should be held in contempt for his failure and refusal to report his substantial increase in income as required by the Temporary Order of the Court.
- 2) Kevin should be held in contempt for concealing the deposit dates on his check Stubs to purposely defeat the purpose of the Court’s Final Judgment.
- 3) Kevin should have been held in contempt of Court for his refusal to secure full coverage health insurance for his children; Angie should have been allowed to maintain full coverage health insurance on the children, permanently, with Kevin required to reimburse her for the costs of the premiums; and, Kevin should have been required to reimburse Angie for all the premiums she had paid for the daughters’ health insurance coverage.
- 4) The Trial Court should have interpreted the language of the separation agreement

to give the daughter's a longer period than their first semester in college to achieve a 2.0 GPA; in the alternative, require Kevin to contribute to their college education when the daughters attained and maintained a 2.0 GPA; or in a second alternative, the Court should have modified the Final Judgment and increased the child support to assist with college expenses.

5) The Trial Court should have restricted Kevin's contacts by email with his daughters by being required to send Angie a copy of all future emails to discourage Kevin from sending further indecent emails to his daughters.

6) The Trial Court should have allowed attorney fees to Angie's counsel, and Attorney fees should be allowed for this appeal.

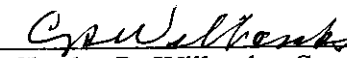
7) The Trial Court should have required Kevin to pay one-half (1/2) of the damages to Ashley's car or the entire deductible.


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CERTIFICATE OF SERVICE

I, the undersigned attorney at law, do hereby certify that I have this day mailed by U. S. Mail, postage prepaid, a true and correct copy of Appellant's Brief to: Chancellor Stuart Robinson, P. O. Box 686, Jackson, MS 39205-00686 and to: Hon. John Robert White, P.O. Box 824, Ridgeland, MS 39158-0824.

SO CERTIFIED, this the 23rd day of March 2007


Charles R. Wilbanks, Sr.