IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2006-CP-01842

RONALD HENRY PIERCE **APPELLANT**

V.

ERNEST ALLAN COOK **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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ATTORNEYS FOR APPELLEE
ERNEST ALLAN COOK

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CERTIFICATE OF INTERESTED PERSONS

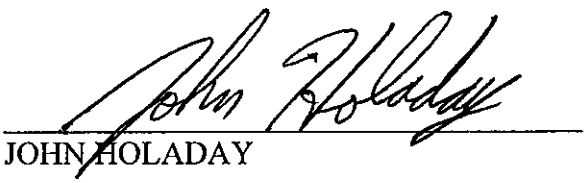
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. John Holaday and George M. Yoder, III, Holaday, Yoder, Moorehead & Eaton, Attorneys At Law, PLLC, Counsel for Appellee

2. Richard Lingle, Counsel for Appellant

3. Ernest Allan Cook, Appellee

4. Ronald Henry Pierce, Appellant



JOHN HOLADAY

STATEMENT REGARDING ORAL ARGUMENT

Ernest Allan Cook, Appellee herein, respectively requests that oral argument be granted. Appellee respectively suggests that oral argument will be of benefit to the Court in making a just and appropriate disposition of this case.

TABLE OF AUTHORITIES

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2006-CP-01842

RONALD HENRY PIERCE **APPELLANT**

V.

ERNEST ALLAN COOK **APPELLEE**

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Course of the Proceedings

Plaintiff does not dispute the procedural facts as set forth in Defendant's Brief in the section entitled, "A. Nature of Case, Course of Proceeding and Disposition in the Court Below." However, to have a complete statement of those procedural facts, it is important to note that the jury returned a verdict in Plaintiff's favor and against Defendant on the claim of alienation of affection in the amount of $300,000.00, on the claim of breach of contract in the amount of $200,000.00 and on the intentional infliction of emotional distress claim in the amount of $1,000,000.00. Tr. at 907, R. at 203-04.

Statement of Facts Relevant to the Issues Presented for Review

Plaintiff does not dispute the procedural facts as set forth in Defendant's Brief in the section entitled, "B. Statement of the Facts" with the following clarifications/additions. Plaintiff did not permanently "move" to California as suggested by Defendant in his Brief. On the contrary, Plaintiff went to California in the Summer of 2000 to attend school in California with the full blessing and understanding of his wife. Tr. at 137, 139. During the time he was gone to California, Plaintiff believed that his marriage to his wife was stable, routinely flew back to Mississippi and spoke to his

wife virtually every day. Tr. at 138-41. During the period of time he was in school, his wife also visited with him in California. Tr. at 146-47. Plaintiff fully intended to live with his wife and family in California or otherwise. Tr. at 144. Plaintiff's wife did not express any concern relating to their marriage until she requested that they see other people and have an "open marriage" in September of 2000. Tr. 148-49. Plaintiff responded that he was not agreeable to this type of marriage. Tr. at 149. Ultimately, Defendant began sharing intimate feelings with Plaintiff's wife as early as August of 2000 and began having sex with Plaintiff's wife as early as September of 2000 all during the time when he was representing Plaintiff, his wife and their son, Ernie. Tr. at 65-68, 101, 153-59. When Plaintiff ultimately discovered the adulterous affair, Plaintiff confronted Defendant and then ultimately terminated his representation. Tr. at 164-67. Plaintiff and his wife were ultimately divorced on the ground of his wife's adultery with Defendant (Tr. at 184), and Plaintiff filed the instant suit against Defendant on claims of breach of contract, alienation of affection and intentional infliction of emotional distress.

SUMMARY OF THE ARGUMENT

The trial court's denial of Defendant's Motion for Partial Directed Verdict and for JNOV relating to the lack of a legal expert on behalf of Plaintiff was proper, as Plaintiff did not assert a legal malpractice claim against Defendant. As a result, it was not necessary or required for Plaintiff to have a legal expert in order to prove his case against Defendant. Likewise, the statute of limitations on Plaintiff's claim for intentional infliction of emotional distress did not run, as the trial court properly found that the tort of intentional infliction of emotional distress was ongoing and continuous. Therefore, Defendant's Motion for Directed Verdict on this basis was properly denied.

The trial court acted properly and without error when it granted Jury Instruction No. 10 relating to the duty of an attorney under contract with a client. The claim asserted by Plaintiff was for breach of contract and not for legal malpractice. This instruction properly informed the jury of the law in the State of Mississippi that an attorney has an obligation to honor the provisions of a contract with his or her client. Thus, the instruction was properly given to the jury.

Defendant incorrectly argues that the trial court made several minor evidentiary errors during the trial of the case and that the totality of these errors constitutes reversible error. Defendant's argument is without merit, as the trial court properly excluded several irrelevant pieces of evidence offered by Defendant at trial. Such evidence included evidence relating to Plaintiff's move to California, the amount of the corpus of Plaintiff's trust, testimony designed to clarify statements made by Defendant on a tape recorded message and evidence relating to the title to the marital home of Plaintiff and his former wife. This evidence was not only properly excluded as irrelevant but also may have been highly prejudicial to Plaintiff if presented to the jury.

Defendant offers no legitimate grounds for a reversal of the jury's award in this case or for the reversal of the trial court's rulings, and the Court should affirm the verdict of the jury and the trial court's rulings.

ARGUMENT

I.[1] The Trial Court did not err in denying Defendant's Motion for Partial Directed Verdict and in denying Defendant's Motion for JNOV.

This Court has on many occasions definitively stated the standard of review on a trial court's

[1]For the convenience of the Court, Appellee has utilized in his Brief the same issue number system set out in Appellant's Brief. However, Appellee has changed the titling of these issues to reflect Appellee's position as to each issue.

ruling on a motion for directed verdict. For example, in *Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp.*, 743 So.2d 954, 960 (Miss. 1999), this Court set out the standard of review on a motion for directed verdict as follows:

> We reiterated our standards of review for denial of a motion for directed verdict, new trial, and J.N.O.V. in *Steele v. Inn of Vicksburg, Inc.*, 697 So. 2d 373, 376 (Miss. 1997):
>
> > This Court's standards of review regarding a denial of a judgment notwithstanding the verdict and a peremptory instruction are the same. Our standards of review for a denial of a judgment notwithstanding the verdict and a directed verdict are also identical. Under this standard, this Court will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand, if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp., 743 So.2d at 960 (quoting *Steele v. Inn of Vicksburg, Inc.*, 697 So.2d 373, 376 (Miss.1997)).

The trial court's denial of the Appellant's Motion for Directed Verdict or, in the alternative, for JNOV was, in all ways, proper. The standard of review of jury verdicts under Mississippi law is well established. In *Junior Food Stores, Inc. v. Rice*, 671 So. 2d 67, 76-77 (Miss. 1996), this Court, citing *Bell v. City of St. Louis*, 467 So.2d 657 (Miss. 1985), stated the standard as follows:

> Once the jury has returned a verdict in a civil case, we are not at liberty to direct that judgment be entered contrary to that verdict short of a conclusion on our part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found.

Bell at 660. In discussing that same standard in *Gorman v. McMahon*, 792 So.2d 307, 312 (Miss.

2001), this Court cited to its opinion in *City of Jackson v. Locklar*, 431 So.2d 475, 478-79 (Miss. 1983), which held:

> Our institutional role mandates substantial deference to the jury's findings of fact and to the trial judge's determination whether a jury issue was tendered... We see the testimony the trial judge heard. We do not, however, observe the manner and demeanor of the witnesses. We do not smell the smoke of the battle. The trial judge's determination whether, under the standards articulated above, a jury issue has been presented, must per force be given great respect here.

Id. Applying this standard to the facts of this case, Plaintiff maintains that this Court should affirm the trial court's denial of Defendant's Motion for Directed Verdict and Motion for JNOV.

a. The Trial Court properly denied Defendant's Motion for Directed Verdict and Defendant's Motion for a JNOV relating to the lack of legal expert testimony to support Plaintiff's claims.

Plaintiff did not assert a claim for legal malpractice against Defendant. Specifically, Plaintiff did not maintain that Defendant committed malpractice in the performance of the legal actions taken on behalf of himself and his son, Ernie Cook. Plaintiff and his former wife, Kathleen, hired Defendant to represent them and their son, Ernie, in a medical negligence action against certain healthcare providers relating to the administration of a vaccine to Ernie. Defendant took several legal actions on behalf of Plaintiff, his wife and his son. Plaintiff did not assert as part of his claims against Defendant that Defendant had made mistakes in the performance of these legal actions. As Defendant is well aware, all of Plaintiff's claims against Defendant involved the fact that Defendant began having an affair with Plaintiff's wife and ultimately alienated her affections from Plaintiff.

Since Plaintiff did not assert a claim for legal malpractice and since the jury's verdict was not based on that claim, Plaintiff was not required to prove the elements of legal malpractice nor to provide expert testimony to support a claim for legal malpractice. Even if Plaintiff had asserted a

claim for legal malpractice, Plaintiff contends that he did not need an expert. This Court has recognized that experts are not required in all legal malpractice cases. This Court in the case of *Byrd v. Bowie*, 933 So. 2d 899, 904-05 (Miss. 2006) stated as follows:

> In discussing the need for experts for legal malpractice actions, we stated:
>
> > Moreover, attorneys involved in malpractice actions must always remember there is a pragmatic difference between the trial of other professional malpractice cases and a legal malpractice case. In the former class, the lawyers and judges are laymen. In professional malpractice cases, excepting extreme cases, we rely upon experts for guidance. The attorney who finds himself the defendant in a legal malpractice case, however, has a judge and the trial attorneys who are already experts. Hickox, 502 So.2d at 636. Furthermore, "[i]t does not require expert testimony to establish the negligence of an attorney who is ignorant of the applicable statute of limitations or who sits idly by and causes the client to lose the value of his claim for relief." Id. (quoting *George v. Caton*, 93 N.M. 370, 600 P.2d 822, 829 (N.M.Ct.App.1979)).

Byrd v. Bowie, 933 So.2d 899, 904-05 (Miss. 2006).

Clearly, in the case at hand, Plaintiff did not need a legal expert to testify to the standard of care that an attorney should not sleep with a client's wife. Such a heinous act does not fall within the providing of legal services to Plaintiff. Again, even if Plaintiff had asserted a claim for legal malpractice against Defendant, it is well within the knowledge of laymen that an attorney breaches his duties to his client when he has an affair with his wife and alienates her affections from his client. Defendant's argument that Plaintiff needed a legal expert to prove his case is without merit, and the trial court's denial of Defendant's Motion for Directed Verdict and Motion for JNOV were properly denied by the trial court.

b. The Trial Court properly denied Defendant's Motion for Directed Verdict on Plaintiff's claim for intentional infliction of emotional distress relating to the statute of limitations.[2]

Defendant maintains that Plaintiff's claims for intentional infliction of emotional distress should have been dismissed by the trial due to the running of the one year statute of limitations. Despite this argument, the trial court properly found that the affair between Defendant and Plaintiff's wife was a continuing tort. Defendant's reliance on the case of *Slaydon v Hansford,* 830 So 2d. 686 (Miss. 2002) is misplaced. The *Slayden* case is easily distinguishable from the case at hand. First, the incident in *Slaydon, supra* was a <u>one time occurrence.</u> The incident in *Slaydon* involved a Waffle House employee who "tainted" certain foods served to the Plaintiff in that case.

Further, this Court has long recognized the concept of "continuing torts" and has provided guidance for trial courts to aid in their analysis of such a concept. The Mississippi Court of Appeals, in 1993, opined in *Stevens v Lake,* 615 So.2d 1177, 1183 (Miss. 1993) that:

> This principle applies, however, in situations where the defendant commits repeated acts of wrongful conduct, not where harm reverberates from a single, one-time act or omission:
>
> [W]here a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortious acts cease. Where the tortious act has been completed, or the tortious acts have ceased, the period of limitations will not be extended on the ground of a continuing wrong.
>
> A "continuing tort" is one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. *A continuing tort sufficient to toll a statute of limitations is occasioned by*

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[2]In the first sentence of sub-paragraph b of Defendant's Brief, he erroneously refers to a Motion for Partial Summary Judgment. The record does not contain any Motion for Partial Summary Judgment filed by Defendant. Plaintiff therefore has responded to this issue assuming that Defendant is referring to the Motion for Directed Verdict and Motion for JNOV filed by Defendant on the statute of limitations issue.

continual unlawful acts, not by continual ill effects from an original violation.

C.J.S., Limitations of Actions § 177 at 230-31 (emphasis added); see also Hendrix, 911 F.2d at 1102 (where violation occurs outside limitations period but is closely related to violations occurring within the period, recovery is permitted on theory that all violations are part of one continuing act).

Stevens, 615 So.2d at 1183 (emphasis in original).

More recently, the Mississippi Court of Appeals has held that the continuing tort doctrine can apply to a claim for intentional infliction of emotional distress provided that the tortious conduct is continuing. In the case of *McCorkle v. McCorkle*, 811 So.2d 258, 263-64 (Miss. App. 2001), the Court of Appeals held as follows:

> Though this cause of action may be subject to the one year statute, it is not necessary that we so hold in order to determine if Mack's cause of action was timely filed. The continuing tort doctrine and facts of this case clearly indicate that Mack filed his claim in a timely fashion. The trial court was correct in its evaluation of the case as one where the evidence disclosed a continuing course of conduct with the most recent incident being Donald's second application for Mack's commitment. A continuing tort involves a repeated injury and the cause of action begins to run from the date of the last injury, tolling the statute of limitations. Smith v. Franklin Custodian Funds, Inc., 726 So.2d 144(¶ 17) (Miss.1998). Donald's wrongful conduct began in August 1994, with the first commitment proceeding, and continued until September 1997, with the culmination of the second commitment proceeding. Mack's complaint was filed just seven months after Donald's second application for Mack's commitment was filed, which tolled the statute and was clearly within its one year limit. Though the first commitment hearing and its related subsequent events prior to the second commitment hearing occurred outside the limitations period, the violation is closely related to the violations occurring within the limitations period and recovery is permitted on the theory that all violations are part of one continuing act. Stevens v. Lake, 615 So.2d 1177, 1183 (Miss.1993); Smith v. Sneed, 638 So.2d 1252, 1255-56 (Miss.1994). Under this theory, evidence of the first commitment filed by Donald in August 1994, and the subsequent sequence of events following, through the second commitment hearing, were properly before the court.

McCorkle v. McCorkle, 811 So.2d 258, 263-64 (Miss. App. 2001).

The evidence presented at trial clearly establishes that Defendant continued to have sexual

relations with Plaintiff's wife and continued to alienate the affections of Plaintiff's wife. Defendant continued the affair with Plaintiff's wife which eventually led to Plaintiff and his wife getting divorced. Tr. at 184. The trial court, in its analysis of this claim, reviewed the facts, the evidence and the case law in making its decision to deny Defendant's motion. The trial court correctly found that the continuing tort continued up to and until the actual entry of the divorce judgment, which notably was obtained based on the adultery between Defendant and Plaintiff's wife. Tr. at 184. Defendant cannot with credibility now assert that his tortious activity was not continuing in nature.

As suggested by the above case law, Defendant's actions in the case at hand constitute a "continuing course of conduct." *McCorkle*, 811 So. 2d at 263. As such, the trial court correctly ruled that Plaintiff's claim of intentional infliction of emotional distress was not time barred and properly denied Defendant's Motion for Directed Verdict and Motion for JNOV on this basis.

II. The trial court properly granted Jury Instruction No. 10 (P20).

Defendant asserts that the trial court erred when it granted Jury Instruction No. 10 (P20) which read as follows:

> The Court instructs the Jury that a lawyer owes his clients duties falling into three broad categories, duty of care, duty of loyalty and duties provided by contract.

See Jury Instruction No. 10. Plaintiff disagrees.

First, it is important to establish that this Court has many times stated that jury instructions are to be read as a whole. In *Whiddon v. Smith*, 2002 WL 485816 (Miss. App. 2002) ¶18, the Court dealt with an argument similar to the one that Defendant now makes that "an instruction was confusing because it amounted to an abstract statement of the law unaccompanied by any direction to the jury as to how that statement should be applied to [that] case." *Id.* There, the Court held:

> [J]ury instructions are not considered in isolation. Rather, when reversal is sought on the basis that the jury was improperly instructed, the reviewing court must read all of the instructions and determine whether, on that basis, it is satisfied that the jury was adequately and properly instructed on the legal principles necessary to properly resolve the case...

Id. at ¶19. In *Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1157 (Miss. 1992), this Court stated that "[I]mperfections in particular instructions do not require reversal where all seen together fairly announce the primary rules applicable to the case. *Flight Line*, 608 So. 2d at 1157 (citing *Purina Mills, Inc. v. Moak*, 575 So. 2d 993, 996 (Miss.1990)). Further, the Court has "ask[ed] only that the instructions, read collectively, fairly inform the jury 'on the elements necessary to establish liability.'"*Id.* (citing *Strickland v. Rossini*, 589 So.2d 1268, 1275 (Miss. 1991)). A review of all of the instructions taken together in this case reveals that the jury was fully informed as to the elements necessary for Plaintiff to be successful on his claims. For example, Defendant intentionally overlooks the following: Jury Instructions No. 7 which informed the jury on the elements necessary to prove a claim for alienation of affection; Jury Instruction No. 9 which informed the jury on the elements necessary to prove a claim for intentional infliction of emotional distress; and Jury Instructions No. 5 and 6 which further informed the jury concerning elements relating to Plaintiff's claims. R. at 160-63, 166-68. Thus, the instructions as a whole correctly informed the jury on the elements necessary to prove Plaintiff's claims.

Further, Jury Instruction No. 10 was a correct statement of the legal duties owed by an attorney to a client. The subject instruction was legally accurate. The language in Jury Instruction No. 10 was set forth by this Court. *Singleton v Stegall,* 580 So. 2d 1242, 1244 (Miss. 1991). Such claims in the instant case were proven and established by the jury in accord with proper and specific instructions. Defendant is simply upset that the jury found against him.

Defendant's argument appears to be that the instruction should not have been allowed, because it provides information on an attorney's duties to a client. Defendant further argues that since Plaintiff did not support a legal malpractice claim with expert testimony, then this instruction should not have been given. Again, Plaintiff did not assert a legal malpractice claim in that Plaintiff did not suggest that Defendant negligently performed his professional duties in relation to his son's medical negligence case. Instruction No. 10 properly and clearly set forth the duties owed by an attorney to a client under Mississippi law. Obviously, Mississippi law does not express an attorney's duties to his client in such terms as, "a duty not to have an affair with your client's wife." Thus, the instruction properly instructed the jury on the duties owed by an attorney to his client which were blatantly and openly violated by Defendant. Instruction No. 18 and others clearly set forth the claims which Plaintiff was making under Mississippi law which included breach of contract, alienation of affection and intentional infliction of emotional distress. The instructions as a whole properly and correctly described the law to the jury. Thus, this issue is without merit.

Defendant seems also to maintain that Instruction No. 10 is based solely on the Rules of Professional Conduct. Defendant, however, fails to mention any basis for his assertion that this Instruction was based on the Rules of Professional Conduct or that the jury was confused in this regard. Defendant is well aware that his duties to Plaintiff were not solely derived from the Rules of Professional Conduct. Mississippi law is clear that:

> It has been said also that even where there is no ethical breach, "an attorney must act with the greatest circumspection in the representation of multiple clients where their exists a possibility that their interest may conflict or be at cross purposes." Stump v. Flint, 195 Kan. 2, 402 P.2d 794, 801 (1965).

Lane v. Oustalet, 873 So.2d 92, 96 (Miss. 2004)(citing *Stump v. Flint*, 195 Kan. 2, 402 P.2d 794, 801

(1965)).

Finally, Defendant fails to "connect the dots" from his unsupported allegations and the factual reality of the trial in this case. For example, Defendant blindly and boldly speculates that "[t]he instruction of the jury in this matter tainted the jury's deliberation on all counts which unduly prejudiced the jury." See Appellant's Brief at 10. However, Defendant fails to provide any evidence or even any legitimate reason for the Court to believe that this instruction tainted or prejudiced the jury. Defendant should not be allowed to rely on his blind accusations as a basis for this appeal. The Court should affirm the trial court's grant of Instruction No. 10.

III. Defendant was not deprived of a fair trial due to the cumulative effect of various rulings from the Trial Court excluding evidence.

Defendant admits that the evidentiary errors which he mentions in his Brief are "small" but suggests that the totality of such errors warrants a reversal of the trial court's rulings and the jury verdict. See Appellant's Brief at 14 and 15. This Court has held on many occasions that the trial court has discretion as to the admission of evidence at trial, and the trial court's rulings will not be disturbed unless upon a finding of abuse of discretion. For example, this Court has recently specifically held, as follows: "[t]he standard for review of evidentiary matters is abuse of discretion." *Payne v. Whitten*, 948 So.2d 427, 429-30 (Miss. 2007)(citing *Floyd v. City of Crystal Springs*, 749 So.2d 110, 113 (Miss. 1999)). Defendant's issue is without merit, as the trial court clearly did not abuse its discretion in any of the evidentiary rulings raised by Defendant.

a. The Trial Court properly restricted Defendant from offering irrelevant evidence relating to Plaintiff's move to California.

As to this error, Defendant illustrates that he is so full of resentment and hostility towards Plaintiff that he cannot professionally state the issue on appeal, i.e., "care-free, jobless lifestyle at

his new home in Hollywood, California . . . ." Ironically, Defendant seems to be angry at Plaintiff for Defendant having an adulterous affair with Plaintiff's wife.

Further, Defendant mischaracterizes the proceedings below in an effort to manufacture an error on appeal. The gist of Defendant's argument seems to be that the trial court failed to allow him to question Plaintiff at trial relating to his relationship with his children before Defendant's affair with Plaintiff's wife. For example, on page 12 of his Brief, Defendant states that "[a]s a result of the trial court's rulings, Pierce was not allowed to question Mr. Cook about the state of his relationship with his children **before** the alienation." See Appellant's Brief at 12. As stated in his Brief, the rationale for questioning Plaintiff about his relationship with his children before the alienation was to attempt to establish that the cause of the separation and divorce between Plaintiff and his wife was not Defendant but Plaintiff's own actions. The main problem with Defendant's argument is that the trial court did not prohibit Defendant from questioning Plaintiff about his relationship with his children prior to the alienation.

In support of his argument, Defendant cites to pages 405 and 406 of the trial transcript. A review of those pages clearly indicates that the request made by Defendant of the trial court was to question Plaintiff about his relationship with his children after the divorce. For example, on page 408 of the transcript, Defendant states as follows:

> MR. PIERCE: Now, as to this, this whole suit is about me alienating him from his children. I have an absolute right to establish what his rights are under the - - to see his children under the - - under the child custody agreement and to establish that I haven't kept him from seeing his children. He has chosen not to see his children. And his testimony will show that he has chosen of his own volition not to see his children. And that's what I will ask him - - now, lets see.
>
> Are you ready to proceed with my proffer, Your Honor?

Tr. at 408. Thus, the proffer which was made by Defendant related to Plaintiff's relationship with

his children after the divorce and not before. Thus, Defendant's argument is without merit, as he did not make a request to cross-examine Plaintiff on his relationship with his children prior to the adultery.

Defendant's citation to the case of *Bland v. Hill*, 735 So. 2d 414 (Miss. 1999), simply proves Plaintiff's defense of this issue. That is, Plaintiff does not disagree that this Court has held that defendants in alienation cases must be allowed to attempt to prove that they were not the cause of the plaintiff's divorce. *Bland*, 735 So. 2d at 419. No rulings of the trial court even come close to violating this principle, and Defendant's assertion to the contrary are blind, self-serving and not supported by the record in this case. Defendant was given ample opportunity to cross-examine Plaintiff about his marriage to his wife. Defendant does not even point to any places in the record where his cross-examination of Plaintiff was limited in this respect. In fact, Defendant was even given broad latitude to enlighten the jury on evidence concerning Plaintiff's move to California not only in his cross-examination of Plaintiff but also of Plaintiff's mother. Tr. at 577-78.

On the contrary, although he cites the *Bland* case which deals with other potential causes of divorce in an alienation case, Defendant's argument refers to the damages Plaintiff suffered. Defendant's Brief does not make clear even what issue he is complaining about in this regard.

Again, Defendant cites to no alleged errors where he was limited on his examination of Plaintiff relating to his prior relationship with his children or his wife. Further, the only two times that Defendant asked Plaintiff about his visitation with his children after the divorce were allowed by the trial court. See Tr. at 405, lines 21-26 (testimony allowed over Plaintiff's objection) and at 405, lines 28-29 and 406, lines 1-4.

The transcript reveals that the only two restrictions on the testimony sought by Defendant

relating to this issue are located on pages 405 and 406 of the transcript. On page 405 of the transcript, the trial court, sustained an objection to Defendant's question of Plaintiff, "[w]hy are you selling that home [Plaintiff's home in Mississippi]?" Clearly, this question does not have any relevance to the issues at hand. Why would Plaintiff maintain a home in Mississippi when he doesn't live here? Maintaining a Mississippi home certainly is not necessary to visit with his children. Thus, this testimony was properly not allowed by the trial court.

Next, the trial court refused to allow Defendant to cross-examine Plaintiff on his rights of visitation as set forth in the divorce agreement between Plaintiff and his wife. See Tr. at 406, lines 5-17. Once again, the trial court properly ruled. The details of Plaintiff's visitation rights as set forth in the divorce agreement have no relevance to whether Defendant committed the tort of alienation of affection and whether such violation caused Plaintiff damages. What Defendant fails to acknowledge is that the mere fact that there is a divorce agreement is an element of Plaintiff's damages. The trial court's ruling was appropriate to limit this testimony.

Further, Defendant mistakenly, or more likely intentionally, misses the point. Plaintiff's argument throughout the entire proceedings was clear. Defendant repeatedly engaged in an adulterous affair with Plaintiff's wife which was the direct cause of the divorce between Plaintiff and his wife. As a direct result of the divorce, Plaintiff could not live with his wife and the mother of his children, and consequently, could not live with his own children. Of course, he was given rights to visit with his children, but any parent would easily recognize that such rights are no substitute for the freedom to live with your children. Defendant undisputedly deprived Plaintiff of this right. How often Plaintiff is able to visit currently with his children is not relevant to this analysis? Plaintiff lived with his children before the divorce, and he couldn't after. Plaintiff could see his children any

time he wanted to before the divorce by walking into their room at home or going to them wherever they were, and he couldn't have this freedom after. Defendant's argument that the trial court erroneously ruled is without merit.

b. The Trial Court properly restricted Defendant from offering improper and irrelevant evidence relating to the "rate of return on investment" utilized by Plaintiff's expert accountant.

Not only is this issue without merit but it is also without logic. This issue deals with the rate or return on investment testified to by Plaintiff's expert accountant. Defendant outlines the issue in his Brief, as follows:

> In order to diligently cross-examine the witness as to whether his use of return on investment of between 10% to 15%) was speculative or not, Pierce should have been entitled to discovery [sic] the total value of the trust before his involvement with Mr. Cook's wife and at the time of trial. This is the only manner in which a proper "rate of return" for the trust could be established. Not allowing this evidence left the jury to speculate as to what the proper rate of return deprived Pierce of a fair trial.

Appellant's Brief at 13. It is frankly difficult for Plaintiff to address this issue, because Defendant does not define it. Both Plaintiff and this Court are left to speculate as to why Defendant feels that he needed the total amount of the corpus of Plaintiff's trust to determine a proper rate of return.

The exchange between the trial court and counsel for Defendant on this issue is located on pages 387 through 391 of the trial transcript. In its ruling, the trial court found that the total amount of the corpus of the trust was irrelevant. Plaintiff's accountant said that he made a determination as to the loss of interest money Plaintiff had incurred on the amount of money he had pulled out of his trust due to Defendant's conduct. He testified that he based his determination on the amount of interest Plaintiff had earned on the trust as a whole and on a personal investment account. Tr. at 377-78. Specifically, Plaintiff's accountant testified that during the pertinent time period, Plaintiff's

trust had grown 13%. *Id.* Logically, when he had to pull out money from that trust due to Defendant's misconduct, then he lost the same percentage of interest on the money that was pulled out from the trust. Thus, as the trial court ruled, the value of the total trust was irrelevant.

The amount of return which Plaintiff lost on the trust as a whole was a matter of fact testified to by the accountant, not a matter of opinion. When money was taken out of that trust during the pertinent time period, the only rate of return which could be used by Plaintiff's accountant was the actual rate of return Plaintiff received on the trust. This logic was articulated by the trial court. Tr. at 390, lines 6-22. Again, Defendant misses the entire point by arguing that the use of this rate of return was speculative. The trial court was not dealing with a situation where the expert accountant had to speculate as to the rate of return on investment a party suffered as in the case of *United Southern Bank v. Bank of Mantee*, 680 So. 2d 220 (Miss. 1996)[3], cited by Defendant. The *United Southern* case is so distinguishable as to make it improper for Defendant to cite to this Court.

The Court in *United Southern* stated as follows:

> It is the opinion of this Court that the record fails to evidence sufficient proof as to the appropriate rate of interest upon which the chancellor could base his determination of any loss of investment opportunity. The only evidence before the chancellor was that Mantee was generally buying three-year Treasury securities at the time of the appeal. No evidence was offered showing that Mantee would have bought a three-year Treasury note, or that Mantee offered to do so. The use of a three-year yield rate was arbitrary and repeatedly objected to by United Southern. The chancellor's use of the three year yield rate without proof that Mantee offered or moved to pledge such securities was speculative and an abuse of discretion.

United Southern Bank, 680 So. 2d at 224. In that case, the trial court simply arbitrarily chose a rate

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[3]Although Defendant used the word "compare" prior to his citation of this case, he did not set forth any case to form comparison with the *United Southern* case. Therefore, Plaintiff assumes that his use of this word is a typographical error.

of return on investment when there was no evidence that the party had lost the investment opportunity or that the party even would have made such an investment. In the case at hand, the trial court found that the expert accountant testified to the actual rate of return which had been obtained by Plaintiff on his trust and which had been lost by drawing the money out of the trust. Thus, the *United Southern Bank* case is inapplicable and offers Defendant no support.

Finally, Defendant suggests to the Court that expert accountant for Plaintiff contradicted himself when he testified at one point that the trust grew 13% but at another point testified that the trust had negative returns over the years. In fact, the accountant testified that the trust grew approximately 13% over the pertinent years from 2000 to 2004. Tr. at 377-78. Next, the accountant testified as to the individual returns for each of these years. Tr. at 399. The testimony from the accountant is not inconsistent in any regard, and Defendant fails to point out how the testimony is inconsistent.

At the end of the day, Defendant fails to point to one reason why he needed the total value of the trust. Defendant likely wanted the jury to hear this evidence to prejudice Plaintiff for having a substantial trust. In fact, as the trial court correctly found, this fact was completely irrelevant to any issue present at trial, and this issue is without merit.

c. The Trial Court properly refused to allow Defendant to offer irrelevant and repetitious testimony relating to a tape recorded message from Defendant to Plaintiff.

Defendant's argument as to this issue is disturbing at best to Plaintiff and his counsel. Defendant argues that "the trial court refused to allow Pierce to testify that he was referring to Mr. Cook's stepfather on the phone message that he left Mr. Cook on his birthday, and not Mr. Cook's deceased father (whom his children refer to as "Grandpa")." Appellant's Brief at 14. It is difficult

to believe that Defendant is not attempting to mislead this Court. The trial transcript reads as follows:

> Q. Okay. Now, they - - early - - it's been a long week - - I think it was the first thing Tuesday, they played a tape where you mentioned something about Mr. Cook's father, who we have now learned was deceased. Were you referring to his deceased father or were you referring to another individual?
>
> A. I was not referring to his deceased father.
>
> Q. And who were you referring to?
>
> A. As his mother testified yesterday, she has remarried. She's been remarried since he was in college, or just got out of college. And the man she was remarried to, Frank, has been in Mr. Cook's life - - virtually, I think, his entire life. Because he - - now, he's his stepfather.
>
> MS. THIBODEAUX: Your Honor, he's - -
>
> THE COURT: He can testify that he's his stepfather.
>
> MS. THIBODEAUX: I have no problem with that.
>
> A. But he used to - - he's been in his life longer than that; because us he used to be his uncle.
>
> MS. THIBODEAUX: Your Honor - -
>
> THE COURT: Mr. Lingle.
>
> MR. LINGLE: Yes, sir.
>
> (SIDE-BAR CONFERENCE)
>
> MR. LINGLE: May I continue, Your Honor?
>
> THE COURT: Yes, sir.
>
> BY MR. LINGLE:
>
> Q. Mr. Pierce, it's suffice to say, that you didn't mean his deceased father, you meant his stepfather. Is that correct?
>
> A. Absolutely.

Tr. at 698-99. Obviously, Defendant's assertion that the trial court did not allow him to testify that he was referring to Plaintiff's stepfather as opposed to his father is a blatant mischaracterization of what actually occurred at trial. Although it would be easy for this Court to assume that Defendant mistakenly failed to recall what occurred at trial, Defendant cited to the exact pages where this exchange occurred.

As Defendant suggests, the trial court restricted Defendant from asking Plaintiff's mother "whether it would be unusual for someone to refer to her husband as Mr. Cook's father."

Appellant's Brief at 14, Tr. at 577. However, in light of the fact that Defendant was able to explain to the jury that he was actually referring to Plaintiff's stepfather and not his deceased father, this issue is without merit. Further, the trial court's ruling in this regard to limit Defendant from asking Plaintiff's mother to speculate about what would or would not be unusual was entirely proper and should not be reversed by this Court.

d. The Trial Court properly refused to allow Defendant to examine Plaintiff on irrelevant issues relating to the manner in which the marital home was titled.

Defendant's issue in this regard is not only "small" as he admits, but is void of merit. Defendant suggests that the trial court erred when it ruled that Defendant could not examine Plaintiff as to why Plaintiff's home was titled in the name of the trust and not in his name and his wife's name. Tr. at 495. Again, Defendant cannot connect the dots to make this issue error. The pertinent issue at trial was whether Defendant's admitted adulterous affair with Plaintiff's wife constituted alienation of affection and the other causes of action asserted by Plaintiff. Defendant again was allowed wide latitude to cross-examine Plaintiff on the difficulties faced between Plaintiff and his wife during their marriage. The trial court did not and should not have allowed Defendant to raise every issue *ad nauseum* which occurred between Plaintiff and his wife. Whether Plaintiff's home was titled in the name of the trust, his own name or jointly in his name and his wife's name is completely irrelevant to the issue of Defendant's breach of duties to Plaintiff by sleeping with Plaintiff's wife. While Plaintiff agrees with Defendant that the *Bland* case cited by Defendant stands for the proposition that an alienation of affection defendant has the right to prove that he did not cause the subject divorce, it does not take away the trial court's discretion in determining what evidence has the probative value to be introduced in that regard. The trial court properly excluded

this evidence.

Conclusion

Based on the foregoing, Appellee Ernest Allan Cook requests that the Court affirm the verdict of the Jury in this case and the rulings made by the Rankin County Circuit Court.

This the 7th day of January, 2008.

JOHN HOLADAY

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Certificate of Service

I, John G. Holaday, counsel for Appellee, do hereby certify that I have forwarded a true and correct copy of the foregoing ***Brief of Appellee Ernest Allan Cook*** via United States Mail, postage prepaid to Richard Lingle, P.O. Box 1928, Jackson, MS 39215-1928, and Honorable Samac S. Richardson, Rankin County Circuit Court Judge, P.O. Box 1885, Brandon, MS 39043.

This the 7th day of January, 2008.

JOHN HOLADAY