IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-CP-01842

RONALD HENRY PIERCE

Defendant -Appellant

Versus

ERNEST ALLAN COOK

Plaintiff -Appellee

Appeal from the Circuit Court of Rankin County

REPLY BRIEF OF APPELLANT RONALD HENRY PIERCE

RONALD HENRY PIERCE, *PRO SE*

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ORAL ARGUMENT REQUESTED

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REPLY ARGUMENT

1. Appellee's Statement of the Facts.

On page one of Cook's brief (paragraph #7), Cook states "Plaintiff did not permanently move to California as suggested by Defendant in his Brief". No many how many times Cook or his attorneys deny it, the fact remains that Cook abandoned his wife and three young children (one of which was autistic) in June of 2000 and moved to Hollywood, California to pursue a career in the film industry - and by September 1, 2000[1], Cook and his wife had finally separated and ceased all martial cohabitation. [See the preamble to the Child Custody and Property Settlement Agreement attached as Exhibit "A" to the Judgment of Divorce, which was introduced as Defendant's Exhibit #10] Perhaps the best evidence can be found in the custody evaluation performed by Jesse F. Dees, Ph.D., Jackson Psychological Group, P.A., dated July 11, 2001 **[CP p. 076-108 (RE p. 74-106)]**. In no uncertain terms, Cook told Dr. Dees he moved to California to pursue a career in the film industry after he realized there was no future in the comic book business because he had been in a *"creative vacuum"* in Jackson, Mississippi." [CP p. 080 (RE p.78); CP p.083 (RE p.81)].

2. The lower court should have granted Pierce's Motion for Directed Verdict *Or* Pierce's Motion for a JNOV on Cook's claim of legal malpractice because Cook failed to offer any legal expert testimony to explain the professional duties owed by Pierce or to offer any opinions as to whether Pierce breached any professional duty which proximately caused damage to Cook.

Although Pierce acknowledged that the circumstances in which he became romantically

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[1] In Appellant's Brief, Pierce mistakenly stated the Cooks separated on September 1, 2001; the preamble of Cooks' Child Custody and Property Settlement Agreement - attached as Exhibit "A" to the Judgment of Divorce which was introduced as Defendant's Exhibit #10 - stated the Cooks' separated on September 1, **2000**.

involved with Mrs. Piece were inappropriate (just as Pierce admitted to the Committee on Professional Responsibility of the Mississippi Bar and just as admitted Pierce to Dr. Jesse Dees, a psychologist appointed by the Madison County Chancery Court to make recommendations regarding custody of Cook's children – as discussed further *infra*, it does not mean that Pierce is liable to Cook for legal malpractice. To recover in a legal malpractice case, it is incumbent upon a plaintiff to prove by a preponderance of evidence the following: (1) Existence of a lawyer-client relationship; (2) Negligence on the part of the lawyer in handling his client's affairs entrusted to him; and (3) Proximate cause of the injury. *Hickox v. Holleman*, 502 So.2d 626, 633 (Miss.1987). "As to the third essential ingredient, the plaintiff must show that, but for their attorney's negligence, he would have been successful in the prosecution or defense of the underlying action." *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1215 (Miss.1996). ***There was no evidence of this third and "essential" element of Cook's claim: there was no evidence introduced at trial that Pierce's affair adversely affected his professional performance.***

Cook tries to cloud the issues in order to negate his failure to provide expert testimony by arguing that he did not assert a claim for legal malpractice. Yet it is clear that Cook's "breach of contract" claim, as he now calls it, is nothing but a disguised legal malpractice claim. For example, the authority Cook cited for Jury Instruction No. 10 was *Singleton v. Stegall*, 580 So.2d 1242 (Miss.1991) [00169-00170 (RE p.123-124)]. *Singleton v. Stegall* was unquestionably a legal malpractice decision. In fact, the first two sentences from the case states:

> ***This is a legal malpractice case.*** Plaintiff alleges that he engaged the services of the defendant lawyer, paid his fee, and that the lawyer wholly failed to pursue his interest with competence, diligence or good fidelity.

Singleton v. Stegall, 580 So.2d at 1243 (emphasis added). Additionally, the language used in Cook's Jury Instruction No. 10 is also quoted another legal malpractice decision, *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205 (Miss.1996). This begs the question, "Why would Cook offer a legal malpractice jury instruction if he was not pursing a legal malpractice claim?" and begs the conclusion that of course Cook was pursuing a legal malpractice claim. A reading of Count Two of Cook's Complaint (which charged Pierce with violations of several Rules of Professional Conduct governing attorneys, including 1.2, 1.6, 1.7, and 1.9) also clearly indicates Cook was pursing a claim for legal malpractice. [CP p. 00015-00018 (RE p. 44-47)] To say Cook's claim was not a claim for legal malpractice is pure duplicity.

The case at bar is strikingly similar to the case of *Kahlig v. Boyd*, 980 S.W.2d 685 (Tex.App.1998). In *Kahlig*, the Plaintiff also attempted to argue he was asserting "breach of contract" claims, not legal malpractice claims, after he discovered that his attorney had been having an affair with his wife. While the Texas court noted that the facts of the case unfolded like a classic "bad lawyer joke", they came to the "inescapable" conclusion that the plaintiff's claims were nothing but disguised malpractice claims. *Kahlig v. Boyd*, 980 S.W.2d at 688. Furthermore, the Texas court dismissed the plaintiff's claims because, although they found the defendant's behavior deplorable, "there was no evidence Boyd's private behavior adversely affected his professional performance." *Kahlig v. Boyd*, 980 S.W.2d at 689. Similarly, in the case at bar, a review of Cook's claims clearly reveals that Cook's "breach of contract" claim is nothing but a disguised malpractice claim.

Alternatively, Cook relies solely upon the case of *Byrd v. Bowie*, 933 So.2d 899 ((Miss.2006) for the proposition that expert testimony was not needed. Cook's reliance on *Byrd,*

however, is misplaced. In *Byrd*, an attorney missed a deadline for designation of an expert – and the Mississippi Supreme Court clearly limited its holding to a previous line of cases which held that an attorney who fails to take action by a court-mandated deadline is negligent as a matter of law. Pierce's error, mistake, blunder or whatever you wish to call it is not so cut and dried. For example, Count Two of Cook's Complaint charged Pierce with violations of Rules of Professional Conduct governing attorneys, including Rule 1.2, Rule 1.6, Rule 1.7, and Rule 1.9; the Committee on Professional Responsibility of the Mississippi Bar, however, only found Pierce to have violated one of these rules – Rule 1.7(b) dealing with conflicts of interest. See Private Reprimand issued by the Committee on Professional Responsibility of the Mississippi Bar, published in *The Mississippi Lawyer*, March-April, 2003, page 38.

In drafting his brief, Cook's attorney demonstrates why expert testimony is needed to explain an attorney's duties to a jury because apparently Cook's attorney does not grasp what duty is at issue in this case. Cook's attorney states on page 6 of his brief:

> 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 affection from his client.

Although Pierce acknowledges that the circumstances in which he became romantically involved with Mrs. Piece were inappropriate (just as Pierce admitted to the Committee on Professional Responsibility of the Mississippi Bar and just as admitted Pierce in May of 2001 to Dr. Jesse Dees, a psychologist appointed by the Madison County Chancery Court to make recommendations regarding custody of Cook's children) [CP p. 00097-00099 (RE p. 95-97)],

there is no rule of professional conduct which expressly prohibits an attorney from becoming romantically involved with the wife of a client. Indeed, in response to the Bar complaint filed against Pierce by Cook, the Committee on Professional Responsibility of the Mississippi Bar did not find Pierce violated the Rules of Professional Conduct because he became romantically involved with his client's wife; rather they found he violated Rule 1.7(b) on conflicts on interests, which states:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless the lawyer reasonably believes: (1) the representation will not be adversely affected; and (2) the client has given knowing and informed consent after consultation.

See Private Reprimand issued by the Committee on Professional Responsibility of the Mississippi Bar, published in *The Mississippi Lawyer*, March-April, 2003, page 38.

Jury Instruction No. 10 [CP p. 000169-000170 (RE p.123-124)] was an abstract instruction from which the jury could have easily interpreted to mean Pierce should pay a large award for not being "loyal" ***in any sense they chose to define the term***, when that term was not explained to the jury in the legal context. This is exactly the reason we require expert testimony in legal malpractice cases. *Lane v. Oustalet*, 873 So.2d 92, 99 (Miss.2004). Experts are needed to explain terms like "loyalty" in the context of a lawyer's duties so that a jury will not decide for themselves what being "loyal" means.

Furthermore, Cook had the burden of proving that Pierce's "breach of contract" proximately caused an injury to Cook. *Singleton v. Stegall*, 580 So.2d at 1246 (even when attorney misses statute of limitations, plaintiff must still show he would probably have prevailed if the action had been filed in a timely manner). Although everyone admits that Pierce's behavior

was inappropriate, ***there was no evidence Pierce's affair adversely affected his professional performance*** – and there was certainly no expert testimony to this effect, as is required in a legal malpractice case. *Compare, Kahlig v. Boyd*, 980 S.W.2d 685 (Tex.App.1998) (there was no evidence the attorney's affair with client's wife adversely affected his professional performance). ***Perhaps the best evidence of the fact that Cook was not damaged by Pierce's violation of the conflict of interest rule is the fact that subsequent to the termination of Pierce, Cook and his wife were both represented in the medical malpractice suit by one attorney, Robert B. Ogletree, who saw no conflict of interest in representing both Cook and Mrs. Cook even after disclosure of the affair and after Mrs. Cook filed for divorce***; it is obvious that there was no real conflict of interest between Cook and his wife in the underlying medical malpractice lawsuit. See Ogletree's Retainer Agreement dated March 1, 2001 [Plaintiff's Exhibit #11]

Expert testimony is required to establish each element in a legal malpractice case. *Lane v. Oustalet*, 873 So.2d 92, 99 (Miss.2004); *Hickox v. Holleman*, 502 So.2d 626, 635 ((Miss.1987); *Dean v. Conn*, 419 So.2d 148, 150 (Miss.1982). Cook presented none. Therefore, the verdict and the judgment entered thereon in this case on July 7, 2006, should be set aside as to Cook's claim of legal malpractice and the Court should render a judgment dismissing Cook's claim of legal malpractice.

3. The lower court should have granted Pierce's Motion for Directed Verdict Or Pierce's Motion for a JNOV on Cook's claim of intentional infliction of emotional distress because this claim was barred by the statute of limitations.

In his brief, Cook ADMITS, the following by agreeing to Piece's rendition of the underlying facts:

- **By the first of October, 2000, Cook was aware of the affair and hired an attorney and a private investigator.** [T. p. 148:8-15 (RE p. 150), T. p158:25 to p159:7 (RE p.160-161), T. p.174:15 to p. 175:11 (RE p.168-169)]

- **Pierce was terminated as Cook's attorney in December, 2000.** [T. p. 715:12-13 (RE p. 149)].

Although there may be circumstances in which the tort of intentional infliction of emotional distress is a "continuing" tort, it is not a continuing tort in this case. For example, Cook's claim of alienation of affection did not "continue" but fully accrued when the alleged alienation was finally accomplished, and did not continue on until his actual divorce award. *Carr v. Carr*, 784 So.2d 227, 230 (Miss.App.2000). In *Carr v. Carr*, the Court explained that a claim for alienation of affection accrues when a spouse moves out of the marital home and abandons the marital relationship in open pursuit of an amorous relationship. *Id.* Similarly, although the cause of Mrs. Pierce's alienation may be disputed, *it is undisputed that Mrs. Pierce's affections for Cook were "alienated" at least by February of 2001, by which time Pierce had been deposed and admitted to the affair* [Defendant's Exhibit #1] and Mrs. Pierce had been deposed and admitted to the affair and sexual relations. [Defendant's Exhibit #11] It could even be argued that Mrs. Pierce's affections for Cook were alienated as early as September 1, 2000, the date Cooks ceased their marital cohabitation:

> WHEREAS, certain unhappy and irreconcilable differences and other disputes have arisen between the parties hereto, as a result of which they have ceased their marital cohabitation and separated in Madison, Madison County, Mississippi, on or about September 1, 2000, and the parties have not cohabitated since that date; and

[The preamble to the Child Custody and Property Settlement Agreement attached as Exhibit "A" to the Judgment of Divorce, which was introduced as Defendant's Exhibit #10]. **Once the affection of Cook's wife (now Mrs. Pierce) was alleged alienated, there was no relationship between Cook and his wife to "continue" to inflict emotional distress upon.** Therefore, just as a cause of action for alienation of affection does not "continue" until an actual divorce award, Cook's claim

for intentional infliction of emotional distress does not "continue" until an actual divorce award, but fully accrues at the time the alleged the alienation or loss of affection is finally accomplished, which by Cook's own admission was September 1, 2000 – the date the ceased their marital cohabitation and separated so that Mrs. Pierce could pursue her relationship with Pierce. *Carr v. Carr*, 784 So.2d 227, 230 (Miss.App.2000). Cook did not to file this action against Pierce until December 23, 2002, *well beyond any calculation of the one-year statute of limitations*. Therefore, the verdict and the judgment entered thereon in this case on July 7, 2006, should be set aside as to Cook's claim of intentional infliction of emotional distress, and the Court should render a judgment dismissing Cook's claim of intentional infliction of emotional distress.

Here is another way to look at it: The continuing tort doctrine as explained by the Mississippi Supreme Court in *McCorkle v. McCorkle*, 811 So.2d 258 (Miss.App.2001) centers around a "continuing course of **conduct**", not just injuries alone. The clock starts ticking from the tortfeasor's last "act", not the necessarily the last injury because suffering may last forever (indeed Cook is still in psychoanalysis for his parents' tumultuous divorce). In *McCorkle,* the defendant engaged in a series of wrongful acts which caused the plaintiff to suffer damage – he tried several times to have the plaintiff civilly committed. But the trial court and Cook are trying to reverse the continuous tort doctrine and focus on the last date of Cook's injury instead of the last date of Pierce's acts. **AFTER PIERCE WAS TERMINATED AS COOK'S ATTORNEY IN DECEMBER 2000, COOK DOES NOT POINT TO ANY ACT OF PIERCE WHICH MIGHT EVEN ARGUABLY EVOKE OUTRAGE OR REVULSION** – [See Jury Instruction No. 9 on intentional infliction of emotional distress – CP p.00162]. Indeed it is a "tall order" to meet the requisites of a claim for intentional infliction of emotional distress in

Mississippi. *Richard v. Supervalu, Inc.*, --- So.2d ----, 2008 WL 307473, ¶28 (quoting (*Speed v. Scott*, 787 So.2d 626, 630 (¶ 19) (Miss.2001) (quoting *Jenkins v. City of Grenada*, 813 F.Supp. 443, 446 (N.D.Miss.1993)). As the Mississippi Supreme Court and the Mississippi Court of Appeals have both explained on numerous occasions:

> In order to prevail in a claim for intentional infliction of emotional distress, it is necessary to show that the conduct complained of was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

Clark v. Luvel Dairy Products, Inc., 821 So.2d 827 (Miss.App.2001).

The only continuing "act" the lower court and Cook points to is that Pierce continued the relationship and married Mrs. Pierce. This is nothing but a disguised claim for criminal conversation, which was abolished by the Court in *Saunders v. Alford*, 607 So.2d 1214 (Miss.1992). ***The trial court even suggested Cook's claims for intentional infliction of emotional distress "continued" until as late as the birth of the child born to Mr. and Mrs. Pierce*** (which child was born on September 27, 2005) stating:

> It's got to continue up to a certain point. And there was even a child born of the marriage where the defendant in this case and the plaintiff's ex-wife married. And to me, it's got to be one where there is continuing emotional distress.

[T.670:27 to 671:4 (RE p.31 to 32)] The problem with the trial court's ruling is that the Pierces' child was born on September 27, 2005:

- ***60 months after Cook became aware of the affair in October 2000 and hired an attorney and a private investigator.*** [T. p. 148:8-15 (RE p. 150), T. p158:25 to p159:7 (RE p.160-161), T. p.174:15 to p. 175:11 (RE p.168-169)]

- ***57 months after Pierce was terminated as Cook's attorney in December, 2000.*** [T. p. 715:12-13 (RE p. 149)].

- ***43 months after Pierce and Mrs. Pierce admitted to the affair and/or sexual relations during the deposition taking in the divorce action in***

February of 2001 [Defendant's Exhibit D-1; Defendant's Exhibit #11]

- ***AND 61 MONTHS AFTER THE COOK AND HIS WIFE FINALLY SEPARATED AND CEASED ALL MARTIAL COHABITATION ON SEPTEMBER 1, 2000. See the preamble to the Child Custody and Property Settlement Agreement attached as Exhibit "A" to the Judgment of Divorce, which was introduced as Defendant's Exhibit #10.***

The trial court's calculation does not properly focus on the dates of Pierce's alleged tortious conduct, as the Court did in *McCorkle*, and if allowed to stand will open the proverbial "floodgates" of litigation by allowing plaintiffs to extend statutes of limitation *ad infinitum* by claiming injury beyond the traditional statute of limitation deadlines.

The trial court erroneously allowed this claim to be submitted to the jury, which greatly prejudiced Pierce. Therefore, the verdict and the judgment entered thereon in this case on July 7, 2006, should be set aside as to Cook's claim of intentional infliction of emotional distress, and the Court should render a judgment dismissing Cook's claim of intentional infliction of emotional distress as barred by the applicable statute of limitations.

4. By giving Jury Instruction No. 10 (P20), the trial court erroneously allowed Cook to use the Rules of Professional Conduct as an improper measuring stick of an attorney' civil liability.

"Abstract instructions on legal principles unrelated to facts and issues set out in the instructions are dangerous, because, although such instructions may be correct in principle, they require legal training to properly interpret. They tend to mislead the jury and are fertile fields on which to grow confusion and dissension." *Freeze v. Taylor*, 257 So.2d 509, 511 (Miss.1972) "If an instruction merely relates a principle of law without relating it to an issue in the case, it is an abstract instruction and should not be given by the Court." *Id.* Jury Instruction No. 10 was an abstract instruction from which the jury could have easily interpreted to mean Pierce should pay a

large award for not being "loyal" ***in any sense they chose to define the term***, when that term was not explained to the jury in the legal context. This is exactly the reason we require expert testimony in legal malpractice cases. *Lane v. Oustalet*, 873 So.2d 92, 99 (Miss.2004). Experts are needed to explain terms like "loyalty" in the context of a lawyer's duties so that a jury will not decide for themselves what being "loyal" means.

Furthermore, Cook's attorneys improperly used Jury Instruction No. 10 (P20) [CP p.169 (RE p.123)] at trial in order to use the Rules of Professional Conduct as a measuring stick to determine Pierce's liability for legal malpractice. The portion of preamble to the Mississippi Rules of Professional Conduct titled "scope" states clearly that the rules are not intended to establish the standard of care in litigation between an attorney and a former client, stating as follows:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty.

In *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205 (Miss.1996), the Mississippi Supreme Court reasoned that the Rules of Professional Conduct should not be used as a measuring stick to determine civil liability in a legal malpractice case:

> Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rules. Accordingly, nothing in the rules should be deemed to augment any substantive legal duties of lawyers or the extra-disciplinary consequences of violating such a duty.

Wilbourn v. Stennett, Wilkinson & Ward, 687 So. 2d 1205, 1216 (Miss.1997). In granting Jury Instruction No. 10 (P20), the trial court specific stated over Pierce's objections:

> But, regardless, I have - - what I had envisioned was you can - - they could be instructed in this manner: "That the Court instructs the jury, that attorneys are governed or regulated by a code of professional responsibility which contain one point" - - whatever - -seven and owes that duty and obligation to a client. If you find by a preponderance of the evidence that this was violated, find for the plaintiff.

[T.866:29 to *867*:10 (RE p.266:29 to 267:10)] Thus the trial court clearly intended Jury Instruction No. 10 (P20) to allow Cook to use the Rules of Professional Conduct as a measuring stick to determine civil liability in a legal malpractice case, ***in direct contradiction to the Rules of Professional Conduct and caselaw, and much to the prejudice of Pierce***. The trial court committed prejudicial error by instructing the jury in this manner on such a crucial, vital issue as an attorney's "duties". This was a critical and vital instruction that tainted the jury's deliberation on all counts. As an example of how important this jury instruction was, it was virtually the only jury instruction mentioned by Cook's attorneys' during closing arguments and Cook's attorneys certainly exploited the error caused by this jury instruction as they stressed the ambiguous nature of this jury instruction in their closing arguments and they encouraged the jury to punish Pierce for not being "loyal" ***in any sense the jurors chose to define the term***, since that term was not explained to the jury in the legal context.

> "And I don't know about you, but when a lawyer breaches his contract of loyalty and duty, you kind of have the right to expect that. By God you're paying for it. But it didn't come. The lawyer – the Court instructs you that you have a duty falling into three broad categories of loyalty and duties."
>
> [T.p887:4-16]

> "I want to just very quickly run through the things that happened and ask you if these are the actions of a person, of an attorney that is held to a duty of loyalty, a

duty of care, and a duty of contract."

[T.p898:28 to p899:1]

The Code of Professional Conduct is not to be used as a measuring stick to determine civil liability for legal malpractice. Therefore, the verdict and the judgment entered thereon in this case on July 7, 2006, should be set aside as to any remaining claims and Pierce should be granted a new trial.

5. The cumulative effect of errors in the exclusion of relevant evidence deprived Pierce of a fair trial, thus requiring reversal and remand for a new trial.

    a. The lower court refused to allow Pierce to cross examine Cook regarding how diligently he exercises his rights to visit his children, i.e. whether Cook "mitigated his damages".

First of all, Cook is correct that Pierce misstated his argument on this point in Pierce's initial brief – ***the point Pierce meant to make is Pierce was <u>not</u> allowed to ask <u>ANY</u> questions about Cook's visitation rights!***

In Cook's complaint under Count One "Alienation of Affection" and during his testimony, Cook alleged that a substantial part of the damages he has suffered as a result of the alleged alienation of affection is being deprived of the ability to enjoy "the pleasure and companionship of his familial relationship" with his children. [CP p15, at ¶ 13 (RE p.44). Additionally, in Count Three "Intentional Infliction of Emotional Distress", Cook alleges as a result of Pierce's intentional acts Cook's minor children have been deprived of Cook's companionship. [CP p19, at ¶ 20 (RE p.48). Furthermore, in the opening statement, Cook's attorney argued:

> And that's what we're going to show you, that this intentional infliction caused him damage . . caused him not to be able to tuck his children into school – into bed, caused him not to be able to hug his children on Father's Day, on Christmas morning. And that is emotional damage. He's suffered.

[T. p. 12:18-26 (RE p. 128)]

Cook's counsel also stated:

> There was a breach of that knowledge that caused Mr. Cook to be separated from his wife, to be separated from his children because of the divorce; to undergo monetary damages; to suffer, to sit at night and cry because he can't see his children.

[T. p. 13:23-25 (RE p. 129)] Finally, Cook testified that a significant part of his damages came from the fact that that he no longer gets to see his children because Pierce had alienated him from his children. [T. p.218 (RE 181); T. p.224 (RE p.187); T. p.225 (RE p.188)].

Despite these inflammatory claims against Pierce, ***the trial court refused to allow Pierce to ask even the simplest questions regarding whether Cook was diligent in exercising his rights to visit his children or whether Cook intended to live in Mississippi.*** For example, Pierce was not allowed to present the jury with the answer to such a basic question as the following, which clearly went to Cook's damages:

> PIERCE: Now, you have the right under the property settlement and custody agreement to visit your children every other weekend?
>
> MS. THIBODEAUX: Your Honor, we're going to object to any testimony out of the judgment of divorce or the property settlement and object to the relevance as to when he as a right to visit his children.
>
> THE COURT: Sustained.

[T.p406:5-14 (RE p.191)] Pierce did make a proffer to show this Court that Cook was entitled to visit his children every other weekend, and five weeks in the Summer, but "chose" not to exercise all of his visitation rights (***Cook had only seen his children twice in six months that year!***) not because of Pierce's actions, but because Cook is "busy" in California for some unexplained reasons. [T.p406-418 RE p191-203)] ***Pierce was not allowed to question Cook before the jury as to why Cook only visits his children three (3) times a year and why Cook almost always returns***

them early during when he does have them. Pierce was not allowed to question Cook before the jury as to why Cook sold his home in Madison, Mississippi – a home which was only a mile away from Cook's children -- to live in California with no job or responsibilities other than managing his trust assets. [T. p. 405 (RE p.190)] Furthermore, as 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.

Of course the jury never heard these facts; they were left to believe the hyperbole of Cook's attorneys and dream of all kinds of evil reasons Cook did not visit with his children very often, instead of knowing the truth. Here are excerpts from closing arguments:

> Ladies and gentlemen, I know y'all are ready to be through and I'm going to try to just really make my remarks brief. And I appreciate y'all being here and listening to everything.
>
> And the question I want you to thing about when you go back to deliberate -- and this is the question I think we asked in the opening statement: What is a man's family worth? What is Mr. Cook's wife and children worth to him or to you? I can't put a value on mine. I'd give anything to have them with me every single minute of every single day. And I think that's what Mr. Cook wanted too.

[T. p896:23 to p897:8 (RE p270-271)]

> This is for mental pain. And only y'all can decide that, because I told you when I first started arguing, only this jury can put the amount right here for what a man's family is worth. $250,000? $500,000? I can't tell you want your family is worth. I just know this man doesn't have his.

[T. p903:10-17 (RE p277)]

It is well established that a party has a duty to mitigate its damages. *Illinois Central R. Co. v. Winters*, 863 So.2d 955, (Miss.2004) (citations omitted) The testimony which the court refused the jury to hear went directly to Cook's damages and whether he contributed to his damages himself.

One of Cook's primary claims was that Pierce caused Cook's relationship with his children to suffer and, as a result of the trial court's rulings, Cook was allowed to portray his relationship with his children as "Norman Rockwell" perfect until Pierce entered the picture and thus ". . . the jury was not given the whole story." *Bland v. Hill*, 735 So.2d 414, 418 (Miss.1999). "By excluding this evidence, the trial court abused its discretion." *Id.* Depriving Pierce of the ability to cross-examine Cook regarding one of the central themes of his case deprived Pierce of a fair trial. *Id.*

b. The lower court refused to allow Pierce to put on evidence to establish the correct "rate of return on investment" that Mr. Cook's accountant should have used.

Mr. Cook's accountant, Raleigh Cutrer, testified Mr. Cook lost between **$65,000.00 to $115,000.00 because of the loss of income** because of having to withdraw funds from his trust (using a speculative return on investment of between 10% to 15%). [T. p. 377:10 to p. 378:25 (RE . 239-240)]. The only way to determine the ACTUAL loss on income would have been to disclose the principal of the trust before and after – the jury already knew Cook was a wealthy man given the dollar figures tossed about and the fact that Cook never had to work for a living. No matter how much double talk Cook's counsel uses, a "range" of a loss from $65,000 to $115,000 is a BIG DIFFERENCE. When Pierce's counsel attempted to discover the total values of the trusts before and after, the trial court sustained Mr. Cook's objection. [T. p.387:24 to p. 391:4 (RE p. 249-253)]. 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 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. *Compare, United Southern Bank v. Bank of Mantee*, 680 So.2d 220 (Miss.1996) (Chancellor's use of three-year yield rate in calculating loss of investment opportunity was speculative and abuse of discretion).

Conclusion

As a result of the errors made by the trial court, the judgment entered in this case on July 7, 2006, should be set aside as to Mr. Cook's claim of legal malpractice and intentional infliction of emotional distress and the Court should render a judgment dismissing these claims. Furthermore, inasmuch as the cumulative effect of errors in the exclusion of relevant evidence deprived Pierce of a fair trial of the claim of alienation of affections, the Court should reverse and remand for a new trial on this claim alone.

Respectfully submitted, this the 25th day of February, 2007.

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CERTIFICATE OF SERVICE

I, RONALD HENRY PIERCE, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing to:

John G. Holaday, Esq.
681 Towne Center Blvd., Suite A
Ridgeland, Mississippi 39157

The Honorable Samac S. Richardson
Post Office Box 1599
Brandon, Mississippi 39043

Betty W. Sephton, Clerk
Mississippi Supreme Court
Mississippi Court of Appeals
450 High Street
Post Office Box 249
Jackson, Mississippi 39205-0249

Elbert E. Haley, Jr.
Sharon Patterson Thibodeaux, Esq.
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THIS, the 25th day of February, 2008.

RONALD HENRY PIERCE