

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**JOHN O'NEAL LUSE**

**APPELLANT**

**VERSUS**

**CAUSE No. 2007-CA-00171**

**LENDER LUSE**

**APPELLEE**

**ON APPEAL FROM THE CHANCERY COURT OF  
HINDS COUNTY FIRST JUDICIAL DISTRICT, STATE OF MISSISSIPPI**

---

**APPELLANT'S REPLY TO BRIEF OF APPELLEE, LENDER LUSE**

---

***ATTORNEY FOR THE APPELLANT***

**BRUCE W. BURTON, MSB NO. [REDACTED]**

**BURTON LAW FIRM  
106 South President Street, Suite 210  
Post Office Box 23144  
Jackson, MS 39225  
(601) 899-5287**

**ORAL ARGUMENT REQUESTED**

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**JOHN O'NEAL LUSE**

**APPELLANT**

**VERSUS**

**CAUSE NO. 2007-CA-00171**

**LENDER LUSE**

**APPELLEE**

---

**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 Judges of the Court of Appeals may evaluate possible conflicts, disqualifications or recusal:

1. Richard R. Grindstaff, Esquire, Byram, Mississippi, Attorney of Record for Appellee
2. Bruce Burton, Esq., Burton Law Firm, Attorney for Appellant
3. Cheryl L. Burton, Esquire, Burton Law Firm, Attorney for Appellant
4. Lender Luse, Appellee
5. John O'Neal Luse, Appellant
6. Chancery Court Judge Patricia D. Wise, Chancery Court of Hinds County, First Judicial District, Mississippi

Respectfully submitted, this the 30th day July, 2007

  
\_\_\_\_\_  
**BRUCE BURTON, ESQUIRE**  
**ATTORNEY FOR JOHN O'NEAL LUSE**

## **TABLE OF CONTENTS**

<b>CERTIFICATE OF INTERESTED PERSONS .....</b>	<b>i</b>
<b>TABLE OF CONTENTS .....</b>	<b>ii</b>
<b>TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED.....</b>	<b>iii</b>
<b>ARGUMENT .....</b>	<b>1-8</b>
<b>CONCLUSION .....</b>	<b>9</b>
<b>CERTIFICATE OF SERVICE.....</b>	<b>10</b>

## **TABLE OF AUTHORITIES**

### **CASES**

<u>Daniels v. Daniels</u> , 950 So. 2d 1044 (Miss. App. Ct. 2007).....	4
<u>Dix v. Dix</u> , 944 So. 2d 134 (Miss. App. 2006).....	2
<u>Ferguson v. Ferguson</u> , 639 So. 2d 921 (Miss. 1994) .....	3, 4
<u>Fisher v. Fisher</u> , 944 So. 2d 134 (Miss. App. 2006) .....	1
<u>Jackson v. Jackson</u> , 933 So. 2d 53 (Miss. App. Ct. 2006) .....	1, 2
<u>Jerome v. Stroud</u> , 689 So. 2d 755 (Miss. 1997) .....	1
<u>Johnson v. Johnson</u> , 823 So. 2d 1156 (Miss. 2002) .....	3, 4
<u>Johnson v. Johnson</u> , 650 So. 2d 1281 (Miss. 1995) .....	3
<u>Jundooshing v. Jundooshing</u> , 826 So. 2d 85 (Miss. App. Ct. 2002).....	1
<u>Lindsey v. Lindsey</u> , 818 So. 2d 1191 (Miss. 2002).....	2, 3
<u>Morreale v. Morreale</u> , 646 So. 2d 1264 (Miss. 1994) .....	2
<u>Ory v. Ory</u> , 936 So. 2d 405 (Miss. 2006).....	6, 7
<u>Owen v. Owen</u> , 928 So. 2d 156 (Miss. 2006).....	4
<u>Sandlin v. Sandlin</u> , 699 So. 2d 1198 (Miss. 1997) .....	4
<u>Stinson v. Stinson</u> , 738 So. 2d 1259 (Miss. App. Ct. 1999).....	2
<u>Vinson, et al v. Johnson, et al</u> , 493 So. 2d 947 (Miss. 1986) .....	5

### **STATUTES**

Mississippi Code Annotated Section 93-5-17(1) .....	5, 6, 7
---	---------

### **RULES**

Mississippi Rule of Civil Procedure 60(b)(4) and (6) .....	4, 5, 7, 8, 9
Uniform Chancery Court Rule 8.05 .....	8, 9

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN O'NEAL LUSE

APPELLANT

VERSUS

CAUSE NO. 2007-TS-00171

LENDER LUSE

APPELLEE

---

APPELLANT'S REPLY TO BRIEF OF APPELLEE, LENDER LUSE

---

**NOW COMES**, Appellant John O'Neal Luse and files this Appellant's Reply to Brief of Appellee, Lender Luse and in support hereof would show unto this honorable Court the following:

The Appellee, Lender Luse's, response is not responsive to Appellant, John O'Neal Luse's, Brief of Appellant. John O'Neal Luse's arguments are not based on the allegations that Appellant is seeking unjust or unfair redress. Mr. John O'Neal Luse's arguments are being made in the interest of fairness, justice, and adherence to the law.

**I. WHETHER THE CHANCERY COURT COMMITTED MANIFEST ERROR OR ABUSED ITS DESCRETION BY NOT EQUITABLY DISTRIBUTING THE MARITAL ASSET AND LIABILITIES OF THE PARTIES WHEN IT FAILED TO MAKE SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

"It is well settled in Mississippi law that [the Court] will not disturb a chancellor's findings in a divorce matter unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard." Fisher v. Fisher, 944 So. 2d 134, 136 (Miss. App. 2006), citing Jundooshing v. Jundooshing, 826 So. 2d 85, 88 (¶10)(Miss.2002). Unless there is an abuse of discretion, the decision of the Chancellor will be upheld. Jerome v. Stroud, 689 So. 2d 755, 757 (Miss. 1997). The Court also reviews the division of marital property under an abuse of discretion standard. Jackson

v. Jackson, 933 So. 2d 53, 57 (Miss. App. 2006). When questions of law are presented, the Court's standard of review will be de novo. A determination by the Court that the legal standard utilized by the Chancellor is not correct, than the decision must be reversed. Dix v. Dix, 941 So. 2d 913, 915-916 (Miss. App. Ct. 2006), citing Morreale v. Morreale, 646 So. 2d 1264, 1267 (Miss. 1994).

The Court noted in Stinson, even when a Husband had not answered a Complaint after being served and a divorce was subsequently granted **after a hearing was held in open court** where the Wife and a corroborating witness testified the Court still reversed and remanded the property division so that complete findings of fact and conclusions of law could be made. Stinson v. Stinson, 738 So. 2d 1259 (Miss. App. Ct. 1999).

This case is similar and in point to the Stinson case because Mr. Luse was served with process and he too failed to answer, and although there is **no record of a hearing held in open court or otherwise** in this present case, the property division of the decision should be reversed and remanded as it was ordered in the Stinson case because there was no finding of fact or conclusions of law.

Appellee is wrong in making reference to the case of Lindsey v. Lindsey, 818 So. 2d 1191 (Miss. 2002) as an authority whereby this honorable Court would allow a matter to escape being reversed and remanded, when it is plainly obvious that there is no record of an original hearing before this Court. In Lindsey, this honorable Court did not reverse and remand the case, the case was affirmed because the record in Lindsey showed that during subsequent hearings concerning a default judgment, proof was presented justifying the uncontested divorce. The Court stated in Lindsey supra at 1195, that "although we have an order granting the uncontested divorce, there is no

record of the original hearing before this Court. Therefore, without more, there would be no way of knowing whether Mark presented sufficient proof in the original hearing.” The Court affirmed the Lindsey decision on the basis that there was a record which presented proof justifying the divorce. Here, there is no such record. In the case at bar, Mr. Luse filed a Motion for Relief from Judgment of Divorce timely, but it has not been heard further, there was no subsequent default hearing held; and there is still no record of any findings of fact or conclusions of law which is required.

A Chancellor is required to classify all property as being a marital asset or a non marital asset. Johnson v. Johnson, 823 So. 2d 1156, 1160 (Miss. 2002) citing Johnson v. Johnson, 650 So. 2d 1281, 1287 (Miss. 1995). Afterwards, the Chancellor must then make an equitable distribution of the marital property by using the Ferguson factors. The court enumerated a list of guidelines to be used by the Chancellor when making an equitable distribution of marital assets. Ferguson, 639 So. 2d at 928. See also Johnson v. Johnson, 823 So. 2d 1156, 1159-1162 (Miss. 2002).

The Ferguson guidelines should be used by Chancellors in making an equitable distribution of the marital assets, and the Chancellor's decision should be supported by findings of fact and conclusions of law. *Id.* Specific findings of fact and conclusions of law should be made on the record. The findings of fact and conclusions of law should justify the division of property that is made and not to the classification of the property. Johnson, 823 So. 2d at 1161. The property division in the Johnson case was reversed and the case was remanded. Mr. Luse case should be reversed and the case should be remanded.

The Chancellor made no classification of the property as being marital assets, there is no discussion of the Ferguson factors, and there are no specific findings of fact

or conclusions of law to be found anywhere in the record or in the Final Judgment of Divorce. There is also no transcript to justify the classification of the property as marital property nor to justify the division of the property.

In Owen v. Owen, 928 So. 2d 156, 166-169 (Miss. 2006), after being remanded so the Chancellor could specifically address the Ferguson factors, the judgment of the Chancellor was reversed when the Chancellor failed to provide conclusions of law in addition to listing of the Ferguson factors and making findings of fact. Further, in Daniels v. Daniels, 950 So. 2d 1044 (Miss. App. Ct. 2007), the Court reversed the judgment because of the Chancellor's failure to adequately address the Ferguson factors and because the Chancellor did not provide an analysis of any of the Ferguson factors. There is no justification is provided for the Chancellor's distribution of assets.

The failure to make findings of fact and conclusions of law [is] manifest error requiring reversal on remand." Johnson, 823 So. 2d at 1160 citing Sandlin v. Sandlin, 699 So. 2d 1198, 1204 (Miss. 1997). Therefore, the Chancellor's failure to make an equitable distribution of the marital property and the Chancellor's failure to make specific findings of fact and conclusions of law is clearly manifest error for which the Final Judgment of Divorce should be reversed and remanded.

Consequently, pursuant to the Mississippi Rules of Civil Procedure, a Rule 60(b) Motion for Relief from Judgment or Order does not operate to stay a proceeding and may be filed up to six months after the original Order has been entered. Mr. Luse timely filed his Appeal to this honorable Court, tolling his 30 days, and thereafter properly and timely filed his Rule 60(b) Motion for Relief from Final Judgment of Divorce.

Mr. Luse timely and properly filed a Rule 60(b) Motion for Relief from Judgment of Divorce which has not been heard by the Chancery Court. A copy of the motion was



made a part of the record excerpts for Mr. Luse's Brief and every issue that needs to be addressed is present in Mr. Luse's motion which still needs to be heard.

Seemingly, should the Court find that it lacks jurisdiction because Mr. Luse's Rule 60(b)(4) and (6) motion was not heard by the Chancellor, then the Court should remand the case back to the Chancery Court so that Mr. Luse's Rule 60(b)(4) and (6) motion can be heard and to allow for a finding of fact and conclusions of law.

**II. WHETHER THE CHANCERY COURT COMMITTED MANIFEST ERROR OR ABUSED ITS DISCRETION/COMMITTED MANIFEST ERROR WHEN GRANTING A DIVORCE ON THE GROUND OF DESERTION WHEN NO RECORD OF A HEARING WAS MADE AND THE DIVORCE PROCEEDINGS WERE NOT HELD IN OPEN COURT AS REQUIRED BY OF THE MISSISSPPI CODE AS AMENDED § 93-5-17(1) (1972).**

Mr. Luse timely and properly filed a Rule 60(b) Motion for Relief from Judgment of Divorce which has not been heard by the Chancery Court. A copy of the motion was made a part of the record excerpts for Mr. Luse's Brief and every issue that needs to be addressed is present in Mr. Luse's motion which still needs to be heard. The divorce proceeding in this case was not conducted in open court as required by Miss. Code Ann. § 93-5-17(1) (1972) and should be void. According to Miss. Code. Ann. § 93-5-17(1) (1972):

The proceedings to obtain a divorce shall not be heard or considered nor a judgment of divorce entered except in open court. . . Any judgment made or entered contrary to the provisions of this section shall be null and void.

In the case *sub judice*, there is no evidence or justification in the record to show that the divorce proceeding was held in open court as required. Therefore, the divorce is void.

The Court reasoned, in Vinson, et al v. Johnson, et al, 493 So. 2d 947, 950 (Miss. 1986), "generally a court reporter is available there in court for a party to see that

a proper record is made. In the event there is no court reporter, or the court reporter fails to make a proper record, or accurate record, the party can prepare a bill of exceptions". In this present case, there was no record of any kind of hearing occurring. When a transcript of the hearing was requested by Appellant's Counsel of record, the Clerk advised there is no record to transcribe. This is evident by the fact that there is no written record presently available for this Court to review, and also evident by a brief review of the lower court's docket sheet. Likewise, there was no bill of exceptions available as a record.

The lower Court committed manifest error when it failed to ensure that this case was held in open court and that a proper record was made in accordance with the Mississippi Code Annotated as Amended section 93-5-17(1) (1972), before it entered a final judgment of divorce. There is no record of any motions being filed, or financial statements being filed, or witnesses being present, or of any evidence being produced in the lower court. As mentioned above, some type of evidence should have been presented, if for no other reason than to justify a distribution of the marital property.

In Ory v. Ory, 936 So. 2d 405, 410 (Miss. 2006), the Court affirmed the granting of a divorce on the Ground of Habitual Cruel and Inhumane Treatment although the argument was made that the divorce had not been held in open court in violation of Miss. Code Ann. Section 93-5-17. The Court reasoned that the issue was never raised **below or on appeal.**

The Court reasoned:

[He] could have filed a motion with the chancery court pursuant to Rule 60(b)(4) of the Mississippi Rules of Civil Procedure, asking the court to set aside the judgment of divorce as void. However, he filed no such motion. Had he made such a request and been denied then we would have jurisdiction to rule on the question. However, because [he] did not seek that relief below, we may not grant it on appeal. *Id.*

The Appellant sought this relief below. Mr. Luse filed a Motion for Relief From Final Judgment of Divorce with the Chancery Court pursuant to Rule 60(b)(4) and (6). According to Rule 60(b)(4) and (6) of the Mississippi Rules of Civil Procedure, "[o]n motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void; . . . or (6) any other reason justifying relief from judgment."

Mr. Luse timely and properly filed his Motion for Relief from Final Judgment of Divorce subsequently to the Notice of Appeal.

Furthermore, Mr. Luse contends that although the Court in Ory v. Ory ruled that a post trial motion should be filed and heard by the Chancellor prior to this Court having jurisdiction to rule on the question, the statute specifies that the judgment of divorce is null and void if the divorce is not heard in open court. Therefore, regardless of the fact that Mr. Luse's post trial motion was not heard by the Chancellor prior to the filing of the Notice of Appeal being filed, Mr. Luse did file the Rule 60(b)(4) and (6) Motion and he attempted to seek leave of this Court to have the matter stayed so that the lower Court could rule on same. Further, Mr. Luse contends that because Miss. Code Ann. § 93-5-17(1) (1972) states that the judgment of divorce is null and void if the divorce is not heard in open court, then the divorce in this case should be null and void.

Again, should the Court find that it lacks jurisdiction because Mr. Luse's Rule 60(b)(4) and (6) motion was not heard by the Chancellor, then the Court should remand the case so that Mr. Luse's Rule 60(b)(4) and (6) motion can be heard and to allow Mr. Luse the opportunity to appeal the ruling (if unfavorable) once the Rule 60(b)(4) and (6) motion is heard.

**III. WHETHER THE CHANCERY COURT COMMITTED MANIFEST ERROR OR ABUSED ITS DISCRETION WHEN IT GRANTED A DIVORCE ON THE GROUND OF DESERTION AND AWARDED ALL THE MARITAL PROPERTY TO THE APPEALLEE WHERE NO UNIFORM CHANCERY COURT RULE 8.05 FINANCIAL STATEMENT WAS FILED NOR WAS AN ORDER EXCUSING THE SAME MADE A PART OF THE RECORD.**

Mr. Luse timely and properly filed a Rule 60(b) Motion for Relief from Judgment of Divorce which has not been heard by the Chancery Court. A copy of the motion was made a part of the record excerpts for Mr. Luse's Brief and every issue that needs to be addressed is present in Mr. Luse's motion which still needs to be heard.

Under Mississippi law a Uniform Chancery Court Rule 8.05 financial statement and disclosure is required unless otherwise excused by order of the presiding Court for good cause. No financial disclosure requirement was filed in the lower court, and there is no record of any order by the lower Court excusing the same for good cause. Because there is no documentation in the record regarding the ownership of the property in question nor is there any evidence presented in the record justifying the Court's division of property, a Uniform Chancery Court Rule 8.05 financial statement and disclosure would have contained information regarding the parties' property and assets. The failure of the lower Court to require an 8.05 financial statement and disclosure, as required, was an error, and this matter should be remanded back to the lower Court for a requirement of the same and a rehearing, especially concerning the distribution of the marital property.

Therefore, should the Court find that it lacks jurisdiction because Mr. Luse's Rule 60(b)(4) and (6) motion was not heard by the Chancellor, then the Court should remand the case back to the Chancery Court so that Mr. Luse's Rule 60(b)(4) and (6) motion can be heard and to allow for a finding of fact and conclusions of law.

### CONCLUSION

The Chancery Court committed manifest error and abused its discretion by granting a divorce and distributing the marital property when it failed to make findings of fact and conclusions of law when distributing the marital property. The Chancery Court also committed manifest error and abused its discretion when it failed to have a hearing in open court, make a written record, take documentary or other evidence, and failed to require a Uniform Chancery Court Rule 8.05 financial statement and disclosure or excuse the same. Therefore, this cause should be reversed because of the manifest error and abuse of discretion. Nevertheless, should the Court find that it lacks jurisdiction because Mr. Luse's Rule 60(b)(4) and (6) motion was not heard by the Chancellor, then the Court should remand the case back to the Chancery Court so that Mr. Luse's Rule 60(b)(4) and (6) motion can be heard and to allow for a finding of fact and conclusions of law. Consequently, this matter should be reversed and remanded to the Chancery Court.

A handwritten signature in black ink, appearing to be 'B. B. A.' with a long horizontal stroke extending to the right.

**CERTIFICATE OF SERVICE**

I, Bruce Burton, Attorney for Appellant, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of Appellant's Reply to Brief of Appellee, Lender Luse of Appellant to the following:

Honorable Patricia D. Wise  
Post Office Box 686  
Jackson, Mississippi 39205

Richard Grindstaff, Esquire  
Post Office Box 720517  
Byram, Mississippi 39272

Dated, this the 30<sup>th</sup> day of July, 2007.

  
**BRUCE W. BURTON**