

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 SUPPLEMENTAL BRIEF

ATTORNEYS FOR THE APPELLANT

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

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ORAL ARGUMENT REQUESTED

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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 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, Esquire, 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 2nd day April, 2008


CHERYL L. BURTON, ESQUIRE
ATTORNEY FOR JOHN O'NEAL LUSE

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS.....	ii
TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED.....	iii
ARGUMENT	1-5
CONCLUSION.....	5
CERTIFICATE OF SERVICE.....	6

TABLE OF AUTHORITIES

CASES

<u>Dix v. Dix</u> , 944 So. 2d 134 (Miss. App. 2006)	1
<u>Ferguson v. Ferguson</u> , 639 So. 2d 921 (Miss. 1994)	5
<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
<u>Jerome v. Stroud</u> , 689 So. 2d 755 (Miss. 1997)	1
<u>Johnson v. Johnson</u> , 823 So. 2d 1156 (Miss. 2002)	4, 5
<u>Johnson v. Johnson</u> , 650 So. 2d 1281 (Miss. 1995)	4, 5
<u>Jundooshing v. Jundooshing</u> , 826 So. 2d 85 (Miss. App. Ct. 2002)	1
<u>Morreale v. Morreale</u> , 646 So. 2d 1264 (Miss. 1994)	1
<u>Sandlin v. Sandlin</u> , 699 So. 2d 1198 (Miss. 1997)	5
<u>Stinson v. Stinson</u> , 738 So. 2d 1259 (Miss. App. Ct. 1999)	3

STATUTES

Mississippi Code Annotated Section 93-5-1	1
Mississippi Code Annotated Section 93-5-17(1)	3

RULES

Fifth Chancery Court District Rule 9	2
Uniform Chancery Court Rule 8.05	4

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 SUPPLEMENTAL BRIEF

NOW COMES, Appellant, John O'Neal Luse, and files this Appellant's Supplemental Brief in response to the Supplemental Findings of the Chancery Court of Hinds County and in support hereof would show unto this honorable Court the following:

In responding to the two issues the Mississippi Court of Appeals requested to be addressed, the Supplemental Findings submitted by the Chancery Court of Hinds County failed to provide any evidence which would affirmatively answer the two issues.

"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).

I. WHETHER THE DIVORCE PROCEEDING OF DECEMBER 29, 2006, OCCURRED IN OPEN COURT AS REQUIRED BY OF THE MISSISSPPI CODE AS AMENDED § 93-5-17(1) (1972).

The Chancery Court failed to provide any evidence to support the allegation that the December 29, 2006 divorce proceeding occurred in open court. The Chancery Court set forth it's response in paragraph II and paragraph III of its Supplemental Findings.

The Chancery Court's response as stated in paragraph II is as follows:

The divorce proceedings were held in open court. . . . Lender Luse presented testimony and corroborating evidence to establish that she was entitled to divorce against John O'Neal Luse on the ground of desertion pursuant to Miss. Code Ann §93-5-1. The Final Judgment of Divorce was entered on December 29, 2006.

This entire statement made by the Chancery Court does not answer the Mississippi Court of Appeal's issue in the affirmative. Was the proceeding held in open court? **No, it was not.**

There was no hearing held in open court which is evident by the fact that there was no record of a hearing being held in open court submitted to the Supreme Court initially, on March 30, 2007 when this appeal was filed and is further evidenced by the fact that the Chancery Court has now failed to submitted a written record in with Supplemental Findings stamped filed March 4, 2008 in the Chancery Court of Hinds County. See Attached Exhibit "A".

The Chancery Court further responded in paragraph III as follows:

The deputy clerk's sign in sheet for uncontested matters heard on December 29, 2006, indicates that Richard Grindstaff, counsel of record for Lender Luse, signed in to have an uncontested matter heard in Division IV.

Consequently, although the Court may be correct in asserting that the Fifth Chancery Court District hears uncontested matters on the fourth Friday of each month pursuant to Rule 9, Rule 9 also states that uncontested divorces "must be tried in open court." In this instance, the complaint for divorce was a contested "desertion" matter. There is no transcript made showing where this divorce proceeding was "tried in open court." Further, although the Court attached a copy of the Deputy Clerk's sign in sheet as Exhibit B in an attempt to prove that Richard

Grindstaff, Esquire did appear for an Uncontested matter on that day, and although the Final Judgment of Divorce was signed on December 29, 2006, there still remains no proof that this divorce proceeding was tried in open court as required by law. There is also no documentation showing any evidence was presented by Lender Luse to corroborate and prove that she was in fact entitled to a divorce on the ground of Desertion and/or the award of property to her.

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), “[t]he 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*, 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.

Furthermore, as 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).

Although John O’Neal Luse was served with process and he failed to answer, and although there is **no record of a hearing held in open court or otherwise**, the property division of the decision should be reversed and remanded as was ordered in the Stinson case because there was no finding of fact or conclusions of law.

I. WHETHER A UNIFORM CHANCERY COURT RULE 8.05 FINANCIAL STATEMENT WAS PROVIDED TO THE CHANCERY COURT BY EITHER PARTY WHEN ALL THE MARITAL PROPERTY WAS AWARDED TO THE APPEALLEE.

No Uniform Chancery Court Rule 8.05 financial statement was provided to the Chancery Court by either party. The Court's response as stated in paragraph II is "[s]ince child support and alimony were not at issue and Mr. Luse failed to appear, this Court waived the financial statement and disclosure in accordance with Rule 8.05 of the Uniform Chancery Court Rules."

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.

According to Rule 8.05 of the Uniform Chancery Court Rules:

Unless excused by Order of the Court for good cause shown, each party in every domestic cause involving economic issues and/or property division shall provide the opposite party or counsel, if known, the following disclosures. (A) A detailed written statement of actual income and expenses and assets and liabilities, such statement to be in the form attached hereto as Exhibit "A" and "B."

No financial disclosure requirement was filed in the lower court, and there is no record of any Order being entered by the lower Court excusing the same for good cause. The Chancery Court did not submit any Order excusing the filing of the 8.05 forms on March 30, 2007 when this appeal was filed nor was an Order excusing the same filed with its Supplemental Findings filed March 4, 2008 in the Chancery Court of Hinds County. See Attached Exhibit "A".

Wherefore, 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 should have been filed regarding the parties' property and assets as required by law. There is no evidence in the record to reflect the Court's reasoning for the division of the marital property.

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 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 as there is no transcript to justify the division of the marital property.

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.

CONCLUSION

The Chancery Court committed manifest error and abused its discretion by granting the Final Judgment of Divorce when it failed to have a hearing in open court, to make a written record, to take documentary or other evidence, to make findings of fact and conclusions of law regarding the property distribution, and when it failed to require the filing of a Uniform Chancery Court Rule 8.05 financial statement and disclosure or excuse the same by Court Order. Therefore, this cause should be reversed and remanded.

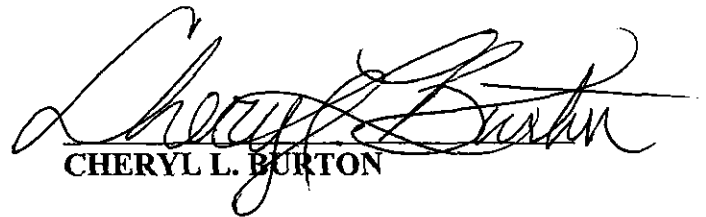
CERTIFICATE OF SERVICE

I, Cheryl L. 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 Supplemental Brief 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 2nd day of April, 2008.


CHERYL L. BURTON

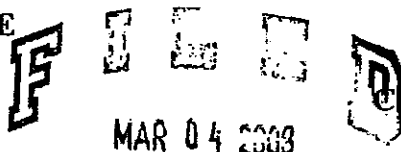
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2007-CA-00171-COA

JOHN O'NEAL LUSE

APPELLANT

v.



Cause No. G2006-2092 W/4

LENDER LUSE

APPELLEE

EDDIE JEAN CARR CHANCERY CLERK
BY [Signature] D.C.

SUPPLEMENTAL FINDINGS

THIS MATTER is before the Court at the request of the Mississippi Court of Appeals for the Chancery Court of Hinds County to submit its Findings as a supplemental record to the Clerk of the Mississippi Court of Appeals to determine whether the divorce proceedings of December 29, 2006 occurred in open court and whether a Uniform Chancery Court Rule 8.05 financial statement was provided to the chancery court by either party. The Chancery Court of Hinds County supplements its Findings as follows:

I.

Lender Luse filed her Bill for Divorce against John O'Neal Luse on November 6, 2006. In accordance with Rule 4 of the Mississippi Rules of Civil Procedure, John O'Neal Luse was personally served the Summons and Bill for Divorce on November 7, 2006. John O'Neal did not file an answer or appear for trial on December 29, 2006.

II.

The divorce proceedings were heard in open court. (Since child support and alimony were not at issue and Mr. Luse failed to appear, this Court waived the financial statement and disclosure in accordance with Rule 8.05 of the Uniform Chancery Court Rules.) Lender Luse presented

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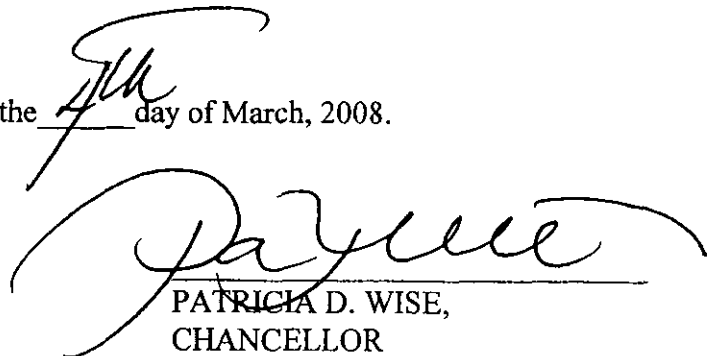
Exhibit A

testimony and corroborating evidence to establish that she was entitled to divorce against John O'Neal Luse on the grounds of desertion pursuant to Miss. Code Ann. § 93-5-1. The Final Judgment of Divorce was entered on December 29, 2006.

III.

In compliance with the Local Rules adopted by the Fifth Chancery Court District located in Hinds County, uncontested matters are heard by Division IV on the fourth Friday of each month. The docket for Division IV during the week of December 25, 2006 provides that uncontested matters were heard on Friday, December 29, 2006 beginning at 9:00 a.m. (A copy of the docket is attached as "Exhibit A"). The deputy clerk's sign in sheet for uncontested matters heard on December 29, 2006, indicates that Richard Grindstaff, counsel of record for Lender Luse, signed in to have an uncontested matter heard in Division IV. (A copy of the deputy clerk's sign in sheet is attached as "Exhibit B").

RESPECTFULLY SUBMITTED, this the 7th day of March, 2008.


PATRICIA D. WISE,
CHANCELLOR

CHANCERY COURT DOCKET - WISE

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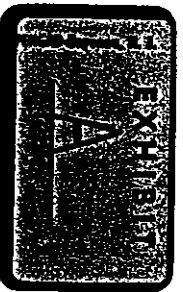
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Figure 1 illustrates the experimental setup. A subject is seated at a table, looking at a video screen. A camera is positioned above the screen to capture the subject's view. A light source is positioned to the left of the screen to illuminate the scene. A scale bar is shown below the screen to provide a reference for the size of the objects. The diagram is labeled with 'Subject', 'Video Screen', 'Camera', 'Light Source', and 'Scale Bar'.

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Figure 1

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Abstract

Figure 6

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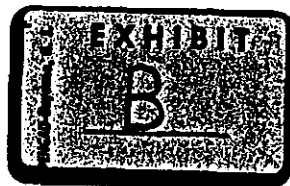
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UNC Matters: Dec. 29, 2006

1. ~~Turner v. Turner~~ ~~Dave Evans~~
2. ~~Dar Kenga W. Waller~~ (Battle)
3. ~~Richard G. Gifford~~
- * 4. ~~Alison Whitthurst~~ (C. Gifford) - ~~Exhibit in Chamber~~
5. ~~Mr. [unclear]~~



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CLERK'S CERTIFICATE

STATE OF MISSISSIPPI

COUNTY OF HINDS.

I, Eddie Jean Carr, Clerk of the Chancery Court in and for the jurisdiction aforesaid, do hereby certify that the above and foregoing is a true and correct supplemental transcript of the record as designated in Cause No. G-2006-2092 on the docket of the Chancery Court of the First Judicial District of Hinds County, Mississippi, JOHN O'NEAL LUSE, Plaintiff, vs. LENDER LUSE, Defendant, as the same appears of record and on file in my office at Jackson, Mississippi.

GIVEN UNDER MY HAND and the seal of said Court on this the 5th day of March, 2008.

EDDIE JEAN CARR, CHANCERY CLERK



By Jana Smith Deputy Clerk.

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NO TRANSCRIPT FEES FOR SUPPLEMENTAL RECORD

(Replacement cost of supplemental record is 10 pages at \$2.00 a page and \$1.00 for Clerk's Certificate which equals \$21.00.)

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