

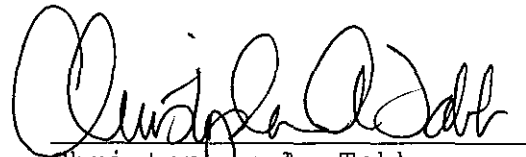
TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	2
TABLE OF AUTHORITIES.....	4
STATEMENT OF THE CASE.....	5
SUMMARY OF THE ARGUMENT.....	8
ARGUMENT.....	10
CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	21

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.

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Rankin County Chancellor
3. Sandra Ann Craft Irby, Plaintiff/Appellant
4. Laura Skeen Kuns, Attorney for Appellant
5. Gloria Dean Irby Marshall, Executrix of the Estate of
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6. Lisa Anderson Reppeto, Watkins Ludlam Winter & Stennis,
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TABLE OF AUTHORITIES

CASES

<i>Blanton v. Board of Sup'rs of Copiah County</i> , 720 So.2d 190 (Miss. 1998).....	11
<i>Cassibry v. Cassibry</i> , 742 So.2d 1121 (Miss. 1999).....	19
<i>Ferguson v. Ferguson</i> , 639 So.2d 921 (Miss. 1994).....	14,16,17
<i>Harris v. Gen. Host Corp.</i> , 503 So.2d 795, 196-97 (Miss. 1986)	10
<i>Huff v. Polk</i> , 408 So.2d 1368, 1371 (Miss. 1982).....	13
<i>Johnson v. Johnson</i> , 650 So.2d 1281,1286 (Miss. 1994).....	15
<i>Klink v. Brewster</i> , 2008 WL 2498244 (Miss. App. 2008).....	10

OTHER AUTHORITIES

Miss. Code Ann. §93-5-2(5).....	18,19
Miss. Code Ann. §93-5-2(3).....	18,19
M.R.C.P. 37(b)(2)(B).....	10
M.R.C.P. 37(e).....	10,12

STATEMENT OF THE CASE

On or about May 18, 2005, Appellant, Sandra Irby, filed a Complaint for Divorce against Appellee, Henry Edward Irby, in the Chancery Court of Rankin County, Mississippi. Appellee filed and served his answer and discovery on the Appellant on 6 July 2005. Appellant filed and served her discovery to Appellee on 1 August 2005. On 16 September 2005 Appellant filed and served her Responses to Appellee's First Set of Interrogatories and Request for Production of Documents. Appellant served the responses to the Request for Production of Documents on Appellee on 15 December 2005. Appellee filed and served his Answers to Appellants Discovery requests on or about 3 January 2006. Depositions of the parties were held on 16 March 2006. Appellee filed a second request for Production of Documents on 14 March 2006. Appellant served her Responses to the second request for Production of Documents on 4 April 2006. Appellant served supplemental responses to Appellee's Request for Discovery via letters dated 25 April 2006 and two letters dated 2 May 2006. In January 2006 this matter was set for a trial on May 4 and 5, 2006. On 3 May 2006, attorney for the Appellant, Karen Spencer, filed a Motion for Continuance and the hearing for that Motion was held on 3 May 2006 at which time Attorney Spencer requested a continuance on the basis that the attorney for Appellee, Henry Irby, would object to all the documents that the Appellant had

not timely produced in response to Appellee's request for discovery. The Motion was denied and the trial was held on 4 and 5 May 2006 in the Chancery Court of Rankin County, Mississippi. At the conclusion of the day on 5 May 2006, the trial was continued to 16 May 2006 to complete the testimony of this matter. On 11 May 2006 Appellant, pro se, filed a Motion for Continuance and it was granted by the Chancellor. By Order of Continuance on 11 May 2006 the trial was continued until 13 June 2006. On 5 June 2006 Appellant again moved for a continuance and the Chancellor once again approved the continuance. The chancellor ordered that the trial be continued until 22 and 23 August 2006. R at 111. On 21 July 2006, Appellant filed a Motion to Allow Plaintiff to Reopen Case and Use Exhibits. R at 120. The Chancellor agreed to allow all of the exhibits requested to be used by the Appellant except for Number 17 on the exhibit. R. at 126. The Chancellor also agreed to yet another continuance. This time the trial was continued from 22 and 23 August 2006 until 14 and 15 September 2006. The trial was ultimately concluded on September 14, 2006. The appellant filed a Motion to Reconsider or to clarify was filed on 27 October 2006 and the Chancellor issued his Clarified Findings of Fact and Conclusions of Law on 8 November 2006. The final Judgment was entered on December 19, 2006. Appellant once again filed a Motion to Reconsider on 29 December 2006.

Defendant, Henry Edward Irby, M.D. died February 6, 2007.

Appellant filed her Motion to declare Final Judgment Void on 28 March 2007 only after Dr. Irby had passed away. Both Motions were denied by the Chancellor by Judgments dated 18 April 2007. Appellant filed her Notice of Appeal on 27 April 2007.

SUMMARY OF THE ARGUMENT

The trial court correctly held that any documents or witnesses that were produced in violation of the discovery rules were not admissible at the trial of this matter. It is within the sound discretion of the trial court to sanction a party for discovery violations by not allowing any documents or witnesses produced by said violation. Any continuance would have caused great expense and prejudice to the Appellee/Defendant in this case. The Appellee/Defendant and his attorney had already prepared for the trial of this matter based on all discovery and other documents that had been produced timely by both parties. Any continuance granted to Appellant/Plaintiff would have awarded her for her blatant disregard for the Mississippi Rules of Civil Procedure and greatly injured the Appellee/Defendant.

All of the trial court's findings were based on the evidence produced by both parties. The Appellant/Plaintiff in this case was afforded two full days to put on her case-in-chief. The Appellee/Defendant only called to the stand the parties in this matter. Most of the evidence that was used to equitable divide the marital property in this matter came from the testimony and evidence of the Appellant/Plaintiff in this matter. The Judge in a Chancery Court is the finder of fact and has the ultimately decision of who and what to believe. All of the findings of fact and conclusions of law made by the trial

court were based on the substantial evidence produced mostly by the Appellant/Plaintiff in this matter.

All of the findings of fact and conclusions of law and rulings of the trial court were within the discretion of the trial court and at no point did the trial court abuse the discretion afforded to him by this honorable court and the rule of law.

ARGUMENT

I. The trial court correctly excluded documents and expert witnesses offered at trial by the Appellant/Plaintiff because of the severe discovery violations of the Appellant/Plaintiff in this case.

The court has the discretion to prohibit a party from introducing documentary evidence or witness testimony at a trial when the party has abused the discovery process. M.R.C.P. 37(b)(2)(B); M.R.C.P. 37(e). This Honorable Court has held in many cases that the "Rules of Civil Procedure were promulgated to avoid such actions." *Klink v. Brewster*, 2008 WL 2498244 (Miss. App. 2008). This court has also held:

We have long been committed to the proposition that trial by ambush should be abolished, the experienced lawyer's nostalgia to the contrary notwithstanding. We have sought procedural justice through a set of rules designed to assure to the maximum extent practicable that cases are decided on their merits, not the fact that the one party calls a surprise witness and catches the other with his pants down. One of the most obviously desirable and rigidly enforced of these rules is that requiring pre-trial disclosure of witnesses.

Harris v. Gen. Host Corp., 503 So.2d 795, 796-97 (Miss. 1986).

Names of expert witnesses do not have to be supplied at the beginning of the discovery process. However, their names and identities must be provided seasonably. *Harris*, at 797. In the *Harris* case, General Host failed to disclose the name of their expert witness "seasonably". The court in *Harris* held that it

was within the discretion of the court and was the duty of the court not to allow a party to abuse the discovery process.

The appellant has argued that it was error for the trial court to exclude their expert witnesses including one by the name of Tom Dial. The court held in *Blanton v. Board of Sup'rs of Copiah County* that there is no bright line rule as to what is seasonable supplementation but that identification of an expert witness six days prior to trial was not seasonable. 720 So.2d 190 (Miss. 1998). It is clear from the deposition of Sandra Irby on March 16, 2006 that the Appellant intended to introduce at trial not only the private investigator's report but also use him as a witness at the trial of this matter on 4 and 5 May 2006. At said deposition the Appellee's attorney clearly stated to Appellant and her attorney that he did not have any report or the name of the investigator. Still, the Appellant and her attorney did not supply the report until 25 April 2006 or the name of the expert witness, Tom Dial, until two days before the trial of this matter. Tr. at 185. The trial court correctly held that the expert witness, Mr. Dial, could not testify as the Appellant had blatantly violated the discovery process. The appellant and her attorney knew in March that they intended to call Mr. Dial to the stand but waited until two days prior to the trial to disclose his name to the Appellee.

The trial court was also correct when it did not allow documents that had not been seasonably supplemented to be introduced into evidence. Appellant supplemented discovery requests that were propounded to her in July 2005 and answered in December 2005, three times. The first time she supplemented documents was on 4 April 2006, the second time was 25 April 2006 and the last time was on 2 May 2006. The trial of this matter was set for 4 and 5 May 2006 in January 2006. Appellant tried to ambush the Appellee by not supplying her documents or witnesses until just before the trial so that he would not have time to depose witnesses or prepare a defense to any of the documents or witnesses produced. Appellant produced 628 documents as supplementation to discovery requests on 4 April 2006 for discovery that was propounded in July 2005. She produced 202 documents as supplementation on 25 April 2006 and 1940 documents, including a witness list, as supplementation to discovery on 2 May 2006. The trial was set on 4 and 5 May 2006. It is within the sound discretion of the trial judge to sanction discovery violations such as this by not allowing the untimely production of documents including the identities of witnesses. M.R.C.P. 37(e).

II. The trial court correctly denied Appellant/Plaintiff's Motion for a Continuance in this matter the day before the trial and again during the trial of this matter.

The granting or denying of a Motion for Continuance is within the sound discretion of the trial court. In *Huff v. Polk* the court stated:

Under the lower court's ruling in this case, in justifying his actions by offering a continuance, the court is setting up a situation where either party to a cause in litigation may decide that he will not be ready for trial on the day it is set and wishes a delay. He could get one by not conforming to the above quoted discovery rules until the morning of the trial, knowing that he would get a continuance by the court giving the already prepared opposition a continuance. We certainly cannot condone the possibility of a situation such as that being legalized.

408 So.2d 1368, 1371 (Miss. 1982).

Had the trial court granted the Appellant's Motions for Continuance, it would have allowed the Appellant to disregard the rules of procedure and set an example like that in *Huff*. The court cannot allow attorneys or parties to disobey or ignore the Rules of Procedure and then be awarded by a continuance so that they can get around the Rules that were designed for a reason.

The appellant only asked for a continuance because she had ignored and abused the discovery process. The only basis given for the continuance was because Appellee's attorney had told Appellant's attorney that he would object to anything that was untimely produced pursuant to the discovery rules. Appellant never argued that she had just received said documents or names. The fact is that she knew what documents and what witnesses were going to testify but failed to produce those items to the

Appellee in an attempt to ambush him at trial. This trial court did not stand for such blatant disregard for the rules as this honorable court has so held.

III. The trial court was well within its discretion when it made an equitable distribution of the marital property.

The court must make a Ferguson evaluation to determine what property is marital and which is not. In this case the trial court made a Ferguson determination that the IRS tax lien was a marital debt that should be paid by both parties. The trial court ordered Appellant/Plaintiff to pay only 25% of said IRS tax debt. Appellant/Plaintiff argues that she cannot be held criminally liable for a debt incurred by Appellee not paying taxes on a business. The trial court did not hold the Appellant criminally liable for any portion of said tax debt. However, since the funds that should have been paid to the IRS were deposited into a joint account between Appellant and Appellee, Appellant enjoyed the fruits of Appellee's noncompliance with the IRS code by using said funds to pay marital debt. Appellant was held liable for 25% of said debt because of the enjoyment of the fruits of said noncompliance. The trial court was correct when it held according to *Ferguson v. Ferguson* that the IRS debt was in fact a marital debt. 639 So.2d 921 (Miss. 1994).

The trial court was also correct in finding that the home located at 130 Langford Cove in Brandon, Mississippi was a marital asset. The home was paid for during the marriage of the parties with marital income. The fact that she owned said home prior to the marriage does not make it nonmarital property. Appellant did acquire the property prior to the marriage of the parties. However, appellant was paying a mortgage on said property with marital funds which makes the property a marital asset. *Johnson v. Johnson*, 650 So.2d 1281, 1286 (Miss. 1994).

The trial court did not err in finding that Appellant had spent approximately \$225,091.08 of the Appellee's settlement from a personal injury suit. The trial court is ultimately charged with finding a witness credible or not. The Judge did not find Appellant's explanation credible. Appellee placed the money into a joint account with Appellant. Appellant without the knowledge of Appellee withdrew the money and placed it into an account in her name only with her daughter as beneficiary. Appellant provided no proof whatsoever of what was paid with the funds that she wasted from Appellee's settlement. Her only statement was that she paid joint bills. The trial court did not find this credible and made a finding based on the Ferguson factors that the money from Appellee's settlement was a marital asset and divided it evenly between the parties even though Appellee had spent approximately \$225,000.00 before it was

placed back in the name of Appellee. *Ferguson*, 639 So.2d 921 (Miss. 1994).

The trial court also found that Appellants personal settlement was a joint asset based on the Ferguson evaluations but found that it was retained by Appellee only with Appellant having no access. *Id.*

The trial court found that the bulldozer and case tractor had no value because of the debt owed thereon. R. at 138.

The value of the Back Clinic was determined to be \$128,000.00 based on the uncontroverted testimony of the Appellee who is a physician and who had opened the clinic and ran it until Appellant took it over. The court can only glean the value of property from the evidence before it in a case. Appellant never offered or testified about the value of the back clinic nor did she have the clinic appraised. The only evidence of the value of said clinic was that of Appellee, Dr. Henry Irby. R. at 146.

Next Appellant argues that Appellee's accounts were not considered and that the balances were incorrect. However, Appellant does not offer the first bit of testimony or evidence to support this allegation. Appellant did not supply any information by documentation or by testimony that the balance with Heritage Bank at the time of the trial on 4 and 5 May 2006 and 14 September 2006 that the balance was not what the Appellee

had listed on his financial statement. The only evidence before the court was Henry's Financial statement and a balance obtained by Appellant as of March 2005.

The trial court did not err when it gave the 1927 Willis Knight vehicle to Appellee as part of the equitable distribution of the property. As Appellant had retained most of the assets, the trial court has discretion in apportioning the rest of the assets including the 1927 Willis Knight vehicle. *Ferguson*, 639 So.2d 921 (Miss. 1994).

IV. The trial court correctly denied the Motion to Declare Judgment Null and Void.

The Appellant did not raise this issue at trial or in her Motion to Reconsider filed on 29 December 2006. R at 165. As a matter of fact, this did not even become an issue until the Defendant, Dr. Irby had passed away. Appellant filed her Motion to Declare Judgment Null and Void on 28 March 2007 which is approximately 7 weeks after Dr. Irby had passed away. R. at 211. Appellant never raised the issue while the defendant was alive.

As the trial of this matter began both parties consulted with their attorney's regarding Consenting to a divorce on the grounds of irreconcilable differences and stipulating to what the court should decide. Tr. At 29.

Appellant argues that in order for these parties to have obtained a divorce on the grounds of irreconcilable differences they first must withdraw fault grounds as provided in Miss. Code Ann. §93-5-2(5). However, as the Chancellor stated in his Judgment, this section does not apply as the first sentence clearly states that a divorce obtained under subsection (3) of this statute does not have to comply with the standards of subsection (5). The subsection of the statute clearly states "Except as otherwise provided in subsection (3) of this section...". Miss. Code Ann. §93-5-2(5).

Subsection (3) clearly provides that parties can consent to a divorce on the grounds of irreconcilable differences and stipulate to what issues they wish the court to decide for them. Miss. Code Ann. §93-5-2(3). The parties clearly Consented to a divorce on the ground of irreconcilable differences and stipulated as to the issues they wished the trial court to decide. The document that allowed this to occur at the trial is titled "Consent to Divorce on the Ground of Irreconcilable Differences". This consent stated that the parties consented to a divorce on the ground of irreconcilable differences and asked the court to decide the enumerated issues as listed on said document. R at 103.

The court has held that:

"in the alternative [parties may] personally consent in writing to a divorce on grounds of irreconcilable

differences and submit to the court any unresolved issues of child custody and maintenance or distribution of marital property. Miss. Code Ann. §93-5-2(3).

The parties must do more, however, than implicitly consent to a divorce on the ground of irreconcilable differences and raise issues in their pleadings. The additional statutory requirements for a valid mutual consent are: (1) The consent must be in writing and signed personally by both parties; (2) the consent must state that the parties voluntarily consent to permit the court to decide the issues upon which the parties are unable to agree; (3) the consent must specifically set forth the issues upon which the parties are unable to agree; and (4) the consent must state that the parties understand that the decision of the court shall be a binding and lawful judgment."

Cassibry v. Cassibry, 742 So.2d 1121 (Miss. 1999) citing *Cook v. Cook*, 725 So.2d 205, 206 (Miss. 1998); *Massingill v. Massingill*, 594 So.2d 1173, 1177 (Miss. 1992).

Both parties, Sandra Irby and Henry Irby, and their attorneys signed the Consent of Parties to Divorce on Irreconcilable Differences. R. at 103. Both parties and their attorneys strictly abided by the statute. The consent is in writing and signed personally by both parties and their attorneys. The consent states that the parties voluntarily agree to a divorce on the ground of irreconcilable differences and that the Court should decide the delineated items. *Id.* The consent sets forth the issues that the parties are unable to agree upon including some items that were written in and initialed by the parties. The consent also states that the decision of the Court shall be a binding and lawful judgment.

The parties and their attorneys complied with all four (4) requirements of the statute as specifically stated in *Cassibry*.

At no time after the entry of the consent for divorce did the Appellant ask to withdraw her Consent. She did not ask for leave to withdraw the consent on 4 or 5 May 2006, at any of hearings for a continuance after the initial two days of trial, nor did she or her attorney, Mr. Prentiss Grant, ask to withdraw the consent on 14 September 2006 which was the final day of the hearing. The Appellant did not raise the issue concerning the statute and consent in her Motion for Reconsideration.

The Appellant in this case did not try to set aside or withdraw her consent to a divorce until after the Defendant, Dr. Irby, had passed away in February of 2007.

It is clear that the parties at the trial of this matter consented to a divorce on the ground of irreconcilable differences and wanted the Chancellor to decide the delineated issues. The parties complied expressly with the statute and the Appellant only now wishes to withdraw her consent because the Defendant, Dr. Irby has passed away.

CONCLUSION

The trial court correctly denied the Appellant's Motions for a Continuance based on her discovery violations. The trial court also correctly denied the Appellants witnesses and documents to be introduced into evidence as a sanction for the

blatant discovery violations and attempted trial by ambush committed by the Appellant.

The trial court correctly applied the Ferguson factors in the distribution of the marital estate and was substantiated by credible evidence.

This learned Court should affirm the decision of the lower court.

CERTIFICATE OF SERVICE

I, Christopher A. Tabb, do hereby certify that I have this day served this document via first class United States mail, postage prepaid, to the following counsel of record:

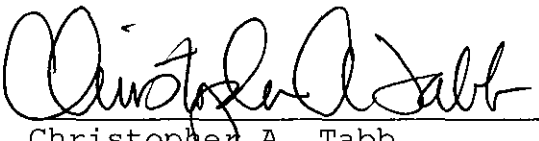
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This the 28th day of July, 2008.


Christopher A. Tabb