

TABLE OF CONTENTSPAGE

CERTIFICATE OF INTERESTED PERSONS.....	I
STATEMENT REGARDING ORAL ARGUMENT.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE ISSUES.....	v
STATEMENT OF THE CASE.....	1
Course of Proceedings.....	1
Statement of Facts Relevant for Issues Presented for Review.....	1
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT.....	5
I.    The trial court erred when it excluded documents offered at trial by Plaintiff due to an alleged discovery violation.....	5
II.   The trial court erred when it denied Plaintiff's motions to continue the trial.....	8
III.  The trial court erred when it excluded an expert witness offered by Plaintiff at trial.....	8
IV.   The trial court abused its discretion in the equitable property distribution set forth in its Final Judgment.....	9
A.    The trial court erred in finding that Plaintiff was responsible for any portion of the IRS taxes owed by Defendant.....	10
B.    The trial court erred in finding that Plaintiff acquired as a marital asset approximately \$75,000.00 in a home she owned prior to the marriage.....	11
C.    The trial court erred in finding that Plaintiff acquired approximately \$193,000.00 in a personal injury lawsuit.....	11
D.    The trial court erred in finding that Plaintiff spent for her own personal use approximately \$225,091.08 of Henry Irby's money which he acquired for a personal injury lawsuit.....	12
E.    The trial court erred in failing to allot Henry Irby value in the equitable distribution for the tractor and bulldozer.....	12
F.    The trial court erred in accepting Henry Irby's speculative value of the Back	

Clinic at \$128,000.00.....	12
G. The trial court erred in failing to allot Henry Irby in the equitable distribution for the funds in his bank accounts.....	12
H. The trial court erred in giving Henry Irby the 1928 Willis Knight vehicle purchased by Ms. Irby.....	13
V. The trial court erred when it denied Plaintiff's Motion to Declare Judgment Null and Void.....	13
VI. The trial court erred when it denied Plaintiff's Motion to Reconsider.....	16
CONCLUSION.....	17
CERTIFICATE OF SERVICE.....	17

### **CERTIFICATE OF INTERESTED PERSONS**

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

1. John Holaday, Holaday, Yoder, Moorehead & Eaton, Attorneys At Law, PLLC, Counsel for Appellant
2. Honorable Dan Fairly, Rankin County Chancery Judge
3. Sandra Ann Craft Irby, Plaintiff below
4. Laura Skeen Kuns, Attorney for Appellant
5. Gloria Dean Irby Marshall, Executrix of the Estate of Henry Edward Irby, Deceased, Defendant below
6. Lisa Anderson Reppeto, Watkins Ludlam Winter & Stennis, Attorney for Appellee
7. Christopher A. Tabb, Attorney for Appellee

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JOHN HOLADAY

### **STATEMENT REGARDING ORAL ARGUMENT**

Sandra Ann Craft Irby, Appellant herein, respectfully requests that oral argument be granted. Appellant respectfully suggests that oral argument will be of benefit to the Court in making a just and appropriate disposition of this case.

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Brennan v. Webb</i> , 729 So. 2d 244, 247 (¶ 11) (Miss. Ct. App. 1998).....	6
<i>Brown by and through Webb v. Blackwood</i> , 697 So. 2d 763, 769 (Miss. 1997).....	7
<i>Caldwell v. Caldwell</i> , 805 So.2d 659, 665 (Miss. App. 2002).....	16
<i>Childers v. Childers</i> , 717 So. 2d 1279, 1281 (¶ 8) (Miss. 1998).....	7
<i>Clark v. Miss. Power Co.</i> , 372 So. 2d 1077, 1078 (Miss. 1979).....	9
<i>Fuentes v. Shevin</i> , 407 U.S. 67, 92 n. 22 (1972).....	7
<i>In re Estate of Carter v. Shackelford</i> , 912 So. 2d 138, 143 (¶ 18) (Miss. 2005).....	9
<i>Johnson v. Johnson</i> , 650 So. 2d 1281, 1286 (Miss. 1994).....	11
<i>Massingill v. Massingill</i> , 594 So.2d 1173, 1178 (Miss. 1992).....	16
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972).....	7
<i>Pierce v. Heritage Props., Inc.</i> , 688 So. 2d 1385, 1388 (Miss. 1997).....	6,9
<i>Robert v. Colson</i> , 729 So. 2d 1243, 1247 (¶ 28) (Miss. 1999).....	9
<i>Robinson v. Southern Farm Bureau Cas. Co.</i> , 915 So.2d 516, 519 (Miss. App. 2005).....	8
<i>Rogers v. Morin</i> , 791 So. 2d 815, 826 (¶ 39) (Miss. 2001).....	9
<i>Vosbein v. Bellias</i> , 866 So. 2d 489, 493 (Miss. Ct. App. 2004).....	6
<i>Wade v. Wade</i> , 967 So.2d 682, 684 (Miss. App. 2007).....	17
<i>Wallace v. Jones</i> , 572 So. 2d 371, 376 (Miss. 1990).....	6
<i>Williams v. Williams</i> , 843 So. 2d 720, 722 (¶ 10) (Miss. 2003).....	9
<u>Other Authorities</u>	
I.R.C. § 6671(b).....	11

I.R.C. § 6672.....	11
IRS, <i>Publication 15 (Circular E) Employer's Tax Guide</i> , <a href="http://www.irs.gov/publications/p15/ar02.html#d0e2767">http://www.irs.gov/publications/p15/ar02.html#d0e2767</a> .....	10
Miss. Code Ann. §93-5-2(3).....	14,15
Miss. Code Ann. §93-5-2(5).....	14,15,16
Miss. Const. art. III, § 14.....	7
Miss. R. Civ. Pro. 41(b).....	6
U.S. Const. amends. V, XIX.....	7

## STATEMENT OF ISSUES

- I. Did the trial court err when it excluded documents offered at trial by Plaintiff due to an alleged discovery violation?
- II. Did the trial court err when it denied Plaintiff's motions to continue the trial?
- III. Did the trial court err when it excluded an expert witness offered by Plaintiff at trial?
- IV. Did the trial court abuse its discretion in the equitable property distribution set forth in its Final Judgment?
  - A. Did the trial court err in finding that Plaintiff was responsible for any portion of the IRS taxes owed by Defendant?
  - B. Did the trial court err in finding that Plaintiff acquired as a marital asset approximately \$75,000.00 in a home she owned prior to the marriage?
  - C. Did the trial court err in finding that Plaintiff acquired approximately \$193,000.00 in a personal injury lawsuit?
  - D. Did the trial court err in finding that Plaintiff spent for her own personal use approximately \$225,091.08 of Henry Irby's money which he acquired for a personal injury lawsuit?
  - E. Did the trial court err in failing to allot Henry Irby value in the equitable distribution for the tractor and bulldozer?
  - F. Did the trial court err in accepting Henry Irby's speculative value of the Back Clinic at \$128,000.00?
  - G. Did the trial court err in failing to allot Henry Irby in the equitable distribution for the funds in his bank accounts?
  - H. Did the trial court err in giving Henry Irby the 1928 Willis Knight vehicle purchased by Ms. Irby?
- V. Did the trial court err when it denied Plaintiff's Motion to Declare Judgment Null and Void?<sup>1</sup>
- VI. Did the trial court err when it denied Plaintiff's Motion to Reconsider?

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<sup>1</sup>This Motion is also referred to as Plaintiff's Motion to Set Aside.

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

**SANDRA ANN CRAFT IRBY**

**APPELLANT**

**VS.**

**CAUSE NO.: 2007-CA-00689**

**GLORIA DEAN IRBY MARSHALL**

**APPELLEE**

**BRIEF OF APPELLANT**

**STATEMENT OF THE CASE**

**Course of the Proceedings**

On or about May 18, 2005, Plaintiff Sandra Ann Craft Irby filed a Complaint for Divorce against Henry Edward Irby in the Chancery Court of Rankin County, Mississippi. R. at 5. A hearing was held on May 4, 2006. Tr. at 12. A subsequent hearing was held on September 14, 2006. Tr. at 429. The Court entered its Final Judgment on or about December 19, 2006. R. at 162. Plaintiff filed post-trial motions including a Motion to Declare Judgment Null and Void and a Motion to Reconsider. R. at 211. Hearings were held on Plaintiff's post-trial motions on February 16, 2007, and April 10, 2007. Tr. at 608. The trial Court denied Plaintiff's Motions by Judgments dated April 18, 2007. R. at 221, 224. Plaintiff timely filed a Notice of Appeal on or about April 27, 2007. R. at 225.

**Statement of Facts Relevant to the Issues Presented for Review**

The parties married on or about December 24, 1992. Tr. at 269. The parties purchased marital real property in 1992 and built a home on such property in 1994. Tr. at 274. During the marriage of the parties, Plaintiff worked outside the home primarily as a realtor. Tr. at 275. In 2002, Henry and Sandra Irby opened the Back Clinic. Tr. at 280. Plaintiff worked at the Back Clinic when



it opened. Tr. at 280. Defendant was the medical director of the subject clinic. Tr. at 280. During their marriage, Defendant had several other positions practicing medicine at various facilities. Tr. at 282-84.

During the course of the parties marriage, Defendant exhibited unethical and/or immoral behavior including but not limited to: failing to disclose to Plaintiff that he had previously filed bankruptcy causing Plaintiff problems with her obtaining credit (Tr. at 272-73); giving a patient an injection of narcotic medication in the parking lot of the Back Clinic (Tr. at 286); lying to Plaintiff about the work he was doing at the Back Clinic (Tr. at 287); threatening Plaintiff to the point that she was afraid for her own life (Tr. at 397); and addictive gambling (Tr. at 287-98).

In fact, Defendant's addictive gambling became so destructive that Plaintiff ultimately left Defendant. Tr. at 299-301. In addition to the foregoing problems, Defendant was addicted to alcohol and drugs. Tr. at 308-09. Dr. Irby would give himself injections from medications out of the back of his truck. Tr. at 309-10. Defendant had narcotic drugs shipped to the Back Clinic despite the fact that no such drugs were dispensed at the Back Clinic. Tr. at 310-13.

Other deceptions by Defendant on Plaintiff included the fact that he was drawing disability benefits without Plaintiff even knowing that he was disabled. Tr. at 313-14. Despite the fact that he was drawing disability benefits, he worked out regularly and engaged in ordinary physical activities such as deer hunting, bushhogging and driving a tractor. Tr. at 313-16. In fact, Plaintiff did not witness any limitations which would be consistent with someone who was disabled. Tr. at 317. Defendant consistently exhibited dishonesty to Plaintiff and others. Tr. at 318-20.

During the marriage of the parties, Plaintiff contributed to the building and maintenance of the marital home both practically and monetarily. Tr. at 328-29, 332. Plaintiff regularly contributed

to the financial well-being of the family by paying bills during the marriage including bills for utilities, furniture, landscaping, groceries, clothes, taxes, property notes and a leasehold fee on property owned by the parties. Tr. at 329, 332-36. By the time of the trial in the instant divorce action, Plaintiff had spent all of her savings and had very little or no income to pay her personal bills. Tr. at 378-79. On the contrary, at the time of the trial, Defendant indicated on his financial statement that he had income of \$13,829.00 per month. Tr. at 394.

Defendant stopped living in the marital home in January of 2005. Tr. at 331. Plaintiff paid the note on the marital home during 2005 after Defendant's departure. Tr. at 332.

In addition, Plaintiff made most of the note payments on a condominium in Palm Beach that the parties purchased during their marriage. Tr. at 342-43. The parties purchased two lots at the Reservoir, and Plaintiff made note payments on these two lots for many years. Tr. at 344-45. The parties also owned a building at the Reservoir and made the note payments by the rent they charged the tenant. Tr. at 345-46.

During the marriage, Plaintiff continued to pay the note on the home which she had owned prior to the marriage of the parties. Tr. at 271, 343. Defendant never paid any amounts towards this note. Tr. at 343. Likewise, Plaintiff had purchased a duplex at the Reservoir and paid the note with her money, until she eventually sold the property. Tr. at 383-85.

Plaintiff paid for most of the personal property of the parties out of her own income. Tr. at 375. Many items of personal property which were located in the marital home were owned by Plaintiff prior to the marriage. Tr. at 376. Plaintiff purchased a 1928 Willis Knight vehicle. Tr. at 387.

Defendant acquired debt during the marriage having nothing to do with Plaintiff. For

example, he obtained a loan from Heritage Bank in Carthage to begin a business known as “Coffee Time” on one or both of the lots at the Reservoir owned by the parties. Tr. at 359-61, 389. Dr. Irby acquired a federal tax lien by not paying withholding taxes on employees of a home health agency he owned in Louisiana. Tr. at 391. Ms. Irby had nothing to do with this business. Tr. at 392.

Plaintiff entertained Defendant’s family by cooking for them and allowing them to stay at the marital home. Tr. at 339. Despite Plaintiff’s support of her husband, Defendant left her several times. Tr. at 340. On at least one of these occasions, he ended up living in a Super Eight Motel. Tr. at 340. Ultimately, in January of 2005, Defendant stopped living in the marital home, and Plaintiff had suffered enough. Tr. at 299-301, 331.

### **SUMMARY OF THE ARGUMENT**

The rulings made by the trial court at the trial of this case were erroneous and placed Plaintiff at an extreme disadvantage in proving her case. With the exclusion of numerous documents and a crucial expert witness, Tom Dial, Plaintiff’s ability to establish her case was hampered throughout the trial. The trial court could have continued the trial at Plaintiff’s request with no prejudice to Defendant but chose not to do so.

Ultimately, the Final Judgment entered by the trial court inequitably divided the property of the parties. Many of the findings by the Court contained within the Final Judgment were not based on substantial, credible evidence or were heavily weighted in Defendant’s favor with no evidentiary justification. The trial court further erred when it did not correct these inequities when it denied Plaintiff’s post-trial motions.

As a result of the foregoing, Plaintiff respectfully requests that this Court reverse the rulings made by the trial court as set forth in this Brief.

## ARGUMENT

- I. The trial court erred when it excluded documents offered at trial by Plaintiff due to an alleged discovery violation.

At the trial of this case which began on May 4, 2006, the trial court ruled that Plaintiff could not utilize at trial numerous documents based on their alleged untimely production to defense counsel. This ruling was reiterated by the trial court on numerous occasions which resulted in many documents being excluded at the trial of the case during both the May 4-5 hearing and the September 14<sup>th</sup> hearing. Tr. at 21, 39, 46-47, 55-56, 58, 62-64, 83-84, 100-01, 143-44, 146, 181, 293-94, 313, 320-21, 399 and 587.

The refusal to allow Sandra's evidence or witness testimony was a disproportionately harsh sanction and does not fit the discovery offence. A Chancery Court's discretion in fashioning a remedy for a discovery violation must be exercised with due regard for the purposes of the discovery rules and the manner in which those purposes can be furthered by imposing sanctions, both by protecting the integrity of the process of finding the truth and deterring misconduct. By excluding numerous documents from evidence, the Court placed Plaintiff at a great disadvantage in proving her case. The Court did not hear evidence concerning Plaintiff's contribution to the marital assets and evidence detailing Defendant's dissipation of vast amounts of money due to gambling. Plaintiff maintains that these rulings caused Plaintiff prejudice, as the Court ultimately relied on an incomplete picture of the equities of the parties.

In essence, Plaintiff was punished by the trial court for an alleged discovery violation by failing to produce the documents earlier in response to Defendant's request for production of documents. The Mississippi Supreme Court recognized that in considering sanctions for discovery

violations the focus should be upon “the intentional nature, as well as the pattern of the plaintiff’s conduct . . . .” *Pierce v. Heritage Props., Inc.*, 688 So. 2d 1385, 1389 (Miss. 1997). The Court should look to the following factors to determine if dismissal is the proper remedy: “(1) whether the discovery violation resulted from willfulness or an inability to comply; (2) whether the deterrent value of Rule 37 could not have been achieved through lesser sanctions; (3) whether the other party’s trial preparation has been prejudiced; (4) whether the failure to comply is attributable to the party [herself], or [her] attorney; and (5) whether the failure to comply was a consequence of simple confusion . . . .” *Id.* (emphasis added).

Refusal to permit evidence or testimony is a drastic and harsh punishment, the most severe sanction provided by the rule. This extreme punishment should only be reserved for the most egregious situations, especially when lesser sanctions are present. *See Vosbein v. Bellias*, 866 So. 2d 489, 493 (Miss. Ct. App. 2004); Miss. R. Civ. Pro. 41(b) cmt. Refusal to permit evidence for failure to comply with an order is appropriate “only where there is a clear record of delay or contumacious conduct and lesser sanctions would not serve the best interest of justice.” *Wallace v. Jones*, 572 So. 2d 371, 376 (Miss. 1990). The exclusion of witnesses for a discovery violation is a sanction of last resort. *Brennan v. Webb*, 729 So. 2d 244, 247 (¶ 11) (Miss. Ct. App. 1998). Failure to allow witness testimony or evidence may be inappropriate when the discovery violation is a neglect plainly attributable to an attorney rather than the blameless client. *Pierce*, 688 So. 2d at 1389.

Nothing in the record shows that Plaintiff did anything willful to violate discovery or to prolong the case. There was, and is, no evidence to support the fact Plaintiff in any way acted in bad faith. This Court imposed this extreme penalty without consideration of other less drastic sanctions

and without Defendant ever having moved the Court for an Order compelling discovery. The decision to exclude the Plaintiff's evidence effectively prohibited her from succeeding on the merits. By failing to consider less extreme sanctions, the Court abused its discretion.

In addition to the trial court abusing its discretion, Plaintiff contends that the trial court's ruling violated Plaintiff's constitutional due process rights. An American may not be deprived of "life, liberty, or property, without due process of law." U.S. Const. amends. V, XIX; *see also* Miss. Const. art. III, § 14. The Fourteenth Amendment clause of the United States Constitution is based on the due process clause of the Fifth Amendment, which applies to the federal government. The clauses parallel each other, with one protecting people against unfair deprivation by the states and the other by the federal government. The due process clause was intended to prevent the government from arbitrarily depriving persons of their most basic rights—to property—and to ensure that if such a deprivation occurred the government be required to act according to fundamental notions of justice and fairness. Once a state chooses to affirmatively confer benefits and create legitimate expectancies, the state must abide by the requirement of procedural due process before withdrawing such entitlement. *See generally Perry v. Sindermann*, 408 U.S. 593 (1972). "[T]he Constitution recognizes higher values than speed and efficiency." *Fuentes v. Shevin*, 407 U.S. 67, 92 n. 22 (1972).

The guarantee of procedural due process includes the right to a fair and impartial trial. *Brown by and through Webb v. Blackwood*, 697 So. 2d 763, 769 (Miss. 1997). A due process violation occurs when a party is not allowed a full and complete hearing before being deprived of property. *Childers v. Childers*, 717 So. 2d 1279, 1281 (¶ 8) (Miss. 1998). Because much of Plaintiff's documentary evidence was excluded, Plaintiff was not allowed a full, complete, impartial

hearing. A clear due process violation occurred in this matter.

Based on the foregoing, Plaintiff respectfully requests that the trial court's ruling on the exclusion of Plaintiff's documents be reversed.

II. The trial court erred when it denied Plaintiff's motions to continue the trial.

Instead of excluding the documents referred to in section I above, the trial court had every opportunity to grant a continuance of the trial of the case and allow Defendant time to review the documents. On May 3, 2006, Spencer filed a Motion for Continuance asking that the Court try the matter on July 26 and 27, 2006. R. at 88. The Court denied Plaintiff's Motion and continued to trial on May 4<sup>th</sup>. The trial began May 4, 2006, and Spencer again moved for a continuance twice during the course of the trial. Tr. at 68, 191. The trial court denied both motions made during trial. Tr. at 68, 191. The record reveals that the specific reason Plaintiff moved for a continuance was to avoid the exclusion of the documentary evidence referred to above.

The Court of Appeals has stated as follows in regard to requests for a continuance of a trial:

The standard of review for a grant or denial of a motion for continuance is abuse of discretion, and this Court will not reverse the trial court unless the ruling resulted in manifest injustice. *New v. Comola*, 881 So.2d 369, 373(¶ 13) (Miss.Ct.App.2004).

*Robinson v. Southern Farm Bureau Cas. Co.*, 915 So.2d 516, 519 (Miss. App. 2005). Plaintiff maintains that the trial court erred when it refused to grant the three separate motions for continuance made by Plaintiff. Plaintiff respectfully requests that the trial court reverse such rulings by the trial court.

III. The trial court erred when it excluded an expert witness offered by Plaintiff at trial.

On the basis that Plaintiff failed to timely notify Defendant of the existence of expert witness Tom Dial, the trial court excluded his testimony. Tr. at 190-91. Mr. Dial's testimony was crucial

to Plaintiff's case. His testimony would have shown the extent and degree of the adverse effect of Mr. Irby's addictive gambling on the marital estate.

The Mississippi Supreme Court has repeatedly held that "[l]ower courts should be cautious in . . . refusing to permit testimony . . . . The reason for this is obvious. Courts are courts of justice not of form. The parties should not be penalized for any procedural failure that may be handled without doing violence to court procedures." *Robert v. Colson*, 729 So. 2d 1243, 1247 (¶ 28) (Miss. 1999) (quoting *Carracci*, 699 So. 2d at 556 (quoting *Clark v. Miss. Power Co.*, 372 So. 2d 1077, 1078 (Miss. 1979)). "The power to [refuse to permit testimony] is inherent in any court of law or equity, being a means necessary to orderly expedition of justice and the court's control of its own docket. . . . Nevertheless, the trial court should [refuse to permit testimony in] a cause of action for failure to comply with discovery only under the most extreme circumstances." *Robert*, 729 So. 2d at 1248 (¶ 28) (quoting *Pierce v. Heritage Props., Inc.*, 688 So. 2d 1385, 1388 (Miss. 1997)).

Again, the trial court refused to allow Mr. Dial to testify based on the alleged discovery violation of not identifying him as an expert witness prior to trial. Plaintiff maintains that such ruling was erroneous and caused great prejudice to Plaintiff. Plaintiff requests that this Court overrule the trial court's exclusion of Mr. Dial as a witness.

IV. The trial court abused its discretion in the equitable property distribution set forth in its Final Judgment.

The Chancellor, as fact-finder, is entitled to substantial deference with regard to his determinations. *Rogers v. Morin*, 791 So. 2d 815, 826 (¶ 39) (Miss. 2001). However, a Chancellor's decisions must be supported by substantial credible evidence. *In re Estate of Carter v. Shackelford*, 912 So. 2d 138, 143 (¶ 18) (Miss. 2005) (citing *Williams v. Williams*, 843 So. 2d 720, 722 (¶ 10)



(Miss. 2003)). Plaintiff maintains that the trial court erred in the equitable distribution of the property of the parties. The foregoing cases are cited in support of each of the subsections listed below regarding the equitable division of property.

- A. The trial court erred in finding that Plaintiff was responsible for any portion of the IRS taxes owed by Defendant.

This Court held that Henry's tax lien was a joint debt and Henry was liable for seventy-five percent and Sandra twenty-five percent. R. at 163. The tax lien which Henry effectuated, is a criminal penalty imposed on those persons determined by the IRS to be the responsible person for willful violations of the tax code. The tax lien is for Henry's violation of tax code 941, the "trust fund recovery penalty."

"If federal income, social security, and Medicare taxes that must be withheld are not withheld or are not deposited or paid to the United States Treasury, the trust fund recovery penalty may apply. . . . The penalty is the full amount of the unpaid trust fund tax." IRS, *Publication 15 (Circular E) Employer's Tax Guide*, <http://www.irs.gov/publications/p15/ar02.html#d0e2767>.

"The trust fund recovery penalty may be imposed on all persons who are determined by the IRS to be responsible for collecting, accounting for, and paying over these taxes, and who acted willfully in not doing so. . . . A responsible person acts willfully if the person knows that the required actions are not taking place." *Id.*

A separate accounting may be required if the responsible party does "not pay over withheld employee social security, Medicare, or income taxes; deposit required taxes; make required payments; or file tax returns." *Id.* Once the violation has occurred, the responsible party "would receive written notice from the IRS requiring [the responsible party] to deposit taxes into a special

trust account for the U.S. Government.” *Id.* The responsible party is “charged with criminal penalties if [the responsible party does] not comply with the special bank deposit requirements for the special trust account for the U.S. Government.” *Id.*

The Internal Revenue Code defines a responsible party as “an officer or employee of the corporation or a partner or employee of the partnership who is under a duty to perform the act at issue.” I.R.C. § 6671(b); *see also* I.R.C. § 6672. Since Plaintiff was not the responsible party and clearly had no part in Defendant’s willful violation of the tax code, in fact, she was not even aware of his violation, she cannot be held criminally responsible with Defendant and the tax debt cannot be considered a joint debt. Therefore, assessing twenty-five percent of the debt to Plaintiff was not equitable and was in error.

- B. The trial court erred in finding that Plaintiff acquired as a marital asset approximately \$75,000.00 in a home she owned prior to the marriage.

First, the Court erred in finding that Plaintiff had \$75,000 equity in a home, 130 Langford Cove in Brandon, Mississippi, which Plaintiff acquired before she married Henry. R. at 142, Tr. at 271, 343. Clearly, the Court erred in finding that the Langford home was a marital asset. As the home was not a marital asset it should not be subject to equitable distribution. *See Johnson v. Johnson*, 650 So. 2d 1281, 1286 (Miss. 1994).

- C. The trial court erred in finding that Plaintiff acquired approximately \$193,000.00 in a personal injury lawsuit.

Second, the Chancellor clearly erred in determining that Plaintiff received \$193,000 in a personal injury settlement. R. at 141. The testimony admitted at trial showed that Plaintiff received \$156,597.08. Tr. at 338. This finding was clearly erroneous and was not supported by any credible evidence.

- D. The trial court erred in finding that Plaintiff spent for her own personal use approximately \$225,091.08 of Henry Irby's money which he acquired for a personal injury lawsuit.

Third, an error was committed when the Court found that Plaintiff spent \$225,091.08 of Defendant's personal injury settlement for her own personal use. Plaintiff explained over and over again how the money was spent for marital bills and not for her own personal use. Tr. at 305-06. Again, no credible evidence suggested the finding of the trial court.

- E. The trial court erred in failing to allot Henry Irby value in the equitable distribution for the tractor and bulldozer.

Fourth, even though Plaintiff may have testified that she thought that it would be fair in the division of marital assets for Henry to have "the bulldozer and Case tractor" these items were not given any value to Defendant in the findings by the Court. R. at 138. These assets were not given an equity value. These were marital assets that should be considered as part of Defendant's overall assets, and values should have been allotted to Defendant. To fail to assign any value to these items was error on the part of the trial court.

- F. The trial court erred in accepting Henry Irby's speculative value of the Back Clinic at \$128,000.00.

Fifth, the Chancellor erred in determining that the Back Clinic was worth \$128,000. R. at 146. Henry estimated to what he "thought" the Clinic was worth. As no evidence, authenticated or otherwise, was admitted as to the Clinic's worth, the Court erred in using Henry's own estimation.

- G. The trial court erred in failing to allot Henry Irby in the equitable distribution for the funds in his bank accounts.

Sixth, an error was committed when all of Henry's bank accounts were not listed as part of his assets. R. at 137-38. Henry testified to having several accounts at Heritage Bank, BankPlus

Bank, Citizens Bank, and a bank account that only he used with the name of Master Petroleum. Clearly, not all of Henry's accounts were considered by the Court. R. at 137-38. Not only were all his accounts considered, but the actual amounts in the accounts that were listed were clearly wrong. As for a debt at the Heritage Bank, the one he listed for \$48,293.67, was contradictory to his testimony. R. at 138.

H. The trial court erred in giving Henry Irby the 1928 Willis Knight vehicle purchased by Ms. Irby.

The trial court gave the 1927 Willis Knight vehicle to Mr. Irby despite the testimony of Ms. Irby that she alone paid for the Willis Knight. Tr. at 387. There was no support in the record which justified the trial court giving this vehicle to Defendant, and the trial court committed error when it did so.

Above are just a few of the factual discrepancies that occurred between the trial court's findings and Judgment and the testimony that was admitted or that was excluded. The trial court's findings in this regard are against the overwhelming weight of the evidence. Further, the trial court's findings are not supported by substantial credible evidence and should be overturned.

V. The trial court erred when it denied Plaintiff's Motion to Declare Judgment Null and Void.

The parties entered into a consent to divorce on irreconcilable differences at the beginning of the hearing on May 4, 2006. R. at 103-04. The parties agreed to allow the Court to decide the property matters between them. R. at 103-04. The trial Court ultimately entered a Final Judgment on December 19, 2006, which included rulings on the property distribution between the parties. R. at 162. It is undisputed that the parties never withdrew the fault grounds stated in the original pleadings of the parties.

Miss. Code Ann. §93-5-2(5) provides that:

(5) Except as otherwise provided in subsection (3) of this section, no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial; provided, however, that a divorce may be granted on the grounds of irreconcilable differences where there has been a contest or denial, if the contest or denial has been withdrawn or cancelled by the party filing same by leave and order of the court.

Miss. Code Ann. §93-5-2(5). The parties did not in any way comply with this subsection.

Plaintiff maintains that the Final Judgment entered by the trial court was void due to the failure of the parties to withdraw their fault grounds. In the April 18, 2007, Judgment, the trial court ruled that §93-5-2(5) is inapplicable when the parties consent to the trial court resolving property rights in an irreconcilable differences divorce. R. at 221. Plaintiff respectfully disagrees.

Divorce is created and allowed in the State of Mississippi only by statute. Section 93-5-2 allows for a divorce on the ground of irreconcilable differences. However, the legislature has placed specific limitations on the circumstances which must be present in order for a divorce to be granted on the ground of irreconcilable differences. If the parties agree both to the divorce itself on the ground of irreconcilable differences and to the terms of custody of children and property settlement, then §93-5-2(2) applies. If the parties agree to the divorce itself but not the custody or property settlement terms, then §93-5-2(3) applies which provides, as follows:

(3) If the parties are unable to agree upon adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between them, they may consent to a divorce on the ground of irreconcilable differences and permit the court to decide the issues upon which they cannot agree. Such consent must be in writing, signed by both parties personally, must state that the parties voluntarily consent to permit the court to decide such issues, which shall be specifically set forth in such consent, and that the parties understand that the decision of the court shall be a binding and lawful judgment. Such consent may not be withdrawn by a party without leave of the court after the court has commenced

any proceeding, including the hearing of any motion or other matter pertaining thereto. The failure or refusal of either party to agree as to adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between the parties, or any portion of such issues, or the failure or refusal of any party to consent to permit the court to decide such issues, shall not be used as evidence, or in any manner, against such party. No divorce shall be granted pursuant to this subsection until all matters involving custody and maintenance of any child of that marriage and property rights between the parties raised by the pleadings have been either adjudicated by the court or agreed upon by the parties and found to be adequate and sufficient by the court and included in the judgment of divorce. Appeals from any orders and judgments rendered pursuant to this subsection may be had as in other cases in chancery court only insofar as such orders and judgments relate to issues that the parties consented to have decided by the court.

Miss. Code Ann. §93-5-2(3).

The trial court found that the opening provision of subsection 5, i.e., “[e]xcept as otherwise provided in subsection (3) of this section . . .” implies that the Legislature did not intend for subsection 5 to apply to cases wherein the parties requested that the trial court decide property settlement issues. R. at 221-22. Plaintiff maintains that the opening phrase of subsection 5 simply acknowledges that courts can never grant an irreconcilable differences divorce when there has been a contest or denial other than in those cases preceding under subsection 3. However, it is important to note that in subsection 3 cases, the only issues that continue to be contested are those involving property. The parties are in agreement that the divorce will be granted on the ground of irreconcilable differences. Thus, there does not continue to be a contest or denial as to the ground for divorce but merely as to the distribution of property.

The second portion of subsection 5 clearly provides that trial courts can only grant irreconcilable differences divorces where there has been a contest or denial, if the parties withdraw their contest or denial. Subsection 3 is mentioned in the preceding sentence to acknowledge that the

Legislature will permit divorces to continue if the contest remains to as to property only. The bottom line is that there is no limitation placed on the second portion of §93-5-2(5). The inclusion of the opening phrase of §93-5-2(5) simply does not change the unlimited nature of the final portion of §93-5-2(5) which provides that the parties must withdraw their fault grounds. This position is supported by applicable case law. E.g. *Caldwell v. Caldwell*, 805 So.2d 659, 665 (Miss. App. 2002); *Massingill v. Massingill*, 594 So.2d 1173, 1178 (Miss. 1992).

The trial court erred when it denied Plaintiff's Motion to Set Aside the Judgment of Divorce.

VI. The trial court erred when it denied Plaintiff's Motion to Reconsider.

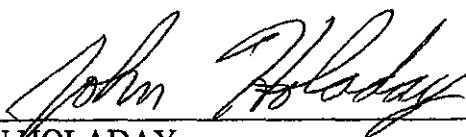
The trial court treated Plaintiff's Motion to Reconsider filed on or about December 29, 2006, as a Motion for New Trial. R. at 165. The Court denied this Motion by Judgment dated April 18, 2007. R. at 224. Plaintiff's Motion to Reconsider contained issues which have all been addressed above. That is, the sections above referring to the trial court's errors in the equitable distribution of the property between the parties were contained within Plaintiff's Motion to Reconsider. Plaintiff will rely on the arguments and case law made above.

In addition, Plaintiff would maintain that the trial court abused its discretion in failing to grant a new trial based on the above mentioned errors. *Wade v. Wade*, 967 So.2d 682, 684 (Miss. App. 2007).

**Conclusion**

Based on the foregoing, Appellant Sandra Ann Craft Irby requests that the Court reverse the Orders and Judgment of the Rankin County Chancery Court as set forth above.

This the 21<sup>st</sup> day of April, 2008.

  
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JOHN HOLADAY

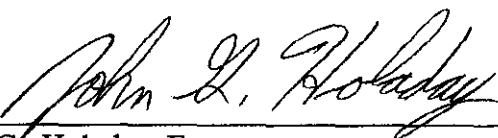
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**Certificate of Service**

I, John G. Holaday, 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: Lisa Anderson Reppeto, Watkins Ludlam Winter & Stennis, P O Box 427, Jackson, MS 39205-0427; Christopher A. Tabb, P.O. Box 87, Brandon, MS 39043-0087; Laura Skeen Kuns, 119 Trace Ridge Dr., Ridgeland, MS 39157; and Honorable Dan Fairly, Rankin County Chancery Judge, P.O. Box 1437, Brandon, MS 39043.

This the 21<sup>st</sup> day of April, 2008.

  
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John G. Holaday, Esq.