IN THE SUPREME COURT OF MISSISSIPPI

2007-CA-01474

JONATHAN M. HARBIT — **APPELLANT**

VERSUS

MARY MELISSA SCARBERRY HARBIT — **APPELLEE**

On appeal from the Chancery Court of Grenada County

BRIEF OF THE APPELLEE
ORAL ARGUMENT REQUESTED

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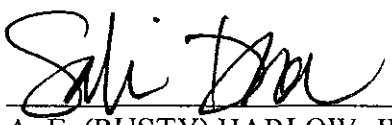
Certificate of Interested Persons

The undersigned counsel of record certifies 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 Court of Appeals may evaluate possible disqualification or recusal.

1.	Jonathan M. Harbit	Appellant
2.	Mary Melissa Scarberry Harbit	Appellee
3.	Carlos E. Moore	Attorney for Appellant
4.	A. E. (Rusty) Harlow, Jr.	Attorney for Appellee
5.	Sabrina A. Davidson	Attorney for Appellee
6.	Honorable Vicki B. Cobb	Chancellor

This the 1st day of May, 2008.

Respectfully submitted,
Mary Melissa Scarberry Harbit

By: 

A. E. (RUSTY) HARLOW, JR.,
SABRINA A. DAVIDSON
ATTORNEYS FOR APPELLEE

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STATEMENT OF THE CASE

On the 20th day of February, 2007, the Appellee filed her Complaint for Divorce with the chancery clerk of Grenada county, Mississippi. R-ii. On March 20, 2007, the Appellant filed an Answer and Counter-complaint for Divorce and Motion to Dismiss. Id. An Offer of Judgment, pursuant to Rule 68 of the Mississippi Rules of Civil Procedure, was filed under seal with the chancery clerk by the Appellee, and a copy duly forwarded to the Appellant as evidenced by the certificate of service. R-1. The Appellant did not accept the Offer of Judgment within ten (10) days and it was, therefore, rejected as is evidence by the continued litigation. R-ii. On June 14, 2007, the matter was tried by the chancery court of Grenada county, Mississippi, with the Honorable Chancellor Vicki B. Cobb presiding. Id. In advance of the trial, the Chancellor acknowledged that there was an Offer of Judgment filed which she would leave sealed until the conclusion of the trial pursuant to the rules. R-8.

The only two witnesses called to testify were the parties, Jonathan M. Harbit and Mary Melissa Scarberry Harbit. At some point during the Appellant's direct testimony, the chancellor realized that the witnesses had not been administered an oath prior to the beginning of the trial. R-12. The chancellor instructed the clerk to immediately administer an oath and include in that oath that the parties swore their previously given testimony was true. R-13. No objection was made by the Appellant at the time the potential error was discovered and subsequent oath was administered. R-13.

The trial concluded and the chancellor delivered an oral opinion which, among other things, allocated the debt associated with the Appellee's 4-Runner to the Appellant and assessed the Appellant with a portion of the Appellee's attorney's fees that were incurred after the Offer of

Judgment was made. R-16. Aggrieved by the chancellor's ruling, the Appellant, for the first time, raised somewhat of an objection to the chancellor basing her opinion on the "unsworn" testimony of the Appellee. R- 22. His objection was overruled. R-22.

On June 21, 2007, the Appellant filed a Motion for Reconsideration requesting that the trial court order a new trial based on the fact that the witnesses were not sworn before giving testimony and the allegations that the trial court reviewed the offer of judgment prior to rendering an opinion. R-6. The Appellant's Motion was denied and the present Appeal was subsequently filed. R-ii.

SUMMARY OF THE ARGUMENT

The Appellant has presented no set of facts or rules of law that support his appeal. There is no way to conclude that the Chancellor's ruling was manifestly wrong, clearly erroneous, applied an erroneous legal standard, was against the overwhelming weight of the evidence, or was an abuse of discretion.

The Appellant has failed to show that the Chancellor was manifestly wrong in her ruling at trial. The Appellant seems to take issue with the following: 1) the trial court's reliance on what he claims to be unsworn testimony of witnesses; 2) the allocation of roughly $2,000.00 of debt associated with a Toyota 4-Runner; and 3) the trial court's award of attorney's fees to the Appellee based on Rule 68 of the Mississippi Rules of Civil Procedure and more specifically an Offer of Judgment rejected by the Appellant.

In response to the Appellant's complaints, the Appellee will show that any potential error in the witnesses not being sworn was immediately corrected by the Chancellor, assumably to the satisfaction of the Appellant since he made no objection at the time. The Appellee will further show that the Appellant is barred from raising an issue regarding the allocation of the 4-Runner debt as he did not address it at trail or in his Motion for Reconsideration or that, in the alternative, the allocation of the debt to the Appellant was not manifestly wrong, clearly erroneous, an application of an erroneous legal standard, against the overwhelming weight of the evidence, nor an abuse of discretion. Finally, the Appellee will clearly show that the trial court's award of attorney's fees to the Appellee was well within its discretion pursuant to Rule 68 of the Mississippi Rules of Civil Procedure and that the Appellant's contention that neither the *McKee* nor *Langdon* factors were considered is a misplaced argument.

LAW AND ARGUMENT

I. STANDARD OF REVIEW

In reviewing a trial Court's decision in a domestic relations case,, the chancellor's findings of fact and conclusions of law will not be disturbed unless the findings are manifestly wrong, clearly erroneous, or if the chancellor applied an incorrect legal standard. *Henderson v. Henderson*, 757 So.2d 285, 289-90 (Miss.2000). The chancellor's findings of fact will be reversed only where there is no "substantial, credible evidence in the record" to justify the findings. *Id.* The facts of a divorce decree are reviewed in the light most favorable to the Appellee. *Fisher v. Fisher*, 771 So.2d 364, 367 (Miss.2000).

II. THE CHANCELLOR DID NOT ERR IN DENYING APPELLANT'S MOTION FOR NEW TRIAL IN LIGHT OF "UNSWORN" TESTIMONY OF THE PARTIES.

The Appellee fully acknowledges that both of the parties testified for a period of time without having been sworn under oath due to an inadvertent error in circumstances wherein none of the officers of the court, including not only the chancellor but also counsel for the Appellant, counsel of the Appellee and the chancery clerk realized the oath had not been administered. Not only was there no error committed, the Appellant has inappropriately directed the attention of this Court to case law that is not on point and misleading. Furthermore, the Appellant has failed to make any showing whatsoever that the failure of the trial court to swear the witnesses before they gave testimony was, in any way, prejudicial to the Appellant or that the testimony would have been any different had the oath been administered at the outset, making the testimony a violation of Rule 603 of the Mississippi Rules of Evidence.

In an immediate effort to repair any potential error, the chancellor, upon realizing the

witnesses had not been sworn, instructed the clerk to administer the oath and in so doing to ask the witnesses to swear to their previous testimony. R-13. The chancellor even went so far as to admonish the parties "to think long and hard about" reaffirming their previous testimony. Id. Both parties swore that their previous testimony was truthful, thereby alleviating any concern that Rule 603 of the Mississippi Rules of Evidence was not complied with. Id. At the time that the parties swore to their previous testimony, the Appellant made no objection to how the potential error was corrected. Id. He never advised the Court that he was concerned that the previously unsworn testimony might not be truthful or was inadmissible for some reason. Id. In fact, the Appellant was silent except to say "Yes, sir" in response to the clerk's administration of the oath. Id. It was not until the Appellant received an unfavorable ruling that he objected to only the Appellee's testimony being unsworn. R-22. There was no mention that the Appellant's previously unsworn testimony was also objectionable. Id.

In his brief, the Appellant relies on *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385 (Miss.1997) and *Scoggins v. Elizey Beverages, Inc.*, 743 So.2d 990 (Miss.1999) for the assertion that false testimony is not favored, should be stricken from the record, and could even result in dismissal of a party's claim. See Appellant's Brief, p. 6. However, these opinions are wholly inaccurate cases upon which to rely. For one, both *Pierce* and *Scoggins* refer exclusively to untruthful or inaccurate ***discovery*** responses, and secondly, the Appellant assumes in his reliance on these cases that the testimony given by the Appellant himself and the Appellee was false. There is no indication that may be the case. There is no evidence in the record whatsoever that either parties' responses were untruthful.

Assuming that the Appellant is implying that either the Appellee or the Appellant himself

is lying, then the case of *Mosley v. Atterberry*, 819 So.2d 1268 (Miss.2002) is more on point. In *Mosley*, the Court affirmed a chancellor's decision not to modify a previous ruling that was based on the mother's admittedly false testimony. *Id.* Similarly to the Appellant in *Mosley*, the Appellant in the case *sub judice* made no motion to strike what he now asserts was inadmissible testimony and, therefore, should be barred from doing so now. *Id.* The *Mosley* Court went further and found that the chancellor, even with the definite knowledge that the wife's testimony was untruthful, is the "fact-finder in a domestic relations case [and] must decide who is telling the truth and what weight to give the testimony." *Id* at 1273. The chancellor in the case *sub judice* is also given the same deference. Assuming that the testimony given without an oath was tainted in some way, as the Appellant would have this Court believe, it is well within the chancellor's discretion to decide the case with that testimony. The chancellor was fully aware of any issues that may have arisen because the oath was not initially administered, and it was her discretion to weigh that testimony accordingly. There is no evidence presented by the Appellant that the chancellor did anything other then consider the testimony and evidence as it was presented to her.

The issue addressed by the Appellant that the trial court's ruling in this matter should be reversed as it is based on the fact that the parties' were not administered an oath in advance of testifying, but did reaffirm the responses given by them under oath, is simply without merit. There is no evidence of any kind of reversible error, and the Appellant's request for relief as to this issue should not be granted.

III. THE CHANCELLOR DID NOT ERR IN ALLOCATING DEBT ASSOCIATED WITH THE TOYOTA 4-RUNNER TO THE APPELLANT.

It is unclear in the Appellant's brief as to whether he is asserting that the debt associated with the Appellee's 4-Runner was wrongly allocated to the Appellant because, as addressed above, the testimony regarding the debt was not elicited under oath and was, therefore, inadmissible or if the Court simply erred in the division of marital debt. If it is the former, then the Appellee reasserts her position and responses as presented in the previous section with regard to the "unsworn" testimony.

However, if the Appellant is now asserting that the chancellor failed to appropriately distribute marital debt, regardless of the fact that some of the testimony was initially unsworn, his claim is not properly before this Court. In the Appellant's Motion for Reconsideration, he mentions only the issues of the oath and the offer of judgment and makes no reference to the trial court's division of marital property and/or debt. He made no objection at trial or in his post trial motion, making the issue not one that this Court can consider. The Appellant is now procedurally barred from asking for relief from this Court that he failed to bring to the attention of the trial court. *Curtiss v. Curtiss*, 781 So.2d 142 (Miss.Ct.App.2000).

In the alternative, the Appellee would show that the division of marital assets and debt is well within the chancellor's discretion. It is the uncontroverted testimony of both parties that there was no debt associated with the Toyota 4-Runner at the time of the marriage and that the debt which was ultimately incurred was a result of the Appellant being unemployed for a prolonged period of time, making the debt necessary because the Appellant was not producing any income for the family. R-9.

The Appellant cites cases dealing with marital property versus separate property and how commingling can result in separate property being converted into marital property. He cites these

cases and their holdings to reach the conclusion that the Appellant was wrongly saddled with the debt associated with the Toyota 4-Runner. However, the chancellor made no finding that the debt was not marital. She simply chose to allocate the debt to the Appellant, obviously because it was incurred at a time when the Appellant was unemployed. Certainly the chancellor's decision to allocate this specific debt to the Appellant is not outside of her discretion and was not manifestly wrong, clearly erroneous, or the application of an incorrect legal standard. The Appellant's request for relief with regard to the Toyota 4-Runner debt should be denied.

IV. THE CHANCELLOR DID NOT ERR IN ASSESSING THE APPELLANT WITH A PORTION OF THE APPELLEE'S ATTORNEY'S FEES PURSUANT TO RULE 68 OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

The Appellant has lastly argued that this Court reverse the chancellor's award of attorney's fees to the Appellee. However, the Appellant's argument that there was neither a *McKee* finding nor a finding that the Appellee was unable to pay her own attorney's fees, pursuant to *Langdon*, is misguided. As the chancellor's opinion clearly reflects, the award of attorney's fees was based on Rule 68 of the Mississippi Rules of Civil Procedure and, more specifically, the Appellant's failure to accept a reasonable offer of judgment made by the Appellee. Further, there is no evidence that the chancellor was procedurally incorrect in her award of attorney's fees based on Rule 68.

In his final argument, the Appellant relies on *McKee v. McKee*, 418 So.2d 764 (Miss.1982) and *Langdon v. Langdon*, 854 So.2d 485 (Miss.Ct.App. 2003) for his proposition that the Appellee should not have been awarded attorney's fees. However, the Appellant's reliance on these two cases is unfounded. *McKee* and *Langdon* both speak to the trial court's ability to award attorney's fees when ruling on issues before it in a divorce proceeding. *Id.* In the case *sub judice*, the trial court awarded attorney's fees based on an offer of judgment made by the Appellee and rejected by the

Appellant. R-20. When awarding attorney's fees based on Rule 68, the trial court need only consider whether "the judgment finally obtained by the offeree," in this case the Appellant, is less favorable than the offer made by the offeror (Appellee) and if so, what fees were incurred by the offeror after the offer was made. M.R.C.P. 68. The chancellor clearly considered the Appellee's offer of judgment to be more favorable than her final ruling to the Appellant. R-20. Because of the chancellor's findings regarding the offer of judgment, there is and was no obligation for the Court to further consider the *McKee* factors and no requirement under *Langdon* that the Appellee be found to be financially incapable of paying her own attorney's fees.

The Appellant further points to *A&L, Inc. v. Grantham*, 747 So.2d 832 (Miss.1999) and *Douglas v. Douglas*, 766 So.2d 68 (Miss.Ct.App.2000) for the conclusion that because there was no finding that the Appellant engaged in any improper conduct, he cannot be assessed with attorney's fees. Again the Appellant's reliance on this line of cases is without merit. The award of attorney's fees was based solely on the chancellor's finding that the final ruling was less favorable to the Appellant than the offer of judgment made by the Appellee. The Appellant's lack of improper conduct is inconsequential.

With regard to the chancellor's decision to procedurally dispose of the offer of judgment issue immediately after making a ruling in the case, the Appellant argues that the chancellor should not have considered the offer of judgment until a subsequent proceeding. However, the chancellor clearly addresses that her decision was made and the ruling finalized before she opened and reviewed the sealed offer of judgment. R-20. Rule 68 does not require that additional pleadings be filed or hearings be conducted in order for a ruling on attorney's fees to be made. In fact, the chancellor's decision to resolve the offer of judgment issue while all parties were present and without further

delay was in the best interests of judicial economy and most efficient for all those involved.

The chancellor's award of attorney's fees to the Appellle was based solely on the offer of judgment rejected by the Appellant and, as such, was well within her discretion and even mandated by Rule 68 of the Mississippi Rules of Civil Procedure. Any relief that the Appellant has requested with regard to the award of attorney's fees should be denied.

CONCLUSION

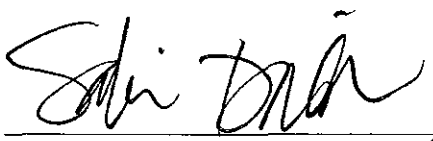
The Appellee would respectfully suggest that the Appellant has provided neither facts nor rules of law that support any of his contentions for appeal. His assertions that the present matter should be reversed and remanded because the chancellor erred with regard to the following issues is without merit: 1) the trial court's reliance on what he claims to be unsworn testimony of witnesses; 2) the allocation of roughly $2,000.00 of debt associated with a Toyota 4-Runner; and 3) the trial court's award of attorney's fees to the Appellee based on Rule 68 of the Mississippi Rules of Civil Procedure and more specifically an Offer of Judgment rejected by the Appellant.

Both the chancellor's decisions and procedure in conducting the trial of this cause were above reproach and well within the discretion afforded to her as as the finder of fact and the ultimate decision maker.

The Appellee respectfully requests that the Court uphold the trial court's ruling and assess the fees and costs of this appeal, including the Appellee's attorney's fees to the Appellant.

Respectfully submitted,

Mary Melissa Scarberry Harbit

BY: 

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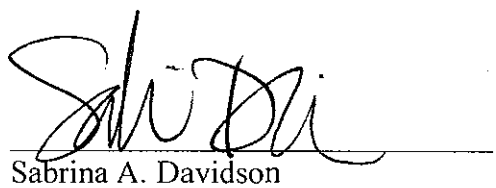
CERTIFICATE OF SERVICE

I, Sabrina A. Davidson, attorney for the Appellee, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Appellee's Brief to:

Carlos E. Moore
P.O. Box 1402
Grenada, MS 38902-1402

Honorable Vicki B. Cobb
Chancery Court Judge
P.O. Box 1104
Batesville, MS 38606-1104

Dated, this the 1st day of May, 2008.



Sabrina A. Davidson