

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record stipulates that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of the Court may evaluate possible disqualifications or recusal.

A. Parties:

Appellant:

Jonathan M. Harbit

Appellee:

Mary Melissa Scarberry Harbit

B. Attorneys:

For Appellant:

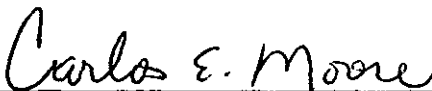

Carlos Moore

For Appellee:

Rusty Harlow

C. Judge

Honorable Vicki Cobb  
Grenada County Chancellor

  
\_\_\_\_\_  
Carlos E. Moore, MSB# 

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**Miss. Rule of Evidence 603 ..... 1,2,3,4,5**

**Miss. R. Civ. P. Rule 6..... 1,2,3,5,9**

## **STATEMENT OF THE ISSUES**

### **ISSUE ONE**

Whether the Chancellor erred when she failed to grant the defendant's motion for new trial when the Chancellor allowed unsworn testimony to be taken in violation of Miss. Rule of Evidence 603, which states; "before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with a duty to do so."

### **ISSUE TWO**

Whether or not, the Chancellor erred when she charged the Appellant with a debt incurred throughout the course of the marriage on property that was co-mingled.

### **ISSUE THREE**

Whether or not, the Chancellor erred when she order the appellant to pay attorney fee's incurred when she based her findings on unsworn testimony and engaged in improper procedure, violating rule 68 of Mississippi Rules of Civil Procedure, when she conducted an improper assignment based on an offer of judgment, after she made a determination in regards to the awarding of legal fees.

## **STATEMENT OF THE CASE**

Jonathan M. Harbit (hereinafter Mr. Harbit) brings this appeal from the Judgement of Divorce entered by the Chancellor of Grenada County, on June 14, 2007. Mr. Harbit had been married to Mary Melissa Scarberry Harbit (hereinafter Ms. Scarberry) for six (6) years. At the time of the divorce, Mr. Harbit was working as a field technician for Cable One, and Ms. Scarberry was working for the Emergency Operating Center. The Chancellor made findings based on unsworn testimony which violates M.R.E. 603. The Chancellor ordered that the parties have joint legal custody and awarded Ms. Scarberry primary physical custody of the parties' minor child, Michael Lisette Lorena Harbit, who is six (6) years of age. (T. 61, RE 20-21, 24) The Chancellor also charged the payment of a marital debt to Mr. Harbit solely, when the property in question was co-mingled throughout the course of the marriage. (T. 68-69, RE 25-26) The Chancellor also awarded the payment of attorney's fees using an improper application of rule 68 of the Mississippi Rules of Civil Procedure when she reviewed a previous offer of settlement and awarded attorney fees based upon that proposal when the Mr. Harbit was never held in contempt of court or violated any terms of the preliminary order. Financially unable to comply with the court's ruling, Mr. Harbit perfects this appeal in an effort to seek relief.

## **SUMMARY OF THE ARGUMENT**

- I.** The Chancellor erred in allowing unsworn testimony to be deemed admissible in violation of Rule 603 of evidence. The chancellor made findings of law and fact from witnesses who failed to take an oath. This violates the explicit language of Rule 603, which states, “before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with a duty to do so.”
- II.** The Chancellor erred when it assigned payment of debt associated with commingled property to the Appellant. According to Henderson v. Henderson, 703 So. 2d 261, 265 (Miss. 1997), separate property that is commingled throughout the course of the marriage transfers into marital property.
- III.** The Chancellor erred when she assigned the Appellant with the payment of the Appellee’s attorney fees based upon unsworn testimony and incorrect application of Rule 68 of Mississippi Rules of Civil Procedure.

## **ARGUMENT**

In this divorce action, the Chancery Court erred by making factual determinations based upon unsworn testimony. This simple divorce case based upon limited assets has placed Mr. Harbit in a significant financially burdensome state. The Chancellor applied a substantial portion of marital debt solely to the Appellant. In addition to paying debt incurred by both parties over the course of the marriage, the Appellant was also charged with the payment of Ms. Scarberry's legal fees without a full analysis being placed upon each individual's separate estate after equitable distribution. (RE 23) It is legally unconscionable to essentially punish one party in an irreconcilable differences divorce when grounds for dissolution have not been a factor in the equation.

### **Standard of Review**

In matters concerning domestic relations, the reviewing Court will not overturn a Chancellor's findings which are based upon substantial credible evidence unless the findings were manifestly wrong, clearly erroneous, or an incorrect legal standard was applied. *Magruder v. Magruder*, 881 So. 2d 363, 369 (P17) (Miss. Ct. App. 2004).

### **Applicable Law**

The issue on appeal is whether or not it is legally plausible for a Chancellor to base findings of law and fact on improperly conducted testimony, completely disregarding the Mississippi Rules of Evidence and procedural posturing. In the case at bar the Chancellor allowed unsworn testimony, which is prohibited by Miss. Rule of Evidence 603. In addition to admitting unsworn testimony, the Chancellor also



committed reversible error when marital debt associated with commingled marital assets was only assigned to one party, which violates Henderson v. Henderson, 703 So. 2d 261, 265 (Miss. 1997), which determined that commingled property transfers into marital property. Lastly, the chancellor committed manifest error when an improper analysis of Rule 68 of Mississippi Rules of Civil Procedure was applied in the awarding of legal fees. These cumulative failures not only severely prejudiced the Appellant's claims, but allowed for an inequitable division of property and debt.

Mississippi Courts generally allow the open testimony of a competent witness with personal knowledge concerning the matter appearing before the court. While it is not alleged that neither Ms. Scarberry nor Mr. Harbit lacked the requisite knowledge that would aid the Chancellor in a resolution in the contested matters, it is alleged that improper procedure was conducted that ultimately prejudiced the Chancellor's findings. According to Miss. Rule of Evidence 603, which states, "before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." This rule was designed to promote open and honest testimony. Failure to establish an oath allows one to testify in a manner that does not awaken his or her conscience and in essence promotes false testimony. While no specific Mississippi Court cases speak to the resolving of this issue, it is important to note the Court's stance on issues involving perjury and analogize its stance to the facts presented within this instance.

According to Pierce v. Heritage Props., Inc., essentially all false testimony should be purged from the record, and any awards should not be made based upon false testimony. 668 So. 2d 1385 (Miss. 1997). Additionally, Scoggings, further supports this argument when the Court affirmed the trial court's dismissal of an action because the plaintiff submitted false answers during the discovery phase of the lawsuit. Scoggins v. Ellzey Beverages, Inc., 743 So. 2d 990 (Miss. 1999). While these facts do not entirely coincide with the case at bar, they effectively illustrate the importance of sworn, truthful testimony, which allows Mr. Harbit to make the argument that there is no way to determine whether or not the testimony taken throughout the proceeding was indeed honest or conducted properly. In addition to this argument, the Chancellor acknowledged this error and attempted to correct this by causing both parties to testify that their previously given respective testimony was indeed true, but this procedure failed to strike awareness from the outset and allowed possible tainted evidence to persuade the Chancellor's judgment. (T. 50-51, 81, RE 27-29) While the cases described were ended at the discovery phase, it is important to acknowledge that this potential contamination was conducted at trial, which is the most critical phase of the lawsuit and the appropriate remedy would have been to declare a new trial where the witnesses could be examined under oath properly. Due to this massive error, Mr. Harbit contends that each legal finding is insufficient, biased, and prejudiced and should have further review.

In the alternative, Mr. Harbit would also argue that the Chancellor erred in her assignment of a marital debt based upon inadmissible testimony. "Mississippi applies the

doctrine of equitable distribution when deciding issues of marital assets.” Taxler v. Taxler, 730 So. 2d 1098, 1101-03 (Miss. 1998). “Marital property is defined as, ‘any and all property acquired or accumulated during the marriage.’” *Id.* In addition to property acquired throughout the course of the marriage, separate property can be converted into marital property by commingling. Henderson v. Henderson, 703 So. 2d 261, 265 (Miss. 1997) (“the money received from Mary’s parents, which was initially non-marital property, became marital property when Mary commingled it with the marital assets.”); Maslowski v. Maslowski, 655 So. 2d 18, 20 (Miss. 1995) (commingling occurs when there is “a combination of marital and non-marital property which loses its status as non-marital as a result”). Mr. Harbit contends that while the Toyota 4-Runner in question was initially separate property, Ms. Scarberry allowed it to be converted throughout the course of the marriage. When the couple ran into troubled times, the couple made a joint decision to refinance the Toyota 4-Runner in order to pay outstanding financial obligations. (T. 36, RE 30) This illustrates that the property was successively converted from separate property to marital property because it was used to secure a marital debt. In essence this is the same as placing separate assets into a marital account. Therefore, Ms. Scarberry’s allowance of the Toyota 4-Runner to be used as marital property dissolved her separate property interest and as such, the debt assigned to the property should be distributed equitably according to the procedures outlined in Mississippi case law.

Additionally, Mr. Harbit would also argue that the Chancellor failed to make a procedurally sound decision regarding the awarding of attorney fees when she conducted her assessment based upon potentially tainted information, an unjustified offer of judgment and contrary to current Mississippi case law. According to McKee, the criteria to be analyzed in determining whether or not to award attorney fees include, (1) “relative financial ability of the parties;” (2) the “skill and standing of the attorney employed,” (3) novelty and difficulty of the issues in the case, (4) the responsibility required in managing the case, (5) “time and labor required,” (6) the “usual and customary charge in the community, and (7) whether the attorney was precluded from undertaking other employment by accepting the case. McKee v. McKee, 418 So. 2d 764, 767 (Miss. 1982). Neither of these factors was addressed in the ruling of the court. While the assessment of attorney’s fees is at the sound discretion of the Chancellor, failure to analyze these factors effectively illustrates reversible error. The court has also established as a general rule that if a party is financially capable of paying his or her legal fees, that party should do so. Langdon v. Langdon, 854 So. 2d 485, 495 (P40) (Miss. Ct. App. 2003). Mr. Harbit would argue that the Chancellor engaged in an improper analysis in determining whether or not attorney fees should be awarded to Ms. Scarberry. In essence if the testimony in question is determined to be admissible during Ms. Scarberry’s she admitted that she chose an attorney that she could afford to pay. (T. 35, RE 31) Ms. Scarberry’s admission should discharge Mr. Harbit of any liability concerning any debt she occurred as a result of this divorce action.

Additionally, Mr. Harbit would contend that the Chancellor engaged in improper procedure when she made an assessment concerning legal fees based upon an offer of judgment as outlined by Rule 68 of Mississippi Rule of Civil Procedure. According to the rule the Chancellor has the discretion to attach fees in the event that the plaintiff would have achieved a more effective settlement than the one received by the court. However assessment of additional legal fees based upon inadmissible testimony in essence presents error and additional legal costs that could have been avoided if the proceedings were conducted properly.

Mr. Harbit would further argue that he did not engage in any improper conduct that further prolonged the case in question or caused additional legal fees. Several prior decisions have upheld the awarding of attorney's fees to one party in cases where one party has actually been found in contempt of court or engaged in conduct that has caused additional legal fees. See A&L, Inc. v. Grantham, 747 So. 2d 832, 844-845 (Miss. 1999) (holding that awarding attorney's fees under certain circumstances, regardless of the party's ability to pay is not a reward, but reimbursement for the extra legal costs incurred as a result of the opposing party's actions); Douglas v. Douglas, 766 So. 2d 68, 71 (Miss. Ct. App. 2000) (where a party who is entitled to the benefits of a previous judicial decree is forced to initiate further proceedings to gain compliance with the previous order of the court, an award of attorney's fees is appropriate). Mr. Harbit contends that he did not engage in any improper conduct nor did he violate any terms of the preliminary

agreement. As such each respective party should be responsible for their own attorney's fees.

### CONCLUSION

In the claim at bar, Mr. Harbit was disproportionately and adversely harmed by the errors committed by the Chancellor. The Chancellor's failure to conduct proceedings in accordance to the Mississippi Rules of Evidence and Civil Procedure, effectively illustrates that all of the findings of law were inaccurate and unsupported by any legally sufficient evidence. Therefore, any factual determinations made by the Chancellor are fatally flawed and inequitable. As such, Mr. Harbit respectfully request this honorable Court to reverse and remand the present case to the appropriate Chancery court and allow a new trial to be conducted in accordance to proper procedure and the rule of law.

Respectfully submitted,

JONATHAN M. HARBIT

BY Carlos E. Moore  
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**CERTIFICATE OF SERVICE**

I, Carlos E. Moore, attorney for the defendant, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the above and forgoing to:

RUSTY HARLOW, ESQ.  
HARLOW LAW FIRM  
1360 Sunset Drive, Suite 3  
Grenada, MS 38901

SO CERTIFIED this the 10<sup>th</sup> day of April, 2008.


Carlos Moore  
CARLOS MOORE

**SUPPLEMENTAL CERTIFICATE OF SERVICE**

I, Carlos E. Moore, attorney for the appellant, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the Brief of Appellant in Harbit vs. Harbit, Supreme Court Case # 2007-CA-01474 to:

Judge Vicki Cobb  
P.O. Box 1104  
Batesville, MS 38606-1104

SO CERTIFIED this the 15<sup>TH</sup> day of April, 2008.

  
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CARLOS MOORE