IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-CA-01868

RHONDA B. (KITTRELL) FARRIOR — APPELLANT

v.

KENDALL K. KITTRELL, SR. — APPELLEE

APPEAL FROM

GREENE COUNTY CHANCERY COURT

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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SUPREME COURT OF MISSISSIPPI

RHONDA LYNN BLACKWELL KITTRELL FARRIOR APPELLANT

VS. CAUSE NO. 2007-CA-01868

KENDALL KURT KITTRELL, SR. APPELLEE

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 disqualification or recusal.

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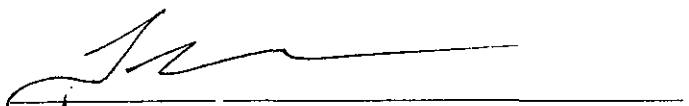

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Rhonda Blackwell (Kittrell) Farrior
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Honorable D. Neil Harris
Chancellor, Greene County
Presiding trial court Judge

TADD PARSONS, Attorney of Record for Appellee

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STATEMENT OF FACTS

Kendall K. Kittrell, Sr. (hereinafter "Kendall") and Rhonda B. (Kittrell) Farrior (Hereinafter "Rhonda") were divorced in the Chancery Court of Greene County on the 7th day of February, 1992. A Property Settlement and Child Custody Agreement was attached to and made part of the final judgment of divorce. This agreement provided for the final resolution of the outstanding issues of the marriage between the parties. Among these were the custody and support of the parties' minor children, Kendall Kurt Kittrell, Jr. and Kenneth Kyle Kittrell. The evidence presented at trial showed that Kendall was in arrears of cash payments of certain obligations in the amount of $10,750.80 for medical bills and child support. This was in excess of the $5,746.90 in medical bills and the $1,554.00 in insurance premiums pled by the Rhonda. (RE 27) There was no mention of the child support arrearage in the Counter Complaint filed by Rhonda. (RE 25-28) During the time leading up to the hearing Kendall had made certain payments for the tuition of the children for private school and provided a vehicle for the children which was sold by Rhonda in which she received the funds to use for the children's benefit. Kendall is entitled to an offset for these amounts due to the facts that the children benefited and Rhonda would be unjustly enriched if he didn't receive credit. These items were not ordered or required to be paid in the previous orders of the Court. Kendall was no found to be in willful contempt and the doctrine of "unclean hands" does not apply in barring Kendall from credit for these items.

ARGUMENT

I. WHETHER THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT DISREGARDED THE "CLEAN HANDS" DOCTRINE.

It is well established law in the State of Mississippi that the Mississippi Supreme Court will only review a Chancellor's findings through the manifest error/substantial evidence rule. In Biddix v. McConnell, 911 So. 2d 468 (Miss. 2005), this Court found, "This Court's 'review of a chancellor's findings of fact is the manifest error/substantial evidence rule.' This Court has held that a chancellor's finding of fact may only be disturbed if the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or applied the wrong legal standard." Biddix v. McConnell, 911 So. 2d 468 (Miss. 2005) (citing (Med. Devices, Inc., 624 So. 2d at 989 and Denson v. George, 642 So. 2d 909, 913 (Miss. 1994)). "The clean hands doctrine prevents a complaining party from obtaining equitable relief in court when he is guilty of **willful** [emphasis added] misconduct in the transaction at issue." Brawdy v. Howell, 841 So. 2d 1175, 1180 (Miss. App. 2003) (citing (Bailey v. Bailey, 724 So. 2d 335, 337 (Miss. 1998)). There is no finding of willful contempt in the order of the Court. (RE 36). No language in the order of the Court cites that Kendall's contempt was "willful" or "contumacious". Id. "Contempt matters are committed to the substantial discretion of the trial court which, by institutional circumstance and both tempered and visual proximity, is infinitely more competent to decide this matter than we are." Brawdy v. Howell at 1181 (citing Morreale v. Morreale, 646 So.2d 1264, 1267 (Miss.1994)).

The Court did not clearly find Kendall to be in willful contempt. There is merely a finding of contempt which does not disallow equitable relief for Kendall. No language in the order prepared by Counsel for the Appellant has any language that would support a finding of willful contempt. "It is a defense to a contempt proceeding that the person was not guilty of

willful or deliberate violations of a prior judgment or decree." Powell v. Powell, 976 So.2d 358, 364 (Miss.App. 2008) (citing Mizell v. Mizell, 708 So.2d 55, 64(¶ 52) (Miss.1998)). "[W]e are hesitant to reverse the decision of the chancellor who, 'by institutional circumstance and both temporal and visual proximity, is infinitely more competent to decide the matter than are we.'" Id. (citing Cumberland v. Cumberland, 564 So.2d 839, 845 (Miss.1990)). The Court in the case at bar made no finding of willful contempt and further the order entered by the Court was prepared by the Appellant's Counsel who had the opportunity to insert this language and did not do so.

II. WHETHER THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT GAVE MR. KITTRELL CREDIT TOWARDS PAST DUE MEDICAL INSURANCE, MEDICAL BILLS AND CHILD SUPPORT.

"[A] father may receive credit for having paid child support where, in fact, he paid the support directly to or for the benefit of the child, where to hold otherwise would unjustly enrich the mother." Holliday v. Stockman, 969 So.2d 136, 138 (Miss.App. 2007) (citing Alexander v. Alexander, 494 So.2d 365 (Miss.1986)). "This principle applies, however, only where the father proves by a preponderance of the evidence that he has, in fact, paid the support to the child under circumstances where the support money was used for the child for the purposes contemplated by the support order, that is, to provide shelter, food, clothing, and other necessities for the child." Id. (citing Nichols v. Tedder, 547 So.2d 766, 769 (Miss.1989)). In the case at bar the funds credited were for the benefit of the children. Kendall paid private school tuition and provided a vehicle which was sold and the funds retained by Rhonda. Kendall met the burden of proof of preponderance of the evidence through his testimony and was properly given credit for the sums expended and benefiting the children and consequently Rhonda.

III. WHETHER THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FAILED TO PROVIDE SPECIFIC FINDINGS OF FACTS AND CONCLUSIONS OF LAW.

The Pretrial Order entered by the Court in this case stated, "Counsel for both parties agree that the Court may listen to the tapes of this matter heard by Judge Bradley, Judge Pierce, and Judge Watts, hear the remaining testimony, review all documents placed in evidence and make findings of fact and apply all the applicable law and enter judgement in this cause." (RE 34). There is no record of requests by Counsel for specific findings of fact. Also, the key word in the Pretrial Order is "may". The order does not contain the words "shall", "will" or "must". Nothing in the Pretrial Order requests or requires specific findings of fact. The Appellant relies on Mississippi Dept. of Transp. v. Trosclair, 851 So.2d 408 (Miss.App. 2003) and Patout v. Patout, 733 So.2d 770 (Miss. 1999), however when examined more closely these cases expand the law put forth by the Appellant. "The Mississippi Supreme Court stated that when a party requests specific findings of fact and conclusions of law in its post trial motions, it is error for the trial court to fail to make such findings. After a thorough examination of the entire record and an even closer look at the defendants' post-trial motion, we fail to find any request made for specific findings of fact and conclusions of law." Mississippi Dept. of Transp. v. Trosclair, 851 So.2d 408, 414-415 (Miss.App. 2003) (citing Patout v. Patout, 733 So.2d 770, 773 (Miss. 1999)). The principles relied upon by the Appellant are contingent upon a specific request. Further, "in cases of any significant complexity the trial court generally should find the facts specially and state separately its conclusions of law. However, the case sub judice is far from complex, and since the court did not make findings on its own accord, the only other option would be upon the request of any party to the suit." Id. (citing Tricon Metals & Services, Inc. v. Topp, 516 So.2d 236, 239 (Miss.1987)). This is not a complex case with complex issues. It is a run of the mill

contempt action regarding support of the minor children in question. The opportunity for providing specific findings of fact in the Court's order was provided when Counsel for the Appellant prepared the order signed by the Court. "Mississippi Rules of Civil Procedure Rule 52(a) specifically states: In all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly." Id. "If no contemporaneous objection is made, the error, if any, is waived." Walker v. State, 671 So.2d 581, 597 (Miss. 1995) (citing Foster v. State, 639 So.2d at 1270). "We will not consider the point, because it is presented for the first time here. Parkinson v. Mills, 159 So. 651, 654 (Miss. 1935) (citing Mitchell v. Finley, 137 So. 330 (Miss. 1931)). "It seems to us that if counsel had presented his complaint to the judge at the time the jury rendered the first verdict, and had requested the court to inform the jury further, or that the issue be properly explained to the jury, then the judge would have had an opportunity to have remedied the situation, and possibly there would have been no objection to the verdict of the jury." Morris v. Robinson Bros. Motor Co., 110 So. 683, 684 (Miss. 1927). "Counsel, generally speaking, may waive substantial rights by failing to object at the proper time. He cannot remain silent until he sees whether the verdict of a jury is favorable to his cause, and when it is not favorable, raise objection for the first time." Id. There is no preservation of the issue of specific findings of fact in the case at bar. "Where the objections urged in this court were not made in the court of original jurisdiction, nor exceptions taken on the trial, nor to the decision on the motion to set aside the verdict, we are disposed to indulge in liberal intendments to sustain the verdict and judgment. Such is the statute of jeofails. "No judgment * * shall be reversed after verdict for any mispleading, insufficient pleading, discontinuance, misjoining of issue, or failure to join issue."

Parisot v. Helm, 1876 WL 7344 (Miss. 1876). Although the cases cited here address objections, the same is true for motions and issue that should have been raised at the trial level. The Chancellor could not have committed manifest error in failing to take action when he was not requested by the parties to so act. The Appellant relies on statement allegedly made in an off the record conference, however there is no record of this request and the Appellant failed to make this request part of any record of these proceedings. This failure of a request for finding and the failure to provide finding when preparing the order for the Court's signature constitutes a waiver of the request for findings of fact.

CONCLUSION

The Chancery Court's rulings should nt be disturbed "unless the chancellor was manifestly wrong, clearly erroneous or applied an erroneous legal standard." Necaise v. Ladner, 910 So.2d 699, 701 (Miss.App. 2005) (citing Tinnin v. First United Bank of Miss., 570 So.2d 1193, 1194 (Miss.1990)). There has been no evidence advanced by the Appellant that there was an error in applying the credit to the benefit of Kendall. The order prepared by Appellant's counsel did not state that Kendall was in "willful" contempt, merely that he was in contempt. Failing a finding of willful contempt unclean hands is not a bar to relier from the Chancery Court.

The Appellant waived a specific finding of facts by the Chancellor by not requesting this in a written motion or on the record during the trial. Given the fact that this was not a complex issue then findings of fact were not necessary and they could have been easily inserted into the order prepared by Appellant's counsel.

KENDALL K. KITTRELL, SR.

By: PARSONS LAW OFFICE

By: _____

TADD PARSONS
MS Bar [redacted]

CERTIFICATE OF SERVICE

I, TADD PARSONS, of counsel for Appellants, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing APPELLEE'S BRIEF to the following at their respective addresses listed below:

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Chancellor, Greene County
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Thomas T. Buchanan, Esquire
John D. Smallwood, Esquire
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THIS, the 22nd day of September, 2008.

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APPELLEE'S BRIEF

ISSUES TO BE CONSIDERED BY THE COURT

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II. WHETHER THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT GAVE MR. KITTRELL CREDIT TOWARDS PAST DUE MEDICAL INSURANCE, MEDICAL BILLS AND CHILD SUPPORT.

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