IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2007-CA-01868

RHONDA B. (KITTRELL) FARRIOR — APPELLANT

VERSUS

KENDALL K. KITTRELL, SR. — APPELLEE

APPEAL FROM THE CHANCERY COURT OF
GREENE COUNTY, MISSISSIPPI

APPELLANT'S BRIEF

ORAL ARGUMENT NOT REQUESTED

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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 this Court may evaluate possible disqualification or recusal:

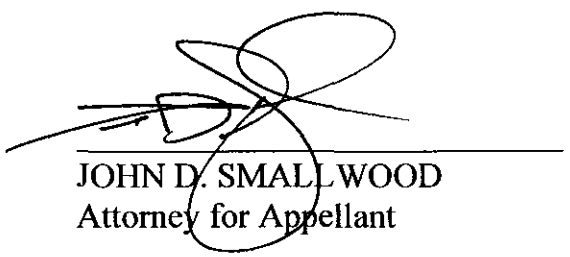
1. Rhonda Blackwell (Kittrell) Farrior, Appellant

2. Thomas T. Buchanan, Esq. and John D. Smallwood, Esq. of TUCKER BUCHANAN, PA (Laurel, MS), attorneys for Appellant

3. Kendall Kurt Kittrell, Sr., Appellee

4. Jack Parsons, Esq. of PARSONS LAW OFFICE (Wiggins, MS) Attorney for Appellee

5. Honorable D. Neil Harris, Chancery Court Judge of Greene County, Mississippi



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STATEMENT OF THE CASE

The basis of this appeal is the final Order [RE-36] entered by the Chancery Court based upon testimony and evidence presented for a Complaint for Change of Custody and Other Relief [RE-9] filed by Kendall K. Kittrell, Sr. (*hereinafter* "Kendall") and a Counter-Complaint for Contempt and Modification [RE-25] filed by Rhonda (Kittrell) Farrior (*hereinafter* "Rhonda").

After several months of discovery, the landscape of the case changed. During the summer of 2006, the Judge presiding over this matter changed hands 3 times. First, Judge Jaye Bradley recused herself, then Judge Randy Pierce recused himself. The case was then assigned to Judge Pat Watts whom began taking testimony and evidence on December 8, 2006. Judge Watts thereafter left his position as Chancellor and the matter was assigned to Judge D. Neil Harris.

On April 13, 2007, Judge Harris entered a Pre-Trial Order [RE-34] which in part provided that he "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 a finding of fact and apply the applicable law and enter judgment in this cause". The testimony and evidence were concluded on August 8, 2007. On August 20, 2007, a final Order was entered by the Court [RE-36].

Aggrieved by the final Order, Rhonda timely filed her Notice of Appeal [RE-38]. Kendall did not file a cross appeal.

STATEMENT OF THE FACTS

Rhonda and Kendall were divorced by Judgment of Divorce dated February 7, 1992 [R. at 44]. The Judgment of Divorce approved and ratified the parties Property Settlement and Child Custody Agreement [R. at 46]. Rhonda and Kendall had two children during the marriage, namely, Kurt and Kyle. Rhonda was granted primary physical custody in the Judgment of Divorce.

In 1993 proceedings, Kendall sought to change custody of the parties' minor children. By Judgment dated November 30, 1994, his request was denied. Kendall's latest attempt was to change custody of just Kyle which was sought in his Complaint for Change of Custody and Other Relief filed on April 21, 2006 [RE-9]. This latest attempt to change custody was also denied by the August 20, 2007 Order [RE-38].

After the Complaint and Counter-Complaint were filed and initial discovery was exchanged, Rhonda filed a Complaint for Writ of Habeas Corpus [R. at 107] for the return of one of the parties' minor children, Kyle. The Chancery Court granted her request by Order dated May 5, 2006 [R. at 128].

The parties began testimony on December 8, 2006. It was not concluded but Judge Watts left his position as Chancellor and the parties had to retry the matter on August 9, 2007. The evidence presented at trial showed and the Court made a finding that Kendall was in arrears in child support, medical insurance premiums and medical bills in the total sum of $10,705.80 [RE-36]. This figure was calculated from documentary evidence presented by Rhonda and admitted into evidence by the Court [see Trial

Exhibits RE-6].

The Court heard oral testimony reflecting the sale of a Jeep and payment of school tuition. No documentary proof was presented as to the sale of the Jeep or payments of school tuition made by Kendall. At the conclusion of the evidence, the Chancery Court found from the bench that "[q]uite honestly, the circumstances surrounding the jeep seem convoluted" and "[t]he Court is confused about the amount of money that Mr. Kittrell paid regarding the schooling" [Tr. at 255]. Nonetheless, the Chancery Court gave Kendall "credit" in the amount of $10,400.00 leaving Rhonda with a Judgment for attorney fees ($4,500) and child support ($305.80) in the total amount of $4,805.80.

SUMMARY OF THE ARGUMENT

The Chancery Court of Greene County, Mississippi committed reversible error in the final Order entered August 20, 2007. The trial court ignored the "Clean-Hands" Doctrine and gave child support credit to a father who it found to be in willful contempt of court without any substantive proof. The Chancery Court also failed to comply with its own Pre-Trial Order, MRCP Rule 52 and with Uniform Chancery Court Rules, Rule 4.01when it did not make Findings of Fact and Conclusions of Law.

ARGUMENT

STANDARD OF REVIEW

Findings of the Chancellor will not be disturbed nor set aside on appeal "unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. In other words, on appeal this Court is required to respect the findings of fact by the chancellor supported by credible evidence and not manifestly wrong." *Flechas v. Flechas*, 791 So.2d 295, 299 (Miss. App. 2001), *Sandlin v. Sandlin*, 699 So.2d 1198, 1203 (Miss. 1997). "Nonetheless, if manifest error is present or a legal standard is misapplied, this Court will not hesitate to reverse." *Flechas* at 299 (Miss. App. 2001); *Tilley v. Tilley*, 610 So.2d 348, 351 (Miss. 1992). Where there is a question of law, the standard of review is *de novo*. *Morreale v. Morreale*, 646 So.2d 1264, 1267 (Miss. 1994).

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

At the conclusion of the trial, the Chancery Court specifically found that

> Kendall is in contempt of the former orders of this Court for failure to maintain medical insurance as required by said orders, failure to pay his portion of the medical expenses for the minor children as ordered by this Court, and failure to pay child support in accordance with the previous orders of this Court and that as a result of said contemptuous behavior, Rhonda Lynn Blackwell Kittrell Farrior, hereinafter referred to as "Rhonda" is entitled to a Judgment against Kendal in the amount of $10,705.80. [RE-38]

The Chancery Court also awarded Rhonda a "Judgment for attorney fees in the sum of $4,500.00".

The "clean-hands" doctrine prevents a complaining party from obtaining equitable relief in court when his is guilty of willful misconduct in the transaction at issue. *Brawdy v. Howell*, 841 So. 2d 1175, 1180-1181 (Miss. COA 2003); *Bailey v. Bailey*, 724 So. 2d 335 (Miss. 1998). It is one of the oldest and most well known maxims that one seeking relief in equity must come with clean hands or face refusal by the court to aid in securing any right or granting any remedy. *R.K. v. J.K.*, 946 So. 2d 764, 774 (Miss. 2007); *Shelton v. Shelton*, 477 So.2d 1357, 1358-59 (Miss. 1985); See also *Cole v. Hood*, 371 So. 2d 861, 863-64 (Miss. 1979) (those who seek equitable relief must do so with clean hands); *Thigpen v. Kennedy*, 238 So. 2d 744, 746 (Miss. 1970); *Taliaferro v. Ferguson*, 38 So. 2d 471, 473 (1949).

In the case at hand, the Chancery Court clearly found Kendall in willful contempt of the prior orders of the Court for his failure to "maintain medical insurance... pay his portion of the medical expenses for the minor children...and failure to pay child support." It was clearly willful as the Court awarded Rhonda her attorney fees. As a result, granting Kendall any affirmative relief such as "credit" was in contradiction of the "clean-hands" doctrine raised by Rhonda by her Motion of April 19, 2006 [RE-30]. As such, the Chancery Court committed reversible error.

II. 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.

Kendall sought a modification of custody, tax dependency, medical insurance and child support [RE-10]. The Court denied his request for modification of custody and all other relief he requested [RE-37]. Rhonda sought a finding of contempt for Kendall's failure to pay certain support obligations, modification to prevent Kendall from having overnight guests of the opposite sex while the boys were in his care and an increase in child support as well as attorney fees [RE-27-28]. The Chancery Court denied her requests for modification, but found Kendall in contempt and awarded her a Judgment for past due arrears as well as attorney fees [RE-36-37].

After considering the exhibits and testimony at trial, the Chancery Court found Kendall in contempt and that he owed Rhonda for past medical insurance, medical expenses, and child support in the amount of $10,705.80. Rhonda does not dispute the

finding of contempt nor the amount of $10,705.80. Kendall has not disputed this Judgment either (No cross-appeal attacking that judgment was filed by Kendall). However, what the Court did next in giving Kendall "credit" for $10,400.00 was neither supported by any evidence nor permitted by Mississippi law.

No party obligated by a judicial decree to provide support for minor children may resort to self help and modify his or her obligation with impunity. *Holliday v. Stockman*, 969 So. 2d 136 (Miss. COA 2007); *Crow v. Crow*, 622 So. 2d 1226 (Miss. 1993); *Cumberland v. Cumberland*, 564 So. 2d 839 (Miss. 1990). A party making an extra-judicial modification does so at his own peril. *Alexander v. Alexander*, 494 So.2d 365, 367-68 (Miss. 1986).

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 (Miss. COA 2007); *Crow v. Crow*, 622 So. 2d 1226 (Miss. 1993); *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. *Crow v. Crow*, 622 So. 2d 1226 (Miss. 1993); *Nichols v. Tedder*, 547 So.2d 766, 769 (Miss. 1989).

In the case at hand, the proof before the Chancery Court did not meet the

preponderance of evidence for the Court to even consider a "credit". This is no more apparent than in the Chancery Court's own finding made from the bench at the conclusion of the evidence: "[q]uite honestly, the circumstances surrounding the jeep seem convoluted" and "[t]he Court is confused about the amount of money that Mr. Kittrell paid regarding the schooling" [Tr. at 255]. Kendall provided no documentary evidence to support his claims for credit on either the jeep or school tuition. His oral testimony was nothing more than speculation and did not meet his burden of proof [see Tr. 173-179]. On the other hand, the Judgment of $10,705.80 (not disputed here) was supported by Rhonda and Kendall's testimony and by the documents introduced by Rhonda at trial.

Additionally, the above cited cases addressing "credit", speak to credit for child support payments made. There is no known case in Mississippi jurisprudence which would permit a Chancery Court to give Kendall credit for past due child support, medical insurance and medical bills for paying school tuition to Wayne County Academy, whether he met his burden of proof or not.

The lower court is limited to the issues raised in the pleadings and the proof contained in the record. *Crow v. Crow*, 622 So. 2d 1226 (Miss. 1993); *Duncan v. Duncan*, 417 So.2d 908, 910 (Miss. 1982). Nowhere in his Answer to Counter-Complaint [R. at 58] nor in any other pleading filed in this matter, did Kendall ask the Chancery Court for the "credit" which was ultimately given.

Kendall's 2005 Tax Return [Trial Exhibit -6(7)] clearly demonstrate that Kendall

had the ability to make the payments for which the Court found him in contempt. Kendall offered no credible evidence that there was any extra judicial modification of child support that the Court could lawfully find binding, see *Bryant v. Bryant 924 So. 2d 627; (Miss. 2006)*. As a matter of law, the Chancery Court committed error in giving Kendall "credit" towards the initial Judgment for which reversal is proper.

III. 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.

M.R.C.P. Rule 52(a) provides in pertinent part that "[i]n all actions tried upon the facts without a jury the court may, and shall upon the request if any party to the suit or when required by the rules, find the facts specially and state separately its conclusions of law thereon...". Uniform Chancery Court Rules, Rule 4.01 provides that "[i]n all actions where it is required or requested, pursuant to M.R.C.P. 52, the Chancellor shall find the facts specially and state separately his conclusions of law thereon.".

When a party requests specific findings of fact and conclusions of law, it is error for the court to fail to make such findings. *Miss. Dep't of Transportation v. Trosclair*, 851 So.2d 408 (Miss. COA 2003). Where the underlying facts are disputed and there are issues of credibility, the court errs in not making specific findings of fact and conclusions of law. *Patout v. Patout*, 7333 So.2d 770 (Miss. 1999).

In a conference with Judge Harris, counsel made requests for Finding of Facts and

Conclusions of Law. This is verified and ordered in the Pre-Trial Order [RE-34]. Therein, the Chancery Court stated that finding of facts would be made by the Court (¶2), and the Chancery Court further required counsel for the parties to send to the Court "proposed findings of fact and conclusions of law at least 10 days prior to trial" (¶6). Rhonda's counsel prepared and sent the proposed Findings of Fact to the Chancery Court [R. at 143]. It is believed that Kendall's counsel did also, but nothing in the Record speaks to that. The Pre-Trial Order is clear. It is also clear that at trial the Court said it would follow the Pre-Trial Order – "THE COURT: I am going to retry the case today. And y'all can narrow the issues. I did a pretrial order. I'm going to follow it. I expect you all to follow it. And that's the way we're going to do it." [Tr. at 155]. Unfortunately, the Court did not follow its Pre-Trial Order. The failure of the Chancery Court to make Findings of Fact and Conclusions of Law is reversible error.

CONCLUSION

Based upon the foregoing the August 20, 2007 Order should be reversed and rendered as to any credit granted to Kendall. This Court should render Judgment against Kendall and in favor of Rhonda in the amount of $15,205.80, together with interest at a rate of eight percent (8%) from the date of the original Order and said judgment to be paid as the Court deem proper.

Respectfully submitted:

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Attorneys for Appellant

CERTIFICATION OF SERVICE

I do hereby certify that I served a copy of the foregoing Appellant's Brief on all parties to this matter by first class mailing to the attorneys and on the date listed below:

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Hon. Jack Parsons
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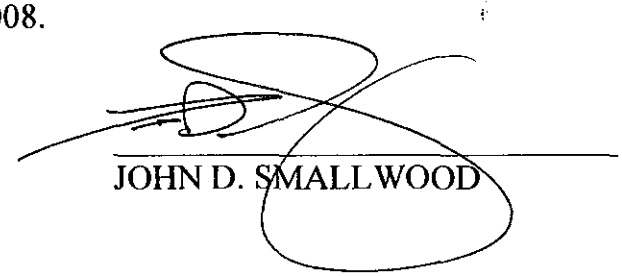
This the 22nd day of August, 2008.



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