IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CECIL BYRON SMITH **APPELLANT**

VERSUS **NO: 2007-CA-01920**

AURORA MICELI SMITH **APPELLEE**

On appeal from the Chancery Court of Lamar County, Mississippi
Case No. 2006-0302-GN-F

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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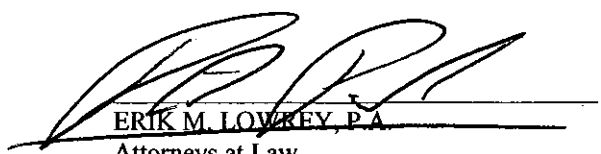
CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record for Aurora Miceli Smith certifies that the following listed persons have an interest in the outcome of this case. These representations are made for the purpose that the Justices of this Court may evaluate possible disqualification or recusal:

1. Appellant, Cecil Byron Smith
2. Appellee, Aurora Miceli Smith
3. S. Christopher Farris, attorney for Cecil Byron Smith
4. All below listed counsel of the law firm of Erik M. Lowrey, P.A.
5. James K. Dukes, former attorney for Cecil Byron Smith
6. Hon. Eugene L. Fair, Chancellor

This the 13th day of August, 2008



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WAIVER OF ORAL ARGUMENT

The Appellee, Aurora Miceli Smith, submits that oral argument would **not** be necessary or beneficial to the resolution of this case, and submits that the record and brief should be sufficient for the Appellate Court to determine that the decision of the Chancellor should be affirmed.

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STATEMENT OF THE ISSUES

1. **WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN DETERMINING THE AMOUNT OF CHILD SUPPORT PAYABLE BY DR. CECIL BYRON SMITH**

2. **WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN AWARDING AURORA SMITH REHABILITATIVE ALIMONY**

3. **WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN RELYING ON THE STIPULATED VALUE OF THE MARITAL HOME**

4. **WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN THE CLASSIFICATION AND EQUITABLE DISTRIBUTION OF MARITAL ASSETS AND LIABILITIES**

5. **WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN AWARDING ATTORNEY FEES TO AURORA SMITH**

STATEMENT OF THE CASE AND RELEVANT PROCEDURAL HISTORY

This case began as a divorce and separate maintenance action filed by Aurora Miceli Smith, alleging habitual cruel and inhuman treatment as a fault based ground for divorce and irreconcilable differences in the alternative. (CP 10-21) No Answer, defenses, or responsive pleadings were ever filed by Defendant, Dr. Cecil Byron Smith. A Temporary Order was entered on October 12, 2006. (CP 27-30) A revised Temporary Order was entered on February 13, 2007. (CP 42-45) After discovery, depositions and the exchange of financial statements as required by Uniform Chancery Court Rule 8.05, the matter was set for trial on June 5, 2007. In lieu of proceeding on fault grounds, the parties filed a Joint Motion to Dismiss Fault Grounds and a corresponding Order which were entered on June 5, 2007. (CP 75-76). The parties subsequently signed a Consent to Divorce which also was entered on June 5, 2007 pursuant to the provisions of §93-5-2 (Mississippi Code, 1972, as enacted or as amended) in which they consented to the entry of a divorce on the grounds of irreconcilable differences and that Mrs. Smith shall have physical custody of the minor child of the parties, Coleman Smith. The parties voluntarily consented for the Court to render a binding and lawful judgment on these remaining issues:

1. An equitable distribution of the marital assets;
2. Whether or not Dr. Smith would pay alimony, and if so, in what amount, and for what period of time;
3. Whether or not Dr. Smith would pay child support above the statutory guidelines, and if so, in what amount. (The question of child support specifically included payments to be made directly to third parties, such as

school payments and medical and dental payments.)

4. Pursuant to Miss. Code 93-5-24 (Mississippi Code, 1972, as enacted or as amended) , the type of custody that Dr. Smith might be entitled to and what type of visitation would be awarded to Dr. Smith, if any.
5. That Mrs. Smith and Dr. Smith had already equitably divided all personal property pursuant to previous Court Order, but Dr. Smith claims certain items of personal property which remained in question.
6. Whether or not Dr. Smith will pay any portion of Mrs. Smith 's attorney's fees; and, if so, in what amount. (CP 77-79)

A trial was held on these remaining issues, at which the Chancery Court took them under advisement, issued an Opinion on July 30, 2007 (CP 80-121) and entered an Amended Opinion on August 7, 2007. (CP 123-172) (RE 3). Subsequently Dr. Smith filed a "Motion for New Trial, Clarification and Correction of Opinion" (CP 173-210) to which Mrs. Smith filed her Response. (CP 224-229) The Chancery Court entered rulings on these motions on September 27, 2007 (CP 224-229) and entered a Final Judgment of Divorce on October 18, 2007 (CP 230-231) (RE 1) from which Dr. Smith filed a Notice of Appeal on October 25, 2007. (CP 237)

STATEMENT OF THE FACTS

Dr. Smith and Mrs. Smith were married on April 3, 1991, in Eureka Springs, Missouri. The parties lived in Kansas City, Missouri, where Dr. Smith ran his own opthamology clinic until 1998, at which time Dr. Smith went to work for Dr. McMahan, in Mississippi, for an enterprise which is now known as Southern Eye Clinic. The parties moved to Ocean Springs, Mississippi, and then ultimately moved to Hattiesburg, Mississippi. The parties lived together until their separation on December 31, 2004, in Lamar County,

Mississippi.

There was one (1) child born to the marriage, that being Coleman Smith, who was, at the time of divorce, eleven (11) years old. A Temporary Order was entered on October 12, 2006, giving Mrs. Smith temporary custody of the minor child, with Dr. Smith having reasonable visitation and awarding Mrs. Smith child support and spousal support in the amount of Four thousand two hundred fifty dollars ($4,250.00) per month. Further, almost all personal property was equally divided pursuant to the Temporary Order as related to household goods, vehicles etc. (CP 27-30) In February of 2007, by agreement of the parties, Mrs. Smith left the marital home and down-sized into a smaller home of her own and the temporary support was at that time increased to Four thousand eight hundred fifty dollars ($4,850.00) per month, the increase to defray Mrs. Smith's increased costs associated with moving out of the marital home. (CP 42-45)

The parties ultimately consented to a divorce on the grounds of irreconcilable differences, and also agreed that physical custody of the minor child would be vested in Mrs. Smith . The question of legal custody and Dr. Smith's visitation rights was left as an issue before the Chancery Court.

The remaining issues before the Court, as set forth in the Consent, were (1) the proper amount of child support and child-related expenses to be paid by Dr. Smith; (2) alimony; (3) division of the marital assets, including the home and the remaining personal property, consisting of bank accounts, retirement accounts, and Dr. Smith's business account and (4)

attorney fees.

Dr. Smith was fifty-eight (58) years old at the time of trial, is a lasik surgeon with the Southern Eye Center in Hattiesburg, Mississippi, and has worked for the Clinic since 1998. Aurora is a forty-two (42) year old female who has an associates degree in nursing but has not worked in her field, or anywhere else, since Dr. Smith fired her from his personal office during the first year of their marriage.

Both parties filed amended Rule 8.05 Financial Statements and both are exhibits to their testimony as well as a *Hemsley* summary, which reflects the total marital assets and liabilities of the parties. (Ex. 2) (RE 53) Further, each party furnished a Social Security Earnings statement reflecting their earning history, attached to their Rule 8.05 Financial Statements . Dr. Smith's income increased consistently after he came to work for Southern Eye Center. Dr. Smith presented some concerns regarding his salary at trial, based on what the future may bring, but beyond his own speculation presented no evidence in the record to this effect. Dr. Smith draws a salary from Southern Eye Center, as well as his new business, Laser Refractive Service. During the history of the sixteen (16) year marriage, Dr. Smith has generated all of the income of the parties. Even when Mrs. Smith worked for Dr. Smith for a short period of time in Kansas City, Missouri, she was not paid a salary.

The record is also clear that during the course of the marriage there was an agreement between the parties that Aurora would stay at home and help raise Dr. Smith's other son, to which he had custody, being Chris. When Mrs. Smith's and Dr. Smith's son, Coleman, was

born, Mrs. Smith also stayed at home, was mother to both children and continues to be a full-time homemaker as it relates to Coleman.

Until 2008, Dr. Smith made no effort, nor requested or required Mrs. Smith to work outside of the home, as her responsibilities were that of a mother and homemaker, while Dr. Smith's responsibility was one of producing the income for the family. The parties accumulated certain property properly deemed to be marital assets, as set out in the *Hemsley* summary, in evidence as Exhibit 2 (RE 53). The stipulated value of the former marital home at 240 Tidewater Drive was Five hundred ninety-nine thousand dollars ($599,000.00). There was no specific evidence introduced as to what the mortgage balance and payments were at the time, but the evidence at trial showed that the maximum amount of the mortgage was at some point Two hundred thirty-five thousand dollars ($235,000.00), leaving equity in the home in an amount exceeding Three hundred sixty-four thousand dollars ($364,000.00). The Court subsequently determined, based on supplemental evidence received into the record by stipulation, that the bank pay-off, as of February, 2007, was $318, 189.00 and the equity in the home was $280, 811.00. (Tr. 370) In addition, a home at 29 Crane Park was purchased by Dr. Smith, which house belonged to him in both title as well as the mortgage, with no apparent equity in the house. Mrs. Smith resided at the time of trial at 73 Summertree Place. This home belongs to her, for which she had a start-up loan with the bank and a second mortgage to her mother and there was also no equity in that home. Further, Mrs. Smith was at the time of trial in need of converting the bank loan into a long term mortgage.

Mrs. Smith had possession of a 2004 Nissan Murano which Dr. Smith agreed through his testimony that he would continue to pay the loan on that car until it is paid in full. Dr. Smith did not agree to pay for the upkeep, maintenance, insurance and tag. Dr. Smith testified that he would be responsible for the 2004 Nissan Titan and the 2006 Infiniti G35 in his own possession. The equities in these vehicles are extremely similar.

According to the *Hemsley* summary, in evidence as Exhibit 2, (RE 53), Dr. Smith has a business account, which is in the name of Laser Refractive Surgery, which had at the time of trial a net balance of approximately Forty-nine thousand one hundred fifty-one dollars ($49,151.00) and an additional checking account balance of Six thousand five hundred forty-nine dollars ($6,549.00). Mrs. Smith had no particular savings at the time of trial, with the exception of some Pfizer stock which was given to her as a gift. Each party has also had life insurance policies which were also included in the *Hemsley* summary.

Both parties have had a long term relationship, which Dr. Smith confirmed through his testimony as outside the normal concept of a relationship as ordinarily set out between a husband and a wife. Dr. Smith went as far as preparing a proposed "sexual contract" a reading of which would make it immediately apparent why Mrs. Smith did not wish to continue to indulge in these requested activities any longer, as the same fall well outside of the scope of any reasonable expectations a husband might have of his wife.

Mrs. Smith further incorporates herein by reference the extensive and documented findings of fact and conclusions of law made by the Chancellor in the Amended Opinion of

August 7, 2007, whereby the Chancellor made a thorough record of over 40 pages, consisting of both findings of fact and conclusions of law. (CP 123-172) (RE 3) as well as in the subsequent Opinion on Motion for New Trial, Clarification and/or correction entered on September 27, 2007 (CP 224-229) (RE 47)

SUMMARY OF THE ARGUMENT

The Chancery Court did not abuse its discretion, was not manifestly wrong, clearly erroneous and did not apply an erroneous legal standard in its ruling on the classification and equitable distribution of marital assets and liabilities, or the awards of alimony, child support and attorney fees, and the findings and Final Judgment of the Chancellor be affirmed on all counts. In the event the findings of the Chancellor are affirmed Mrs. Smith should also be awarded one-half of the amount of attorney fees awarded by the Chancery Court, plus all costs of this appeal.

STANDARD OF REVIEW

"This Court's scope of review in domestic relations matters is limited." *Montgomery v. Montgomery*, 759 So.2d 1238, 1240 (Miss. 2000). The findings of a Chancellor will not be disturbed by the reviewing Court unless the Chancellor was "manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Id.* "Our familiar standard holds that, absent an abuse of discretion, we will uphold the decision of the Chancellor. To disturb the

factual findings of the Chancellor, this Court must determine that the factual findings are manifestly wrong, clearly erroneous or the Chancellor abused his discretion." *Hollon v. Hollon*, 784 So.2d 943, 946 (Miss. 2001). Findings of the Chancellor will not be disturbed or set aside on appeal unless the decision of the trial court is manifestly wrong and not supported by substantial credible evidence, or unless an erroneous legal standard was applied. *Sarver v. Sarver*, 687 So.2d 749, 753 (Miss. 1997). Where there is a question of law the standard of review is *de novo*. *Morreale v. Morrreale*, 646 So.2d 1264,1267 (Miss. 1994). The trial court is presumed to be correct unless the record shows otherwise. *Myers v. Miss. Farm Bureau Mut. Ins. Co.*, 749 So.2d 1172 (Miss. App. 1999) Particularly in the areas of divorce and child support, the reviewing Court must respect a chancellor's findings of fact which are supported by credible evidence and not manifestly wrong. *Mizell v. Mizell*, 708 So.2d 55, 59 (Miss. 1998).

ARGUMENT

1. **WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN DETERMINING THE AMOUNT OF CHILD SUPPORT PAYABLE BY DR. CECIL BYRON SMITH**

The Chancery Court did not abuse its discretion, was not manifestly wrong and did not apply an erroneous legal standard in its determination of child support to be paid by Dr. Smith. The Chancery Court found that Dr. Smith's income exceeded $50,000.00 per year

and cited and followed the provisions of Miss. Code Ann. § 43-19-101 (2004) which provides guidelines for child support and further states in pertinent part as follows:

> (4) In cases in which the adjusted gross income as defined in this section is more than Fifty Thousand Dollars ($50,000.00) or less than Five Thousand Dollars ($5,000.00), the court shall make a written finding in the record as to whether or not the application of the guidelines established in this section is reasonable.

The Chancery Court made a written finding regarding the needs of the minor child, both directly and indirectly, as part of the overall expenses for Mrs. Smith and the minor child and applied the statutory percentage of 14% to all of Byron's income. The Court found this amount to be reasonable and appropriate, taking into consideration the lifestyle of the child and his parents, tuition costs for his possible attendance in private school, the testimony of both parties with regard to Coleman's extensive extra-curricular activities and the fact that he would likely benefit from enhanced education activities not open to the average student. The Court noted that Mrs. Smith testified that she had no intention of returning to work until Coleman is 18 and that she intends to remain available and involved in his day to day activities. Dr. Smith testified that he has a draw of $144,000.00 per year, then in addition he receives bonuses, twice in one year in 2006. (Tr. 151) Dr. Smith's reported adjusted gross income for the year 2006 was $336, 835.00. (Ex. 5) (RE 62). Dr. Smith's Social Security Statement earnings record reflected taxed earnings in the amount of $357,421.00 for the year 2005. (Ex. 4) (RE 60-65) (Tr. 192) Dr. Smith further testified that after deducting all of the expenses listed on his Rule 8.05 financial statement he still has a net surplus of $5,000.00 per

month. (Tr. 190) Accordingly the Court ordered Dr. Smith to pay child support in the amount of 14% of his stated monthly income of $19, 408.17 for the monthly amount of $2, 717.14. In arriving at this figure the Court referred to Dr. Smith's Rule 8.05 financial statement as well as the parties' tax returns and social security statements in evidence by stipulation. (CP 145) (RE 25) (Ex. 13) (RE 84-89)

The Chancellor has discretion when awarding child support. The statute required that the Chancellor make on the record findings because Dr. Smith's available income was more than Fifty Thousand Dollars ($50,000.00). The Chancellor did exactly that. (CP 144-146) (RE 24-26) The Chancellor considered all circumstances relevant to the needs of the child, as well as the capacity of the parents as directed to do by the Mississippi Supreme Court in *McEachern v. McEachern*, 605 So.2d 809, 814 (Miss. 1998). The Chancery Court considered the child's educational and extra-curricular activity expenses. These are legitimate and well-established considerations in determining the appropriate amount of child support. *Hensarling v. Hensarling*, 824 So.2d 583, 588 (Miss. 2002). In *Hensarling* the Chancellor found that special circumstances so exist which would necessitate a variance from the statutory guidelines in setting Dr. Hensarling's obligation of child support, noting that, as a doctor, Dr. Hensarling had the ability to earn a substantial income, whereas his wife had no source of income other than alimony and that Dr. Hensarling had substantial savings and other income producing assets. As in the case at bar, the Court noted the substantial difference in income between the parties and the Doctor's greater ability to produce income.

The Chancellor in *Hensarling* also noted further that the children in that case had special needs which he deemed to include private school tuition, as well as the children's friends and daily routines and activities which stemmed from attending private school. *Id.* at 588-589 See also *Vaughn v. Vaughn,* 798 So.2d 431 (Miss. 2001) where the Mississippi Supreme Court affirmed the findings made by the Chancellor which noted the source of the husband's income, noted that the income was expected to continue, and found that the resulting child support award was necessary and reasonable to maintain a reasonable standard of living for the child.

As the Mississippi Supreme Court stated in *Thurman v. Thurman,* 559 So.2d 1014 (Miss.1990), in which that Court held that the statutory guidelines regarding child support are not absolute, and the actual circumstances in each case are to be taken into consideration by the Chancellor when making his award, so should be the case in the case at bar. Based on the stated income and expenses of Dr. Smith relative to those of Mrs. Smith and based on the reasonable needs of the child as supported by the record and the written findings of the Chancellor, the Chancellor satisfied the provisions of Miss. Code Ann. § 43-19-101 (2004). The Chancery Court did not abuse its discretion, was not manifestly wrong and did not apply an erroneous legal standard in its determination of 14% child support to be paid by Dr. Smith and the award was well within Dr. Smith's ability to pay that amount.

2. WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN AWARDING AURORA SMITH REHABILITATIVE ALIMONY

The Chancery Court did not abuse its discretion, was not manifestly wrong and did not apply an erroneous legal standard in awarding Mrs. Smith rehabilitative alimony, to be paid by Dr. Smith in the amount of $500.00 per month for 24 months. Mrs Smith was also awarded $2000.00 per month in periodic alimony. (CP 164) (RE 44) Dr. Smith has not argued on appeal against the award of periodic alimony, but takes issue with the Chancellor's award of rehabilitative alimony. The criteria for an award of both rehabilitative and periodic alimony in Mississippi is well established as set forth in *Armstrong v. Armstrong*, 618 So.2d 1278, 1280-81 (Miss. 1993).

Before undergoing a thorough *Armstrong* analysis the Chancellor took note of the familiar *Ferguson* and *Hemsley* cases concerning the classification and equitable distribution of marital assets and liabilities, as well as the statutory language set forth in Miss. Code Ann. § 93-5-23 (2004). *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994); *Hemsley v.Hemsley*, 639 So.2d 909 (Miss. 1994). The Chancery Court also cited in its Opinion that alimony and equitable distribution are distinct concepts and that where one expands, the other recedes. *Lauro v. Lauro*, 847 So.2d 843, 848 (Miss. 2003). The Chancellor noted that with regard to equitable distribution this case is not usual for those earning six figures and in the medical profession and that, during their 16 year marriage, the parties had accumulated no long term investment accounts, no retirement accounts and no real estate other than their home. (CP147-148) (Re 27-28) The Chancery Court then made a thorough *Armstrong* analysis, which is amply supported by the record:

Income and expenses of the parties:

It is quite evident from the record that Dr. Smith has made and will continue to make in excess of Three hundred thousand dollars ($300,000.00) per year, whereas Mrs. Smith has not worked during the vast majority of the marriage. The Chancellor also took into account Dr. Smith's available assets and future earning capacity. The Chancellor noted that Mrs. Smith intends to continue to care for Coleman until he completes high school in another six years and has 23 years before she becomes eligible for social security income and medicare benefits, whereas Dr. Smith will be eligible far sooner. (CP 156-157) (RE 36-37)

Health and earning capacities of the parties:

The record reflects that Dr. Smith is in good health and has a historically demonstrable earning history and earning capacity. Dr. Smith was 58 at the time of trial, a licensed physician specializing in opthamology, and the Lasik Specialist at Southern Eye Center in Hattiesburg. (CP 127) (RE 7) Mrs. Smith is not able to work based on her responsibility to provide for the daily needs of Coleman. Mrs. Smith had not worked for many years and was not encouraged to work by Dr. Smith throughout the marriage. In fact she was fired from her last job by Dr. Smith and was discouraged by him from getting other jobs. (Tr. 224) The Chancellor noted that Mrs. Smith has not worked for 16 years at Dr. Smith's instance. (CP 157) (Re 37)

Needs of each party:

The record, including the Rule 8.05 financial statements, tax returns and social

security statements of the parties support the finding of fact by the Chancellor that Dr. Smith can certainly afford to pay alimony in addition to covering his own needs and that Mrs. Smith is incapable, even if she worked, of making sufficient money in which to meet the requirements of herself as well as Coleman. (CP 145) (RE 25) (Ex. 13) (RE 84-89) Mrs. Smith also testified that as a 42 year old white female she understood that her medical insurance goes up about 15% every year. (Tr. 46)

Each parties' obligations and assets:

The record supports the Chancellor's finding of fact that Dr. Smith has agreed to accept responsibility for the majority of the marital debts. Dr. Smith himself testified that he had created and paid for a lifestyle for himself, his wife and son. (Tr. 190) Dr. Smith has in the past shown his ability to pay and has in fact paid for these debts. The Chancellor acknowledged that both parties have to pay usual household expenses and long term debt on their respective real estate. The Court further noted that Dr. Smith has an IRA which, though determined to be a non-marital asset, could be considered as an income producing asset in the determination of alimony. (CP 159) (RE 39)

Length of the marriage:

This was a sixteen (16) year marriage and, as observed by the Chancellor, is a fairly long one by current societal standards. (CP 159) (RE 39)

Presence or absence of minor child in the home, which may require that one or both of the parties each pay for, or personally provide, child care:

Though Mrs. Smith will not have to pay for child care if she is not working, she in

fact will take care of Coleman individually. The Chancellor noted that Coleman's extra-curricular activities occupy much of his time and that Mrs. Smith had expressed a preference to personally provide both transportation and supervision for Coleman when he is not attending school. (CP 159-160) (RE 39-40)

Age of the parties:

Dr. Smith is fifty-eight (58) years old and Mrs. Smith is forty-three (43) years old. The Chancellor noted that Dr. Smith's age is closer to normal retirement age, as well as access to retirement benefits without penalty. The Court noted that its findings of fact regarding present earning capacity would not preclude an award of alimony and that any future modification based on changed circumstances would not preclude such an award of alimony now. (CP 160) (RE 40)

Standard of living of the parties, both during the marriage and at the time of the support determination:

The Chancery Court found as a matter of fact that both parties have had an unusually high standard of living, both during the marriage and presently, based on the six figure income of Dr. Smith which allowed the parties to effectuate a very high standard of living. (CP 160) (RE 40)

Tax consequences of the spousal support order:

Obviously any alimony awarded to Mrs. Smith will be considered income to her and deductible to Dr. Smith for income tax purposes. The Chancellor noted that a taxable award to Mrs. Smith, if she remains unemployed, will provide an advantage to both parties. (CP

160-161) (RE 40-41)

Fault or misconduct of the parties:

Though the Chancellor did not appear to give this factor particular weight the evidence and testimony reveals that Dr. Smith has a sexual proclivity and needs beyond that which is to be expected to be normal and reasonable between a husband and wife and which drove Mrs. Smith away from the marriage. (Tr. 61-63) The record is replete with evidence that Dr. Smith drank heavily (Tr. 294) watched pornography on his computer (Tr. 65) (Tr. 297) and asked Mrs. Smith to engage in conduct far beyond the bounds of any usual standard of decency (Tr. 316) and even went as far as drafting a "sexual contract" which was presented to Mrs. Smith but never signed. (Tr. 316) (Ex. 10) (Re 92-94)

Wasteful dissipation of assets by either party:

The Chancery Court found that during the course of the marriage both parties had wasted and dissipated substantial income and assets and enjoyed a standard of living which deviated from the norm in terms of extravagance. (CP 163) (RE 43)

In a recent case handed down by the Mississippi Court of Appeals, *Lauro v. Lauro*, 924 So.2d 584, 588 (Miss. Ct. App. 2006), a case involving a doctor with a reported income less than Dr. Smith in the case at bar, Dr. Lauro claimed that the Chancellor erred in awarding his wife $3,000 per month in periodic alimony when considered with the $2,001 per month in child support. The Mississippi Court of Appeals disagreed and affirmed the rulings of the Chancellor. The Chancellor in the instant case made a thorough analysis, on

the record, of all of the applicable *Armstrong* factors in fashioning a remedy which combined both periodic and rehabilitative alimony. Contrary to the assertions of Dr. Smith, Mrs. Smith does not have to be "destitute" for an award of rehabilitative alimony. Chancellors are permitted to combine one or more forms of alimony when fashioning a remedy. *Grogan v. Grogan*, 641 So.2d 734, 742 (Miss. 1994); *Jenkins v. Jenkins*, 278 So.2d 446, 449 (Miss. 1973). The Chancery Court acted well within the bounds of its discretion in awarding both permanent periodic alimony as well as limited rehabilitative alimony.

3. WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN RELYING ON THE STIPULATED VALUE OF THE MARITAL HOME

In his brief Dr. Smith makes numerous factual assertions that are either based on evidence that was not admitted at trial or not contained in the record, such as purported facts and events that occurred "post-decision" (Brief of Appellant, page 13). "This Court can act only on the basis of the contents of the official record . . . . It may not act upon statements in briefs or arguments of counsel which are not reflected by the record." *Porter v. State*, 749 So. 2d 250, 256 (Miss. Ct. App.1999). Mrs. Smith respectfully requests that the reviewing Court strike or disregard any factual assertions that are neither found in, or supported by, the record on appeal.

As noted by the Chancery Court in the Final Judgment of Divorce, Dr. Smith sought to admit testimony and an appraisal (Ex. 17, not admitted, marked for identification only) to reflect a valuation for the former marital home of less than the $600,000.00 set forth in the

prior stipulation (Exhibit 2, *Hemsley* summary) (CP 150) (RE 30). The Chancellor noted that the value assigned to the former marital home was based on a jointly approved appraisal which was conducted nine months earlier and which was represented as correct by both parties in their depositions and through trial. (Tr. 24) Dr. Smith's own testimony at trial also supports this finding:

Q Do you agree that Aurora is entitled to 50 percent of the equity in the home that you are in?
A I do.
Q Now, Doctor, let's talk about something. I did your deposition, and certainly you will remember this. I asked you specifically about that house. Do you remember that?
A No.
Q And I asked you, "Doc, what is that house worth?" You said, "599,000," and I said, "Are you going to have it appraised again," and you said, "No. We have just got it appraised, and there is nothing wrong with that appraisal." Do you remember that?
A Yeah
Q And I asked you about an offer of $500,000.
A Uh-huh (affirmative response)
Q Now, you received an offer, you both did, of $500,000 a month or so before. Did you ever make a counter?
A No.
Q And in fact, you told me you didn't want another appraisal because you felt that house was worth $599,000, did you not?
A I did.

(Tr. 220-221)

The jointly stipulated *Hemsley* summary, as admitted into evidence by stipulation, (Ex. 2) (RE 53-57) also supports the Chancellor's classification and valuation of this marital asset. The Chancellor did not err in sustaining the objection to the admission of another appraisal at the eleventh hour, long after all discovery deadlines had passed pursuant to MRCP 26.

(CP 151) (Re 31) In addition, no expert was designated by Dr. Smith pursuant to Uniform Chancery Court Rule 1.10(a), which requires, in addition to the completion of all discovery within ninety days, the designation of any expert witness to all attorneys of record at least sixty days before trial. The Chancellor again addressed this issue on post-trial motions, noting that the appraisal sought to be admitted by Dr. Smith was obtained on May 11, 2007, less than two weeks prior to trial. (CP 227) (RE 50) The Chancellor further noted that neither party had moved the Court for a continuance to gather more evidence at either of the hearings held in this matter. (CP 228) (RE 51) The Chancery Court did not abuse its discretion, was not manifestly wrong and did not apply an erroneous legal standard in relying on the stipulated value of the marital home.

4. WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN THE CLASSIFICATION AND EQUITABLE DISTRIBUTION OF MARITAL ASSETS AND LIABILITIES

The Chancery Court did not abuse its discretion, was not manifestly wrong and did not apply an erroneous legal standard in the classification and equitable distribution of marital assets and liabilities. The Chancery Court first classified the assets of the parties as either marital or non-marital assets and liabilities. *Hemsley v.Hemsley*, 639 So.2d 909 (Miss. 1994). The Chancery Court began with the presumption set forth in *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994) that the contributions and efforts of both marital partners, whether economic, domestic, or otherwise, are of equal value, observing that Dr. Smith also

acknowledged his wife's expenditure of her time in domestic matters and in caring for their son, Coleman, as well as other marital duties which had significant value to him. (Re 150) (CP 30)

The Chancellor went on to set forth all of the factors that Chancery Courts have been instructed to consider by Mississippi's appellate courts in the equitable distribution of assets and liabilities, pursuant to the seminal cases of *Ferguson* and *Hemsley*, as well as their progeny, *Johnson v. Johnson*, 650 So.2d 1281 (Miss. 1995) and others. (CP 146-150) (RE 26-29) The Chancellor then undertook a detailed and thorough on the record analysis, as required by those cases, and applied them to the case at bar. (CP 150-154) (RE 30-34) As stated by Dr. Smith in his brief, and as he represented at trial, it was his desire to assume responsibility for the majority of the marital debts. The Chancellor fashioned a remedy which allowed him to do precisely this, yet still leave him a greater proportion of the marital assets *after* debts are applied, as well as allowing him to keep as separate assets his income producing business interests.

The argument made by Dr. Smith on appeal, that the Chancellor did not take into account or consider marital debts to be paid by Dr. Smith, is not supported by the record. Ultimately the Chancellor awarded Mrs. Smith total marital assets valued at $609,545 minus debts of $292,000 for a total of $317, 545. The Chancellor awarded Dr. Smith total assets of $1,094,495 minus debt of $734, 435 for a total of $360,060. Neither of these figures represented the separate and non-marital property of the parties, such as Dr. Smith's business

interests in Laser Refractive Services. (CP 181-156) (RE 34-36) (Ex. 6) (RE 83) In addition, after hearing post-trial motions, the Chancellor awarded Dr. Smith an additional $6,000 dollar account and also reduced the award to Mrs. Smith from between $21,000 and $25,000 to $15,000 from another account. (CP 225) (RE 48).

The appellate court's scope of review in domestic relations matters is limited by the familiar substantial evidence/manifest error rule. Dr. Smith has cited no evidence to warrant disturbing the findings of the Chancellor or to suggest error in his *Hemsley/Ferguson* analysis for the purposes of classification and equitable distribution of the assets and the liabilities of the parties. The Chancellor accounted for both assets and liabilities in this analysis and accommodated Dr. Smith's desire to control and be responsible for payment of the majority of the marital debts. The Chancellor was not clearly erroneous, nor was an erroneous legal standard applied. The Chancellor's findings of fact are supported by credible evidence contained in the record and exhibits and are not manifestly wrong.

5. WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN AWARDING ATTORNEY FEES TO AURORA SMITH

An award of attorney's fees in domestic cases is largely a matter entrusted to the sound discretion of the trial court. *Poole v. Poole,* 701 So.2d 813, 819 (Miss.1997); *Arthur v. Arthur,* 691 So.2d 997, 1004 (Miss.1997). Unless the Chancellor is manifestly wrong, a decision regarding attorney fees will not be disturbed on appeal. *Bredemeier v. Jackson,* 689 So.2d 770, 778 (Miss.1997). Absent an abuse of discretion, the Chancellor's decision in such

matters will generally be upheld. *Armstrong v. Armstrong,* 618 So.2d 1278, 1282 (Miss.1993); *Martin v. Martin,* 566 So.2d 704, 707 (Miss.1990); *Kergosien v. Kergosien,* 471 So.2d 1206, 1212 (Miss.1985); *Lauro v. Lauro*, 924 So.2d 584, 588 (Miss. Ct. App. 2006).

The Chancery Court cited and followed *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1982) and its progeny which sets forth the well established criteria for payment toward attorney fees by one party to another party, noting that the same is allowed without undue hardship to one party and at the discretion of the Court. (CP 164) (RE 44) The Chancellor noted that in this case the parties have a disparity in income (Dr. Smith makes a lot, Mrs. Smith makes none) and further noted that some of the efforts of Mrs. Smith's attorney were occasioned by failures in discovery which may not have been intentional, but certainly were subject to apportionment by Dr. Smith. Mrs. Smith submitted into evidence an attorney fee bill for a total of $30,680.50, which was admitted into evidence as Exhibit 12. The Chancery Court found that the amount of attorney fees submitted, and the effort reflected in the attorney fee bill as admitted, given the complexity of the case, the need for extensive research, analysis, briefings and hearings, and the length of the litigation, was reasonable and necessary and consistent with the usual and customary charges for specialized legal services in that community. Accordingly the Chancellor ordered Dr. Smith to contribute $15,340.00 toward Mrs. Smith's attorney fees, approximately half of the cost of her attorney fees at the trial court level. The Chancery Court did not abuse its discretion, was not manifestly wrong and did not apply an erroneous legal standard in awarding Mrs. Smith attorney fees.

Mrs. Smith has incurred additional attorney fees at the appellate level. The appellate Courts in Mississippi have customarily awarded attorney's fees on appeal in the amount of one-half of what was awarded in the lower court. *Monroe v. Monroe,* 745 So.2d 249, 253 (Miss.1999); *Lauro v. Lauro*, 924 So.2d 584, 588 (Miss. Ct. App. 2006). As is customary, if the appellate court affirms the decision of the Chancellor, Mrs. Smith respectfully requests that she be awarded $7,670.00, which is one-half of the amount of attorney fees awarded by the Chancery Court, plus all costs of this appeal.

CONCLUSION

The Chancery Court did not abuse its discretion, was not manifestly wrong, clearly erroneous and did not apply an erroneous legal standard in its ruling on the classification and equitable distribution of marital assets and liabilities, or in the awards of alimony, child support and attorney fees. The findings and Final Judgment of the Chancellor should accordingly be affirmed. Mrs. Smith further respectfully requests that she be awarded one-half of the amount of attorney fees awarded by the Chancery Court, interest on any amounts awarded to her at the legal rate of 8%, plus all costs of this appeal.

RESPECTFULLY SUBMITTED this the 13th day of August, 2008.

Aurora Miceli Smith

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CECIL BYRON SMITH **APPELLANT**

VERSUS **NO: 2007-CA-01920**

AURORA MICELI SMITH **APPELLEE**

CERTIFICATE OF SERVICE AND FILING

I, David A. Pumford, do hereby certify that I have this date mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the following persons at their usual mailing addresses:

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Hon. Chancellor Eugene L. Fair
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I, David A. Pumford, Attorney for the Appellee, hereby certify that I have actually mailed this date the Original and three copies of the Brief of the Appellee to the Mississippi Supreme Court.

THIS, the 13th day of August, 2008.

David A. Pumford

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