IN THE SUPREME COURT OF MISSISSIPPI

CECIL BYRON SMITH **APPELLANT**

versus **CAUSE NO. 2007-CA-01920**

AURORA MICELI SMITH **APPELLEE**

****

BRIEF ON BEHALF OF APPELLANT

****

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CERTIFICATE OF INTERESTED PARTIES

I, the undersigned counsel for the Appellant, do hereby certify that the following persons have an interest in the outcome of this case. These representatives are made in order that the Justices of this Court may evaluate possible disqualifications or recusals.

Dr. Cecil Byron Smith, Appellant

Aurora Miceli Smith, Appellee

Hon. Erik Lowrey, Attorney for Appellee

Hon. S. Christopher Farris, Attorney for Appellant

Respectfully submitted this the 10th day of May, A.D. 2008.

S. CHRISTOPHER FARRIS

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STATEMENT OF THE CASE

This matter is before the Court for review of the Chancellor's equitable distribution, alimony and child support award to the Appellee. This case was presented to the Chancellor upon CONSENT OF BOTH PARTIES to a divorce upon the grounds of irreconcilable differences and those issues the parties could not agree upon. (C.P. 75- 78 R.E. 12-14). The trial of all issues was held on May 22 and June 5, 2007 and a Memorandum Opinion and Final Judgment was entered by the Chancellor on July 30, 2007. (C.P. 80-121, R.E.15-55). The chancellor filed an amended opinion on August 7, 2007. (C.P. 123-166, R.E.56-99) A motion for new trial, clarification and correction of opinion was filed by Dr. Byron Smith on August 13, 2007. (C.P. 173-210, R.E.100-138). A response was filed by Aurora Miceli Smith on August 31, 2007. (C.P. 211-223, R.E.139-151). After a hearing was held, the Chancellor entered an opinion. (C. P. 224-229, R.E.152-157)

A final judgment incorporating all of the opinions of the Chancellor was entered on October 18, 2007. (C.P. 230-231, R.E.158-159) Dr. Smith filed his notice of appeal on October 25, 2007 along with a motion for superseadeas bond. (C.P. 237-241, R.E.160) The

certificate of compliance was filed on November 19, 2007 and the Order granting the stay of judgment and superseadeas bond was entered on February 21, 2008.(C.P. 259-261, R.E.163-164)

STATEMENT OF THE FACTS

Dr. Byron Smith and Aurora Miceli Smith were married in Eureka Springs, Missouri on April 3, 1991. At the time of the marriage, Dr. Smith was an adjunct professor at the University of Kansas Medical School as an assistant professor of ophthalmology. He also had a successful private practice in opthalmology in Kansas City, Missouri. One child was born of the marriage, Coleman Gibson Smith, born August 25, 1995.

The parties lived in Kansas until they relocated to Ocean Springs, Mississippi. In March of 1998, they relocated to Hattiesburg, Mississippi. Dr. Smith was hired by Southern Eye Center, P.A. II as a staff doctor specializing in refractive laser surgery.(R. 152, R.E. 185) Aurora while a trained surgical nurse stayed at home to raise the only child of this marriage. The parties separated in December of 2004. While they attempted reconciliation it was short lived and a complaint for divorce was filed by Aurora Miceli Smith on July 27, 2006. The parties agreed to a divorce on irreconcilable differences and a consent as to the only issues for the Chancellor to resolve.

SUMMARY OF THE ARGUMENT

The Chancellor erred in awarding the exorbitant amount of $ 2,717.14 in child support to Mrs. Smith after specifically finding that her estimates or guesstimates were ridiculous. There was no specific findings made by the Chancellor as is required to exceed an award above $50,000.00 in annual salary. There was no evidence other than the tuition expenses which did not come close to the amount of support awarded.

The Chancellor further erred in relying upon an appraisal of the marital home that was over 10 months old and not considering the appraisal Dr. Smith ordered days before trial or even the appraisal ordered by Banccorp South post decision. Everyone news media in this country has been discussing the real estate decline for the last year and one-half. Dr. Smith's only asset from which to obtain the funds to pay the award was the marital home. The Court found that he had no assets from which to generate any further income. How can this not be error? He further compounded that error by not considering that Dr. Smith was paying each and all marital debt when equitable dividing the assets. No consideration was made by the Chancellor and this is in clear violation of the ***Ferguson*** factors and reversible error.

The Chancellor awarded to Mrs. Smith rehabilitative alimony without any proof whatsoever of her entitlement to such an award. She testified that she had no intention of attempting to find employment especially not until Coleman graduates High School. He also ordered Dr. Smith to pay her attorney fees after awarding to Mrs. Smith all cash and liquid assets and leaving Dr. Smith with all of the marital debts, no cash and having to refinance the only asset available to generate money, the marital home. This was tantamount to pouring salt into an open wound.

ARGUMENT

ISSUE NO. 1:

THE CHANCELLOR ERRED IN THE AMOUNT OF CHILD SUPPORT AWARDED AND DID NOT MAKE THE NECESSARY FINDINGS TO JUSTIFY EXCEEDING THE $50,000.00 CAP.

The Court acknowledges that the Defendant , Dr. Cecil Byron Smith has a **"negative net worth"**. (C.P. 112, R.E. 47) His 8.05 was supported with the proper documentation of income and expenses. However, Mrs. Smith did not provide any supporting documentation

as to actual monthly expenses nor the tuition expense of PCS all as required by rule 8.05 of the uniform chancery court rules. She did an estimate or guesstimate as to her expenses. (R. 103-112, R.E. 173-182) Many of the categories for which she listed exorbitant expense she was not actually incurring those at the time of trial.

The Court did a detailed analysis of how exorbitant some of her expenses she listed were and the inaccuracies and inflated values between the 8.05 of February 2007 and May 2007. (C. P. 117-118, R.E.152-153). However, the Court then relied upon those guesstimates and exorbitant amounts and awarded to her child support in the amount of $2,717.14 which was **$ 7.86** less than what she claimed on the inaccurate 8.05 financial affidavits. (Exhibits # 1, R.E.189-200) Dr. Smith paid each and every one of the expenses as admitted to by Mrs. Smith. (R. 103-108, R.E.173-178).

Utilizing the analysis employed by the Court on Aurora's daily expenses to the child support, there was absolutely no evidence submitted that substantiated expenses for Coleman of approximately **$ 90.00. PER DAY.** This is not based upon the record but totally upon Aurora's inaccurate 8.05. (Exhibit #1, R.E.189-200). According to the actual testimony cited by the Court, ***"Aurora has requested that Byron pay in addition to regular child support, the costs of tuition to private school, and extra expenses of attending school of the child which she asserts to be in the amount of $700.00 per month."*** (C.P. 100, R.E. 35).

In light of the actual testimony, the child support award based upon $50,000.00 a year income of 14% would be approximately $583.34. The Court is then required to make a detailed finding addressing the factors contained in ***Mississippi Code section 43-19-103(Rev. 2004)*** to justify exceeding the limits of child support. The Court only made three references in support of the excessive child support award:

1) ***" The fact that it [private school tuition] is a factor involved in the Court's determination of the application of the statutory percentage of 14% to <u>all</u> of Byron's income."***

From this statement counsel assumes that the Court was factoring the tuition cost into the total child support award. However, the tuition expenditures should have been added to the initial child support cap of $50,000.00. The testimony reflected that the cost of all of the private school tuition needs was $600.00 to $700.00 at the maximum. The best evidence would be the statement of the expenses for the coming year that the Court instructed Aurora to submit. Dr. Smith has attached to his motion for a new trial the coming school year expenses of PCS. The actual monthly cost is only $ 455.84 (registration fee of $250.00/12= $20.84; building fund fee $600.00/12= $50.00; tuition for one child $355.00 per month). (C. P. 182, R.E. 110)

The Court also accepted as fact, Aurora's claim that it cost an additional $700.00 per month "for attending school of the child". Where is the proof as to what these "attendance fees are for and how much" ? (R. 52, R.E.171) For the sake of argument if we accept these ridiculous figures that still only generates a child support obligation of $ 1,739.18 ($583.34 plus $455.84 actual tuition expense plus the $700.00 "attendance expenses").

2) ***" the testimony of both parties in regard to Coleman's extensive extracurricular activities..."***

Coleman at the time of trial was not involved in any extracurricular activities. The testimony of Aurora was that Coleman quit karate and was only involved in football in the fall and soccer in the spring.(R. 105, R.E.175) These are both league activities that do not generate a monthly fee or expense to participate other than uniform costs and registration fees as testified to by Aurora on cross-examination. There are no babysitting fees or after school

care costs because Aurora has no intention of returning to work until Coleman reaches 18 years of age. (C.P. 100, R.E. 35)(R.119, R.E.183)

3) ***" [Aurora] intends to remain available and involved in the details of his[Coleman's] day-to-day care and activities, and portions of these funds[child support] will obviously be used by her for her own day-to-day expenses as she performs parental duties and responsibilities."(C.P. 101, R.E.36).***

What is the monthly alimony support award going to pay for? Any expenses for Aurora should have already been factored into the equitable distribution, and periodic alimony awarded by the Court. This amounts to charging the Defendant **twice** for the plaintiff's expenses without providing to him the benefit of the deductibility of her additional expenses.

In determining the appropriateness of an award of child support, " the chancellor should consider all circumstances relevant to the **needs of the child** and the capacity of the parents." ***McEachern v. McEachern, 605 So.2d 809, 814 (Miss. 1992).*** It says nothing about the needs of the custodial parent who is already receiving periodic alimony. This is plain error.

Because of Defendant's income level, he can not utilize any tax benefit for the minor child. Aurora has the complete and sole benefit of the tax deduction and exemptions for Coleman. This is a tremendous financial benefit to her that the Court did not consider. Further, both parents have an obligation to provide for the support of their child not just the Doctor non- custodial parent. Based on the current award, the Court specifically found that the Plaintiff was able to pay all of the child's expenses and then use some to pay her own

personal expenses. (C.P. 114, R.E.49).

Dr. Smith acknowledges that a chancellor has discretion when awarding child support but the record must possess credible evidence to support the award. ***Hensarling v. Hensarling, 824 So. 2d 583, 586 (Miss. 2002).*** There is not one single document other than the two 8.05 financial affidavits provided by the plaintiff to support the exorbitant child support award. The Court in it's analysis found these documents and the figures contained therein to be less than credible. (C.P. 113, 114, R.E.48, 49)

ISSUE NO. 2

THE CHANCELLOR ERRED IN AWARDING TO THE PLAINTIFF REHABILITATIVE ALIMONY

Rehabilitative alimony is designed to allow a party to become self-supporting without becoming destitute in the interim. There was absolutely no testimony offered by the Plaintiff to support the award of rehabilitative alimony. The Temporary Order paid her $4800.00 per month through the trial. With those funds she was financially able to vacate the marital home and buy another home. Dr. Smith is paying for the expenses of her car. The only obligation she has is the alleged note to her mother for a loan and her personal living expenses. Once again the truth of her real expenses is impossible to determine because of the inaccurate guesstimates of her expenses. The evidence overwhelming established that she was in good physical health and capable of working as a nurse. Even Aurora admitted to this and the Chancellor also found this to be factual. (C.P. 114, R.104, 112, 119, R.E. 49, 174, 182, 183)

Dr. Smith proffered the rebuttal testimony of Wayne Chance the human resources director at Forrest General Hospital of the current vacancies and demand for nurses and their ability to set their work schedules. Aurora testified that she was in good health, physically

and mentally capable of working but she did not want to work. Therefore, providing for an additional payment of $500.00 in rehabilitative alimony in addition to the $2000.00 in periodic alimony was reversible error in light of Aurora's statement that "**she did not intend on returning to the work force**"and the lack of any evidence of her being destitute.(R. 119, R.E. 183) ***LeBlanc v. Andrews, 931 So. 2d 683, 685, 686, 687(Miss. Ct. Apps. 2006); Oster v. Oster, 876 So.2d 428, 431 (Miss. Ct. Apps. 2004); Lauro v. Lauro, 847 So.2d 843, 848 (Miss. Ct. Apps. 2006).***

ISSUE NO. 3

THE CHANCELLOR ERRED IN RELYING UPON A STIPULATION OF THE PARTIES AS TO THE VALUE OF THE MARITAL HOME AND NOT ALLOWING THE APPRAISAL OF DR. SMITH OR BANCCORP SOUTH

In August of 2006, Aurora obtained an appraisal of the marital home with a value of $600,000.00. At that time the real estate market was still over inflated by Hurricane Katrina and the continued lack of housing. However, neither party anticipated that the divorce action would continue for eleven more months. Further, the daily and monthly news in this country advises of the decline in value of the real estate market. Even Dr. Smith was not aware until two homes in his neighborhood sold for less that $500,000.00. (R.161, R.E.185) The marital home was placed on the open market but the parties received only two offers one for $500,000.00 and another for $450,000.00 in January and February of 2007.(R. 61, R.E.185) In February 2007, Mrs. Smith provided her first updated 8.05 and listed the value of the marital home at $550,000.00.(R. 83, R.E.172). In May of 2007 she files another updated 8.05 and lists the value of the marital home at $600,000.00. (Exhibit #1, R.E.189-200)

Upon review of the original appraisal, the appraiser used as comparable property those homes in the Canebrake Golf Course Community which is only some 4 years old, not

the original Canebrake Community that is some 17 years old. (Exhibit #9, R.E.201-216)

Dr. Smith hired Stan Lightsey a renown appraiser whom all of the banks and this Chancery Court District has used as an expert in thousands of divorce cases. Dr. Smith knew that any lump sum award the Court gave to Mrs. Smith would require him to seek new financing. As the Court found, Dr. Smith had a negative net worth.(C.P.112, 156, R.E. 47, 89) Where is he going to come up with any cash money except through a refinancing. The Court erroneously excluded the appraisal as not being timely. This was a rebuttal document and the only appraisal before the court.

The Court in it's opinion references a stipulation between the parties which is reflected no where in the record.(C.P. 106, R.E.41) In fact, when the Helmsley report was offered into evidence, counsel for Mrs. Smith acknowledged that the $599,000.00 figure for the marital home, **" that value is in question"** (R. 7, R.E. 170). Counsel for Dr. Smith then advised that there were other figures as to the Lasik practice , Crane Park home of Dr. Smith and the Summer Tree home of Mrs. Smith that were listed as marital and should have been non-marital. No where does Dr. Smith or his counsel stipulate to the value of the marital home. It was in dispute from the beginning of the trial and it is still in dispute.

Post decision, Dr. Smith attempted refinancing to pay the award, through Bancorp South. The Bank, not Dr. Smith, ordered another appraisal that showed a fair market value of $515,000.00.(C. P. 185, R.E.113-137) The parties only paid $505,000.00 the year before their separation, for the home. (R.82 , R.E. 171) Bancorp South will not finance more than $412,000.00 to $417,000.00 based upon **their appraisal** of the Tidewater home at $515,000.00. (C.P. 210, R.E.138) The Chancellor specifically found that " with the exception of his income, Dr. Smith has no assets capable of production of income in excess

were in his name as well as Mrs. Smith and did not want to risk his credit standing. He also agreed to pay for the balance on her car which the court erroneously stated had "no equity."(C.P. 86, R.E.21) the 8.05 of Mrs. Smith and the Helmsley report both respectively assert equity of $ 7,378.00 and $7,600.00.(Exhibit #1, R.E. 194) Equitable distribution is a consideration of the marital assets and **debts.** Just because Dr. Smith agreed to be responsible for the payment of the marital debt does not mean he gets no consideration for that payment when dividing the assets. The laser surgery account was where the parties kept the money to pay their income tax liability.

ISSUE NO. 5

THE COURT ERRED IN REQUIRING DR. SMITH TO PAY FOR MRS. SMITH'S ATTORNEY FEES.

The awarding of attorney fees in a domestic case is largely a matter entrusted to the sound discretion of the trial court. ***Poole v. Poole, 701 So.2d 813,819 (Miss. 1979).*** Absent an abuse of discretion, the chancellor's decision in such matters will be upheld. ***Armstrong v. Armstrong, 618 So.2d 1278, 11282 (Miss. 1993).*** Based upon the cash distribution to Mrs. Smith, she was provided with sufficient assets in which to pay her own attorney fee bill. She received a substantial award of child support, rehabilitative alimony, periodic alimony and the only expense left was to pay her own attorney. She never testified that she was financially unable to afford to pay her attorney.

The award of attorney fees to Mrs. Smith was tantamount to assessing Dr. Smith with each and every single expense of the marriage and the divorce which is an abuse of discretion. This is plain error.

CONCLUSION

Appellant, Dr. Cecil Byron Smith, would request that this Court reverse and remand the decision of the Chancellor as to the child support award, rehabilitative alimony award, equitable distribution to include the consideration of the debt payments by Dr. Smith and the attorney fee award.

Respectfully submitted,
CECIL BYRON SMITH, Appellant

BY: _____
S. CHRISTOPHER FARRIS

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date mailed a true and correct copy of the foregoing Brief of Appellant, Cecil Byron Smith to the Mississippi Supreme Court Clerk, Ms. Betty Sephton, Post Office Box 249, Jackson, MS 39205; ERIK M. LOWREY, P.A., Attorneys at Law, Erik M. Lowrey MSB #1466, 525 Corinne Street Hattiesburg, MS 39401; Hon. Gene Fair,Chancery Court Judge, P. O. Box 872, Hattiesburg, MS 39403 by regular United States mail, postage prepaid.

DATED this the 10th day of May, A.D., 2008.

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S. CHRISTOPHER FARRIS