IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TONY SESSUMS — APPELLANT

VS. — NO. 2008-CA 00198

WANDA NANCE — APPELLEE

BRIEF FOR THE APPELLAANT

APPEAL FROM THE CHANCERY COURT OF
NEWTON COUNTY, MISSISSIPPI

PREPARED BY:

P. SHAWN HARRIS, MSB [redacted]
ATTORNEYS AT LAW
POST OFFICE BOX 649
FOREST, MS 39074
(601) 469-9910

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TONY SESSUMS **APPELLANT**

VS. **NO. 2008-CA 00198**

WANDA NANCE **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 this Court may evaluate possible disqualifications or refusal.

Honorable Jason Mangum, Esq
P.O. Box 85
Decatur, MS 39327

Nikki Rogers
Court Reporter
303 Brenmar St
Brandon MS 39042

George Hayes
Chancery Clerk
P. O. Box 68
Decatur, MS 39327

Honorable Judge H. David Clark
P.O. Box 434
Forest, MS 39092

This the 7th day of July, 2008.

P. SHAWN HARRIS, ATTORNEY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TONY SESSUMS **APPELLANT**

VS. **NO. 2008-CA 00198**

WANDA NANCE **APPELLEE**

STATEMENT OF ISSUES

The issue on this case is whether the lower Court erred in refusing the modification of child support, by the Appellant, finding that there was not material change of circumstances and the loss of income by the Appellant was forseeable and the award of Attorney fees.

STANDARD FOR REVIEW

When reviewing decisions of the Chancellor on appeal, the Court employs a limited standard of review. The findings of a Chancellor will not be disturbed unless the Court determines the Chancellor was manifestly wrong, clearly erroneous, or applied a wrong legal standard.

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TONY SESSUMS **APPELLANT**

VS. **NO. 2008-CA 00198**

WANDA NANCE **APPELLEE**

STATEMENT OF THE CASE

Tony B. Sessums and Tammy Sessums Vance, were divorced in the Chancery Court of Newton County, by a divorce decree dated June 28, 2005. That in said divorce decree, Tony B. Sessums was ordered to pay child support in the amount of $750.00 per month. At the time of the divorce decree, Tony Sessums was working two jobs, his regular job of truck shop foreman with Choctaw Maid Farms and as a farm hand for Dr. Wesley Bennett.(Record Page 6.) That in February, 2007, Tony B. Sessums sought out and found another job with CocaCola Bottling in Meridain, Mississippi, doing similar work. He has to he carries a Commerical Drivers License (CDL) with that job, and has to abide by its regulations. Before he took that job, his second job as a farm hand, was lost because the farm he was working on was sold to another individual, in December, 2006, and it was no longer available to him.(R.P. 6) Also, the Coca Cola job, requires him to commute back and forth a distance of 102 miles.(R.P. 5) As such he is putting in more hours.

On June 28, 2007, Tony B. Sessums filed his amended motion for a modification of his child support, stating that a material change in circumstances had occurred, in that he lost his

second job, of $600.00 per month, and therefore he was entitled to a modification of child support, to lower his support obligation.

A hearing was conducted before the Chancery Court in Newton County, on November 14, 2007. The Appellant produced his 8.05 financial statement that showed a $200 residue, but he explained to the Court that he needed to purchase another vehicle and would require more than that money to pay for such. The father testified he was driving two automobiles, of which one had more than 500,000 miles and one more than 230,000 miles.(R.p. 7) He requested that the Court consider his need for another automobile to travel back and forth to work.

The Chancellor, having heard the testimony, ruled that the loss of his second job was forseeable and therefore there was no material change in circumstances, and granted the motion to dismiss by the Appellee in this matter, and awarded attorney fees in the amount of $1,750.00. In setting the award of Attorney fees, the Court arbitrarily set a number, without the benefit of having any testimony regarding attorney fees.

ARGUMENT

The Appellants request that the Court reverse the decision of the Chancellor because the Chancellor was manifestly in error, in determining that the loss of the second job by the Appellant was not a material change in circumstances. The issues to be determined by the Court are very narrow.

"Decisions regarding modification of child support are within the discretion of the chancellor, and [an appellate court] will reverse only where there is a manifest error in findings of fact, or an abuse of discretion." Powell v. Powell, 644 So.2d 269, 275 (Miss.1994)

This matter arose from an irreconcilable differences divorce between the parties. Support agreements for divorces granted on the ground of irreconcilable differences are subject to modification. *Thurman v. Thurman,* 559 So.2d 1014, 1017 (Miss.1990). The modification can occur only if there has been a material change in the circumstances with one or more of the parties. *Id.; See also, Gregg v. Montgomery,* 587 So.2d 928, 932 (Miss.1991). The change must occur as a result of after-arising circumstances of the parties not reasonably anticipated at the time of the agreement. *Tingle v. Tingle,* 573 So.2d 1389, 1391 (Miss.1990). The Court has delineated a set of factors that the Court should consider in determining a material change has occurred, in stating;

> The party seeking modification must show a material change in circumstances of the father, mother or children arising subsequent to the original decree. Id. The factors to be considered are: "(1) increased needs of children due to advanced age and maturity, (2) increase in expenses, (3) inflation, (4) relative financial condition and earning capacity of the parties, (5) health and special medical needs of the child, both physical and psychological, (6) health and special medical needs of the parents, both physical and psychological, (7) necessary living expenses of the father, (8) estimated amount of income tax each party must pay, (9) free use of residence, furnishings and automobile, and (10) other facts and circumstances bearing on the support as shown by the evidence." . *McEachern v. McEachern,* 605 So.2d at 813 (Miss.1992); *Adams v. Adams,* 467 So.2d 211, 215 (Miss.1985)

Tony Sessums lost a second job that he had for a number of years, through no fault of his own, when the farm upon which he worked, was sold. Therefore he has now suffered a loss of $600.00 per month in income. In addition, he has an additional necessary living expense, in that he has to now purchase a vehicle, as both his vehicles have a colossal number of miles, and he needs reliable transportation.

The Court in Austin v. Austin, 2007 WL 3076870, granted a modification of support, where a father lost his job which resulted in a decrease to 1/3 of the amount of his previous salary. The Court here held that reduction of income by the father was sufficient to prove a material change in circumstances, and warranted a downward modification.

As the Appellant was making $1913 gross per month, at his salary job, plus the $600 per month, his total monthly income was $2513 each month. (R.p. 27) The loss of the part time job, and its $600 per month salary is a 23.8% decrease in salary. The salary he was making at his job he had at the time of his divorce, was roughly equilivant to the job that he had at the CocaCola plant at the time he filed the motion.(R.p. 26-27) That is an extremely significant reduction in income, and is a material change in circumstances.

In Dill v. Dill, 908 So.2d 198 (MissApp2005), the Court determined that a loss of income from $2,866 to $1,644 would qualify as a material change, but determined that the loss of the income was foreseeable. In that case, the father had been in the Marine Corps and earning a salary of $2,866.00. The testimony in that case indicated that at the time of the divorce, in February, 2003, it was anticipated that he would be leaving the Marine Corps, and indeed it was only 5 months later when he filed his motion for modification. The Court determined that it was anticipated and foreseeable that his income would be substantially reduced, therefore he was entitled to no reduction.

In the case at bar, the Chancellor determined that the Appellants loss of his job "was something that he could have reasonably anticipated" R.p.37 This was a manifest error in the finding of facts by the Court. The Court in Austin, when faced with a similar situation, ruled that the loss of his job was not foreseeable. Had the Appellant voluntarily left that second job, or had he moved away from the job, that may have been foreseeable. It was not foreseeable that he would lose the job, due to the farm on which he worked, being sold to a third party. To argue that his loss of his second job is foreseeable would be akin to making a final determination that **any loss** of **any job** is foreseeable. There is nothing in the record to indicate that the Appellant had any inclination that the job would be lost, as the farm he was working on was sold to another person. Therefore, he did not quit nor was he fired. The job position was terminated by no fault of his own. This was not foreseeable and it was clearly erroneous for the Chancellor to determine it so.

Further the Court ignored the fact, that the Appellant had a need to purchase an automobile to travel to and from work, to maintain his job and income that he was making. The Appellant had two vehicles. One has 250,000 miles on it, and the other had 500,000 miles. It is obvious that the Appellant has demonstrated to the Court, his need for another vehicle, and his inability to pay for one, without the lowering of his child support payment. (R.p.7 & 33,34) He demonstrated to the Court that he had a necessary living expense that he needed to pay, an automobile, according the McEachern and Adams decision. *McEachern v. McEachern*, 605 So.2d at 813 (Miss.1992); *Adams v. Adams*, 467 So.2d 211, 215 (Miss.1985)

As to the award of attorney fees, the Chancellor abused his discretion in awarding attorney fees, in that the Court failed to hear any evidence of attorney fees from the other side. (R.p. 42) The record is devoid of any documentary evidence concerning the attorney's fees he

to pay. Without proof of entitlement to fees, amount of attorney time, services rendered, or reasonableness of the award, the Court cannot set an amount of attorney fees.

> This Court has many times held that the amount of attorney's fees is a matter left to the discretion of the chancellor. *See, e.g.*, *Greenlee v. Mitchell*, 607 So.2d 97 (Miss.1992); *Smith v. Dorsey*, 599 So.2d 529 (Miss.1992); *Young v. Huron Smith Oil Co., Inc.*, 564 So.2d 36 (Miss.1990). However, the award must be supported by sufficient evidence, and not merely "plucked out of the air." *Young*, 564 So.2d at 40; *Carter v. Clegg*, 557 So.2d 1187, 1192 (Miss.1990). *See also Holleman v. Holleman*, 527 So.2d 90, 96 (Miss.1988). Where the evidence is insufficient, this Court will reverse the award. *Karenina by Vronsky v. Presley*, 526 So.2d 518, 525 (Miss.1988); *McKee v. McKee*, 418 So.2d 764 (Miss.1982).
> Cited by Powell v. Powell, 644 So.2d 269, 275 (Miss.1994)

In short, because the Court heard no proof regarding the attorney fees, there can be no award of attorney fees. The Court must establish that the Movant is entitled to attorney fees, the amount of time the attorney spent on the case, what services were performed and whether the award was reasonable. Failing to do so, demands that the decision of the Court be reversed. The award of the Chancellor to the Appellant of $1,750.00 in attorney fees, should be reversed, as the Chancellor abused his discretion.

CONCLUSION

The Appellants would request that this Court reverse the decision of the lower Court and direct the Court to consider the significant decrease in income by the Father, sufficient to modify his child support, as it is significant and was not reasonably foreseeable. The Appellant has also had a significant financial burden as he is in need of purchasing a vechile as his two have significant wear and tear in the form of a spectacular number of miles. Finally the Appellant would request that the Court reverse the award of attorney fees, as there is no proof in the record to support the finding.

RESPECTFULLY SUBMITTED, this the 7th day of July, 2008.

TONY SESSUMS

BY: _____
P. SHAWN HARRIS, HIS ATTORNEY

P. Shawn Harris, P.A.
Attorney at Law
MSB#[redacted]
P.O. Box 649
Forest, MS 39074
Phone: 601 469-9910
Fax: 601 469-9882

CERTIFICATE OF SERVICE

I, P. Shawn Harris, hereby certify that a true and correct copy of the above and foregoing Appellants Brief has this day been forwarded, via U.S. Mail, postage prepaid, to counsel of record as follows:

Honorable Jason Mangum, Esq.
P.O. Box 85
Decatur, MS 39327

Nikki Rogers
Court Reporter
303 Brenmar St
Brandon MS 39042

George Hayes
Chancery Clerk
P. O. Box 68
Decatur, MS 39327

Honorable Judge H. David Clark
P.O. Box 434
Forest, MS 39092

SO CERTIFIED, this the 7th day of July, 2008.

P. SHAWN HARRIS