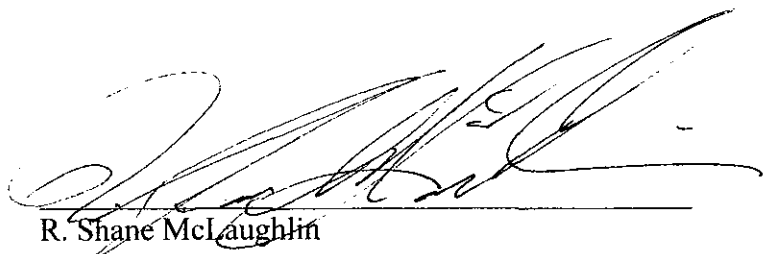
2008-CA-01785 SCTT

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.

1. Merlene W. Anderson, Appellant
2. Donald R. Anderson, Appellee
3. Rebecca Phipps, counsel for Appellee
4. R. Shane McLaughlin, counsel for Appellant
5. Nicole H. McLaughlin, counsel for Appellant
6. D. Kirk Tharp, counsel for Appellant



R. Shane McLaughlin
Attorney of record for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SECONDARY MATERIALS

STATEMENT REGARDING ORAL ARGUMENT

The Chancellor's grant of a divorce in this case significantly expands the ground of habitual cruel and inhuman treatment as the record establishes no more than mere incompatibility between the Parties. Oral argument would be helpful to discuss the dearth of record evidence in this case bearing on the issue of habitual cruel and inhuman treatment.

STATEMENT OF THE ISSUES

1. Whether the Chancellor erred in granting a divorce based on habitual cruel and inhuman treatment where there was no evidence of endangering or infamous conduct, but rather evidence of mere bickering and incompatibility.
2. Whether, in any event, the Chancellor erred in denying a divorce based on the doctrine of condonation.

STATEMENT OF THE CASE

Donald Anderson filed a Complaint for Divorce alleging the grounds of habitual cruel and inhuman treatment against Merlene Anderson on January 31, 2006. (R. Vol. 1, p. 2). Merlene Anderson filed her Answer on November 27, 2006. (R. Vol. 1, p. 25).

The Court entered a Temporary Order on July 25, 2007. (R. Vol. 1, p. 84). Following several days of trial, the Court entered an Opinion and Final Judgment of Divorce on September 26, 2008. (R. Vol. 2, p. 215).

Merlene Anderson timely perfected this appeal. (R. Vol. 2, p. 236).

STATEMENT OF FACTS

Donald Anderson ("Donald") and Merlene Anderson ("Merlene") were married on October 2, 1994. (R. Vol. 1, p. 3). Donald had two children, Samuel and Joshua, from a prior marriage. (*Id.*). Shortly after the marriage Donald asked Merlene to adopt Samuel and Joshua and Merlene did so. (T. Vol. 4, p. 561).

Merlene and Donald first met through a church program in Starkville, Mississippi. (T. Vol. 3, p. 557). Donald was the minister of Little Zion Missionary Baptist Church in Corinth, Mississippi, where he had been the pastor since 1990. (T. Vol. 3, p. 309; T. Vol. 5, p. 682). Merlene was employed by the United States Army Reserve in Tupelo, Mississippi. (T. Vol. 1, p. 93). Merlene moved to Corinth soon after she married Donald. (T. Vol. 4, p. 562). Donald was living in the church parsonage when he and Merlene married. (T. Vol. 4, p. 563). The couple bought a home close to the church once they were married. (*Id.*).

Donald had been a minister for over twenty (20) years at the time of trial. (T. Vol. 3, p. 305). Both Donald and Merlene were devoutly religious. (*See* T. Vol 1, p. 94).

Donald claims that he and Merlene began experiencing marital problems as early as 1999. (T. Vol. 5, p. 686). Donald claimed that Merlene's conduct became so bad as to justify divorce on the grounds of habitual cruel and inhuman treatment. (*See* T. Vol. 1, p. 2). Merlene, however, did not want a divorce from Donald and contended that the couple should stay together and attempt to work on their marriage. (T. Vol. 1, p. 97).

At trial, Donald voiced myriad complaints as to Merlene as justification for a divorce. (*See, e.g.,* T. Vol. 3, p. 349-54). First, Donald claimed he had recently learned that Merlene abused and mistreated his children. (See, e.g., T. Vol. 3, p. 321). Because of accusations of abuse, the Court appointed a guardian *ad litem* for the children. (T. Vol. 1, p. 40). The guardian

ad litem found the allegations of abuse unsubstantiated. (*See* T. Vol. 2, p. 157; R. Vol. 2, p. 215).

Donald next testified that Merlene's behavior had deteriorated and the marriage turned sour around 1999. (T. Vol. 3, p. 311). Donald claimed that Merlene's behavior became too "dominant" to suit him after 1999. (*Id.*). Prior to the marriage Merlene had not engaged in, as Donald put it, "this self-dominance type thing." (T. Vol. 5, p. 673). However, according to Donald, Merlene wanted to have her own way in the marriage after about 1999. (*Id.* at 314). Donald first realized Merlene was exerting dominance when she argued with him about whether the family would have a dog. (*See* T. Vol. 1, p. 311 – 312; T. Vol. 5, p. 574). Donald and his sons wanted a dog, but Merlene refused. (*Id.*). Donald testified that "that's when I got into a real problem with Merlene is because anything she states, it's got to be the way she states it or it's wrong, and that's where the problem comes." (T. Vol. 3, p. 315). Donald repeatedly testified that Merlene's alleged dominant behavior was the major problem in the marriage, and was just more than he could bear. (*See, e.g,* T. Vo. 3, p. 314-15, 673-74). Donald explained at trial:

> So everything, no matter how minute it was, everything had to be exactly as she said. And this point of dominance and – that – ***that I could not handle. I just can't handle it.***

(T. Vol. 3, p. 315). (emphasis added). And further:

> She thinks she's always right, and that's one of the most detrimental parts about her. ***You can't tell her nothing, you know, and that's what really – what really hurts more than anything else.***

(T. Vol. 3, p. 354) (emphasis added).

Donald also claimed Merlene was always "ranting and raving" whenever they were alone. (T. Vol. 3, p. 330). There were frequent arguments. (T. Vol. 3, p. 327). Donald testified that Merlene was "[a]ll the time in my face" and there was frequent "bickering." (T. Vol. 3, p.

327-28, 331). While Donald testified that the conduct made the marriage difficult, Donald admitted that he had not sustained any emotional or anxiety problems that required medication or treatment. (T. Vol. 4, p. 480).

In addition to Merlene's "self-dominance type thing" Donald claimed that Merlene committed cruel and inhuman treatment by making various statements during arguments, which Donald referred to as Merlene's "devil stories." (*See* T. Vol. 3, p. 332-33). After Donald filed the divorce action, he and Merlene continued to live in the same house, but stayed apart. (*See* R. Vol. 1, p. 16). Donald generally stayed on one side of the house and Merlene on the other. (*See id.*).

In the summer of 2007 Donald killed a snake with a shovel after it had ventured into the house. (T. Vol. 3, p. 333). According to Donald, after the snake came into the house "here come the devil stories" from Merlene. (*Id.*). Merlene told Donald the snake was a representation of the devil. (*Id.*; T. Vol. 1, p. 107). (*Id.*). During that same summer, the central air conditioning unit broke down on Donald's side of the home. (T. Vol. 1, p. 107). Donald testified that Merlene stated that God had allowed the air conditioner to break down "because of how you [Donald] are." (T. Vol. 3, p. 332).

Donald testified that he knew that Merlene was "not crazy" and of course she did not really think the snake was the devil. (T. Vol. 3, p. 333-34). Further, Merlene explained that her comment regarding the air conditioner had been made in jest. (T. Vol. 1, p. 107-08). However, later in his testimony, Donald testified that he feared that Merlene "had began to dabble in witchcraft" because "there ain't [sic] nobody going to start talking about the devil that much." (T. Vol. 4, p. 508).

Donald also claimed that Merlene had made statements about him and the couple's marital problems in church and that these statements amounted to further cruelty. (T. Vol. 3, p. 340). Donald claimed that Merlene stood up in a worship service and told the congregation that only two people loved her, her adopted son Joshua and another Parishioner, Ms. Wollette. (T. Vol. 3, p. 340). This incident occurred four to five years before the divorce action was filed. (T. Vol. 5, p. 668). Later, in Sunday School, Merlene apologized to anyone she had wronged in the church. (*Id.).* Donald also claimed Merlene came into a leadership meeting at the church "ranting and raving" on one occasion. (T. Vol. 3, p. 341).

Donald also faulted Merlene because of comments made by a third-party at a State minister's convention. (*Id.* at 341-42). During the Minister's Wife Division meeting, some other woman, allegedly one of Merlene's "cohorts" stood up and disparaged the way Donald was treating his wife. (*Id.*). Donald felt denigrated by such commentary, noting that "[s]ome people are going to believe that." (T. Vol. 3, p. 343).

Merlene, for her part, admitted that that she told some congregation members that she and Donald were having problems. (*See* T. Vol. 5, p. 662). When several women in the church inquired why she would want to stay with Donald, when he wanted a divorce, Merlene told them that she would stay married because of her faith. (*See id.*). Merlene asked parishioners to pray for her marriage. (T. Vol. 5, p. 663). However, Donald and Merlene's marital problems were well-known within the Church membership. In fact, Donald himself told members of his congregation that he and he and Merlene were "having serious marital problems." (T. Vol. 4, p. 713).

Next, Donald claimed that Merlene made various accusations of infidelity against him and that the allegations amounted to cruel and inhuman treatment. (T. Vol. 3, p. 334). Donald

claimed that Merlene accused him of having affairs in approximately 1999. (T. Vol. 3, p. 334-35). Predictably, Donald denied any affairs. (T. Vol. 3, p. 336). However, the record shows that Merlene had ample basis for questioning Donald regarding infidelity. Merlene found an e-mail message on Donald's computer from Donald to a female dated September 20, 2005, which consisted entirely of the following text:

good PUSSY

(Exhibit No. 7, p. 29) (emphasis in original). Donald had sent the two-word e-mail to his administrative assistant, Lisa Spencer. (T. Vol. 4, p. 452).

Merlene also found that Donald had signed up for membership with services such as BBPeopleMeet.com and DivorcedPeopleMeet.com during the marriage. [1] (Exhibits Nos. 8-9). Donald filled out a "profile" for membership on DivorcedPeopleMeet.com that indicated he was divorced. (T. Vol. 4, p. 492). Donald also viewed pornography on his computer during the marriage. (T. Vol. 4, p. 435).

Donald, of course, had innocuous explanations for everything. As to the email referencing "good pussy" he claimed it was merely the punch-line to a joke he had heard with a Lisa Spencer, and he sent it to cheer her up. (T. Vol. 4, p. 454). Donald claimed he visited, and enrolled, in the pornographic and dating Internet websites merely as "research" so that he could better counsel his Church membership. (*See* T. Vol. 4, p. 432; 487). While he watched a fair amount of pornography from his computer, "it wasn't for lustful purposes." (*Id*).

Further, Donald made frequent overnight trips for home throughout the marriage. (T. Vol. 4, p. 460). Merlene learned that in August 2006 Donald traveled to New Orleans for a meeting and booked his hotel room for two people instead of just one. (T. Vol. 4, p. 461-62).

[1] "BBPeopleMeet.com" refers to a dating website for "Big and Beautiful" singles. *Available at:* http://www.bbpeoplemeet.com. DivorcedPeopleMeet.com is likewise a dating website for divorced singles. *Available at:* http://www.divorcedpeoplemeet.com.

When confronted, Donald claimed that he had planned on sharing the room with a male but the male did not come to New Orleans as had been planned. (T. Vol. 4, p. 463-66). Donald denied that he had planned a rendezvous with a female while he was out of town. (T. Vol. 4, p. 465).

Finally, throughout the trial, Donald relied on an incident that occurred on January 30, 2006, as the primary example of Merlene's cruel treatment justifying divorce. On January 30, 2006, Merlene and Donald slept in the same bed. (T. Vol. 4, p. 576). In the morning, Merlene reached out to touch Donald, and he repeatedly rejected her advances. (*Id.*). Donald rushed from the bed into the bathroom. (*Id.*). Merlene followed Donald into the bathroom and asked that they talk about their problems and why he had rejected her. (*Id.* at 576-77).

Donald explained that Merlene then stood in front of the bathroom door, and would not let him exit the bathroom until he talked to her. (T. Vol. 3, p. 322). Donald told Merlene to ask him whatever she wanted to know; Donald proceeded to field questions from Merlene in the bathroom. (T. Vol. 3, p. 324). After talking for some time, Donald claimed Merlene still refused to move from the door and let him exit the bathroom. (*Id.*). Donald testified that he called Church member John Hall to come to the house to diffuse the situation, as Reverend Hall was someone Merlene respected and was a Corinth Police Officer. (*Id.*). When Hall arrived he gave Merlene thirty (30) minutes to relent and to move away from the door so Donald could exit the bathroom. (T. Vol. 1, p. 165). After twenty-seven (27) minutes Merlene complied and Donald left the bathroom. (*Id.*). Donald testified that the entire incident, including the time in which he and Merlene talked in the bathroom, lasted approximately three to three and one half hours.[2] (T. Vol. 3, p. 333). The incident on January 30 was an isolated occurrence, as there was never such an incident before or since. (T. Vol. 5, p. 605).

[2] Merlene testified they were in the bathroom from about 7:30 a.m. until 9:10 a.m. (T. Vol. 4, p. 577).

Donald and Merlene continued to live together and sleep in the same bed even after the incident of January 30, 2006. (*See, e.g.*, T. Vol. 4, p. 582). In fact, the couple continued to sleep in the same bed until April 2006. (T. Vol. 5, p. 582). Donald and Merlene continued to reside in the marital home until Merlene was ordered to vacate by July 21, 2007. (R. Vol. 1, p. 85). Merlene testified that she and Donald last had sexual relations on February 23, 2006. (T. Vol. 5, p. 607). Donald claimed, in one breath, that he and Merlene had not had sex since February 1996 but then testified that he "did not remember" when they last had sex. (T. Vol. 5, p. 673). Later in his testimony, Donald denied he and Merlene had sex in February 2006, but had testified in his deposition that they "slept together as husband and wife." (T. Vol. 5, p. 694-98).

After hearing Donald's complaints regarding Merlene the Chancellor granted Donald a divorce based on habitual cruel and inhuman treatment. (T. Vol. 2, p. 219-20). The Court mentioned condonation of the alleged grounds for divorce, but ostensibly found that the grounds for divorce had been revived after being initially condoned. (T. Vol. 2, p. 220).

As discussed fully below, the Chancellor erred in finding habitual cruel and inhuman treatment in this case and erred, in any event, in applying the doctrine of condonation.

STANDARD OF REVIEW

In domestic relations cases, a Chancellor's findings are not reversed "unless those findings are clearly erroneous or an erroneous legal standard was applied." *Sproles v. Sproles*, 782 So. 2d 742, 746 (Miss. 2001). That is, factual issues are reviewed only for manifest error. *Sproles*, 782 So. 2d at 746. However, issues of law are reviewed *de novo*. *Oswalt v. Oswalt*, 981 So. 2d 993, 995 (Miss. Ct. App. 2007).

SUMMARY OF THE ARGUMENTS

The Trial Court manifestly erred in granting a divorce based on habitual cruel and inhuman treatment. The Chancellor concluded that a combination of the following conduct amounted to habitual cruel and inhuman treatment: 1) Merlene's accusations of infidelity against Donald and her statements to Church members about the marriage; 2) Merlene's attempts to "dominate" Donald; 3) Merlene's "imprecatory declarations" against Donald; 4) Merlene's emotionally abusive behavior toward children and 5) Merlene's reference to a publicized incident involving a wife shooting her minister-husband.

The proof Donald adduced at trial, even accepting it all as true, does not come even close to rising to the level of habitual cruel and inhuman treatment. Donald testified that Merlene accused him of having affairs. However, there was much evidence that Merlene was justified in her suspicions. Merlene found a scandalous e-mail from Donald to a female and learned that Donald frequented pornographic and dating websites during the marriage. Further, Donald was frequently out-of-town on business. Merlene knew that Donald had booked a hotel room for two people during an out-of-town trip when he had supposedly traveled alone. Such good-faith allegations of infidelity do not amount to habitual cruel and inhuman treatment under Mississippi law.

Donald also complained that Merlene was "cruel" by speaking out about their marital problems in church. The evidence showed that Merlene made a few references to the marital problems she and Donald were going through to members of her Church. However, Donald likewise told Church members about the couple's marital difficulties and the issues were well-known among the congregation. Mere truthful statements regarding the state of the couple's marriage is likewise no basis for a divorce under the law.

Donald made it plain at trial that his most serious complaint regarding Merlene was that she was insufficiently submissive to him and that "[s]he thinks she's always right." Donald went to great lengths to describe incompatibility between himself and Merlene. Of course, this is precisely the sort of evidence which Mississippi Courts have long held does not justify divorce on the grounds of habitual cruel and inhuman treatment. Further, the fact that this conduct subjectively hurt Donald more than any other conduct necessarily exhibits that none of Donald's complaints rise to the level of cruelty required for a divorce under Mississippi law.

Finally, even if Donald's accusations could rise to the level of habitual cruel and inhuman conduct (which they clearly do not), Merlene introduced evidence showing that Donald had condoned the conduct. The proof established that Merlene and Donald engaged in normal marital sexual relations as late as February 23, 2006. There is no record-evidence of any cruel and inhuman conduct in this case, much less any such conduct after February 23, 2006. To the contrary, Merlene attempted to reconcile with Donald and keep the marriage together. Thus, even to the extent Donald could prove habitual cruel and inhuman treatment, he clearly condoned the conduct.

Accordingly, the Chancellor erred in granting a divorce based on these facts. This Court should reverse the Chancellor's decision and render judgment here in favor of Merlene.

ARGUMENT I.

THE CHANCELLOR ERRED IN GRANTING A DIVORCE BASED ON HABITUAL CRUEL AND INHUMAN TREATMENT.

In order for a divorce to be granted on grounds of habitual cruel and inhuman treatment, one of the following must be proven by a preponderance of the evidence:

1. The offending spouse engaged in conduct that endangered life, limb or health or created a reasonable apprehension of such danger rendering the relationship unsafe for the party seeking a divorce; or
2. The offending spouse engaged in conduct that "is so unnatural and infamous as to make the marriage revolting to the non-offending spouse and render it impossible for that spouse to discharge the duties of marriage, thus destroying the basis for its continuance."

Jackson v. Jackson, 922 So. 2d 53, 56 (Miss. Ct. App. 2006).

Importantly, Mississippi Courts have repeatedly stated that "[t]he conduct must consist of something more than unkindness or rudeness or mere incompatibility or want of affection." *Horn v. Horn*, 909 So. 2d 1151, 1155 (Miss. Ct. App. 2005). Further, the allegedly cruel treatment must be "routine and continuous" rather than an isolated occurrence. *See Moore v. Moore*, 757 So. 2d 1043, 1047 (Miss. Ct. App. 2000); *Parker v. Parker*, 519 So. 2d 1232, 1234 (Miss. 1988). Importantly, the conduct is viewed by a subjective standard, focusing on the impact on the offended spouse. *Bodne v. King*, 835 So. 2d 52, 59 (Miss. 2003)

It is well-established that mere unkindness, rudeness, incompatibility or lack of affection are insufficient for a divorce on grounds of habitual cruel and inhuman treatment. *Smith v. Smith*, 614 So. 2d 394, 396 (Miss. 1993). The Court has explained that habitual cruel and inhuman treatment is not a "catch-all" to be used for divorce under any circumstances:

> The popular idea is that, like charity, it covers a multitude of marital sins, and is the easiest road to freedom from the marital bonds. As a result suits are often brought, based on petty indignities, frivolous quarrel, general incompatibility and the petulant temper of one or both parties, seeking divorce for habitual cruel and inhuman treatment, without ever realizing or understanding, in the remotest degree, what is meant by the words as used in the statute. They do not realize the nature, gravity, or duration of the cruelty required to warrant a divorce. * * * The cruelty required by the statute is not such as merely to render the continuance of

> cohabitation undesirable, or unpleasant, but so gross, unfeeling and brutal as to render further cohabitation impossible, except at the risk of life, limb, or health on the part of the unoffending spouse; and that such risk must be real rather than imaginary merely, and must be clearly established by proof.

Howard v. Howard, 138 So. 2d 292, 293 (Miss. 1962) (internal quotations omitted).

Simply put, inability to live together as husband and wife is not enough for a divorce on this ground. *Stennis v. Stennis*, 464 So. 2d 1161, 1162 (Miss. 1985). In *Stennis*, for instance, the Supreme Court reversed the Chancellor's grant of divorce based on habitual cruel and inhuman treatment where the evidence showed that: 1) the husband had slapped the wife on one occasion; 2) the husband once put the wife in a "hammer-lock"; 3) the husband had washed out the wife's mouth with soap; and 4) the husband casually consumed alcohol. *Stennis*, 464 So. 2d at 1162.

The Court has observed that, in many cases, "fidelity to law makes us leave legally married two people who despise each other." *Wilson v. Wilson*, 547 So. 2d 803, 804 (Miss. 1989) (reversing divorce on grounds of habitual cruel and inhuman treatment where parties frequently accused each other of adultery, each claimed verbal and psychological abuse and marriage was generally "a shambles"). *See also Stringer v. Stringer*, 46 So. 2d 791, 791-92 (Miss. 1950) (reversing where spouses were generally quarrelsome); *Marble v. Marble*, 457 So. 2d 1342, 1343 (Miss. 1984) (difference in religious views and general incompatibility insufficient for divorce); *Talbert v. Talbert*, 759 So. 2d 1105, 1109 (Miss. 1999) (spouse's "boorish, obnoxious, and selfish behavior" insufficient for divorce). Notably, the Court in *Morris v. Morris*, 804 So. 2d 1025, 1030 (Miss. 2002) stated that intense arguing and the fact that one spouse was "overly controlling" are likewise insufficient reasons for a divorce on grounds of habitual cruel and inhuman treatment.

The Chancellor in this case first stated that she gave particular weight to Merlene's "false accusations" of infidelity against Donald. As the Chancellor noted, persistent false and

malicious accusations of infidelity, together with other sufficiently oppressive conduct, can amount to cruel and inhuman treatment. *Richard v. Richard*, 711 So. 2d 884, 889 (Miss. 1998). However, **good faith** allegations of infidelity do not amount to cruel and inhuman treatment. *See, e.g.*, Deborah H. Bell, BELL ON MISSISSIPPI FAMILY LAW § 4.02(9) (1st Ed. 2005) (noting that "[a]ccusations made in good faith, although ultimately disproved, do not constitute habitual, cruel and inhuman treatment."). *See also Gregory v. Gregory*, 881 So. 2d 840, 845 (Miss. Ct. App. 2003) ("honestly made claims, even when later found to have been erroneous, do not constitute habitual cruel and inhuman treatment."); *Cf. Robison v. Robison*, 722 So. 2d 601, 603 (Miss. 1998) (referring to "habitual *ill-founded* accusations") (emphasis added).

In this case, Donald claimed that Merlene frequently accused him of engaging in extra-marital affairs. However, such accusations could not amount to habitual cruel and inhuman conduct in this case as Merlene had a firm factual basis for the allegations and inquired of Donald in good-faith. As noted above, Merlene discovered that Donald had sent an explicit email to his female secretary which consisted solely of the phrase "good PUSSY." Merlene likewise knew that Donald had viewed pornography on his computer and that he signed up for accounts on dating websites. Donald was frequently out of town for long periods of time on business. Finally, Merlene knew that for a business trip in August 2006 Donald had booked a hotel room for two people, even though he had told her he was traveling alone.

While Donald attempted to explain away these circumstances, they are, at the least, sufficient to give Merlene a good-faith basis for questioning Donald's fidelity. The record is utterly devoid of any unfounded or malicious accusations by Merlene. To hold otherwise would sanction spouses from even inquiring into highly suspicious circumstances indicative of

extramarital affairs. Thus, since Merlene's accusations were not unfounded, and were not pervasive or malicious, the accusations are insufficient to justify a divorce.

The Trial Court also noted that religious zeal could be carried to such extremes as to amount to habitual cruel conduct. In this case, however, there was no such testimony. Both Donald and Merlene were devoutly religious; Donald was a minister for over two decades. Both Donald and Merlene's lives revolved around the church. The only mention of such religiosity was Donald's surmise that Merlene could be involved in "witchcraft" because she had compared his conduct to the devil. The fact that Merlene told her minister-husband that a snake in the marital home represented the devil, and jokingly stated that God had allowed his air conditioner to malfunction, is obviously not the sort of dangerous or infamous conduct which justifies divorce.

Donald also claimed Merlene was cruel when she brought up to him in an argument that a preacher's wife had shot her husband in Selmer, Tennessee. However, during cross-examination admitted that Merlene had never threatened to shoot him. (T. Vol. 4, p. 478). Again, this statement, leveled during a domestic spat, is hardly grounds for divorce.

The most telling part of Donald's testimony is the aspect of Merlene's conduct which he found to be most unbearable. On multiple occasions Donald testified that Merlene's alleged controlling behavior, lack of submission and acting as if she "knows everything" was his most significant problem in the marriage. According to Donald, it was this conduct which "hurt the most."

Of course, this conduct, which Donald concedes was subjectively the most damaging to him, is absolutely not the sort of conduct which warrants a divorce under Mississippi law. Merlene's arguing with Donald about a family dog, or attempting to exert control over other

familial issues, amount to the sort of petty indignities, frivolous quarrels and general incompatibility referred to by the Court in *Howard* as insufficient to warrant a contested divorce.

Clearly, since this insignificant behavior amounted to Donald's most damaging complaint, none of the conduct alleged by Donald could rise to the level of habitual cruel and inhuman treatment.

The strict test for a divorce based on habitual cruel and inhuman treatment is simply not satisfied under the facts of this case. There is absolutely no evidence that Merlene engaged in dangerous conduct or caused Donald to have a reasonable apprehension of danger. Donald clearly did not fear for his physical safety around his wife of twelve years. In fact, even after the conduct culminated with the "bathroom incident" of January 30, 2006, Donald continued to sleep under the same roof and in the same bed as Merlene. Further, the conduct Donald complained of was in the nature of arguments, bickering and perhaps a genuinely disharmonious marriage. As noted, Merlene's "self dominance type thing" was the most significant cruelty to Donald. According to Donald's own testimony, Merlene's dominant behavior hurt him more than any of her other alleged conduct.

The conduct in this case was far less odious that the conduct at issue in cases such as *Stennis* and *Wilson*, where divorce based on habitual cruelty was denied. In sum, the evidence in this case merely proved that Merlene and Donald had frequent arguments, bickered incessantly and were perhaps incompatible, at least after Merlene became "self-dominant." As noted in legions of cases such as *Talbert* and *Morris*, such evidence simply does not warrant a divorce under Mississippi law.

Therefore, the Trial Court committed error in granting a divorce based on habitual cruel and inhuman treatment. This Court should reverse the Trial Court's decision and render judgment here for Merlene.

ARGUMENT II.

THE CHANCELLOR ERRED IN GRANTING A DIVORCE AS THE DIVORCE WAS BARRED BY THE DOCTRINE OF CONDONATION.

This Court has summarized the doctrine of condonation as follows:

> Condonation is the forgiveness of a marital wrong on the part of the wronged party. Condonation may be express or implied. The mere resumption of residence does not constitute a condonation of past marital sins and does not act as a bar to a divorce being granted. Condonation, even if a true condonation exists, is conditioned on the offending spouse's continued good behavior. If the offending party does not mend his or her ways and resumes the prior course of conduct, there is a revival of the grounds for divorce. In practical effect, condonation places the offending spouse on a form of temporary probation. Any subsequent conduct within a reasonable time after resumption of cohabitation which evidences an intent not to perform the conditions of the condonation in good faith, may be sufficient to avoid the defense of condonation, even though the conduct so complained of in and of itself may not be grounds for divorce. An entire course of conduct rule applies. A party's conduct both before and after the alleged condonation can be joined together to establish the cause for divorce.

Cherry v. Cherry, 593 So. 2d 13, 17-18 (Miss. 1991). Thus, even where there is condonation, prior and subsequent conduct can be considered as grounds for divorce if the conduct recurs after condonation. *Lawrence v. Lawrence*, 956 So. 3d 251, 257 (Miss. Ct. App. 2006).

While the doctrine of condonation generally applies to non-continuing causes for divorce, such as adultery, it can also be applied to continuing causes such as habitual cruel and inhuman treatment. *See, e.g., Chaffin v. Chaffin*, 437, So. 2d 384, 386 (Miss. 1983); *Langdon v. Langdon*, 854 So. 2d 485, 490-91 (Miss. Ct. App. 2003).

The Court of Appeals recently accepted a Chancellor's conclusion that a single act of sexual intercourse following a continuing cause for divorce condoned the prior conduct unless

the conduct recurs after the resumption of sexual relations. *Ashburn v. Ashburn*, 970 So. 2d 204, 216 (Miss. Ct. App. 2007). In *Ashburn*, the Court accepted that a voluntary act of sexual intercourse condoned all previous habitual drug use. *Ashburn*, 970 So. 2d at 216. However, when the offending spouse used drugs again after the act of sexual intercourse the doctrine of condonation was no longer a bar to the divorce. *Id.*

In this case, even if Donald had proven habitual cruel and inhuman treatment (which he clearly did not), the doctrine of condonation would nevertheless bar a divorce. Merlene testified that she and Donald had marital sexual relations on February 23, 2006, in a hotel room in New Albany, Mississippi. Donald's testimony regarding resumption of sexual relations was all over the board: Donald gave deposition and trial testimony that he simply did not recall when he last had sex with Merlene; Donald later testified he slept with Merlene in February 2006, but they did not have sex; finally, Donald also gave testimony that he and Merlene had sex in August 2006. (*See* T. Vol. 5, p. 694).

The Chancellor apparently found that Donald had condoned his alleged grounds for divorce. (*See* R. Vol. 2, p. 220) (Chancellor's opinion noting that where condonation has occurred previous offenses are revived by subsequent cruel conduct). However, the Chancellor ostensibly found that Merlene had engaged in subsequent cruelty after the condonation, such that previous conduct could be considered.

This conclusion, however, is not supported by any evidence in the Record. First, as discussed above, Merlene never engaged in any conduct whatsoever that meets the definition of habitual cruel and inhuman treatment under Mississippi law. Thus, her conduct could not have revived this as a ground for divorce. Second, there is no evidence that Merlene engaged in any such conduct after she and Donald last engaged in marital sexual relations.

Accordingly, even had Donald proven grounds for a divorce, based on previous events in the marriage, he necessarily condoned the conduct by resuming normal marital sexual relations. There was no evidence that Merlene continued any actionable conduct thereafter. Accordingly, in any event, the defense of condonation barred a divorce.

Thus, on this basis as well, the Chancellor's decision should be reversed and judgment rendered here in favor of Merlene.

CONCLUSION

The evidence in this case was manifestly insufficient to warrant the grant of divorce under Mississippi law. Merlene's alleged conduct does not come even close to meeting the test for habitual cruel and inhuman conduct. The Mississippi Courts have routinely denied a divorce in cases involving far more severe conduct. To allow a divorce under these circumstances disregards the admonition of *Howard* regarding the severe "nature, gravity, [and] duration of the cruelty required to warrant a divorce" under established Mississippi law. Nothing from the facts of this case showed that this marriage was, in the words of *Howard*, "so gross, unfeeling and brutal as to render further cohabitation impossible." Accordingly, the Chancellor erred in granting a divorce based on these facts.

Finally, even if these facts could meet the strict test for habitual cruel and inhuman treatment under Mississippi law, the Chancellor likewise erred by finding that Merlene had revived the cause for divorce after condonation. The evidence exhibited that Merlene and Donald engaged in normal sexual relations after the complained-of conduct and there was no evidence of cruel conduct after the resumption of sexual relations. Accordingly, in any event, the divorce should have been denied based on condonation.

Accordingly, for the above and foregoing reasons, Merlene respectfully requests the Court to reverse the Judgment of the Chancery Court and to render judgment denying the divorce.

RESPECTFULLY SUBMITTED, this the 17th day of June, 2009.

MCLAUGHLIN LAW FIRM

By: _____

R. Shane McLaughlin (Miss. Bar No. [redacted]
Nicole H. McLaughlin (Miss. Bar No. [redacted]
338 North Spring Street Suite 2
P.O. Box 200
Tupelo, Mississippi 38802
Telephone: (662) 840-5042
Facsimile: (662) 840-5043
E-mail: rsm@mclaughlinlawfirm.com

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

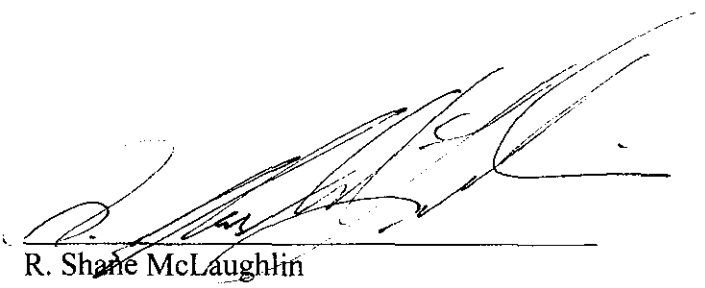
I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

Rebecca Phipps, Esq.
Post Office Box 992
Corinth, Mississippi 38835

D. Kirk Tharp, Esq.
Attorney at Law
Post Office Box 7332
Tupelo, Mississippi 38802

Hon. Jacqueline Estes Mask
Chancellor
Post Office Box 7395
Tupelo, Mississippi 388027395

This the 17th day of June, 2009.



R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

This, the 17th day of June, 2009.

R. Shane McLaughlin