

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES B. YELVERTON

APPELLANT

VS.

NO. 2008-TS-01852

RHONDA YELVERTON

APPELLEE

APPEAL FROM THE CHANCERY COURT OF THE  
FIRST JUDICIAL DISTRICT OF HARRISON COUNTY, MISSISSIPPI

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BRIEF FOR THE APPELLANT  
JAMES B. YELVERTON

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**ORAL ARGUMENT REQUESTED**

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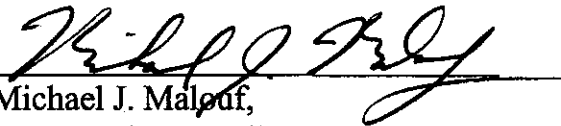
## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal:

- |                                  |   |                         |
|----------------------------------|---|-------------------------|
| 1. James B. Yelverton            | - | (Appellant herein)      |
| 2. Michael J. Malouf, Esq .      | - | (Counsel for Appellant) |
| Melissa A. Malouf, Esq.          |   |                         |
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| 3. Rhonda H. Yelverton           | - | (Appellee herein)       |
| 4. D. Scott Gibson, Esq.         | - | (Counsel for Appellee)  |
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RESPECTFULLY SUBMITTED

BY:

  
Michael J. Malouf,  
Attorney for Appellant

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### **REQUEST FOR ORAL ARGUMENT**

James respectfully submits that oral argument will be of valuable assistance to this Court. Oral argument will ensure a thorough and effective presentation of this appeal to help bring a final conclusion to this matter.

## **STATEMENT OF THE ISSUES**

**The Chancellor Erred In Not Having An Evidentiary Hearing On Remand  
And In Not Basing His Judgment After Remand On Current Facts**

## **STATEMENT OF THE CASE**

The original **Judgment of Divorce** was entered in this cause on April 29, 2004, wherein Appellee Rhonda H. Yelverton (hereinafter “Rhonda”) was granted a divorce from Appellant James B. Yelverton (hereinafter “James”), and was awarded custody of the two (2) minor children born of the parties. James was required to pay child support in the amount of \$2,500 per month, together with periodic alimony in the amount of \$2,500 per month, and lump-sum alimony in the amount of \$250,000, payable at \$5,000 per month. (RE 8) Feeling aggrieved of that judgment, James perfected his appeal to the Supreme Court of Mississippi, and on July 26, 2007, the Mississippi Supreme Court reversed the Chancellor’s judgment and remanded the matter with instructions. (RE 7)

After the remand, counsel for the parties had a telephonic conference with the Chancellor and advised him that the parties were trying to resolve this matter between themselves. (RE 2, p 2; RE 9) Subsequent to that conference, counsel for James attempted unsuccessfully to contact Rhonda’s counsel about the settlement or retrial of this matter. (RE 9) Without further notice from the Chancellor or counsel opposite, James’ counsel received by mail the **Judgment After Remand** entered by the Chancellor on March 5, 2008. That judgment was based on evidence introduced during the original divorce proceedings on **November 17, 2003**, and on **January 20-26, 2004**, and failed to consider the current financial situation of the parties. James immediately filed his Motion for Reconsideration asking for a full hearing on the matter. (RE 3) The Chancellor however refused James’ request to have an evidentiary hearing (RE 4), but did grant James motion

to make a proffer. (RE 5; RE 6) Inasmuch as James has been ordered to pay considerably more than he is capable of paying, he has perfected his appeal of said Judgment After Remand.

### **SUMMARY OF THE ARGUMENT**

#### **The Chancellor Erred In Not Having An Evidentiary Hearing On Remand And In Not Basing His Judgment After Remand On Current Facts**

The **Judgment After Remand** entered by the Chancellor on March 5, 2008, was based upon the evidence received by the Chancellor during the original divorce proceedings on November 17, 2003 and January 20-26, 2004. Despite a specific request by James, the Chancellor refused to have a hearing to determine the current needs and financial abilities of the parties. Based upon the prior trial transcript and exhibits, the Chancellor in his Judgment After Remand made the following ruling:

- A. Reduced child support from \$2,500 per month to \$2,400 per month.
- B. Awarded Rhonda lump-sum alimony in the amount of \$250,000, the same amount as previously ordered, but without a minimum monthly payment.
- C. Reduced periodic alimony from \$2,500 to \$2,000 per month.
- D. Left attorney fees as originally ordered.

James respectfully submits that the Chancellor manifestly abused his discretion in not allowing James an evidentiary hearing, and in not basing his judgment on the current facts and evidence available to him.



## **ARGUMENT**

### **The Chancellor Erred In Not Having An Evidentiary Hearing On Remand And In Not Basing His Judgment After Remand On Current Facts**

The original **Judgment of Divorce** was entered in this cause on April 29, 2004 based upon trial evidence presented on November 17, 2003 and January 20-26, 2004. (RE 8) In that judgment, Rhonda was granted a divorce from James, and was awarded custody of the two (2) minor children born of the parties. James was required to pay child support in the amount of \$2,500 per month, together with periodic alimony in the amount of \$2,500 per month, and lump-sum alimony in the total amount of \$250,000, payable at \$5,000 per month. The Chancellor based that decision on his finding that James owned forty-eight percent (48%) of Yelverton Mitsubishi, and was capable of earning \$12,000 per month after taxes as general manager of that dealership. (RE 8)

After remand, the Chancellor had a telephonic conference with counsel for both parties, and was advised that the parties were attempting to resolve the matter between themselves. (RE 2, RE 9) Subsequent to that conference, James' counsel attempted unsuccessfully to contact Rhonda's counsel about settling or retrying the case. (RE 9) Without further notice, James' counsel received the Judgment After Remand entered on March 5, 2008. (RE 2) Counsel for James immediately filed his Motion For Reconsideration, specifically asking for a full hearing of the matter. (RE 3) That request was denied and the Judgment After Remand remained in effect. (RE 4) Without an evidentiary hearing, the parties did not file current 8.05 Financial Statements as required

by the Uniform Chancery Court Rules, or present testimony or other evidence as to their current financial situation. Even though the Chancellor refused James' request for an evidentiary hearing, he did grant James' motion to make a proffer as to what his testimony would be if allowed a hearing. (RE 5; RE 6) Through proffer, James introduced his 8.05 Financial Declaration showing that he had remarried, had two (2) young daughters, with a third due in January 2009, and had a net monthly income of approximately \$4,700. His financial statement further showed that his monthly living expenses exceeded his income by more than \$1,100 per month. It also showed that he had no assets, real or personal, of any sort and had no savings account, retirement account, or other such asset. James also introduced by proffer his 2004 income tax return showing his adjusted gross income of \$259,490, (RE 11) and his 2005 income tax return showing his adjusted gross income to be \$154,736. (RE 12) Tax returns for subsequent years had not been filed.

James further testified through proffer that he owned no interest whatsoever in the automobile dealership formerly known as Yelverton Mitsubishi, in that his stock had been repossessed in April 2004. (RE 13, p 4) James' proffer further revealed that he was terminated shortly after Hurricane Katrina in August 2005, but was paid through December 2005 at his regular salary of \$10,000 per month gross. (RE 13, p 6) James also testified that his sole source of income was Yelverton Used Car Lot on Pass Road in Gulfport, Mississippi, which he owned with his current wife. (RE 13, p 6) James further testified that even though he and his wife could earn approximately \$10,000 per month

gross income from their used car lot, the bad economy had reduced their gross income to between \$6,000-\$7,000 a month, and he did not anticipate any improvement in the near future. (RE 13, p 6)

The Chancellor in refusing to conduct an evidentiary hearing after remand, had no way of knowing Rhonda's current financial needs or James' current financial abilities. Instead, the Chancellor chose to rely on testimony and evidence introduced more than four (4) years earlier. A review of the Chancellor's ruling demonstrates how the Chancellor all but ignored the mandate of the Supreme Court:

### **I. Child Support**

The Supreme Court in its mandate of July 30, 2007, reversed and remanded the Chancellor's judgment of divorce wherein he awarded \$2,500 a month child support for two (2) children. Specifically, the Supreme Court ruled **On Writ of Certiorari**:

In addition, as explained *infra*, **the chancellor, on remand, will be required to reevaluate James' net worth.** Upon revisiting this issue, should the chancellor decide again to deviate from the statutory guidelines, the chancellor must make a specific, on-the-record finding which overcomes the rebuttable presumption. Because this issue has merit, we reverse and remand to the chancery court. (*emphasis added*) (RE 7)

The Chancellor refused to follow the Supreme Court's mandate to reevaluate James' net worth, and instead reduced child support by \$100 [four percent (4%)], despite the fact that James' income had been reduced by two-thirds of what the Chancellor determined it was four (4) years earlier. (RE 8) The Chancellor further refused to hear and thus consider

that Blake, the older of the two minor children, had been living with James on a full-time basis for more than two (2) years, and was presently enrolled as a freshman at Ole Miss, with James providing all of his college and living expenses. (RE 13, p 4) The Chancellor further refused to consider that Elizabeth, the younger child, had lived with James for eighteen (18) months through February 2008, and moved back and forth between Rhonda and James' residences. (RE, p 4) While James sought sole legal and physical custody of Blake, he asked for joint legal and physical custody of Elizabeth. The Chancellor made no attempt to learn the current needs of the children or obtain financial information from Rhonda, as required by Uniform Chancery Court Rule 8.05.

## **II. Lump Sum Alimony**

The Chancellor in his Judgment After Remand stated:

2. The Supreme Court found that the court needed to **reevaluate James Yelverton's net worth**, and further in calculating lump sum alimony, the Supreme Court found that this Court needed to specifically address each of the factors set forth in *Cheatham v. Cheatham*, 537 So.2d 435, 438 (Miss. 1988), and further in *Ferguson v. Ferguson*, 639 So.2d 921, 928 (Miss. 1994). (*emphasis added*) (RE 2, p 2)

Despite acknowledging such mandate, the Chancellor failed to consider James' current assets or income when he issued his Judgment After Remand. The Chancellor for instance, determined that the Magnolia Place residence had a net worth of \$37,500, yet failed to comprehend that that residence had been foreclosed years earlier, and neither party received any funds from its sale. (RE 3) The Chancellor next spent a great deal of time trying to determine the value of James' interest in Yelverton Imports, Inc., but

refused to acknowledge that James had lost his ownership interest by foreclosure in April 2004. (RE 13, p 4; RE 3) Also, had the Court allowed testimony from the parties he would have learned that the marital residence on Victoria Circle had been sold by the parties years ago, and the equity divided as the Chancellor had instructed.

Though James has no assets, real, personal or otherwise, and has a negative net worth, (RE 10), the Chancellor ordered him to pay \$250,000 lump sum alimony, the same amount ordered in the original judgment of divorce. The only difference is that the Chancellor did not order a minimum payment of \$5,000 per month as originally required, but such unpaid judgment will continually accrue six percent (6%) interest as ordered in the original judgment of divorce. (RE 8)

### **III. Periodic Alimony**

On remand, the Chancellor awarded Rhonda \$2,000 per month in periodic alimony without any testimony or evidence with regard to her needs or James' ability to make such payments. The Chancellor in his Judgment After Remand recognized that Rhonda in 2003 was making \$3,300 a month **part-time** as a registered nurse, and would make substantially more when she began working full-time. The Chancellor however made no effort to determine what her current full-time salary was. James' income, according to his 8.05 financial statement, showed his net income to be approximately \$4,760 per month. The Chancellor, without knowledge of the current financial situation of the parties ordered periodic alimony of \$2,000 a month.

#### **IV. Attorney Fees**

In reversing the Court of Appeals, the Supreme Court in its Writ of Certiorari ruled:

We note that in his petition for writ of certiorari, James did not ask us to consider the Court of Appeals' affirmance of the chancellor's \$10,000 award in attorney's fees for Rhonda; however, as a result of our decision today, the chancellor is not restricted from revisiting this issue as well as all issues raised on appeal. (RE 7, p 18)

In spite of such tacit invitation from the Supreme Court for the Chancellor to reconsider attorney fees, the Chancellor refused to do so. There was no mention whatsoever in the Judgment After Remand concerning attorney fees other than the Chancellor's final mandate that:

**All other provisions of the original judgment of this Court not specifically referenced herein are to remain in full force and effect.** (RE 2, p 16)

The Supreme Court has repeatedly held that attorney fees should not be assessed if the receiving party has sufficient financial ability to pay her own attorney fees. *Haney v. Haney*, 907 So.2d 948 (Miss. 2005). The Chancellor however again awarded Rhonda attorney fees in addition to substantial child support, periodic alimony, and lump sum alimony.

Though the Chancellor refused to have an evidentiary hearing on remand, there is abundant precedence for such hearing. In fact, *Haney* clearly mandates such and was in fact cited by the Supreme Court in its decision **On Writ of Certiorari**. (RE 7, p 8) In

*Haney v. Haney*, 881 So.2d 948 (Miss. App. 2003) (*Haney II*), the Court of Appeals reversed the chancellor for declining to hear additional testimony or conduct a hearing after the case was remanded:

The principle governing this issue is clearly set forth in the leading treatise on chancery practice, which states:

The chancellor should allow whatever amendments are necessary **that he may consider the action as the parties are situated on the date of the remand hearing.** To hold otherwise would not be equitable.

Billy G. Bridges & James W. Shelson, *Griffith Mississippi Chancery Practice* § 700 (2000 ed.) (citing *McKay v. McKay*, 312 So.2d 12 (Miss.1975)). *See also Rainer v. Rainer*, 393 So.2d 475, 477 (Miss.1981)(chancellor correctly sustained motion to amend and consider the cause as the parties were situated on the date of the remand hearing).

Because the values of the non-marital assets from which the lump sum alimony award was to be made were ever changing, based on current market valuations and the lengthy intervening time period, **it was vital that the chancellor consider evidence of any substantial change in value or any disposition of assets to arrive at a just, fair and proper decision.** At a minimum, equity and justice required that the chancellor grant a party an opportunity to present any relevant evidence to establish changed circumstances that may affect a party's ability to comply with the court's final order.

**The proper procedure on remand was for the chancellor to allow testimony regarding the parties' changed circumstances. The principles of equity and justice demand it.** Because he did not, we are of the opinion that the chancellor failed to properly consider the *Cheatham* factors in the award of lump sum alimony. Therefore, we reverse and remand the case for further proceedings consistent herewith. (*emphasis added*) (881 So.2d 864)

In *Theobald v. Nossar*, 784 So.2d 142 (Miss. 2001), the Supreme Court ruled that the chancery court acted properly in holding a hearing on remand to establish definitively the amount of attorney fees owed by defendants, where the Supreme Court had specifically chosen to remand a case rather than render it. In the more recent case of *Weeks v. Weeks*, 2006 CA-01287-COA, the chancellor in that case (who also presides in this case) allowed testimony after the case was remanded. Additionally, several earlier Supreme Court decisions recognize that the chancellor even has authority to allow amendments to pleadings on remand. *Poole v. McCarty*, 103 So.2d 922 (Miss. 1958); *Nichols v. Gaddis and McLaurin, Inc.*, 87 So.2d 673 (1956); *Armstrong v. Jones*, 22 So.2d 7 (1945).

With all due respect, it seems painfully obvious that a chancellor cannot render a fair and equitable ruling without having current facts before him. It seems elementary to argue that parties' financial conditions change, particularly after a four (4) year lapse in time when the paying spouse has suffered the consequences of Hurricane Katrina, had his ownership in a dealership repossessed, lost his residence by foreclosure, and been fired as general manager of his former dealership. For some inexplicable reason, none of these facts seemed to matter to the chancellor who still seemed intent on punishing James, and rendered virtually the same judgment which had been reversed by the Supreme Court. James respectfully requests that the Judgment on Remand be reversed and rendered, or alternatively, the appellate court specifically order that an evidentiary hearing be had on remand.

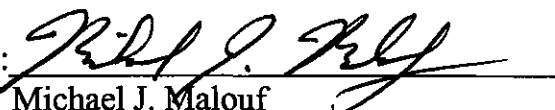


## CONCLUSION

For the above and foregoing reasons, James respectfully requests that the Judgment After Remand of the lower court be reversed and rendered, or alternatively, be remanded for a full and current evidentiary hearing.

RESPECTFULLY SUBMITTED this the 30<sup>th</sup> day of March, 2009.

JAMES B. YELVERTON, Appellant

BY:   
Michael J. Malouf

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**CERTIFICATE OF SERVICE**

I, Michael J. Malouf, Attorney for Appellant, do hereby certify that I have this day mailed, by U. S. Mail, first-class postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLANT to the following:

Honorable Carter Bise  
Harrison County Chancellor  
P. O. Box 1542  
Gulfport, MS 39502

D. Scott Gibson, Esq.  
P.O. Box 208  
Gulfport, Mississippi 39502-0208

DATED this the 30<sup>th</sup> day of March, 2009.

JAMES B. YELVERTON, Appellant

BY:   
Michael J. Malouf