IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-TS-00414

JOHN BOYCE TALBERT, III — APPELLANT

VS.

DEBORAH A. TALBERT — APPELLEE

APPEAL FROM
CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI
CAUSE NO. 2002-0943

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

WILLIAM C. BELL, MSB [redacted]
P. O. BOX 1876
RIDGELAND, MS 39158
601-956-0360/PHONE
601-956-2922/FAX
Attorney for John Boyce Talbert, III,
Appellant

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-TS-00414

JOHN BOYCE TALBERT, III APPELLANT

VS.

DEBORAH A. TALBERT APPELLEE

CERTIFICATE OF INTERSTED 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:

Deborah Talbert, Appellee

Benny M. "Mac" May, Esq.
Counsel for Appellee

John Boyce Talbert, III, Appellant

William C. Bell, Esq.
Counsel for Appellant

This the 20th day of October, 2008.

Respectfully submitted,

WILLIAM C. BELL, MSB [redacted]
Attorney for Appellant

TABLE OF CONTENTS

TABLEOF CASES, STATUTES AND OTHER AUTHORITIES

ADDENDUM

STATEMENT OF THE ISSUES

I. The trial court abused its discretion and/or committed manifest error by finding that Boyce Talbert was not entitled to a termination or downward modification of his alimony and insurance obligations.

   a. The trial court erred as a matter of law by failing to consider the applicable *Armstrong* factors.

   b. The trial court's findings of fact are not supported by substantial credible evidence.

II. The trial court abused its discretion, committed manifest error and erred as a matter of law by modifying and re-writing the parties' divorce judgment regarding the payment of Debby Talbert's uninsured medical expenses.

III. The court abused its discretion, committed manifest error and erred as a matter of law in finding Boyce Talbert in contempt of court regarding a $1,500.00 lump sum alimony payment.

IV. The trial court abused its discretion, committed manifest error and erred as a matter of law by ordering Boyce Talbert to pay Debby Talbert's attorney fees.

V. The trial court abused its discretion, committed manifest error and erred as a matter of law by rejecting and disregarding unrebutted and uncontradicted expert testimony from a certified public accountant who was qualified by the court as an expert witness.

STATEMENT OF THE CASE

John Boyce Talbert, III ("Boyce") and Deborah A. Talbert ("Debby") married February 20, 1988. The Talberts had no children together and divorced on the ground of irreconcilable differences in the Chancery Court of Madison County on May 30, 2003.

As part of the final judgment, the chancery court incorporated the Talbert's "Property Settlement Agreement". The "Property Settlement Agreement" was reached at the conclusion of a lengthy mediation session. Based on the parties' respective financial positions at the time of the mediation, Boyce agreed to pay lump sum alimony of $54,000.00 and periodic alimony of $3,300.00 per month. Boyce also agreed to pay Debby's long term care insurance premium up to $350.00 per month. Boyce also agreed to pay for Debby's health insurance, plus Debby's uninsured expenses up to a monthly cap of $500.00.

In a subsequent 2004 modification and contempt proceeding, the parties agreed that Boyce would continue to pay Debby's health insurance premium and all uninsured medical and dental expenses up to $750.00 per month until such time as Debby is eligible for Medicare.

On October 27, 2006, Boyce filed his Petition for Modification of Final Judgment, in which Boyce alleged that there were material changes in circumstances that warranted a downward modification or elimination of Boyce's alimony and insurance obligations. On February 5, 2007, Debby filed her Petition for Citation of Contempt and for Other Relief. The trial of the parties' respective pleadings began April 26, 2007 and was continued to and completed on July 19, 2007.

The trial court entered its Opinion and Final Judgment on September 26, 2007, denying any and all relief requested by Boyce and finding Boyce in contempt for not paying

a $1,500.00 lump sum alimony payment. Boyce filed his Motion for New Trial and for Other Relief on Friday, October 5, 2007 and his Amended Motion for New Trial and for Other Relief on Monday, October 8, 2007. On February 11, 2008, the trial court entered its Order Denying, in which the trial court denied Boyce's Amended Motion for New Trial and for Other Relief. Boyce filed his Notice of Appeal on March 6, 2008.

STATEMENT OF FACTS[1]

At trial, Boyce presented substantial credible evidence regarding the parties' respective financial positions in 2003 [the divorce] and 2007 [the modification trial]. This evidence was presented through Boyce, Debby, and through a certified public accountant who was designated as an expert and accepted by the court as an expert witness. Deborah Talbert did not rebut or contradict any material financial information provided by Boyce at trial. In fact, Debby admitted to most, if not all, of the changes in her financial situation and needs that support Boyce's request of a modification.

During 2003, when the Talberts divorced, Boyce's total income was $145,774.00. RE 89, lines 11-16. Boyce's total personal income for the first six (6) months of 2007 was $14,545.00, an average of $2,424.00 per month. RE 91, lines 4-14. Boyce paid total alimony and insurance premium obligations during the first six (6) months of 2007 in the amount of $29,655.00. RE 64; exhibit #15.[2] Boyce's periodic alimony obligation for the first six (6) months of 2007 was $19,800.00 (6 x $3,300.00 per month). During the first six (6) months of 2007, Boyce's total alimony and insurance obligations to Debby exceeded his total income by more than $15,000.00. At trial, Boyce presented uncontradicted and

[1] "RE" in this brief refers to "Record Excerpts".
[2] This figure includes periodic alimony and insurance obligations.

unrebutted evidence that he was paying his alimony and insurance obligations from borrowed funds. RE 98, lines 20-26.

Boyce's income for 2006, not including a one-time taxable inheritance from his mother, was ($101,744.00). RE 90, line 29 to RE 91, lines 1-3. Boyce's adjusted gross income for 2006, including his inheritance and alimony obligations, was $31,647.00. *See* Exhibit #5 (2006 Form 1040 return for Boyce). Debby's adjusted gross income for 2006, including alimony and medical obligations, was $78,654.00. RE 96, lines 14-15. Not including Boyce's one-time inheritance from his mother, Debby's adjusted gross income in 2006 was approximately $180,000.00 higher than Boyce's 2006 adjusted gross income. RE 96, lines 22-28. Debby's income from her occupation in 2006 was approximately $67,000.00 higher than Boyce's 2006 income from his occupation. RE 96, lines 7-13.

In order to provide the trial court with income levels over longer periods of time leading up to the 2007 trial, Boyce presented the trial court with the following unrebutted and uncontradicted expert and lay witness evidence regarding his business finances:

1. Boyce's business income for January 1, 2006 through April 2, 2007 was ($22,315.13), an average monthly business income of ($2,527.00) per month. *See* Exhibit #9, page 2
2. Boyce's net business loss for 2006 was ($54,996.00). RE 86, lines 25-27.
3. Boyce's equity in his business at the time of trial was ($2,796.39). RE 97, lines 13-16.
4. At the end of 2006, Boyce's business lost approximately $60,000.00 in recurring revenue due to a loss of three (3) regular clients. *See* Transcript, pages 33, line 16 through page 35, line 10, inclusive.

5. Boyce lost approximately 50% of his business revenue when he lost his clients from his Diamondhead office after Katrina. *See* Transcript, page 30, lines 5-19.

At the time of the 2007 trial, the after-tax cost to Boyce of his alimony and insurance obligations was $4,868.00 per month. RE 104, lines 5-10, and see Exhibit #15. At the time of the divorce, the after-tax cost to Boyce of his alimony and insurance obligations was $3,137.00. RE 101, lines 8-12, and see Exhibit #15.

At the time of the divorce, Debby's income was $0.00. RE 47. The 8.05 financial statement that Debby presented at or just prior to the divorce mediation showed an income of $0.00. RE 47. At the time of the divorce, Boyce negotiated the settlement with the anticipation that Debby would not make any income. See: transcript, page 65, lines 14-27.

At the time of the divorce, Debby's standard of living was a minimum of $10,000.00 per month. See: transcript page 113, lines 11-13. At the time of trial, Debby's standard of living was approximately $4,000.00 per month. See: transcript, page 113, lines 17-19. Debby admitted at trial that her current standard of living is "...roughly 40% of what it was at the time of the divorce. See: transcript, page 113, lines 20-22.

At the time of the divorce, Boyce agreed to pay periodic alimony that was equal to 31.5% of Debby's 2003 standard of living ($3,300.00/$10,462.00=31.5%). See: transcript, page 37, lines 1-18. At the time of trial, Boyce's periodic alimony obligation was more than 82% of Debby's 2007 standard of living ($3,300.00/$4,000.00 = 82.5%).

In spite of Debby's zero income at the time of the divorce, at the time of the modification trial, Debby's annual gross income was $1,830.00 per month. RE 53. At the time of the modification trial, Debby admitted that her health does not prevent her from

working at a job that requires her to be on her feet most of the day and to see 20-25 patients every day. See: transcript, page 148, lines 3-9.

Boyce provided substantial credible evidence that a combination of market competition from other financial planners, hurricane Katrina, increasing difficulty attracting clients with advertising and mailings, the loss of $60,000.00 in steady revenue from three (3) recurring clients and work time lost due to health problems combined to cause a drop in Boyce's business income. See: transcript page 27, line 10 through page 31, line 28 (inclusive).

In the March 8, 2004 modification, Boyce agreed to pay Debby's uninsured medical and dental expenses up to a monthly limit of $750.00. The trial court, in its opinion and judgment, *sua sponte* modified and re-wrote the Talberts' prior agreements regarding medical insurance and the payment of Debby's medical expenses. Debby never filed a Rule 60(b) or any other motion requesting that the court modify, interpret or re-write the Talberts' agreements regarding the payment of Debby's uninsured medical expenses. At no time during the modification trial did Debby ever move for leave to amend her pleadings.

In its opinion and judgment, the trial court awarded Debby $10,000.00 in attorney fees, of which approximately $8,500.00 appear to be attributable to the modification proceeding. Debby never provided proof that she was unable to pay her attorney fees. Since the divorce, Boyce has paid to Debby over $210,000.00 in periodic alimony and lump sum alimony. Debby continues to receive periodic alimony of $3,300.00 per month, and her monthly expenses are less than her monthly income by roughly $500.00 per month.

At the time of the modification trial, Boyce's monthly obligations to Debby exceeded his monthly income by more than $2,400.00. Boyce's personal income for the

first six (6) months of 2007 was $2,424.00 per month (RE 91, lines 10-18) and the after-tax cost of his alimony and insurance obligations in 2007 was $4,868.00 per month (RE 104, lines 5-10).

SUMMARY OF THE ARGUMENT

With all due respect, the trial court abused its discretion, committed manifest error, and erred as a matter of law in refusing to grant Boyce any of the relief he requested in his October 27, 2006 Petition for Modification of Final Judgment.

The record clearly shows that there have been material changes in the parties' circumstances since the Talberts divorced in May of 2003. The trial court erred by not analyzing the *Armstrong* factors. Both parties knew, or should have known, that there are inherent risks when agreeing to permanent periodic alimony. An essential part of permanent alimony is that the alimony is always modifiable upon a showing of a change in circumstances in one or both parties.

By failing to conduct an *Armstrong* analysis and denying all relief requested by Boyce, the trial court saddled Boyce with all of the inherent risk that goes with permanent alimony. In other words, the trial court's ruling insulates Debby from one of, and arguably the most, essential elements of permanent alimony—that it can be modified if circumstances change.

At the time of the divorce, Debby's income was $0.00 and Boyce's income was more than $145,774.00. Boyce's income for 2004 was more than $300,000.00 and included income that he knew was in the works when he entered into the May, 2003 divorce agreement. At the time of the modification hearing, Debby's income was higher than

Boyce's and Boyce's alimony and insurance obligations exceeded his income by more than $2,400.00.

At the time of the modification hearing, Debby admitted that her standard of living and her living expenses dropped to forty percent (40%) of her 2003 standard of living and living expenses. Debby is now able to work almost full time, stay on her feet most of the day, and see 20 to 25 patients each work day.

Debby's 2007 liabilities are less than 1/3 of her 2003 liabilities. Boyce's 2007 liabilities are almost double his liabilities at the time of the 2003 divorce.

At the time of the divorce, the divorce agreement resulted in Boyce paying approximately 31.5% of Debby's living expenses and standard of living. At the time of the modification hearing, Boyce was paying over 82% of Debby's living expenses and standard of living.

At the time of the divorce, the after tax cost of Boyce's obligations was $3,137.00 per month. At the time of the modification hearing, the after tax cost of Boyce's obligations was $4,868.00 per month and exceeded his monthly income by more than $2,400.00.

The material changes in circumstances in either or both parties are grounds for Boyce to get relief from his alimony and insurance obligations. The trial court's rulings satisfy the manifest error and the abuse of discretion standards.

The trial court never found that Boyce acted in bad faith to avoid his alimony and insurance obligations to Debby. The trial court erred by finding certain facts that are not supported by credible evidence. For example, the trial court found that Boyce is ..."more a victim of his poor business decisions catching up with him than a victim of unforeseeable forces." There is no substantial credible evidence in the record to support this and the trial

court's related findings. Even if this finding had some basis, the trial court never made the requisite finding that Boyce must have acted in bad faith in an attempt to avoid his obligations.

The trial court also erred by rewriting, modifying and adding to the Talbert's March 8, 2004 agreement regarding uninsured medical expenses. Without either party asking the court to change the agreement, the trial court "modified" the agreement beyond the four corners of the agreement. Neither party claimed that the language in the March 8, 2004 agreement was ambiguous. Boyce agreed to pay Debby's uninsured medical and dental expenses up to a monthly cap. The trial court proceeded to expand the agreement to include essentially anything that is not paid by insurance up to the monthly cap, even if the charges and services are insured by the policy.

The trial court also erred by finding Boyce in contempt regarding a $1,500.00 lump sum alimony payment that Debby never contested until after Boyce filed for a modification. The evidence at trial showed that Boyce's nonpayment of the $1,500.00 was a bookkeeping error. There was no evidence showing that Boyce willfully violated the court's order. With no showing that Boyce willfully violated the court's order, that court erred by finding Boyce in contempt.

The trial court erred by ordering Boyce to pay $9,263.41 of Debby's attorney fees in defense of the modification. Debby failed to prove that she was unable to pay her attorney fees. Since the divorce, Debby has received over $250,000.00 in alimony, lump sum alimony and proceeds from the sale of the Talbert's home. Debby continues to receive periodic alimony of $3,300.00 per month and her monthly expenses are approximately

$500.00 less than her net income. Therefore, the court erred by awarding attorney fees to Debby.

The trial court also erred by disregarding and rejecting virtually all of the expert testimony and evidence presented through Boyce's CPA, Kenneth G. Walker. Mr. Walker was the only expert witness who testified. Mr. Walker presented substantial evidence and opinions regarding the Talbert's respective financial positions at the time of the divorce in 2003 and during the time leading up to the modification hearings in 2007. Without providing any explanation, the trial court disregarded and rejected the evidence presented by Mr. Walker. The trial court's rejection and disregard of expert testimony and expert evidence in this case is an abuse of discretion, manifest error, and error as a matter of law. Debby never contradicted, rebutted or otherwise attacked the evidence provided by Mr. Walker. Therefore, Mr. Walker's expert testimony and evidence should be binding on the trier of fact. This error alone is grounds for reversal, especially in light of the fact that the trial court never conducted an *Armstrong* analysis.

STANDARD OF REVIEW

The appellate court reviews a chancellor's decisions for manifest error or abuse of discretion. *Clower v. Clower*, 988 So.2d 441, 443 (¶6)(Miss.Ct.App.2008), citing *Holcombe v. Holcombe*, 813 So.2d 700, 703)(¶10)(Miss.2002). "Therefore, we will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or a clearly erroneous legal standard was applied." *Clower* (¶6), citing *Yelverton v. Yelverton*, 961 So.2d 19, 24 (¶6)(Miss.2007). "The word 'manifest' as used in this context is defined as 'unmistakable, clear, plain, or indisputable.'" *Magee v. Magee*, 661 So.2d 1117, 1122 (Miss.1995).

"The chancellor's findings of fact will not be reversed if there is any substantial credible evidence which supports it." *Pacheco v. Pacheco*, 770 So.2d 1007, 1009 (¶8), (Miss.Ct.App.2000).

"The standard of review for questions of law is de novo." *G.B. "Boots" Smith Corporation v. Cobb*, 860 So.2d 744, 777, (¶6), (Miss.2003) (internal citations omitted).

APPELLANT'S ARGUMENT

ISSUE I.[3]

The trial court abused its discretion and/or committed manifest error by finding that Boyce was not entitled to a termination or downward modification of his alimony and insurance obligations.

- **The trial court erred as a matter of law by failing to consider the applicable *Armstrong* factors.**

- **The trial court's findings of fact are not supported by substantial credible evidence.**

Boyce filed his Petition For Modification of Final Judgment on October 27, 2006. See: Clerk's record beginning at page 92. In order to obtain a modification of his alimony, insurance, and medical expense obligations, it is well settled that Boyce must prove by a preponderance of the evidence that there has been a material change in circumstances that could not have been anticipated at the time of the divorce. *Varner v. Varner*, 666 So.2d 493 (Miss.1995).

When the Talberts entered into their "Property Settlement Agreement" on May 22, 2003, both parties knew or should have known that the periodic alimony and insurance premium portions of the agreement could be modified. Professor Debbie Bell points out in her treatise *Bell on Mississippi Family Law* at page 275 that "...modification is an essential feature of permanent alimony" (citing *Hubbard v. Hubbard* 656 So.2d 124, 130 (Miss.1995).

The Court of Appeals in *Jones v. Jones*, 917 So.2d, 95(¶11) (Miss.Ct.App.2005) held that in a modification proceeding, the chancellor must consider the *Armstrong* factors when considering a request for a modification:

[3] Issue I actually contains three (3) argued issues, but combines two (2) sub issues into the primary issue because these three (3) issues are so closely related.

> Not only must the chancellor consider the *Armstrong* factors in initially determining whether to award alimony and the amount of the award, but the chancellor should also consider the *Armstrong* factors in deciding whether to modify periodic alimony, comparing the relative positions of the parties at the time of the request for modification in relation to their positions at the time of the divorce decree.

Jones at 99(¶11), citing *James v. James*, 774 So.2d 1098, 1102 (¶14)(Miss.Ct.App.1998).

"Periodic alimony can be modified by increasing, decreasing or terminating the award due to a material change in circumstances." *Clower* (¶7), citing *Holcombe v. Holcombe*, 813 So.2d 700, 703 (¶11)(Miss.2002). "The material change must be one that was not reasonably anticipated at the time of the original decree." *Clower* (¶6)(internal citations omitted). A material change in the income and expenses of both parties "...should be considered in determining any modification of periodic alimony." *Clower* (¶7), citing *Austin v. Austin*, 766 So.2d86, 90, (¶19)(citing *Armstrong v. Armstrong*).

The *Armstrong* factors that a chancellor must consider when considering a request for a modification of alimony are:

(1) the income and expenses of the parties;

(2) the health and earning capacities of the parties;

(3) the needs of each party;

(4) the obligations and assets of each party;

(5) the length of the marriage;

(6) the presence or absence of minor children in the home;

(7) the age of the parties;

(8) the standard of living of the parties;

(9) the tax consequences of the spousal support order;

(10) fault or misconduct;

(11) wasteful dissipation of assets by either party and

(12) any other factor deemed by the court to be just and equitable in connection with the setting of child support.

See Jones v. Jones, 917 So.2d, 95(¶11) (Miss.Ct.App.2005).

The *Armstrong* Factors

The trial court was manifestly in error, abused its discretion and erred as a matter of law by failing to utilize the applicable *Armstrong* factors to analyze the facts of this case. This is especially true with regard to the *Armstrong* factors that are set out below. In fact, the court's Opinion and Final Judgment reveals that the trial court opinion makes little or no substantive analysis of the *Armstrong* factors. By failing to utilize the applicable *Armstrong* factors in reaching its decision, the trial court allowed Debby to continue to receive alimony and insurance payments that the parties agreed to in 2003 when the relative position of the parties' was much different. The primary *Armstrong* factors [without limitation] that the trial court did not consider or utilize are as follows:

Income and Expenses of the Parties: The record reflects that Debby's income at the time of the divorce was $0.00 and her expenses were in excess of $10,000.00 per month. RE 47-49. Debby admitted at trial that the financial statement that she provided shortly before the mediation showed an income of "zero dollars", that it was truthful. *See* transcript, page 111, lines 2-19. At the time of the modification proceeding, Debby's gross income was $5,130.00 per month, of which $1,830.00 was from her job. RE 53. Debby's expenses at the time of the modification proceedings dropped by more than 60% to approximately $4,000.00 per month. RE 54-56. Debby admitted on cross examination that her 2007

financial statement did not reflect that her mother currently lives with her and pays $450.00 per month towards Debby's expenses. See: transcript page116, lines 4-18.

Boyce's total income at the time of the divorce in 2003 for tax year 2003 was $145,774.00. RE 166, lines 11-16. At the time of the modification proceeding, Boyce's monthly income averaged $2,424.00 per month in 2007. RE 91, lines 10-14. Mr. Walker presented expert testimony and his opinion [unrebutted] that Debby's 2006 income from her occupation was $67,000.00 more than Boyce's 2006 income from his occupation. RE 96, lines 2-13.

The record is devoid of any evidence that Boyce manipulated his income and business fortunes or in some way exhibited bad faith. If there is any bad faith by either party, Debby exhibited bad faith by representing to Boyce at the time of the divorce agreement that her health was such that she could not earn an income, and then moved to Indiana, where she works on her feet much of the day and sees 20-25 patients each day as a dental assistant. See: transcript page 148, lines 3-9.

Debby's current ability to work and earn an income is a material change in circumstances that warrants a reduction in Boyce's alimony obligations. Boyce is not claiming that the court should punish Debby for being resourceful and obtaining employment. To the contrary, Debby's new-found ability to work practically full time and on her feet for much of the day and earn an income is a material change that was not anticipated at the time of the divorce. Debby admitted that her 2003 income at the time of the divorce agreement was $0.00.

At the time of the divorce agreement, Debby's expenses were more than $10,000.00 per month. RE 49. Debby's monthly expenses at the time of the modification proceeding

dropped by approximately sixty percent (60%) to $4,051.00. RE 56. This substantial and material reduction in Debby's living expenses, coupled with Debby's ability to work almost full time are grounds for a modification in favor of Boyce.

"An award of alimony can only be modified where it is shown that there has been a material change in the circumstances of one or both of the parties" (emphasis added). *Varner v. Varner*, 666 So.2d 493, 497 (Miss.1995). When a party requests a modification, the court can modify Boyce's obligations based not only on a change in Boyce's circumstances, but also on a change in Debby's circumstances. With all due respect, the chancellor erred by not recognizing that the evidence showed a material change in circumstances not only with Boyce's income, but with both parties' income and expenses. Boyce's income decreased markedly, while Debby's income increased from $0.00 to over $1,800.00 per month, in spite of Debby's claims that her income at the time of the divorce was $0.00. Boyce relied on Debby's representations that her income was $0.00 and that her expenses were more than $10,000.00 when he entered into the divorce agreement. See: transcript page 36, line 13 through page 37, line 4, inclusive.

"The law is well-settled that, if an obligor, acting in bad faith (emphasis added), voluntarily worsens his financial position so that he cannot meet his obligations, he cannot obtain a modification of support." *Clower*, (¶9), citing *Parker v. Parker*, 645 So.2d 1327, 1331 (Miss.1994). Given the material changes in circumstances that are reflected in the record, and the lack of a finding of any bad faith on the part of Boyce, Boyce is entitled to a modification of his alimony, insurance, and medical obligations.

Health and Earning Capacities of the Parties

Since the divorce agreement, Boyce's earning capacity deteriorated due to his unanticipated glaucoma surgeries. Boyce was sixty-four (64) years old at the time of the trial. *See*: transcript page 8, lines 24-25. Boyce testified that his glaucoma required eight (8) surgeries over a period of two (2) years that repeatedly interfered with his work schedule. *See*: transcript page 26, line 16 through page 28, line 14, inclusive. Debby, while still claiming to have health problems, is now able to work on her feet for much of each day with a thirty-five (35) hour per week schedule. In addition, the court totally disregarded uncontradicted testimony from Boyce that he has not made any decisions that reduced his business income and business revenue. *See*: transcript page 39, line 16-28. The court totally failed to consider these material changes in the relative position of the parties regarding their health and earning capacities.

Needs of Each Party

Debby admitted that her needs were much less at the time of the modification trial than at the divorce. Debby admitted that her monthly living expenses were $4,051.00 at the time of the modification hearing. *See*: transcript page 114, lines 1-3. At the time of the divorce agreement, Debby's monthly living expenses were more than $10,000.00. RE 49. Debby has no dependents and lives with her mother. The trial court totally failed to consider this large reduction in Debby's needs. The record clearly reflects that Debby's needs since the divorce have dropped by approximately 60%. The chancellor was manifestly in error and abused her discretion by not considering this drastic reduction in Debby's needs.

Obligations and Assets of Each Party

At the time of the modification proceeding, Debby's only obligations were her mortgage, home equity line and her vehicle loan, totaling $55,793.00. RE 59. At the time of the divorce, Debby's obligations (i.e. liabilities) were $169,649.41. RE 51.

The trial court seems to take the position that Boyce can simply pay Debby's alimony, uninsured medical expenses, and insurance obligations from his assets. The record reveals the following about Boyce's assets at the time of the modification trial:

Assets (RE 74-75):

. Real estate:	$105,000.00
	$ 36,667.00 [1/3 interest in South Carolina property]
b. Vehicle and personal property	$337,123.00
c. Liquid Capital Cash on hand	$120,000.00
Total assets:	$598,790.00

Liabilities:

a. Listed on 8.05 [RE 76]	$281,400.00
b. Owed to JBT III, Inc.	$185,000.00 (RE 98, line 27 through RE 100, line 6)
Total liabilities:	$466,400.00 (RE 100, lines 2-6)

Boyce's liabilities at the time of the divorce, including the parties' mortgage, totaled $235,493, roughly ½ of Boyce's current liabilities. *See* Exhibit #1.

The trial court erred by not considering the Talbert's assets and liabilities and makes no analysis whatsoever about this critical *Armstrong* factor. Clearly, Boyce is not in a position to continuously fund his obligations to Debby from his assets, especially given his

business results in the months leading up to the trial. Importantly, Boyce's assets include the assets that reflect Boyce's inheritance from his mother. Unfortunately, if the lower court ruling stands, Boyce would be forced to continue to pay his obligations from borrowed funds and/or use the money that his mother earned from her efforts, to pay Debby.

The chancellor committed manifest error, abused her discretion and erred as a matter of law by not considering the material changes in the parties' obligations and assets since the divorce.

The Standard of Living of the Parties

Debby admitted that at the time of the divorce, her standard of living was a minimum of $10,000.00. RE 78. Debby also admitted that her standard of living at the time of the modification trial was $4,000.00 per month. RE 78. Debby admitted that her standard of living has decreased materially since the divorce and that her current standard of living is 40% of her standard of living at the time of the divorce. RE 78, lines 11-22 To illustrate and substantively prove how Boyce's alimony obligations had changed since the divorce, Boyce showed the trial court that at the time of the divorce, the Talbert's agreement resulted in Boyce providing Debby with approximately 31.5% of her standard of living. *See*: transcript page 37, lines 1-18. At the time of the modification proceeding, the changes since the divorce now result in Boyce providing Debby with more than 82% of her standard of living----clearly a material change.

Debby's lower standard of living is a material change in circumstances that supports a modification of Boyce's alimony and insurance obligations. The trial court abused its discretion, manifestly erred, and erred as a matter of law by never addressing or considering

the evidence in the record regarding Debby's large and material decrease in her standard of living.

The Tax Consequences of the Spousal Support Order

Boyce presented substantial and unrebutted expert testimony regarding the changed tax consequences of Boyce's alimony and insurance obligations. This expert testimony presented the chancellor with detailed testimony and evidence about the tax implications at the time of the divorce and the tax implications at the time of the modification trial. Boyce's expert witness, Kenneth G. Walker, a certified public accountant, presented the following evidence and opinions regarding the tax implications of the alimony and insurance payments:

0. After tax cost to Boyce in 2003: $3,137.00 per month (RE 101, lines 8-12).

0. After tax cost to Boyce in 2007: $4,868.00 per month (RE 104, lines 5-10).

Debby never rebutted or contested Boyce's expert witness testimony regarding the tax implications of Boyce's obligations. Clearly, the tax consequences of Boyce's alimony and insurance obligations changed materially since the divorce. At the time of the 2007 modification trial, Boyce's alimony and insurance obligations not only exceeded his income, but Mr. Walker rendered an opinion that the tax benefits in 2007 would be "...very little". RE 104. There was no evidence that Boyce's changed circumstances since the divorce were the result of bad faith by Boyce. The chancellor abused her discretion, was manifestly in error, and erred as a matter of law by never considering or in any way addressing the tax consequences and the material changes in the tax consequences of the alimony and insurance premium payments.

Findings Not Supported By Substantial Credible Evidence

In its decision, the trial court reached a number of conclusions and findings that are not supported by credible evidence in the record, and which separately or when taken together, constitute grounds for reversal, including, but not limited to the following:

. The chancellor erroneously found that Boyce's "...current financial condition is the product of his own spending habits, investments and career decisions...". RE 36. There is no credible evidence in the record to support this finding by the chancellor. In fact, the overwhelming and unrebutted evidence in the record shows that Boyce's negative business results were due to forces beyond his control, such as increased competition, hurricane Katrina, the loss of three (3) recurring clients, increasing difficulty obtaining clients, and Boyce's glaucoma. *See*: transcript page 27, line 10 through page 31, line 28 (inclusive).

This finding by the chancellor formed the basis of the chancellor's reasoning for denying Boyce's modification request. Even if, for sake of argument there was evidence in the record to support this critical finding, the chancellor's use of this standard for denying an alimony modification is error as a matter of law. In *Clower v. Clower*, 988 So.2d 441 (Miss.Ct.App.2008), the appeals court stated the well settled rule that "...if an obligor, acting in bad faith (emphasis added), voluntarily worsens his financial position so that he cannot meet his obligations, he cannot obtain a modification of support." *Clower* (¶9), citing *Parker v. Parker*, 645 So.2d 1327,1331 (Miss.1994). Importantly, the chancellor in the instant case never found that Boyce acted in bad faith, as required by and as set out in *Clower v. Clower.*

In fact, the record reflects that there was never any credible evidence presented that Boyce's business decisions were made in bad faith. There was never any credible evidence presented that Boyce's "investments" and "career decisions" were in bad faith.

Therefore, this critical finding by the trial court that Boyce's present financial condition is the product of his own voluntary decisions is without support in the record and; further, there is no evidence that Boyce acted in bad faith. To the contrary, Boyce presented unrebutted expert testimony that Boyce was paying his obligations to Debby from borrowed funds. RE 175, lines 23-26.

b. The chancellor also found that "Rather than save this money (inherited from his mother) or conservatively invest it, Boyce chose to invest approximately $100,000.00 into a company called Liquid Capital...". RE 36. The record reveals that the evidence presented by Boyce was that his investment in Liquid Capital was an ongoing attempt to replace lost income, which is not evidence of bad faith. The chancellor did not make the requisite finding that Boyce's investment was in bad faith, and there is no evidence in the record showing that Boyce's business decisions were in bad faith, as required by *Clower v. Clower.* Furthermore, this analysis by the trial court failed to consider that Boyce's income was negative.

c. The chancellor also found that "The evidence presented revealed that Boyce is more a victim of his poor business decisions catching up with him than a victim of unforeseeable forces." RE 37. With all due respect, the chancellor in her opinion never cited one single piece of evidence in this record to support her finding that Boyce is a victim of poor business decisions. Even if for sake of argument this finding had some support in the record, the chancellor still erred as a matter of law by denying the modification because

with this and all of the trial court's findings, the chancellor never made the requisite finding that Boyce worsened his financial position in a bad faith effort to avoid his obligations.

The trial court never defines or cites what it considers to be Boyce's "poor business decisions" and never ties these claimed poor business decisions to the court's finding of how the court claimed that these poor business decisions were "catching up with" Boyce. The ultimate effect of the chancellor's findings about Boyce's business decisions is to shield Debby from the risk of a change in circumstances, and placing all risk of business fortunes on Boyce. Debby could have avoided some or all of this risk by insisting on flows of money that were not modifiable, such as lump sum alimony. The chancellor's findings allow Debby to totally insulate herself from the risks of future events that are inherent in periodic alimony. Periodic alimony, by definition, involves inherent risks for both parties. Professor Debbie Bell points out in her treatise *Bell on Mississippi Family Law* at page 275 that "...modification is an essential feature of permanent alimony" (citing *Hubbard v. Hubbard* 656 So.2d 124, 130 (Miss.1995). The trial court's denial of a modification with these facts places 100% of this risk on Boyce and allows Debby to avoid the risks associated with an essential feature of permanent alimony.

d. The trial court found that "...an increase in the cost of health insurance premiums should have been reasonably anticipated by the parties in 2003". RE 37. The chancellor then proceeds to deny Boyce's request for relief on "this point". RE 38. By denying relief regarding insurance premiums, the trial court committed manifest error and abused its discretion because, while increasing premiums are an issue, Boyce based his modification request on material changes in circumstances that were not directly related to increasing premiums. Boyce presented unrebutted evidence that his business fortunes and income

level dropped drastically since the divorce. Boyce also presented unrebutted evidence that the tax benefits to him of providing insurance and alimony dropped to $450.00 for the first six (6) months of 2007. RE 181, 3-4.

Therefore, the trial court was manifestly in error and abused its discretion by simply basing its finding about insurance premiums on the court's belief that the parties' should have reasonably anticipated the increased premiums. Boyce's worsened financial condition and drastically reduced income and tax benefits are material changes in circumstances that were not anticipated at the time of the divorce.

In order to survive review on appeal, the chancellor's findings must be supported by substantial credible evidence in the record. "The chancellor's findings of fact will not be reversed if there is any substantial credible evidence which supports it." *Pacheco v. Pacheco*, 770 So.2d 1007, 1009 (¶8), (Miss.Ct.App.2000). The trial court's findings and rulings are not supported by substantial credible evidence. This Court should reverse and render, or reverse and remand to the trial court for entry of a judgment that provides substantive relief to Boyce.

Boyce Proved His Claim for a Modification

By any measure, Boyce proved by a preponderance of the evidence that there has been a material change in circumstances since the divorce. Boyce's income is less than Debby's income. Boyce's income for fifteen (15) months leading up to the trial was negative. Boyce presented unrebutted evidence that his business decline was due to forces beyond his control, and there was no credible evidence presented that the material changes were due to Boyce's bad faith. Debby is now able to work, when, by her own admission, she represented to Boyce at the time of the divorce agreement that her health prevented her

from working. Boyce now provides over 82% of Debby's expenses and standard of living, when the divorce agreement resulted in Boyce providing roughly 31.5% of Debby's living expenses. Debby's expenses and standard of living have dropped to roughly 40% of her expenses and standard of living at the time of the divorce. Debby's adjusted gross income for 2006 was $180,000.00 higher than Boyce's 2006 adjusted gross income. RE 96. After adding in Boyce's inheritance from his mother, Debby's adjusted gross income in 2006 exceeded Boyce's adjusted gross income by $47,007.00. RE 96.

It is difficult to imagine how one can argue that Boyce is not entitled to a modification of his obligations. It is difficult to imagine that these kinds of material changes in the relative positions of the parties do not support modification.

An appellate court can find manifest error when the appellate court, upon review of the record, can determine that the trial court's ruling contains error that is "...unmistakable, clear, plain, or indisputable.'" *Magee v. Magee*, 661 So.2d 1117, 1122 (Miss.1995). In the instant case, with all due respect, the trial court's findings and rulings are clearly, unmistakably, plainly and indisputably in error.

In addition, the chancellor applied the wrong legal standard as set out in *Clower* by basing her decision in large part on the trial court's finding that Boyce's "...current financial condition is the product of his own spending habits, investments and career decisions." RE 36. The trial court then refers to "...his poor business decisions catching up with him...". RE 37. The trial court never found that Boyce acted in bad faith to avoid his obligations and Debby never presented any evidence that Boyce acted in bad faith to avoid his obligations.

This court should reverse and render; or in the alternative, remand this case to the trial court for entry of a judgment reducing or terminating Boyce's alimony, insurance and medical and dental obligations.

ISSUE II.

The trial court abused its discretion, committed manifest error and erred as a matter of law by modifying and re-writing the parties' divorce judgment regarding the payment of Debby's uninsured medical expenses.

In the 2003 divorce agreement, the Talberts agreed to the following regarding Debby's uninsured medical expenses:

> Husband shall pay Wife's health insurance and all uninsured medical and dental expenses until such time as Wife is eligible for Medicare benefits. Husband's responsibility for uninsured expenses shall be limited to $500.00 per month.

RE 13.

In a subsequent 2004 agreed modification, the Talberts agreed to strike the 2003 paragraph, and entered into the following agreement regarding Debby's uninsured medical expenses:

> Husband shall pay Wife's health insurance premium and all uninsured medical and dental expenses up to $750.00 per month until such time as Wife is eligible for Medicare benefits. The deductible on Wife's health insurance policy shall be set at not more than $4,000.00.

RE 22.

In her September 26, 2007 *Opinion and Final Judgment* (RE 40-42), the chancellor re-wrote and revised the Talbert's agreement regarding uninsured medical expenses by defining uninsured medical expenses as: "...all bills not covered by insurance whether the bill is for a deductible amount, a percentage not covered by insurance, or a procedure/treatment rejected by insurance coverage." RE 42.

The trial court stated in its opinion that "This court is now being asked to provide a meaning for the phrase "uninsured medical and dental expenses". RE 42. The record is devoid of any evidence that either party asked the trial court to provide a meaning for the phrase "uninsured medical and dental expenses...." Debby never moved the court to interpret and/or modify the Talbert's agreement regarding uninsured medical expenses. Debby never filed a Rule 60(b) motion asking the court to award any relief from the 2004 modification or the 2003 divorce agreement. While Debby claims to have a conflicting interpretation of the meaning of "uninsured", Debby never claimed that the "uninsured" language was ambiguous. The trial court classified its expansion of the agreement as an "interpretation". RE 42. The end result of this "interpretation" is an expansion of the medical expenses that Boyce would have to pay, over and above Debby's uninsured medical expenses.

The Talbert's agreement regarding payment of insured expenses is clear and unambiguous. "The parties are bound by the language of the contract where a contract is unambiguous. The mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law." *Ivison v. Ivison*, 762 So.2d 329, 335 (¶16)(Miss.2000), citing *Delta Pride Catfish, Inc. v. Home Ins. Co.*, 697 So.2d 400, 404 (Miss.1997).

"It is fundamental in contract law that courts cannot make a contract where none exists, nor can they modify, add to, or subtract from the terms of a contract already in existence." *Ivison v. Ivison* at ¶23), citing *Wallace v. United Miss. Bank*, 726 So.2d 578, 585-85 (Miss.1998). "A court cannot draft a contract between two parties where they have

not manifested a mutual assent to be bound." *Ivison* at¶(23), citing *A. Copeland Enterprises v. Pickett & Meador, Inc.*, 422 So.2d 752, 754 (Miss.1982).

The Talbert's agreement does not require that Boyce pay deductibles, uncovered percentages, or other procedures that are covered by the policy, but are not paid. If Debby intended for Boyce to pay her deductibles, co-pays and covered [but unpaid] medical and dental expenses, then this language could have and should have been included in the agreement. For example, Debby could choose to undergo a medical or dental cosmetic procedure that is excluded from coverage and is therefore uninsured. Boyce would be liable for an uninsured medical or dental procedure up to the agreed monthly cap of $750.00.

Another prime example of how the trial court erred in rewriting the Talberts' agreement is in the area of deductibles. In order to qualify towards a deductible on an insurance policy, the charge that is incurred must be covered. For instance, an insured on a policy cannot satisfy a deductible utilizing an uninsured service. In the instant case, the trial court's modification of the agreement now requires Boyce to pay for insured and covered procedures that are applied to the deductible, when the Talberts only agreed that Boyce would pay uninsured medical and dental expenses up to a certain amount each month. If Debby intended for Boyce to pay some or all of her deductible, then such a provision should be in the Agreement or in the 2004 modification. In support of this argument, the record reflects that Debby even admitted that if her deductible were zero, that her policy would pay all of the charges that would have applied to the deductible. RE 79, line 29 to RE 80, lines 1-3. Clearly then, the deductible amounts are insured and covered charges, and are not "uninsured".

The unilateral modification of the Talbert's agreement regarding medical and dental expenses now requires Boyce to not only pay uninsured medical and dental expenses [as he agreed], but also requires that Boyce pay insured medical and dental expenses, deductibles, copays, and other charges that are insured and covered by, but are not paid by Debby's insurance policy. This wholesale re-writing of the agreement by the trial court clearly expands Boyce's liability for medical and dental expenses and goes far beyond the four corners of the Talbert's agreement. A court has no authority to "...modify, add to, or subtract from the terms of a contract already in existence." *Ivison v. Ivison* at ¶(23)(internal citations omitted here).

Debby never filed a Rule 60(b) motion seeking relief from the agreement and never filed a petition seeking a modification of her agreement with Boyce that he pay her uninsured medical and dental expenses up to a monthly cap. Even if, arguendo, Debby filed a Rule 60(b) motion or a petition to modify, the chancellor would still be without authority to modify, add to, or subtract from the terms of the Talbert's uninsured medical and dental expense agreement. Certainly, then, it follows logically that in the absence of a Rule 60(b) motion or a petition, the court was without authority to unilaterally and sua sponte modify the agreement without notice to Boyce.

Debby's claimed misunderstanding of the term "uninsured" is in the nature of accident or mistake. Therefore, in order to obtain relief from the March 8, 2004 modification agreement because Debby was mistaken about or misunderstood the meaning of the term "uninsured", Debby would have had to file a motion for relief under Rule 60(b) of the *Miss. Rules of Civil Procedure* on or before September 8, 2004. The record reflects that Debby did not file a Rule 60(b)(1), (2) or (3) motion within six (6) months and that she

never filed any such motion. The record also reflects that Debby never filed for relief under Rule 60(b) 4, 5 or 6. Even if, for sake of argument, Debby were entitled to relief from the March 8, 2004 modification agreement on the ground of accident or mistake, the chancellor was without authority to grant any such relief. "The Mississippi Supreme Court has held that 'where the grounds of rule 60(b)(1),(2) and (3) are the basis for action, the court is without authority if the motion is not made within the six month time period.'" *Jenkins v. Jenkins*, 757 So.2d 339 (¶10)(Miss.Ct.App.2000), citing *Overby v. Murray*, 569 So.2d 303, 305 (Miss.1990).

Debby had avenues at law available to her through Rule 60(b) and through the court's authority under Miss. Code Section 93-5-23 to seek a modification, alteration or other relief from the March 8, 2004 Agreement. Debby never availed herself of any rule or law under which she could have sought relief. The court, without any pleading or request for relief from Debby, fashioned relief that she never requested. The chancellor never cites Section 93-5-23 as the basis for modifying the Talbert's March 8, 2004 Agreement, and cites the court's "power of equity" to add additional terms regarding how Boyce is to repay any sums submitted by Debby. RE 43. "Courts of equity cannot modify or ignore an unambiguous statutory principle in an effort to shape relief." *Estate of Smith v. Smith*, 891 So.2dc 811, 813, (¶5)(Miss.2005)(internal citation omitted).

The chancellor was manifestly in error, abused her discretion and erred as a matter of law by modifying, adding to, or in any way re-writing the parties' March 8, 2004 Agreement regarding the payment of Debby's uninsured medical and dental expenses. This portion of the chancellor's ruling should be reversed and rendered.

ISSUE III.

The chancellor abused her discretion, committed manifest error and erred as a matter of law by finding Boyce in contempt of court regarding a $1,500.00 lump sum alimony payment.

The chancellor abused her discretion, committed manifest error and erred as a matter of law by finding Boyce in contempt of court for not paying a $1,500.00 lump sum alimony payment. Debby never took any affirmative steps to address this issue until after Boyce filed for a modification. Boyce testified that because the $1,500.00 lump sum payment was the same amount as the temporary alimony payments that predated the divorce, he inadvertently classified a $1,500.00 temporary alimony payment as a lump sum alimony payment.

Debby never presented any evidence that Boyce willfully or contumaciously avoided this obligation. In fact, Boyce agreed at trial that undercounting the $1,500.00 payment was a bookkeeping error and he agreed to pay. *See*: transcript page 90, lines 4-16. "The behavior necessary for a finding of contempt must amount to a willful or deliberate violation of a judgment or decree." *Goodson v. Goodson*, 816 So.2d 420, 423 (¶4)(Miss.Ct.App.2002)(internal citations omitted).

The chancellor abused her discretion, committed manifest error and erred as a matter of law by finding Boyce in contempt of court when the evidence presented at trial clearly showed that this error was an accounting error and not a willful or deliberate violation of the court's prior order.

This court should reverse and render the trial court's finding of contempt regarding the $1,500.00 lump sum alimony payment.

ISSUE IV.

The trial court abused its discretion, committed manifest error and erred as a matter of law by ordering Boyce to pay Debby's attorney fees for the modification action.

In order to obtain an award of attorney fees for defending the modification, Debby would have to prove that she was financially unable to pay her attorney. The trial court awarded Debby attorney fees in the amount of $9,263.41 for her defense of the modification. RE 39.

The chancellor abused her discretion, committed manifest error and erred as a matter of law by awarding Debby any sum for defense of the modification petition because Debby failed to establish that she was unable to pay her attorney fees.

Since the divorce, Boyce has paid to Debby over $250,000.00 in periodic alimony, lump sum alimony and proceeds from the sale of the Talbert's home. *See*: transcript page 118, lines 3-23. Debby continues to receive periodic alimony of $3,300.00 per month, and Debby's income exceeds her expenses by approximately $500.00 per month after including the household expenses paid by her mother. "Generally, if a party is financially able to pay an attorney, then an award of such fees is inappropriate." *Bruce v. Bruce*, 687 So.2d 1199, 1203 (Miss.1996)(internal citation omitted). "The party requesting attorney's fees has that burden of proof on that issue...If the record does not demonstrate the wife's inability to pay her attorney's fees, then an award of the fees is an abuse of discretion." *Deen v. Deen*, 856 So.2d 736, 739, (¶16)(Miss.Ct.App.2003), citing *Benson v. Benson*, 608 So.2d 709, 712 (Miss.1992).

Debby failed to meet her burden of proving that she was unable to pay her attorney fees. It is not incumbent on Boyce under *Deen* to prove that Debby can pay her attorney

fees. The burden is on Debby to show that she cannot pay her attorney fees. Because Debby failed to meet her burden of proving an inability to pay her attorney fees, this court should reverse and render the award of attorney fees.

ISSUE V.

The trial court abused its discretion, committed manifest error and erred as a matter of law by rejecting and disregarding unrebutted and uncontradicted expert testimony from a certified public accountant who was qualified by the court as an expert witness.

Boyce presented substantial expert testimony from Kenneth G. Walker, a certified public accountant. Mr. Walker is a certified public accountant in Brandon, Mississippi who has been practicing for twenty-three (23) years. RE 81. Mr. Walker is clearly respected by his peers, as evidenced by his sitting on the statewide CPA peer review committee for approximately ten (10) years. RE 82.

Debby presented no expert testimony to rebut Mr. Walker's testimony and opinions. Mr. Walker provided testimony that covered twenty-four (24) transcript pages, several exhibits, and additional testimony on cross examination and re-direct examination.

With all due respect, the chancellor abused her discretion and committed manifest error by rejecting all of the testimony and evidence presented by Mr. Walker. In support of this assignment of error, one need only review the *Opinion and Final Judgment* entered by the trial court on September 26, 2008. RE 32-45. In its *Opinion and Final Judgment*, the trial court, in the face of substantial and credible expert testimony from Mr. Walker, only makes a fleeting reference to Mr. Walker's testimony one time on page six (6) of the opinion. RE 37.

With this fleeting reference to Mr. Walker, the trial court even draws conclusions that are not supported by the record. This fleeting reference to Mr. Walker is where the trial court states that "Mr. Walker testified regarding his (Boyce's) reduced income and expenses." RE 37. The trial court then proceeds to assign weight to a pay raise for an employee (without citing a number), CPA rates (without citing a number) and the increase in salary for officers (without citing a number). RE 37.

The chancellor then proceeds to find that "The evidence presented revealed that Boyce is more a victim of his poor business decisions catching up with him than a victim of unforeseeable forces." RE 37. This finding is not supported by any credible evidence, and certainly is not supported by any evidence that Mr. Walker presented.

For example, Mr. Walker rendered an expert opinion that if Boyce's revenue remained constant from 2006, and Boyce were to reduce his expenses by $50,000.00, then he would still only "break even" in 2007. RE 94, lines 6-12. The chancellor also rejected and disregarded other expert testimony from Mr. Walker regarding Boyce's personal and business income and expenses, the tax implications of the alimony and insurance obligations, and Debby's income relative to Boyce's income.

Another example of error by the trial court in rejecting and disregarding unrebutted expert testimony is found in the exchange regarding Boyce's 2007 personal income. Mr. Walker testified that Boyce's personal income for the first six (6) months of 2007 was $2,424.00 per month. RE 91, lines 10-18. Mr. Walker presented expert testimony that the monthly after-tax cost of the alimony and insurance obligations to Boyce at the time of trial was $4,868.00 per month (RE 104, lines 5-10). Boyce's 2007 monthly after-tax cost of alimony and insurance obligations therefore exceeded his 2007 monthly income in the first

six (6) months of 2007 by more than $2,400.00 per month. The trial court erred by totally disregarding and not even discussing in an *Armstrong* analysis this critical and unrebutted testimony regarding the parties' income and the increase in the after-tax cost of the alimony and insurance obligations.

Yet another example of error by the trial court in rejecting and disregarding unrebutted expert testimony is found later in Mr. Walker's testimony when Mr. Walker compares the Talbert's 2006 income from their respective occupations. Mr. Walker testified that due to Boyce showing a loss in his business, Debby's 2006 income from her occupation was $67,000.00 more than Boyce's 2006 income from his occupation. RE 96, lines 2-13. The trial court rejected and totally disregarded this testimony.

The trial court also erred by rejecting and disregarding the difference in the Talbert's adjusted gross incomes for 2006, which was the last year for which tax returns were available. Debby's adjusted gross income for 2006 was $78,654.00. RE 96, lines 14-15. Boyce's adjusted gross income for 2006 was $31,647.00, including the inheritance from his mother. RE 96, lines 16-21. Mr. Walker then rendered his expert opinion that without the inheritance from his mother, Debby's 2006 adjusted gross income was $180,000.00 higher than Boyce's 2006 adjusted gross income. RE 96, lines 22-29 and RE 97, lines 1-2. In fairness, even if the court were to subtract Debby's alimony and medical obligations that are included in her adjusted gross income, the difference is still well over $100,000.00.

The trial court's wholesale rejection and disregard of the unrebutted testimony and evidence submitted by Mr. Walker is an abuse of discretion, manifest error and error as a matter of law. The chancellor arbitrarily, without explanation, rejected and disregarded all of the expert testimony and evidence from Mr. Walker. This is not a case of dueling

experts, where the chancellor would have the discretion to assign weight to and adopt the opinions of the expert that the chancellor deems to be most credible. The chancellor simply cannot arbitrarily reject and disregard expert testimony that is not rebutted or contradicted—especially when the trial court is presented with only one (1) expert.

In the Talbert case, there was only one (1) expert. Debby never contradicted any of the figures and opinions presented by Mr. Walker. "It is well settled law that the weight to be accorded expert opinion evidence is solely within the discretion of the judge sitting without a jury. While he may not arbitrarily fail to consider such testimony, he is not bound to accept it. In the final analysis, the trier of fact is the final arbiter as between experts whose opinions may differ...." *Pittman v. Gilmore*, 556 F.2d 1259, 1261 (5thCir.1977). The *Pittman* case from thirty-one (31) years ago was a case of dueling experts and accurately states the current rule in Mississippi. Presented with dueling experts, the court in *Pittman*, sitting in a bench trial, had the discretion to act as the final arbiter as between experts, and to thereby reject or disregard expert testimony. The Talbert case is not a case of dueling experts that would give the chancellor the discretion to reject or disregard Mr. Walker's unrebutted and uncontradicted expert testimony.

The expert testimony and evidence that Boyce presented through his CPA in support of his modification was never rebutted, was never contradicted and was never shown to be untrustworthy. The expert testimony and evidence from Mr. Walker is entitled to the following treatment and standing in this action:

> Evidence which is not contradicted by positive testimony or circumstances, and is not inherently improbably, incredible, or unreasonable, cannot be arbitrarily or capriciously, discredited, disregarded, or rejected, even though the witness is a party or interested; and unless shown to be untrustworthy, is to be taken as conclusive, and binding on the triers of fact (emphasis added).

Dunn v. Dunn, 911 So.2d 591, 599, (¶25)(Miss.Ct.App.2005)(internal citations omitted).

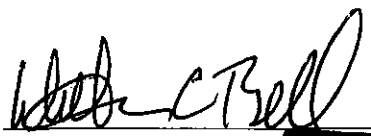
The trial court committed reversible error by rejecting and disregarding Mr. Walker's testimony and evidence. The trial court abused its discretion, committed manifest error, and erred as a matter of law. The holdings set forth above in *Dunn* and *Pittman* support Boyce's argument that the trial court cannot arbitrarily reject and disregard expert testimony. The trial court committed reversible error by arbitrarily rejecting and disregarding credible and substantial evidence presented by the only expert witness. This assignment of error is a mixed issue of fact and law that supports a de novo review. Regardless of the standard of review, the trial court's rejection and disregard of Mr. Walker's expert testimony without any explanation and without any discussion of how the expert testimony fits into an *Armstrong* analysis is reversible error. This Court should reverse and render a judgment in favor of Boyce, or in the alternative, reverse and remand this case and direct the trial court to enter a judgment in Boyce's favor that provides substantive relief to Boyce.

CONCLUSION

This Court should reverse and render the findings and judgment of the trial court; or, in the alternative, reverse and remand this action to the trial court and order the trial court to award specific and substantive relief to Boyce. This Court should also order such other relief to Boyce which the Court deems appropriate in the circumstances.

Respectfully submitted, this 20th day of October, 2008.

John Boyce Talbert, III, Appellant

By: 

William C. Bell, MSB[redacted]
PO Box 1876
Ridgeland, MS 39158
601-956-0360
Fax: 601-978-1770
Attorney for John Boyce Talbert, III

CERTIFICATE OF SERVICE

I, William C. Bell, the attorney for the Appellant John Boyce Talbert, III, do hereby certify that I have this day filed this Brief of the Appellee with the Clerk of this Court to be received on behalf of the Supreme Court of Mississippi and/or the Court of Appeals and have served a copy of this Brief by first-class U.S. Mail, postage prepaid, upon the following:

Honorable Cynthia L. Brewer
Chancellor, Eleventh Chancery District
P.O. Box 404
Canton, Mississippi 39046

Benny M. "Mac" May, Esq.
Dunbar Monroe, PLLC
1855 Lakeland Drive, Suite R201
Jackson, MS 39216

So certified, this 20th day of October, 2008.

William C. Bell
Attorney for John Boyce Talbert, III

ADDENDUM

This document has been updated. Use KEYCITE.

WEST'S ANNOTATED MISSISSIPPI CODE
TITLE 93. DOMESTIC RELATIONS
CHAPTER 5. DIVORCE AND ALIMONY

→ § 93-5-23. Children; spousal maintenance or alimony

When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him, and shall, if need be, require bond, sureties or other guarantee for the payment of the sum so allowed. Orders touching on the custody of the children of the marriage shall be made in accordance with the provisions of Section 93-5-24. For the purposes of orders touching the maintenance and alimony of the wife or husband, "property" and "an asset of a spouse" shall not include any interest a party may have as an heir at law of a living person or any interest under a third-party will, nor shall any such interest be considered as an economic circumstance or other factor. The court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require. However, where proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each. In the event a legally responsible parent has health insurance available to him or her through an employer or organization that may extend benefits to the dependents of such parent, any order of support issued against such parent may require him or her to exercise the option of additional coverage in favor of such children as he or she is legally responsible to support.

Whenever the court has ordered a party to make periodic payments for the maintenance or support of a child, but no bond, sureties or other guarantee has been required to secure such payments, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, the court may, upon petition of the person to whom such payments are owing, or such person's legal representative, enter an order requiring that bond, sureties or other security be given by the person obligated to make such payments, the amount and sufficiency of which shall be approved by the court. The obligor shall, as in other civil actions, be served with process and shall be entitled to a hearing in such case.

Whenever in any proceeding in the chancery court concerning the custody of a child a party alleges that the child whose custody is at issue has been the victim of sexual or physical abuse by the other party, the court may, on its own motion, grant a continuance in the custody proceeding only until such allegation has been investigated by the Department of Human Services. At the time of ordering such continuance, the court may direct the party and his attorney making such allegation of child abuse to report in writing and provide all evidence touching on the allegation of abuse to the Department of Human Services. The Department of Human Services shall investigate such allegation and take such action as it deems appropriate and as provided in such cases under the Youth Court Law (being Chapter 21 of Title 43, Mississippi Code of 1972) or under the laws establishing family courts (being Chapter 23 of Title 43, Mississippi Code of 1972).

If after investigation by the Department of Human Services or final disposition by the youth court or family

court allegations of child abuse are found to be without foundation, the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegation.

The court may investigate, hear and make a determination in a custody action when a charge of abuse and/or neglect arises in the course of a custody action as provided in Section 43-21-151, and in such cases the court shall appoint a guardian ad litem for the child as provided under Section 43-21-121, who shall be an attorney. Unless the chancery court's jurisdiction has been terminated, all disposition orders in such cases for placement with the Department of Human Services shall be reviewed by the court or designated authority at least annually to determine if continued placement with the department is in the best interest of the child or public.

The duty of support of a child terminates upon the emancipation of the child. The court may determine that emancipation has occurred pursuant to Section 93-11-65.

Custody and visitation upon military temporary duty, deployment or mobilization shall be governed by Section 93-5-34.

Current through End of the 2008 Regular Session and 1st Ex. Session

END OF DOCUMENT

C
West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Civil Procedure
Chapter VII. Judgment

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders up until the time the record is transmitted by the clerk of the trial court to the appellate court and the action remains pending therein. Thereafter, such mistakes may be so corrected only with leave of the appellate court.

(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

(2) accident or mistake;

(3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(6) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

(c) Reconsideration of transfer order. An order transferring a case to another court will become effective ten (10) days following the date of entry of the order. Any motion for reconsideration of the transfer order must be filed prior to the expiration of the 10-day period, for which no extensions may be granted. If a motion for reconsideration is filed, all proceedings will be stayed until such time as the motion is ruled upon; however, if the

transferor court fails to rule on the motion for reconsideration within thirty (30) days of the date of filing, the motion shall be deemed denied.

CREDIT(S)

[Amended effective July 1, 2008, to provide for reconsideration of transfer orders entered on or after that date.]

COMMENT

Rule 60(a) prescribes an efficient method for correcting clerical errors appearing in judgments, orders, or other parts of a trial record; errors of a more substantial nature must be corrected in accordance with MRCP 59(e) or 60(b). Thus, the Rule 60(a) procedure can be utilized only to make the judgment or other document speak the truth; it cannot be used to make it say something other than was originally pronounced. See, e. g., West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702 (5th Cir. 1954). This procedure accords with prior Mississippi practice. See Miss.Code Ann. § 11-1-19 (1972); Ralph v. Prester, 28 Miss. 744 (1855) (this statute applies solely to the correction of judgments and decrees and cannot be extended so as to supply a judgment never rendered); Rawson v. Blanton, 204 Miss. 851, 35 So.2d 65 (1948) (judgment which is erroneous as to plaintiff's name involves merely a clerical error which may be corrected in the supreme court without reversal); Healy v. Just, 53 Miss. 547 (1876) (there is no time limit within which a correction to a judgment may be made); Wilson v. Town of Handsboro, 99 Miss. 252, 54 So. 845 (1911) (all courts have inherent power to correct clerical errors at any time and to make the judgment entered correspond to that rendered).

Under Rule 60(a), evidence dehors the record may be considered in making the correction; this also accords with prior Mississippi practice. See Wilson v. Town of Handsboro, supra (In making a determination as to whether the correction should be permitted, any evidence of parol or other kind is competent which throws material light on the truth of the matter. "The object of every litigation is to obtain ... a final determination of the rights of the parties. That determination is invariably what the judges direct, and not invariably what the clerks record. The power of the court to make the record express the judgment of the court with the utmost accuracy ought not to be restricted."). See also 6A Moore's Federal Practice ¶¶ 60.01-.08 (1971); 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2851-2856 (1973).

Rule 60(b) specifies certain limited grounds upon which final judgments may be attacked, even after the normal procedures of motion for new trial and appeal are no longer available. The rule simplifies and amalgamates the procedural devices available in prior practice. Prior to MRCP 60(b), Mississippi recognized the following procedural devices for relief from judgments, other than by appeal:

Statute for Correction of Misrecitals, Miss.Code Ann. § 11-1-19 (1972). This statute, referred to in the preceding discussion of MRCP 60(a), supra, applied solely to corrections of judgments and decrees and could not be extended to supply a decree or judgment never rendered. See Ralph v. Prester, supra; Rawson v. Blanton, supra; V. Griffith, Mississippi Chancery Practice, § 634 (2d ed. 1950).

Writ of Error Coram Nobis. Generally, this device was for review of errors of fact, not of law, which substantially affected the validity of the judgment but which were not discovered until after rendition of the judgment. See Petition of Broom, 251 Miss. 25, 168 So.2d 44 (1964). It was instituted as an independent action.

Bill of Review for Error Apparent. This device was an original bill, and was filed and docketed as such. It cured a material error of law apparent on the face of the decree and the pleadings and proceedings on which it is

based, exclusive of the evidence. However, Miss.Code Ann. § 11-5-121 (1972) placed a two-year limitation upon the period of time after the judgment was entered for filing the bill. See Brown v. Wesson, 114 Miss. 216, 74 So. 831 (1917); V. Griffith, supra § 635.

Bill of Review Based on Newly Discovered Evidence. Leave of court was required for the filing of a bill of review based on newly discovered evidence, but after leave was obtained the bill was considered as part of the action it sought to challenge. See V. Griffith, supra §§ 636-641. The two-year limitations of Miss.Code Ann. § 11-5-121 (1972) applied.

Bill in the Nature of a Bill of Review. This bill was available as an original action for vacating judgments tainted by fraud, surprise, accident, or mistake as to facts, not to law. See Corinth State Bank v. Nixon, 144 Miss. 674, 110 So. 430 (1926); City of Starkville v. Thompson, 243 So.2d 54 (Miss.1971); V. Griffith, supra § 642. This device did not require leave of court for filing, nor was it limited to two years' availability. Cf. Bill of Review for Error Apparent and Bill of Review Based on Newly Discovered Evidence, supra.

Motions for relief under MRCP 60(b) are filed in the original action, rather than as independent actions themselves. Further, motions seeking relief from judgments tainted by fraud, misrepresentation, or other misconduct of an adverse party, MRCP 60(b)(1), accident or mistake, 60(b)(2), or newly discovered evidence, 60(b)(3), must be made within six months after the judgment or order was entered. Aside from these two features, Rule 60(b) does not depart significantly from traditional Mississippi practice with respect to relief from judgments, but it dispenses with the arcane writs and technical requirements of prior practice. Importantly, a Rule 60(b) motion does not operate as a stay or supersedeas; further, in the courts governed by these rules, Rule 60 supersedes the devices discussed above for relief from judgments and orders.

Rules Civ. Proc.,Rule 60, MS R RCP Rule 60

Current with amendments received through June 1, 2008

END OF DOCUMENT