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

CASE NO. 2009-CA-00062
(Lee County Chancery Court Cause No. 06-0595-41-H)

L. DENNIS COBB — APPELLANT

VS.

SHERYL JEAN COBB — APPELLEE

BRIEF OF APPELLEE, SHERYL JEAN COBB

EDWIN H. PRIEST
Priest & Wise, PLLC
301 West Main Street
Post Office Box 46
Tupelo, Mississippi 38802-0046
(662) 842-4656
[redacted]

ATTORNEY FOR APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate any possible disqualification or recusal concerning same:

1. L. Dennis Cobb, Appellant;
2. Sheryl Jean Cobb, Appellee;
3. Honorable John A. Hatcher, Chancellor;
4. Honorable Jacqueline Mask, Chancellor;
5. Jak M. Smith, Attorney for Appellant;
6. Edwin H. Priest, Attorney for Appellee;
7. A. Rhett Wise, Attorney for Appellee.

Respectfully submitted,

Sheryl Jean Cobb, APPELLEE

BY: Edwin H. Priest

EDWIN H. PRIEST [redacted]

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1. STATEMENT OF THE CASE

On September 4, 1970, Sheryl Jean Cobb and L. Dennis Cobb, were married in Lee County, Mississippi. Of this union, two children were born who were emancipated at the time as hereinafter provided.

On April 17, 2006, the parties separated. Simultaneous with the parties' separation, Sheryl Jean Cobb, filed a Complaint for Divorce in the Chancery Court of Lee County, Mississippi. The Complaint stated the grounds for divorce were L. Dennis Cobb's habitual and inhuman treatment, adultery, or, in the alternative, irreconcilable differences. On April 20, 2006, L. Dennis Cobb filed an Answer to the Complaint. In his Answer to the Complaint, L. Dennis Cobb denied Sheryl Jean Cobb was entitled to a divorce on the grounds set out in her Complaint.

On September 21, 2007, a temporary hearing was held before Chancellor Jacqueline Mask. On November 16, 2007, Chancellor Jacqueline Mask rendered a Temporary Order *nunc pro tunc* to October 9, 2007. Within the Temporary Order, Chancellor Jacqueline Mask set a final hearing on the merits in this matter for November 28, 2007, in the Chancery Court of Prentiss County, Mississippi. Prior to November 28, 2007, Chancellor Jacqueline Mask recused herself. The matter was reassigned to Chancellor John A. Hatcher.

Up to the time of the Temporary Order, L. Dennis Cobb, was represented by the Honorable Michael Malski. However, Honorable Michael Malski was elected as Chancellor for the same district, whereupon he withdrew. As a consequence, the Honorable Luanne A. Thompson, undertook L. Dennis Cobb's representation. Throughout all proceedings, Sheryl Jean Cobb, has been represented by Edwin H. Priest.

On November 28, 2007, the parties, with counsel, appeared before the Court in Prentiss County, Mississippi. Thereafter, the parties, through their respective counsel, began protracted

negotiations for a period of time of approximately nine (9) hours. Prior to 5:00 p.m. on November 28, 2007, the attorneys announced unto the Court that the parties had agreed to a divorce on the grounds of irreconcilable differences based in part on L. Dennis Cobb's uncondoned adultery as well as the settlement of all property issues between the parties. As a result, Chancellor John A. Hatcher signed and filed the Final Judgment for Divorce on November 28, 2007, at 5:30 p.m.

Despite having indicated through his counsel, Honorable Luanne A. Thompson, that he had consented to the divorce on the grounds of irreconcilable differences as well as having individually signed the Final Judgment for Divorce, L. Dennis Cobb filed a Notice of Appeal on December 27, 2007. The Notice of Appeal was filed on the 27th day of December through his new counsel, Jak M. Smith. At no point in time did L. Dennis Cobb file a supersedeas bond. On January 4, 2008, Sheryl Jean Cobb filed a Motion to Find in Contempt due to L. Dennis Cobb failing to abide by the November 28, 2007 Final Judgment for Divorce. In addition, Sheryl Jean Cobb, filed a Motion for Emergency Relief on March 5, 2008. Thereafter, L. Dennis Cobb filed numerous requests for extensions of time with regard to the December 27, 2007 appeal.

Finally, on July 22, 2008, the Supreme Court Clerk's office issued a show cause notice directing that L. Dennis Cobb's appeal would be dismissed if it was not filed by August 5, 2008. In response, L. Dennis Cobb, filed yet another motion for additional time on August 4, 2008. The Supreme Court denied the August 4, 2008 request for additional time. On August 12, 2008, L. Dennis Cobb filed a motion to file brief out of time. On August 29, 2008, Sheryl Jean Cobb filed a Reply to Motion to File Brief Out of Time in which Sheryl Jean Cobb argued that L. Dennis Cobb had failed to satisfy the "good cause shown" provision of Mississippi Rules of Appellate Procedure 2 (c). By order dated September 9, 2008, the Supreme Court denied L. Dennis Cobb's Motion to File the Brief Out of Time and dismissed the appeal.

On November 10, 2008, L. Dennis Cobb filed a MRCP Rule 59 or MRCP Rule 60 motion to set aside judgment and/or to alter and/or amend judgment. Within the motion, L. Dennis Cobb alleged that the November 27, 2007 Final Judgment was void due to Sheryl Jean Cobb not withdrawing her fault grounds of the divorce or the Appellant withdrawing his denial. Also, L. Dennis Cobb argued the Chancellor did not recite that the property settlement was "adequate and sufficient" and no proper written consent for divorce was entered into between the parties. On November 25, 2008, Sheryl Jean Cobb, filed a response to L. Dennis Cobb's motion which denied L. Dennis Cobb's allegations that the Final Judgment for Divorce was void. In addition, Sheryl Jean Cobb's response cited five affirmative defenses.

L. Dennis Cobb's motion to set aside judgment and/or amend judgment as well as Sheryl Jean Cobb's motion for contempt was heard on November 26, 2008 in Lee County, Mississippi. On December 4, 2008, Chancellor John A. Hatcher rendered an opinion wherein the Court denied L. Dennis Cobb's motion. In pertinent part, Chancellor John A. Hatcher reasoned that L. Dennis Cobb and Sheryl Jean Cobb executed the Final Judgment for Divorce which contained the language "all further relief herein requested by either party is denied" was in fact a "cancellation" by L. Dennis Cobb of his denial. Also, the Court noted that each of the parties' signatures were placed under the heading "Agreed and Approved for Entry". Furthermore, Chancellor John A. Hatcher noted that prior to the execution of the Final Judgment for Divorce that the Court reviewed ten exhibits, including appraisals, the parties' 8.05 Financial Statements, tax returns and related documentation. As such, the Court found that the property matters in the Final Judgment for Divorce were "adequate and sufficient" and not inconsistent with substantial justice, inequitable, over-reaching, fraudulent or an agreement that resulted from an inequity affording such that there was no meaningful choice on the part of L. Dennis Cobb. The Court further found that there was no need for a "written

consent" since all issues were decided by the parties prior to the presentation unto the Court of the Final Judgment for Divorce. In response to the Court's ruling, L. Dennis Cobb filed his second Notice of Appeal on December 31, 2008.

2. SUMMARY OF THE ARGUMENT

Despite having executed a Final Judgment for Divorce which contained a resolution for divorce on the ground of irreconcilable differences based in part on L. Dennis Cobb's uncondoned adultery, as well as the resolution of all property issues between the parties, L. Dennis Cobb evidently became dissatisfied and has attempted to set aside the judgment on the ground that neither of the parties had withdrawn either fault grounds or defenses prior to the entry of the Final Judgment for Divorce. Sheryl Jean Cobb contends that the Final Judgment for Divorce is valid in that there was a "cancellation" by the parties of the fault grounds and defenses and the failure of the Final Judgment for Divorce to contain the words "adequate and sufficient" was but harmless error which was addressed by the Chancellor's decision in L. Dennis Cobb's motion to set aside and/or amend judgment hearing. In that all issues were decided by the parties, no consent to divorce was entered since one was not necessary. Furthermore, the Chancellor did not violate L. Dennis Cobb's attorney-client privilege in that L. Dennis Cobb, through his testimony, argued that his previous attorney misrepresented him and thereby waived any attorney-client privilege as same related to that issue.

Finally, this Court lacks jurisdiction to consider L. Dennis Cobb's appeal pursuant to Mississippi Code Section 11-3-15 due to his previous appeal having been dismissed for lack of prosecution.

3. ARGUMENT

A. This Court lacks jurisdiction to entertain L. Dennis Cobb's appeal as L. Dennis Cobb has previously appealed in the same cause.

Mississippi Code Section 11-3-15 states as follows:

> After the dismissal of an appeal or supersedeas by the Supreme Court, another appeal or supersedeas shall not be granted in the same cause, so as to bring it again before the Court.

As noted herein, L. Dennis Cobb filed an initial Notice of Appeal on December 27, 2007. Thereafter, L. Dennis Cobb filed numerous requests for extensions of time with regard to the December 27, 2007 appeal. Finally, on July 22, 2008, the Supreme Court Clerk's office issued a show cause notice directing that L. Dennis Cobb's appeal would be dismissed if it was not filed by August 5, 2008. In response, L. Dennis Cobb filed yet another Motion for Additional Time on August 4, 2008. The Supreme Court denied the August 4, 2008 request for additional time. On August 12, 2008, L. Dennis Cobb filed a Motion to File Brief Out of Time. On August 29, 2008, Sheryl Jean Cobb filed a Reply to Motion to File Brief Out of Time wherein Sheryl Jean Cobb argued that L. Dennis Cobb had failed to satisfy the "good cause shown" provision of Mississippi Rules of Appellate Procedure 2(c). By Order dated September 9, 2008, the Supreme Court denied L. Dennis Cobb's Motion to File Brief Out of Time and dismissed the appeal.

The Mississippi Supreme Court in *First American National Bank of Iuka v. Alcorn, Inc.*, 361 So.2d 481, 493 (Miss. 1978) and interpreting Mississippi Code Section 11-3-15 makes it crystal clear that after the dismissal of an appeal or supersedeas by the Supreme Court, another appeal or supersedeas shall not be granted in the same cause, so as to bring it again before the Court. The Court noted that Mississippi Code Section 11-3-15 had a long history in our jurisprudence and was the law of Mississippi as early as 1822 when its language was "that after the dismission of an appeal, writ of error or supersedeas in the Supreme Court, no appeal, writ of error or supersedeas shall be allowed." The Supreme Court citing *Stokes v. Shannon*, 55 Miss. 583 (1878); *Bull v. Harrell*, 7 How. 9 (Miss. 1843) reasoned that Mississippi Code Section 11-3-15 has been interpreted to the

effect that statute does not apply where the dismissal is without fault of the appealing party or from an irregularity over which he has no control. However, the Supreme Court citing *Merrill v. Hunt*, 52 Miss. 774 (1876); *Smith v. Union Bank of Tennessee*, 13 S. & M. 240 (Miss. 1849) held that where an appeal has been perfected and dismissed for want of prosecution, a subsequent appeal or writ of error is barred. The Court noted in the matter before it that the dismissal of the appeal was the result of the Appellant's inaction, and that a second appeal on the same issue is barred. Consequently, the Court reasoned that any assignment of error by an appellant is without merit. Such is the case here. L. Dennis Cobb's first appeal with regard to the matter at hand was styled "L. Dennis Cobb v. Sheryl Jean Cobb, 2008-CA-00008." On September 9, 2008, the Supreme Court denied L. Dennis Cobb's first appeal for failing to show "good cause shown" as to why he failed to timely file his brief. Consequently, this Court, pursuant to Mississippi Code Section 11-3-15 lacks jurisdiction to consider the instant appeal. Accordingly, L. Dennis Cobb's appeal should be dismissed.

B. Under Mississippi law, in an irreconcilable differences divorce, parties must withdraw all fault grounds and defenses prior to the entry of a final judgment for divorce. In his Opinion and Judgment on Appellant's motion to set aside the Final Judgment for Divorce, the Chancellor found that the statement in the Final Judgment for Divorce that "all further relief herein requested by either parties is denied" was a withdrawal of fault grounds. The Appellant contends that such language is insufficient to qualify as a withdrawal of fault grounds or defenses, while the Appellee contends that the intent of *Miss. Code Ann.* §93-5-2 was sufficiently met with the aforementioned verbiage.

As noted in L. Dennis Cobb's Brief, the instant matter was set for a trial on the merits on November 28, 2007. The parties, with counsel, appeared. Thereafter, protracted settlement negotiations occurred over the course of approximately nine (9) hours. At approximately, 5:00 p.m. on November 28, 2007, the parties, through counsel, announced unto the Court that a complete settlement had been reached between the parties on all issues. The Final Judgment for Divorce,

which encompassed the entire agreement was prepared with both parties and attorneys having executed same prior to the Chancellor's execution.

L. Dennis Cobb, having become dissatisfied with his informed agreement attempts to circumvent same saying that he was coerced into executing the document by his own counsel. As hereinafter provided, his own acts and words betray him.

First, L. Dennis Cobb argues that the controlling law in Mississippi is the case of *Perkins v. Perkins*, 787 So.2d 1256 (Miss. 2001). However, the *Perkins* decision is easily distinguishable. Foremost, neither party in *Perkins* ever filed a complaint which stated as a ground for divorce irreconcilable differences. As such, there was no comport with the sixty day requirement. This is not the case in the instant matter. Sheryl Jean Cobb specifically pled in her complaint for divorce, the ground of irreconcilable differences. Furthermore, *Miss. Code Ann.* §93-5-2 (1994) specifically provides in pertinent part in subsection (5) that

> "...a divorce may be granted on the grounds of irreconcilable differences where there has been a contest or denial, if the contest or denial has been withdrawn or cancelled by the party filing same by leave and order of the Court.

In the instant matter, the parties did in fact cancel both fault grounds and denials by order of the Court. In the body of the Final Judgment of Divorce, it provided that "[A]ll further relief herein requested by either party is denied". Of course, such relief would include Sheryl Jean Cobb's prayer for a fault ground divorce as well as L. Dennis Cobb's request that a fault ground divorce be denied by the Court. Furthermore, it is readily apparent that the Final Judgment for Divorce is a consent decree as evidenced by the heading within the Final Judgment for Divorce "Approved and Agreed for Entry" followed by the parties' respective signatures.

As stated by Chancellor John A. Hatcher in his subsequent opinion denying L. Dennis Cobb's Motion to Set Aside the Judgment and/or to Alter and/or to Amend Judgment, L. Dennis Cobb, seeks

relief "pretextially because of the deficiencies of his counsel and procedures, but in fact he seeks relief because he changed his mind over unhappiness with the agreement, as set forth in the Final Judgment for Divorce. "The Mississippi Supreme Court has clearly stated that a party is not entitled to relief merely because he is unhappy with the judgment, but he must make some showing that he was justified in failing to avoid mistake or inadvertence; gross negligence, ignorance of the rules or ignorance of the law is not enough." *Perkins v. Perkins*, 787 So.2d 1256, 1261 (Miss. 2001).

The Mississippi Supreme Court in the case of *Irby v. Estate of Irby*, 2007-CA-00689-SCT (Miss. 4-23-2009) explained the intent of *Mississippi Code Section* 93-5-2(5). In *Irby*, the parties entered into a written consent for a divorce on the ground of irreconcilable differences but failed to withdraw their fault grounds. Thereafter, the husband died and the wife sought to have the divorce set aside as void. In examining *Massingill v. Massingill*, 594 So.2d 1173 (Miss. 1992) and the line of cases that followed such as *Perkins v. Perkins*, the *Irby* Court noted an exception in subsection (3). In other words, the Court reasoned that the entry of a written consent to a divorce effectively acted as an intent to withdraw all contests and denials. Likewise, in addressing *Massingill*, the *Irby* Court opined that the issue is whether "the facts negate any conclusion there was mutual consent to a divorce on the ground of irreconcilable differences". The *Irby* Court noted that in *Massingill* the Court reasoned it is conceivable the required mutual consent in writing could have been accomplished by written stipulation, written agreement, or by some other viable means either prior to or during the last appearance before the Chancellor. Furthermore, the *Irby* Court held that had either side in *Perkins* filed for divorce on the ground of irreconcilable differences that the failure to execute a document explicitly withdrawing fault grounds could be treated as a technical flaw and thus harmless error especially if prejudice was not shown. In fact, the *Irby* Court opined that it was conceivable in light of *Perkins* that had irreconcilable differences been plead that an executed written

settlement agreement could be sufficient to comply with the requirements of *Miss. Code Ann.* §93-5-2(5).

As further precedent as to technical flaw acting as harmless error, the Court in *Rounsaville v. Rounsaville*, 732 So.2d 909, 911 (Miss. 1999) upheld the trial court's grant of a divorce where at the time of the granting of the divorce, the parties had not entered into a property settlement agreement, nor had the trial court adjudicated the presented issues as required under the statute. The *Rounsaville* Court stated that although a technical error, it was a harmless error since the Appellant demonstrated no prejudice which would make the error reversible. Such is the case here. L. Dennis Cobb consented to the divorce on the ground of irreconcilable differences as evidenced both as to his execution of the Final Judgment for Divorce as well as his own testimony. As noted hereinbefore, L. Dennis Cobb executed the Final Judgment for Divorce as a consent decree acknowledged by his signature below the hearing "Agreed and Approved for Entry". Furthermore, L. Dennis Cobb, by executing the Final Judgment for Divorce effectively cancelled any denial he may have had due to the approval language "all further relief herein required by either party is denied." In other words, he agreed that he desired to cancel or withdraw any other relief, i.e., the "denial" which was contained within his answer. The same is true with regard to Sheryl Jean Cobb as it applies to her fault grounds. The parties met the standard as set out in *Irby v. Estate of Irby*. There was mutual consent. There was no necessity for a separate written consent because all issues were decided with the parties' signatures affixed to the Final Judgment for Divorce prior to its presentation to the Court. Finally, L. Dennis Cobb acknowledged through his testimony that he was desirous of the divorce as well as agreement to the settlement of all issues between the parties. Transcript page 4, lines 22-27:

Q I want to take you to the final page and ask you what it says above your signature.

A Agreed and approved for entry.
Q Now, above L. Dennis Cobb, is that your signature, sir?
A Yes.

Transcript page 5, lines 6-11:

Q Do you also recall that during the course of negotiations initialing certain changes in this particular document?
A Yes.
Q Is that yes?
A Yes.

Transcript page 12, lines 21-26:

Q And in this document, which is a final divorce decree, it sets out all issues between you and Mrs. Cobb, does it not?
A Yes, sir.
Q Were there any property issues that were not determined on that particular date?
A Not that I recall.

Transcript page 14, lines 17-19:

Q And you agreed to a divorce on that day, did you not?
A Yes, sir.

Transcript page 22, lines 17-29 and page 23, lines 1-5:

Q Luanne, would it be fair to say that with regard to the property and separation agreement, it was incorporated into the final divorce decree?
A Yes.
Q And I want to show you the final divorce decree, and I think this is important.
Q Did Mr. Cobb – when did he execute this agreement? In other words, was it before or after Judge Hatcher's signature?
A It was before.
Q And was your signature before or after Judge Hatcher?
A Before.
Q Do you recall my signature and Mrs. Cobb's signature?
A It was all before.

Transcript page 75, lines 25-29:

Q My question to you is this. Even though you entered into this agreement voluntarily – you signed it; correct? That being the final divorce decree; correct?
A Yes, sir.

Transcript page 84, lines 4-7:

Q All right, sir. Well, did you have any difficulty in reading and understanding what you were signing when you signed the final judgment for divorce on November 28, 2008?
A I understood, yes, sir.

As is clear, there was mutual consent between the parties. Also, the parties entered into a consent judgment wherein all issues were decided prior to presentation to the Chancellor. Moreso, the parties withdrew both the fault grounds as well as any denial as evidenced by the language "All other relief ...is denied". Finally, even assuming arguendo, that there exists a technical flaw, which is denied, such an error was at most a harmless error from which L. Dennis Cobb has demonstrated no prejudice which would make the error reversible.

C. The Final Judgment of Divorce in this cause recited that "...the parties both being present and giving testimony in court..." was inaccurate as no testimony was taken from anyone. No property settlement agreement was entered nor was any consent entered. This judgment should be set aside as void for those reasons.

L. Dennis Cobb argues that due to the Final Judgment of Divorce incorrectly citing "and giving testimony" warrants the Final Judgment for Divorce being void. The Appellant Court in *Engel v. Engel*, 920 So.2d 505, 509 (Miss. App. 2006) citing *Rounsaville v. Rounsaville*, 732 So.2d 909, 912 (Miss. 1999); *Johnston v. Johnston*, 722 So.2d 453, 457 (Miss. 1998) noted that in *Johnston*, the Chancellor granted a divorce before adjudicating the issues of permanent child support, permanent alimony and property rights. The *Engle* court found that it could have followed the mandate of the Mississippi Supreme Court if it determined that equity did not warrant reversal if the Appellant can show no prejudice as a result of the procedural error. That is the situation in the instant matter. L. Dennis Cobb has shown no prejudice. As the Chancellor noted in the Rule 59 and Rule 60 hearing, "the Court heard the Defendant testify that he was under no physical, mental or

emotional impairment, drugs or alcohol, physical threat or undue coercion when he entered the agreement voluntarily (emphasis added) ... but ... just changed his mind, sought to appeal, but let his appeal lapse."

Furthermore, the Mississippi Court of Appeals in *In Re Marriage of De St. Germain*, 977 So.2d 412 (Miss. App. 2008) held that although the Chancellor never specifically stated that either the initial or amended property settlement agreement was "adequate and sufficient", that the statutory requirement of *Miss. Code Ann. §*93-5-2 clearly anticipates more than just a mere recitation of the obligatory words of the statute. In applying the Supreme Court's decision in *Perkins*, the *St. Germain* court reasoned that "logic and reason dictate that a lack of 'a mere recitation of the obligatory words' is not outcome determinative or fatal to the property settlement agreement at issue." *Id.* At 417. The *St. Germain* court further concluded that it is necessary to view the actual agreement and the provisions it contains to determine whether the agreement is adequate and sufficient in terms of equity and its entirety. Such is the case here. As the Chancellor stated, the Court considered ten exhibits on the date of execution of the Final Judgment for Divorce. The exhibits included real property appraisals, Rule 8.05 Financial Disclosures of both parties, the parties' 2003, 2004 and 2005 tax returns, home loan information, marital savings account statements of savings accumulated during the marriage and L. Dennis Cobb's check stubs. The Chancellor concluded that based upon the matters before him, that the property matters were and are an equitable distribution of the parties' marital assets, which were and are an adequate and sufficient disposition of the parties' property rights, real, personal and mixed. The Chancellor further found that based upon a thirty-six year marriage in which L. Dennis Cobb was the primary bread winner as well as his uncondoned adultery justified the greater percentage of assets going unto Sheryl Jean Cobb. As such, the Chancellor, in addition to his other findings, held that the agreement between

the parties was not overreaching, fraudulent or an agreement that resulted from an inequity of bargaining power or other circumstances such that there was no meaningful choice on the part of the Defendant.

As the *St. Germain* court stated, "A party is not entitled to relief merely because he is unhappy with the judgment, but he must make some showing that he was justified in failing to avoid mistake or inadvertence; gross negligence, ignorance of the rules or ignorance of the law is not enough." Such is the case here. L. Dennis Cobb is now unhappy over an agreement he fully and freely embraced and entered into and as such, is attempting to have this court undo his agreement based upon a technicality.

Finally, the *St. Germain* court noted that law favors the settlement of disputes between parties. Absent fraud, mistake or overreaching, the settlement agreement will be enforced. Consequently, the general rule favoring enforceability of a settlement, such as a divorce case, is a strong rule with few, if any, exceptions. Likewise, and in light of the aforementioned pronouncement, the Chancellor should be allowed broad latitude when enforcing settlement agreements.

As to the second issue, L. Dennis Cobb argues that no property settlement agreement was entered or written consent given. L. Dennis Cobb's argument is irrelevant in that all property issues were decided by the parties. Consequently, no written consent was required. In fact, the Final Judgment for Divorce encompasses a resolution of all issues between the parties. Also, the Final Judgment for Divorce is a consent judgment between the parties. It naturally follows since the Final Judgment of Divorce is a consent judgment that same acts as the contract between the parties without the need of a separate property settlement agreement or written consent.

Finally, as stated in *Harvey v. Harvey*, 918 So.2d 837, 839 (Miss. App. 2005), the mere fact that a party wavers on whether a divorce should be entered may often occur but such wavering does not invalidate the divorce. The *Harvey* court reasoned that what is important is that the parties agree to the divorce and the property settlement. The *Harvey* court noted that in the matter before it that the Appellant executed both the Judgment of Divorce as well as the property settlement agreement. In fact, the Court found it significant that the Appellant initialed changes that were made before the documents were submitted to the Chancellor for approval. The same is true in the instant matter. Not only did L. Dennis Cobb participate in nine hours of negotiations, but he likewise executed the Final Judgment for Divorce after having initialed several changes to said judgment and prior to the Court's having considered same.

The law is well established that when a judgment of divorce is supported by substantial evidence that unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous, or applied an erroneous legal standard, the Chancellor's findings will be upheld. See *Sanderson v. Sanderson*, 824 So.2d 623, 625-26 (Miss. 2002). The Chancellor's decision in the matter at hand was proper and should be affirmed by this Court.

D. Rule 502, Mississippi Rules of Evidence, protects the attorney/client privilege. At the hearing on the motion to set aside the Final Judgment for Divorce, the Chancellor required the Defendant/Appellant to testify (over his objection) as to privileged communications between himself and his former attorney, and further allowed his former attorney to testify as to confidential communications between her and the Defendant/Appellant over the objection of the Defendant/Appellant. The Chancellor took the objection as to privilege under advisement, and in his Opinion and Judgment given after the hearing, the Chancellor sustained the Defendant/Appellant's objection to the testimony. Is it a sufficient protection of the attorney/client privilege if the court forces clients and attorneys to testify as to their privileged communications, take the objections under advisement, and after the trial, sustain the objection?

As noted by L. Dennis Cobb, on November 26, 2008, the Chancellor heard his motion to set aside the Final Decree. Also, L. Dennis Cobb is correct in that he was called as an adverse witness on Sheryl Jean Cobb's motion for contempt. It was during this phase of L. Dennis Cobb's testimony that he raised a defense to the Final Judgment for Divorce, "misrepresentation" by his then counsel, Honorable Luanne Thompson. In particular part, the exchange was as follows:

Transcript, page 7, lines 17 through 20:

Q Why did you file an appeal?
A I feel like I was misrepresented.
Q Who misrepresented you, sir?
A Mrs. Thompson.

Transcript, page 8, lines 27 through page 9, line 4:

Q Why did you believe that you were misrepresented and by whom?
A By Mrs. Thompson. We never went to court. It was all done behind closed doors, and she told me that the judge had made a decision as to the terms of the divorce, and I had two choices. The first choice was stay married to her, or I could sign it and be divorced.

L. Dennis Cobb argues that Rule 502 of the Mississippi Rules of Evidence allows him to raise as an objection to the enforcement of the Final Judgment for Divorce, "the misrepresentation of his then attorney" without revealing the nature of the misrepresentation. In other words, L. Dennis Cobb argues that Rule 502 acts as an absolute cloak. L. Dennis Cobb is wrong. This Court in *Hewes v. Langston*, 853 So.2d 1237, 1244 (Miss. 2003) noted that "the attorney-client privilege is the oldest of the privileges for confidential communications known in the common law." However, the privilege is not absolute. In *Henderson v. State*, 769 So.2d 210 (Miss. App. Ct. 2000) the Appellant in filing for post conviction relief argued that his previous attorney had provided ineffective assistance of counsel. Despite the Appellant's assertion, the Appellant objected to the State calling his former attorney to testify concerning discussions he had in the time leading up to a plea

agreement. The Mississippi Court of Appeals in upholding the trial court's ruling that the former attorney could testify, reasoned that the Appellant put in issue the question of counsel's performance of the duty owed. In citing *Bennett v. State*, 293 So.2d 1, 5 (Miss. 1974) (overruled on other grounds), the *Henderson* court concluded that the privilege was waived when the Appellant testified that his trial counsel had failed to properly advise him (*Henderson*, 769 So.2d 210 at 217). Furthermore, Mississippi Rules of Evidence Rule 502 (d)(3) and (4) provides an exception as to any communication relevant to an issue of breach of duty by the lawyer to his client as well as to a document attested by a lawyer. Both the *Henderson* decision and Mississippi Rule 502(d)(3) and (4) are applicable to the matter at hand. L. Dennis Cobb argues that he was misrepresented by his former attorney despite a Final Judgment of Divorce executed by both himself and his attorney. Therefore, he placed both the issue of misrepresentation and void judgment at issue. Consequently, it was proper to make a limited query into each issue with both L. Dennis Cobb and his former attorney. It is irrelevant as contended by L. Dennis Cobb that no statement or allegation regarding his representation was contained within his Motion to Set Aside and/or Amend Judgment. L. Dennis Cobb clearly waived the privilege when he on his own volition made the allegations of misrepresentation in his sworn testimony. Accordingly, L. Dennis Cobb's argument is without merit.

4. CONCLUSION

The parties entered into a valid and binding Final Judgment for Divorce which contained resolution of all issues between the parties. Any technical errors were at most harmless errors and do not warrant reversal merely because L. Dennis Cobb is unhappy with a decision he freely and voluntarily entered into. The decision of the Chancellor in this matter should be upheld.

RESPECTFULLY SUBMITTED this, the 18th day of August, 2009.

EDWIN H. PRIEST
Priest & Wise, PLLC
301 West Main Street
Post Office Box 46
Tupelo, Mississippi 38802-0046
(662) 842-4656
[redacted]
ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

I, Edwin H. Priest, attorney for Appellee, Sheryl Jean Cobb, do hereby certify that I have this day filed this Reply Brief of Appellee, Sheryl Jean Cobb, with the Clerk of this Court, and have served a copy of this Reply Brief by United States mail with postage prepaid on the following persons:

Chancellor John A. Hatcher
P. O. Box 118
Booneville, MS 38829

Jak M. Smith, Esq.
P. O. Box 7213
Tupelo, MS 38802-7213
Attorney for Appellant

DATED, this 18th day of August, 2009.

Edwin H. Priest

EDWIN H. PRIEST