IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOSHUA ADAM STRANGE	**APPELLANT**
VERSUS	**CAUSE NO. 2009-CA-00449**
AMY MELINDA STRANGE	**APPELLEE**

APPEAL FROM THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

MARK H. WATTS
MARK H. WATTS, P.A.
408 Convent Avenue
Post Office Drawer 1499
Pascagoula, MS 39568-1499
(228) 762-2373
State Bar No [redacted]

ATTORNEY FOR APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant, Adam Joshua Strange, hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Joshua Adam Strange, Appellant

2. Mark H. Watts, Esq.
   408 Convent Avenue
   Post Office Drawer 1499
   Pascagoula, MS 39568-1499
   Attorney for Appellee

3. Mark A. Maples, Esq.
   362 Summer Street
   Lucedale, Mississippi 39452
   Attorney of Appellant

4. Amy Melinda Strange, Appellee

5. Hon. D. Neil Harris, Chancellor
   Jackson County Chancery Court
   P.O. Box 998
   Pascagoula, Mississippi 39568

Respectfully submitted, on this the 24th day of November, 2009.

Mark Watts

MARK H. WATTS

TABLE OF CONTENTS

PAGE REFERENCES IN THIS BRIEF ARE CITED AS FOLLOW:

CP - Clerk's Papers
T - Court Reporter's Transcript
Ex - Exhibits
RE - Record Excerpts

TABLE OF AUTHORITIES

STATUTES

STATEMENT OF THE ISSUES

I. WHETHER THE CHANCELLOR ERRED IN DENYING APPELLANTS REQUEST FOR STANDARD VISITATION.

II. WHETHER THE CHANCELLOR ERRED IN AWARDING AN INCREASE IN CHILD SUPPORT.

III. WHETHER THE CHANCELLOR'S AWARD OF ATTORNEY FEES WAS IN ERROR.

STATEMENT OF THE CASE

A. Nature of the Case

The parties herein, Adam Joshua Strange (hereinafter "Adam") and Amy Melinda Strange (hereinafter "Amy") were granted a divorced on the grounds of Irreconcilable Differences by Order of the George County Chancery Court entered November 17, 2004, with attached Child Custody and Property Settlement Agreement (CP 131). In the Divorce the parties agreed they would enjoy joint legal custody of their one minor child, Shelby Parker Strange, a female born April 13, 2001, with Amy being awarded primary physical custody and Adam scheduled visitation. Adam was ordered to pay child support for the use benefit of the minor child in the amount of $360.00, per month

On November 8, 2007, Amy filed her Petition for Modification of the Divorce Order requesting, among other things, a modification of the Summer visitation so that Adam would not have the child for four consecutive weeks in the summer; that the Court re-examine the level of child support to see if child support should be adjusted; a modification to require Adam to pay for one half of the child's extracurricular activities; and a modification to require Adam to pay for the child's school clothes. (RE 42) In response to Amy's Petition, Adam filed an Answer and Counter Claim on April 24, 2008 denying her allegations and requesting a modification of custody or in the alternative a modification of the visitation schedule to allow him additional visitation with his daughter. (CP 118) On April 24, 2008 Amy filed a Petition for Citation of Contempt and for Sanctions alleging that Adam refused to return the child at the end of a visitation period. (CP 111)

The matter came on for trial on August 25, 2008 and the trial was not concluded. The second day of trial was October 14, 2008 and the matter was finally concluded. The Chancellor entered his order on October 24, 2008 awarding Adam some additional holiday visitation but

denying him standard thanksgiving visitation; ordering Adam to pay one half of the child's extracurricular expenses; finding that Adam was in contempt, but that it was not willful contempt; awarding Amy attorney fees in the amount of $750.00; Ordering Amy to retrieve the child from Adam's home at the end of the visitation periods; and, increasing Adam's child support obligation from $360.00, per month, to $430.00, per month. (RE 17, CP 57)

Adam filed his Motion for New Trial, to Alter or Amend Judgment and for Reconsideration on October 27, 2008. (CP 55)

Amy filed another Petition to Modify on November 21, 2008 asking the Court to modify the Order of October 28, 2008, to relieve Amy of the obligation to retrieve the child from Adam's home at the end of the visitation periods. (CP 44) That same day Amy also filed a Rule 60 Motion complaining about the retrieval of the child from Adam's residence. (CP 42)

The Post Trial Motions were heard on December 5, 2008, which resulted in the Chancellor's Order entered February 4, 2009, denying Adam's request for relief. (RE 15, CP 37)

B. FACTS

This case came on for trial on August 25, 2008 and October 14, 2008. Amy called Adam as her first witness. Adam testified that he was employed at Northrop Grumman Ship Systems as a process engineer (T-17), and that he was a salaried employee (T-25), with a net income of $376.00, per week (T-26). Adam testified that his weekly gross income was $920.76 as evidenced by his pay stub of July 13, 2008 (T-27, RE 30; Ex. 2). Adam's Rule 8.05 Financial Declaration, with attached pay stubs, (RE 22, 30; Ex 2), his 2007 Federal and State Income Tax Returns (T-24, RE 31-39; Ex. 2) were introduced as proof of his income.

Amy was called as the next witness (T-44). On direct examination, Amy testified about her request to modify the Divorce Judgment to prohibit the parties from having overnight guests of the opposite sex to whom they are not related by blood or marriage (T-45). She testified that

she wanted the Court to modify the Summer visitation (T-45-49). Amy testified that she wanted the Court to order Adam to pay for one half of the child's extracurricular expenses (T-50). She also testified that she felt that Adam was in contempt for keeping the child until the Thursday of Spring Break week (T-50), even though Amy was out of town that week (T-53).

On Cross examination, Amy testified that her monthly gross income, with the child support, was $2,887.08 (T-64, Ex.1). She further testified that her net monthly income was $2,189.80 (T-65, Ex. 1). On the second day of trial, October 14, 2008, Amy testified that she had received an increase in her salary since the first day of trial and that her income had increased by $200.00, per month (T-71, RE 20-21). Amy testified that her income was sufficient to cover all of hers and the child's expenses (T-71, RE 21).

Amy rested her case without calling any additional witnesses (T-93).

On direct examination, Adam requested additional summer visitation with his daughter (T-97). He also testified that he wanted to be awarded the entire Thanksgiving holiday during alternating years instead of one half of the holiday during alternating years (T-99). In regard to Amy's claim for contempt over the Spring Break incident, Adam testified that he and Amy had an agreement that he would be allowed to keep the child during the Spring Break week until Thursday when Amy was to return from her business trip (T-101-105).

Adam testified that his gross monthly income was $3,480.00, per month (T-107), and that after the mandatory deductions his net monthly pay was $2,554.88, per month (T-107). He testified that his combined monthly expenses were $3,445.17 (T-107). Adam further testified that he had not received any raises since completing his 8.05 Financial Declaration (T-108, RE 22). In response to a question by the Court, Adam testified that he is earning more now than at the time of the divorce, but that his child support was not based on what he was earning at the time of the divorce (T-108). Adam testified that he was currently paying $86.00, per week in child

support (T-110), which would be $372.38, per month (T-110). Adam testified that he is paying more in child support than the statute requires (T-110-111).

After the Cross Examination and Redirect Examination of Adam both sides rested (T-126-27), and the Court began to make a ruling from the bench (T-127). The Chancellor stated that he had figured Adam's child support at $362.72, (T-129), whereupon Amy's attorney made the statement that the check stubs produced showed a different amount than the 8.05 (T-129). The Chancellor held Adam in contempt but, found that it was not willful and ordered Adam to pay Amy's attorney fees in the amount of $750.00, (T-129). The Chancellor then asked Amy's attorney about the check stubs (T-131). Amy's attorney stated to the Court that Adam's 2007 tax return showed an adjusted gross income of $38,162.00, and that fourteen percent of that was $445 dollars per month. (T-131), whereupon the Chancellor stated that $445 a month will be the child support (T-131). When asked what the Chancellor used to base this figure on, he responded that it was based on the documents in evidence (T-131).

The Trial Court issued its Order on October 24, 2008 (RE 17) holding as follows:

1. Adam to pay ½ of all extracurricular activities of the minor child with a maximum of $350.00, per year;
2. Denying Adam's request for full thanksgiving visitation and for additional Summer visitation;
3. Awarding Adam some additional holiday visitation for Memorial Day, Labor Day, child's birthday and Tuesday afternoons;
4. Finding Adam in contempt, but finding that the contempt was not willful;
5. Ordering Adam to pay Amy's attorney fees in the amount of $750.00, for contempt; and,
6. Increasing Adam's child support obligation to $430.00, per month.

On October 27, 2008 Adam filed a Motion for New Trial, to Alter of Amend Judgment and for Reconsideration (CP 55). On January 7, 2009 the Court heard Adam's Motion and entered its Order of February 4, 2009 holding as follows:

1. That Amy had met the requirements regarding modification of child support;
2. That Adam should pay $430.00, per month child support and $350.00, per year for the extracurricular expenses of the child;
3. Changing the exchange location for visitation purposes back to the arrangement contained in the original Property Settlement Agreement; and denying all of other relief prayed for by Adam.

(RE 15).

SUMMARY OF THE ARGUMENT

1. STANDARD OF REVIEW.

When an Appellate Court reviews a Chancellor's decision in cases involving modification of divorce and all related issues, the scope of the Appellate Court's review is limited by the substantial evidence/manifest error rule. R.K v. J.K , 946 So. 2d 764, 772 (Miss. 2007); (citing Mizell v. Mizell, 708 So. 2d 55, 59 (Miss. 1998). The Appellate Court will not reverse the findings of a Chancellor unless the Chancellor was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Id. Manifest error in a trial Court's decision is deemed to have occurred if, based upon the evidence, the reviewing Court is left with a definite and firm conviction that the trial Court made a mistake. McCoy v. McCoy, 611, So. 2d 957 (Miss. 1992); Carter v. Taylor, 611 So. 2d 874 (Miss. 1992). Manifest error means error that is unmistakable,

clear, plain or indisputable. Magee v. Magee, 661 So. 2d 1117 (Miss. 1995); Bell v. Parker, 563 So. 2d 594 (Miss. 1990).

I. WHETHER THE CHANCELLOR ERRED IN DENYING APPELLANTS REQUEST FOR STANDARD VISITATION.

The noncustodial parent should be allowed to exercise reasonable standard visitation with his or her minor children. Standard visitation varies to some degree from district to district. However, Summer visitation has been determined to be five weeks and in the case at bar the parties minor child is out of school for an entire week for Thanksgiving. Therefore, Adam should have been awarded five weeks of visitation in the summer and should have been awarded alternating Thanksgiving visitation for the entire Thanksgiving holiday. It was error for the trial Court to deny Adam's request for Standard Visitation.

II. WHETHER THE CHANCELLOR ERRED IN AWARDING AN INCREASE IN CHILD SUPPORT.

Most of the testimony at trial centered around visitation and extracurricular activities of the child and the issue of contempt on Adam's part for not returning the child at the end of a visitation period. Adam placed into evidence copies of his most recent pay stubs, his 2006 and 2007 tax returns, with attached W-2, and his 8.05 financial declaration (RE 22-39). There was no testimony by the Amy, or any other witness for the Plaintiff, in regard to a substantial and material change in circumstances justifying an increase in Adam's child support obligation.

In fact, the only discussion contained in the record in regard to an increase in child support, were the statements made by Amy's attorney after both sides had rested. Her attorney held up Adam's tax return and announced to the Court that the tax return for 2007 showed an adjusted gross income of $38,162.00. Based on the statement made by Amy's attorney the Chancellor arbitrarily increased Adam's child support obligation to $430.00 per month, which is

more than fourteen percent (14%) of his adjusted gross income. The modification of Adam's child support obligation without any evidence of a material change in circumstances and in an amount not calculated pursuant to the statutory guidelines was manifest error.

III. WHETHER THE CHANCELLOR'S AWARD OF ATTORNEY FEES WAS IN ERROR.

A Chancellor has discretion to award attorney fees and an award of attorney fees is appropriate where a party is found to be in willful contempt of Court. However, in this case the Chancellor found that Adam was not in willful contempt. Further, Amy's attorney failed to submit an itemized statement of the fees incurred and therefore the award of attorney fees was not only improper where there was no finding of willful contempt, there was also no basis for the amount awarded. Therefore, it was error for the Chancellor to award attorney fees.

ARGUMENT

1. STANDARD OF REVIEW

The standard of review for all appeals involving domestic relations matters is limited. The Appellate Court will not disturb the findings of a Chancellor unless the Chancellor was "manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." Perkins v. Perkins, 787 So. 2d 1256, 1260 (Miss.2001)

I. WHETHER THE CHANCELLOR ERRED IN DENYING APPELLANTS REQUEST FOR STANDARD VISITATION.

Our Chancery Courts are vested with the responsibility of determining visitation schedules that are in the best interest of the children, and this Court gives great deference to the Chancellor's discretion in this regard. Chamblee v. Chamblee, 637 So. 2d 850, 861 (Miss. 1994);

Newsom v. Newsom, 557 So. 2d 511, 517 (Miss. 1990). At the same time, the Mississippi Supreme Court has held that the non-custodial parent is reasonably entitled to a significant period during the summer vacation period of the child and that the non-custodial parent is entitled to a five week period of visitation. Wilburn v. Wilburn, 991 So. 2d 1185 (Miss. 2008); Crowson v. Moseley, 480 So. 2d 1150, 1152 (Miss. 1985. As a general rule, non-custodial parents are entitled to more than very limited and short periods of visitation. Childers v. Childers, 717 So. 2d 1279 (Miss. 1998). Further, our Supreme Court has made it clear that the objective in visitation arrangements is that non-custodial parents and their children "should have as close and loving relationship as possible despite the fact that they may not live in the same house." Dunn v. Dunn, 609 So. 2d 1277, 1286 (Miss. 1992). Restrictions on the visitation rights of the non-custodial parent must be supported by evidence demonstrating that the child would be harmed in some way absent the restriction. Id.

There is absolutely no evidence in the case at bar that would suggest that Adam's daughter would be harmed in some way if Adam were allowed full Thanksgiving visitation and a full five weeks of visitation in the summer. Therefore, it was reversible error on the part of the Chancellor to deny Adam standard visitation.

I. WHETHER THE CHANCELLOR ERRED IN AWARDING AN INCREASE IN CHILD SUPPORT.

Miss. Code Ann. Section 43-19-101 sets forth the child support award guidelines, which are a rebuttable presumption in all judicial proceedings regarding the awarding or modifying of chills support in this state. The guidelines provided in that section apply unless the judicial body awarding or modifying the child support award makes a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate as determined under the criteria specified in Section 43-19-103 Miss. Code Ann.

The Mississippi Supreme Court addressed the issue of child support modification in the case of Evans v. Evans, 994 So. 2d 765, (Miss. 2008), wherein the Court held once again that, the law governing this area was, and remains, well settled: "There can be no modification of a child support decree absent a substantial and material change in the circumstances of one of the interested parties arising subsequent to the entry of the decree sought to be modified." Gillespie v. Gillespie, 594 So. 2d 620, 623 (Miss. 1992) (citing Caldwell v. Caldwell, 579 So. 2d 543, 547 (Miss. 1991); Clark v. Myrick, 523 So. 2d 79, 82 (Miss. 1988); Adams v. Adams, 467 So. 2d 211, 214 (Miss. 1985). The change must occur as a result of after-arising circumstances of the parties, not reasonably anticipated at the time of the agreement. Tingle v. Tingle, 573 So. 2d 1389, 1391 (Miss. 1990); Clark, 523 So. 2d at 82; Shaeffer v. Shaeffer, 370 So. 2d 240, 242 (Miss. 1979). Some of the factors which may be considered in determining whether a material change has taken place include: (1) increased needs caused by advanced age and maturity of the children; (2) increase in expenses; (3) inflation; (4) the relative financial condition and earning capacity of the parties; (5) the health and special needs of the child, both physical and psychological; (6) the health and special medical needs of the parents, both physical and psychological; (7) the necessary living expenses of the non-custodial parent; (8) the estimated amount of income taxes the respective parties must pay on their incomes; (9) the free use of a residence, furnishings, and automobile; and (10) such other facts and circumstances that bear on the support subject shown by the evidence. Adams, 467 So. 2d at 215 (citing Brabham v. Brabham, 226 Miss. 165, 84 So. 2d 147 (1955).

In Turner v. Turner, 744 So. 2d 332 (Miss. Ct. App. 1999), The Court of Appeals held that in order to demonstrate a material change in circumstances warranting a modification of child support, the movant must show that increased financial obligations have eaten away so

significantly at the purchase power of the existing child support award that it no longer meets the needs of the child.

In the Case at bar the record is void of any evidence of a substantial and material change in circumstances that was not reasonably anticipated at the time of the divorce in regard to Amy's request for an increase in child support. There was no testimony that the previous child support amount was not meeting the needs of the child. In fact, Amy testified that with her income, including the previous child support, she is able to cover all of her and the child's expenses (T-71, RE 21).

Adam presented proof of his current income by way of his 2006 and 2007 State and Federal Income Tax Returns, with the supporting documentation. (RE 31-41, Ex. 2). According to his 2007 Tax Return (RE 32; Ex. 2) Adams gross income was $41, 762.40 for the year. His Mississippi State Taxes were $1,523.14; Federal Taxes were $6,329.98; Social Security withholding was $2,634.81; Medicare withholding was $616.27.

§ 43-19-101 Miss. Code Ann States in part as follows:

(1) The following child support award guidelines shall be a rebuttable presumption in all judicial or administrative proceedings regarding the awarding or modifying of child support awards in this state:

Number Of Children Due Support	Percentage Of Adjusted Gross Income That Should Be Awarded For Support
1	14%
2	20%
3	22%
4	24%
5 or more	26%

(2) The guidelines provided for in subsection (1) of this section apply unless the judicial or administrative body awarding or modifying the child support award makes a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case as determined under the criteria specified in Section 43-19-103.

(3) The amount of "adjusted gross income" as that term is used in subsection (1) of this section shall be calculated as follows:

(a) Determine gross income from all potential sources that may reasonably be expected to be

available to the absent parent including, but not limited to, the following: wages and salary income; income from self employment; income from commissions; income from investments, including dividends, interest income and income on any trust account or property; absent parent's portion of any joint income of both parents; workers' compensation, disability, unemployment, annuity and retirement benefits, including an individual retirement account (IRA); any other payments made by any person, private entity, federal or state government or any unit of local government; alimony; any income earned from an interest in or from inherited property; any other form of earned income; and gross income shall exclude any monetary benefits derived from a second household, such as income of the absent parent's current spouse;

(b) Subtract the following legally mandated deductions:

(i) Federal, state and local taxes. Contributions to the payment of taxes over and beyond the actual liability for the taxable year shall not be considered a mandatory deduction;

(ii) Social security contributions;

(iii) Retirement and disability contributions except any voluntary retirement and disability contributions;

(c) If the absent parent is subject to an existing court order for another child or children, subtract the amount of that court-ordered support;

(d) If the absent parent is also the parent of another child or other children residing with him, then the court may subtract an amount that it deems appropriate to account for the needs of said child or children;

(e) Compute the total annual amount of adjusted gross income based on paragraphs (a) through (d), then divide this amount by twelve (12) to obtain the monthly amount of adjusted gross income.

Upon conclusion of the calculation of paragraphs (a) through (e), multiply the monthly amount of adjusted gross income by the appropriate percentage designated in subsection (1) to arrive at the amount of the monthly child support award.

Miss. Code Ann. 43-19-101 clearly sets forth the mathematical formula for determining an award of child support. Applying Adam's financial information to the statutory formula will produce the following result:

Adams Gross Income:		$41, 762.40
Legally Mandated Deductions		
Federal Taxes	$6,329.98	
Mississippi State Taxes	$1,523.14	
Social Security	$2,634.81	
Medicare	$616.27	

Total Deductions	$11,104.42	<$11,104.42>
Yearly adjusted gross income		$30,658.20

$30,658.20 divided by 12 equals a monthly adjusted gross income of $2,554.50

$2,554.50 multiplied by the guideline percentage of 14% equals a monthly child support award in the amount of $357.67.

The only evidence presented on the issue of child support was Adam's financial information which clearly shows that his child support obligation, pursuant to the guidelines, should be $357.67 per month. In the initial Divorce Decree Adam was ordered to pay and had been paying up until the modification, the sum of $360.00, per month. Thus, even before the Chancellor modified the child support award, Adam was paying more than guideline support.

The Chancellor failed to make a written or specific finding on the record as to how he arrived at the $430.00, per month child support award. Further, the Chancellor failed to make a written or specific finding on the record that the application of the guidelines, if that is what he used, set forth in Section 43-19 101 Miss. Code Ann., would be unjust or inappropriate as determined under the criteria specified in Section 43-19-103 Miss. Code Ann.

In the recent case of Grove v. Agnew, 14 So. 3d 790 (Miss. Ct. App. 2009), the Court of Appeals reversed the Chancellor for failing to follow the method provided in section 43-19-101 Miss. Code Ann. and for failing to provide any written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in that case.

Therefore, the Chancellor committed reversible error by increasing Adam's child support obligation in the absence of a material change in circumstance, absent any proof that the needs of the child were not being met by the current child support award and absent any on the record finding that an award of guideline child support was inappropriate under the facts of this case.

II. WHETHER THE CHANCELLOR'S AWARD OF ATTORNEY FEES WAS IN ERROR.

An award of attorney's fees is generally left to the discretion of the chancellor. Gray v. Pearson, 797 So. 2d 387 (Miss. Ct. App. 2001). Furthermore, the chancellor's findings on the issue of attorney's fees will not be disturbed unless manifestly wrong. Cumberland v. Cumberland, 564 So. 2d 839, 844 (Miss. 1990). To award attorney's fees in a contempt matter, trial courts must first consider whether there was a contempt or willful violation of the court's order. Purvis v. Purvis, 657 So. 2d 794, 796-97 (Miss. 1994). If so, the chancellor must determine what relief is necessary to remedy the violation. Id. Attorney's fees are properly awarded if a party is found in contempt. Rogers v. Rogers, 662 So. 2d 1111, 1116 (Miss. 1995).

In the case at bar the Chancellor found that Adam was not in willful contempt for keeping the child during part of the Spring Break holiday. Amy's complaint for contempt was filed on April 24, 2008, which was six months after she filed her petition for Modification on November 8, 2007. The parties were already before the court on the parties respective pleadings for modification. So, her Petition for Contempt did not initiate this litigation. Further, Amy failed to submit any type of itemization or statement of the fees incurred. Without an itemization of the fees incurred it is not possible to determine which fees were incurred as a result of the Petition to Modify or the Contempt. Amy also failed to introduced sufficient evidence to satisfy the necessary factors required by McKee v. McKee, 418 So. 2d 764 (Miss.1982).

Therefore, it was error for the Chancellor to award attorney fees.

CONCLUSION

Although a Chancellor is given discretion to deal with the issue of visitation such discretion is not unfettered and is subject to appellate review. When a Chancellor denies standard

visitation to a non-custodial parent, for no apparent reason, this Court should, indeed must, correct this error. Amy gave the Court no reason whatsoever, why Adam should not have the five weeks of summer visitation that this Court has stated he should have. There was no evidence of any danger to the child or that anything adverse had ever happened to the child during a period of visitation. The same goes for Thanksgiving. It is manifestly wrong that Amy gets to enjoy the entire Thanksgiving holiday with the child, on alternating years, and that Adam never gets the entire holiday.

The record is void of any evidence whatsoever that would justify an upward modification of Adam's child support obligation. This Court should reverse the Chancellors decision to increase Adam's child support.

The chancellor's award of attorney fees after his finding that Adam was in contempt, but that it was not willful contempt is a bit perplexing. An award of attorney fees is not proper where there was not a finding of willful contempt. Especially in this case, where the contempt was filed after the initial petition for modification and the parties were already in court. Further, an award of attorney fees that was not based on an itemized statement or even any testimony as to the amount of time expended or the hourly rate at which the fees were incurred should not be allowed. In the case at bar, where there were multiple pleadings filed and no itemization of the time and charges, there is no way to determine whether the fees awarded were actually incurred as a result of the contempt. Therefore, the award of attorney fees should be reversed.

Respectfully submitted,
Adam Strange

By: 
MARK H. WATTS

MARK H. WATTS
ATTORNEY AT LAW
408 CONVENT AVENUE
POST OFFICE DRAWER 1499
PASCAGOULA, MS 39568-1499
TELEPHONE #: (228) 762-2373
FACSIMILE #: (228) 769-1417
MISSISSIPPI STATE BAR #: [redacted]

CERTIFICATE OF SERVICE

I, MARK H. WATTS, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to: Hnorable Mark A. Maples, attorney for Appellee, at 362 Summer Street, Lucedale, Mississippi 39452, and to Honorable D. Neil Harris, Chancellor, at Post Office Box 998 Pascagoula, Mississippi 39568-0998

THIS, the 24th day of November, 2009.

MARK H. WATTS