IN THE COURT OF APPEALS OF MISSISSIPPI

NO. 2009-CA-01083-COA

ROBERT S. CORKERN — APPELLANT

VS.

AMANDA S. CORKERN — APPELLEE

APPEAL FROM THE CHANCERY
COURT OF AMITE COUNTY, MISSISSIPPI

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Robert notes that Amanda's brief fails to offer the Court her opinion about whether oral argument would be useful to the Court. In Robert's view, oral argument might well help the Court sort through the volume of facts in the record to help it reach through the chaff that most contentious cases throw off. While the core issue is simple – whether the chancellor erred in ignoring the overwhelming evidence of Robert's financial catastrophe – arriving at a resolution requires sorting through the chancellor's contentions that the evidence was murky enough legitimately to conclude that Robert had suffered no diminution of income.

Aside from getting the facts right, there is also the difficult issue of deciding the nature of the various awards in the Parties' 2005 divorce Agreement – which may charitably be described as "hybrids." Traditionally, Mississippi's appellate courts have allowed divorcing parties some leeway in modifying by contract the otherwise well-defined awards available under Mississippi law.

And then finally, once all that is accomplished, the Court will have to decide whether, and how, the Parties' 30% clause – limiting Robert's responsibility for paying monthly sums to 30% of his before-tax "salary" – applies to the various awards provided in the 2005 Agreement. One hesitates to presume on the Court's capacities, autonomy, and discretion, but this seems to be a case where the Court should require assistance from counsel.

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ARGUMENT IN REPLY

I. The chancellor erred in failing to adjust the various awards.

A. Fact Rebuttal

Preliminarily, one party's commentary on the other party's brief would seem to be only of rare assistance to an appellate court. In this instance, the brief filed on Amanda's behalf violates Rule 28(a)(4)'s simple requirement that, in the principal briefs, after a short statement of the case's procedural history a statement of facts must follow. The fact statement must contain the facts "relevant to the issues presented for review, with appropriate references to the record." Amanda's brief's statement of facts contains no specific citations to the record.

Amanda's brief does contain citations sporadically in her argument. These are almost uniformly inaccurate or non-existent. For example, Amanda states that the chancellor "required Robert to provide an 8.05 Financial Declaration to the Court *under oath* because of the discrepancies, inaccuracies and omissions contained in his previous declarations and testimony." (Red brief at 8) For support of this statement, Amanda refers to the transcript from page 97 to 132. The testimony on these pages consists of the cross-examination of Robert's accountant, Keith Winfield, and the first few pages of the adverse examination of Amanda. These pages of testimony have no obvious bearing on the chancellor's reasons for requiring the pre-trial 8.05 form. If anything, Winfield's testimony explains much of what Amanda sought to make appear to be "discrepancies."

Amanda does make references to what is clearly the chancellor's findings

and conclusions. These references, however, are not to pages in the record.[1] For example, Amanda quotes the chancellor's "holding" on page 8 of the red brief and cites in a footnote to "R at 754, ¶ 21." There is no "R" at 754. The clerk's papers are sequentially numbered from 1 to 619, the transcript is numbered from 1 to 364. The exhibits are in four binders. The references to the chancellor's ruling are not hard to find, but that cannot be said of the other miscellaneous references to "R" pages that do not exist.

The obvious problem sought to be averted by Rule 28(a)(4) is that without a party's stating that party's factual contentions in the form of a story about what happened to bring the parties to court, the appellate court has no context within which to understand the party's legal position. A party's failure to provide pinpoint record citations means that a party's factual contentions cannot accurately be explored – for veracity or fidelity to the record – by the appellate court or the opposing party. Under the anomalous circumstances presented by Amanda's brief, Robert would be remiss is failing to point out that there are usually obvious reasons why a lawyer would fail to put a client's best factual foot forward.

For example, Amanda states that based on Robert's income they acquired "substantial assets during the marriage." [Red brief at 2] Amanda goes on to say that the Parties' Rule 8.05 statements at the time of their divorce in 2005 reflected "a large amount of real property in Amite County, an airplane and numerous items of expensive personal property." [Red brief at 2] The 2005 8.05 statements are

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[1]The chancellor's opinion is found in volume 4 at 482-512.

found at V. 1: R. 34-53. These statements reflect that Robert had monthly income from his medical practice, rental residential property, and "mineral rights on farm" in the approximate amount of $20,161. [V. 1: R. 45-46] Robert's then monthly expenses were also approximately$20,000 per month. [V. 1: R. 48]

There was no airplane listed by either party and the "large amount of real property in Amite County" was encumbered to the tune of about $340,000.00. [V. 1: R. 52] The airplane was purchased by a business entity, Aviation Advantage, LLC, of which Robert was a member. Schedule C and Form 4562 relating to Aviation Advantage are contained in the first volume of bound exhibits as Exhibit D5, Robert and Amanda's amended joint return for 2003.

Perhaps the most telling difficulty presented by Amanda's fact statement is that it presents Robert as having "embarked upon a variety of business ventures related to the medical field," that he bought real property in Arkansas, and that he "has become intricately entwined in hospital management activities in the Batesville area." [Red brief at 2-3] As a statement of facts true in the past but not presently, Robert agrees that he has been an entrepreneurial physician.

The problem that Amanda is unable to come to grips with is that the accuracy of none of these statements of past fact survived the bankruptcy of the Tri-Lakes Medical Center in Batesville. It is difficult to imagine that Amanda's failure to mention the consequences of the hospital's financial collapse on Robert's personal and business income was unintentional. Robert's recitation of the consequences on his finances of the hospital's failure is detailed in his blue

brief at 11-15 and will not be repeated here.

More of this inability to see the "forest for the trees" is evident in Amanda's brief's recitation of the case's procedural history. Amanda repeatedly alleges that Robert failed in his several amended complaints and answers to counterclaims to allege an inability to pay as a reason to modify the prior decree or to avail himself of the decree's incorporated settlement agreement's term that Robert's payments of the various awards would not exceed 30% of his "gross before tax salary."

The original complaint for modification[2], signed by Robert in April of 2007, primarily sought clarification of visitation with the Parties' minor daughter, Caroline. [V. 1: R. 54-62] In addition, it sought clarification, and some reduction, of Robert's financial responsibilities for child support (i.e., reducing then infant Caroline's $12,000 per year clothing allowance to a mere $6,000) [V. 1: R. 58-60], and clarification of the alimony award. [V. 1: R. 60-61] At this point, in early 2007, Robert sought additional and clarified visitation and contract interpretation.

As for the amended complaint filed in late January of 2008, the complaint actually tried, Amanda again claims that Robert failed to allege an inability to pay. (Red brief at 3-4) The second page of the amended complaint states that Robert no longer has the income "necessary to support his financial obligations under [the Parties' settlement agreement]" due to Tri-Lakes' bankruptcy. [V. 2: R. 215] This

[2]It is not clear why the pleadings prior to the ones actually tried are in the record. Rule 10(b)(3)(v), Miss.R.App.P., expressly excludes from the record any pleadings that precede the pleading(s) actually tried. Robert's notice of appeal expressly disclaimed a designation of Rule 10(b)(3) materials. [V. 5: R. 612]

case has a record that fills an entire box and it does nothing but record or "talk about" Robert's financial morass. To swap cliche's, Amanda has now stuck her head in the sand and wants the Court to join her in that uncomfortable position.

Next Amanda complains that Robert's Rule 8.05 statements "were neither consistent nor were they supported by any attachments of pay stubs, W-2, 1009 [sic] forms or the like." (Red brief at 4) What Rule 8.05(B) requires, in its present form, is "[c]opies of the preceding year's Federal and State Income Tax returns, in full form as filed, or copies of W-2s if the return has not yet been filed." The record contains Robert's tax returns from 2000 through 2007. [Binder 1, D3-D9]

Of course, at the hearing in mid-2008, the most recent tax return was for 2007. Also a then-recent pay stub showing a pay date of January 15, 2008, is Exhibit 19 found in the third of the three binders. There is no doubt from the record that the cascade of financial bad news resulting from the hospital bankruptcy yielded necessarily changing financial disclosures from Robert over the course of 2007 and 2008. Amanda's invitation to the Court to conclude that Robert was trying to hide something because his financial facts were rapidly changing, and not in a good way, is nothing more than innuendo.

Similarly, Amanda states that "at no time did [Robert] provide supporting documentation f any type or nature to support his claim of inability to pay nor did he present evidence to support his contention that his payments exceeded thirty percent" of his salary. (Red brief at 4) This is the sort of broad conclusory statement that Rule 28(a)(4) is intended to discourage. The financial diminution of

Robert's interconnected businesses is well documented through his tax returns, including Schedule C's for the business entities, Robert's testimony, Robert's accountant's testimony, and Missy Corkern's testimony. The truth is that Amanda nowhere in the testimony or documents refutes the basic facts that Robert's financial life is in ruins due to large tax and other liens against him which are all detailed in his principal brief. Save for this sort of innuendo and conclusory statement, Amanda presents no factual case at all.

Finally, Amanda claims that "[i]t is also noteworthy that Robert, being in arrears for child expenses and alimony at the time of hearing, had access to monthly royalty from a current producing oil well . . . [had] incurred substantial debt for other financial ventures, and had acquired additional real estate, but had not liquidated one asset subsequent to the divorce decree to try to meet any of his financial obligation(s) to Amanda." (Red brief at 5) The only evidence in the record is that the royalty payments were going toward Robert's obligations to Amanda and their daughter and that all of his assets were for sale. [V. 8: T. 248-51, 264, 297, 301-02)

As noted in the blue brief, after the hearing Robert's Amite County property was sold and the proceeds distributed under court order.

Nor does the last "fact" stated in the red brief's fact statement fair any better than the others: "Based upon the information contained in Robert's [Rule 8.05 forms] at the time of the divorce, and at the hearing on his Petition for Modification, Robert's monthly expenses increased from $15,207.50 to

$27,712.00."

Without knowing where this purported fact appears in the record, it is impossible to check. As noted *supra*, the amount of Robert's monthly expenses at the time of the divorce was about $20,000. The June, 2008 Rule 8.05 form includes expenses for Amanda and Caroline. Robert was paying $2,433 for Amanda's mortgage, about $300 for Amanda's health insurance, $2,000 in child support for Caroline, and between $500 to $1,000 for Caroline's "clothing allowance," and the $5,000 alimony payment. [Binder 1, Ex. D11, 12] These monthly expenses add up to between $10,233 and $10,733.

Amanda's implication that Robert's *personal* monthly expenses increased by $12,000 does not withstand scrutiny.

B. The Parties' Agreement, incorporated into the divorce decree, should be enforced as written and Robert's obligations under the agreement reduced, as provided in the Agreement, to 30% of his "gross before tax salary."

Amanda does not contest that the so-called "30 percent clause" may apply to the alimony and property settlement provisions of the Parties 2005 Agreement. She only chooses to contest its applicability to child support amounts. (Red brief at 16) From Robert's perspective, this case is primarily about contract construction. He asks the Court to determine the nature of the unusual awards and how the 30% rule may apply.

With respect to child support, Amanda is correct that the Legislature has provided that child support awards are not solely based on W-2 salary and wages,

but on a definition that includes other sources of income, less customary deductions.[3] What Amanda forgets is that at the time of the hearing Robert was supporting a child from a prior marriage, Michael Corkern, who was twenty at the time of the hearing. [Binder 1, D 11, 12] At the time of the hearing, Robert had no income from his other companies. [Binder 1, D9, Schedule C] As noted by Robert's accountant, Keith Winfield, Robert's most immediate financial problem

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[3]Miss. Code Ann. § 43-19-101(3) provides in relevant part:

(3) The amount of "adjusted gross income" . . . shall be calculated as follows:

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

at the time of the hearing was Robert's $500,000 debt to taxing authorities. [V. 6: T. 94]

The question before the trial court and this court, is not how Robert's income should be calculated under the statute, but how Section 12 of the Parties' divorce Agreement – the 30% rule – applies. The chancellor enforced other parts of the Agreement, but not this one. This was legal error.

Amanda essentially confesses that, unless the 30% clause conflicts with Section 43-19-101, it may be enforced according to its terms. Because of the flexibility inherent in the Agreement signed by the Parties and the chancery's equitable power over divorce awards, Robert sees no necessary reason why the 30% rule should conflict with the child support guidelines. Amanda's half-page argument on interpretation and application of Section 12 of the Parties' Agreement implicitly admits the trial court's error.

The Court should reverse and remand for this section of the Parties' contract to be interpreted and applied.

C. Robert proved an inability to pay the awards stated in the Parties' 2005 divorce Agreement, and that his financial circumstances had radically changed for the worse, justifying modification of the prior awards.

Amanda argues that Robert failed to prove "with particularity" that he was unable to pay sums required under the Parties' 2005 divorce Agreement. (Red brief at 8-16) Amanda correctly sets out generally the standard for showing that one is unable to pay and eligible for modification of divorce awards. Citing

Howard v. Howard, 913 So.2d 1030 (Miss.App. 2005), Amanda notes that a showing of inability to pay must be made with particularity, not generality, and that the proof must show that Robert earned all he could, lived economically, and paid what surplus was available to Amanda. (Red brief at 8-9) Amanda again refers to alleged increases in Robert's living expenses to show that he was not living "economically." As pointed out *supra*, the allegation that Robert's monthly expenses has increased drastically are incorrect. There is no document or testimony in the record that reflects Robert's failure to live as economically as possible, given his obligations to Amanda and to the rest of his family.

Amanda appears to believe that these factors are considered in isolation when the three factors can only be informed by the facts of a particular case. Instead Amanda makes magisterial assertions such as, "[t]he testimony of Robert and his accountants together with financial declarations indicate that he had the means to pay, and in fact did pay other debts despite of (sic) Amanda's paramount claim on his earnings." (Red brief at 9) There are, of course, no citations to the record for this sweeping generalization nor an explanation of how Robert had extra income or where it might be.

The statement quoted immediately above is followed by a seemingly inconsistent assertion that although the evidence "regarding Robert's financial affairs was varied and inconsistent at best, what never varied is the fact that Robert holds the same medical degree, medical experience and medical licensure at present that he did at the time of his divorce from Amanda." (Red brief at 9) It is

hard to see how Robert's evidence of income shows indisputably that he had the means to pay the divorce Agreement's awards, but is also too "varied and inconsistent" to show his diminution of income and assets. The implication, according to Amanda, is nevertheless that Robert is not earning all he could because "the increased experience in practicing medicine typically results in an increased earning capacity . . .." (Red brief at 9)

That Amanda prefers not to acknowledge the consequences on Robert's professional, personal, and financial life of the Tri-Lakes hospital bankruptcy – or even to acknowledge that it took place – is her choice. But the fact that the gorilla in the room is not mentioned in the red brief must tell against her. Nowhere in the record or in the red brief is there any rebuttal of the facts showing the economic devastation wrought by Robert's having entwined his own financial prospects with that of the hospital.

Robert showed with particularity the consequences of the hospital bankruptcy. Robert's only surviving entity with financially material operations holds the long term acute care hospital ("LTACH") – the hospital-within-the-hospital. The other entities, designed by Robert, and in some cases partners, as a feeder or referral system for Tri-Lakes are defunct. These facts have already been presented at length in the blue brief at 6-15. As for an inability to pay the awards in the Agreement, Robert has already shown that, at the time of the hearing, his net monthly income was a little over $8,000; the Agreement's awards – excluding the $12,000 "clothing allowance" for Caroline – were almost $10,000 per month.

(Blue brief at 16-17)

The Agreement's awards exceed Robert's income, let alone consideration of any equitable amount for Robert's own personal expenses. It is a proposition that needs no citation that divorce awards are not intended to economically destroy one of the former marital partners.

Amanda also argues that Robert came to court with unclean hands and because this "issue" has not been appealed, Robert cannot succeed on a claim for common law modification. (Red brief at 10) Just as this case is about nothing else than the effect of the Tri-Lakes bankruptcy on Robert's entwined finances, the appeal is about nothing else than that the chancellor erred in finding that Robert was not entitled to modification under the Parties' contract – a proposition Amanda concedes by her silence. Implicitly, were the Court to reverse the chancellor's ruling about modification, the "unclean hands" ruling – facially invalid on the undisputed facts in the record – also fails.

But, Amanda insists, Robert was in arrears on child support and alimony, had failed as required by the Agreement to provide Amanda credit cards, had failed to pay furniture allowances, and failed to execute to her a deed for her home in Reunion. (Red brief at 11) The record is silent as to Robert's providing Amanda credit cards, but as for the economic arrearages, those sums have been paid through the post-hearing but pre-final judgment sale of the Amite County property. (Blue brief at 2-3, fn. 2; Red Binder Ex. 31, 32, 35, 37)

Even if Robert entered the court with unclean hands by failing to show an

inability to pay, that fact does not dictate the conclusion that he has left the court with unclean hands so as to disrupt this Court's authority to remand the matter for redetermination. *Howard*, 913 So.2d at 1043.

The *Howard* case involved a physician who had gotten into personal and financial trouble and failed to pay under the existing order. The chancellor ruled that Martin Howard had come to court with unclean hands and entered judgment in the amount of the arrearages. This Court held that entry of the final judgment against Dr. Howard "cleansed" his hands and revived the matter of modification. *Id.* at 1043, ¶ 28. Not only did the chancellor rule adversely to Robert, he has paid the arrearages. Robert denies that he entered court with unclean hands but even if the chancellor's decision on that matter may be affirmed Robert's hands have been cleansed not only by the adverse ruling but by his having paid.

Amanda's argument regarding "unclean hands" is invalidated by the case she cites.

With respect to Robert's showing a material change in circumstances, Amanda argues in support of the chancellor's finding that Robert had failed to prove that the entities in which he had an ownership interest that were "feeder" clinics to the hospital were defunct. Amanda claims that "Robert's testimony was the only evidence presented of the financial status of the companies and absolutely not objective evidence, 'no financial statements, bank statements, cash flow statements or other credible evidence' was presented to the Court." (Red brief at 12)

The record citation for this assertion is accountant Winfield's explanation of how cash flow could be determined from a tax return, supplemented by certain other information, i.e., starting "with taxable income, add back depreciation and then subtract[] the principal portion of debt serviced and that will give you a pretty good measure of a person's spendable income." [V. 6: T. 107] This is an explanation of how cash flow can be approximated, not that Robert's testimony was the "only evidence" or that no objective evidence about the entities' fates appeared in the record.

The record reflects that Robert, the companies' manager Missy Corkern, and the accountants Winfield and Fisher, all testified about the various companies and whether they had operations. (Blue brief at 6-15) The "objective evidence" overlooked by the chancellor and Amanda are the cash flow facts related by Angela Fisher and the tax forms from tax year 2000 through 2007. There are no facts in this record to contradict that, aside from the LTACH, the stream of income to the entities was entirely curtailed once Tri-Lakes stopped paying the payrolls for these entities.

According to Fisher, Robert's wage income declined 44% comparing the first nine months of 2007 with the prior year. (Ex. D33 at 18-19) The companies' decline was 62%. (Ex. D 33 at 20) In 2007, Tri-Lakes had paid only $125,000 before cutting off the companies altogether. (Ex. D at 20) Fisher noted that Robert's personal debt, in November of 2007, amounted to $2.6 million.

Robert's companies were structured under two "parents," Healthcare

Engineers, LLC, and Emergent Health, LLC. [Binder 2, Ex. D35 and D 36] Looking to the tax forms for 2006 and 2007, the amended form for 2006 reported that Robert's K-1 from Healthcare Engineers, LLC, was an ordinary loss of $114,790. [Third Binder, Ex. 39] Emergent Health had positive income of $696,000.02. [Binder 3, Ex. 39]

As Winfield explained, the original 2006 Schedule E [Binder 1, Ex. D8] showed the companies earning amounts they never had before. [V. 6: T. 77] Because Winfield's firm was Tri-Lakes' auditor, he was aware of the somewhat unusual relationship between Emergent Health and Healthcare Engineers on one side, and Tri-Lakes on the other. In other words, Winfield was in a position to know that Tri-Lakes was not paying Emergent Health enough to yield a profit to that entity of $1.5 million. [V. 6: T. 77-79]

As Winfield related, the 2006 return had to be amended because Robert's prior accounting firm had made a basic mistake of accruing income for a business that reported on a cash basis, not accrual. [V. 6: T. 80] In other words, the first accountant had reported receivables as income when in fact they had not yet been paid. [V. 6: T. 80] The related bills payable by Emergent Health were not posted. Consequently, the company appeared to have a far larger profit than was actually the case. [V. 6: T. 81]

Winfield explained that he was constrained by this inherited accounting position and that to protect that accounting position, but also to accurately reflect revenues and expenses, he had the companies execute notes to reflect debt. [V. 6:

T. 81] With respect to this accounting device to repair the earlier accountant's mistake, Winfield remarked that he did not like it: "I would not [account for revenue as had the prior accountant], but in order to protect it, we had notes executed and signed by both Emergent Health and Heathcare Engineers. And to further protect ourselves, if we were going to prove the expense side, they were already accruing the revenue side. . . . I'm not saying it's right, but I wouldn't want to say that in front of the IRS." [V. 6: T. 81]

Amanda repeats the chancellor's distortion of what Winfield actually said: "'[the accountant] would not want the IRS to know that we did it that way,' regarding Robert's financial inter-workings." (Red brief at 11) Aside from slandering an accountant who appears well-qualified, being licensed in three states and having practiced for thirty-five years, Amanda has the temerity to repeat an objectively-demonstrable misstatement by the chancellor. During the hearing the chancellor twice indicated she understood Winfield's explanation of how the prior accounting firm's basic error was repaired. Neither Winfield nor the chancellor had to like it; the tax return simply had to reflect the truth about Emergent Health's profit.

As for tax year 2007, the return prepared by Winfield shows a loss of about $9,000 on Schedule C (Profit or Loss from Business – Sole Proprietorship) and Schedule E (Supplemental Income and Loss – Partnerships, S Corporations, etc.) reports from the K-1's the Healthcare Engineers had income of $26,480; Emergent Health had passive income of $28,026; and that Batesville Hospital Management

reported a loss on its K-1 of $584,633. [Binder 1, Ex. D 9] The offset yielded net loss on Schedule E of $416,716.

Amanda argues – without accurate citation to the record – that Robert obtained his interests in these companies subsequent to their August 2005 divorce. She says, "Robert expended funds for the benefit of these companies while withholding funds owed to his minor child and Amanda. [] It would fly in the face of reason . . . to allow a non-custodial parent to invest discretionary funds to acquire interests in business(es) while claiming an inability to pay established child support awards." (Red brief at 12-13)

This argument borders on the delusional. It is one thing to take the position that Tri-Lakes' bankruptcy had no material affect on Robert's income or assets – that's merely ridiculous. It is quite another matter to have taken the benefits of what were highly profitable businesses while Tri-Lakes was viable and now to sanctimoniously aver that Robert should not have diverted resources to the very businesses having previously enriched Amanda.

It is worth repeating at this pass that from April 13, 2006 through November 1, 2006, Robert paid about $174,290.40, for child support, alimony, and other items called for under the Agreement. From December of 2006 through December of 2007, Robert paid $116,397.70. (V. 7: T. 197-98; Ex. P 38) The grand total for less than a two-year period comes to about $568,703.00 (V. 7: T. 201) This sum does not include the amounts paid through the sale of the Amite County property.

With respect to the factors used to determine whether a material change in

the payor's circumstances warrants modification of prior awards, Amanda argues that while she is a nurse, Robert has failed "[to discuss] his refusal to seek other or additional employment as an emergency medical doctor. And in addition to his medical prowess, Robert has knowledge of and experience organizing and managing complicated, sophisticated business ventures." (Red brief at 14)

Having just said that Robert could not prove his right to modification because he had diverted resources to business ventures and away from paying her, Amanda now argues the opposite: that Robert is not entitled to modification because he is not pursuing other business ventures. Amanda cannot have it both ways.

As for Robert's work schedule, his wife and business manager reported that Robert works both a regular schedule and is on "call." [V. 6: T. 11] His normal shift is 12 hours, but Missy said the longest shift she was aware of was 36 hours. [V. 6: T. 12] Generally he works Monday through Friday with Wednesdays off and is on call over the weekends. [V. 6: T. 17] Robert is a regular employee of the Batesville Clinic, a physician-owned group, and also sees patients in the hospital and also in the LTACH. [V. 6: T. 17]

Amanda does not contest that Robert works more than a normal forty hour work-week, but demands that he work more.

Finally Amanda argues that Robert is not eligible for a modification of the prior awards because the chancellor has discretion to determine the credibility of witnesses having appeared in court. Also, Amanda argues that the chancellor

could also determine "the credibility of documentary evidence . . .." (Red brief at 16) Certainly, witnesses can be mistaken, forgetful, or even deceitful. Too, documents can contain errors, typos, or deliberately state untruths. But Amanda's argument is not that the chancellor heard conflicting testimony and made a rationale choice of what seemed more consistent with other testimony and documents. Nor does Amanda argue that the chancellor had conflicting documents and so had to select what rationally seemed more in tune with the overall facts.

No, Amanda's undeveloped argument appears to be that the chancellor had the "discretion" to disbelieve testimony that was not contradicted and disbelieve documents that were uncontradicted either by testimony or other documents. To the contrary, the Supreme Court of Mississippi has held for a very long time that "where the testimony of a witness is uncontradicted and he is not impeached in some manner known to the law and is not contradicted by the physical facts and circumstances it must be accepted as true." *Tombigbee Electric Power Ass'n v. Gandy*, 216 Miss. 444, 454, 62 So.2d 567, 570 (1953); *A & F Properties, LLC v. Lake Caroline, Inc.*, 775 So.2d 1276, 1282 ¶ 17 (Miss.App. 2000)(uncontradicted evidence which is not inherently improbable, incredible, or unreasonable, cannot be arbitrarily disregarded or rejected and unless shown to be untrustworthy must be taken as conclusive, and binding on the triers of fact), *quoting Lucedale Veneer Co. v. Rogers*, 211 Miss. 613, 635, 53 So.2d 69, 75 (1951).

Amanda claims that the chancellor "gave examples of contradictory testimony, spending behavior and inconsistent documentary evidence that led her

to the conclusion that Robert's testimony lacked credibility and the documentary evidence he presented lacked credibility." The citation for this assertion is "R at 755." The reference is obviously to the chancellor's opinion, but there is no page 755 in the record.

The chancellor did say in her opinion that she thought it likely that Robert had provided incorrect information on the Rule 8.05 form "either knowingly or under circumstances he should have known were not true." (V. 4: R. 488] Unfortunately, the chancellor does not describe what incorrect facts the form contained. The chancellor did say that Winfield did not corroborate Robert's claim of decreased income. Instead, the chancellor averred, "creative accounting" was used to minimize tax liability and that confused the trial judge. [V. 4: R. 488]

The chancellor blamed Robert for failing to produce financial statements, bank statements, or similar items to show the decrease in income. Robert's "failure" to produce raw financial information does not create a suspicious "inconsistency." The tax returns showed Robert's regular wages as well as the income and losses from his businesses. The big story for 2007 was in the Schedule E which collects the K-1 returns from Robert's various entities. There was no evidence of "creative" accounting being used to show losses. The only evidence that exists in this record shows that Tri-Lakes had stopped paying and that Robert's entities' debts to Tri-Lakes still remained.

As noted in the blue brief, the chancellor was understandably miffed that Robert and his financial advisor, David Vance, could not provide accurate

numbers for three loans. Vance had listed the obligations at their original face amounts, rather than the reduced balances reflecting Robert's payments. As Robert candidly admitted on the witness stand, Vance was incorrect in listing three loans at their original face amounts. But the fact is that the correct amount of the loan payoffs only marginally affect the large debt owed by Robert.

Nor does this error, readily admitted by Robert, somehow impeach all the other evidence in this case about Robert's income or the consequences of the Tri-Lakes' bankruptcy on it. There is no connection between the misstated outstanding balances and the multitude of tax returns and testimony about them or that Robert's medical businesses largely collapsed, save for the LTACH, when Tri-Lakes stopped paying the businesses' payrolls. As noted previously in the blue brief, that Tri-Lakes was able to extinguish its debts to Robert's companies through bankruptcy does not affect Robert's debts to Tri-Lakes.

II. Robert is equitably entitled to additional credit for amounts he has paid and is also entitled to a ruling on the tax consequences to the Parties of his loan payments on Amanda's behalf.

Amanda seeks to rebut Robert's reasoning that equity does not entitle her to being paid twice for amounts owed under their Agreement by arguing that this issue is somehow barred because arrearages were ordered paid from the proceeds of the sale of the Amite County real property. (Red brief at 17) As noted in the blue brief, ordinarily Mississippi favors allowing credit for informal payments of amounts specifically due under a divorce decree.

Amanda's argument that this issue is untimely appears to be based on the

fact that arrearages were ordered paid from the June 16, 2009, disbursement order. Robert filed his notice of appeal from the chancery court's final judgment and other orders on July 1, 2009. (V. 5: C.P. 604) The appeal from all orders having been entered in this case was within thirty days under Rule 4, Miss.R.App.P.

Moreover, the order from which this issue arises is not the disbursement order but the order granting some relief on this issue but not the full amount requested which was entered on May 20, 2009. Amanda's "untimeliness" argument appears to be a non-sequitur.

Similarly, Amanda argues that Robert "withdrew" his request that the trial court decide whether principal payments are deductible to him. The Court will not be surprised that the record citation for this proposition does not appear in the actual record. Amanda's citation is "R at 841 ¶ 5." (Red brief at 17) Apparently the reference is to the chancellor's order on Robert's post-judgment motion. [V. 5: R. 572-76]

While it is not clear what was "withdrawn" in terms of the request for post-judgment relief, the issue had already been ruled on in the chancellor's opinion. Robert is free to appeal from any issue reasonably contained in that opinion and judgment. Again, Amanda's argument is inapposite.

With respect to the trial court's refusal to determine the tax consequences of the various awards in the 2005 Agreement, it must be said that a Mississippi court, having jurisdiction over an issue, cannot refuse a party's request that such jurisdiction be exercised where that jurisdiction is properly invoked. *Shewbrooks*

v. A.C. and S., Inc., 529 So.2d 557, 560 (Miss. 1988)(*en banc*)("When we have a case before us which we have the lawful authority to decide, we have no authority not to decide it.")

One would have thought, prior to this chancellor's announcement, that the chancery had the solemn authority to rule on the issue of whether a particular monetary award, arising from a divorce, is taxable to the payor or the payee. *Ivison v. Ivison*, 762 So.2d 329 (Miss. 2000).

Amanda raises other points in support of the judgment but Robert has determined that these points are adequately addressed by his principal brief and there is no benefit to the Court in rehashing these arguments.

III. Conclusion

The case should be reversed and remanded with instructions for the trial court to apply the 30% clause to the monetary awards to effect the Parties' express intention that Robert's "gross before tax salary" is the proper measure of how Robert pays the awards contained in the Parties' 2005 divorce Agreement.

Alternatively, the Court should reverse the chancellor's ruling that Robert failed to show a material change in circumstances entitling him to a modification of the alimony and child support awards.

The Court should also reverse the chancellor's refusal to rule on the issue of taxation of certain payments and render judgment in Robert's favor that principal payments of Amanda's mortgage are deductible by Robert. Finally, the Court should reverse and render judgment here on the chancellor's failure to allow

Robert credit for certain payments made on behalf of his daughter and former spouse.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

The undersigned counsel of record hereby certifies that the above and foregoing Appellant's Reply Brief, together with the required electronic and paper copies, has been filed with the Clerk of the Court by personal deposit of the undersigned into the United States Mail, first-class postage prepaid. A copy has also been served through first-class mail on the following addressees:

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SO CERTIFIED, this the 5th day of August, 2010.

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