IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

NO. 2009-CA-01412
CONSOLIDATED WITH
NO. 2008-M-01855

TOULMAN D. BOATWRIGHT, JR. — APPELLANT

VS.

GRACE BONDS BOATWRIGHT — APPELLEE

BRIEF OF APPELLEE, GRACE BONDS BOATWRIGHT

ON APPEAL FROM THE CHANCERY COURT
OF MARSHALL COUNTY, MISSISSIPPI

(ORAL ARGUMENT IS NOT REQUESTED)

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PERSONS

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

1. **Honorable Glenn Alderson**
   Chancellor, 18th District
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   Oxford, MS 38655

2. **Honorable Edwin H. Roberts, Jr.**
   Chancellor, 18th District
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AMANDA WHALEY SMITH, MSB [redacted]
KENT E. SMITH, MSB [redacted]

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would not be helpful in this case, as it would not aid in offering additional facts, law or argument in support of these issues. The issues before the Court are straightforward issues of law applied to the facts of this case. As such, oral argument would not be of benefit and is not requested.

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The following abbreviations shall apply as used herein for citation reference:

1. "C.F." means Clerk's File and references that which is contained in the record of four (4) volumes of bound orange files containing 468 total pages;

2. "C.R.T." means Court Reporter's Transcript and references that which is contained in the record of eight (8) volumes of bound black files containing 1,136 pages;

3. "P.R.E." means Petitioner's Record Excerpts and references that which is contained within the bound Petitioner's Record Excerpts containing 178 pages which accompanied Petitioner, Toulman D. "Toulie" Boatwright's Petition for Review of Denial of Motion to Recuse; and

4. "A.R.E" means Appellee's Record Excerpts and references those brief extracts from the pleadings, instructions, transcript or exhibits as allowed pursuant to Rule 30(b) of the Rules of Appellate Procedure.

STATEMENT OF THE CASE

Grace Bonds Boatwright seeks affirmation of the decisions of Chancellor Edwin H. Roberts, Jr. and Chancellor Glenn Alderson on her Petition for Citation of Contempt and for Modification of Final Decree of Divorce. Hearing on this matter was brought in the Eighteenth Chancery Court District of Marshall County, Mississippi, and resulted in the Court's finding of the following items which, on appeal, Mr. Boatwright takes issue with: (1) willful contempt on the part of Mr. Boatwright for nonpayment of certain child support obligations and for failure to produce certain documentation as required in the parties' Final Decree of Divorce; (2) imposition of a $1,000.00 fine against Mr. Boatwright as a result of his willful contempt; (3) award of attorney fees to Ms. Boatwright as a result of Mr. Boatwright's willful contempt; (4) denial of Mr. Boatwright's request to terminate his support obligations regarding his daughter, Wynne Boatwright; (5) denial of Mr. Boatwright's request for reimbursement of child support paid to Ms. Boatwright; and (6) denial of Mr. Boatwright's request that Ms. Boatwright pay back child support. (C.F. 367-75).

On May 12, 2004, a decree was entered granting the termination of matrimonial bonds between Toulman D. Boatwright and Grace Bonds Boatwright. (C.F. 38-56). Since that time, litigation has been ongoing in this cause.

On October 19, 2007, Grace Bonds Boatwright filed a Petition for Citation of Contempt and For Modification of Final Decree of Divorce (C.F. 58-63). An Agreed Temporary Order was entered on December 4, 2007 which, among other things, appointed the Honorable Jennifer L. Shackelford as guardian ad litem. (C.F.64-66). In July, 2008, upon motion of the guardian ad litem, Dr. Wyatt Nichols was appointed to conduct psychological evaluations on the parties and minor children.

On May 17th and 18th of 2008, Ms. Boatwright captured a series of telephone conversations between her sixteen-year-old daughter, Hannah Boatwright, and her father, Mr. Boatwright with a digital recording device she had caused to be installed on her home telephone line. (A.R.E. 12-14). In pertinent part, the conversations between Hannah and Mr. Boatwright are as follows: (1) He tells Hannah to "rare back and knock the dog sh_t out of her sister, Wynne; (2) He tells Hannah to "pick up something and hit [Wynne] as hard as you can – she'll leave you alone"; (3) After Hannah tells him that she called Wynne "a stupid whore", he tells her "I wouldn't apologize"; (4) After discussing the physical altercation she had just had with Wynne, Hannah tells him that Wynne "is going to die before she turns 20"; (5) He tells Hannah to "grab a bat"; (6) Hannah confides that she "thought about grabbing a knife" with no discouragement whatsoever from Mr. Boatwright; (6) In regard to Wynne he tells Hannah to "knock the dog sh_t out of her – I'm talking about knock her unconscious – she'll stop it" (7) In regard to Ms. Boatwright, he tells Hannah "while they're outside laying out, I would put Clorox in the margarita mix, I would put Clorox in her wine, I would screw her up, Hannah", to which Hannah replies "I've already looked for it"; and (8) He calls Ms. Boatwright names and speaks negatively of her to Hannah by saying "she is a psycho crazy", "she's a looney", "she is so psychotic". (A.R.E. 13-14). It should be noted that on June 16, 2008, as a result of these recorded conversations, Mr. Boatwright was indicted by the Marshall County, Mississippi Circuit Court on a charge of directing the commission of a felony by a person under the age of 17 pursuant to §97-1-6 of *Mississippi Code Annotated.* (A.R.E. 75-78, 128). On May 20, 2008, immediately after discovering what had been captured during these telephone calls between Mr. Boatwright and Hannah, Ms. Boatwright filed a Motion for Emergency Relief and noticed an emergency hearing for May 23rd. (C.F. 67-

72). Ms. Boatwright alleged in her Motion that the content of these recorded conversations between Mr. Boatwright and Hannah evidenced that Mr. Boatwright's visitation with the minor children "should be suspended, restricted or otherwise modified in order to protect them from further harm at their father's hands". (C.F. 70).

The filing of the Motion for Emergency Relief prompted Mr. Boatwright's counsel, the Honorable Anne Jackson, to file a Motion for Permission to Withdraw as Counsel on May 21st which she noticed for hearing on May 23rd as well. (C.F. 73-75) Mr. Boatwright presented at the scheduled hearing with new counsel, the Honorable Helen Kennedy Robinson. An Order allowing Attorney Robinson to substitute as counsel was signed on May 23rd but not entered with the Court until July 16th. (C.F. 76). In chambers, Mr. Boatwright's newly retained counsel requested a continuance of the matter in order to have time to prepare for same and in order for the guardian ad litem, who was only available by phone, to be present. The Chancellor and counsel agreed to continue the matter until the next week and to suspend Mr. Boatwright's visitation with the minor children until the hearing. Attempts were made by Ms. Boatwright's counsel to set the matter for hearing, but were unsuccessful due to conflicts in the professional schedules of counsel for the parties, the guardian ad litem and three (3) therapists / counselors.

On July 16th, Mr. Boatwright filed a Motion to Dismiss Ms. Boatwright's Motion for Emergency Relief. (A.R.E. 139-143).

Mr. Boatwright filed a Motion for Temporary Relief on September 5, 2008 requesting he pay support to Hannah's paternal grandparents for her benefit as opposed to Ms. Boatwright and that Ms. Boatwright be required to also pay support to the paternal grandparents. (C.F. 78-80). On September 16th, at a hearing on said motion, the

Chancellor temporarily divided Mr. Boatwright's previously determined monthly child support obligation of $320.00 between Ms. Boatwright, the custodial parent of the other two (2) Boatwright children, and the paternal grandparents, the custodians of Hannah. (C.R.T. 42-44). The Chancellor temporarily reduced the amount of child support Ms. Boatwright was to receive by ordering that $100.00 of the $320.00 be paid unto the paternal grandparents for Hannah's benefit and an order to that effect was subsequently entered on September 29th. (C.R.T. 42-44; C.F. 102).

Mr. Boatwright filed a Motion to Recuse on October 6, 2008 (P.R.E. 1-13). On October 15th, in response thereto, Ms. Boatwright's counsel filed a Response to Motion to Recuse and Counter-Motion for Sanctions. (P.R.E. 130-180). Hearing was had on the Motion to Recuse on October 16th in Benton County. Mr. Boatwright was unable to substantiate any of the allegations made in his Motion to Recuse. (C.R.T. 185-281; 922-53; 971-988). The lower court took the matter under advisement and ordered the parties to appear before the Court on October 28th for the rendering of his opinion. (C.R.T. 183). On the 28th, the Chancellor rendered a lengthy opinion in which he denied Mr. Boatwright's Motion to Recuse. (C.R.T. 185-281). Mr. Boatwright then filed a Petition for Review of Denial of Motion to Recuse with the Mississippi Supreme Court on November 13th. (C.P. 183-213). That Petition for Review was denied by Order dated December 10, 2008. (C.F. 222).

A hearing on the merits of all pending motions, petitions and counter-petitions was initially scheduled for February 10th, 11th and 12th, 2009 (C.F. 214). That date was later changed to the 9th, 10th, and 12th, 2009. Ms. Boatwright noticed her Counter-Motion for Sanctions for February 9th. (C.F. 223-4). The Court's staff attorney advised counsel

for Ms. Boatwright at the beginning of the trial, however that the hearing on sanctions would be taken up at the conclusion of trial. (C.R.T. 915).

The guardian ad litem did not issue her preliminary report until February 6th, the Friday prior to trial beginning on Monday. (C.F. 265-82). Her detailed preliminary report included a copy of the assessment of Dr. Wyatt L. Nichols, Ph.D., the court-appointed psychologist, which was dated February 3rd. (A.R.E. 134-38).

At the conclusion of the hearing on February 12th, the Court directed counsel to submit proposed findings of fact and conclusions of law and took the matter under advisement until March 11th, which was later changed to March 10th. (C.R.T. 921). The Court also advised all counsel that he would take up the Counter-Motion for Sanctions on the day he rendered his opinion on the trial on the merits. (C.R.T. 921). The Court reiterated its intent to take up this motion by way of a facsimile letter to all counsel dated February 13th. (C.F. 283-5).

The hearing on Ms. Boatwright's Counter-Motion for Sanctions was, in fact, had on March 11, 2009. (C.R.T. 922-953). Chancellor Roberts issued a detailed ruling at the conclusion of said hearing (C.R.T. 971-88) wherein he imposed sanctions pursuant to the Litigation Accountability Act against Mr. Boatwright and his counsel, jointly and severally, by awarding attorney's fees and costs to Ms. Boatwright. (C.R.T. 984-88). The Order Imposing Sanctions was executed by the Court on April 14, 2009, *nunc pro tunc* to the 10th day of March, 2009. (C.F. 377).

Following the Court's ruling on sanctions, Chancellor Roberts rendered his opinion as to the trial on the merits from the bench in open court on March 10, 2009. (C.R.T. 988-1078). An Order consistent with the Chancellor's ruling was executed on April 9th, *nunc pro tunc* to the 10th day of March, 2009. (C.F. 367-375). Particularly, as

said order indicates, as a result of the Court's finding of willful contempt on the part of Mr. Boatwright, the Chancellor awarded Ms. Boatwright attorney fees. (C.R.T. 1057-58). The Court further directed a writ of inquiry with regard to determining just what portion of the $39,000.00 in attorney fees and expenses Ms. Boatwright incurred during the course of this litigation were attributable to the contempt action, alone. (C.R.T. 1058). The Writ of Inquiry was later set for April 9, 2009. (C.F. 360).

On the morning of April 9th, counsel and the parties presented for the scheduled writ of inquiry in Lafayette County Chancery Court. Mr. Boatwright's counsel requested an "in camera" conference with the Chancellor and counsel for Ms. Boatwright. (C.R.T. 1097). Once in chambers, counsel for Mr. Boatwright informed advised that on the previous day information had come to her attention which she felt required her, pursuant to Rule 8.3 of the Rules of Professional Conduct, to file a report with the appropriate agency, and she requested a continuance of the hearing in order to give her time to file a new Motion to Recuse. The continuance was granted. (C.R.T. 1098; C.F. 365). Mr. Boatwright filed a motion requesting he be allowed to file a sealed motion to recuse on April 13th. (C.F. 362-63). The Court granted that motion on April 16th. (C.F. 386). On April 16th, Mr. Boatwright filed a Motion to Alter or Amend or for a New Trial Pursuant to Rule 59 of the Mississippi Rules of Civil Procedure. (C.F. 379-81). On April 20, 2009, Chancellor Roberts, on the Court's own motion, and "in the best interest of equity and justice", recused himself from the cause. (C.F. 383).

Mr. Boatwright subsequently, on May 5th, filed an Amended Motion to Alter or Amend or for a New Trial Pursuant to Rule 59 and 60 of the Mississippi Rules of Civil Procedure which was dated April 6, 2009. (C.F. 387-89). A hearing was had on said motion in Tippah County Chancery Court on July 9th before Chancellor Glenn Alderson.

(C.R.T. 1101-33). Chancellor Alderson denied the motion and an order to that effect was entered on July 24, 2009. (C.F. 391).

STANDARD OF REVIEW

In domestic relations and child custody cases it is well established that Chancellors are vested with broad discretion and his findings should not be overturned "unless the court's actions were manifestly wrong, the court abused its discretion or the court applied an erroneous legal standard." *Andrews v. Williams*, 723 So.2d 1175, 1176 (Miss.Ct.App.1998). "Findings of fact made by a chancellor will not be disturbed if this court finds substantial evidence supporting the factual findings". *Lenoir v. Lenoir*, 611 So.2d 200, 203 (Miss.1995) (citing *Tedford v. Dempsey*, 437 So.2d 410, 417 (Miss.1983).

"The chancellor, as the trier of fact, evaluates the sufficiency of the proof based upon the credibility of the witnesses and the weight of their testimony" *Fisher v. Fisher*, 771 So.2d 364 (Miss.2000), and "has the sole authority for determining the credibility of witnesses." *Yarbrough v. Camphor*, 645 So.2d 867, 869 (Miss.1994).

SUMMARY OF THE ARGUMENT

Mr. Boatwright's argument that the appellate court should apply heightened scrutiny to its review of the lower court's findings of fact as opposed to the great deference normally afforded same is without merit as the lower court did not adopt verbatim, nor did it incorporate Ms. Boatwright's proposed findings of facts and conclusions of law as Mr. Boatwright alleges.

The restriction of Mr. Boatwright's visitation was within the lower court's discretion and was a proper measure to take in order to prevent harm to the minor child. Nothing in the record indicates that the Chancellor was acting in any manner other than the best interest of the minor child, which is to be, and properly was, the Court's polestar consideration when making visitation decisions.

The Chancellor in no way abused his discretion by determining that Mr. Boatwright should not be relieved of his financial obligation to pay support and college expenses for the benefit of his daughter, Wynne Boatwright, when Mr. Boatwright offered no evidence to meet the standard required to warrant such relief.

The Chancellor was acting well within the wide range of discretion afforded him in regard to support issues when he denied Mr. Boatwright's request to be reimbursed for a four-month period of child support paid to Ms. Boatwright after having temporarily removed the parties' minor daughter, Hannah Boatwright, from Ms. Boatwright's home and placing her with Mr. Boatwright's parents as a result of improper actions on Mr. Boatwright's part. Mr. Boatwright did not ask that his support obligation be modified until four months after Hannah had been placed with her grandparents and the payments were already vested. Likewise, the Chancellor did not abuse his discretion when he denied Mr. Boatwright's request that Ms. Boatwright be ordered to pay back support unto

him for the time the minor child was in the custody of the paternal grandparents as he was not the custodial parent of any of the three (3) minor children and Ms. Boatwright had custody of two (2) of them.

At trial, Chancellor Roberts, acting in his capacity as the trier of fact, properly and in accordance with the discretion placed upon the finder of fact, found that Mr. Boatwright was in willful contempt of the previous orders of the Chancery Court of Marshall County, and that as a result thereof, he should be fined and held responsible for the attorney fees Ms. Boatwright incurred in the pursuit of the contempt action. The findings are proper and are supported by the weight of the evidence presented at trial.

Due to the allegations fabricated by Mr. Boatwright and supported by his counsel in his Motion to Recuse and accompanying affidavits, the chancellor's decision to sanction Mr. Boatwright and his attorney fell within the confines of the discretion the chancellor is afforded and was nothing short of proper. The proof showed that Mr. Boatwright swore to matters under oath when he filed his Motion to Recuse and accompanying affidavit that he either had no knowledge of or that were simply false. The Chancellor's decision to impose sanctions under the Litigation Accountability Act is supported by the overwhelming weight of the evidence.

Mr. Boatwright is procedurally barred from raising the issue of whether Chancellor Roberts erred in previously failing to recuse as same has already been answered by the Mississippi Supreme Court by its denial of Mr. Boatwright's Petition for Review of Denial of Motion to Recuse and is therefore *res judicata.*

The Chancellor did not have a duty to disclose that he had occasionally hunted with one of Ms. Boatwright's attorneys some time prior to the initiation of the cause of action which is the subject of this appeal when the evidence showed that the two did not

hunt together from Spring of 2007 until after the trial on the merits of this matter was concluded and the Court had rendered its ruling. Further, there was nothing about the terms of the relationship shared by Chancellor Roberts and Attorney Smith which mandated recusal by the Mississippi Constitution, Mississippi Code Annotated or the Code of Judicial Conduct.

Finally, Chancellor Alderson did not abuse his discretion when he denied Mr. Boatwright's Motion to Alter or Amend or for a New Trial, as no evidence was offered at the hearing to warrant such relief.

ARGUMENT AND AUTHORITIES

A. Mr. Boatwright is not entitled to a review of the Chancellor's findings under heightened scrutiny.

Mr. Boatwright alleges that the Chancellor's findings in regard to the trial on the merits are subjected to the heightened scrutiny our appellate courts have applied in instances where a chancellor had adopted verbatim, the proposed findings of fact and conclusions of law prepared by a party. (See *Gutierrez v. Bucci*, 827 So.2d 27 (Miss.Ct.App.2002) and *Brooks v. Brooks*, 652 So.2d 1113 (Miss.1995)). In support of this argument, Mr. Boatwright lists a number of instances wherein the ultimate ruling of the Chancellor was the same as that which Ms. Boatwright proposed the ruling of the Court should be in her findings of fact and conclusions of law. Where Mr. Boatwright's argument falls grossly short is in the fact that there is no "verbatim" adoption or incorporation by the Chancellor of Ms. Boatwright's proposed findings of fact and conclusions of law. In fact, the record reflects that the Chancellor prepared his own findings of fact and conclusions of law which he rendered from the bench and once transcribed, encompasses some ninety-six (96) pages. (C.R.T. 988-1063). He fails to point to any such verbatim adoption or incorporation, as same simply does not exist.

In complete contrast to the case *sub judice*, the chancellor in *Brooks* wholly failed to make his own findings of fact and conclusions of law and "adopted verbatim and by incorporation the findings of fact and conclusions of law prepared by a litigant's attorney as those of the lower court". *Brooks*, 652 So.2d at 1118. No similarity whatsoever exists between the circumstances at hand and those of *Brooks*. Further, each and every instance Mr. Boatwright points to in which the Chancellor ruled as Ms. Boatwright suggested he should in her proposed findings of fact and conclusions of law is supported by the evidence. Mr. Boatwright doesn't make argument that any of the facts adopted by the

Court are inaccurate nor does he allege that any incorrect legal standard was applied by the Court in reaching its conclusions as in *Brooks*.

Accordingly, Mr. Boatwright's argument is without merit.

B. The Chancellor's Rulings are Supported by the Weight of the Evidence and are Not Based on Bias.

On appeal, Mr. Boatwright lists a litany of examples which he alleges constitute bias on the part of the Chancellor. Those which were addressed in Mr. Boatwright's Motion to Recuse and subsequent Petition for Review of Denial of Motion to Recuse, which the Supreme Court denied, will not be addressed herein. However, Mr. Boatwright alleges that there are new indications of bias on the part of the Chancellor which arose out of the trial on the merits and hearing on sanctions, and they are as follows: (1) findings of willful contempt; (2) imposition of fine as a result of contempt; (3) imposition of sanctions, (4) refusal to order reimbursement of support paid to Ms. Boatwright for the benefit of Hannah while she was in the custody of Mr. Boatwright's parents; (5) refusal to order Ms. Boatwright to pay back support for Hannah; (6) refusal to relieve Mr. Boatwright of further duty to pay support for the benefit of the minor child, Wynne; (7) finding Ms. Boatwright was entitled to be awarded attorney fees as a result of Mr. Boatwright's willful contempt; (8) not finding Ms. Boatwright to be in willful contempt. Mr. Boatwright further alleges that the Chancellor's application of credibility as to witnesses presented at trial evidences bias on his part, as well.

It is presumed that a judge who is sworn to administer justice is qualified, impartial and unbiased. *Hathcock v. S. Farm Bureau Cas. Ins. Co.*, 912 So.2d 844 (Miss.2005) Our Supreme Court has held that "to overcome the presumption, the evidence must produce a 'reasonable doubt' (about the validity of the presumption); that is, one must question whether 'a reasonable person, knowing all of the circumstances,

would harbor doubts about the judge's impartiality." *Id.* (See also *McBride v. Meridian Pub. Improvement Corp.*, 730 So.2d 548, 551 (Miss. 1998)) The presumption is only overcome "by showing beyond a reasonable doubt that the judge was biased or unqualified." *Id.*

Adverse rulings alone are not sufficient to prove bias or warrant recusal. *Stringer v. Astrue*, 252 Fed.Appx.645, 2007 WL 3151804 (C.A.5 (Miss.)) (citing *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994)). "Deep-seated favoritism or antagonism" on the part of the judge is required to succeed on a bias claim. *Id.* The *Stringer* Court found the bias claim made by Mr. Stringer to be without merit due to the fact that he could not point to any evidence of "deep-seated favoritism or antagonism" on the part of the judge. *Id.* Just as Mr. Stringer could not point to any evidence of deep-seated favoritism or antagonism on the part of the judge, Mr. Boatwright cannot point to any on the part of the Chancellor in the case *sub judice*.

Many of Mr. Boatwright's alleged indications of bias on the part of the Chancellor in the case *sub judice* are eerily akin to those made by the Appellant, Ernest, in *Norton v. Norton*, 742 So.2d 126 (Miss.1999). In *Norton*, Ernest alleged that the chancellor had already decided the case prior to his arrival at the scheduled hearing, that he was antagonistic toward Ernest and his attorney, that he became an advocate for the opposite party, and that he would not allow Ernest's attorney to respond to the arguments made by his former wife's attorney. *Id* at 131. Ernest also argued that the fact that the chancellor sanctioned his attorney for filing a motion for reconsideration is clear evidence of bias. *Id.* Finally, Ernest argued that the excessive amount of sanctions levied against him and his attorney in the amount of $2,193.23 indicated bias and prejudice. *Id.* The

Court in *Norton* held that those factors were not enough to overcome the presumption that the chancellor was impartial and unbiased. *Id.*

The Chancellor's ruling as to each and every one of the aforementioned outlined issues which Mr. Boatwright alleges indicates bias is proper and as shown herein below in the following subsections, is both supported by the overwhelming weight of the evidence and is a correct application of the law.

1. The Chancellor was acting in the best interest of the child and therefore was proper when he temporarily suspended Mr. Boatwright's visitation.

The best interest of the child is the "polestar" consideration in all cases dealing with child custody and visitation. *Riley v. Doerner,* 677 So.2d 740, 743(Miss.1996). Visitation restrictions are within the sound discretion of the chancellor. *Newsom v. Newsom*, 557 So.2d 511, 517 (Miss.1990); *White v. Thompson*, 569 So.2d 1181, 1185 (Miss.1990); *Clark v. Myrick*, 523 So.2d 79, 83 (Miss.1988); *Cheek v. Ricker*, 431 So.2d 1139, 1146 (Miss.1983). This Court affords great deference to a chancellor's decision regarding visitation. *Craft v. Craft* 32 So.3d 1232, 1238 (Miss.Ct.App.2010). Where a chancellor has made a factual finding on the matter of visitation, this Court has held that it will not disturb those findings unless there is no credible evidence, he has committed manifest error or he has applied an erroneous legal standard. *Henderson v. Henderson*, 952 So.2d 273, 279 (Miss.Ct.App.2006) (citing *Bredemeier v. Jackson*, 689 So.2d 770, 775 (Miss.1997)).

This Court has held that a chancellor has the power to restrict visitation in circumstances which present an appreciable danger of hazard. *R.L.N. v. C.P.N.* 931 So.2d 620 (Miss.Ct.App.2005). In *Craft v. Craft*, 32 So.3d 1232, 1237 (Miss.Ct.App.2010) where the father had been arrested and charged with four counts of

child exploitation, including sexual battery of a minor child in violation of *Mississippi Code Annotated* §97-5-33 and §97-3-95, the chancellor restricted his visitation to one day a week for one-and-a half hours at DHS. On appeal, the Court of Appeals held that the Chancellor did not abuse his discretion in restricting the father's visitation, even though there was no indication in the record that his children had ever been subjected to physical harm while in his care because the chancellor properly took into consideration the children's best interests in making his decision. *Id* at 1243.

In the case *sub judice,* the basis for Ms. Boatwright's emergency plea that the Court suspend Mr. Boatwright's visitation was the content of a series of telephone calls made by sixteen year old Hannah Boatwright to her father, Mr. Boatwright, on May 17th and 18th, 2008 which were captured and recorded by the digital recording device Ms. Boatwright had caused to be installed on her home telephone line. (A.R.E. 12-14) The Motion for Emergency Relief filed by Ms. Boatwright laid out the content of the recorded conversations in very specific detail. (A.R.E. 113-117) The Motion alleged that during the course of the recorded conversations, the following occurred: (1) Mr. Boatwright encouraged Hannah to poison her mother with Clorox to which Hannah replies that she has looked for Clorox but doesn't have any; (2) Hannah voices an intent to harm her older sister, Wynne, by saying "I thought about grabbing a knife . . . she's gonna die before she turns 20", to which Mr. Boatwright replies by saying "do something like that"; (3) Mr. Boatwright encourages Hannah to attack Wynne by telling her to "knock the dog sh_t out of her" and tells her to "find you something like a bat". (A.R.E.114-115). Ms. Boatwright alleged in her Motion that the content of these recorded conversations between Mr. Boatwright and Hannah evidenced that Mr. Boatwright's visitation with the

minor children "should be suspended, restricted or otherwise modified in order to protect them from further harm at their father's hands". (A.R.E.116).

The hearing on the Motion for Emergency Relief was set for May 23, 2008, and it was Mr. Boatwright's newly retained counsel, the Honorable Helen Kennedy Robinson, who requested a continuance of the hearing in order to have time to adequately prepare. Mr. Boatwright's former counsel, the Honorable Anne Jackson, did not request to withdraw as his counsel until two days before the scheduled hearing and did not withdraw until the day of the scheduled hearing on May 23, 2008. (C.F. 73-77).

Quite obviously, the allegations contained within the Motion for Emergency Relief were of an extremely serious nature. Based upon the gravity of the allegations as well as the Chancellor's obligation to consider the best interest of the children, he was proper in temporarily suspending Toulman D. Boatwright's visitation with the minor children pending a hearing which Mr. Boatwright's own attorney requested a continuance of.

Mr. Boatwright makes issue with the fact that the hearing on Ms. Boatwright's Motion for Emergency Relief did not ever get re-set until such time as he filed his Motion to Dismiss it on July 16, 2008. (A.R.E. 139-143). He further alleges that the Court bore responsibility for allowing this matter to rock-on, if you will, while his visitation was suspended. However, the record reflects that Mr. Boatwright made no effort to bring this issue to the Court's attention until such time as he filed the Motion to Dismiss Ms. Boatwright's Motion for Emergency Relief. In fact, the record reflects that during this period of time from May 23rd until July 16th, Mr. Boatwright was busy securing an expert to review the recorded conversations in an effort to support his allegation in paragraph 5 of his Motion to Dismiss that they had "been submitted to the Court with numerous and

major omissions in the conversation which drastically alter the content and intent of the conversations. (P.R.E. 141). In the same paragraph of the Motion, Mr. Boatwright alleged that he would "show the omissions in the recording through qualified expert testimony". (P.R.E. 141).

Ms. Boatwright submits to this Court that the record reflects that the reason, in fact, why Mr. Boatwright allowed the emergency matter to linger, was due to the fact that the content of those recorded conversations was so graphic and severely disturbing that his only chance at not having his visitation restricted upon the Chancellor hearing them was by attempting to show that they had been altered or were, somehow, not what they appeared to be.

Once Mr. Boatwright brought to the Court's attention that he had not been visiting with the minor children since May 23rd and wished to do so, the Court addressed it at that very moment by requesting a recommendation from the guardian ad litem with regard to how visitation should be conducted. (A.R.E. 1-3) More specifically, the Chancellor stated:

> "I want a recommendation from the guardian ad litem with regard to some type of visitation between now and the hearing date with that child. And I'll just tell you, I'm going to go with whatever the guardian ad litem recommends on a temporary basis. She's been a lot more involved with this family than I have. And I don't see how we can go forward on a hearing, Ms. Robinson, without you being able to put on the proof that you feel like you need to put on. And unless you're ready to go—if you elect to go forward with the hearing next week, then that's fine, we'll do it and I'll address it then. If you don't, why my thought is, is to have the guardian ad litem make a recommendation to the Court with regard to some kind of visitation for the son with your client. And whether it be supervised, whether it be unsupervised or whatever, I don't know. But I'm going to rely on her to make a recommendation to me until we can get you in the court."
>
> (A.R.E. 1-2)

On appeal, Mr. Boatwright alludes to the fact that this previously alleged bias against him on the part of the Chancellor in regard to visitation issues continues through the conclusion of the trial of the matter. Mr. Boatwright alleges that the Chancellor's questioning of Dr. Ruth Cash as to her interpretation of what Dr. Nichols' visitation recommendation was is evidence of bias. Clearly, a review of the record will discredit such an allegation, as the Court's questioning was obviously in an effort to gain clarification. (A.R.E. 90-95) The record further reflects that upon receiving clarification from Dr. Nichols as to what his visitation recommendation was, the Chancellor followed same. (

A.R.E. 26). Further, at the conclusion of the trial, the Chancellor granted Mr. Boatwright some additional summer visitation for the next two years in an effort to allow him to make up some of the visitation time he missed. (A.R.E. 27-28)

The record reflects that the Chancellor was acting in the best interest of the minor child each and every time in which visitation issues were addressed. The Chancellor exercised the discretion given to him by this Court when he temporarily restricted Mr. Boatwright's visitation with his son in an effort to protect what this Court has also held to be the "polestar" consideration in terms of decisions regarding visitation—the best interest of the child. Finally, nothing in the record regarding the Chancellor's rulings on visitation indicate bias. Mr. Boatwright's claims regarding visitation are completely void of merit.

2. The Chancellor's denial of Mr. Boatwright's request to terminate his obligation to pay support and college expenses for the benefit of Wynne Boatwright was proper.

The seminal Mississippi case addressing situations in which child support may be terminated due to deterioration of the parent-child relationship is *Caldwell v. Caldwell*,

579 So.2d 543 (Miss.1991). In *Caldwell*, the Court sets out the standard for a determination that a child has rejected the parent-child relationship to the point where child support is forfeited, and that standard is that the child's actions must be both "clear and extreme." Id at 548; (See *Dykes v. McMurry*, 938 So.2d 330, 333-34 (Miss. Ct. App. 2006); *Markofski v. Holzhauer*, 799 So.2d 162, 168 (Miss. Ct. App. 2001)). The *Caldwell* Court, further not only held that a child that has a strained relationship with the non custodial parent should not be in danger of having his/her support reduced, but that the amount of money that the non custodial parent is required to pay for the support of his minor children should not be determined by the amount of love the children show toward that parent. *Id.*

This Court found a child's conduct to be sufficiently "clear and extreme" to forfeit her support from her father in *Roberts v. Brown*, 805 So.2d 649 (Miss.Ct.App.2002). In *Roberts*, not only had the daughter falsely accused her father of raping her, but also testified that she did not love him, did not want to visit or communicate with him, and did not desire to have a relationship with him or visit him. *Id.* at 650. This Court found that the rape accusation coupled with the child's open abandonment of the relationship was the type of clear and extreme conduct envisioned by The Supreme Court in *Caldwell. Id.*

The chancellor found no merit in Mr. Boatwright's allegations that the behavior of his daughter, Wynne, had risen to the level of allowing his support obligation regarding her to be terminated and specifically stated as follows:

> The Court finds that this case is distinguishable from the *Hambrick* case in which the appellate court found that the father could stop paying for the daughter's college. This is factually distinguishable. While this Court acknowledges that Mr. Boatwright at least early on made some efforts to go to some of Wynne's basketball games and there was some

> communication, later on, that has not occurred. The Court notes from the testimony that Mr. Boatwright has not given Wynne Christmas presents, birthday presents or graduation presents over the years. In fact, he didn't even attend her graduation, stating that she didn't send him an invitation, and that's why he didn't go. The Court further finds as evidenced by the recorded conversations in this case that Mr. Boatwright told his daughter, Hannah, not to apologize for calling her sister, Wynne, a whore. He also told her to hurt her sister, take a bat to her head and hit her and knock her unconscious. The Court finds that the poor relationship between Wynne and her father is not of Wynne's making and is not sufficient to warrant terminating Wynne's child support.
>
> (A.R.E. – 23-24).

In *Hambrick*, which the Court referenced in his ruling, the Supreme Court held that the duty of a father to send a child to college, under the circumstances of this case, is not absolute, but is dependent, not only on the child's aptitude and qualifications for college, but on whether the child's behavior toward, and relationship with the father, makes the child worthy of the additional effort and financial burden that will be placed on him. *Hambrick v. Prestwood*, 382 So.2d 474 (Miss.2002). The child in *Hambrick* testified to a dislike for the father which bordered on hatred. The circumstances which the *Hambrick* Court held prevented the child from receiving support for college from her father simply do not exist in the case *sub judice*. The record reflects that Wynne was doing well in college (A.R.E. 111-112) and Mr. Boatwright offered no proof from Wynne that she had any dislike for her father, much less hatred.

The Chancellor was proper in his finding that Mr. Boatwright was not entitled to a termination of his previously imposed financial obligations of support and college expenses for his minor daughter, Wynne Boatwright as the record is completely void of any evidence, whatsoever, of the required "clear and extreme" conduct on the part of Wynne toward her father. In fact, as the Chancellor pointed out, if anyone's actions are "clear and extreme" it would be those of Mr. Boatwright in encouraging his own sixteen year old child, Hannah, to hurt her sister, Wynne, by taking a bat to her head and

knocking her unconscious. (A.R.E.23-24). Further, Mr. Boatwright offered testimony that he saw nothing wrong with referring to, allowing his daughter, Hannah, to or personally calling his daughter, Wynne, a whore under certain circumstances. (C.R.T. 826-827)

3. The denial of Mr. Boatwright's request for back child support and reimbursement for child support paid to Ms. Boatwright was not an abuse of discretion.

It is within the chancellor's discretion to award child support, and this Court will not reverse that award unless the chancellor was manifestly wrong in the findings of fact or manifestly abused his discretion. *Henderson v. Henderson*, 952 So.2d 273, 279 (Miss.Ct.App.2006) (citing *Chesney v. Chesney*, 910 So.2d 1057, 1060 (Miss.2005). This Court gives great deference to a chancellor's judgment because a chancellor is in a better position to determine what action would be fair and equitable in the situation than a court of appellate jurisdiction. *Department of Human Services v. Ray*, 997 So.2d 983 (Miss.App.2008). The Chancellor's awarding of child support is actually an exercise of fact finding which significantly restrains the appellate court's review of same. *Clausel v. Clausel*, 714 So.2d 265, 267 (Miss. 1998).

Once a child support payment becomes due, that payment vests in the child, and once vested, they cannot be modified or forgiven by the Courts. *Department of Human Services v. Ray*, 997 So.2d 983 (Miss.Ct.App.2008); *Burt v. Burt*, 841 So.2d 108 (Miss.2001); *Tanner v. Roland*, 598 So.2d 783 (Miss.1992); *Premeaux v. Smith*, 569 So.2d 681 (Miss.1990). However, within the sound discretion of the trial court, retroactive modification may be allowed as of any reasonable date on or after the date of the filing of the motion to amend the support order. *Lawrence v. Lawrence*, 574 So.2d 1376, 1384 (Miss.1991).

Hannah Boatwright was placed in the temporary custody of her paternal grandparents on May 23, 2008. At that time, Mr. Boatwright made no request to modify child support. Pursuant to his Final Decree of Divorce, he was obligated to pay $320 per month in child support to Ms. Boatwright for the benefit of their three (3) minor children. (C.F. 43). It wasn't until September 5, 2008 that he filed a Motion for Temporary Relief wherein he requested that the Court enter a temporary order requiring him to pay support for Hannah Boatwright's benefit unto the paternal grandparents and requiring Ms. Boatwright to also pay support. (A.R.E.118-119). Therefore, in response to Mr. Boatwright's request, and as he was a totally non-custodial parent, on September 16th, the Chancellor divided Mr. Boatwright's previously ordered monthly child support obligation between Ms. Boatwright, the custodial parent of two (2) of the Boatwright children and his parents, the custodians of one (1) of the children, Hannah. (A.R.E. 4). The Chancellor ordered Mr. Boatwright to pay $100.00 to his parents for the benefit of Hannah and the remaining $220.00 to Ms. Boatwright for the benefit of the other two (2) minor children. (A.R.E. 4).

The Chancellor did not abuse his discretion when he did not award any reimbursement for support paid unto Ms. Boatwright for the benefit of Hannah during the four (4) month period as he did not have custody of any of the minor children during that time and he did not request any modification of his support payments until September 5th. By law, Mr. Boatwright is not entitled to be awarded reimbursement for any support payments made prior to a request for modification of same. Further, Mr. Boatwright was not the custodial parent of any of his three (3) children. Had he been the custodian of Hannah as opposed to his parents, he would have been entitled to an offset as to an amount of support Ms. Boatwright would be required to pay, by statute, for the benefit of

Hannah. However, as he was not the custodial parent of any of the three (3) children and was obligated to pay support as the non-custodial parent, the Court's reasoning that Ms. Boatwright was not obligated to pay support for Hannah was within reason and certainly not an abuse of discretion.

4. The Chancellor's findings in regard to contempt, the imposition of fines and the award of attorney fees was proper and supported by the evidence.

(a) Mr. Boatwright was in willful contempt.

Contempt matters are left to the substantial discretion of the trial court "which, by institutional circumstance and both temporal and visual proximity, is infinitely more competent to decide the matter than [the appellate court]." *Ellis v. Ellis*, 840 So.2d 806, 811 (Miss.App.2003) (citing *Varner v. Varner*, 666 So.2d 493, 496 (Miss.1995)). A citation for contempt is proper when the contemnor has willfully and deliberately ignored the order of the court. *Strain v. Strain*, 847 So.2d 276, 278 (Miss.App.2003) (quoting *Bredemeier v. Jackson*, 689 So.2d 770, 777 (Miss. 1997)).

It has further been held that, "the chancellor should be allowed wide latitude in the exercise of sound discretion when exerting his coercive powers to enforce his decrees." *Matthews v. Matthews*, 86 So.2d 462 (Miss.1956). This discretion will only permit a reversal of the chancellor's decision upon a clear showing that the chancellor has "manifestly abused the wide latitude of discretion afforded him in such manners." *Dunaway v. Dunaway*, 749 So.2d 1112, 1115-16 (Miss.App.1999). A chancellor's orders for contempt will not be reversed "unless manifestly wrong, clearly erroneous, or the proper legal standard was not applied." *Hensarling v. Hensarling*, 824 So.2d 583, 587 (Miss. 2002).

Upon rendering his opinion, the Chancellor went into great detail as to what the testimony at trial had been as well as what the exhibits evidenced. (A.R.E. 5-11; 17-22). Each of the Court's findings in regard to contempt are supported by the weight of the evidence offered at trial.

With regard to civil contempt, payment prior to the hearing is a defense. *BELL ON MISSISSIPPI FAMILY LAW*, 344. However, the Court held in *Stauffer v. Stauffer* that it was not improper to hold a father in contempt even though he complied with the Court Order prior to the hearing due to the fact that his conduct cost his ex-wife attorney fees and expenses. *Stauffer v. Stauffer*, 379 So.2d 922, 924-25 (Miss. 1980).

Further, failure to comply with a court order is not contempt if the defendant was genuinely unable to pay or did not act willfully, if the provision was ambiguous, or if performance was impossible. *Bell*, 344.

Mr. Boatwright offered no proof as to any of these defenses. Further, the record is clear that Mr. Boatwright made a willful and conscious decision not to pay the portion of college related expenses by first saying that he didn't think it was a legitimate college expense and then said he didn't think it was purchased by Ms. Boatwright. (A.R.E. 65-68)

As of the date of the completion of the trial in this cause, Mr. Boatwright, even after receiving credits for payment made after Ms. Boatwright filed her petition alleging contempt, had still failed to pay a portion of his one-half obligation of out-of-pocket medical expenses. (A.R.E. 46-64).

Although Ms. Boatwright testified that as of the beginning of the trial of this matter, Mr. Boatwright had produced complete copies of the requested income tax returns, Mr. Boatwright did admit that he only provided her with the first page of his

2006 federal income tax return prior to her filing her petition. It was not until after the filing of Ms. Boatwright's petition and after retaining counsel that he provided complete copies of the requested returns as ordered in the Final Decree of Divorce. (A.R.E. 104-105).

The proof also showed that Mr. Boatwright did not provide proof of life insurance coverage to Ms. Boatwright as ordered in the Final Decree of Divorce until after the filing of Ms. Boatwright's petition, which he did through his attorney of record. (A.R.E. 105-10).

(b) Ms. Boatwright was entitled to an award of attorney fees.

In instances where an individual has willfully not complied with a chancery court order, Mississippi law mandates, pursuant to § 93-5-23 of *Mississippi Code Annotated* that "the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegations." The award of attorney's fees is largely within the sound discretion of the chancellor. *Wright v. Stanley*, 700 So.2d 274, 282 (Miss.1997). In a civil contempt action, the courts have the authority to award reasonable attorney fees. *Hinds County Bd. Pf Sup'rs v. Common Cause of Mississisippi*, 551 So.2d 107, 125 (Miss.1989). This power serves to make the plaintiff whole and enforce compliance with a court decree. *Id.* In *Hinds County Bd. Of Sup'rs*, the court determined that a chancellor has "broad discretion" in determining the award but the award must be fair and reasonable. *Id.* at 126.

In general, the court must show an inability to pay, due to valid reasons, for attorney's fees to be awarded; however, in contempt actions, even if the contempt deals with domestic relations, the chancellor has the discretion to make the prevailing party

whole by awarding attorney's fees without regard to whether the prevailing party is able to pay his fees. *Creel v. Cornacchione*, 831 So.2d 1179, 1184 (Miss.App.2002). When one of the parties is held in contempt for violating a court's previous order, this Court has held that attorney's fees should be awarded to the party who was forced to seek the court's enforcement of its own judgment. *Elliott v. Rogers*, 775 So.2d 1285, 1290 (Miss.Ct.App.2000); *Henderson v. Henderson*, 952 So.2d 273, 281 (Miss.Ct.App.2006); see *Chasez v. Chasez*, 935 So.2d 1058, 1063 (Miss.Ct.App.2005).

In *Creel*, the father was awarded physical custody of the two daughters and the mother was awarded rights to visitation. *Id.* at 1181. Since the divorce, four motions were filed by the mother to force the father to abide by the divorce decree. Upon finding the mother's allegations were unfounded the chancellor ruled in favor of the father and awarded him reasonable attorney's fees. This Court affirmed the award. *Id.* at 1182-83.

In *Stribling v. Stribling*, 906 So.2d 863 (Miss.Ct.App.2005), the chancellor awarded Mr. Stribling partial attorney's fees totaling $24,901.90 for expenses incurred for enforcing contempt orders due to Mrs. Stribling's failure to abide by court orders. The chancellor determined that a partial award of attorney's fees was appropriate, needed, and equitable. *Id.* This Court found no abuse of discretion in the award where the findings were supported by substantial evidence. *Id.* (citing *Anderson v. Anderson*, 692 So.2d 65, 72 (Miss.1997)).

Based upon the Chancellor's finding that Mr. Boatwright was in willful contempt, his determination that Grace Boatwright was entitled to an award of reasonable attorney fees incurred as a result of the pursuit of a willful contempt action against Mr. Boatwright was warranted and proper. (A.R.E. 25-26).

(c) Mr. Boatwright was subject to a fine.

Upon a proper finding of contempt, *Mississippi Code Annotated* §9-5-87 states that the chancery court "shall have power to punish any person for breach of injunction, or any other order, decree, or process of the court, by fine or imprisonment, or both". Accordingly, as the Chancellor's finding of willful contempt on the part of Mr. Boatwright was proper, so, too, was the imposition of the fine. (A.R.E. 25).

(d) Ms. Boatwright was not in willful contempt.

Mr. Boatwright alleged in paragraph 11 of his counter-petition for contempt that Ms. Boatwright failed to provide forty-eight (48) hour notice of the children's medical appointments as previously ordered by the Court and that in further violation of the Court's previous orders, she had "never" provided him advanced notice of the minor children's medical/dental appointments. (C.F. 104-115).

Upon cross-examination, Mr. Boatwright could not dispute that Ms. Boatwright had forwarded him twenty (20) letters via certified mail during the time in question and within those certified letters, had given him advance notice of at least twenty-two (22) medical appointments. (A.R.E. 69-73). The Chancellor found as follows:

> "Ms. Boatwright has not failed to provide notice of appointments in a timely manner . . . [as she] has given reasonable explanations as to why they might not have all been within the 48-hour period when she explained that they're late when they go to the doctor on the weekend or she is not able to run by the post office because she's taking care of a sick child. The Court also finds that she has repeatedly asked for an email address or a fax number in which to provide that information in a more timely manner and that all of these requests have gone unanswered according to the testimony."
>
> (A.R.E. 15-16).

The Chancellor's decision not to hold Ms. Boatwright in contempt is supported by credible evidence and is therefore proper.

5. The Chancellor's sanctioning of Mr. Boatwright and his attorney was proper.

Rule 11(b) of the Mississippi Rules of Civil Procedure provides:

> "If any party files a motion or pleading which in the opinion of the Court is frivolous or is filed for the purpose of harassment or delay, the Court may order such a party or his attorney or both to pay the opposing party or parties reasonable expenses incurred by such other parties and by their attorneys, including reasonable fees."
>
> *M.R.C.P. 11(b)*

Similarly, *The Litigation Accountability Act*, §11-55-3(a) of the *Mississippi Code Annotated* provides that a claim is without substantial justification when it is "frivolous, groundless in fact or in law, or vexatious, as determined by the court". The Court uses the same test to determine whether a filing is frivolous under both Rule 11 and *The Litigation Accountability Act* and as such a claim is said to be frivolous when "objectively speaking the pleader or movant has no hope of success. *Leaf River Forest Prods., Inc. v. Deakle*, 661 So.2d 188, 197 (Miss.1995). The pivotal point in time to assess a party's or attorney's actions is the instant when the signature is placed upon the document. *Thomas v. Capital Security Services, Inc.* 836 F.2d 866, 874 (5th Cir.1988). "Rule 11 states, and the Act has been interpreted to state, that the decision to award sanctions is within the discretion of the trial court". *Illinois Central Railroad Company v. Broussard*, 19 So.3d 821, 823 (Miss.Ct.App.2009); Miss.Code Ann. §11-55-5 (Rev.2002); M.R.C.P. 11(b); *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis and Dove*, 965 So.2d 1041, 1045 (Miss.2007).

The Chancellor's decision to award Rule 11 sanctions is reviewed pursuant to the abuse-of-discretion standard. *Walton v. Walton*, 2010 WL 1664086 (Miss.App.); *Illinois Cent. R. Co. v. Broussard*, 19 So.3d 821,823 (Miss.Ct.App.2009); *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis and Dove*, 965 So.2d 1041, 1045 (Miss.2007). The

Court may order expenses or attorney fees "[i]f any party files a motion of pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay . . .". *M.R.C.P. 11(b)*; *Choctaw Inc. v. Campbell-Cherry-Harrison-Davis and Dove*, 965 So.2d 1041, 1045 (Miss.2007).

The Chancellor in this case made a very detailed ninety (90) page ruling upon denying Mr. Boatwright's Motion to Recuse wherein he pointed out a litany of inconsistencies with the proof and Mr. Boatwright's allegations contained within his Motion and accompanying affidavits executed by him and his counsel. (C.R.T. 185-281). Likewise, those inconsistencies are pointed out in detail in Ms. Boatwright's Response to Mr. Boatwright's Motion to Recuse. (P.R.E. 14-63) During the hearing on Ms. Boatwright's request for sanctions, Mr. Boatwright admitted having sworn to matters under oath when he filed his Motion to Recuse that he either had no knowledge of or were proven to be false. (A.R.E. 79-89). Specifically, and contrary to the statements made by Mr. Boatwright in his Brief submitted to this Court, Mr. Boatwright's affidavit sworn to on October 6, 2008 and filed with his Motion to Recuse, stated that "the Court immediately prior to hearings in this matter has visited with opposing counsel, . . . Grace Boatwright, and her brother in chambers without myself or my attorney present". (A.R.E. 146-147). At the hearing on Ms. Boatwright's Counter-Motion for Sanctions, Mr. Boatwright openly admits that he never actually saw either Ms. Boatwright or her brother go into chambers with the Chancellor. (A.R.E. 84-87). Further, Mr. Boatwright's counsel, during the course of the hearing on the motion to recuse, admitted to never having requested or read the first transcript from prior proceedings in an effort to investigate Mr. Boatwright's allegations. (A.R.E. 144-145).

The Chancellor also rendered a very detailed sixteen (16) page ruling upon the conclusion of the hearing on Ms. Boatwright's request for sanctions wherein he again took the time to point out the gross inconsistencies between Mr. Boatwright's allegations and the actual proof adduced at the recusal and sanction hearings. (C.R.T 29-45). The Court specifically found as follows:

> "This Court finds Mr. Boatwright and his attorney did not read the transcripts that were available to them prior to the filing of this motion. Had they asked for them or at least had the attorney ask for them and reviewed them, she would have discovered that the affidavit that Mr. Boatwright signed contains arguably perjurious facts which are diametrically opposed to his prior sworn testimony in this court. That was not done and that is not arguable as to whether or not that was done. The attorney has admitted it as has Mr. Boatwright under oath . . . In short, Mr. Boatwright's attorney did not thoroughly verify or investigate her client's claim before going forward with this motion. In fact, I'm quite troubled that both of them signed affidavits concerning their allegations. Yet at the hearing on the recusal motion, there was no evidence presented that verified the sworn allegations in the petition. Had even a minimal effort been made by Mr. Boatwright and his counsel, they would have known that most of these allegations were false. An example of that is Mr. Boatwright's claim that he saw and his daughter saw Mr. Bonds, who is Ms. Boatwright's brother, go into the judge's chambers. He previously admitted, as did his daughter under oath, that they never saw this, this never occurred, and he admitted that again here today in court."
>
> (A.R.E. 36-37)

> "In this case, Mr. Boatwright nor his attorney investigated these claims, not even a minimal investigation. Didn't interview the witnesses. Didn't look at the transcripts. And as I've said earlier, this motion was brought in this Court's opinion by Mr. Boatwright as an attempt to gain and advantage against his ex-wife. What's missing in here is the ex-wife's equal right not to have to bear unreasonable expense because of Mr. Boatwright's "beliefs". His beliefs are not the standard by which this Court or any court is held. There must be some reasonable basis for those beliefes and there just is no basis for that."
>
> (A.R.E. 42)

Simply put, the record of the testimony at the hearing on the motion to recuse supports the Chancellor's findings. (A.R.E. 29-45). A review of same will reveal that the Chancellor's findings were supported by credible evidence, or where applicable, the

lack thereof, and the Chancellor's decision to impose sanctions was not an abuse of the discretion afforded him by our appellate courts.

6. It is the proper duty of the Chancellor to sit as the finder of fact, assess evidence and determine what weight and worth to give it.

The Chancellor is in "a better position than this Court to judge the veracity of witnesses and credibility of evidence. *Hammers v. Hammers*, 890 So.2d 944, 951 (Miss.App.2004) (quoting *Lee v. Lee*, 798 So.2d 1284, 1291 (Miss.2001). "It is the chancellor's duty, sitting as finder of fact, to assess the evidence and determine what weight and worth to give it." *Id* at 953 (quoting *Hinders v. Hinders*, 828 So.2d 1235, 1244 (Miss.Ct.App.2002)).

Mr. Boatwright's allegation that the Chancellor found almost no testimony presented by him to be credible and that the Chancellor gave more weight to certain testimony than other and as such, is evidence of bias is absurd. The law is clear that this is exactly the duty of the chancellor – to sit as the ultimate finder of fact and in observing the witnesses and listening to testimony, determine the weight and worth to give same.

Mr. Boatwright single-handedly did a significant amount of damage to his personal credibility with the Court by, among other things, not being truthful on the 8.05 financial statement (A.R.E. 159-61), lying to the guardian ad litem about whether he participated in an underage drinking party (A.R.E. 156-58), and lying in a sworn affidavit that accompanied his motion to recuse (A.R.E. 148-155).

The Chancellor, in the rendering of his findings, summarized the testimony of each witness put on by each party. (C.R.T. 1021-27). An analysis of the Court's summary of the testimony in comparison to the transcript of the testimony given will yield that the Chancellor made no misstatement of facts.

Mr. Boatwright has shown no abuse of discretion in terms of the Chancellor's determination of weight and worth of the evidence before the Court.

C. Mr. Boatwright is Procedurally Barred From Raising Issue of Whether Chancellor Erred in Previously Failing to Recuse.

As previously stated, Mr. Boatwright filed a Motion to Recuse in this cause on October 6, 2008. (P.R.E. 1-13). Ms. Boatwright filed a Response to Motion to Recuse and Counter-Motion for Sanctions on October 15, 2008. (P.R.E. 14-63). A hearing was had on the recusal motion on October 16th and the Chancellor rendered a lengthy ruling from the bench and denied the Motion to Recuse on October 28, 2008. (C.R.T. 184-281). Mr. Boatwright then filed a Petition for Review of Denial of Motion to Recuse with the Mississippi Supreme Court on November 13, 2008. (C.F. 183-213). That Petition for Review was denied by Order dated December 10, 2008. (A.R.E. 120). On appeal to this Court, however, Mr. Boatwright again raises the issue of whether the Chancellor's refusal to recuse was error.

Directly on point regarding this issue is *Allen v. Williams*, 914 So.2d 254 (Miss.Ct.App.2005). In *Allen*, during the course of her chancery court proceedings, Robyn filed a motion for the chancellor's recusal. *Allen*, 914 So.2d at 257. The chancellor denied Robyn's motion. *Id.* Robyn then filed a motion for review before the Mississippi Supreme Court. *Id.* The Court denied her petition for review of the chancellor's denial of motion for recusal. *Id.* On appeal after the conclusion of the trial of the matter, Robyn asserted as error that the chancellor abused his discretion in refusing to recuse. *Id* at 259. The Court of Appeals held that having been considered by the Mississippi Supreme Court pursuant to Allen's petition for review of trial court's denial of motion for recusal and denied, this assignment of error is *res judicata. Id.*

Accordingly, the Mississippi Supreme Court having considered the issue of Chancellor Roberts' refusal to recuse on Mr. Boatwright's Petition for Review of Denial of Motion to Recuse and having denied said Petition on December 10, 2008, this assignment of error on appeal as to all allegations addressed in said Petition for Review is *res judicata.*

D. The Terms of the Relationship Shared by Chancellor Roberts and Ms. Boatwright's Attorney Did Not Require Recusal and Chancellor's Failure to Make Disclosure of Same was Neither Improper Nor a Violation of Law

Mr. Boatwright alleges that the Chancellor erred in "failing to disclose his personal relationship with opposing counsel" and that "not making a full disclosure of his relationship with counsel opposite" at the time in which Mr. Boatwright filed his Motion to Recuse was a clear violation of Canon 3(e)(1)(a) of the *Code of Judicial Conduct.* He further alleges that "this relationship was relevant to the issue of recusal" and that "the Chancellor committed reversible error for failing to recuse himself upon motion of Mr. Boatwright".

At the July 9, 2009 hearing on Mr. Boatwright's Motion to Alter or Amend or for a New Trial, the only evidence relevant to determining the type of relationship the Chancellor had with Ms. Boatwright's counsel, Kent E. Smith, was offered through the testimony of Kent E. Smith upon direct examination conducted by counsel for Mr. Boatwright as follows:

Counsel: Okay. And you just stated in part of your statement in response to my statement that you actually on April 8th, the day before our hearing on attorneys' fees set for April 9th, had gone turkey hunting with Judge Roberts, correct?

Mr. Smith: Yes, ma'am. He went with me.

Counsel: Yeah. He went with you on your property I believe?

Mr. Smith: Yes, ma'am.

Counsel: Okay. In Marshall County?

Mr. Smith: That's right.

Counsel: Okay. How many other times have you been hunting with Judge Roberts?

Mr. Smith: Ms. Robinson, in anticipation of answering that question that I felt like I would be answering, you know, I've thought back the best that I can. He and I hunted one time this year, which was a couple months after the trial and I had asked him to hunt with me. He's raising his three grandkids. His schedule is not like it used to be so I can tell you for 2009 I hunted one time. For 2008 my father was an avid turkey hunter. He was on his death bed and passed the first week in May of 2008. I did not hunt at all with Judge Roberts or anybody else in the spring of 2008. In 2007 the best that I could tell you would be a couple of times. It may have been once and it may have been three times, but I would say a couple of times. And then in 2006 I would say the same thing, probably a couple of times. And that would be the best answer that I could give you. I've hunted with Judge Roberts there for, what, five to eight times in my life. And none in 2008 and none before the trial or his ruling this year, 2009.

Counsel: Can you recall when you became friends with Judge Roberts?

Mr. Smith: Yes, ma'am. And friends – acquaintances and friends would be the way I'd answer it to be responsive. I grew up in Oxford. I've known Judge Roberts before he was judge. He was a lawyer in town practicing with Barrett Clisby. I've known Judge – I've been practicing 18 years or better. I've known Judge Roberts and I guess been acquaintances of his for, you know, a lot of years, 18, 20, 25 years just like I've known Judge Alderson for nearly 40 years. So I was an acquaintance, but I want to say this to try to get the friendship deal out and what people think of friends. Judge Roberts when he was still a lawyer prior to being elected as chancellor in this district represented my ex-wife.

Counsel: I was aware of that.

Mr. Smith: Okay. In a domestic matter that was, I guess the end of 2000 through the middle of 2001. I can tell you we weren't very good friends at that time and for some period of time after. We never had a hearing. We never had a deposition. The matter settled like a lot of domestic relations things do. And so it went on, he got

> elected, and, you know, I started seeing him. And I guess things, what you would say, healed or patched up, Ms. Robinson.
>
> (A.R.E 97-100)

The issue of a judge's duty to make disclosure under Canon 3(E)(1) was addressed by our Supreme Court in *Hathcock v. Southern Farm Bureau Cas. Ins. Co.*, 912 So.2d 844 (Miss.2005). In *Hathcock*, the judge had previously represented the defendant insurance company and his son was currently employed with the insurance company in an unrelated capacity. *Hathcock*, 912 So.2d at 853. The Court specifically referenced the commentary to Canon 3(E)(1) which Mr. Boatwright cites and uses as his basis for assigning error on appeal. *Id* at 852. The Court, citing Article VI §165 of the *Mississippi Constitution*, §9-1-11 of the *Mississippi Code Annotated* and Canon 3 of the *Code of Judicial Conduct*, stated that this type of disclosure is not required, per se. *Id* at 853. Additionally, the Court held that even if the judge had made a disclosure, the ultimate result would have been no different because there is no real basis for disqualification. *Id.* The Court further held that the judges past relationship and his son's current relationship with the defendant company alone was not enough to create a reasonable doubt as to the judge's impartiality. *Id.* Finally, the Court held "assuming arguendo that Judge Terry's failure to disclose would be error, it would be de minimum at best, and therefore, harmless". *Id.*

The record is clear that the underlying cause of action which serves as the subject of this appeal was initiated on October 19, 2007 by the filing of Ms. Boatwright's Petition for Citation for Contempt and for Modification of Final Decree of Divorce. (C.F. 58-63). Turkey season for the year had concluded by that time. Further, the record reflects that the Chancellor and Kent E. Smith did not turkey hunt together at all during

2008. (A.R.E. 98). Finally, the record reflects that the Chancellor and Kent E. Smith only hunted together one time in 2009 and same occurred some two months after the trial of the case *sub judice* concluded on February 12, 2009 and a month after the Chancellor issued his ruling on March 11, 2009. (A.R.E. 98-99).

As to Mr. Boatwright's allegation that it was reversible error for Chancellor Roberts not to have recused based upon the personal relationship he perceives the Chancellor to share with Attorney Kent E. Smith, the Supreme Court has already determined that at the time the recusal motion was filed, there was nothing in the record to suggest the Chancellor was improper in not recusing. (A.R.E. 120). Mr. Boatwright's acquisition of knowledge that Chancellor Roberts and Attorney Smith occasionally hunt together does not magically change the facts such that the same alleged instances now serve to prove bias on behalf of the Chancellor.

Our Appellate Court has routinely held that a judge's decision not to recuse is subject to review only in a case of manifest abuse of discretion. *Henderson v. Henderson* 952 So.2d 273, 278 (Miss.Ct.App.2006) (citing *Steed v. State*, 752 So.2d 1056, 1061 (Miss.Ct.App.1999)) (See also *Hubbard v. State*, 919 So.2d 1022 (Miss.Ct.App.2005). Canon 3(E)(1)(a) of the Code of Judicial Conduct states that a judge should disqualify himself if "the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." "in the absence of a judge expressing a bias or prejudice toward a party or proof in the record of such bias or prejudice, a judge should not recuse himself." *Hathcock*, 912 So.2d at 852 In fact, "where required by fairness and compliance with the standard of the Code of Judicial Conduct, the duty to recuse prevails; but otherwise, the judges have a duty to serve unless

they cannot adjudicate the litigants' claims fairly". *Washington Mutual Finance Group, LLC v. Blackmon*, 925 So.2d 780, 785 (Miss.2004).

The test for recusal has been stated as follows: "[W]ould a reasonable person, knowing all the circumstances, harbor doubts about the judge's impartiality?" *Doe v. Stegall*, 900 S9.2d 357, 360 (Miss.2004) (quoting *In re Conservatorship of Bardwell*, 849 So.2d 1240, 1247 (Miss.2003)).

Article 6, §165, of the *Mississippi Constitution of 1890* provides:

> "No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity of consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties . . . "

There is no constitutional prohibition against Chancellor Roberts presiding over the case, since he is neither related to the parties nor has an interest in the case.

Mississippi Code Annotated, §9-1-11 provides:

> "The judge of a court shall not preside on the trial of any cause where the parties, or either of them, shall be connected with him by affinity of consanguinity, or where he may be interested in the same, or wherein he may have been of counsel, except by the consent of the judge and of the parties."

There is no reason under the statute for Chancellor Roberts to recuse himself, since it basically tracks the *Mississippi Constitution* in regard to the issue of disqualification. Cannon 3(C)(1) of the *Code of Judicial Conduct* provides:

> "(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where (a) he has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . "

Nothing in the record suggests Chancellor Roberts had personal bias or prejudice against Mr. Boatwright nor is there any evidence or even allegation that Chancellor

Roberts had a personal knowledge of any disputed evidentiary facts concerning the proceeding.

Mr. Boatwright's contention is that the mere fact that Chancellor Roberts and Attorney Smith have contact outside of the courtroom suggests impropriety and therefore requires the Chancellor's recusal. Our Supreme Court tackled a very similar issue in *Irwin vs. Irwin*, 546 So.2d 683 (Miss.1989). The *Irwin* Court held that the refusal of the special chancellor to recuse after Ms. Irwin had made a motion for same was not reversible error. *Irwin*, 546 So.2d at 685. As basis for her motion, Ms. Irwin alleged that the chancellor and her husband (1) both had offices and practiced law in the same county, (2) played golf together, and (3) dined together on an occasion wherein the Mr. Irwin had paid for the chancellor's meal. *Id* at 684. The evidence showed that Mr. Irwin and the chancellor had played golf together on approximately three occasions, the two had lunch together on one occasion in order to discuss a case pending before the municipal court in which Mr. Irwin was the city prosecutor, and a coin was flipped after the meal to determine who would pay and Mr. Irwin lost and paid for the meal. *Id.* The evidence further showed and the Court pointed out that there was never a time that could be recalled wherein the two had social contact. *Id.* Just as in *Irwin*, the record in the case *sub judice* is void of any evidence of the Chancellor having any relationship outside of the occasional turkey hunt, and the record reflects that same has only occurred five to eight times over an approximate four (4) year period. (A.R.E. 98). Further, the record reflects that the Chancellor and Attorney Smith have not shared a long standing close personal friendship, as the Chancellor, immediately prior to taking the bench, had represented his ex-wife in their divorce proceedings. (A.R.E. 99).

Also bearing similarity to the issue at hand is *Medley v. State,* 600 So.2d 957 (Miss.1992). In *Medley*, the judge had known the appellant, who was also an attorney, for nine (9) years, and the attorney had gone to the judge's home on occasion. *Id* at 960. The Court held that the record having been clear of any indication of bias or prejudice on the part of the judge, these factors alone did not warrant recusal. *Id* at 961. The Court went further to state that "in many areas, particularly rural areas, where judges have known practically all the people for many years, if such were a disqualification, the judge could never preside on most cases". *Id.*

Based upon the evidence that the Chancellor and one of Ms. Boatwright's attorneys occasionally hunt together, Mr. Boatwright is adducing that the two have a friendship that reaches such a level that the Chancellor could not be fair and impartial. As our Supreme Court said in *Washington Mutual Finance Group, LLC v. Blackmon*, 925 So.2d 780 (Miss.2004), "our judges are perfectly capable of distinguishing between attorneys, their client, and the legal issues which the attorneys present".

Mr. Boatwright alleges on appeal that a turkey hunt is something of value and in doing so makes innuendo that this would cause Chancellor Roberts to be indebted to Attorney Smith in such a way that would cause bias or partiality. It is entirely unreasonable to believe that Chancellor Roberts could be bought so cheap. (See *Cheney v. United States District Court For District of Columbia*, 541 U.S. 913, 124 S.Ct.1391 (2004) wherein Justice Scalia wrote "The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I cannot decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it

is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.")

This Court held in *Bateman v. Gray*, 963 So.2d 1284, 1290 (Miss.Ct.App.2007) that where the record contained no evidence that the trial judge had a personal bias or prejudice concerning either party or that the trial judge had personal knowledge of disputed evidentiary facts, the Plaintiffs' allegations that the judge had eaten at the defendants' lodge on numerous occasions did not demonstrate that the judge had an interest in the outcome of the case as would require him to recuse himself from presiding over the case. Just as in *Bateman*, the record in the case at hand is completely void of any evidence that the Chancellor had an interest in the outcome.

There is no evidence that improper contact was had with the Chancellor concerning the cause and in fact, the evidence is directly contrary to that. Attorney Smith not only specifically denied speaking of the case *sub judice* with the Chancellor while hunting with him (A.R.E. 102-3), he also denied ever discussing any case he had pending before the Chancellor when hunting with him. (A.R.E. 103).

Based upon the record, the only thing that a reasonable person could find suspect of impropriety on the part of the Chancellor, would be the fact that the two hunted together on April 8th, 2009 which was the day before a scheduled hearing on what portion of Ms. Boatwright's attorney fees and expenses could be attributed to having resulted from Mr. Boatwright's willful contempt. And as such, assuming arguendo that it could be found to be suspect of impropriety, the Chancellor cured the potential for error when he continued the hearing until further order and then recused upon objection of Mr. Boatwright by and through counsel.

Essentially, Mr. Boatwright wants this Court to hold that the fact that the Chancellor and one of Ms. Boatwright's attorneys occasionally turkey hunted, although same did not occur at all during the course of the litigation until ***after*** the trial in this cause was concluded and judgment rendered, is improper and as such, is prima facie evidence of the type of bias on the part of the Chancellor which would require recusal. To hold such would be precedent for requiring Chancellors to live in the proverbial "bubble".

In a world where we are friends and acquaintances with those we come in contact with every day, it stands to reason that judges and attorneys are going to have contact with each other outside of the courtroom. Our Supreme Court has previously stated in *Washington Mutual Finance Group, LLC v. Blackmon*, 925 So.2d 780, 796 (Miss.2004)

> "The nature of the profession is such that attorneys and judges often draw their their friends and daily associations from their vigorous adversaries. They are schooled and nourished in an adversary system in which they learn quickly that lawyers are merely representatives of clients and position. Those who do not generally live out their careers in misery. The judges of our state are thoroughly capable of distinguishing the attorneys from their clients and to recognize their duty to the public and the law. Our laws and rules governing recusal are written to allow remedy in the few cases where judges' conduct indicates that they may truly appear to fall short of the responsibility to make those distinctions. The recusal mechanism must be guarded carefully to check its use as a weapon to be wielded in a campaign to maneuver onto more favorable fields of battle."

In summary, Chancellor Roberts had no *per se* duty to disclose the fact that he and counsel for Ms. Boatwright had hunted together in the past and as such, in no way violated our constitution, our code of statues, or our code of judicial conduct. Irregardless of same, any error which could possibly be assigned to Chancellor Roberts by not disclosing the fact that he had hunted with one of Ms. Boatwright's attorneys in past years, alone, is harmless. Further, as no evidence of bias on the part of the Chancellor can be found in the record, there exists no evidence which indicates that the

contact the Chancellor had with Attorney Smith by way of occasionally turkey hunting with him would require recusal. As such, the failure of Chancellor Roberts to recuse was not and is not reversible error.

E. Chancellor Alderson's denial of Toulie Boatwright's Motion to Alter or Amend or For a New Trial was Neither an Abuse of Discretion or a Miscarriage of Justice.

Mr. Boatwright alleges that Chancellor Alderson erred in denying the Motion to Alter or Amend or for a New Trial Pursuant to Rules 59 and 60 of the *Mississippi Rules of Civil Procedure* he filed on April 16, 2009, just three days after the entry of the Court's final judgment in the cause and the subsequent Amended Motion filed on May 5, 2009.

This Court has previously held that "the grant or denial of a Rule 59 motion is within the discretion of the judge[,] and we will not reverse the denial absent an abuse of discretion or if allowing the judgment to stand would result in a miscarriage of justice." *Journeay v. Berry*, 953 So.2d 1145, 1160 (Miss.Ct.App.2007) (citing *Clark v. Columbus & Greenville Ry.Co.*, 473 So.2d 947, 950 (Miss.1985) (See also *Harrison v. Mississippi Transportation Commission*, 2010 WL 610655 (Miss.App.). The review of a denial of a Rule 60(b) motion is also conducted by this Court under an abuse-of-discretion standard. *Tel. Man, Inc. v. Hinds County*, 791 So.2d 208, 210 (Miss.2001). The grant or denial of a Rule 60(b) motion is also generally within the discretion of the trial court. *Am. Cable Corp. v. Trilogy Commc'ns, Inc.*, 754 So.2d 545, 549 (Miss.Ct.App.2000).

"M.R.C.P. 59(e) provides for a motion to alter or amend a judgment. In order to succeed on a Rule 59 (e) motion, the movant must show: (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, or (3) the need to correct a clear error of law or to prevent manifest injustice." *Journeay*, 953 So.2d

at 1160 (citing *Brooks v. Roberts*, 882 So.2d 229, 233 (Miss. 2004)). Rule 60 (b)(6) allows the trial court to relieve a party from a final judgment for "any reason justifying relief from the judgment".

In the case *sub judice*, there is no sufficient evidence to show that the judgment is prejudicial, unconscionable or unfair. There has been no intervening change in controlling law, nor is there a need to correct a clear error of law or prevent manifest injustice. Mr. Boatwright's Motion to Alter or Amend or for a New Trial hinges on his discovery of new evidence. The Motion is based solely on the premise that this relief should be granted because, as the record reflects, Chancellor Roberts went turkey hunting with one of Ms. Boatwright's counsel, Kent E. Smith, ***after*** the trial on the merits had been concluded and ***after*** Chancellor Roberts' ruling had been rendered. (emphasis added).

Mr. Boatwright requests that he be granted a new trial or at least granted relief from Chancellor Roberts' following rulings: (1) the award of sanctions; (2) the findings of willful contempt; (3) the finding regarding counseling with Ruth Cash; (4) the award of attorney fees regarding the contempt issues; and (5) the denial of the requested child support refund and back payment. (C.F. 387-90). Chancellor Alderson, at somewhat of a disadvantage due to the fact that he did not hear any portion of the trial on the merits, conducted a hearing on Mr. Boatwright's motion, where he entertained both argument and testimony. Mr. Boatwright's argument that Chancellor Alderson's denial of his motion was error is without merit as he has shown no action on the part of Chancellor Roberts which constitutes an abuse of discretion or miscarriage of justice. Chancellor Alderson, in so much as he heard, found no evidence to support the relief requested, and therefore, his denial of Mr. Boatwright's motion was proper.

CONCLUSION

Chancellor Roberts' decision to: (1) find Mr. Boatwright in willful contempt for failing to pay college related expenses , (2) fine Mr. Boatwright as a result of his willful contempt for the Court's previous orders, (3) not terminate Mr. Boatwright's support obligation for the benefit of Wynne Boatwright, (4) not reimburse Mr. Boatwright for child support paid unto Ms. Boatwright during the time Hannah Boatwright was in the custody of her grandparents, (5) deny Mr. Boatwright's request for back child support for the time in which Hannah Boatwright was in the custody of her paternal grandparents, and (6) award Ms. Boatwright attorney fees was proper and in accordance with the overwhelming weight of the evidence presented at trial. Further, the Chancellor's denial of Mr. Boatwright's Motion to Recuse was proper and was affirmed by the Mississippi Supreme Court when it denied Mr. Boatwright's Petition for Review of Denial of Motion to Recuse. There is no evidence to support that the Chancellor and one of Ms. Boatwright's counsel had any type of relationship outside of an occasional turkey hunt together. The evidence, in fact, shows that it had been months prior to the initiation of the proceedings at hand since counsel and the Chancellor had hunted, and that throughout the course of the proceedings, counsel and the Chancellor did not hunt a single time together. As such, no error can be found in the fact that the Chancellor refused to recuse himself nor can there be found a violation of any of the Canons of the *Code of Judicial Conduct* which would warrant a reversal of any of the Court's findings.

For the reasons given above, the decision of the Chancery Court of Marshall County, Mississippi, should be affirmed in its entirety.

RESPECTFULLY SUBMITTED, this the 3rd day of November, 2010

GRACE BONDS BOATWRIGHT,
Appellee

By: Amanda W. Smith

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CERTIFICATE OF SERVICE

This will certify that the undersigned attorney for Smith Whaley, PLLC, that I have this date delivered a true and correct copy of the above and foregoing *Brief of Appellee, Grace Bonds Boatwright,* to all counsel of record by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed as follows:

1. **Honorable Glenn Alderson**
   Chancellor, 18th District
   P.O. Box 70
   Oxford, MS 38655

2. **Honorable Edwin H. Roberts, Jr.**
   Chancellor, 18th District
   P.O. Box 49
   Oxford, MS 38655

3. **Helen Kennedy Robinson, Esq.**
   Attorney at Law
   P.O. Box 187
   Oxford, MS 38655

THIS, the 3rd day of November, 2010.

AMANDA WHALEY SMITH
KENT E. SMITH

ADDENDUM PERTINENT TO BRIEF

THE MISSISSIPPI CONSTITUTION

Article 6: *Judiciary*
Section 165. Disqualification of judges

> No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties. Whenever any judge of the Supreme Court or the judge or chancellor of any district in this state shall, for any reason, be unable or disqualified to preside at any term of court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the governor may commission another, or others, of law knowledge, to preside at such term or during such disability or disqualification in the place of the judge or judges so disqualified.

STATUTES

Mississippi Code Annotated § 9-1-11 *Interest or Relationship*

> The judge of a court shall not preside on the trial of any cause where the parties, or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, or wherein he may have been of counsel, except by the consent of the judge and of the parties.

Mississippi Code Annotated § 9-5-87 *Punishment for Violations*

> The chancery court, or the chancellor in vacation, or judge granting the writ, shall have power to punish any person for breach of injunction, or any other order, decree, or process of the court, by fine or imprisonment, or both, or the chancellor or judge granting the writ may require bail for the appearance of the party at the next term of the court to answer for the contempt; but such person shall be first cited to appear and answer. And any person so punished by order of the chancellor in vacation, may on five (5) days' notice to the opposite party, apply to a judge of the Supreme Court, who, for good cause shown, may supersede the punishment until the meeting of the said chancery court.
>
> At the discretion of the court, any person found in contempt for failure to pay child support and imprisoned therefore may be referred for placement in a state, county or municipal restitution, house arrest or restorative justice center or program, provided such person meets the qualifications prescribed in Section 99-37-19.

Mississippi Code Annotated § 11-55-3. *Definitions (The Litigation Accountability Act)*

> The following words and phrases as used in this chapter have the meaning ascribed to them in this section, unless the context clearly requires otherwise:

(a) "Without substantial justification," when used with reference to any action, claim, defense or appeal, including without limitation any motion, means that it is frivolous, groundless in fact or in law, or vexatious, as determined by the court.

Mississippi Code Annotated §11-55-5. *Costs awarded for meritless action*

(1) Except as otherwise provided in this chapter, in any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure.

(2) No attorney's fees or costs shall be assessed if a voluntary dismissal is filed as to any action, claim or defense within a reasonable time after the attorney or party filing the action, claim or defense knows or reasonably should have known that it would not prevail on the action, claim or defense.

(3) When a court determines reasonable attorney's fees or costs should be assessed, it shall assess the payment against the offending attorneys or parties, or both, and in its discretion may allocate the payment among them, as it determines most just, and may assess the full amount or any portion to any offending attorney or party.

(4) No party, except an attorney licensed to practice law in this state, who is appearing without an attorney shall be assessed attorney's fees unless the court finds that the party clearly knew or reasonably should have known that such party's action, claim or defense or any part of it was without substantial justification.

Mississippi Code Annotated § 93-5-23. *Children; spousal maintenance or alimony; referrals for failure to pay child support*

When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him, and shall, if need be, require bond, sureties or other guarantee for the payment of the sum so allowed. Orders touching on the custody of the children of the marriage shall be made in accordance with the provisions of Section 93-5-24. For the purposes of orders touching the maintenance and alimony of the wife or husband, "property" and "an asset of a spouse" shall not include any interest a party may have as an heir at law of a living person or any interest under a third-party will, nor shall any such interest be considered as an economic

circumstance or other factor. The court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require. However, where proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each. In the event a legally responsible parent has health insurance available to him or her through an employer or organization that may extend benefits to the dependents of such parent, any order of support issued against such parent may require him or her to exercise the option of additional coverage in favor of such children as he or she is legally responsible to support.
Whenever the court has ordered a party to make periodic payments for the maintenance or support of a child, but no bond, sureties or other guarantee has been required to secure such payments, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, the court may, upon petition of the person to whom such payments are owing, or such person's legal representative, enter an order requiring that bond, sureties or other security be given by the person obligated to make such payments, the amount and sufficiency of which shall be approved by the court. The obligor shall, as in other civil actions, be served with process and shall be entitled to a hearing in such case.

At the discretion of the court, any person found in contempt for failure to pay child support and imprisoned therefore may be referred for placement in a state, county or municipal restitution, house arrest or restorative justice center or program, provided such person meets the qualifications prescribed in Section 99-37-19.

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

If after investigation by the Department of Human Services or final disposition by the youth court or family court allegations of child abuse are found to be without foundation, the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegation.

The court may investigate, hear and make a determination in a custody action when a charge of abuse and/or neglect arises in the course of a custody action as provided in Section 43-21-151, and in such cases the court shall appoint a guardian ad litem for the child as provided under Section 43-21-121, who shall be an attorney. Unless the chancery court's jurisdiction has been terminated, all disposition orders in such cases for placement

with the Department of Human Services shall be reviewed by the court or designated authority at least annually to determine if continued placement with the department is in the best interest of the child or public.

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

CODE OF JUDICIALCONDUCT

Canon 3: *A Judge Should Perform the Duties of His Office Impartially and Diligently*

E. Disqualification.

(1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:

COMMENTARY
Under this rule, a judge should disqualify himself or herself whenever the judge's impartiality might be questioned by a reasonable person knowing all the circumstances, regardless whether any of the specific rules in Section 3E(1) apply.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

For procedures concerning motions for recusal and review by the Supreme Court of denial of motions for recusal as to trial court judges, see M.R.C.P. 16A, URCCC 1.15, Unif. Chanc. R. 1.11, and M.R.A.P. 48B. For procedures concerning motions for recusal of judges of the Court of Appeals or Supreme Court justices, see M.R.A.P. 27(a).

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

COMMENTARY
A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); judges formerly employed by a government agency, however, should disqualify themselves in a proceeding if the judges' impartiality might reasonably be questioned because of such association.

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or member of the judge's family residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

COMMENTARY
The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might be questioned by a reasonable person knowing all the circumstances "under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

MISSISSIPPI RULES OF CIVIL PROCEDURE

Rule 11. Signing of Pleadings and Motions

(b) Sanctions. If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or motion had not been served. For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of Mississippi; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of Mississippi. On a motion for a new trial in an action without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be filed not later than ten days after the entry of judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten days after service to file opposing affidavits, which period may be extended for up to twenty days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than ten days after entry of judgment the court may on its own initiative order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment.

Rule 60. Relief from Judgment or Order

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

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

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

(2) accident or mistake;

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

(4) the judgment is void;

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

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

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

(c) Reconsideration of transfer order. An order transferring a case to another court will become effective ten (10) days following the date of entry of the order. Any motion for reconsideration of the transfer order must be filed prior to the expiration of the 10-day period, for which no extensions may be granted. If a motion for reconsideration is filed, all proceedings will be stayed until such time as the motion is ruled upon; however, if the transferor court fails to rule on the motion for reconsideration within thirty (30) days of the date of filing, the motion shall be deemed denied.