

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

**CASE NO. 2010-CA-000375
(Lee County Chancery Court Cause No. 05-0359-41-L)**

MICHAEL TURNER

APPELLANT

VS.

JANE TURNER

APPELLEE

BRIEF OF APPELLEE

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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 judges of this Court may evaluate any possible disqualification or recusal concerning same:

1. Michael Tuner, Appellant;
2. Jane Turner, Appellee;
3. Honorable Talmadge Littlejohn, Chancellor;
4. R. Shane McLaughlin, Attorney for Appellant;
6. Jonathan W. Martin, Attorney for Appellee;

Respectfully submitted,

JANE TURNER, APPELLEE

BY: 


JONATHAN W. MARTIN,
MSB No. 

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STATEMENT OF THE CASE

On February 2, 1996, Michael Turner and Jane Turner were married in Waukegan, Illinois. Of this union, one child was born, namely, Cameron Turner, whose date of birth is April 22, 1996.

On December 1, 2004, the parties separated. Simultaneous with the parties' separation, Jane Turner, filed a Complaint for Divorce in the Chancery Court of Lee County, Mississippi on March 23, 2005. (R. p. 005). The Complaint stated the grounds for divorce were habitual cruel and inhuman treatment, habitual and excessive use of prescription drugs and habitual drunkenness. On April 15, 2005, Michael Turner filed an Answer and Complaint-Complaint. (R. p. 011).

Following a hearing on temporary features of the divorce, the Court entered a Temporary Order on March 10, 2006. (R. p. 049). By Order entered on November 12, 2009, Michael Turner's trial counsel was allowed leave to withdraw, Michael Turner was given ten days to retain new counsel, and the trial was rescheduled to a date certain, specifically December 8, 2009. (R. p. 125). On December 8, 2009, Michael Turner was called in open court three times and failed to appear for trial. Trial was held, including as witnesses the Jane Turner and a corroborating witness, and the Court entered a Final Decree for Divorce. (R. p. 126-28). Michael Turner filed his post-trial motions, including for a New Trial, to Set Aside Final Decree, or to Alter or Amend Judgment on December 17, 2009. (R. p. 131). The Court heard argument and testimony on the motions on February 2, 2010. (See T. p. 96). The Court denied the motions and entered its Order on February 5, 2010. (R. p. 137-38).

STATEMENT OF FACTS

Michael Tuner ("Michael") and Jane Turner ("Jane") were married on February 2, 1996. (R. p. 006). Cameron Turner, born on April 22, 1996, is the only child of the marriage. (T. p. 85).

On March 23, 2005, Jane filed a Complaint for Divorce in the Chancery Court of Lee County, Mississippi. (R. p. 005). The sworn Complaint stated the grounds for divorce were habitual cruel and inhuman treatment, habitual and excessive use of prescription drugs and habitual drunkenness. On April 15, 2005, Michael Turner filed an Answer and Complaint-Complaint. (R. p. 011).

Following a temporary hearing on March 8, 2006, Jane was awarded physical custody of Cameron and use and possession of the marital home. (T. p. 70-72). At the hearing, Jane testified and presented photographic proof received as exhibits to her testimony that from 2002 through 2006 Michael: drank everyday, abused prescription medication daily, and passed out often from intoxication with a lit cigarette in hand. (T. p. 11-12).

On November 12, 2009, counsel and parties appeared in the Lee County Justice Center, Chancery Courtroom, for a final hearing on Jane's Complaint for Divorce and Michael's Counter-Complaint for Divorce. On *ore tenus* Motion of Michael's counsel, and over Jane's objection, the Court allowed attorney Jak Smith to withdraw as counsel for Michael. (R. p. 125). The Order entered on the morning of November 12, 2009, stated that Michael "shall have ten (10) days from the date of this Order to secure new Counsel." (R. p. 125). Additionally, the November 12, 2009 Order reset the long-delayed trial on the merits for "December 8, 2009 at 9:30 a.m. at the Prentiss County Chancery Building located in Booneville, MS." (R. p. 125).

Michael was present in the courthouse, but not in the courtroom, at 9:30 a.m. on November 12, 2009. (T. p. 102). Michael was agitated with his lawyer, who he felt was

unprepared for trial. (T. p. 112). Michael had earlier expressed to his counsel that proceeding to trial on November 12, 2009 would be “legal suicide” and “just like me not showing up.” (T. p. 112). Frustrated with Michael’s unwillingness to proceed with the now nearly five years pending divorce suit, the Hon. Jak Smith requested and was granted leave to withdraw. (R. p. 125).

On December 8, 2009 at 9:30 a.m. at the Prentiss County Chancery Building located in Booneville, MS, Jane and her counsel announced to the Court at docket call that Jane was ready to proceed with the trial on the merits. Michael did not answer the docket call. The Court called the case up for trial at 9:56 a.m. and asked the clerk to call for Michael, again with no response. (T. p. 80).

The Court first received the testimony of Jane. At this time, as during the temporary hearing of March 8, 2006, Jane testified clearly as to the duration of the drinking, along with its negative effect on her and the marriage. Jane testified that Michael drank every day of the marriage. (T. p. 81) He drank alcohol and took pain medication for a previous disc injury from the time he woke up in the morning. (T. p. 81-82). Michael drank the alcohol and injected the pain medication without eating at all until around 10:00 p.m. (T. p. 81). Jane testified that because of Michael’s substance abuse, she had to walk him to bed, disrobe him herself, and put him in bed. (T. p. 81). Jane testified that she was, in essence, taking care of a child. (T. p. 81). Jane then referred the Court to the pictures and testimony introduced as evidence during the March 8, 2006 temporary hearing: pictures of Michael passed out in his food, pictures of Michael clothes and the furniture poked with holes from his fallen cigarette. (T. p. 82). Jane’s testimony was uncontraverted.

Jane next called Sara Tims (“Sara”), a friend of Jane’s for thirty years. (T. p. 91). Sara testified that every time she saw Michael he was drunk. (T. p. 91). She further testified that she

believes the alcoholism was the proximate cause of the separation of Michael and Jane. (T. p. 91). Sara's testimony was uncontroverted.

The Chancellor granted Jane a divorce on grounds of habitual drunkenness. (T. p. 95). Jane was awarded full legal and physical custody of Cameron, full ownership of the former marital residence, seventeen hundred dollars (\$1,700) in past medical expense reimbursement, ownership of a Nissan Altima automobile, and fifteen hundred dollars (\$1,500) in attorney's fees. (T. p 92-95). Additionally, Michael's child support would be satisfied through Jane's receipt of Cameron's monthly disability dependant payment of approximately eight hundred dollars (\$800). (T. p 95). Michael was granted visitation with Cameron as agreed upon by the parties. (T. p. 95). Jane was not awarded ownership of a Harley Davidson motorcycle or three vehicles, alimony, the mobile home in Michael's possession or the personal property found therein. (T. p 92-95). Jane also did not receive any of Michael's remaining lump sum disability settlement, valued on the date of trial as approximately sixty thousand dollars (\$60,000). (T. p 92-95).

On December 17, 2009, Michael Turner filed his post-trial motions, including for a New Trial, to Set Aside Final Decree, or to Alter or Amend Judgment. Michael asserted at hearing on his post-trial motions that Attorney Smith did not tell him the case was reset for trial on December 8, 2009 (T. p. 104). Michael also dubiously asserts that Attorney Smith did not tell Michael why he was withdrawing, did not advise Michael as to why the Court allowed him to withdraw, and did not advise him of any future proceedings whatsoever. (T.p. 114) Most incredibly, Michael would have the Court believe that Attorney Smith advised him he would call him to assist in finding new counsel sometime in January or February of 2010 – though mere minutes earlier the Court reset the hearing, through an Order approved as to form by Attorney Smith, on the merits for December 8, 2009. (T. p. 104). Attorney Smith stated to the Court through stipulated testimony only that he acknowledged possession of the Order, it does not

appear he mailed the Order to Michael and he lacks a recollection as to whether or not he gave the November 12, 2009 Order directly to Michael (T. p. 99).

The Chancellor found that Michael did not present good cause for failing to appear at the December 8, 2009 hearing and denied Michael's to set aside the decree. (T. p. 136). Further, the Court found Michael's request for a new trial moot, and denied all other relief. (T. p. 138).

STANDARD OF REVIEW

A Chancellor's findings are not disturbed "when supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous, or applied an erroneous legal standard". *Sanderson v. Sanderson*, 824 So.2d 623, 625-26 (Miss.2002). Questions of law are reviewed *de novo*. *Estate of Jones v. Howell*, 687 So.2d 1171, 1174 (Miss.1996).

SUMMARY OF THE ARGUMENT

Michael Turner was properly served with notice of the December 8, 2009 trial in this case. At the time the November 12, 2009 Order was entered, Michael had counsel of record. Counsel of record, the Honorable Jak Smith, approved the Order which was granted on his own Motion and personally received a copy of the Order pursuant to Mississippi Rule of Civil Procedure 5. Mississippi Rule of Civil Procedure 5 states that "service shall be made upon such attorney unless service upon the party himself is ordered by the court." The Court did not Order service on Michael. Regardless of Michael's dubious protestations that Attorney Smith failed to inform him of the Order, the Rules do not contemplate it to be Jane's responsibility to advise Michael, through personal service of process, that his own counsel had withdrawn, that he had ten days to seek new counsel, and that the Court had reset the case to a date certain. Attorney Smith had a duty, which he may have performed, to inform his client of the Order entered pursuant to his own motion, and Michael had a duty to represent himself diligently, at minimum to make an

entry of appearance and conduct a cursory review of the Court file following the postponement of the trial on the merits.

Jane Turner presented sufficient proof to show that Michael's habitual drunkenness was cause for divorce under Miss. Code. Ann. § 93-5-1 (Fifth). Jane testified that Michael drank everyday, passed out often, took pain medication without eating while he drank, and had to be cared for as a child because of his substance abuse. She testified this behavior took place throughout the marriage. Jane's corroborating witness also testified that Michael's drinking was the proximate cause of the separation.

The Court properly ordered visitation to take place at the mutual agreement of the parties. The Court must first look to the best interests of the minor child in making a visitation schedule, and the Court found that allowing Cameron's primary care giver, Jane, some discretion based on Michael's present state of mind and possible future sobriety to be in Cameron's best interest now and moving forward.

The Court properly conducted an equitable division of the marital estate. Following a finding that Jane was entitled to a divorce on grounds of habitual drunkenness, the Court granted both parties a proper apportionment of the marital estate which the Court found, in its discretion, equitable. The Court conveyed the marital home to Jane, and allowed Michael to maintain full ownership of his home, motorcycle, three other vehicles, personal property, and all of his remaining lump-sum disability benefits.

The Court properly granted Jane's attorney's fees. The proof demonstrated that Michael had a significant separate estate, had failed to timely appear and prosecute a five year old divorce suit, and Jane possessed limited resources to provide for herself and son without contribution from Michael.

ARGUMENT I.

THE CHANCELLOR PROPERLY REFUSED TO SET ASIDE THE FINAL DECREE ON THE BASIS OF PURPORTED LACK OF NOTICE.

Michael purports that he was denied due process by Jane for her failure to personally serve or mail the November 12, 2009 Order to him. As a result, Michael claims, he was not given proper notice and the final decree must be set aside.

The November 12, 2009 Order was entered related to an *ore tenus* motion brought by Michael's counsel to withdraw. As Michael's own testimony shows, Michael was present in the courthouse, but not in the courtroom, at 9:30 a.m. on November 12, 2009. (T. p. 102). Michael was agitated with his lawyer, who he felt was unprepared for trial. (T. p. 112). Michael had earlier expressed to his counsel that proceeding to trial on November 12, 2009 would be "legal suicide" and "just like me not showing up." (T. p. 112). Frustrated with Michael's unwillingness to proceed with the now nearly five years pending divorce suit, and forced to defend an empty chair or withdraw, the Hon. Jak Smith requested and was granted leave to withdraw. (R. p. 125).

The Order was entered over Jane's objection. The Order allowed Attorney Smith to withdraw, gave Michael ten days to find new counsel, relieved the Guardian *ad litem* of her duties, and reset the hearing.

Mississippi Rule 5 provides as follows:

Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon such attorney unless service upon the party himself is ordered by the court. **Service upon the attorney or upon a party shall be made by delivering a copy to him;** or by transmitting it to him by electronic means; or by mailing it to him at his last known address, or if no address is known, by leaving it with the clerk of the court, or by transmitting it to the clerk by electronic means. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or,

if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by electronic means is complete when the electronic equipment being used by the attorney or party being served acknowledges receipt of the material. If the equipment used by the attorney or party being served does not automatically acknowledge the transmission, service is not complete until the sending party obtains an acknowledgment from the recipient. Service by mail is complete upon mailing.

Miss. R. Civ. P. 5(b)(1) (emphasis added).

It is undisputed that at the time the motion was granted and the Order was entered, Attorney Smith was counsel of record for Michael. It is undisputed that Attorney Smith had himself received a copy of the Order. (T. p. 133). The Court was presented with testimony at the post-trial hearing that Attorney Smith did not recall whether or not he gave the Order to Michael. Michael's incredible testimony was that Attorney Smith said to him, in essence: he was withdrawing, don't worry about why he was withdrawing after four years of representation, you won't have a trial today, and (even though he knew the trial was reset for December 8) he'd get back with Michael in a couple of months to assist in finding new counsel.

Assuming *arguendo*, Attorney Smith did not properly advise Michael of the Order, the burden to provide Michael notice of his counsel's withdrawal does not and should not shift that burden to Jane. The November 12, 2009 Order was primarily an Order allowing counsel to withdraw necessitated by a motion by Attorney Smith to withdraw. There is no rule, or statute, or case that this counsel can locate which would require opposing counsel to personally serve opposing party with the Order allowing opposing party's former counsel to withdraw.

Not only did Attorney Smith have an ethical obligation to serve Michael with the Order, but Rule 5 clearly contemplates this Order, the final Order entered under Attorney Smith's representation, to be served by Party Counsel, not Opposing Counsel. That the Order contained

additional provisions related to resetting and the dismissal of the Guardian *ad litem* should create a greater duty and burden on Attorney Smith, not Jane.

Lastly, Michael's brief cites no authority for the proposition that Jane was required to serve Michael with his own attorney's Order to withdraw.

As no good cause was shown to set the decree, the Court's decision to deny Michael's request to set aside the divorce should be affirmed.

ARGUMENT II.

THE CHANCELLOR PROPERLY GRANTED A DIVORCE ON HABITUAL DRUNKENNESS

As noted in Michael's brief, according to Miss. Code Ann. § 93-5-7 (1994), in a divorce matter, no judgment by default may be granted. This does not, however, mean that a claimant is barred from obtaining an uncontested divorce.

According to Rule 55(e) of the Mississippi Rules of Civil Procedure, no judgment by default shall be entered against a party to a suit for divorce unless the claimant establishes his claim or rights to relief by evidence. M.R.C.P. 55(e). A divorce claimant must prove the allegations of the complaint, even when the defendant has failed to answer or defend. As stated in *Rawson v. Buta*, the rule for default judgments in divorce cases imposes special requirements. *Rawson v. Buta*, 609 So.2d 426, 430 (Miss. 1992). The claimant must present proof in open court. *Id.* Furthermore, a divorce will not be granted on the uncorroborated testimony of the claimant. *Anderson v. Anderson*, 190 Miss. 508, 200 So. 726, 727 (1941).

In *Sproles v. Sproles*, 782 So. 2d, 742, 748 (Miss. 2001), the Mississippi Supreme Court affirmed the granting of a divorce on grounds of habitual drunkenness based on testimony that the husband drank each night and his drinking caused his mental condition to become intolerable to any reasonable person.

Jane testified clearly as to the duration of the drinking, along with its negative effect on her and the marriage. Jane testified that Michael drank every day of the marriage. (T. p. 81) He drank alcohol and took pain medication for a previous disc injury from the time he woke up in the morning. (T. p. 81-82). Michael drank the alcohol and ingested the pain medication without eating at all until around 10:00 p.m. (T. p. 81). Jane testified that because of Michael's substance abuse, she had to walk him to bed, disrobe him herself, and put him in bed. (T. p. 81). Jane testified that she was, in essence, taking care of a child. (T. p. 81). Jane then referred the Court to the pictures and testimony introduced as evidence in the March 8, 2006 temporary hearing: pictures of Michael passed out in his food, pictures of Michael clothes and the furniture poked with holes from his fallen cigarette. (T. p. 82). Jane's testimony was uncontraverted.

Jane next called Sara Tims ("Sara"), a friend of Jane's for thirty years. (T. p. 91). Sara testified that every time she saw Michael he was drunk. (T. p. 91). She further testified that she believes the alcoholism was the proximate cause of the separation of Michael and Jane. (T. p. 91). Sara's testimony was uncontroverted.

Jane presented sufficient proof of Michael's drunkenness and its effects on the marriage, both at the time of the final hearing and at the temporary hearing, such that the Court's rant of a divorce on grounds of habitual drunkenness should be affirmed.

ARGUMENT III.

THE CHANCELLOR DID NOT ERR IN DETERMINING MICHAEL'S VISITATION SCHEDULE.

Michael argues that the chancery court's imposition of a visitations as agreed upon by the parties was manifest error and an abuse of discretion. Michael contends that the visitation was ordered was less than what he was allowed in the temporary order from four years prior. *Cox v. Moulds*, 490 So.2d 866, 868 (Miss.1986), Michael points out that " the visitation rights of the

non-custodial parent should be tantamount to custody with respect to the place and manner of exercise of same, except in the most unusual circumstances[.]" that is-" something approaching actual danger or other substantial detriment to the children...."

In domestic-relation matters, as with other issues concerning children, our chancellors enjoy considerable discretion with visitation issues. *Harrell v. Harrell*, 231 So.2d 793, 797 (Miss.1970). When determining visitation, the best interest of the child is the main concern, "keeping in mind the rights of the non-custodial parent and the objective that parent and child should have as close and loving a relationship as possible, despite the fact that they may not live in the same house." *White v. Thompson*, 569 So.2d 1181, 1185 (Miss.1990) (citing *Cox*, 490 So.2d at 870). Accordingly, this Court affords great deference to a chancellor's decision regarding visitation. *Id.*

The record shows that Michael is a habitual substance abuser of alcohol and pain medication. The chancellor properly took into consideration the child's best interests in his decision, with Jane stated for the record the possibility and hope that Michael may be granted some greater form of visitation with his child in the future.

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

ARGUMENT IV.

THE CHANCELLOR DID NOT ERR IN DISTRIBUTING THE MARITAL ASSETS AND APPORTIONING THE MARITAL DEBT.

Michael next contends that the division of the marital estate was unjust. "A chancellor's findings of fact will not be disturbed unless manifestly wrong or clearly erroneous." *Sanderson v. Sanderson*, 824 So.2d 623, 625 (Miss. 2002). A chancellor's conclusions of law are reviewed de novo. *Chesney v. Chesney*, 910 So.2d 1057, 1060 (Miss. 2005). The distribution of marital assets in a divorce will be affirmed if "it is supported by substantial credible evidence." *Bowen v. Bowen*, 982 So.2d 385, 393-394 (Miss. 2008) (quoting *Owen*, 928 So.2d at 160).

The Chancellor granted Jane a divorce on grounds of habitual drunkenness. (T. p. 95). Jane was awarded full legal and physical custody of Cameron, full ownership of the former marital residence, seventeen hundred dollars (\$1,700) in past medical expense reimbursement, ownership of a Nissan Altima automobile, and fifteen hundred dollars (\$1,500) in attorney's fees. (T. p 92-95). Additionally, Michael's child support would be satisfied through Jane's receipt of Cameron's monthly disability dependant payment of approximately eight hundred dollars (\$800). (T. p 95). Michael was granted visitation with Cameron as agreed upon by the parties. (T. p. 95). Jane was not awarded ownership of a Harley Davidson motorcycle or three vehicles, alimony, the mobile home in Michael's possession or the personal property found therein. (T. p 92-95). Jane also did not receive any of Michael's remaining lump sum disability settlement, valued on the date of trial as approximately sixty thousand dollars (\$60,000). (T. p 92-95).

"[M]arital misconduct is a viable factor entitled to be given weight by the chancellor when the misconduct places a burden on the stability and harmony of the marital and family relationship." *Carrow v. Carrow*, 642 So.2d 901, 904-05 (Miss. 1994). *See also Brabham v. Brabham*, 950 So.2d 1098, 1101-02 (Miss. Ct. App. 2007). "[A]n equitable division of property

does not necessarily mean an equal division of property." *Chamblee v. Chamblee*, 637 So.2d 850, 863-64 (Miss. 1994).

The Court clearly considered Michael's fault, and apportioned the assets and debts of the marriage in a fair and equitable manor falling within the Court's discretion. As such, the decision of the Chancellor should be affirmed.

ARGUMENT V.

THE CHANCELLOR DID NOT ERR IN AWARDING ATTORNEYS' FEES

Michael also takes issue with the chancellor's imposition of fifteen hundred dollars in attorney's fees to Jane. "An award of attorney's fees in domestic cases is largely a matter entrusted to the sound discretion of the trial court." *Lauro v. Lauro*, 924 So.2d 584, 591 (Miss. Ct. App. 2006); *Arthur v. Arthur*, 691 So.2d 997, 1004 (Miss. 1997)). Unless we find the chancellor was manifestly wrong, we will not disturb the attorney's fees award on appeal. *Lauro*, 924 So.2d at 591.

Factors to be considered in an award of attorney's fees include the relative financial ability of the parties; the skill and standing of the attorney employed; the nature of the case and novelty and difficulty of the questions at issue; the degree of responsibility involved in the management of the cause; the time and labor required; the usual customary charge in the community; and, the preclusion of other employment by the attorney due to the acceptance of the case. *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1982).

The chancellor awarded Jane fifteen hundred dollars (\$1,500) toward her attorney's fees after considering her limited financial resources, Michael's financial ability to pay, particularly considering his separate property of approximately sixty-five thousand dollars (\$65,000), and the difficulty and frustrations involved in bringing Michael into court to finally conclude the matter.

The Chancellor's decision was not manifestly wrong, was supported by the credible evidence before the Court, and should be affirmed.

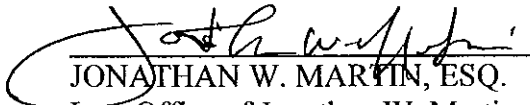
CONCLUSION

Michael Turner's testimony regarding lack of notice lacked credibility. Notwithstanding the likelihood of actual notice, the trial on the merits was continued from a date certain to a subsequent date certain following a motion by his own counsel that was granted. Jane had no duty to serve his own counsel's Order to him. The Order allowing his counsel to withdraw, which included a provision resetting the trial to a date certain, was decided and prepared while he was represented. To the extent any duty existed, Michael's attorney owed that duty, not Jane. As a result, the Trial Court's decision to deny the Motion to Set Aside should be affirmed.

The Trial Court was well within its discretion to find sufficient proof to award a divorce on habitual drunkenness, to order visitation at the discretion of Jane, to equitably divide the marital property as ordered and to award Jane's attorney's fees.

Accordingly, the decision of the Chancellor in this matter should be affirmed.

RESPECTFULLY SUBMITTED this, the 21st day of January, 2011.


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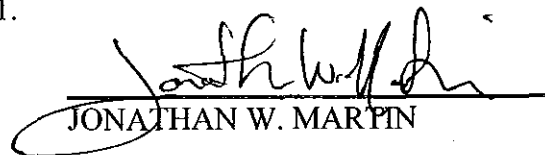
I, Jonathan W. Martin, attorney for Appellee, Jane Turner, do hereby certify that I have this day filed this Reply Brief of Appellee, Jane Turner, with the Clerk of this Court, and have served a copy of this Reply Brief by United States mail with postage prepaid on the following persons:

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DATED, this 21st day of January, 2011.


JONATHAN W. MARTIN