IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

PERCY D. HESTER, SR. APPELLANT

VS. NO. 2010-CA-00582

SUNDRA SAMPLES APPELLEE

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APPEAL FROM THE CHANCERY COURT OF NEWTON COUNTY, MISSISSIPPI

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REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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2. THIS COURT SHOULD REFORM THE JUDGMENT BECAUSE THE CHANCELLOR ERRED IN THE ORIGINAL FINAL JUDGMENT WHEN HE FAILED TO AWARD PERCY CREDIT FOR THE $897.00 HE PAID FOR RENT WHEN PRISCILLA WAS LIVING AT AN APARTMENT IN 2006.

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STATEMENT OF THE CASE

(i) Statement of the Facts:

In her August 2009 petition for contempt, Sundra swore that Percy had made no child support payments from May of 1992 through December of 2004.[1] R.I/77. At trial, she testified

[1] Hester has attached Sundra's sworn accounting which she attached to her 2009 contempt petition as Exhibit A to this brief. In his initial brief, Hester mistakenly said that Sundra had stated in her contempt petition that he had made no child support payments at all. The accounting shows that she did give Hester credit for making $10,139.00 in payments for the years 2005 and 2006. Counsel for Hester apologizes to the Court for this error.

that he had paid no payments from May of 1992 through December of 2004.[2] At the motion for reconsideration filed in this case, counsel for Sundra admitted that in 2007 Sundra had signed an affidavit[3] in Texas when she sought the assistance of the Texas Attorney General's office in enforcing the child support order in this case. Her attorney, Donald Boykin, admitted that at the time Sundra testified at trial, he had the affidavit in his possession. He also admitted that he did not disclose the affidavit to counsel opposite. He said that he did not do so because counsel opposite had not asked for it in discovery. Tr. 282-83. Neither did he disclose the affidavit to the trial court even though Sundra's affidavit reflected payments which were significantly different than those in her 2009 contempt petition and in her testimony.

Sundra's affidavit reflected that in the May 1992 through December of 1996 time frame, Percy had paid her $11,200.00 more in child support than she testified that he paid her at trial. RE 35. In short, her 2007 affidavit confirmed Percy's testimony that he paid her this amount during that time period.[4] Tr. 188. The affidavit also confirmed that he paid her an additional $1,000.00 in 2004. RE 35. In her contempt petition filed in 2009, she swore that he had not paid her anything from May of 1992 through December of 1996 and further stated that he had not paid anything in 2004. *See,* Exhibit A to this Brief.

The following chart shows a comparison of the yearly totals between the 2007 affidavit and the affidavit Sundra filed with her August 2009 petition in this cause:

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[2] "Q. (By Mr. Boykin) From May of '92 until January 1, of '05, did he pay you anything?
A. (Shaking head.)
Q. Your answer was no?
A. No, sir." Tr. 56.

[3] The affidavit can be found in Percy's Record Excerpts at p. 35.

[4] Percy testified that he made his $200.00 monthly payments from May of 1992 through May or June of 1998 when Sundra moved and did not pick up her MoneyGram payments. Tr. 188, 225-26. He resumed payments once Sundra called him in 2004 to pick up their daughter in October or November of 2004. Tr. 145-47. Sundra's 2007 affidavit shows that he made his payments through 1996 ($11,200.00) and shows that he paid an additional $1000.00 in 2004. RE 35.

		2007 affidavit[5]			2009 petition[6]
1992		1600.00			0
1993		2400.00			0
1994		2400.00			0
1995		2400.00			0
1996		2400.00			0
1997		0			0
1998		0			0
1999		0			0
2000		0			0
2001		0			0
2002		0			0
2003		0			0
2004		1000.00			0
2005		2400.00			5645.00
2006		2500.00			4494.00
2007		2450.00			0
2008[7]					
	Total	17,050.00			10,139.00

Sundra claims several times over the course of her brief that she never received services under Title IV-D of the Social Security Act. Appellee's Brief, p. 1, 2. Sundra's claim that she never received such services is totally irrelevant to the issues in this case. That would be a matter between her and any agency she might have received funds from.

Sundra says that Hester failed to show that the hearing on the merits of her petition for contempt was delayed several times for DHS to produce an affidavit from Sundra which she signed when she and the Texas welfare department were pursuing a suit for past due child support in Texas. Sundra says that the only proof of this claim came from statements made by Hester's counsel at the evidentiary hearing on his motion for reconsideration. She says this is insufficient proof of the fact. Significantly, however, at the hearing, neither Sundra nor her counsel made any attempt to dispute Hester's attorney's statement to the court, and are now

[5] RE 35.
[6] Tr. 77.

estopped from raising a fact they admitted by silence at the hearing. Tr. 270. Had Sundra objected at the time, counsel for Hester could have further developed proof.

Moreover, it is not true that the only evidence that the case was delayed in order to allow DHS to get the affidavit came from Hester's attorney, Michael Marks. In a proffer to the Court, Hester himself also testified to these same facts. Tr. 301-303.

Sundra also claims that the testimony as to what Nicole Bryan and others told Marks and Hester about the affidavit was hearsay and, therefore, this Court cannot now consider it in making a decision in this case. The problem with this argument is that the trial court made a ruling on Hester's motion for reconsideration without first allowing Hester to put on any testimony. Tr. 292-93. Once it appeared that the Court was ruling on the motion rather than merely discussing the evidence as the Court had previously done during the course of the hearing, the following colloquy occurred between the Chancellor and Marks:

> MR. MARKS: Is that the conclusion of today's ruling Judge? I needed to make a short record by –
>
> THE COURT: Tell me what you want to proffer. What would he say?

Tr. 294-95. Subsequently, the Chancellor allowed Marks to make a proffer which consisted of testimony from Hester about what he had been told by DHS about the affidavit, what occurred in court previously in the case regarding the affidavit and what he had been told and did in Texas after the case to get the affidavit from them. Tr. 295-318.

SUMMARY OF THE ARGUMENT

In her brief, Sundra makes mostly conclusory allegations in support of her argument and fails to support her contentions with on point legal authority. This Court is not required to consider an argument, which is not supported by authority that is on point. *Howard v. State*, 945 So.2d 326, 356 (Miss. 2006) (citing *Bell v. State*, 879 So.2d 423, 434 (Miss. 2004)). Nor is the

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[7] Sundra's affidavit only goes through September of 2007. RE 35.

Court required to consider an argument that fails to make meaningful reference to facts in the record. *Randolph v. State*, 852 So.2d 547, 558 (Miss. 2002) [finding that the Appellant's "cursory argument without either citing to specific instances in the record of an abuse of discretion by the trial court or without further reason or explanation" amounted to a lack of meaningful argument for appellate review and constituted a waiver of the issue]. Sundra, therefore, has waived most of her arguments by failing to cite meaningful legal or factual authority for her arguments.[8] *See also, Holloway v. Jones,* 492 So.2d 573, 573-4 (Miss. 1986) [failure to cite authority in support of one's arguments may be construed as conceding to the other side's claims].

ARGUMENT

I. THE CHANCELLOR ERRED IN NOT ADMITTING SUNDRA'S TEXAS AFFIDAVIT INTO EVIDENCE AT THE HEARING ON THE MOTION TO RECONSIDER. BECAUSE THE CHANCELLOR FAILED TO DO SO, HE ERRED IN OVERRULING PERCY'S MOTION FOR RECONSIDERATION.

Sundra argues that the judge was correct in finding that Sundra's affidavit was not newly discovered evidence which warranted reconsideration of the finding of contempt against Hester. Hester first argued that the judge erred as a matter of law in finding that the document was inadmissible because of a lack of authentication. As Percy has already noted, counsel for Sundra admitted Sundra signed the affidavit. Consequently, the document was admissible as an

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[8] For example, Parrish in his brief has three citations. One is to Griffith's Mississippi Chancery Practice (1950) for the general proposition that courts of equity require litigants to have "clean hands." He cites *Wheeler v. Parks,* No. 2005-CA-00932 (Miss. 12/12/1006) for the notion that Donna should not be heard because of the fugitive disenfranchisement doctrine. He finally cites *In re Hampton,* 919 So.2d 949 (Miss. 2006), a case that holds that an attorney, under appropriate circumstances, can be cited for criminal contempt for failure to appear for a hearing. The last case is the only one applicable to Spencer and then only on the question of whether Spencer was properly cited for criminal contempt for failing to appear at a hearing. Kramer in his "GAL" brief cites two cases, Rule 11 and the Litigation Accountability Act. The first case is *State v. Blenden,* 748 So.2d 77 (Miss. 1999) – which is cited for the general proposition that attorney's fees may be awarded to a party who has been wronged by the intentional misconduct of the other party. *GAL, p. 9.* The second case citation is to *Riley v. Doerner,* 677 So.2d 740 (Miss. 1996) for

admission of a party opponent without the need for further authentication. Sundra does not contest this argument in her brief, so Percy will not make further argument here on that issue.

Sundra does claim, however, that the Chancellor correctly found that the affidavit was not "newly discovered evidence." First of all, she claims that the document was known by Hester to exist prior to trial and, therefore, cannot be "newly discovered." She claims that because Hester knew of the documents existence prior to trial, he was not diligent in obtaining it for use at trial.

Sundra's argument that Hester in fact knew for certain that there was an affidavit overstates the inferences to be drawn on this record. As counsel for Hester testified at the hearing on the motion for reconsideration, when DHS was still a party to the action, the case was continued two times in order for DHS to secure the affidavit from Texas.[9] According to Marks, Nicole Bryan, the attorney for DHS, as well as Tanya Carl, another attorney from DHS, both represented that they had no affidavit. Tr. 302, 306. Marks did not engage in formal discovery or issue a subpoena for the document because he relied on their representations that they had tried to obtain the affidavit and that there was no affidavit. Tr. 304.

At some point thereafter, DHS apparently did obtain the affidavit—presumably after DHS had withdrawn and Boykin began to represent Sundra. However, it was never produced to Marks prior to trial although Boykin admitted he had a copy of it and knew that the amounts paid

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the general proposition that in determining issues of child custody, a chancellor's "ultimate concern" must be the child's best interests. *GAL, p. 5.*

[9] Sundra makes much in her brief about who first asked for a continuance of the case. The point is not whether or not Hester first sought a continuance or DHS did. The point is that DHS sought continuances at some point to secure the elusive affidavit from Texas. In any event, Sundra cites Tr. 303 for the proposition that Hester's attorney said DHS sought a continuance when the hearing was initially set. Appellee's Brief, p. 12. The record cite does not support that Hester's attorney made that statement. In any event, whether or not the initial continuance was sought by Hester or by DHS is irrelevant.

differed from those Sundra both in her 2009 petition and her trial testimony claimed Hester had paid her. Tr. 282-83.

Sundra argues, however, that she should be excused from her perjury because Hester was not diligent in discovering the affidavit prior to trial. As Hester pointed out in his initial brief, an attorney cannot sit by and allow his client to commit perjury without notifying the court. *See, Appellant's Brief, pp. 20-23.*

Sundra does not address this issue. Rather she argues that because Marks' testimony about what Bryan and Carl told him is hearsay, the affidavit does not constitute newly discovered evidence because Hester cannot show that he was not negligent in failing to discover the affidavit earlier. At the hearing on the motion to reconsider, however, Sundra never objected to Marks statements to the Court about what Bryan and Carl had told him. She is now estopped from doing so. It is axiomatic that "'A specific and contemporaneous objection to the admission of the hearsay [evidence] must be made ... in order for [its] admissibility to be considered on appeal.' *Bailey v. State*, 960 So.2d 583, 588(¶ 19) (Miss.Ct.App. 2007) (citation omitted)." *Anthony v. State*, 23 So.3d 611, 622 (Miss.App. 2009) Had Sundra made a proper specific objection at the time of Marks' statements, Marks would have then had the opportunity to further develop evidence on the issue. Sundra cannot now complain of the lack of more specific evidence when she did not do so at trial. *Id.*

In any event, Sundra misses the point. Her attorney admitted that the affidavit was authentic and that he had it at the time she testified. He even admits that he called Sundra's attention to the discrepancies in her accounts of payments from Hester and asked for an explanation for those inconsistencies. Tr. Tr. 265, 267. He attempts to excuse his failure to call these differences in Sundra's sworn statement to the court's attention because he says he obtained a satisfactory explanation from Sundra regarding them which was that Texas authorities

somehow "forced" her to make up the payments. *Id.* It is not up to him, however, to determine whether Sundra's explanation for her differing sworn statements is satisfactory. That is for the Court to decide. What Sundra's attorney knew beyond all doubt at the time of her testimony was that her testimony at trial differed significantly from her 2007 affidavit. In other words, he knew that one of these statements under oath was false. He was under an ethical duty to disclose this discrepancy to the court and to counsel opposite. *See,* discussion in Hester's initial brief.

Here, Marks specifically asked Sundra at trial about Exhibit 3 for id. Exhibit 3id is a spreadsheet from the Office of the Attorney General Child Support Enforcement Division in Texas showing payments purportedly made by Percy toward his child support obligations dating from May of 1992 through August of 1997. Boykin admitted at the hearing that the spreadsheet payments correspond to the payments shown on Sundra's 2007 affidavit. Tr. 265, 267.

When asked at trial about Exhibit 3id, Sundra responded that she had not seen that document. Tr. 97. Strictly speaking that testimony might be true. It is possible that Sundra had not in fact seen the spreadsheet; however, she had to know that the spreadsheet had been compiled from her own 2007 affidavit. Because Exhibit 3id was not authenticated by her, it was not admitted at trial. Hester, therefore, was unable to cross-examine her about the inconsistencies in that exhibit and her testimony. Both she and her attorney knew that the spreadsheet was based on an affidavit which differed from her 2009 petition and her trial testimony, and, at the very least, it was disingenuous that this fact was not revealed to Marks and the Chancellor.

Sundra's claim that Hester for lack of diligence in discovering her perjury is not something which this Court should do. Here, Marks had every reason to believe that Nicole Bryan was being truthful that the affidavit did not in fact exist and that efforts to issue a subpoena to Texas to procure the document would be futile. Sundra argues, however, that Hester had been told by some unidentified person in Texas that there was an affidavit. However, the

State of Mississippi through the office of DHS had been unable to procure it after what Marks had every reason to believe were reasonable efforts to do so and that Hester's information to the contrary from some unidentified official was incorrect. That after the fact, Hester was able to obtain the affidavit by himself going to Texas, and hiring an attorney and threatening to sue them does not mean that counsel was unreasonable for relying on agents from DHS in the first instance. Not insignificantly, Hester was also entitled to rely on the duty of counsel not to knowingly allow his client to contradict prior sworn statements. *See,* discussion in initial brief.

Sundra next argues that in any event, the result of the proceedings would not have been different if the affidavit had been discovered and admitted prior to trial. She says that the affidavit fails to show that Sundra perjured herself. This argument is specious. Either Sundra was truthful in her Texas affidavit or she was truthful in her complaint and trial testimony. She cannot be truthful in both because they contradict one another. Regardless of whether she had an excuse for falsifying her Texas affidavit does not mean that she did not made a false affidavit.

Next Sundra argues that the case of *Trim v. Trim,* 33 So.3d 471 (Miss. 2010), cited by Hester for the proposition that the case should have been dismissed because of her perjury, is inapposite because "[o]ther than her petition, Samples filed no document with the Court" and one was filed in *Trim. Appellee's Brief, p. 13-14.* Sundra's response is misleading. She filed an affidavit with the Court when she filed her contempt petition stating that Exhibit A, her accounting, was true and correct. That document differs substantially from her 2007 Texas affidavit. Thus, Sundra's affidavit in her petition, like the false 8105 Financial Statement in Trim, constituted a fraud on the court because it is inconsistent with what she had said under oath in her 2007 affidavit.[10]

[10] Sundra's excuse for the difference in her complaint and testimony and her 2007 affidavit is that Texas authorities "forced" her to submit a false affidavit. As an excuse, it lacks credibility. First of all, Sundra proposes no reason why Texas would want her to say she received more child

Sundra also argues that the result would not have been different because her testimony that Hester made no payments from May of 1992 through 1996 is consistent with Hester's interrogatory responses and is therefore supported by his own statement. Specifically, in her interrogatories, Hester was asked "For each payment you have made child support, educational costs, medical costs, dental costs and orthodontic costs for your child, stat the date of payment, the payment was hand-delivered or mailed, to whom payment was made, and state whether you have a receipt signed by the Petitioner for payment." In response, Hester said "See documents attached" and attached the MoneyGram printouts from showing the payments from 2004 through 2008. RE 36-42.

Hester testified at trial, without objection that his testimony conflicted with his interrogatories, that he made his $200.00 monthly payments from May of 1992 through June or July of 1998 when Sundra moved and did not tell him where she was. He explained that he only had receipts for the years shown on Exhibit 12 because he could not obtain receipts from Western Union going back more than five years.[11] Hester's inability to obtain records going back to 1992 is in large part due to Sundra's failure to bring her lawsuit until some sixteen or seventeen years after the divorce was first final.

Sundra next makes the extraordinary claim that Hester should not be given credit for the money shown on the MoneyGrams because did not pay his child support payments with his own money but paid Sundra from church money.[12] She then suggests that this supports the notion that

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support than she really had. Secondly, she advances no reason why she would do so. In short, her explanation defies logic and common sense. Consequently, it need not be accepted by this Court.

[11] Sundra claims that the fact that Hester only issued a subpoena duces tecum for the five year period shows that he was lying about being able to get receipts for only five years and that he did not even try to go back further. That Hester only subpoened records going back five years may mean only that he did not do so because he had talked to Western Union earlier and learned that those were all they had.

[12] In both her petition and at trial, Sundra conceded that Hester should be credited with the amounts in 2005 and 2006 shown on the MoneyGrams history. R.I/77.

if "anyone committed fraud on the Court, or perjury, it was Hester" and that she did not have to give him any credit for the MoneyGram payments. *Appellee's Brief, p. 15.* In support of her argument that Hester did not pay the child support shown on the MoneyGram printout with his own money, Sundra cites the transcript at p. 192.

The MoneyGram printout shows many payments in addition to those made to Priscilla and Sundra. It also shows payments to another child and to church employees. At trial, counsel for Sundra, for some reason, asked Percy to add up all the payments for all sums paid. Hester explained that

> [t]here is no need for me to add it up to the people that are not apart [sic] of this. I sent money—I sent money to everybody to pay my bills . . . . to people that work for me. . . . You will notice that there are MoneyGrams for $1,900 to a young lady that's my secretary sitting back there. That's how I do. I don't send money through the mail because I don't trust the mail for losing stuff." Tr. 192.
>
> [Counsel then asked:]
>
> Q. All that money that you paid out in MoneyGrams receipts that was your money and nobody else's money?
>
> A. No sir. That money was church money. These people are members of a church and work for the church. . . ."
>
> [Counsel then went on to ask:]
>
> Q. All right. The money you paid to Sundra, that came from church money?
>
> A. **No. That was my personal money that I gave her.**

Tr. 192-93.

Thus, Sundra's claim that Hester paid her child support from church money is based on a misreading of the record. What Hester testified to was that the MoneyGram printout included both records of payments for church expenses and personal expenses. The church expenses, such as those to his secretary, were from church funds; however, he unequivocally testified that the money he paid from Sundra came from his personal funds, not church money. In any event,

Sundra does not explain why she should get paid twice, once from church funds and then from Hester's personal funds. Nor does she explain why Hester should not get credit for money he paid Priscilla to pay her college tuition and board and why she claims that his payment to Priscilla constitutes a fraud on the Court. Plainly, Priscilla's tuition was paid. Whether Hester paid it directly or to Priscilla and she paid it is irrelevant. Nor does Sundra explain why this would be a fraud on the Court. Hester never testified that he paid the money directly to the school. He testified he paid it to Priscilla.

In any event, Sundra conceded at trial that Hester should receive credit for the 2005 and 2006 MoneyGram payments so her argument on appeal that he should not receive that credit is procedurally barred by her concession in the trial court and by the Chancellor's ruling that Hester should get that credit, a ruling which she did not appeal.

In summary, when she filed her petition in 2009 and when she testified, Sundra knew that she had signed an affidavit in Texas which directly conflicted with her statements in the petition and her testimony. Moreover, not only did it conflict, the 2007 affidavit from Texas supports Percy's testimony that he paid for the years in question.

This is not a case where a father has deliberately attempted to evade his responsibilities to pay child support. Unquestionably, the evidence supports Percy's testimony that Sundra hid from him during the periods when he did not pay, and that when she contacted him, he immediately assumed responsibility for Priscilla, paying out large sums of money for her support. He took her into his home, bought her a car, paid for her college tuition and did everything a loving father could do to support her both emotionally and financially. He should not now be penalized because Sundra made her belated claims of past due child support at a time when he could no longer produce documentary evidence of his payments.

Sundra makes no attempt to cite any legal authority to contradict that cited by Hester in his initial brief, so Hester will not reiterate those arguments here. Nor does she address the remainder of his arguments in this proposition, so again Hester will not rehash those here but will rely on his initial brief.

Finally, it bears repeating that the Chancellor declined to consider the 2007 affidavit on the motion to reconsider, not only because he considered that it was not "newly discovered," but also because he wrongly believed that Hester's claim that he should receive credit for the amounts that Sundra said he had paid prior to 2004 was inconsistent with Hester's trial testimony. Specifically, the Chancellor stated:

> Secondly, Reverend Hester is here today submitting to the Court an affidavit showing payments going back to May of 1992. That would contradict his testimony in the November, 2009 trial of this matter.

Tr. 293. The judge's erroneous ruling was based on Boykins' statement at the hearing that Hester had testified that he made no payments prior to 2004. Tr. 273. Plainly, both Boykin and the trial judge were mistaken. Hester definitely testified that he made payments from May of 1992 through June of 1998. Tr. 188, 225-26.

There is no credible reason for Sundra to have signed an affidavit in 2007 that Percy had paid her if he had not. Her attempts to distance herself from that affidavit in order to justify her trial testimony is simply not credible and it would be unconscionable for the Court to allow her to benefit from her behavior.

II. THIS COURT SHOULD REFORM THE JUDGMENT BECAUSE THE CHANCELLOR ERRED IN THE ORIGINAL FINAL JUDGMENT WHEN HE FAILED TO AWARD PERCY CREDIT FOR THE $897.00 HE PAID FOR RENT WHEN PRISCILLA WAS LIVING AT AN APARTMENT IN 2006.

Sundra argues that because Hester's attorney signed the final judgment agreeing as to form, he is now procedurally barred from arguing that the court erred in failing to award him

credit for $897.00 in rent. *Appellee's Brief, p. 16.* Sundra cites no authority for the notion that an agreement as to form constitutes an agreement as to the substance of a judgment. In fact, it indicates that the party is not agreeing to the substance of the order. *Klein v. McIntyre,* 966 So.2d 1242, 1258 (Miss. App. 2007) [approval as to form does not indicate that the substance of the order was agreed to by a party].

Sundra then argues that the Chancellor in fact gave Percy credit for the $897.00 when he gave Percy credit for $10,439.00. RE 36-42. The MoneyGram receipt history shows, however, that Percy paid $10,439.00 directly to Sundra in 2005 and 2006. The $897.00 at issue was paid directly to Raymond Prince, Priscilla's landlord. RE 39-40. Thus, it is not true that the $897.00 was included in the $10,439.00. The Chancellor found that Percy should receive credit for the rent; however, he made an error in finding it was included in the $10,439.00. Percy, therefore, should receive this credit. *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc., supra* [Chancellor commits an error of fact warranting relief where the Court is left with a definite and firm conviction that a mistake was made].

III. THE CHANCELLOR ALSO ERRED AS A MATTER OF LAW IN FAILING TO GIVE PERCY CREDIT FOR THE MONEY HE PAID DIRECTLY TO PRISCILLA FOR HER RENT AND EXPENSES AFTER SHE WAS KICKED OUT OF SUNDRA'S HOME IN NOVEMBER OF 2004 UNTIL SHE WENT TO LIVE WITH PERCY IN JUNE OF 2005. ALTERNATIVELY, PERCY SHOULD HAVE BEEN GIVEN CREDIT OF $200.00 A MONTH FOR THOSE MONTHS WHEN PRISCILLA WAS EFFECTIVELY IN HIS CUSTODY.

Sundra now objects for the first time on appeal that the MoneyGram history was not properly authenticated. She is procedurally barred from making this argument by her failure to make this objection in the trial court and by her concession that the payments in 2005 and 2006 should be credited to Hester. *Anthony v. State,* 23 So.3d at 622.

Next, she argues that Hester wants to use the MoneyGram receipts but then he also wants to use the affidavit of 2007 and that the two are basically in conflict. As Hester pointed out, there can be no doubt that Sundra was estimating payments in the 2007 Texas affidavit. What Hester is asking the Court to do is to use its common sense in determining which parts of which documents more accurately reflect the payments.[13] It is clear that the MoneyGram history reflects sums actually sent through Western Union in the operative years. Since these are documented payments, where MoneyGram history is available, those are the records that should be used. The Chancellor himself found that the MoneyGram showed transactions which actually occurred. Tr. 293.

However, Hester could not get the MoneyGram history for the earlier years because Sundra delayed so long in filing for child support she claimed Percy had not paid. Instead, he testified that he paid the money from May of 1992 through June of 1998. Tr. 188, 225-26. Sundra denied in her petition and at trial that he had done so. However, her 2007 affidavit showed that he had made $200.00 monthly payments from May of 1992 through December of 1996. In short, that affidavit provided corroboration which was otherwise lacking for Percy's testimony.

Because there is no earthly reason why Sundra should have overestimated payments in her 2007 affidavit, a reasonable inference is that Hester did in fact make those payments.[14] The MoneyGram history shows numerous direct payments to Priscilla during the time she was not living with Sundra from November of 2004 through May or June of 2005. In June through August of 2005, Priscilla went to live with Percy. RE 12, Tr. 145-47. Priscilla lived with Percy in

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[13] Hester claims that the case is subject to *de novo* review because the Chancellor's ruling was flawed by the legal and factual errors discussed here and in his initial brief.

[14] Whether or not Percy made the May 1992 through June 1998 payments is largely irrelevant to this particular issue which is whether or not he should receive credit for later payments made directly to Priscilla. However, because Sundra discusses it in this issue, Hester rebuts it here, too.

Mississippi from June through August of 2005 when Percy managed to talk Sundra into taking Priscilla back so that she could finish her senior year in Texas. Priscilla remained there until October of 2005 when she again fell out with Sundra and Dwayne. At that point, Percy paid for Priscilla to stay at a motel until he could arrange an apartment for her. This is the apartment of Raymond Prince that Priscilla lived in though the end of July of 2006 when she went to live with her father in Mississippi to go to college. Tr. 148-52.

The MoneyGram history corroborates that in addition to the money he paid directly to Sundra, Percy paid a total of $5446.00 directly to Priscilla from December of 2004 through December of 2006.[15] The Chancellor should have credited this amount toward any arrearage. There can be no doubt that a Chancellor has the authority to give a father credit for payments for support and goods paid directly to or for the benefit of the child in order to avoid unjustly enriching the mother. *Varner v. Varner,* 588 So.2d 428 (Miss. 1991); *Johnston v. Parham,* 758 So.2d 443, 446 (Miss. App. 2000) [holding that non-custodial parent is entitled to receive credit for having paid child support where, in fact, he paid the support directly to or for the benefit of the child, where to hold otherwise would unjustly enrich the mother].

Sundra really does not address this argument in her brief other than to argue that it was Percy, not she, who committed perjury. Accordingly, Hester will rely on his argument in his initial brief that the Chancellor should have given him credit for the time when he had *de facto* custody of Priscilla.

IV. THE CHANCELLOR FURTHER ERRED IN NOT GIVING PERCY CREDIT ON ANY ARREARAGE FOR THE MONEY HE PAID TOWARD PRISCILLA'S COLLEGE TUITION.

[15] This sum is in addition to the $11,139.00 which Sundra's 2007 affidavit shows Hester paid directly to Sundra. The Chancellor gave Hester credit for 10,139.00 for the 2005 and 2006 payments.

Sundra argues that because Percy did not introduce a receipt from the college, he should not be given credit for $1900.00 which he paid for Priscilla's college tuition.[16] Hester did not testify, however, that he gave the money directly to the college. Tr. 204. He testified that he gave the money to Priscilla for her to pay tuition and board. In support of his claim as to the amount of the tuition, he introduced a bill he had received from the college for tuition for the semester after Priscilla flunked out. That bill was dated, therefore, May 24, 2007. Priscilla was emancipated in December of 2007. The Chancellor chose that date because it was the end of the semester when Priscilla flunked out of school. *Exhibit 8.*

Clearly then, the Chancellor believed that Priscilla was in college during that time period. It follows then, that somebody in all likelihood did pay for her tuition, which Hester testified included her room and board. Given that Sundra did not claim she paid the tuition, the reasonable inference from the evidence is that Percy was truthful when he said he did. That tuition, room and board was then paid for a period prior to the time Priscilla was emancipated.

Sundra's argument that tuition payment cannot be credited toward child support payment because it does not diminish the child's need for food, clothing and shelter, as the evidence shows the payment was for room, board and tuition and that Percy was otherwise supporting her during this time.

V. THIS COURT SHOULD AWARD PERCY ATTORNEY'S FEES AND COSTS FOR THIS APPEAL AND SHOULD REMAND FOR A HEARING ON APPROPRIATE SANCTIONS TO BE IMPOSED ON SUNDRA AND/OR HER COUNSEL FOR ATTORNEY'S FEES AND OTHER COSTS INCURRED BY PERCY AS A RESULT OF SUNDRA'S PERJURY AND THE MISCONDUCT OF HER ATTORNEY.

[16] Although the testimony is somewhat confusing, upon rereading the transcript, it appears to counsel that Percy paid for only one semester of tuition, not two. The bill for one semester would be $1900.00.

Sundra claims that it is she, not Hester, who should be awarded attorney's fees. She claims that Percy's appeal is frivolous. She cites no legal authority for her claim and alleges no specific reasons why the appeal is frivolous. Plainly it is not.

The Litigation Accountability Act and MRCP, Rule 11 provide for an award of attorney's fees to a party where an attorney or party asserts claims or defenses "without substantial justification", which are "interposed for delay or harassment" or where proceedings are expanded "unnecessarily." §11-55-5(1), Miss. Code Ann. and MCRP, Rule 11. Pleadings are "unjustified" or "frivolous" under both Rule 11 and the Act where they are "groundless in fact or in law, or vexatious." This Court has repeatedly held that a "pleading is "frivolous 'only when, objectively speaking, the pleader or movant has no hope of success.' [quoting *Tricon Metals & Services, Inc. v. Topp,* 537 So.2d 1331, 1334 (Miss. 1989)]." *Scruggs v. Saterfield,* 693 So.2d 924 (Miss. 1997) "[T]hough a case may be weak or 'light-headed,' that is not sufficient to label it frivolous [internal quotations and citations omitted]." *Id.* at 927.

Because Sundra does not otherwise address Hester's contentions in his initial proposition, Hester will rest on his original brief with regard to those.

CONCLUSION

This Court should find that Percy is entitled to have his case dismissed because of Sundra's perjury. Alternatively, he should be given proper credit for the payments he made to Priscilla and for her support as discussed herein. Finally, the Court should impose appropriate sanctions on Sundra and her attorney or remand this case to the lower Court with instructions to determine appropriate sanctions, including, but not limited to, Percy's costs and attorney's fees. Percy requests any other relief to which he might be legally entitled.

Respectfully submitted,
PERCY D HESTER, SR., APPELLANT

By: E. Michael Marks
ATTORNEY FOR APPELLANT

CERTIFICATE

I, the undersigned attorney for Appellant, do hereby certify that I have this date mailed by United States mail, first class, postage prepaid, a true and correct copy of the above and foregoing to Donald W. Boykin, Attorney for Appellee, at 515 Court Street, Jackson, MS 39201 and one to Hon. H. David Clark II, Chancellor, PO Box 434, Forest, Mississippi 39074, and the original and three copies to Kathy Gillis, Clerk, PO Box 249, Jackson, Mississippi 39205-0249.

This the 28th day of February, 2011.

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