

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

THOMAS DALE WATTS

APPELLANT

VERSUS

NO: 2010-CA-00613-COA

KIMBERLY J. WATTS

APPELLEE

APPEAL

APPELLANT'S REPLY BRIEF

**APPEAL FROM THE CHANCERY COURT OF
HARRISON COUNTY, MISSISSIPPI**

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I. Introduction

In Issue 1, Thomas has indeed made a bold proposition to the Court. He claims there is *not a single fact and certainly not substantial evidence* to support the Chancellor's findings of facts, including, among other harsh findings, that Thomas "set Mrs. Watts up" to commit abusive acts against her 11-year old child, Trevor, and that he "manipulated" or "poisoned" Trevor against his mother. The Chancellor based his award of custody, alimony and attorney fees on these and similar findings. While claims presented on appeal by an appellant often seem compelling, judicial experience teaches that there are usually two sides to a story. Not in this case.

With a skilled and able attorney at the helm and months to comb the record for facts to support the Chancellor's rulings, Kim has succeeded only in making the divergence between uncontroverted fact and judicial fiction more glaring.

Kim¹ fails to address the law and arguments advanced in Issue 2, regarding joint custody, choosing instead to hitch her wagon to the Chancellor's reckless finding of parental interference. That ground evaporates on even a casual review of the evidence addressed in Issue 1. The record demonstrates Kim is unable "*to cooperate* in reaching shared decisions in matters affecting the child's welfare." *Waller v. Waller*, 754 So. 2d 1181, 1183 (Miss. 2000). The decision to award joint custody in this case was an abuse of discretion.

Likewise, on Issue 3, dealing with the Chancellor's unusual award of alimony far greater than Kim testified she needed, Kim relies on the Chancellor's finding of *fault* leading to the divorce based on Thomas' alleged "manipulation of Trevor" and Thomas' "manipulation of the Court". (Bench Ruling, Vol. 7 TR. 725; RE 101) Each of these findings was in reckless disregard of uncontroverted evidence and not proper factors in awarding alimony. The

¹ For clarity, Thomas will continue to use first names, unless quoting other sources.

Chancellor also found *fault* with Thomas based on his single, brief drug relapse in November 2006, the only drug or alcohol usage by Thomas in 12 years of marriage. (Bench Ruling, Vol. 7 Tr. 725; RE 101) There was no testimony from Kim that this was the reason she was divorcing Thomas two years later. Both Dr. Miller, her expert, and Dr. Gasparrini, the Court's expert, reached a different conclusion. Hence, the finding, like many others, has no factual basis.

In addressing Issue 4, regarding the award of attorney fees for causing issuance of a TRO that was *never served or challenged*, based on an Affidavit that was uncontroverted in every material allegation, Kim uses a little magic "slight of hand" and old-fashion "hide-dragging" in a attempt to deal with an insurmountable legal impediment. She fails to address the long-standing law that a Court cannot award attorney fees or damages after a trial on the merits of the main case for obtaining injunctive relief that was ancillary to the main relief. *Rice Researchers, Inc. v. Hiter*, 512 So. 2d 1259, 1270 -1271 (Miss. 1987). The failure to respond to argument, like a failure to file a brief, is tantamount to confession of error and will be accepted as such. *Turner v. State*, 383 So. 2d 489, 491 (Miss. 1980). Kim fails to address many issues raised in this appeal, including this legal issue.

Issue 5 is a high-wire circus act for Kim. She seeks to support the Chancellor's *sua sponte* ruling that the Journal, *which she introduced* and which Thomas adopted as fact, should be disregarded, even though she relied on it heavily in her testimony and relies on it in her brief on appeal. The Journal is not essential to any finding of fact in this case, since the uncontroverted material facts were covered in the testimony and are covered, for the most part, in Thomas' Affidavit, which was also introduced by Kim as Exhibit 10 (Tr. 148). This is another example of the Chancellor trying to help Kim too much.

Issue 6 concerns post-trial motions and a Motion to Modify, where the Court reviewed the transcripts and heard testimony, only to find that there was no medical evidence that Kim's

conduct was “abusive”, despite her expert’s uncontroverted testimony that her conduct was abusive. The M.R.C.P 59 motion testimony is discussed in the main brief under the appropriate issues, since the same “abuse of discretion” standard applies to that ruling on appeal. The Chancellor failed to address and/or applied the wrong standard to the M.R.C.P 60 motion and/or the Motion to Modify.

It is apparent that whatever the source of the Chancellor’s bias, conscious or not, it shows in nearly every ruling at issue on this appeal. Yet, none of the issues raised depend on a finding of bias. The rulings are just plain wrong. The Chancellor made “quantum leaps”, “revealing a bias resulting in an abuse of discretion”. *Taylor v. Taylor*, 755 So. 2d 33, 38 (Miss. App. 1999).

On each of the issues, the Court should reverse and render. On the custody issue, for this child, who is now a young teenage boy that needs and wants his father, anything less will be a tragic blow.

II. Argument

Issue 1 A Chancellor must accept as true uncontroverted evidence and may not make “quantum leaps” from the evidence to reach unsupported findings. Where the evidence is uncontroverted that the mother engaged in a pattern of abuse and alienation conduct toward her 12-year-old child, over the nine months prior to separation, for the admitted purpose of making him feel shameful of his father; and that the father never said a negative word to his son about his mother, attempted to avoid arguments and shield his son from her abusive behavior; it was an abuse of discretion for the Chancellor to apply five *Albright* factors based on a finding that the father manipulated their son against the mother by “setting her up” to commit the abuse. The Chancellor abused his discretion in his findings and application of the *Albright* factors.

The Chancellor used the following findings to decide five *Albright* factors against

Thomas and as a basis for ignoring Trevor’s preference of where he wanted to live:

Thomas “set Mrs. Watts up” (Bench Ruling, Vol. Tr. 713; RE 89);

Thomas “play[ed] Trevor against Mrs. Watts” (Tr. 715; RE 90);

Thomas “manipulated Trevor’s relationship with Mrs. Watts” (Tr. 714-15; RE 90-91)

Thomas “destroyed Trevor’s true free will” by “stag[ing] things at home” (Tr. 717; RE 93);

Thomas “actively interfered with the relationship between Mrs. Watts and Trevor” (Tr. 718; RE 94)’ and

Thomas “poisoned Trevor against his mother” (Tr. 716; RE 92)

A. Kim advances not a single incident or fact on which the Chancellor could base these findings

In responding to the Appellant’s Brief, it was incumbent on Kim to refute Thomas’ claim that there was *not a single fact and certainly not substantial evidence* to support the Chancellor’s harsh findings. Kim and her very skilled attorney had months to comb through this record in search of evidence that would place the facts alleged by Thomas in controversy. She has failed.

In her response, Kim makes conclusory arguments, without specific record citations, and broadly references all of the exhibits and witnesses as providing substantial evidence for the Chancellor’s rulings. However, she does not direct this Court to any evidence that would support the Chancellor’s harsh findings against Thomas. Her inability to cite facts showing any misconduct by Thomas involving Trevor underscores the “quantum leaps” the Chancellor made to rule in Kim’s favor.

These findings would only make sense if the Chancellor were to drop the “s” from “Mrs”.

1. The Evidence: those nagging facts

The following material facts are overwhelmingly established and/or are uncontroverted:

A. In the fall of 2007, Kim told Thomas she wanted a divorce. (TW, Vol. 3 Tr 157, 174; KW Vol. 7, Tr 629) Thomas did not want a divorce. He consulted a lawyer, who advised him to start keeping a journal, in case Kim ever followed through on her threat (TW, Vol. 3 Tr 174:13-175:12)

B. Between October 2007 and July 2008, when the parties separated, Kim instigated numerous confrontations, during which she improperly involved Trevor, then 11-years old (RE

1-53). In these many instances, Kim attempted to alienate Trevor against his father by threatening that his father will cause Trevor to have to go to 'juvie' or be regulated by the state; or telling Trevor that his father is a drug addict, has to be regulated by the state, has hurt hundreds of people, is a liar, who has and will continue to lie to Trevor, steals drugs, goes to the restroom and shoots up drugs in his arm and takes care of patients while he's under the influence of drugs (RE 1-53);

C. Kim's *stated purpose* was to make Trevor feel *shameful* of his father;²

D. It is uncontroverted that Kim initiated *every* attack detailed in this record and in *every* case Thomas attempted to defuse the anger by refusing to engage³, removing himself from her presence or asking Kim to continue the argument away from Trevor⁴. Thomas literally begged her to stop her abusive behavior, See E., *infra*. If Trevor was out of the room, or if Thomas attempted to send him away or Trevor attempted to escape, Kim would call Trevor to the room⁵ or stop him from leaving⁶ and continue her abusive conduct toward Trevor. (See also, Appellant's Brief, pp. 28-30);

E. Thomas tried to disengage from Kim's clashes, tried to protect Trevor, pleaded with her to stop and ultimately, on July 5, 2008, blocked her from getting to Trevor, who had locked himself in the bathroom to escape her threats to take him. Trevor refused to come out until the police arrived. (RE 39-40). For example,

January 2008 (after Emeril's):

² TW Vol. 3 Tr. 86; RE 34.

³ E.G., TW Vol. 3 Tr. Vol. 3 61:14-17; RE 7.

⁴ E.G., TW Vol. 3 Tr. 66; RE 17-19; 85:28-86:9; RE 34-35; 89:1-8, RE 38-39.

⁵ E.G., TW Vol. 3 Tr. 48:20-27; RE 1; 61:20-22, RE 7.

⁶ E.G., TW Vol. 3 Tr. 85:18-27; RE 34.

"I try to stop her. I try to, Kim, this is not appropriate. Do not do this. Do not involve the child. This is wrong. You're scaring him. Please don't do this"

February 2, 2008 (after a Mardi Gras Parade)⁸

*"Kim, don't do this. Please don't have this conversation in front of Trevor. This is so wrong to do this."*⁹

*"I [was] trying to flag her off, "Kim, you're scaring this child. You've got to quit this. You cannot do this.""*¹⁰

Late June 2008¹¹

*"He was that scared. He was that upset with her in his face telling him these things, while I'm trying to block it off verbally. "We cannot be doing this. This is not right. This is not proper. Please don't do this.""*¹²

*"Come on, Kim. Please, please, let's just go talk about this someplace else. Do not do this to this kid.""*¹³

F. The nine-month campaign to make Trevor feel ashamed of his father had a negative impact on Trevor:

1. Thomas' Observations:

Frightened, almost crying, shaking, head down, very upset¹⁴

Shook up, head down, visibly frightened¹⁵

Very, very scared, very frightened, teary-eyed, shaking, wrenching his hands back and forth¹⁶

Balled up with his arms around his knees staring at the couch and fidgeting with his hands, viciously tearing up a piece of paper, so shaken¹⁷

⁷ TW Vol. 3 Tr. 63; RE 8.

⁸ TW Vol. 3 Tr. 65-68; RE 18-26.

⁹ TW, Tr. 66:1-5; RE 17.

¹⁰ TW, Tr. 67:2-68:5; RE 18-19.

¹¹ TW Vol. 3 Tr. 83-86; RE 33-38; RE 33-37.

¹² TW Vol. 3 Tr. 84:29-85:1; 85:15-17; RE 34.

¹³ TW Vol. 3 Tr. 85:28-86:9; RE 34-35.

¹⁴ TW Vol. 3 Tr. 48, 56; RE 1-3.

¹⁵ TW Vol. 3 Tr. 37-38; RE 3-6.

¹⁶ TW Vol. 3 Tr. 62-63; RE 7-8.

Trevor goes to car to wait alone to leave for Sunday School¹⁸

Trevor's demeanor over the course of this period changed from a happy, gleeful boy to more depressed and withdrawn when his mother was around¹⁹

Trevor walked on "eggshells" around his mother²⁰

When Kim is around, Trevor took very lengthy showers, he stayed in the bathroom, he stayed in his room. If his mom's was not there, he would come out, he would roam around the house, he would play, he would have fun. When Kim drove up, he became reclusive and hid out in his room²¹

2. Dr. Jule Miller (Kim's Expert): The negative effect of Kim's actions

November 2007 (Auto Zone)

Kim's misconduct **"would have a negative impact"** on Trevor, was Kim's misconduct **"certainly not a good thing"**,

Kim's misconduct **"would make him feel stressed out"**

Kim's misconduct would make it a **"difficult place for him to be"**

Kim's misconduct was **"alienation conduct"**²²

Fall 2007

Kim's misconduct **"would cause fear"** in a child of 11 years old and could be **"abusive"**.²³

January 2008 (after Emeril's)

Kim's misconduct following drinks at Emeril's in early January, 2008 (RE 7-15), was **"abusive"** and **"had a negative impact"** on Trevor,

Kim's misconduct caused Trevor **"emotional distress"** and can lead the child to **"feel especially badly about himself"**.

¹⁷ TW Vol. 3 Tr. 65-68; RE 18-26.

¹⁸ TW Vol. 3 Tr. 80; RE 26-27.

¹⁹ TW Vol. 3 Tr. 92-93.

²⁰ TW Vol. 3 Tr. 49.

²¹ TW Vol. 3 Tr. 93.

²² Miller Vol. 5 Tr. 394-95; RE 5-6.

²³ Miller Vol. 5 Tr. 394; RE 3.

Kim's misconduct is **"alienation conduct"** that could lead to Trevor having a negative view of his mother.

Telling Trevor that his Daddy has hurt hundreds of people is **"abusive"**²⁴

February 2, 2008 (Kim's Mardi Gras parade day explosion)

An example of a third level of misconduct, where Kim is making Trevor stand in as her proxy to ask her demeaning rhetorical questions of his father for her.

Kim's misconduct here was **"abusive", more "severe" and "pretty bad"**²⁵

June 3, 2008 incident (RE 29-33),

Kim's misconduct would **"definitely have a negative impact"** on Trevor, would **"stress Trevor out a great deal"** and will make him **"feel badly about himself"**. Trevor looks up to his Dad and, psychologically, and **any criticism of his Dad is criticism of him**²⁶

Late June 2008 Incident

Kim's misconduct in the late June 2008 incident (RE 33-37) would have a **"negative impact on Trevor"**, and is **"certainly inappropriate behavior"**. There is **"no doubt"** Mrs. Watts **"overstepped bounds, acted inappropriately, put her son under undue stress"**²⁷

G. Kim's misconduct was **so bad** that her own expert, Dr. Miller, testified that just a **single additional incident would disqualify her as a custodial parent**²⁸;

H. Kim admitted that **her conduct had the effect of driving Trevor away from her**²⁹;

I. Thomas' conversations with and explanations to Trevor after these traumatic episodes were appropriate. Rather than exploit Kim's misconduct to his advantage with Trevor,

²⁴ Miller Vol. 5 Tr. 395-98; RE 13-15.

²⁵ Miller Vol. 5 Tr. 401-02; RE 25-36.

²⁶ Miller Vol. 5 Tr. 406-407; RE 32-33.

²⁷ Miller Vol. 5 Tr. 409; RE 37.

²⁸ *Id.*; After the trial, Kim engaged in arguably worse abusive behavior toward Trevor (Appellant's Brief, pp. 12-13; 40-41).

²⁹ KW Vol. 7 Tr. 648, 666.

he would take the blame, telling Trevor that his mother was only angry with Thomas, not Trevor (Appellant's Brief, pp. 28-30); and

J. Kim's psychological evaluation accounted for her abusive misconduct (Appellant's Brief, pp. 30-37);

2. In Trevor's own words

Trevor's description of his mother's conduct and how it made him feel thoroughly corroborates Thomas' testimony.

a. Trevor's statements to Dr. Gasparinni

I was always scared of mom because she would ...get mad for no reason. She dragged me into mom and dad's arguments. All of them. So, for right now, I like it better with just dad there. (Ex 11, Gasparinni, Trevor, p. 3, RE 195)

Trevor states he is anxious, "*Just around mom.*" When asked what he was thinking at that time, he said, "*That she'll get mad and drag me into another conversation or argument.*" When asked how that would occur, he said, "*She'll say, 'Trevor, come here. We have to talk about something. Then she'll tell me what the argument is about, like at work, how people are doing something wrong or, at home, something about dad, She'll say he's a liar'.*" (Ex 11, Gasparinni Evaluation, Trevor Watts, 9-4-08, P. 4, RE 196)

All of this got Trevor upset when it occurred and he was able to describe these events pretty clearly. When asked, "*Does your dad draw you into their arguments?*" He responded, "*No. He tries to keep me out of them.*" (Ex 11, Gasparinni Evaluation, Trevor Watts, P. 4, RE 196)

Trevor states that **his dad does not say anything bad to him about his mom**, but his mom says bad things to him about his dad. (Ex 11, Gasparinni, Trevor, p. 5, RE 197)(Emphasis added)

b. Trevor's statements to Dr. Miller

She is always nice to me unless she drags me into something or is in a bad mood. She is nice until she is mad or sad.

He is scared that she will "go ballistic" again. She gets mad for no reason, or over simple things

When she is angry it all goes away." She is "always nice to me unless she drags me into something or is in a bad mood. She is nice until she is mad or sad."

*His mother calls his father a liar and rude*³⁰.

c. Trevor testimony to Court

I just like my dad a little bit more. Mom always like involved me whenever they got in a fight or something, so ... I like my dad a little bit more. (Trevor, Vol. 6 Tr. 486)

3 Kim's broad assertion that the Journal, which she introduced and which covers many events and facts not relevant to the issues, is not a fair depiction of the events related in the Journal does not place the *material facts* in controversy

Unable to refute the evidence of her misconduct toward her 11-year old son, Kim chose instead to introduce Thomas' Journal and loosely attack its accuracy on immaterial facts (setting up a straw man and knocking it down). She employs the same strategy on appeal.

Kim claims that the evidence *is controverted* because she testified that the Journal, which *she introduced in evidence*, was not a fair and accurate depiction of events on the dates noted in the Journal. She then cites examples of Thomas' statements to her that she claims were not recorded in the Journal.³¹ (Appellee's Brief, p. 30).

None of these alleged statements had any bearing, relevance or materiality on the issues concerning Trevor, as none of this alleged conduct occurred in Trevor's presence. None of it placed the facts of her abusive conduct toward Trevor in controversy. None of it lessened the impact that her conduct had on Trevor over the course of nine months. None of it would support the Chancellor's findings that "she was set up" or that Thomas "poisoned" Trevor.

4. Kim's Non-Denial Denials

Kim cites, *in a footnote*, two instances of controverted evidence regarding the events covered in the testimony:

As already pointed out, Kim testified the journal was neither accurate nor a fair depiction of the events described Tr.548. More specifically, and to the contrary of

³⁰ Ex. 12, Miller, Trevor, p. 3, 4; RE 209-10.

³¹ Actually, contrary to Kim's assertions, some of the negative statements made by Thomas are in the Journal. (See, e.g., Journal Ex 9, p. 18, LL 792-802, RE 100)

Thomas' assertions, Kim testified she never told Trevor that he would go to 'juvie' as asserted by Thomas Tr.635. She testified she never told Trevor the state would 'regulate' him like they regulated his dad Tr.636.

(Appellee's Brief, p. 30, fn 5).

Kim's threats to Trevor that he would go to "juvie" and that the state would have to regulate Trevor like it does his Dad were recurrent themes in Kim's nine-month campaign to turn Trevor away from his father before filing for divorce. In this footnote, Kim claims that she placed in controversy, by her testimony, these statements to Trevor, which Thomas attributed to her.

Does close examination of the record support her argument? Did Kim *really* deny making the "juvie" comment?

I've never said that to my son **that I know of**, nor would I ever. I don't use the term "juvie."That's not a common term I would even begin to use.**I don't recall ever saying those words like that.** ... No. I never told my son that I would take him to juvie **that I can ever remember.** (Kim Watts, Tr. 635-37; RE 3-4)

Also, did Kim *really* deny that she told Trevor that the State was going to regulate him, like it does his Dad?

No. I don't remember saying it that way...(Kim Watts, Tr. 636-37; RE, pp. 3-4)

You have said to Trevor, ... He has to be regulated by the State? Didn't you admit that to the doctor? *I've said those things, yes.* (Kim Watts, Tr. 642; RE, p. 11)

I've said a few times that the State has to regulate Thomas because he's lied. (Kim Watts, Tr. 657; RE 31-32)

Kim's evasive responses to cross-examination, especially when Kim failed to rebut Thomas' version in her direct testimony, do not place these important facts in controversy.³² "Testimony of a witness that [she] does not remember whether a certain event took place does not contradict positive testimony that such event or conversation took place." *McClellan v.*

³² A Table of Kim's non-denial denials included in the record excerpts. (See, Table, RE 53-56)

David, 439 P.2d 673, 677 (Nev. 1968); See, *Dunn v. Dunn*, 911 So. 2d 591, 599 (Miss. App. 2005) (positive testimony required).

5. Thomas embraces Dr. Miller's admitted bias and his testimony

Kim misconstrues Thomas' argument regarding Dr. Miller's admission on cross-examination and re-direct that he was biased in favor of Kim. Thomas is not asking this Court to disregard Dr. Miller's testimony because of this. On the contrary, this admitted bias adds weight to Miller's opinions, reluctantly given, once he was required to consider the uncontroverted facts.

Miller's initial report to the Court concluded: "[Trevor] tends to side with his father's view of the marital conflict, which is not uncommon in these situations." (Ex 12, Miller Joint Report, RE 202) This conclusion, based on a "feeling" from a single interview, would not support the Chancellor's harsh findings.

Miller further explained this opinion at trial. Miller testified that a child's allegiance to one parent is normal in cases where one party has custody and the child and parent are of the same sex. (Miller Vol. 5 Tr. 348, 431-32) Trevor's alliance with Thomas is more of a result of what *his emotional needs* are at that moment, than what either parent has done or not done. (Miller Vol. 5 Tr. 340) When asked to assume the undisputed facts, Dr. Miller's testimony was devastating to Kim, *supra*.

6. Trevor's fear of his mother and his preference for Thomas was shaped by Kim's conduct toward him, not by Thomas

Dr. Miller conceded the obvious: that Kim's conduct was alienation conduct, which would naturally turn Trevor away from his mother. (Miller Vol. 5 Tr. 394-95, 396-97, 433). Even Kim conceded that her conduct toward Trevor pushed him away from her and toward his father, for whom he already had a natural inclination. (KW Vol. 7 Tr. 648, 666)

Kim lifts the "good as gold" comment from Dr. Miller's report from his interview with Thomas to present a distortion. Here is the full comment:

He says that **when his wife is good "she is as good as gold". . . .**"On the other hand, **when she is bad she is "angry, irritable, way off in her thought processes. She gets paranoid and suspicious."** He said she has gone back and forth, but the good times have been decreasing in frequency and duration, especially over the last two to three years. She "turns on a dime~ now and can be loving one moment and then pull her hand away the next. **Lately, she has been involving their son in their arguments.** In the past Trevor (their son) would be asleep while she was breaking things in anger. **Now she wants to wake Trevor up to tell him how she is angry at his father.** Things escalated at home to where the police were called on July 5th or 6th and his wife was removed to jail.³³ (Emphasis Added)

Trevor's fear of his mother was experienced-based. The record is devoid of facts on which a conclusion can be made that it was based on anything Thomas said or did.

7. Kim's argument that Thomas "set her up" to commit the abusive conduct toward Trevor and sacrificed his son to her abuse is outrageous and not supported by a single fact

Kim avoids any discussion of the facts regarding her conduct by simply saying she knows she was wrong, while at the same time supporting the Chancellor's ruling that she was "set up" to commit these acts against Trevor, something akin to an "entrapment" defense for child abuse. At trial, Kim disowned the allegation that she was "set up". (KW, Tr. 635:8-16) Attempting to support on appeal a negative finding against Thomas that she disowned in her testimony is no easy task.

Now she argues that Thomas "set her up" to abuse Trevor and *sacrificed* Trevor to her abuse, so it could go in his Journal. In addition to there not being a single fact offered to support it, the obvious logical problem with this theory is that the Journal would not be evidence. Thomas could not introduce the Journal. Kim introduced the Journal.

³³ Ex. 12, Miller, Thomas, RE 203-204.

The finding that Thomas “set Kim up” to commit these acts against Trevor is simply mindboggling. Kim’s effort to support it by alleging that Thomas *sacrificed* Trevor to her abusive conduct is simply outrageous.

8. Kim’s claim that Thomas manipulated and poisoned Trevor’s relationship with her

Kim’s has not identified even one action by Thomas that would support the finding that he manipulated and poisoned Trevor’s view of his mother. She has not identified even one negative statement Thomas made to Trevor about his mother, even when she was degrading Thomas in Trevor’s eyes. Not one.

Kim’s asserts that the Chancellor’s findings were also based on Dr. Miller’s opinion that “Mr. Watts plays victim *in front of Trevor*”, citing for this quote: Tr. 714 (the Chancellor’s ruling) and Dr. Jule Miller Report, Page 3, Exhibit 12, March 2-5, 2009. There is no such testimony or statement in the record. Dr. Miller never said Thomas play a victim *in front of Trevor*. This is one of many examples of a negative finding by the Chancellor without *any evidence* to support it.

She does attempt to identify facts, mostly from the Journal after the separation. Some of the facts she identifies are:

a) Before Separation on July 5, 2009

- June 18, 2008, the journal refers to Thomas and Trevor having a "beware face" to beware of Kim
- June 28, 2008, Kim states that the Journal reads "don't worry about it son, we'll get a secret meeting [in camera testimony] with the Judge so you can tell him who you want to live with"

b) Post-Separation

- Thomas played the 'cool dad' by allowing Trevor to do things that Kim, the disciplinarian, would not allow
- Thomas played up fear in Trevor by changing the locks after she was arrested and removed from the home

- Thomas played the role of the ultimate 'protector' by texting Trevor after he expressed sadness about his preferred Presidential candidate losing: "I am sad about it also. The fact that I am your father and that I love you and always will won't ever change by any election. [sic]" Tr.170
- Thomas' entry in his Journal on July 10, 2008: "I assured [Trevor] he was very very safe and loved by both parents and that he had nothing to do with this. He said he ... knew why, it was mom. He was happy when he learned I was going to have full custody of him till the 22nd of this month and that his mother could not just show up We ran errands and met Mr. [Mike] Holleman....Trevor asked if, he could go to a movie with Dame, Jared and Hallie. I said I don't see why not. He said we will have to it [sic] in secret. I asked why. He said he didn't want his mom stalking him. He didn't want her showing up where he was".³⁴
- July 13, 2008 Journal entry: "Trevor wants me to get a cell phone from Verizon so I can get parent/child chaperone. This allows me to keep up where he is. For safety he wants me to be able to keep up where he is".
- Thomas and his parents took Trevor on a one-week cruise, allowing him to miss a week of school.
- Thomas once again portrayed himself to Trevor as the 'cool dad' when he allowed Trevor to bring "Cuban" cigars from the cruise back in to the States, as gift for his uncle George Bass³⁵

What these facts prove is just how traumatized Trevor was from nine months of hell.

None of the information, in the context of Kim's abusive conduct, would support a finding that Thomas "manipulated" or "poisoned" Trevor. Moreover, it is clear that the Chancellor did not rely on the Journal (See, Appellant's Brief, Issue 5)

Some of the representations of what is in the Journal are distortions. For example, the quote attributed to the Journal for June 28, 2008 is not even close to being accurate. What is more significant from that entry is what Trevor says about how his mother's conduct affected

³⁴ Kim's second quote about custody, "he was going to have full custody" drops the "until the 22nd of this month", the Temporary Hearing date, to make the statement appear inappropriate. Trevor was justifiably concerned about his safety during this period. Thomas reassured him in an appropriate way.

³⁵ Trevor did not bring back any cigars, Thomas did. Trevor never touched the cigars. He had no idea that the cigars were "Cuban" or that his Dad had allegedly done any wrong. It is highly unlikely that Thomas did anything wrong, as 95 percent of the Cuban cigars sold to tourists off cruise ships are fakes. http://www.cigaraficionado.com/blogs/show/id/Fake-Cigar-Central_3.

him: *"She doesn't make me feel good inside. My stomach hurts a lot when I am around her..."* (Journal, RE 166)

Also, despite having lived through the abuse himself, Thomas demonstrates, once again, the consistent maturity and judgment of an excellent parent by reassuring Trevor *"that his mother loves him and that we love her very much her"*. (Journal, RE 166) The July 10, 2008 entry provides another good example: *"I assured [Trevor] he was very very safe and loved by both parents and that he had nothing to do with this"*. (Journal, RE 171)

B. The Affidavit

From the outset, Kim makes much of the Affidavit submitted in support of the request for a TRO. The Affidavit became important because the Chancellor considered it under the Voluntary Consent Order, which provided that the Court could decide, among other issues:

m) the appropriateness of the issuance of the emergency order under MRCP 65 at the request of the Plaintiff/Counter Defendant and whether the Defendant/Counter Plaintiff is entitled to damages and attorney fees and **the appropriateness of the Court's consideration of this issue under the filed pleadings and the Plaintiff/Counter Defendant's right to have the Court reconsider whether this issue should be considered after the entry of judgment in this matter or on appeal.** (RE.68; CP 65)(Emphasis Added)³⁶

The Affidavit submitted in support of the request for a TRO, without notice, took on even greater importance in the case than the award of attorney fees. The Chancellor based several of his rulings, including alimony and custody, in part, on his finding that Thomas misled him in the Affidavit.

Thomas has demonstrated that the Chancellor's finding that the Affidavit was false in material matters are not supported by substantial evidence, and are, in fact, contrary to the

³⁶ In Issue 4, Thomas' challenges the authority of the Chancellor to award damages or attorney fees based on the issuance of the emergency order under MRCP 65. He clearly did not, as Kim concedes by failing to address this legal argument.

overwhelming weight of evidence. (See Appellant's Brief, pp. 44-49) The material facts alleged in the Affidavit were not only true, but were also uncontroverted.

Kim does not respond to Thomas' argument concerning two negative findings regarding the Affidavit, specifically Kim's alcohol use and Thomas acting "as if he had no responsibility towards the creation of the document." Presumably, she concedes these points. Instead, she focuses her efforts on trying to support the Chancellor's erroneous finding that the Affidavit falsely stated that Kim was a danger to herself or others, which the Chancellor equated with the civil commitment standard.

In making her argument, Kim repeatedly misstates what Thomas said in the Affidavit, recasting it as stating that Kim had a mental illness, although the medical evidence would support that statement. In fact, in addition to a detailed account of Kim's treatment of Trevor, the Affidavit states,

My wife exhibits signs of emotional illness, including symptoms of bipolar disorder, depressive disorder and uncontrolled anger management. Her moods swing from pleasant to depressive and angry in an instant. She has been advised to seek treatment and I have pleaded with her to seek treatment, but she refuses. Kim has told me on several occasions that she believes she is a depressive person and she should probably be on medications. (Affidavit, Para 6, RE 108)

Contrary to Kim's assertion that there was no testimony or evidence to support the Affidavit, in addition to affirming the Affidavit, Thomas testified:

Kim can have rapid mood changes. She can be normal, and in a matter of moments, be angry, upset, hostile, threatening. She can also have long bouts of a depressive-like state where she's withdrawn and upset. There are times that she's been, I guess, paranoia-like in keeping up with me and going through my stuff, going through Trevor's stuff, trying to find something. [It] left Trevor and I walking on eggshells or kind of walking on or being on pins and needles because you never knew from one moment to the next where she would be in her emotional state. (TW, Vol. 3, Tr. 49; see also, "aggressive, almost hostile", Tr. 53; "angry", "Manic", Tr. 62; "one moment...all is good and well, the next moment, she's angry and upset)

The Affidavit and Thomas' trial testimony were also corroborated by Dr. Miller and Dr. Gasparrini, *both of whom recommended psychotherapy for Kim*. Neither disputed Thomas' observations. In fact, Gasparrini's findings better explained her abusive conduct:

Mrs. Watts is **experiencing some symptoms of emotional distress**, which could be described as Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, including anxiety, depression, and irritable, *acting out behavior*. She has a problem with **anger and hostility**. She has **aggressive and antisocial personality** traits, as well as passive-aggressive tendencies. She shows histrionic personality traits and **very significant paranoid tendencies**. She has been quite angry with her husband and she tends to project blame onto him for all problems that occur in her life.

....She may not have a full personality disorder, but **she certainly has paranoid traits that contribute to conflict in her marriage**, as well as some antisocial and histrionic traits. Her paranoid traits cause her to mistrust her husband and fears that he will resume drug abuse. He has been abstinent from drugs abuse [sic] for a long while. **She probably should participate in psychotherapy**.

(Ex 11, Gasparrini, Kim Watts, p. 8, RE 182)(Emphasis added)

Gasparrini's findings were also consistent with Kim's attempts to manipulate Trevor's view of his father. According to Dr. Miller, manipulative behavior is a trait of both an antisocial and a histrionic personality. Antisocial personality traits include *poor behavioral controls*, including expressions of irritability, annoyance, impatience, threats, aggression, and *verbal abuse* and include *inadequate control of anger and temper, a tendency to violate the boundaries and rights of other people and disregard for the safety of self or others*. (Miller Vol. 5 Tr. 372-73)

At the time the TRO was issued, the important issues were *Kim's abusive conduct and its effect on Trevor*. The facts are what motivated the Chancellor to issue the TRO, not Thomas' guess as to cause. It was immaterial whether Kim's conduct was caused by the death of her father, depression, adjustment disorder, anger and hostility, aggressive and antisocial personality traits, paranoid tendencies or other emotional issues. Protecting Trevor from further harmful conduct was the paramount concern of a very temporary emergency order.

C. Kim concedes that she attempted to manipulate the doctors by falsely accusing Thomas of murdering his grandmother

Kim has conceded that she attempted to manipulate the doctors by falsely accusing Thomas of murdering his grandmother. This failed and abandoned attempt to manipulate the court-appointed doctors, and thereby the Court, is as outrageous as the “he set me up” defense for her abusive attempts to manipulate Trevor. Under what sense of justice could it be in the best interest of a boy that he be forced to live with someone so manipulative of his love for his father?

D. The Chancellor’s Bias

On this record, the Chancellor’s bias is revealed by the “quantum leaps” he makes from no evidence at all to reach reckless findings. It is not based on his treatment of the parties and attorneys in the courtroom. For this reason, when the Chancellor suddenly announced during the testimony of the last witness that he had a relationship with Kim’s brother, including his service as the Chancellor’s part-time bailiff, Thomas’ attorney had no reason to believe that the Chancellor was biased. However, Thomas’ attorney did correct the Chancellor’s statement that he had advised counsel before trial of this fact and all agreed that it was not a problem. Neither the Chancellor, nor Kim’s counsel disputed that statement.

While Thomas carries no burden to prove on appeal *why* the Chancellor made such reckless findings, this relationship and the Chancellor’s erroneous belief that Thomas had misled him in his Affidavit may explain the results. The Chancellor may very well have been unaware of any bias. Obviously, the Chancellor was moved by something other than the facts.

E. The Chancellor’s finding, after reviewing the transcript, that *neither* doctor found that Kim’s conduct was “abusive” reveals bias leading to an abuse of discretion

In his Order on the Rule 59 Motion, the Chancellor found that neither Dr. Miller nor Gasparrini characterized Kim’s conduct as “*abusive*”. (Order 3-11-10, RE 132) Kim’s response is that the Chancellor was referring only to the reports, not the testimony. However, the

Chancellor in his Order states: “The Court had reviewed and has again reviewed their reports and Dr. Miller's testimony.” (Order, CP 219; RE 133) Once again, the Chancellor findings cannot be reconciled with fact.

F. Albright factors

Thomas has adequately addressed the *Albright* factors in his main Brief. One point deserves mention here.

Kim suggests that the two teachers that testified, Ms. Carter, Trevor’s fifth grade teacher, and Ms. Attipoe, Trevor’s first and second grade teacher and coach for the Robotics team, were of the view that Thomas and Kim were roughly equal as parents in terms of school and extra-curricular activities. This is not at all what their testimony reflects. According to Ms. Attipoe, both parents would come for special events, but Thomas was there day-to-day running one of the class learning centers. Thomas built a reading loft for the class reading center and a big storage center for supplies. Thomas would “quite often” come to school and assist Trevor in his advanced reading program. Attipoe, Vol. 1, Tr. 194-96.

While neither said bad things about Kim, both teachers described Thomas in exceptional terms. (“Absolutely excellent.”; “One of the excellent parents that I have ever had in teaching” Carter, Vol. 3 p.14; “How many parents provide the type of support that Mr. Watts does?” “He is the only one.” Attipoe, Vol. 4 pp. 196-198).

Issue 2: Joint physical and legal custody is not appropriate for a 12-year-old son, where the father serves in a significant supporting relationship with the son in school and extra-curricular activities, which the mother cannot provide; and where the mother has engaged in a pattern of abuse for the stated purpose of making the son feel *shameful* about his father; refuses to speak or confer with the father, cannot hide her negative views of the father and has refused to act civilly toward the father in the presence of their son.

Kim's fails to address this specific issue. She does not discuss the evidence or the law relevant to this issue. Her failure to do so is tantamount to a confession of error. *Turner v. State*, 383 So. 2d 489, 491 (Miss. 1980). Thomas' position is amply stated in his Appellant's Brief.

Issue 3: Where, following a 12-year marriage, the Chancellor granted wife's request for ½ of all marital assets, including husband's retirement pension and wife testified to her need for temporary alimony of \$500.00 for twelve (12) months, the Chancellor's award of permanent alimony of \$1000.00 a month was an abuse of discretion. The Chancellor's finding of fault in awarding alimony was an abuse of discretion.

Kim perhaps made a "Freudian slip" when she labels the alimony as "rehabilitative alimony", which is what she requested, only to re-label it "periodic alimony", which is what she got. The Chancellor again reveals bias by awarding Kim much more than she requested.

Kim requested and was awarded one-half of all marital property, including one-half of Thomas' retirement pension; one-half of the equity in the house; one-half of furniture as per a list she provided; and the better of the two automobiles. In addition, Kim testified that she needed \$500.00 per month for 12 months following the divorce. The Chancellor gratuitously awarded her \$1000.00 per month for life.

In assessing alimony, the Chancellor assessed *fault* leading to the divorce on Thomas, based on his single, brief relapse in November 2006 and his "manipulation of Trevor". (Bench Ruling, Vol. 7 Tr. 725; RE 101) Thomas has addressed the alleged manipulation. On this erroneous ruling alone, the alimony award must be reversed. The Chancellor also considered that Thomas manipulated him in his Affidavit (Bench Ruling, Vol. 7 TR. 725; RE 101), which is not a proper basis for finding fault in the demise of a marriage, logically or legally. Moreover, as Thomas has demonstrated the finding that he misled the Chancellor is contrary to uncontroverted material facts.

Thomas' medical condition is not *fault* that led to the demise of this marriage. Neither of the doctors found that Thomas' 2006 drug episode, when he took three doses of prescription medication in a two week period, the only episode in the 12-year marriage, was the cause of the marital dissolution. Dr. Gasparrini attributed the cause to her paranoid traits. "*Her paranoid traits cause her to mistrust her husband and fears that he will resume drug abuse. He has been abstinent from drugs abuse for a long while. She probably should participate in psychotherapy.*" (Ex 11, Gasparrini, Kim Watts, p. 8, RE 182) Dr. Miller concurred that this incident was not the cause of the conflict. (Ex 12, Miller, Kim Watts, p. 4, RE 169) Dr. Miller opined that the source of Kim's problems and the marital discord was the death of her father in October 2007, just before she stated she wanted a divorce. (Ex 12, Miller, K. Watts, p. 4, RE 214; See also, Miller, Vol. 5 Tr. 350)

Clearly, it was Kim's *misconduct* over a nine-month period that led to the divorce. Thomas did not want a divorce, testifying at trial that he still loved her and expressing at every chance that if she would only get some help, the marriage would survive.³⁷ Thomas was forced to file suit to protect his son from her emotional abuse and even then, he wanted most for her to get help. (Ex 5, 10, Para. 3, RE 107)

The Chancellor should have denied alimony based on Kim's clear fault in causing the divorce. *Retzer v. Retzer*, 578 So. 2d 580, 592 (Miss. 1990). The award of alimony should be reversed and rendered, denying any alimony. Alternatively, the Court should award her no more than she testified she needed: \$500 for 12 months.

Issue 4: The Chancellor's ruling that Thomas misled the Chancellor in his Affidavit submitted with his *ex parte* request for a TRO and awarding attorney fees to Kim for defense of the Affidavit and TRO was erroneous in that it was an error of law

³⁷ "Her husband stated that he would be willing to participate in marriage counseling to try to save the marriage." (Ex 11, Gasparrini, Kim Watts, p. 8, RE 137)

to consider the issue at trial on the merits and the ruling was not supported by substantial evidence, was manifestly wrong and a clear abuse of discretion.

The injunctive relief, initiated to protect the child from an out-of-control mother in need of psychotherapy, was ancillary to the divorce and custody case. The Chancellor had no authority to award attorneys fees based on the Affidavit and TRO. *Rice Researchers, Inc. v. Hiter*, 512 So. 2d 1259, 1270 -1271 (Miss. 1987); citing *Kendrick v. Robertson*, 145 Miss. 585, 598, 111 So. 99, 102 (1927) (attorneys fees on dissolution of an injunction are not allowable when the dissolution was upon final hearing on the merits).

Kim's failure to address this issue is a confession of error requiring this Court to reverse and render.

Kim engages in a little old-fashion "hide dragging", as if the Court were comprised of "puppies" that could be thrown from the trail by a false scent. Several times in her brief, Kim stresses that the Complaint requested a permanent injunction. Kim highlights this point, but never says why it is relevant, nor does she provide any law that suggests relevancy. She is simply hoping that an appellant judge might think it is significant and be misled. The Voluntary Consent contains no issue regarding permanent injunctive relief. A prayer for permanent injunctive relief is usually included in an initial pleading, even if just for non-harassment purposes, should it be required.

Kim also conflates the Affidavit with the Complaint to make it appear as though Thomas' Affidavit states something more than it actually states and/or that he obtained a TRO prohibiting even supervised visitation. By failing to distinguish between the two, Kim's argument is extremely misleading.

Thomas filed a Complaint that alleged every possible ground for relief that the facts could reasonably justify, including no visitation until Kim could be evaluated. However, by the time that Thomas' attorney presented the request for an emergency order to the Chancellor,

Kim's agreed supervised visitation had gone well, with the exception that she violated that agreement on July 9, 2009. Still, with court ordered supervision addressing that problem, Thomas' attorney presented an Order that only called for supervised visitation, not the more severe restriction alleged in the Complaint.

The Court must look at the Affidavit and *the Order presented* and entered in judging this issue, not an abandoned pleading. Thomas and his attorney properly responded to changing facts and tailored the actual TRO presented for entry accordingly.

Finally, the Temporary Restraining Order, which was never served, set a hearing on July 22, 2008, to consider its continued effect and any other Temporary Relief. Kim's Complaint for Temporary Relief was set the same day by agreement. At that hearing, Kim did not challenge the accuracy of the allegations in the Affidavit or the appropriateness of the issuance of the TRO. She agreed to a new Temporary Order that contained the same supervised visitation provision. The total attorney fees though that date were 6 hours, none of which was devoted to the unserved TRO. Until trial on the merits, Kim never challenged the appropriateness of the emergency order. Nor did she defend the consequences of the Affidavit, whatever that means. She only defended the consequences of her abusive conduct toward her 11-year old son.

Issue 5: Thomas maintained a Journal, on the instructions of his attorney, which Kim introduced in evidence. The Journal was uncontroverted in material facts. The Chancellor's ruling that the Journal was not trustworthy was a clear abuse of discretion.

Thomas has adequately addressed the Journal in his main Brief. He would only note the disingenuous of Kim's complaint that he did not tape the incidents of her abusive conduct. (Appellee's Brief, p. 29). In one of Kim's sessions with Dr. Miller, he notes Kim's *fear* that Thomas may have tape-recorded her abusive outrages and the judge may get to hear it. (Miller Office Notes, 1-9-09, RE 220)

Issue 6: The Chancellor applied the wrong standard to Thomas' post judgment motions under Miss.R.Civ.P. 59(a), abused his discretion in denying the motion under Miss.R.Civ.P. 59(e), and failed to rule on the Motion for Modification, or alternatively, abused his discretion in failing to grant the Motion for Modification. Alternatively, the Court failed to make appropriate findings of fact and conclusions of law, as required when Thomas requested such pursuant to Miss. R. Civ. P. 52(a).

While his ruling is less than clear, the Chancellor considered the testimony at this hearing under Thomas' amended Miss.R.Civ.P. 59 motion, which the Order identifies before discussing the evidence. The Chancellor never discusses a Rule 60 motion.

Under 59, Trevor's testimony establishes his mother's continued abusive attempts to alienate him against his father after the divorce hearing. Combined with Dr. Miller's testimony to the effect that if Kim did this one more time she would be disqualified from having custody, this additional abusive conduct adds weight to an argument that needs no help. The evidence also met the standard for modification of custody based on Miller's testimony of the effect that such abusive conduct would have on Trevor.

III. Conclusion

Overturning a Chancellor's factual findings *should be difficult*. If there were competing facts comprising substantial evidence on the points raised, Thomas could not rightly request that the Court overturn the Chancellor. In this case, however, the record is void of support of the Chancellor's findings. Moreover, the evidence compels the opposite conclusions. Thomas respectfully requests that the Court reverse and render on the custody issue. Likewise, in addition to the erroneous findings of fact, as a matter of law, the Chancellor had no authority to consider the wrongful procurement of a TRO that was never served or challenged until the trial on the merits and was ancillary to the divorce and custody proceedings. The Court should reverse and render the award of attorney fees and alimony.


Respectfully submitted, this 4th day of May 2011.

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CERTIFICATE OF SERVICE

I, Robyn Blackwell, certify that on May 4, 2011, I served an original and four copies of the **Appellant's Reply Brief**, including CD ROM, by United States mail with postage prepaid to:

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This 4th day of May 2011.


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