IN THE SUPREME COURT OF MISSISSIPPI
SOUTHERN DISTRICT

JESSICA (MCLEOD) MENARD — APPELLANT

VERSUS — CAUSE NO: 2005-1064-JB

ANTHONY SCOTT MCLEOD — APPELLEE

APPEAL FROM CHANCERY COURT

BRIEF FOR THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND SERVICE OF APPEAL

I, ELLIOT G. MESTAYER, as counsel for the Appellant, do certify that the only known interested persons to this action are the parties and Appellant also certifies that he has mailed a true and correct copy of the foregoing Brief and Record Excerpts to: Mark Knighten at his usual mailing address of P.O. Box 10, Pascagoula, MS 39568 and Chancellor Jaye Bradley P.O. Box 998, Pascagoula, Ms 39568-0998.

On the 22 day of September, 2010.

Elliot Mestayer

MAILING CERTIFICATE

I, ELLIOT G. MESTAYER, do certify that I have mailed and deposited on this day by U.S. mail, first class, postage prepaid Brief for the Appellant (4) and Appellant's Record Excerpts (4) this the 22 day of September, 2010 unto the Mississippi Supreme Court at P.O. Box 117, Jackson, MS 39205.

Elliot G. Mestayer

STATEMENT OF THE ISSUES

1. Whether the Chancellor committed manifest error in determining there was ambiguity in the Child Custody, Child Support and Property Settlement Agreement concerning educational expenses.
2. Whether the Chancellor committed manifest error by applying erroneous legal standard to educational expenses portion of the Child Custody, Child Support and Property Settlement Agreement.
3. Whether the Chancellor committed manifest error in not awarding tuition payment as an extraordinary expense under Section 43-19-103 of the Mississippi Code.
4. Whether the Chancellor committed manifest error in failing to hold the Appellee in Contempt of Court for non-payment of past due medical expenses.
5. Whether the Chancellor committed manifest error when denying an increase in child support despite clear documentation and testimony concerning the Appellee's income.
6. Whether the Chancellor committed manifest error by not granting the relief requested by the Appellant in her Amended Motion under Rule 60(b).

STATEMENT OF THE CASE

The Parties were divorced by the Jackson County Chancery Court on July 8, 2005 on the grounds of Irreconcilable Differences. The Child Custody, Child Support and Property Settlement Agreement provides, in relevant parts, the following:

> "JESSICA MICHELLE MCLEOD shall have sole paramount legal and physical care, custody and control of the minor child of the parties..." (Page 5 of the Judgment of Divorce – Exhibit 1)

> "Husband shall pay to the Wife as child support the sum of Three hundred fifty and no/100's ($350.00) per month,... Every year, Husband shall provide a copy of his federal and state tax returns to Wife no later than ten (10) days after filing same." (Page 6 of the Judgment of Divorce)

> "...Husband and Wife shall each be responsible for one-half (1/2) of all medical, dental, ocular and pharmaceutical expenses of the minor child of the parties not covered by insurance. All such uncovered bills received by the Wife shall be submitted to the Husband for payment within thirty (30) days, and Husband shall reimburse the Wife for any such bills within (30) days after the receipt of the bills" (Page 7 of the Judgment of Divorce)

> "Husband and Wife shall each be responsible for one-half (1/2) of all school and extracurricular expenses incurred by the minor child including but not limited to the cost of books, activity fees, lab fees, school uniforms, tuition, and sports equipment." (Page 7 of the Judgment of Divorce)

Since the Divorce, the Appellant filed two Motions for Contempt and Modification. On February 13, 2009, Chancellor Bradley found the Appellee in Contempt for failure to pay child support but denied the Appellant's request for additional child support. The child support has not been increased or modified in any way since the date of the Final Decree of Divorce.

The Appellant filed a Motion for Contempt and Modification on October 15, 2009 and M.R.C.P. Rule 60(b) Motion was filed on November 12, 2009. No Answer was

received to the Motion for Contempt or Amended Motion for Contempt under Rule 60(b).

Appellant requested that the Court find the Appellee in Contempt for harassing the minor child's medical providers, failure to provide complete tax returns, and failure to pay his portion of the minor child's medical expenses, educational expenses and extracurricular activities as provided in the Child Custody, Child Support and Property Settlement Agreement and Judgment of Divorce granted on July 8, 2005. Appellant also requested the Court set aside its Order of February 13, 2009 to the extent that it denied an increase in child support based upon newly discovered information reflecting the Appellee had approximately 50% higher income than was disclosed during the first Contempt trial (Amended Motion under Rule 60(b)). Appellant also requested an increase in child support due to increased costs in raising the child.

This case was originally set on November 19, 2009 but was continued to January 11, 2010 at 9:00 a.m. at the request of the Appellee. Neither the Appellee nor his counsel appeared at 9:00 a.m. The Court called the Appellee's counsel to no avail. So the Chancellor began taking testimony of the Appellant at 9:20 a.m. The Appellee and his counsel showed up around 9:30 a.m. This case was not finished on January 11, 2010 and had to be continued until April 23, 2010.

Jessica McLeod Menard, Appellant, Anthony Scott McLeod, Appellee, Cammie Harrison, Appellant's mother, Ann (Lisa) Garrison, Appellant's friend, and Caterra Payton, principal of Central Elementary, testified at trial.

On May 19, 2010, Chancellor Bradley entered her Findings of Fact and Conclusions of Law and a Final Judgment. The Chancellor refused to hold the Appellee

in Contempt "for failure to produce tax records, harassment, pay past due medical expenses, or pay educational expenses", failed to order him to pay past due medical expenses, failed to order him to pay the educational costs of the minor, failed to increase past child support under Rule 60(b) and denied the Appellant's request for an increase in child support. The Chancellor decreed that the Property Settlement Agreement was ambiguous and decided that the term "tuition" as used therein only refers to college tuition.

SUMMARY OF THE ARGUMENT

The Chancellor erred in not finding the Defendant in willful contempt of the Judgment of Divorce failure to pay one-half of the minor's school expenses. The Chancellor's finding that the term "tuition" is ambiguous is unjustified after reading the plain language of the Agreement. The documents admitted into evidence, without objection, clearly established beyond any reasonable doubt that the Appellee had the clear and unambiguous obligation to pay for one-half of the minor's tuition and the ability to pay said tuition. The Appellee had in fact refused, in writing, to comply with this part of the Final Decree of Divorce. Since the language of the Property Settlement Agreement was clear, the Chancellor was without authority to re-write the agreement.

If Chancellor was correct in finding an ambiguity in the Property Settlement Agreement, the Court was bound to apply the Four Corners Doctrine. Instead of using the language of the divorce agreement to glean the intent of the parties, the Chancellor employed a subjective standard. The Court was obligated to enforce the Child Custody, Child Support and Property Settlement Agreement as written.

The Chancellor also changed the Appellee's obligation to pay his half of the educational expenses of said minor until the minor attended college citing *Southerland v. Southerland* 816 So2d 1004 (Miss 2002) and *Moses v. Moses* 879 So.2d 1043 (Miss. Ct. App. 2004). The Appellant herein requests that the Court apply *East v. East,* 493 So 2d 927, 931-932 (Miss 1986) and *Bell v. Bell,* 572 So.2d 841, 844 (Miss. 1990) to the Child Custody, Child Support and Property Settlement Agreement.

The Chancellor ruled the Appellee did not have to pay his half of past due medical expenses and further modified the Final Decree of Divorce by restricting the

Appellant's ability to submit medical bills and restricting the minor's medical providers. The Appellee did not file any Motions to Modify the Judgment of Divorce, never raised any ore tenus Motions for Modification, and came to the Court with "unclean hands." Had the Appellee filed a Motion to Modify, it would have been denied as a matter of law.

The Chancellor refused to increase child support in accordance with Section 43-19-10. A wealth of proof was provided at trial demonstrating that the minor's educational needs constitute an extraordinary expense. The Chancellor also misapplied the child support guidelines resulting in incorrect adjusted gross income. The child support guidelines provided by the Mississippi Code of 1972, as amended, justified an increase in child support.

Chancellor Bradley denied the Appellant's Rule 60(b) Motion despite unequivocally and unchallenged documentation that the Appellee was making substantially more money income than Appellee disclosed at a prior hearing. The incorrect and incomplete 8.05 Declaration the Appellee submitted at the prior trial was, at best, prepared with a careless indifference to the accuracy of the income information contained therein. The Appellant provided the Chancellor documentation form the Appellee's employer showing that Appellee's income was approximately 50% higher than what the Appellee disclosed on the financial declaration.

ARGUMENT

WAS THERE AN AMBIGUITY IN THE PROPERTY SETTLEMENT AGREEMENT CONCERNING EDUCATIONAL EXPENSES

The Judgment of Divorce on July 8, 2005 specifically provided on Pages 5 and 7 respectively the following:

> "JESSICA MICHELLE MCLEOD shall have sole paramount *legal and physical* care, custody and control of the minor child of the parties..." (emphasis added)
>
> Section 93-5-24(5) (d) of the Mississippi Code of 1972, as amended says "...legal custody means the decision-making rights, the responsibilities and the authority relating to the health, *education* and welfare of a child." (emphasis added)
>
> "Husband and Wife shall each be responsible for one-half (1/2) of all school and extracurricular expenses incurred by the minor child including but not limited to the cost of books, activity fees, lab fees, school uniforms, *tuition*, and sports equipment..." (emphasis added)

The Appellant had placed the minor child in private school at total annual cost of $4,545.00 and asked the Chancellor to simply enforce these terms. The Appellee never filed any Motions or other requests for relief from any part of the Divorce Decree. The Chancellor declined stating that the clause was ambiguous and cited *Moses,* supra and *Southerland,* supra. Ultimately the Chancellor found that the"...'tuition' as it applies to the Property Settlement Agreement is intended to mean college tuition for the minor child as the parties never contemplated sending the child to private school". (Page 5 of Judgment)

In *Bell vs. Bell*, supra, this Court ruled that "when parties in a divorce proceeding have reached an agreement that a Chancery Court has approved, it will be enforced, absent fraud or overreaching, and will take a dim view of efforts to modify it just as we

ordinarily do when persons seek relief from improvident contracts." We respectfully ask that this Court to remind the Chancellor that she does not have the authority to remove the Appellee from the benefit of bad bargain. Further, the Chancellor committed manifest error by modifying the terms of the Child Custody, Child Support and Property Settlement Agreement when the Appellant was seeking enforcement of said Agreement and especially when the Appellee never asked for a modification. The Appellee never filed any pleadings whatsoever in this case.

This Court has in the past enforced property settlement agreements which require the payment of pre-secondary education. In *Durr v. Durr* 912 So2d 1033 (Miss. Ct. App. 2005), the Parties were already divorced and said Final Decree of Divorce provided that pre-secondary tuition would be paid by the parents. The Court of Appeals had absolutely no problem with enforcing this provision.

Appellant takes exception to the Chancellor's conclusion that the term "tuition" is ambiguous. Webster's dictionary defines the term ambiguous as meaning "susceptible of multiple interpretations". However when we look at the precise language of the Child Custody, Child Support and Property Settlement Agreement, there truly is no ambiguity. Webster's dictionary defines tuition as the "price of or payment for instruction". Therefore tuition can include college tuition, the cost of trade school, junior college tuition, or pre-secondary education. Simply because the term "tuition" is general does not mean it is ambiguous.

The term tuition was not used in a vacuum but was rather just one example of the different types of school expenses both parents would have to pay:

> "Husband and Wife shall each be responsible for one-half (1/2) of all school and extracurricular expenses incurred by the minor child including but not

limited to the cost of books, activity fees, lab fees, school uniforms, *tuition*, and sports equipment..." (emphasis added)

The Child Custody, Child Support and Property Settlement Agreement says "all school ... expenses." There is nothing ambiguous about the terms "all", "school", or "expenses". The phrase "all school expenses" means exactly what it says it means – all school expense. From the language of the PSA, it is clear the Parties chose not to put limitations on the phrase "all school expenses". Instead the parties chose broad terms and even supplied examples of some but not all of the types of school expenses the parties would have to share. For example school uniforms, activity fees, sports equipment and activity fees were all listed as examples of school expenses.

Therefore even if the Chancellor is correct that term "tuition" only means college expenses, her ruling is still erroneous because the Chancellor failed to honor the phrase "all school ...expenses". The term tuition was only an example of the critical phrase "all school ...expenses". So when the Chancellor declined to order the Appellee to pay the private school expenses, she not only modified the term tuition but also the phrase "all school...expenses" without a sound legal basis.

The Parties to a contract are perfectly within their right to use general or specific terms. Since the contract is clear and unambiguous, the Court is obligated to enforce the terms. *Ivision v. Ivision* 762 So2d 329, 335 (Miss 2000). The Chancellor should have found the Appellant in Contempt of Court for non-payment of his one-half (1/2) of the minor's tuition totaling $2,272.50.

IF THE PSA IS AMBIGUOUS, THEN THE COURT APPLIED ERRONEOUS LEGAL PRINCIPALS

If the PSA is ambiguous, for the sake of argument, then the Chancellor still applied the wrong legal standard in interpreting the PSA. The Chancellor decided that the Parties ... "never contemplated sending the child to private school". This Court has repeatedly stated that when a contract is in fact ambiguous, the Court looks to the language of the contract for meaning, not the "intent" of the parties. (*Ivision* and *Landry v Moody Grisham Agency* 181 So2d 134, 139 (1965)). The Court looks to the four corners of the document to determine the intent of the parties.

The Chancellor was supposed to focus on the language employed in the contract and not what the parties may have meant or intended. *Shaw v. Burchfield* 481 So2d 247, 252 (Miss. 1985) Instead the Chancellor, over the objection of the Appellant, looked to what the Appellee thought the phrase meant. The Chancellor also found relevant what was going on with the minor and what was going on between the parties and where the minor was attending school when the agreement was signed. (Transcript Page 133 Lines 16-26). The Chancellor wrote that the phrase "...'tuition' as it applies to the Property Settlement Agreement is intended to mean college tuition for the minor child as the parties never contemplated sending the child to private school". (Page 5 of Judgment)

> Mississippi has long established rules for the interpretation of contracts. The plain meaning of the contract controls. Webster's Dictionary defines tuition as "the price of or payment for instruction." It is difficult to imagine that the term tuition needs clarification.

"In construing a written instrument, the task of the courts is to ascertain the intent of the parties from the four corners of the instrument. Courts look at the

instrument under consideration as a whole and determine what the parties intended by giving a fair consideration to the entire instrument and all words used in it. When a written instrument is clear, definite, explicit, harmonious in all its provisions, and is free from ambiguity, a court in construing it will look solely to the language used in the instrument itself. In such a case a court will give effect to all parts of the instrument as written." *Pfisterer v. Noble*, 320 So. 2d 383, 384 (Miss. 1975).

> "We have also historically recognized that parties may upon the dissolution of their marriage have a property settlement agreement incorporated in the divorce decree, and such property settlement agreement is not subject to modification. *A true and genuine property settlement agreement is no different from any other contract,* and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character..." (emphasis added) *East v. East,* 493 So. 2d 927, 931-32 (Miss. 1986)

In *East v. East,* supra, the Supreme Court clearly acknowledges that a property settlement agreement is a contract. The language of this Child Custody, Child Support and Property Settlement Agreement was clear and concise. The Child Custody, Child Support and Property Settlement Agreement specifically lays out each and every responsibility of each Party and was signed of each Parties own free will. Five (5) years have lapsed between the execution of the document and the time where the Appellee requested an interpretation. The Appellee had been paying the minors other school expenses without question. (See Exhibit 5) Since the term "tuition" is not qualified or limited to any specific type, the learned Chancellor exceeded the scope of authority when she interpreted the meaning of tuition when the Parties entered into the Child Custody, Child Support and Property Settlement Agreement they chose not to limit tuition to specifically college.

For the sake of argument, if the term tuition is unclear or needs to be interpreted, we must first look to the language surrounding the phrase tuition i.e. place term in context.

> "Husband and Wife shall each be responsible for one-half (1/2) of all school and extracurricular expenses incurred by the minor child including but not limited to the cost of books, activity fees, lab fees, school uniforms, tuition, and sports equipment." (Page 7 Paragraph C of the Judgment of Divorce)

The Agreement specifically says *all* school expenses. Therefore this can only mean all school expenses. The phrase tuition was meant to demonstrate examples of the types of school expenses for which each party was to be responsible. So the question becomes how does the phrase "all school expenses" be subject to interpretation by the Chancellor? If the Parties intended for the school expenses be limited to college only there would have been no mention of school uniforms. The Child Support, Child Custody and Property Settlement Agreement specifically mentions the payment of school uniforms and the Appellee admits he knows of no college or university that requires uniforms (Transcript Page 179 Lines 27-29).

If the term "tuition" is ambiguous as the Appellee claimed at trial, why did he not file pleadings requesting an interpretation or requesting relief from his obligation to pay tuition prior to being sued for contempt? (Transcript Page 180 Lines 17-20).

The question of ambiguity is a fiction created by the Appellee's counsel since the Appellee never questioned the meaning of tuition prior to trial or in his written correspondence to the Appellant (Exhibit 7) (Transcript Page 181 Lines 10-28).

On cross-examination, the Appellee admits that his real or biggest objection to paying the tuition was due to cost and his supposed inability to pay (Transcript Page 148 Lines 14, 17, 20 and Pages 149 Lines 1, 3, 6, 8, 10).

The Chancellor's finding the term tuition is subject to interpretation is clearly erroneous when said term has a clear and plain meaning. The Chancellor committed manifest error when she failed to apply the "Four Corners Doctrine" and *East v. East* to the Child Custody, Child Support and Property Settlement Agreement.

DID THE CHANCELLOR COMMIT MANIFEST ERROR IN REFUSING TO INCREASE CHILD SUPPRT UNDER 43-19-103

In addition to her Motion for Contempt, the Appellant had requested an increase in support. Section 43-19-103 of the Mississippi Code states in part that "the rebuttable presumption as the justice or appropriateness of an award...based upon the guidelines established in Section 43-19-101, may be overcome by a judicial or administrative body awarding or modifying the child support award by making a written finding or a specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case as determined according to the following criteria:

(a) Extraordinary medical, psychological, educational or dental expenses...

In denying the Appellant's request for tuition, the Chancellor cited *Southerland v. Southerland,* 816 So.2d 1004 (Miss. 2002) and *Moses v. Moses*, 879 So.2d 1043 (Miss. Ct. App. 2004). In both cases, private school tuition was ordered by the Chancellor in the divorce decree because the Parties had discussed putting the child through private school prior to separation or around the time of divorce. In both cases there was no evidence presented or offered showing that the cost of private tuition could meet the requirements of an extraordinary expense under Section 43-19-103.

The Findings of Fact, Conclusions of Law and Judgment of the Court was entered on May 19, 2010, and Chancellor Bradley cited *Moses v. Moses*, 879 So.2d 1043 (Miss. Ct. App. 2004) and *Southerland v. Southerland,* 816 So.2d 1004 (Miss. 2002) stating that the cost of secondary school tuition is included in the statutory amount of child support and is "not an extraordinary expense." *Id.* In both *Southerland v. Southerland* and *Moses v. Moses*, the Parties were appealing the divorce ruling rendered by the lower court and there was no property settlement agreement between the Parties.

In both *Moses*, supra and *Southerland*, supra, the Court found that a mere agreement of the Parties to pay tuition was not sufficient and therefore did not constitute and extraordinary expenses "While a father's agreement prior to divorce to send a child to private school may be one legitimate factor to be considered, it is by itself an inadequate basis for an award of support in excess of that allowed by the statutory guidelines" *Southerland* supra at 1007. The record in both cases does not reflect any effort to prove any special needs or circumstances of the minor. The Appellant agrees that an informal agreement to put a child through private school is not sufficient. The Appellant also agrees with the proposition that the cost of private school tuition is ordinarily included in child support.

However the Appellant showed at trial that the facts of this case are anything but ordinary.

Quite the opposite of the facts of *Moses* and *Southerland*, the Appellant, the Appellant's mother, Ann (Lisa) Garrison, and elementary school principal Caterra Payton all testified as to the severe problems the minor child was having at Central Elementary.

Their testimony established that the minor child was attending public school at Central Elementary School during the 4th grade and a portion of the 5th grade until she was moved to Resurrection Catholic School on or about September 9, 2009. The minor was harassed and bullied by many students and even one teacher. The minor, the minor's grandmother Cammie Harrison, Ann (Lisa) Garrison and the Appellant brought the threats and other bullying to the attention of the Principal, Caterra Payton. Before these problems arose the minor enjoyed school, was in the gifted program, and got almost all A's and maybe one B.

As a result of the bullying, the minor's grades dropped from all A's and B's to A's, B's and C's.

The overwhelming testimony established that the minor cried before school and begged her mother and grandmother not to make her go to school at Central Elementary anymore. Ann (Lisa) Garrison testified as follows:

> "Q. Okay. Good. Do you have any personal knowledge of Ms. Menard Attempting to speak to the principal at Central Elementary?"
> "A. I do."
> "Q. How many times or how many occasions have you heard or seen Ms. Menard try to talk to the principal?"
> "A. Jessica and I had several conversations and I saw her at the school on Several occasions trying to address the bullying going on within the classroom. Her daughter and my daughter, they go to the Ideas Program. And for some reason the two of them were being picked on constantly in the classroom and there was nothing being done about it. It was being brought to the teacher. It was being brought to the principal, and it was being brought up on several occasions, and there was absolutely nothing being done. And it remains the same to this day when Anna was pulled out of the school, it seemed to double up on my child, because she was the only one that remained in the classroom that was still in the Ideas Program, which is for gifted students." (Transcript page 21 lines 20-29 and page 22 lines 1-10)

> "Q. Can you tell us what Anna had to say, what she said was harassment? What Were the children doing that Anna felt was harassment?"
> "A. The children in this classroom, some of the girls in the classroom they gang

up on Anna and my daughter because they are in the gifted program. There is a lot of name-calling, there is a lot of threatening, there's a lot of: I am going to get you on the playground type stuff." (Transcript page 26 lines 5-13)

"Q. And how many times do you have personal knowledge that Mrs. Menard Went down to meet with the principal this year?"
"A. Probably about four or five" (Transcript page 27 lines 11-14)

This clearly demonstrates that the principal was aware of the problem and that the problem was not being corrected. Anna was not the only victim of the bullying and the principals "efforts" were meaningless. According to the testimony of Ms. Garrison, Appellant and Cammie Harrison, many complaints were made to the school principal, Caterra Payton during the 2009-2010 school year.

Cammie Harrison, the minor's grandmother, testified that some of the harassment consisted of actually shoving the minor (Transcript page 106 lines 3-4). She also testified that the minor cried before school in the mornings and that she was miserable (Transcript page 106 lines 28 and 29). Further, the minor began acting out at home and was afraid to go to school (Transcript page 106 line 29, page 107 line 1, and page 108 line 6).

The Appellee's witness, Caterra Payton, Principal of Central Elementary, initially testified that she had no knowledge that bullying was taking place and that she had never met with the Appellant (Transcript page 70 lines 25-29 and page 71 line 1). However, later in her testimony, Mrs. Payton indirectly admitted that the minor had, in fact, been bullied on four separate occasions.

"Q. Okay. Can you tell the Court about that and how these allegations surfaced and what you did as a result of them?"
"A. Ms. Menard reported that Anna was being bullied at school. Anna had gone home and told her parents that the students were picking on her. And upon investigating, I learned that the students, a little girl was teasing Anna saying that Anna had a boyfriend. And I did talk to both students, and we resolved the conflict. And in that same week another - - we had tutoring, after-school tutoring. Ms. Menard again reported that Anna was being bullied, this

was a different set of students. The students were pushing in line. And Anna for some reason was outside the line. And the teacher on duty asked Anna to go to the end of the line, and Anna reported that she was pushed out of line. And I, again, spoke with the group of students and that matter was resolved." (Transcript page 71 lines 9-26)
"Q. Okay. And was there ever – Okay. Let's stay focused on that January 2009, did you ever have any meeting with Ms. Menard with respect to those two allegations?"
"A. I did."
"Q. Okay. And tell us how that went and what happened in that meeting."
"A. Ms. Menard again was upset, because she felt that Anna was being bullied and I explained to her what my investigations turned out and she also brought up the fact that someone had called Anna a stupid little white girl, or something to that matter, and upon investigating, because we do take those claims very seriously, I spoke with all students involved and it turned out that Anna had referred to herself as a stupid little white girl with no friends. So that was it as far as that goes that was it. We did talk to the students about that if they were saying, that if the little girl was saying that Anna had a girlfriend, when Anna said she didn't like it, it should have stopped. So the little girl lost a recesses as a result, but that was it, as far as that was concerned." (Transcript page 72 lines 1-22)

In addition to the multiple meetings with the Principal, the Appellant contacted the Superintendant in an attempt to have the minor moved to another school within the same public school district. The Appellant's request was declined. The Appellant also contacted the School Board Attorney, Kelly Sessoms, both individually and through her counsel (Transcript Page 39 Lines 26-29 and Page 40 Lines 1-3). The Appellant also scheduled counseling sessions with Central Elementary's guidance counselor for the minor child. When Anna's emotional state began to decline further, the Appellant began taking the minor to a licensed psychologist, Dr. John Stoudenmire.

After the minor's first and uncharacteristically average, progress report for the 2009-2010 school year (Exhibit 8), the minor was taken out of Central Elementary and placed in private school at Resurrection Catholic School. The Appellant wrote a letter to

the Appellee describing the problems the minor was experiencing at Central Elementary. The Appellee acknowledged receipt of this letter (Transcript page 147 lines 13-24). The Appellee responded to these problems at school as follows:

> "This letter is to inform you that I am in receipt of the 2 letters you sent me on September 8 and September 9 regarding Anna being placed in private school. I am unable to afford this expense, I am barely making ends meet now, and I am not able to afford this." (Exhibit 7)

The first time the Appellee questioned what the phrase tuition meant or ever suggested that it only meant college tuition was at trial (Transcript page 133 line 15).

After having exhausted all available remedies and after getting the Appellee's refusal to help, the Appellant instituted this action and moved the child to Resurrection Catholic School located in Pascagoula, Mississippi.

A letter was written to the Appellee informing him of the child's new school and enclosed was a copy of the tuition rates and fees charged by the school (Exhibits 6 and 11).

The Appellee claimed he could not afford the cost of private school. As evidenced by the Appellee's bank statements (Exhibit 21), payroll information provided from Northrop Grumman (Exhibit 4) and the Appellee's 8.05 Financial Declaration (reflecting a $2905.43 monthly adjusted gross income), there is no doubt that the Appellee could afford his half of the minor's tuition totaling $2,272.50. In fact, the Appellee took approximately 6 out-of-state trips in one (1) year as well as multiple local hotel stays and casino visits. (Transcript pages 174 line 2 through page 177 line 18). Appellee has no other children and lives with his parents (Transcript page 140 lines 9 and 10.)

Further, the Chancellor admonished the Appellant for making a unilateral decision to move the child to private school. Since the Appellant had sole legal custody of the minor child, the Appellee had no voice in whether or not the child was moved to private school. Further, the Appellee's failure to exercise visitation or return the minor's numerous phone calls and letters since June 2008 epitomizes how pointless it would have been for the Appellant to discuss this issue with the Appellee. Because of the lack of communication, it was virtually impossible for the Appellant to make any decision other than a unilateral one.

In the Appellee's letter to the Appellant dated September 12, 2009 (Exhibit 7) wherein he acknowledges receipt of September 8, 2009 correspondence concerning the bullying at Central, the only comment he made was that he could not afford the tuition (Transcript page 38 lines 25-29). The Appellee never inquired about the minor. He never asked how she was doing. He never asked how the minor was being bullied. He never made alternate suggestions. He never contacted the Appellant, minor or the school to find out what was going on. With the voluminous amount of credible testimony and documentation concerning the special circumstances coupled with the Appellee's ability to pay, it is clear that the Court committed manifest error in not awarding ***tuition*** and ***future tuition*** as an extraordinary expense under Section 43-19-103.

DID COURT COMMIT MANIFEST ERROR BY FAILING TO ORDER PAYMENT OF PAST DUE MEDICAL EXPENSES?

The Judgment of Divorce of the Parties on or about July 8, 2010 specifically addresses the issue of the minor's medical expenses as follows:

> "...Husband and Wife shall each be responsible for one-half (1/2) of all medical, dental, ocular and pharmaceutical expenses of the minor child of

> the parties not covered by insurance. All such uncovered bills received by the Wife shall be submitted to the Husband for payment within thirty (30) days, and Husband shall reimburse the Wife for any such bills within (30) days after the receipt of the bills" (Page 7 of the Judgment of Divorce)

The Appellant admitted into evidence the delinquent medical bills of the minor child together with the letters sent to the Appellee upon receipt of said medical bills (Exhibit 5) and (Transcript Page 32 Lines 12-28). The Appellee never offered any evidence to contradict the validity of the bills submitted other than claiming he didn't receive them. Further, the Appellant retained copies of each and every check sent by the Appellee for payments such as medical bills and kept a meticulous spreadsheet of every payment owed and due (Exhibit 5). The Appellant did acknowledge one error in the application of a payment to the proper bill but the mishap did not affect the bottom line.

One of the points of contention was a bill from Singing River Hospital for July 2009 provided by the Appellant to the Appellee in the time frame required by the Child Custody, Child Support and Property Settlement Agreement. The bill was received and paid by the Appellant. The Appellee never paid his portion and on January 8, 2010 requested clarification from Singing River Hospital about the amount owed (Transcript Page 123 Lines 6-29 and Page 124 Lines 1-9) . According to the Child Custody, Child Support and Property Settlement Agreement, the Appellee shall reimburse wife for any such bills within thirty (30) days after receipt of such bill. Additionally, the Appellee receives the Explanations of Benefits from his insurance company. The Child Custody, Child Support and Property Settlement Agreement says that the Appellee is to pay one-half (1/2) of the medical expenses of the minor child and does not condition the obligation on any event or occurrence.

A second point of contention was the minor child's visits to Dr. John Stoudenmire, a licensed psychologist. The minor had been seeing the psychologist for the bullying she was enduring at the public school as well as issues related to her father discontinuing his relationship with her in April 2008. Dr. Stoudenmire is not covered by the insurance provided by the Appellee, however, the relationship between the minor and the doctor started prior to the Appellee providing insurance for the minor child.

The Chancellor determined that the Appellee was not responsible for the bill from Singing River Hospital because the insurance claim was pending. The Appellant's previous insurance provider, Aetna, had denied the claim, and said denial admitted into evidence (Exhibit 13). The Appellant had paid the bill and sent the bill to the Appellee for reimbursement as mandated by the Child Custody, Child Support and Property Settlement Agreement. The Court still did not require the Appellee to pay the past due amount owed to the Appellant.

The Appellee presented copies of untendered checks made out to the Appellant for other medical expenses submitted to him. However, he could not demonstrate that these checks were actually mailed to, received by or cashed by the Appellant (Transcript 126 Lines 9-10). The Chancellor accepted the Appellee's testimony as truthful. The argument that the Appellee had sent these checks and the Appellant was refusing the checks is so outside the realm of reason or plausibility. The Appellant had clearly demonstrated throughout the trial that the Appellee had committed fraud and perjury upon the Court both in this trial and the previous Contempt trial.

In Chancellor Bradley's Findings of Fact, Conclusions of Law and Judgment of the Court, the Court ruled that the Appellee was no longer responsible for the costs

incurred as a result of visits to Dr. Stoudenmire. The Child Custody, Child Support and Property Settlement Agreement between the parties stipulates "Husband and Wife shall each be responsible for one-half (1/2) of all medical, dental, ocular and pharmaceutical expenses of the minor child of the parties not covered by insurance." The language is clear and concise. It does not require that the provider be covered by the insurance of the minor, only that the non-covered expenses be paid. Further, if the father had not abandoned his child almost two (2) years prior to this trial, the child would no longer need counseling since the bullying issue previously mentioned had been resolved. Since the only therapists covered by the Appellee's insurance are in other cities, the Appellant would have to take additional time off work thereby losing pay since the Appellee has not taken the child to see a doctor since October 2007 (Transcript Page 89 Lines 23-25).

The Chancellor modified the way medical bills can be submitted to the Appellee by shortening the amount of time the Appellant had to submit the bills after they received. The Court further granted the Appellee a modification of the decree by allowing him to pay the amounts submitted within thirty (30) days of receiving the Explanation of Benefits from his insurance provider. However, neither the Court nor the Appellant have any way of knowing when the Explanations of Benefits were received by the Appellee in order to determine the true time as to when payments are due to the Appellant. Further, since the Explanation of Benefits are received only by the Defendant and no copies are forwarded to the Plaintiff, the Defendant can pay any amount he wishes and claim that the Explanation of Benefit showed only the amount paid was the amount not covered by insurance. The Appellant is entitled to advanced notice of potential

modifications to the Final Decree of Divorce and said notice was not provided. As a result, the Appellant was denied due process under the law.

The Chancellor committed manifest error when relieving the Appellee of his obligations under the Final Decree of Divorce and further, by modifying the terms of the Final Decree of Divorce when no such modification was requested and notice of potential modification being given.

SHOULD THE CHANCELLOR AWARDED AN INCREASE IN SUPPORT FOR OTHER REASONS

The Appellant also requested an increase in child support based upon an increase in the needs of the minor due to age as well as an increase in the income of the Appellee.

Again reliable evidence was submitted showing that the costs of raising the child had increased since child support was first established on July 2005. However the Chancellor denied the Appellant's request for an increase in child support stating that the Appellee's adjusted gross income on his 8.05 financial statement was $2,404.68 (Exhibit 19 and page 6 of the opinion). This did not include his V.A. benefits. According to the Appellee's financial statement, he gets $598.00 per month in V.A. benefits. The information submitted by the Appellee and his employer demonstrate a monthly adjusted gross income of $2905.43, a $500.00 difference. However, the Appellant introduced into evidence information received from the Appellee's employer by way of a Subpoena duces Tecum (Exhibit 4) reflecting the Appellee's true monthly income. As per the guidelines, 14% of said monthly adjusted gross income is $406.76. Therefore, an increase in child support is warranted from $350.00 to $406.00 per month. The Chancellor indicated that the child support guidelines would be applied and "there was no

reason presented to the Court that would justify deviation from the child support guidelines." (Findings of Fact Page 6 Paragraph 5).

Section 43-19-101(3) (a) of the Mississippi Code of 1972, as amended, provides the following guidelines for calculating child support:

> "Determine gross income from all potential sources that may reasonably be expected to be available to the absent parent including, but not limited to, the following: wages and salary income; income from self employment; income from commissions; income from investments, including dividends, interest income and income on any trust account or property; workers' compensation, *disability*, unemployment, annuity and retirement benefits, including an individual retirement account (IRA);...." (emphasis added)

Therefore the Appellee's V.A. income is included in calculating adjusted gross income and obviously the Chancellor failed to include the Appellee's VA income. The Chancellor committed manifest error by denying the Appellant an increase in child support when the documentation provided by the Appellee and his employer clearly warrant an increase.

DID COURT COMMIT MANIFEST ERROR BY FAILING TO GRANT RELIEF UNDER RULE 60(b)

The Appellant filed a Rule 60(b) Motion to Set Aside titled Amended Motion, to address the denial of an increase in support in the Court's Order of Contempt entered in February 2009. While gathering information for the current contempt trial, information was discovered that demonstrated the Appellee's intention fraud upon the Chancellor. Specifically, the Appellee submitted a false 8.05 Financial Declarations Statement (Exhibit 3) to the Court in the previous trial by purposefully failing to disclose his true income. The Appellee listed his income in his previous financial statement as being

$11.66 per hour however, documents received from the Appellee's employer show that the Appellee in fact made $15.57 per hour at the time of the previous trial. The Appellee never offered any evidence contradicting the proof that he previously submitted false information. Instead, the Appellee testified that he did not know how much he made (Transcript Page 143 Lines 2-11 and Page 144 Lines 4-5). Since the Chancellor had received false information in prior proceedings, either the subject intended or at best with gross indifference to accuracy, the Appellant filed a Motion for Relief from the Judgment of February 2009 as it pertained to child support. This falls squarely within the scope of Rule 60(b). If this does not fall under the scope of Rule 60 then what set of facts does? The Chancellor did not take into consideration the intentional fraud perpetuated by the Appellee, nor did it allow for an increase in child support.

Additionally, the Child Custody, Child Support and Property Settlement Agreement between the Parties was executed when the minor child of the Parties was six (6) years old. There has never been a modification of child support. The minor child is now eleven (11) years old and incurs substantially more expenses than she did when she was six (6). In fact, this was not questioned by the Court or by the Appellee's counsel. This was not taken into consideration by the lower Court either.

The Appellant acknowledges that the Chancellor's failure to rule on the Amended Motion tantamount to a denial however, the Chancellor is compelled to grant relief from Judgments based upon clearly false information. To do anything less would open the door to the approval of fraud and deception on the lower Courts.

The Chancellor committed manifest error when denying the relief requested in the Amended Motion under Rule 60(b). The evidence was presented, admitted, and

unchallenged by the Appellee that fraud was committed upon the Chancellor in the contempt and modification hearing in February 2009. We ask this Court to allow the increase in child support requested at the original contempt hearing of February 13, 2009 pursuant to Rule 60(b) and require the Appellee to pay all back support owed as a result of the retroactive increase.

CONCLUSION

With all due respect to the Chancellor, we ask this Court to reverse Chancellor Bradley's decision concerning the educational expenses of the minor child and order the Appellee to pay his half of past due tuition in the amount of $2,272.50 for the 2009-2010 school year as well as one half of all present and future tuition and educational expenses of the minor child. Appellant also requests that this Court find the Appellee in willful Contempt of Court for failure to honor the terms of the Final Decree of Divorce.

The Appellant asks this Court to reverse the Chancellor's ruling on the medical expenses of the minor child and award the Appellant $199.42 for the minor's past due medical expenses. Further, we ask this Court to revoke the modifications to the Final Decree of Divorce as it pertains to the medical expenses of the minor enacted by the Chancellor and revert the arrangement back to that set forth in the original Child Custody, Child Support and Property Settlement Agreement. The Appellant requests that this Court find the Appellee in willful Contempt of Court for failure to pay the medical expenses of the minor child.

The Appellant respectfully requests that this honorable Court reverse the Chancellor's ruling on a modification of child support and award the Appellant an increase in child support retroactive to the February 13, 2009 Order of Contempt against the Appellee. Due to fraudulent information given to the lower Court at that time and the preponderance of evidence concerning the Appellee's true income, the Appellant should be awarded $406.00 per month in child support from the February 13, 2009 with the total amount of arrearage being awarded in the amount of $1,064.00. The Appellant respectfully requests that this Court find the Appellee guilty of perjury.

Further, the Appellant respectfully requests that this Court remand this cause to Chancellor Bradley for the determination of sentencing for Contempt of Court and the award for attorney's fees for the original trial. The Appellant respectfully requests any and all additional relief unto which she is entitled.