

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2010-CA-01193

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WILLIE JOHNSON, JR.

*Appellant*

v.

HAZEL GWENDOLYN JOHNSON

*Appellee*

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**BRIEF OF APPELLEE**

On Appeal from the Chancery Court of Hinds County, Mississippi

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**SHARON PATTERSON THIBODEAUX, ESQ.**

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIE JOHNSON, JR.

APPELLANT

VS.

NO. 2010-CA-01193

HAZEL GWENDOLYN JOHNSON

APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

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

Willie Johnson, Jr.  
*Appellant/Defendant*

Felicia Perkins  
*Attorney for Appellant*

Hazel Gwendolyn Johnson  
*Appellee/Plaintiff*

Sharon Patterson Thibodeaux  
*Attorney for Appellee*

Honorable Patricia Wise  
*Chancery Court Judge, Hinds County, Mississippi*

SO CERTIFIED, this the 22<sup>nd</sup> day of March, 2011.

  
SHARON PATTERSON THIBODEAUX

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## STATEMENT OF THE ISSUES

I. DID THE TRIAL COURT COMMIT MANIFEST ERROR IN FINDING SUFFICIENT EVIDENCE TO AWARD THE PLAINTIFF A DIVORCE ON THE GROUNDS OF HABITUAL CRUEL AND INHUMAN TREATMENT?

II. DID THE TRIAL COURT COMMIT MANIFEST ERROR IN ITS ASSESSMENT OF ALIMONY UNDER *ARMSTRONG V. ARMSTRONG*?

III. SHOULD THE APPELLATE COURT AWARD APPELLEE A REASONABLE SUM FOR HER ATTORNEY FEES INCURRED IN THE APPEAL PROCESS AND STATUTORY DAMAGES?

## SUMMARY OF THE ARGUMENT

Hazel Gwendolyn Johnson was granted a divorce from Willie C. Johnson on the ground of Habitual Cruel and Inhuman Treatment by the Chancery Court of the First Judicial District of Hinds County, Mississippi on January 28, 2010. The Court awarded Hazel monthly periodic alimony payments of Nine Hundred Dollars (\$900.00). The Court also awarded Hazel attorney fees in the amount of Three Thousand Dollars (\$3,000.00).

The record in the lower Court is replete with evidence supporting the finding of habitual cruel and inhuman treatment. The evidence presented consists of testimony, admissions by Willie Johnson corroborating Hazel's testimony, and documentary evidence corroborating Hazel's testimony.

The lower Court also awarded Hazel monthly periodic alimony of Nine Hundred Dollars (\$900.00). In rendering her opinion, the lower Court makes a thorough and complete analysis of the factors set forth in *Armstrong v. Armstrong*, 618 So. 2d 1278 (Miss. 1993). (R.E. 218-221). While both Willie and Hazel contributed to the financial support of the family throughout their marriage prior to separation, the lower Court correctly determined that Willie wasted substantial marital assets on his mistresses and illegitimate child.

The lower Court awarded Hazel attorney fees in the amount of \$3,000.00. (R.E. 221-222). Hazel is currently unemployed. Willie has a net monthly income of \$5,589.30. Hazel has severe health issues. (R.E. 219). Hazel is unable to pay her attorney for the services rendered in connection with her defense of this appeal and she requests this Court to grant her a reasonable sum for the attorney fees incurred. Additionally, Hazel is entitled to statutory penalties in the likely event that this Court affirms the decision of the lower Court.

## ARGUMENT

### **I. DID THE TRIAL COURT COMMIT MANIFEST ERROR IN FINDING SUFFICIENT EVIDENCE TO AWARD THE PLAINTIFF A DIVORCE ON THE GROUNDS OF HABITUAL CRUEL AND INHUMAN TREATMENT?**

The lower Court record is replete with evidence sustaining a divorce on the grounds of habitual cruel and inhuman treatment. In its legal analysis of the evidence, the lower Court set forth the conduct of an offending spouse that must be proven to support a finding of habitual cruel and inhuman treatment. This conduct must be such that either:

- (a) *Endangers life, limb, or health, or creates a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief; or,*
- (b) *Is so unnatural and infamous as to make the marriage revolting to the non-offending spouse and render it impossible for that spouse to discharge the duties of marriage, thus destroying the basis for its continuance.*

**Rawson v. Buta**, 609 So. 2d 426, 431 (Miss. 1992).

*The burden of proof that must be met in awarding a divorce on the ground of habitual cruel and inhuman treatment is a preponderance of the credible evidence. Morris v. Morris*, 783 So. 2d 681 (Miss. 2001), *citing Smith v. Smith*, 614 So. 2d 394, 396 (Miss. 1993). Habitual cruelty “may consist of repeated acts of the same nature such as personal violence, or it may consist of a series of acts, some of the same nature and some of different natures, but which, when taken together, tend to cause pain and suffering on the part of the innocent spouse.” **Savell v. Savell**, 240 So. 2d 628, 629 (Miss. 1970). *A pattern of adultery during marriage may be a factor in finding habitual, cruel and inhuman treatment, even if the adultery has been condoned. Fisher v. Fisher*, 771 So. 2d 364 (Miss. 2000).

The proof presented to the lower Court in this case established that Mr. Johnson had at least three (3) affairs during the course of the parties' marriage. Mrs. Johnson testified that Mr. Johnson had an affair with Mary Payne, one of his students while teaching at Utica Junior College. (T-63-65). This affair resulted in the birth of a child, Olivia Gibson, born in 1992. (T-62-65, 193-194). Yet Mrs. Johnson did not learn of the affair until the year 2001 when the minor, illegitimate child was approximately nine (9) years old, at which time Mrs. Johnson inadvertently learned of the child's existence through mailings. (T-62-65).

After suffering the shock of learning that her husband had fathered a child with a student while married to her, Mrs. Johnson was very quickly thrust into the center of another affair that Mr. Johnson was having with Carrie Mae Jones, another one of his students. (T-57). However, this affair was far different. This affair placed Mrs. Johnson in the very center of a maelstrom. Mrs. Johnson was harassed (T-57,71), stalked (T-69), threatened (T-59-60; 71; 234-235; TE-31) and verbally abused (T-72) by Mr. Johnson's paramour. The paramour, Carrie Jones, trespassed at the parties' home. (T-76). She distributed flyers in the parties' neighborhood. (T-73; TE-5). She damaged Mrs. Johnson's vehicle. (T-76-78; TE-6). She frightened Mrs. Johnson to the point that she feared for her safety and stayed indoors with the garage door down. (T-72).

Despite promises of fidelity and allegiance, Mrs. Johnson learned that Mr. Johnson had never ended his relationship with Carrie Jones. He bought Carrie Jones two (2) cars (T-127-129; 216-218), jewelry (T-192; 220) and furniture (T-190-192) and took her on vacation trips (T-68; TE-4). Then, Mrs. Johnson learned that Mr. Johnson had fathered a child with Carrie Jones, Amber Crawford (T-61-62) – his second illegitimate child conceived during the parties' marriage. Additionally, Carrie Jones gave birth to a son in 2008, which Mr. Johnson admitted could be his child (T-237-238) – which would constitute the third illegitimate child conceived during the marriage of Mr. and Mrs. Johnson.



And, it was not enough for Mr. Johnson to subject Mrs. Johnson to his adulterous affairs. He was physically abusive to Mrs. Johnson. His abusive actions towards Mrs. Johnson resulted in a hospital visit for Mrs. Johnson. (T-80-82; Ex 8; 9). Further, Mrs. Johnson testified, in detail, that after learning of Mr. Johnson's deceit and continued affair with Carrie Jones, Mr. Johnson raped her. (T-159-162).

And, even that was not enough. Mr. Johnson began a course of financial abuse to the point that Mrs. Johnson was reduced to begging for his financial assistance. (T- 99; 119-120; TE-20). Even after Mrs. Johnson obtained a Court Order prohibiting Mr. Johnson from withdrawing funds from various marital financial accounts, Mr. Johnson violated that Court Order on two (2) separate occasions. (T-96-98).

And, throughout all of this abuse, Mrs. Johnson continued to maintain a home for and to provide for the rearing of the parties' minor daughter.

This Court found in *Morris*, "*Although we affirm the chancellor's opinion and ground for divorce, it is on different reasoning.*" Mrs. Johnson would show that the record may be void of the evidence that Mr. Johnson transmitted a venereal disease to her, but this Court can, as in *Morris*, affirm the Chancellor's opinion based on the *substantial* evidence of habitual cruel and inhuman treatment she suffered at the hands of Mr. Johnson which is contained in the record.

*"The combination of the acts of violence, willful failure to support and extramarital affairs clearly support the granting of a divorce to the Plaintiff on the ground of habitual cruel and inhuman treatment."* *Morris supra*. Clearly, all of these factors are applicable to the case at bar and the Chancellor's opinion must be upheld.

## II. DID THE TRIAL COURT COMMIT MANIFEST ERROR IN ITS ASSESSMENT OF ALIMONY UNDER *ARMSTRONG V. ARMSTRONG*?

In its proper award of permanent, periodic alimony to Mrs. Johnson from Mr. Johnson, the lower Court made a thorough, well reasoned analysis of the *Armstrong* factors. (R.E. 218 – 221). Once again, Mr. Johnson would urge this Court to believe that the lower Court's analysis was based on uncorroborated accusation – primarily relating to the venereal disease. However, a review of the lower Court record will support the following corroborated and/or uncontested facts:

- (a) At the time of the divorce hearing, Mrs. Johnson was *unemployed* (R.E. 219) while Mr. Johnson had a gross monthly income of \$8,041.86; (T-195).
- (b) Even disregarding the venereal disease, Mrs. Johnson has significant health issues, including but not limited to pancreatic problems, kidney problems, diabetes, heart murmur, COPD, chronic bronchitis, a prosthetic eye, dry eyes and eye socket irritation. (T-110-112; 129). In fact, the various medical problems of Mrs. Johnson resulted in at least two of the continuances of the divorce trial, as evidenced by the Trial Court Docket. On the other hand, Mr. Johnson is in good health; (R.E. 219).
- (c) The parties were married for twenty-seven years – a lengthy marriage;
- (d) Mrs. Johnson was awarded a divorce from Mr. Johnson based on fault of Mr. Johnson. (It should be noted that in his brief, Mr. Johnson does not challenge the fact that it was his fault that triggered the demise of the marriage. In fact, the Brief of the Appellant states: *While Willie's adulterous behavior arguably satisfies the requirements for a divorce*

*based on adultery, his behavior does not rise to the legal of extremes necessary to constitute habitual cruel and inhuman treatment (Appellant Brief p6.)* This statement must be considered in light of the fact that the burden of proof for a divorce on the ground of uncondoned adultery is *clear and convincing* while the requisite burden of proof on the ground of habitual cruel and inhuman treatment is merely *a preponderance of the evidence*; and ,

- (e) Mr. Johnson wasted marital assets while Mrs. Johnson used all of her earnings to support the family. Mr. Johnson appears to take exception with the fact that the lower Court found he had wasted marital assets. One simply has to review the adverse testimony of Mr. Johnson himself and the trial exhibits 21-A through 21-K, 22, 23 and 29 to ascertain this truth.

### **III. SHOULD THE APPELLATE COURT AWARD APPELLEE A REASONABLE SUM FOR HER ATTORNEY FEES INCURRED IN THE APPEAL PROCESS AND STATUTORY DAMAGES?**

As evidenced by the trial record in this case, the financial situation of Mrs. Johnson is bleak. She is unemployed. She has limited funds. She is totally unable to pay her attorney for defending this appeal. The lower Court awarded Mrs. Johnson the sum of Three Thousand Dollars (\$3,000.00) attorney fees. (R.E. 222). Mrs. Johnson is entitled to a reasonable sum for her attorney fees in defending this frivolous appeal in an amount of at least one-half (1/2) of what she was awarded in the lower Court. See *Grant v. Grant*, 765 So. 2d 1263 (Miss. 2000); *Monroe v. Monroe*, 745 So. 2d 249, 253 (Miss. 1999); *Clements v. Young*, 481 So. 2d 263, 271 (Miss. 1985); and *Stewart v. Stewart*, 2 So. 3d 770 (Miss. App. 2009).

Section 11-3-23 of the *Mississippi Code Annotated* provides, in part, as follows:

*In case the judgment or decree of the court below be affirmed, ..., the Supreme Court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment or decree affirmed be for a sum of money, the damages shall be upon such sum. If the judgment or decree be for the possession of real or personal property, the damages shall be assessed on the value of the property....*

The lower Court awarded Mrs. Johnson the following:

- (a) The marital home and the equity which the lower Court valued at \$150,000.00;
- (b) The ING 403 (b) account which the lower Court valued at \$9,871.59;
- (c) The Pentagon Federal Credit Union IRA Accounts which the Court valued at \$10,130.21 and \$5,216.46;
- (d) Household goods which the Court valued at \$10,000.00;
- (e) The 1998 Lexus LS400 automobile which the lower Court valued at \$8,000.00; and
- (f) Attorney fees of \$3,000.00.

In total, the value of the real and personal property and attorney fees awarded unto Mrs. Johnson is \$196,218.26. When the lower Court decision is affirmed, Mrs. Johnson will be entitled to the statutory penalty of 15% of the total award of \$196,218.26. See, *Murray v. Murray*, 754 So. 2d 1200, 1202 (Miss. 2000); *Lowicki v. Lowicki*, 429 So. 2d 917, 920 (Miss. 1983). Further, the award of the statutory damages as set forth in Mississippi Code Annotated §11-3-23 is “mandatory not discretionary”. *Murray* at 1202. “If the case fits the statute and if the successful Appellee so requests, the statutory damages must be awarded.” *Lowicki* at 919. See also, *Hart v. Catoe*, 393 So. 2d 1346 (Miss. 1981); *Chrismond v. Chrismond*, 56 So. 2d 482 (Miss. 1952).

## CONCLUSION

The evidence, both oral and documentary, provided to the lower Court clearly supports the findings of fact and conclusions of law made by the Chancellor. This Court should not, and cannot, reverse but for manifest error, abuse of discretion, or application of an erroneous legal standard. No such errors exist in the case at bar. Chancellor Wise was imminently correct in her decision and should be affirmed. Additionally, Mrs. Johnson is entitled to an award of her reasonable attorney fees and statutory damages in this appeal.

Mrs. Johnson respectfully moves this Court to affirm Chancellor Wise's decision and to assess attorney fees and statutory damages against Mr. Johnson.

Respectfully submitted,

Hazel Gwendolyn Johnson, Appellee

BY: Sharon Patterson Thibodeaux  
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**CERTIFICATE OF SERVICE**

I, Sharon Patterson Thibodeaux, Attorney for Hazel Gwendolyn Johnson, hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of the Appellee to the following persons:

Honorable Patricia Wise  
Trial Judge  
Post Office Box 686  
Jackson, Mississippi 39205

Honorable Felicia Perkins  
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This the 22<sup>nd</sup> day of March, 2011.

  
SHARON PATTERSON THIBODEAUX