

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2010-CA-01269**

**J. LANE KIMBROUGH**

**APPELLANT**

**VS.**

**CRISTAL KIMBROUGH**

**APPELLEE**

**APPEAL FROM THE CHANCERY COURT OF SMITH COUNTY**

**APPELLANT'S PRINCIPAL BRIEF**

T. Jackson Lyons  
T. Jackson Lyons & Associates, P.A.  
P.O. Box 4690  
Jackson, Mississippi 39296  
Tel. (601) 969-0731  
Email [appealsinms@bellsouth.net](mailto:appealsinms@bellsouth.net)  
MSB [REDACTED]

David E. James  
James & O'Brien Family Law Group  
P.O. Box 2623  
Ridgeland, Mississippi 39158  
Tel. (601) 952-0050  
MSB [REDACTED]

*Counsel of Record to Mr. Kimbrough*

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2010-CA-01269**

**J. LANE KIMBROUGH**

**APPELLANT**

**VS.**

**CRISTAL KIMBROUGH**

**APPELLEE**

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record hereby 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 the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. The Appellant, J. Lane Kimbrough, resides in Smith County, Mississippi. Counsel to Mr. Kimbrough are T. Jackson Lyons, with offices in Jackson, Mississippi, and David E. James, in Ridgeland, Mississippi.
2. The Appellee is Ms. Cristal Meichel Mooney Kimbrough and she resides in Covington County, Mississippi.
3. Ms. Kimbrough is represented by Mr. Stanley Sorey, from Raleigh, Mississippi.
4. Cristal's admitted paramour is one Jeff Graves, a resident of Covington County, Mississippi.
5. The Parties' minor children are Camille, John, and Abby, and they primarily reside with their mother, subject to visitation with their father.

6. The guardian *ad litem* is Ms. April D. Taylor.

T. Jackson Lyons

## **TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS .....	ii
TABLE OF CONTENTS .....	iv
TABLE OF AUTHORITIES .....	v
ISSUES .....	1
STATEMENT OF THE CASE .....	1
A. Nature of the Case and Procedural History .....	1
B. Facts .....	4
ARGUMENT .....	21
I. The chancellor erred as a matter of law in ruling that each Party was entitled to a divorce based on their mutual fault of each having deserted the other .....	21
A. Standard of Review .....	21
B. Mississippi law is well-settled that the statutory regime of fault does not admit the possibility for mutual fault; only the more innocent party may be granted a divorce .....	22
II. The chancellor erred as a matter of law by <i>sua sponte</i> “amending” the pleadings to reflect the trial of a fault ground that neither party had pleaded or was on notice to prepare testimony or other evidence to meet .....	23
III. Alternatively, Lane proved that Cristal and her paramour were engaged in a sexual relationship while the Parties remained married to one another . . .	32
IV. Conclusion .....	34
CERTIFICATE OF FILING AND SERVICE .....	36

## TABLE OF AUTHORITIES

### **Cases:**

<i>Alexander v. Womack</i> , 857 So.2d 59 (Miss.2003) .....	26
<i>Benson v. Benson</i> , 608 So.2d 709 (Miss. 1992) .....	29
<i>Brumfield v. Brumfield</i> , 49 So.3d 138 (Miss.App. 2010) .....	21
<i>Criswell v. Criswell</i> , 254 Miss. 746, 182 So.2d 587 (Miss. 1966) .....	27
<i>Day v. Day</i> , 501 So.2d 353 (Miss.1987) .....	30
<i>Etheridge v. Webb</i> , 210 Miss. 729, 50 So.2d 603 (1951) .....	28
<i>Fortenberry v. Fortenberry</i> , 338 So.2d 806 (Miss. 1976) .....	25
<i>Fulton v. Fulton</i> , 36 Miss. 517 (Miss. Err.&App. 1858) .....	27
<i>Garriga v. Garriga</i> , 770 So.2d 978 (Miss.App. 2000) .....	23
<i>Grant v. Grant</i> , 765 So.2d 1263 (Miss.2000) .....	30
<i>Graves v. Graves</i> , 85 Miss. 677, 41 So. 384 (1906) .....	27
<i>Griffin v. Griffin</i> , 207 Miss. 500, 42 So.2d 720 (1949) .....	30
<i>Hinton v. Hinton</i> , 254 Miss. 50, 179 So.2d 846 (Miss. 1965) .....	22
<i>Hoskins v. Hoskins</i> , 21 So.3d 705 (Miss.App. 2009) .....	32
<i>Hyer v. Hyer</i> , 636 So.2d 381 (Miss. 1994) .....	22
<i>King v. King</i> , 246 Miss. 798, 152 So.2d 889 (1963) .....	28
<i>King v. King</i> , 946 So.2d 395 (Miss.App. 2006) .....	25, 31
<i>Lestrade v. Lestrade</i> , 49 So.3d 639 (Miss.App. 2010) .....	21
<i>Lexington Ins. Co. v. Buckley</i> , 925 So.2d 859 (Miss.App. 2005) .....	3

<i>Massey v. Huggins</i> , 799 So.2d 902 (Miss.App. 2001) .....	25
<i>Mclemore v. Mclemore</i> , 173 Miss. 765, 163 So. 500 (Miss. 1935) .....	27
<i>Mississippi Comm’n on Judicial Performance v. Buffington</i> , No. 2010-JP-00871-SCT (Miss. February 17, 2011)( <i>en banc</i> ) .....	3
<i>Queen v. Queen</i> , 551 So.2d 197 (Miss. 1989) .....	25
<i>Rives v. Rives</i> , 416 So.2d 653 (Miss.1982) .....	22
<i>Sarphie v. Sarphie</i> , 180 Miss. 313, 177 So. 358 (1937) .....	27
<i>Shorter v. Shorter</i> , 740 So.2d 352 (Miss.App.1999) .....	32
<i>Shorter v. Shorter</i> , 740 So.2d 352 (Miss.Ct.App.1999) .....	27
<i>Talbert v. Talbert</i> , 759 So.2d 1105 (Miss. 1999) .....	33, 34
<i>Tedford v. Tedford</i> , 856 So.2d 753 (Miss.App. 2003) .....	27
<i>Tyrone v. Tyrone</i> , No. 2007-CA-10933-COA (Miss.App., September 22, 2009) .....	3

#### **Statutes and Other Authorities:**

Miss. Code Ann. § 93-5-1 .....	1, 26
<i>Random House Dictionary of the English Language</i> , 2 <sup>nd</sup> Ed., unabridged .....	26
Rule 15(b), Miss.R.Civ.P. ....	24
Rule 54(c), Miss.R.Civ.P. ....	24
Shelton Hand, Jr., <i>Mississippi Divorce, Alimony and Child Custody</i> , § 4, n. 71 (4 <sup>th</sup> ed. 1996) .....	32

## **ISSUES**

- I. Whether the chancellor erred as a matter of law in granting divorce to each Party on the grounds of the other's "desertion."
- II. Alternatively, whether the chancellor committed legal error in failing to grant a divorce to Lane Kimbrough on the grounds of Cristal's admitted and uncondoned adultery.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case and Procedural History**

The issues involved in the Parties' divorce were bifurcated for hearing. [V. 2: C.P. 197; 211; 232] During the hearing held in February of 2010, the Hon. Larry Buffington<sup>1</sup> presiding, the chancellor considered only whether either Party had grounds for divorce. Under Miss. Code Ann. § 93-5-1, Cristal filed for divorce in October of 2007 alleging habitually cruel treatment as well as habitual drunkenness. [V. 1: C.P. 10] Lane answered with denials and initially counter-claimed alleging habitually cruel treatment and, later, uncondoned adultery. [V. 1: C.P. 29; V. 2: C.P. 164, 172] Cristal filed an amended answer to the counter-claim stating general denials and, inter alia, the affirmative defense of recrimination in response to the claim of adultery. [V. 2: C.P. 213-16] Neither Party claimed the other had deserted.

---

<sup>1</sup>The Court may notice that subsequent to these proceedings, Judge Buffington lost a run-off election to the lawyer formerly representing Cristal Kimbrough, Hon. David Shoemake.

Curiously, there is no written order in the Record severing the issues, but the chancellor's order dismissing the Parties' grounds reflects the severance, as does the course of the hearing. [V. 2: C.P. 211; see Transcript]

On Lane's motion at the conclusion of Cristal's case, the trial court dismissed the habitual cruel and inhuman treatment ground alleged by Cristal, but took the drunkenness charge under advisement pending hearing the entire case. [V. 4: T. 178; V. 2: C.P. 211] Subsequently, the trial court entered orders dismissing Lane's alleged grounds of adultery and habitually cruel treatment. [V. 2: C.P. 211]

The trial court entered a judgment on all fault grounds in late April of 2010. [V. 2: C.P. 232-33] Cristal's remaining ground of habitual drunkenness was dismissed and then the chancellor *sua sponte* ordered the pleadings amended to conform to the evidence. [V. 2: C.P. 232] Whereupon the chancellor granted both Parties a divorce based on each Party's desertion of the other. [V. 2: C.P. 232] This ruling, according to the chancellor, was because "the marital relationship of the parties had gradually eroded and that in fact, for a period in excess of two years that the marital relationship was absent." [V. 2: C.P. 232]

This turn of events prompted Lane to ask for reconsideration. [V. 2: C.P. 236-38] Lane complained, in effect, that neither Party had notice that desertion would be contested and hence no opportunity for a full hearing on the three statutory conditions of "willful," "obstinate," and "continued" desertion. [V. 2: C.P. 237] Lane pointed out that in cases where both parties establish grounds for



divorce, Mississippi law requires chancellors to grant the divorce to the most innocent party. [V. 2: C.P. 238] Cristal responded by essentially admitting all the points in Lane's motion but insisting that the proof at trial showed that Cristal was the most innocent party and that she was entitled to a divorce either for Lane's habitual cruel treatment or habitual drunkenness. [V. 2: C.P. 240]

Subsequently the trial court entered a Rule 54(b) final judgment as to the fault grounds. [V. 2: C.P. 243-44] The court again purported to grant both Parties divorces due to each of them having deserted the other. [V.2: C.P. 243] The trial judge's novel doctrine of "mutual" fault – and on a ground neither Party had pleaded – is unknown to Mississippi law and will be discussed *infra*.<sup>2</sup> The final order on fault grounds, entered on July 6, 2010, and denominated an "amended judgment," expressly certified the order as final under Rule 54(b). [V. 2: C.P. 244] The trial court's order noted that the "parties' claims for dissolution of their marriage union on fault grounds are fully and finally adjudicated and that there is

---

<sup>2</sup>As noted *supra*, Mr. Buffington is no longer a sitting chancellor but the Court can likely take notice of the fact that during his tenure in office he had become rather famous for his idiosyncratic exercise of office. See, e.g., *Mississippi Comm'n on Judicial Performance v. Buffington*, No. 2010-JP-00871-SCT (Miss. February 17, 2011)(*en banc*)(public reprimand for willful misconduct of improperly issuing bench subpoenas); *Tyrone v. Tyrone*, No. 2007-CA-10933-COA (Miss.App., September 22, 2009)("There was no pleading for divorce based on irreconcilable differences . . . The chancellor attempted to *sua sponte* enter an order reinstating [the] first complaint . . . in what must have been an attempt to somehow resurrect [a] counterclaim for divorce. However, there is nothing in the record that indicates that either [party] provided notice to the other that the [hearing] would be on a request for divorce based on irreconcilable differences."); and *Lexington Ins. Co. v. Buckley*, 925 So.2d 859 (Miss.App. 2005)("[n]ot only did [the plaintiff] fail to serve process, but the chancellor erred when he failed to follow our rules of civil procedure. Because the chancery court lacked personal jurisdiction to enter a judgment following an improper trial on the merits, it is unnecessary to delve into the questionable amendment of complaints . . .")

no just reason for delaying an appeal regarding same.” [V. 2: C.P. 243-44]

An earlier temporary order had been entered governing custody and support. [V. 1: C.P. 50-55] Its terms were ordered to remain in force during the pendency of any appeal. [V. 2: C.P. 244] Lane timely filed his appeal on July 30, 2010, and Cristal timely filed a notice of appeal on August 9, 2010. [V. 2: C.P. 245, 256]

## **B. Facts**

As noted supra, neither Party in any pleading alleged desertion by the other. Though both Parties complained in post-judgment filings that desertion was not tried, the Court is not obligated to accept the unexamined representations of Parties that facts underlying desertion were not presented and implicitly tried. Lane believes that, on one hand, there are incidental facts in the record that might relate to a claim of desertion. Facts underlying the various statutory grounds almost unavoidably overlap. But on the other hand, as the pleadings make clear, neither party had notice that desertion would be tried and, as a consequence, the record does not reflect a trial of the statutory elements of desertion.

To orient the Court to the facts that follow, and as will be set out fully in the discussion section, a party alleging desertion must prove three elements, as stated in the statute: “Willful, continued and obstinate desertion” for the statutory period, which is now one year.

The Supreme Court has characterized desertion as a separation of the parties coupled with the deserter’s willful and continued failure to support the other spouse. Under Mississippi law the concepts of “separation” and “support” are

understood liberally to refer to the entire bundle of rights and duties attending the marital relationship.

For example, our law recognizes that parties can be quite “separate” while living under the same roof, and that “support” has aspects relating to money, sex and affection, and simple thoughtfulness. Mississippi law also recognizes the corollary meaning of desertion, that of constructive desertion, where the offending spouse’s behavior has been so repugnant that the other spouse must leave.

The Parties married in June of 1990 and lived together until Cristal left the marital domicile in August of 2007. [V. 1: C.P. 9, 24] The Parties’ three children, Camille, John, and Abby, are presently 16, 14, and 13 years of age, respectively. [V. 1: C.P. 9, 24]

The pleadings agreed that Cristal left the marital domicile in mid-August of 2007. [V. 1: C.P. 9, 24] Cristal sued for divorce two and a half months later at the end of October. [V. 1: C.P. 8] The Parties had never physically separated for a twelve month span. As for whether they were “separate” under the same roof, the chancellor observed that the testimony reflected a gradual erosion of the marital relationship over a period in excess of two years. [V. 2: C.P. 232]

In support of this conclusion, the chancellor noted that Lane “had gone through a period of unemployment that had left him depressed and together with the effects the same had on [Cristal] and her reaction to these problems resulted in both parties[,] even though under the same roof[,] abandoning the marital relationship.” [V. 2: C.P. 233]

Lane testified that it was the manner in which his *employment* developed that caused his stress and depression, not a period of unemployment. At the time of the hearing, he was employed in Lamar County by the Natural Resources Conservation Service, an agency of the United States Department of Agriculture. [V. 4: T. 179] Earlier he had been employed with the same agency as a district conservationist where he managed an office and staff, implemented programs, and managed contracts. [V. 4: T. 180]

Lane seemed proud to have built the district office from nothing to programs with budgets of several hundred thousand dollars. [V. 4: T. 180] As much as this may have been good for the county, Lane was increasingly unhappy being indoors with his head in a computer all the time. [V. 4: T. 180-81] He observed that his skills managing subordinates were not very good. [V. 4: T. 181] Dissatisfied with his work, Lane took a voluntary leave of absence that lasted some seven and a half months. [V. 4: T. 181] During this period of time, he availed himself of counseling through Dr. Carl Dickerson, about which more will be said *infra*. [V. 3: T. 6] The leave might not have lasted that long except that it took time to find a more suitable position within his agency in a different county. [V. 4: T. 182] He explained that in his "line of work," there are not many jobs. [V. 4: T. 196]

On cross-examination, Lane elaborated on the circumstances having led to the leave. Lane had approached his supervisor with his problems in the job and the supervisor responded with an invitation for Lane to take time off and re-evaluate

his career through the agency's employee assistance plan. [V. 5: T. 209]

According to Cristal – testimony that Lane did not dispute – the leave began in February of 2007. [V. 3: T. 123]

Lane acknowledged that he told the counselor at the beginning of the leave that he was miserable at work, his nerves were “shot,” and that he was drinking three to six beers a day. [V. 5: T. 218] Lane denied that he attributed these and other problems to his wife, but insisted that he was part of the marriage, too, and that during his therapy, he discussed first his job and only over time with Dr. Dickerson did they reach other aspects of his life, including his marriage. [V. 5: T. 219]

As for Lane's support of his family, it is not disputed that he materially contributed financially. [V. 4: T. 185] Cristal testified that she handled the family finances prior to her departure. [V. 4: T. 167] According to Cristal, Lane did not keep the checkbooks or even have a debit card. [V. 4: T. 168] For her part, Cristal was working for a bank at the time of their separation. [V. 4: T. 122]

Because neither party had pleaded desertion, no one offered any evidence of whether Lane's leave of absence was with pay or not. However, both Parties testified that Lane had worked with Cristal's father during his leave to help clear trees damaged or destroyed by Hurricane Katrina and that Lane was paid for his work. [V. 4: T. 174, 195] Lane explained that his father-in-law had signed up under one of Lane's agency's cost-sharing programs. [V. 4: T. 195] According to Lane, he worked with his father-in-law some three months, from early March to

early June of 2007. [V. 4: T. 195] And, as stated supra, Lane began working again as a conservationist for the USDA within a few weeks of Cristal's departure. The temporary order provided for Lane to provide financial support and for visitation. [V. 1: C.P. 50-51]

As for behavior that might conceivably support constructive desertion or a separation-under-the-same-roof theory, there is conflicting evidence relating to: 1) the Parties' declining expressions of physical affection, 2) Lane's alleged anger, 3) Lane's alleged excessive drinking, and 4) his viewing of pornography over the internet.

As for physical intimacy, both Parties admitted that sex was infrequent, not utterly absent for a period of a year. [V. 4: T. 156, 187, 189] According to Lane, their marital problems developed over a long period of time. [V. 4: T. 185] From Lane's perspective, his marital unhappiness sprang mainly from his inability to understand why Cristal did not seem to care about him: "I didn't seem to be of any importance in her life." [V. 4: T. 185]

He explained that there had been a time when they did not argue on a regular basis. [V. 4: T. 186] Over about the last seven years of the marriage, the occasions of the Parties' physical intimacy, according to Lane, declined greatly to a few times a year. [V. 4: T. 187] The last time they were physically intimate was in April of 2007. [V. 4: T. 189] Cristal agreed that their physical relationship declined over five or six years, but that before then, it had been fine. [V. 4: T. 156] Cristal said that while their physical relationship had deteriorated, both of them

had made intimate overtures to the other during Lane's leave of absence, when they both saw Dr. Dickerson. [V. 4: T. 157] Cristal admitted that she did not respond favorably to Lane's overtures, and that he rejected her's. [V. 4: T. 157] For his part, Lane denied that he was ever unreceptive. [V. 4: T. 187-88]

Lane claimed that Cristal was able to say "no" to him and that she also employed more non-verbal means to discourage him, for example, by having a child in the marital bed. [V. 4: T. 188] Lane said he responded to Cristal's "body language" and that he was not going to "push it" if he "got that indication from her." [V. 4: T. 188]

As for Lane's alleged excessive drinking, Cristal said that Lane had been drinking more over the three years prior to the separation. [V. 4: T. 122] There are at least two problems with the trial court's "amending" the pleadings to use this allegation, *sub silentio*, as grounds for constructive desertion: first, Cristal pled habitual drunkenness, but never testified that Lane's alleged drinking forced her to desert the marriage; and second, the trial court dismissed Cristal's claims of habitual drunkenness as well as habitual cruelty.

Cristal acknowledged her husband's unhappiness in his job and thought that it contributed to his drinking. [V. 4: T. 123] Before the leave of absence, Cristal said that most nights Lane would leave his office in the evening, return home, and then go back to the office and stay until ten o'clock or midnight. [V. 4: T. 124] Usually Lane drank beer outside the house and he would drink until he was drunk. [V. 4: T. 124] At which time he would come inside and "throw fits." [V. 4: T. 124]

Lane disputed this version of his drinking and daily routine. Before taking his leave of absence, Lane's routine depended on the needs of his job. [V. 4: T. 182] Sometimes he left work at the regular time, between 4:30 p.m. and 5:00 p.m., but sometimes he would need to stay an hour or two. [V. 4: T. 182-83] According to Lane, he was on a flexible schedule and figured that he averaged getting home at about 7:00 p.m., with the latest arrival at about 9:00 p.m. [V. 4: T. 183] He denied ever getting home at 11:00 p.m., or leaving work and then returning later. [V. 4: T. 183-84]

Before his leave began, Lane's drinking varied and he enjoyed drinking two or three beers over a two-hour period. [V. 4: T. 184] However, if his workload was going to be lighter the following day, sometimes he drank more. [V. 4: T. 184] Lane denied drinking seven or eight beers at any time and denied that he drank regularly to the point of intoxication. [V. 4: T. 184-85]

As noted *supra*, after the leave began Lane began seeing a counselor, Dr. Dickerson. [V. 4: T. 189] Lane and Dickerson discussed his drinking and his quantity of drinking. [V. 4: T. 189-90] The counselor explained that alcohol was a depressant and since Lane was depressed about his job, Dickerson asked Lane to consider not drinking at all. [V. 4: T. 190] For two and a half months – from March to late May of 2007 – Lane did not drink at all. [V. 4: T. 190-91] Lane reported that Dickerson followed up with him for several sessions until Dickerson was satisfied that Lane's beer drinking was no longer an issue in his treatment. [V. 4: T. 191-92] At the time of the hearing, Lane drank very little, save for times such



as when he cooks outside on the grill. [V. 4: T. 192]

Carl Dickerson testified that he is a licensed counselor practicing in Jackson and Hattiesburg. [V. 3: T. 5] To refresh his memory, Dickerson testified from his therapy notes which had been subpoenaed for that purpose. [V. 3: T. 5-6] Though the nearly illegible notes were not admitted into evidence, they are part of the record for identification purposes. [V. 3: T. 13] Dickerson cautioned the lawyers and the chancellor that his notes had been recorded for on-going therapeutic purposes; he was writing down certain impressions in order to be able to prepare for subsequent sessions. [V. 3: T. 7-8, 30] His notes were not prepared with an eye to becoming evidence of facts or to containing enough information to refresh his memory years later. [V. 3: T. 30]

Dickerson related that Lane's seeing him was not a supervisory referral from an employer, but voluntary on Lane's part. [V. 3: T. 14] Their first session was February 13, 2007. [V. 3: T. 6] Stress relating to his job was a motivating factor in Lane's seeking counseling. [V. 3: T. 9] Dickerson's impression was that Lane was an "outdoor" person and that Lane's job stresses related to delegating tasks and managing employees. [V. 3: T. 12, 9]

At the outset of the therapy, Lane described his drinking as three to six beers a day. [V. 3: T. 11] Dickerson's impression was that Lane was "self-medicating" his job problems with alcohol. [V. 3: T. 11] He described Lane's consumption as alcohol abuse, but not alcoholism. [V. 3: T. 11]

In July, 2007, Dickerson recommended to Lane that he take an

anti-depressant. [V. 3: T. 35] Lane had mentioned to Dickerson that Cristal was taking an anti-depressant and that it seemed to be helping her. [V. 3: T. 36] The subject of medication came up in the context of Lane's drinking. [V. 3: T. 39] According to Dickerson, this would be a problem if Lane continued to drink, but since Lane was not drinking at the time, it was not an issue. [V. 3: T. 39, 51-52] Moreover, during their sessions together and separately, neither Lane nor Cristal mentioned to him that Lane's drinking was affecting his ability to work. [V. 3: T. 54] Cristal told Dickerson in a session without Lane that Lane was drinking a lot every night. [V. 3: T. 25]

As evidence of Lane's alcohol abuse, in the weeks prior to Cristal leaving with the children, she had taken photographs of bags of beer cans and loose cans outside the marital home. [V. 4: T. 127-29; Ex. 10-23] According to Cristal, every few days before she left she would take a different picture. [V. 4: T. 128] Asked about the photographs, Lane recognized the grounds of the house but said that the pictures did not depict the home's usual appearance. [V. 4: T. 193] After getting to know a retired man who collected cans, apparently to supplement the man's income, Lane saved cans for months at a time to later give to the retired man. [V. 4: T. 193] Given the disparity between how the grounds usually appeared, and the pictures of strewn beer cans, Lane believed at least some of the pictures were staged. [V. 4: T. 194]

Lane reported that he had never been charged with DUI. [V. 5: T. 204] Nor did he believe he had ever been intoxicated to the point of scaring his wife or

children. [V. 5: T. 205] He declared that he was not so impaired after drinking two or three beers. [V. 5: T. 205] There were no periods in his life where he was unable to remember what happened the night before; he had suffered no "black-outs" or "pass-outs." [V. 5: T. 206] Cristal never mentioned to him directly that she believed his drinking was a problem. [V. 5: T. 206-07]

According to Lane, sometimes during their arguments Cristal would tell him to go outside and drink a beer. [V. 5: T. 207] As the other members of his family testified, Lane agreed that he mostly drank outside in order to keep the direct experience of a father's drinking alcohol from his children. [V. 5: T. 207]

Cristal also called the Parties' two elder children to testify about Lane's daily routine and drinking habits. At the time of the hearing in February of 2010, Camille was fifteen and a half years old. [V. 1: C.P. 9] She said her parents' relationship during the year or so before the separation was not good and that they fought. [V. 3: T. 67] Camille described her father's drinking as a problem for the three or four years prior to the separation. [V. 3: T. 67] According to Camille, Lane returned home in a drunken state "[j]ust about seven days a week." [V. 3: T. 68]

Camille described her father's state as falling-down drunk, stumbling and calling them by the wrong names. [V. 3: T. 70] This routine, according to Camille, kept the entire family up until early mornings all the time. [V. 3: T. 71] During cross-examination, Camille was certain that her father kept them up late every single night and that Cristal and the three children would sleep with Cristal and

Lane would sleep on the couch. [V. 3: T. 89] Camille insisted that her father was drunk every night and when he got home at 11:00 p.m., he would continue drinking. [V. 3: T. 90] She did not know where her father went every night, nor did she ever ask him. [V. 3: T. 90-91]

Camille testified that her parents argued frequently, but that only Lane ever yelled. When Cristal tried to respond, Lane would “run [Cristal] down and it got to where she didn’t say anything at all.” [V. 3: T. 91-92] According to Camille, during her father’s allegedly drunken arguments, her mother never yelled at her father. [V. 3: T. 92] Cristal admitted that this was not true and that she, Cristal, did raise her voice. [V. 4: T. 153-54] Lane agreed that they both raised their voices during their too-frequent arguments. [V. 4: T. 197-98]

Camille’s complaints about her father extended into the post-separation period. She objected to her father’s “go[ing] up to the school and get[ting] our grades and he knows all this stuff about it . . .” [V. 3: T. 99] Indeed, Camille classified her father’s behavior as “stalking”: “[H]e doesn’t have a reason to be driving by our house” – or being informed of his children’s grades, apparently – and when they were moving from one residence to another, “we didn’t tell him. We didn’t want him to find out because he was already driving by [the house they were vacating].” [V. 4: T. 106]

Camille’s school work has suffered and not improved post-separation, yet she is unwilling to accept her father’s help. [V. 3: T. 99] According to Camille, the children blame Lane for how the divorce case has proceeded. [V. 3: T. 99-100] At

first denying that she had expressed her anger to her father about a prior continuance in the case, Camille then explained that Cristal had explained to her that the continuance was to accommodate Cristal's boyfriend's schedule: "And the reason I'm mad is because [my father] told us that it would be over just like he told us this time it would be over and it's just ridiculous." [V. 3: T. 100] Camille admitted that she was angry with her father and has told him so. [V. 3: T. 100]

Camille and her father also had a conflict over her use of a cell phone. After the separation, Camille claimed that Lane's drinking continued and she recounted one evening when they were visiting Lane and he was drunk and had taken her cell phone away. [V. 3: T. 76-77] Camille admitted that she had secreted another cell phone because her father took their phones at night. [V. 3: T. 77] Camille said she called the police because she was afraid due to her father's alleged drunken conduct, but that the sheriff did not come. [V. 3: T. 77]

As for the cell phones, Camille said that during the week, she was not on the phone "late." [V. 3: T. 95] But on weekends, she is "on it pretty late." [V. 3: T. 95] At Lane's, she visits on weekends "so I'm on it most of the night." [V. 3: T. 95] She said her father had a problem with her phone usage and that he took the children's phones at night. [V. 3: T. 95-96] Camille allowed that Lane no longer takes their phones and that she is up late on her's when she visits. [V. 3: T. 97]

John Kimbrough was thirteen at the time of the hearing. [V. 4: T. 110] He related that his father would drink, "corner [John] up" in his room, and ask him strange questions. [V. 4: T. 110] He said his father drank enough to change and act

differently; he would get mean, question them, and cuss at Cristal. [V. 3: T. 111] John also said that most nights Lane would come home and corner Cristal in their room. [V. 4: T. 116] Sometimes his father arrived home at seven or eight, but sometimes later at ten or eleven o'clock. [V. 4: T. 116] Since his bedtime was 9:30 p.m., some nights his father got home after John went to bed and usually the children were in bed with their mother. [V. 4: T. 116]

According to John, sometimes Lane asked the children to leave; other times he and Cristal would repair to the den or living room. [V. 4: T. 117] John, too, had never heard his mother raise her voice to his father. [V. 4: T. 118]

As for the Parties' jointly acknowledged frequent arguments and Lane's alleged anger issues, Cristal claimed that anything or nothing would set him off. [V. 4: T. 124] Cristal claimed that Lane would "corner [her] up" in their bedroom to argue with her. [V. 4: T. 125] Conceding that Lane never struck her, she claimed that he would hit things in his anger, such as a pillow or the bed's headboard. [V. 4: T. 125] Cristal agreed that no police were ever summoned regarding these alleged incidents. [V. 4: T. 173-74]

Photographs submitted by Cristal show a hole or holes in sheetrock. [V. 4: T. 126; Exhibit 6-9] According to Cristal, Lane knocked the hole in the wall in July, 2007, prior to the separation in August. [V. 4: T. 125-26] On cross-examination, Cristal said that the photographs admitted were of three separate holes; she claimed that two of the holes were from the same evening, and another "indentation" happened later. [V. 4: T. 154-55] She did not see Lane make

the third "indentation" and agreed it could have had some other cause than Lane's striking the wall. [V. 4: T. 155]

According to Camille, Lane punched the wall one night because John did not want to go fishing with his father. [V. 3: T. 74] She said her father had hit the wall before, but never hard enough to make a hole. [V. 3: T. 75] Camille said that her father had never used his fist in a threatening manner before he punched the whole in the wall; after that, however, she said her father used his fist to scare. [V. 3: T. 75] She said once, in anger, he struck a couch near where she was sitting. [V. 3: T. 76]

On cross-examination, Camille said she took one of the photographs of the hole and that her mother had taken the others. [V. 3: T. 94; Ex. 6-9] Also, Camille first said that there were two wall-punching episodes, both occurring after the separation, then said the hole was put in the wall before the separation. [V. 3: T. 93-94]

Lane admitted that he had put the hole in the wall, but testified that there was only one hole depicted in three pictures. [V.4: T. 198] He explained that the marital domicile was a "manufactured home" with very thin sheetrock. [V. 4: T. 199] He did not "punch" the wall by taking a swing at it, but simply whacked it. [V. 4: T. 199] Lane said there had been no argument leading up to the hole, but that he had wanted John to go fishing with him and that John had refused. [V. 4: T. 199] Lane was alone at that end of the house at the time and no one saw him hit the wall. [V. 4: T. 200]

According to Dr. Dickerson, while Lane had come to him about his job-related discouragement and unhappiness, eventually they discussed Lane's unhappiness with the lack of affection in his marriage and related issues. [V. 3: T. 37] Lane told Dickerson that he, Lane, was so miserable he was "destructive." [V. 3: T. 31] Dickerson explained that Dickerson's use the word "destructive" in his notes did not mean that Lane was going to hurt himself or someone else, but that it meant Lane was frustrated and "fixating at an earlier level and maybe got mad and broke something. That's a very common thing that happens." [V. 3: T. 31-32]

Lane denied that he had ever struck the bed's headboard near his wife, but admitted to having "sacked" his pillow during an argument they had in bed. [V. 4: T. 200] At that point, the chancellor interjected that Cristal's claim of habitually cruel treatment had already been dismissed and that the examination should move on. [V. 4: T. 200]

And finally, with respect to "desertion" or the claims actually raised by Cristal, there is the matter of Lane's "internet porn." Lane said his leave from his job had nothing to do with drinking, porn, or anger as Cristal claimed. [V. 5: T. 210] Asked on cross-examination whether Cristal had confronted him about viewing pornography, Lane explained that on a Sunday evening, after she had been on the phone with someone from work, Cristal asked him if he had looked at pornography on the internet. [V. 5: T. 210] It is not clear from the testimony whether Cristal had been speaking with someone she worked with, or someone with whom Lane worked.



According to Lane, his response was “yeah, so what?” [V. 5: T. 211] He denied that the context of his “admission” was a remorseful confession. [V. 5: T. 211] The counselor Dickerson recalled that Lane had told him that he, Lane, was struggling with lust. [V. 3: T. 18] In context as understood by Dickerson, Lane meant he was having a “Jimmy Carter” lust-in-his-heart moment. [V. 3: T. 18]

Cristal and the Parties’ elder daughter Camille also testified about internet pornography. Camille reported that Lane was watching pornography every day. [V. 3: T. 72-73] Camille tied this to Lane’s alleged drinking; if Cristal were not at home, Lane would watch porn every day. [V. 3: T. 72] Apparently Camille was referring to the period of Lane’s leave of absence. [V. 3: T. 72-73] At any rate, she reported that when her father would fall asleep, “we went on the computer at our house, we’d pull it up and there it would be.” [V. 3: T. 72]

Cristal claimed that Lane told her he was using his computer at work to view pornography and that this was one of the reasons he took the leave of absence. [V. 4: T. 142] However, Cristal acknowledged that while she had seen pornography on the computer at the house – the context makes clear that Cristal was referring to Lane’s use of the computer, not her own – she had no evidence of Lane’s viewing porn, other than his admission to her. [V. 4: T. 149]

With respect to Lane’s grounds for divorce, Lane presented evidence of Cristal’s post-separation sexual relationship with one Jeff Graves. Cristal testified that she had known of Graves’ family, but not Jeff until he contacted the bank where she worked in September of 2008. [V. 4: T. 146] From first speaking on the

telephone with Graves in September, Cristal and Graves were engaged in a sexual relationship by December. [V. 4: T. 147]

Cristal recalled her deposition testimony from November of 2008, when she testified that she and Graves were only talking on the telephone. [V. 4: T. 161]

Cristal also recalled testifying that she had no interest, at the time of the deposition, in pursuing a romantic relationship. [V. 4: T. 161] This concession led to the following exchange at trial between Cristal and Lane's lawyer:

Q. Is there something that happened in the next couple of weeks that went from no interest to pursuing a romantic relationship and becoming sexually active with him?

A. I probably just didn't know him that well at that time.

[V. 4: T. 161]

Jeff Graves agreed with Cristal that they had been sexually active together since December, 2008, after having met in September. [V. 5: T. 238] He claimed they met through a mutual friend and, after spending time together, became friends. [V. 5: T. 239]

For his part, Lane said that even after Cristal left he had remained open to reconciliation. [V. 5: T. 201] Cristal said that she had seen Dr. Dickerson once or twice after leaving Lane and that she may have told him that the door was not closed on the marriage. [V. 4: T. 165] But she explained that she was willing to talk about it even while feeling that her marriage was over. [V. 4: T. 165] On proffer, Lane expanded this testimony by observing that he had tried to get Cristal

to attend counseling with him, and that she had done so, at least up to a point. [V. 5: T. 245] However, after he learned of Cristal and Graves' affair, he was no longer willing to reconcile. [V. 5: T. 246]

## **ARGUMENT**

### **I. The chancellor erred as a matter of law in ruling that each Party was entitled to a divorce based on their mutual fault of each having deserted the other.**

#### **A. Standard of Review**

The standards used by Mississippi's appellate courts in reviewing the rulings of chancellors in cases involving marital matters are well-settled: "In domestic relations cases, [the appellate court's] scope of review is limited by the substantial evidence/manifest error rule.' (Citations omitted) We 'will not disturb the chancellor's opinion when [it is] supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied.' (Citations omitted) However, questions of law are reviewed de novo. (Citations omitted)" *Lestrade v. Lestrade*, 49 So.3d 639, 642 ¶ 9 (Miss.App. 2010). In cases like this one, where only family members testified, each of whom may be regarded as self-interested at least to a degree, the important corollary is that the chancellor is the trier-of-fact and is the sole judge of the witnesses' credibility; appellate courts do not re-weigh testimony the court has never seen or heard. *Brumfield v. Brumfield*, 49 So.3d 138, 150 ¶ 48 (Miss.App. 2010).

**B. Mississippi law is well-settled that the statutory regime of fault does not admit the possibility for mutual fault; only the more innocent party may be granted a divorce.**

The first issue is the easiest to dispatch. The Supreme Court of Mississippi has held in an unbroken line of cases since at least 1965 that “mutual” fault grounds cannot exist in the context of our statute which requires fault to be established where that fault has been the proximate cause of the marital dissolution. As the Supreme Court has explained, “[i]n order for habitual cruel and inhuman treatment to warrant a divorce, it must be the proximate cause of the separation. (Citation omitted) The two parties cannot be both guilty and innocent of habitual cruel and inhuman treatment. The divorce laws of this State do not provide that the habitual cruel and inhuman treatment of both parties can be concurring proximate causes of the separation, entitling both to a divorce. The decree in this case is self-contradictory, and should be reversed.” *Hinton v. Hinton*, 254 Miss. 50, 54-55, 179 So.2d 846, 847-848 (Miss. 1965); see also, *Rives v. Rives*, 416 So.2d 653, 656-57 (Miss.1982)(same).

In *Hyer v. Hyer*, 636 So.2d 381, 383 (Miss. 1994), the Supreme Court observed that the “proximate cause of the separation” requirement had been limited by subsequent decisions in other fault contexts. Nevertheless, as the *Hyer* Court explained, “the two parties to a divorce cannot be both guilty and innocent of habitual cruel and inhuman treatment. In a situation where both parties are at fault, if a divorce is to be granted, the chancellor must determine which party's conduct was the proximate cause of the deterioration of the marital relationship

and the divorce itself.” In this analysis, the Supreme Court concluded that the former husband was “less at fault” and reversed the “mutual” divorce while affirming as modified the award of a divorce to the former husband. *Id.* at 384.

In *Garriga v. Garriga*, 770 So.2d 978, 983 ¶ 23 (Miss.App. 2000), the Court of Appeals said simply that “[t]here can be but one divorce granted. Where each party has requested a divorce and offers proof sufficient to establish a basis for divorce, the chancellor must then determine which of the parties will be granted a divorce.”

The chancellor erred as a matter of law in purporting to grant two divorces in a single case. That ruling can only be reversed and rendered. The slightly more difficult question is whether the Court should exercise its enormous discretion in domestic cases and modify the trial court ruling because the chancellor correctly concluded that one of the Parties demonstrated that the other’s desertion led to the demise of the marital relationship.

**II. The chancellor erred as a matter of law by *sua sponte* “amending” the pleadings to reflect the trial of a fault ground that neither party had pleaded or was on notice to prepare testimony or other evidence to meet.**

Preliminarily, the same standard of review governs this issue as the preceding one. Lane regards the answer to the question of whether the Court should modify to affirm one of the divorces granted by the trial court as ultimately easy. However, that determination can only be based on an assessment of whether the trial judge’s amendment of the pleadings to reflect the trial of desertion

grounds was correct. And second, a decision to modify to award a divorce must necessarily be based on one Party or the other actually having proved desertion. The legal standards governing “desertion” inform each of these determinations.

Amending pleadings to reflect issues not expressly pleaded but implicitly or explicitly tried by consent during the hearing is governed by Rule 15(b), Miss.R.Civ.P.: “When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.”

In this case it is incontrovertible that no pleading raised the issue of desertion, nor is there any doubt that the Parties’ were unaware they were, at least in the chancellor’s mind, trying the fault ground of desertion. Lane’s post-judgment motion expressing incredulity over the trial court’s unexpected resolution, together with Cristal’s response conceding Lane’s points, together show beyond doubt that neither party had any notice that desertion was part of the hearing.

Of course, in conjunction with Rule 15(b), trial courts are commanded to “grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings.” Rule 54(c), Miss.R.Civ.P.

At the same time the rules of civil procedure are a partial measure of what process is due parties having engaged the state's compulsory process, the rules are also bounded by other principles of due process. Generally, absent a party – or parties as the case is here – having notice of an issue upon which relief may be granted and the corresponding opportunity to be heard on that issue, the purported grant of relief on the issue is a deprivation of due process. *Massey v. Huggins*, 799 So.2d 902, 909 ¶ 26 (Miss.App. 2001), citing *Fortenberry v. Fortenberry*, 338 So.2d 806, 807 (Miss. 1976).

In the Supreme Court's seminal case of *Queen v. Queen*, 551 So.2d 197, 200 (Miss. 1989), the Court explained that if a party offers proof on an issue not pleaded, then the other party may object and demand that the evidence be excluded. "Nothing in the Mississippi Rules of Civil Procedure alters this rule of fundamental fairness. (Citations omitted) Rule 15(b), Miss.R.Civ.P., is nothing more than a rule of waiver. Where a party offers no timely objection, we treat the issue as having been tried by implied consent."

Consequently, in some measure the search for the answer to the question whether the issue of desertion was tried turns on actual or constructive waiver; an act or actions of an evidentiary nature signaling the parties' awareness that such waiver was occurring. Or as the Court of Appeals has observed, "It is not enough that evidence was introduced which would have supported such a claim, had it been made. The issue, in some form, must have been presented before the chancellor and [the Parties]." *King v. King*, 946 So.2d 395, 401 ¶ 15 (Miss.App.

2006), citing *Alexander v. Womack*, 857 So.2d 59, 62 ¶ 13 (Miss.2003).

Whether there was knowing acquiescence in proving desertion requires an examination of the legal standard governing that fault ground. Only by knowing what facts or set of facts the legal standard makes relevant can the Court possess a reasonable yardstick for measuring whether sufficient direct evidence of desertion was presented by the Parties unequivocally to indicate waiver. Miss. Code Ann. § 93-5-1 provides, as the fourth fault-based ground for divorce, “Willful, continued and obstinate desertion for the space of one (1) year.” The statute elaborates no further, but no case has been found referring to these terms as by any means ambiguous.

“Willful” carries its ordinary meaning in the statute: “deliberate, voluntary, intentional.” *Random House Dictionary of the English Language*, 2<sup>nd</sup> Ed., unabridged. “Continued” refers to lasting or enduring circumstance proceeding without interruption. *Id.* And “Obstinate” generally means an “inflexible persistence or an unyielding attitude.” *Id.*

The cases give some examples. For “obstinate” we have the lesson of Mr. Mclemore who, while acknowledging he was not averse to rejoining his spouse, was unwilling to promise that he had “freed” himself of an “trouble” having led to the parties’ separation. As Justice Griffith remarked, “the condition required by the wife as a prerequisite for forgiveness of the desertion . . . was, to say the least, a reasonable one, and the husband should have followed it up by some dependable showing made to her, either that he had never been in such trouble, or else that he



had in truth and in fact permanently and absolutely rid himself of it . . . . This he did not do nor attempt to do . . . .” *Mclemore v. Mclemore*, 173 Miss. 765, 768, 163 So. 500 (Miss. 1935); see also, *Criswell v. Criswell*, 254 Miss. 746, 182 So.2d 587 (Miss. 1966)(the rejection of reconciliation overtures may change the character of a separation to one of desertion).

Desertion requires absence or separation and an intent by the deserting party not to return. *Fulton v. Fulton*, 36 Miss. 517, 528 (Miss. Err.&App. 1858). However, the Supreme Court cautioned over a century ago that desertion “may be as complete under the same shelter as if oceans rolled between.” *Graves v. Graves*, 85 Miss. 677, 41 So. 384 (1906).

Similarly, “separation” or desertion by severing the most instinctual marital bond – that of sex – was explored in *Tedford v. Tedford*, 856 So.2d 753, 757 ¶ 17 (Miss.App. 2003). As the *Tedford* Court noted, the inexcusable and enduring refusal of sexual relations justifies a divorce, either on the ground of desertion or habitual cruel and inhuman treatment. *Sarphie v. Sarphie*, 180 Miss. 313, 319, 177 So. 358, 359 (1937). To grant a divorce on grounds of habitual cruel and inhuman treatment for refusal of sexual relations must be “extreme.” *Id.* The *Tedford* Court commented that it had previously determined that a year and a half without sex was not extreme enough to meet the test for habitual cruel and inhuman treatment. *Shorter v. Shorter*, 740 So.2d 352, 357 ¶ 29 (Miss.App.1999).

In sum, “The prerequisites for desertion are separation without fault on the [part of the spouse alleging desertion], and willful abandonment of [that spouse]

by [the other] with refusal to support . . .” *King v. King*, 246 Miss. 798, 804, 152 So.2d 889, 892 (1963), citing *Etheridge v. Webb*, 210 Miss. 729, 743, 50 So.2d 603 (1951).

The most obvious kind of desertion is that of physical separation lasting an uninterrupted year. That did not happen in this case. Nor, according to both parties, were there unequivocal rejections of physical intimacy for more than one year. Lane said their last intimate time together was April prior to the August separation. Lane testified that he was willing to seek reconciliation until he learned of Cristal’s extramarital relationship. Both Parties participated in counseling sessions, together and separately, with Carl Dickerson within one year of Cristal’s leaving the marital domicile. None of these facts suggest that either party had altogether abandoned the marriage for a period of a year. These facts eliminate the statutory elements: intention to part ways, obdurate refusal to reconcile, which situation endured uninterrupted for one year.

Nor is there any evidence that Lane or Cristal failed to support each other or their children for the period of one year. Prior to Lane’s leave of absence, both Parties worked to support their family. As noted *supra*, there is no evidence whether Lane’s leave was with or without pay, but there is evidence that he worked to clear land damaged by Hurricane Katrina which was owned by Cristal’s father and that he was paid for these efforts. Clearer is the fact that Cristal was the family’s treasurer who kept the checkbooks while Lane did not have so much as a debit card.

There is no evidence that either Cristal or Lane was intentionally separating from the other – else they might not have had so many arguments. There is nothing about the evidence recited in this brief, or other similar facts contained in the record, to suggest that these Parties were engaged in anything else by an American tragedy, the slow and mysterious dissolution of a marriage. They both recalled that they did not used to argue so much. They knew that not so long ago they had a satisfying sexual partnership.

The evidence of Lane's alleged excessive drinking, anger, and internet pornography viewing was tailored for either showing an habitually cruel environment or habitual drunkenness. From a theoretical perspective, tailored differently Cristal's evidentiary offerings might also have supported a claim of constructive desertion.

The standard for constructive desertion has been repeatedly stated as: "If either party, by reason of such conduct on the part of the other as would reasonably render the continuance of the marital relationship unendurable, or dangerous to life, health or safety, is compelled to leave the home and seek safety, peace and protection elsewhere, then the innocent one will ordinarily be justified in severing the marital relation and leaving the domicile of the other, so long as such conditions shall continue, and in such case the one so leaving will not be guilty of desertion. The one whose conduct caused the separation will be guilty of constructive desertion and if the condition is persisted in for a period of one year, the other party will be entitled to a divorce." *Benson v. Benson*, 608 So.2d 709

(Miss. 1992), citing *Griffin v. Griffin*, 207 Miss. 500, 505, 42 So.2d 720, 722 (1949); *Day v. Day*, 501 So.2d 353 (Miss.1987); *Grant v. Grant*, 765 So.2d 1263, 1267 ¶ 10 (Miss.2000).

There are several impediments to analyzing the facts presented as indicating the Parties knowingly tried the issue of desertion. First, one of the Parties' behavior would have had to be of a nature to make the marriage either unendurable or dangerous to life, health or safety, and that for the period of a year. Cristal and the two elder children did not testify that their home life was "unendurable." To the contrary, they did endure what they testified was Lane's purported noisy rampages until the early morning hours every day.

Cristal, Camille, and John said they were sometimes afraid of Lane, but not that they thought he was dangerous to them. Cristal and Camille also brought up Lane's viewing of internet pornography. But neither testified that it made them feel unsafe or created an environment that decent persons should not endure. To the contrary, like Lane's drinking it was something he attempted to keep private. Lane admitted that one of his problems at the job he left was his lack of facility with computers. Evidently he did not realize that Camille only had to go look it up on the computer by clicking the history tab on the internet browser. And Cristal had no evidence at all about the nature or extent of Lane's viewing of pornography.

This seems a telling omission where she was able to make photographs of a hole or holes in the sheetrock and beer cans strewn around the grounds of the

house prior to her departure. It is difficult to argue that one able to take pictures cannot also print a computer's recent internet history.

And to these observations there is one other that cannot be avoided: the chancellor discounted all of the conflicting testimony regarding Lane's drinking, anger management, and pornography viewing. As stated *supra* – and also a proposition scarcely in need of a citation – unless and until Mississippi invests in a complete audio-visual recording of every trial, chancellors remain the sole arbiters of witnesses' credibility for they are the only judge who sees the witness in the full panoply of court process.

For this case, that has two crucial implications. First, as stated *supra*, as a matter of due process it does not suffice for a chancellor to refer to incidental evidence that might partly support a claim, had it been made, in "amending" the pleadings or rendering fair judgment whether or not the relief was requested. It is the actual issue, presented in the fullness of an evidentiary hearing, that heralds a party's knowing acquiescence in the trial of that issue. *King*, 946 So.2d at 401 ¶ 15.

Second, as the recital of the constructive desertion standard used in Mississippi reflects, there is a clear connection between constructive desertion and habitually cruel treatment. The Court of Appeals has explained the distinction this way: "As noted by one commentator, 'the line between the heretofore seldom used ground of constructive desertion and the ground of habitual cruel and inhuman treatment [is] blurred' with the only distinction being that in the former, the non-

complaining party is compelled to leave and the objectionable conduct continues for one year.” *Hoskins v. Hoskins*, 21 So.3d 705, 710 ¶ 21 (Miss.App. 2009), citing *Shorter v. Shorter*, 740 So.2d 352, 358 ¶ 29 (Miss.App.1999), quoting Shelton Hand, Jr., Mississippi Divorce, Alimony and Child Custody, § 4, n. 71 (4<sup>th</sup> ed. 1996).

In *Hoskins*, the chancellor had, as here, found that the spouse claiming habitual cruelty had failed to prove the claim. Consequently, the spouse claiming cruelty grounds necessarily failed to prove constructive desertion grounds because constructive desertion merely adds the requirements that the unendurable conduct continued for one year and that the spouse was forced to leave. In *Hoskins*, as here, Cristal’s failure to demonstrate habitual cruelty fails the threshold of proving constructive desertion.

Lane denies and disavows that he ever made any attempt to try by implication the issue of desertion. That remains the sole machination of the former chancellor. The Court should reverse or vacate the trial court’s ruling in its entirety and either dismiss the case here, or remand with instructions that the case should be dismissed for the Parties’ failure to prove fault grounds.

**III. Alternatively, Lane proved that Cristal and her paramour were engaged in a sexual relationship while the Parties remained married to one another.**

This issue also is governed by the ordinary standard of review presented in the other two issues. It is probably no secret to the Court that some chancellors, like the recently retired chancellor having served in this case, do not like the rule

that post-separation adultery may constitute grounds for divorce. Nor, reciprocally, is it any surprise to chancellors that most appellate courts prefer to overrule their own cases.

Regardless of how this works out over time, Mississippi's appellate courts have remained steadfast that post-separation adultery may stand as grounds for divorce. *Talbert v. Talbert*, 759 So.2d 1105, 1110 ¶ 14-16 (Miss. 1999). As the *Talbert* Court explained, "In authorizing a divorce on grounds of adultery, the Legislature has not required that the adultery cause a separation. See Miss.Code Ann. § 93-5-1 (1994). Indeed, '[i]t shall be no impediment to a divorce that the offended spouse did not leave the marital domicile or separate from the offending spouse on account of the conduct of the offending spouse.' *Id.* § 93-5-4." *Id.* at 1110 ¶ 14.

As that Court continued, "We find it judicially unsound to apply law governing divorce upon grounds of habitual cruel and inhuman treatment to an issue of adultery, because of the nature of these very different grounds for divorce. A single act of cruelty is usually insufficient to sustain a divorce, while a single act of uncondoned adultery is sufficient. However, even the case law applicable to divorce upon grounds of habitual cruel and inhuman treatment indicates that the offending conduct need not be causally related to the separation. Nothing in our jurisprudence requires that a ground for divorce, such as adultery, arise before separation." *Id.* at 1110-11 ¶ 16.

The justification for this rule – aside from there being no positive command

otherwise in the statutes or cases – is that even in cases of habitual cruelty, the cruelty relates as much to physical impacts as it may to being the actual cause of the separation. Hence the analysis into a fault ground of divorce focuses on both the conduct of the offending spouse and the consequences of that conduct on the innocent spouse. *Id.* at 1110 ¶ 15.

In this case, the evidentiary standard necessary to prove adultery – clear and convincing evidence – need not detain us inasmuch as Cristal and her paramour admitted to their adultery. Consequently, under *Talbert*'s straightforward command, the only remaining inquiry is the affect their adultery had on Lane.

Lane testified that he desired to reconcile prior to learning of his wife's adultery. After learning of Cristal and Graves' relationship, Lane is no longer interested in any reconciliation with Cristal. The Court should reverse or vacate the trial court ruling and render a judgment here awarding Lane a divorce, or remand to the trial court with instructions to enter a judgment of divorce on grounds of adultery in Lane's favor.

#### **IV. Conclusion**


The chancellor's ruling on a ground neither party pleaded or had notice of trying can only be vacated or reversed. The Court should either render judgment here and dismiss the case, or remand with instructions to dismiss. Alternatively, the Court should hold that Lane proved fault grounds and either render judgment here, awarding Lane a divorce on the grounds of adultery, or remand with instructions to the trial court to enter a judgment of divorce to Lane on the grounds




of adultery.

Respectfully submitted,


J. LANE KIMBROUGH

By:   
T. Jackson Lyons, Appellate Counsel  
to Mr. Kimbrough

Of Counsel:

T. Jackson Lyons  
T. JACKSON LYONS & ASSOCIATES, P.A.  
P.O. Box 4690  
Jackson, Mississippi 39296  
Tel. (601) 969-0731  
Email [appealsinms@bellsouth.net](mailto:appealsinms@bellsouth.net)  
MSB 

and

David E. James  
JAMES & O'BRIEN FAMILY LAW GROUP  
P.O. Box 2623  
Ridgeland, Mississippi 39158  
Tel. (601) 952-0050  
MSB 

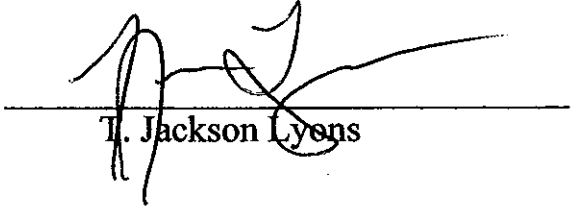
**CERTIFICATE OF FILING AND SERVICE**

The undersigned counsel of record hereby certifies that the above and foregoing Appellant's Principal Brief, together with the required electronic and paper copies, has been filed with the Clerk of the Court by personal deposit of the undersigned into the United States mail, first-class postage prepaid. Copies have also been served upon the following addressees:

Hon. Joe Dale Walker  
Chancellor for the 13<sup>th</sup> District  
P.O. Box 909  
Monticello, Mississippi 39654

Mr. Stanley A Sorey  
Sorey & Sorey  
P. O. Box 861  
Raleigh, Mississippi 39153-0861

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

  
\_\_\_\_\_  
T. Jackson Lyons