

2011.11.11

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

TERESA DE JESUS ZWEBER, APPELLANT

VS.

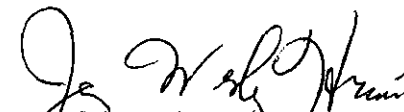
EVERETT CHARLES ZWEBER, APPELLEE

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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Teresa De Jesus Zweber
2. Everett Charles Zweber
3. Jerry Wesley Hisaw, Attorney of Record for Appellant/Cross-Appellee
4. Adam A. Pittman, Attorney of Record for Appellee/Cross-Appellant
5. Mary Lee Walker Brown, Trial Counsel for the Appellant/Cross-Appellee
6. Tracy Buster Walsh, Trial Counsel for Appellee/Cross-Appellant
7. Honorable Mitchell M. Lundy, Jr., Chancellor

THIS 29th day of April, 2011.


JERRY WESLEY HISAW

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

TERESA DE JESUS ZWEBER, APPELLANT

VS.

EVERETT CHARLES ZWEBER, APPELLEE

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STATEMENT OF THE ISSUES

(1) The chancellor properly only awarded Mr. Zweber a portion of his attorney's fees.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition

This is an appeal from the Order Denying Motion for Reconsideration and/or Motion for a New Trial and Order Granting Rule 60 Motion entered on October 4, 2010 in the Chancery Court of DeSoto County, Mississippi from a Judgment entered on August 4, 2010 determining issues raised by Appellee, Everett Charles Zweber (hereafter Mr. Zweber) and the Appellant, Teresa De Jesus Zweber (hereafter Teresa).¹ Mr. Zweber filed a Petition for Citation of Contempt and Modification of Decree and Child Support on October 21, 2009 seeking to have Teresa held in contempt for alleged payments due for college expenses on a clause from the Final Judgment of Divorce which only covered meals, tuition, books and room expenses for college of the minor children. (R.169). Mr. Zweber additionally sought an increase in the amount of child support he was being paid by Teresa for the minor child in his custody.² Mr. Zweber also sought attorney's fees and all court costs.

Teresa filed her Answer and Counterclaim to Petition for Citation of Contempt and Modification of Decree and Child Support on December 11, 2009 (R. 178), in which she stated that the amounts Mr. Zweber requested were not covered by the Final Judgment of Divorce. She also argued that the prior chancellor had already ruled that the Final Judgment of Divorce covered only meals, tuition, books, and room (R. 179). Teresa also filed a counterclaim for contempt against Mr. Zweber for not paying the vested college expenses of Daniel, who is in her

¹ Citations to the Record are designated as (R. __), the Transcript of Testimony as (Tr. __) and Exhibits as (Ex. __).

² At the hearing during the original divorce, Teresa obtained custody of the parties minor child Daniel Everett Zweber (hereafter Daniel) who was born on April 29, 1988 who had turned twenty-one (21) at the time of this contempt hearing and Mr. Zweber obtained custody of Lindsey Arianna Zweber (hereafter Lindsey) born on November 26, 1991 in a factually unique case.

custody, and a request for a determination regarding certain retirement amounts that were to be due from Mr. Zweber. (R. 179-180).

Following the trial on May 6, 2010, the Chancery Court issued a bench ruling on June 2, 2010 and entered its Judgment on August 4, 2010. (Tr. 131-140 and R. 222-223).

The chancellor held Teresa in contempt for the nonpayment of college expenses comprising the considerable sums needed to pay for private flying lessons Lindsey took prior to entering college. The chancellor interpreted the Final Judgment of Divorce to cover anything related to the college expenses of the minor children, including the private flying lessons. The chancellor awarded Mr. Zweber a total judgment of Eight Thousand Five Hundred Seventy-Three Dollars and Fifty-Three cents (\$8,573.53) which included alleged college expenses in the amount of Five Thousand Five Hundred Seventy-Three Dollars and Fifty-Three cents (\$5,573.53), Two Thousand Dollars (\$2,000.00) in attorney's fees for the alleged contempt, and an additional One Thousand Dollars (\$1,000.00) for Mr. Zweber's Motion to Compel Discovery. The chancellor declined to hold Mr. Zweber in contempt for not paying Daniel's college expenses, and he did rule on the issue of the retirement accounts due to Teresa.

Teresa obtained new counsel on August 12, 2010 and filed a Motion for Reconsideration and/or a New Trial Pursuant to Rule 59 of the Mississippi Rules of Civil Procedure and Rule 60(b) Motion to Strike a Portion of the Final Judgment of Divorce along with various other pleadings. (R. 224-244). On October 4, 2010 the chancellor entered an Order Denying the Motion for Reconsideration and/or Motion for a New Trial and Order Granting Rule 60 Motion. (R. 255-256). The chancellor refused to modify his ruling regarding his interpretation of the Final Judgment of Divorce or the other factual findings of the court regarding alleged contempt and discovery issues. However, the chancellor did find that the last sentence of Paragraph 9 of

the parties Final Judgment of Divorce was void as a matter of law and could be attacked at any time. As a result, the chancellor struck the language from the Final Judgment of Divorce that stated: "This obligation shall continue even if the child is over twenty-one (21) years of age prior to the completion of college." (R. 255-256).

Aggrieved, Teresa now appeals the Chancery Court Judgment and Mr. Zweber also filed a cross-appeal.

B. Statement of the Facts

Teresa and Mr. Zweber were divorced on August 31, 2005. The parties have two children: Daniel Everett Zweber (hereafter Daniel), born on April 29, 1988 and twenty-one (21) years old at the time of this contempt hearing; and Lindsey Arianna Zweber (hereafter Lindsey), born November 26, 1991 and eighteen (18) at the time of the contempt hearing. Unusually, the court awarded physical custody of Daniel to Teresa and physical custody of Lindsey to Mr. Zweber. (R. 56-92). For reasons not disclosed in the record, a family master heard the case instead of the chancellor, though each of them ultimately signed the Final Judgment of Divorce.

On February 15, 2007, Mr. Zweber filed a Petition for Termination of Child Support. (R. 107). On July 29, 2007, Teresa filed a Petition to Cite for Contempt and Other Relief. (R. 110). Mary Lee Walker Brown was still serving as counsel for Teresa. Upon advice from the court, Mr. Zweber conceded he was in contempt of court and an Agreed Order was entered which was dispositive of the case. (R. 164-165).

Following that unsuccessful 2007 Petition, on October 21, 2009 Mr. Zweber filed his Petition for Citation of Contempt and Modification of Decree and Child Support, seeking an increase in child support and alleging that Teresa was in contempt for amounts covered by the

divorce decree. (R. 169). In her answer, Teresa argued that the amounts of college-related support that Mr. Zweber sought were not covered by the divorce decree, and that the court had previously advised as such. (R. 179-180).

This litigation concerns the interpretation of the following language from the divorce decree:

“The Husband and Wife shall each be required to pay for the costs of the minor children, with Husband paying two-thirds (2/3) of the expense and Wife paying one-third (1/3) of the expense, based on the costs of the child attending college at a four year state supported institution in such state as the child is a resident of. All costs are to be based on the average cost of meals, tuition, books and room, published in a state supported school catalog and not to exceed the costs of a four year state supported institution.”

During the course of the litigation, various discovery disputes broke out between the attorneys. The parties filed dueling motions to compel. (R. 202, 208). In an unusual twist, the chancellor denied Teresa’s motion to compel in its entirety, despite the fact that the expenses of each party are relevant for determining college support amounts. The chancellor then granted Mr. Zweber’s motion to compel only to the extent that Teresa had to produce five months of credit card statements which had no balance. R. (219-220). The chancellor went on to direct both parties to supplement their discovery, which he found deficient. This decision was unusual in that the parties had already swapped financial declarations in discovery, and Teresa’s no-balance credit card statements had no discovery value. (R. 213).

The chancellor held Teresa in contempt for the nonpayment of Lindsey’s college expenses, specifically private flying lessons which she took **prior to entering college** and for which she received no college credit. The chancellor interpreted the Final Judgment of Divorce to cover anything necessary for the college expenses of the minor children of the parties with no

scope or restrictions. The chancellor awarded Mr. Zweber a total judgment of Eight Thousand Five Hundred Seventy-Three Dollars and Fifty-Three cents (\$8,573.53) which include college expenses in the amount of Five Thousand Five Hundred Seventy-Three Dollars and Fifty-Three cents (\$5,573.53). Two Thousand Dollars (\$2,000.00) in attorney's fees for prosecuting the alleged contempt of Ms. Zweber in not paying college expenses, and an additional One Thousand Dollars (\$1,000.00) for a Motion to Compel Discovery that Mr. Zweber filed. The chancellor declined to hold Mr. Zweber in contempt for not paying Daniel's college expenses nor did he make any ruling regarding the retirement accounts due to Teresa. However, the chancellor did note that Mr. Zweber was in contempt for interfering with Teresa's visitation with Lindsey. (R. 139). As Mr. Zweber was in contempt for the visitation issues and since Mr. Zweber was unsuccessful on his attempt to increase child support, the chancellor ordered Teresa to pay Mr. Zweber \$2,000.00 in attorney's fees, which represented the fees incurred by him to enforce the nonpayment of college expenses.

SUMMARY OF THE ARGUMENT

The chancellor properly separated the attorney fees regarding Teresa's contempt for the nonpayment of college expenses from fees related to Mr. Zweber's motion to compel, motion to increase child support, and his defense of Teresa's counterclaim. From reviewing the record, the chancellor also makes the statement regarding Mr. Zweber's compliance with court ordered visitation to show that Mr. Zweber created a large portion of this litigation and attorney's fees associated therewith himself due to his history with Teresa. The chancellor is in a better position than the Court to judge the veracity of witnesses and credibility of evidence. If the trial court's analysis of the contempt is correct, the trial court properly apportioned the fees awarded to Mr. Zweber to show only the fees necessary for the contempt proceeding.

ARGUMENT

STANDARD OF REVIEW

"[T]he matter of determining attorney's fees in a domestic action is largely entrusted to the discretion of the chancellor." *O'Neill v. O'Neill*, 501 So. 2d 1117, 1119 (Miss. 1987). The Courts are "reluctant to disturb a chancellor's discretionary determination [of] whether or not to award attorney fees and of the amount of the award." *Geiger v. Geiger*, 530 So. 2d 185, 187 (Miss. 1988).

In the field of domestic relations, the law regarding attorney's fees is well-settled. Absent a finding of contempt or an inability to pay, an award of attorney's fees is not appropriate. *Voda v. Voda*, 731 So.2d 1152, 1157 (¶ 29) (Miss. 1999), *Mount v. Mount*, 624 So. 2d 1001, 1005 (Miss. 1993).

Contrary to Mr. Zweber's assertions, he filed two claims, one for an increase in child support and another for contempt. (R. 169). As Mr. Zweber appears to concede in his brief, he did not come to this litigation with clean hands because he withheld visitation with their daughter from Teresa.

The trial court separated attorney's fees into four categories: contempt, motion to compel, funds expended in attempting to increase in child support, attorney's fees spent defending Teresa's counterclaim. Teresa would incorporate her arguments by reference contained in her original brief and reply brief on direct appeal in stating that Mr. Zweber was not entitled to any attorney's fees. Mr. Zweber provided no evidence as to his attorney fees related directly to the contempt charge against Teresa. What he did present was a lump sum invoice for all attorney's

fee incurred on the entire matter as a whole. In reviewing the invoices, it is abundantly clear that a large portion of the fees were incurred for the motion to compel, attempting to increase Teresa's child support obligation, and defending Teresa's counterclaim.

While an award of attorney's fees in a contempt case is proper, it is largely entrusted to the sound discretion of the chancellor." *In re Hampton*, 919 So.2d 949, 958(¶ 36) (Miss.2006). The chancellor properly reviewed the invoices and apportioned out only those fees concerning the contempt issues against Teresa. The chancellor also noted that Mr. Zweber's hands were not clean because he did not ensure that Lindsey complied with the court's visitation order. "It is one of the oldest and most well known maxims that one seeking relief in equity must come with clean hands or face refusal by the court to aid in securing any right or granting any remedy." *R.K. v. J.K.*, 946 So.2d 764, 774 (¶24) (Miss. 2007).

Our Supreme Court has held that "[t]he maxim should be applied by the court sua sponte where it is shown to be applicable." *Brennan v. Brennan*, 605 So.2d 749, 752 (Miss. 1992)(emphasis added). This doctrine has broad application and has been found to apply on numerous occasions by our courts where the party seeking relief has engaged in fraudulent conduct. *See Collins v. Collins*, 625 So.2d 786, 789 (Miss. 1993); *Cain v. Thomas*, 373 So.2d 812, 814 (Miss. 1979); *Willenbrock v. Brown*, 239 So.2d 922, 925 (Miss. 1970); *Ellzey v. James*, 970 So.2d 193, 196 (¶14) (Miss. Ct. App. 2007); *see also Goodwin Motor Corp. v. Mercedes-Benz of N. Am., Inc.*, 411 A.2d 1144, 1148 (N.J.Super.Ct.App.Div. 1980) (applying the clean-hands doctrine to bar corporation from intervening where principals of corporation deliberately misled court from initial stages of litigation).

Based upon the record as a whole, the chancellor properly apportioned the fees regarding Teresa's alleged contempt. The chancellor observed that Mr. Zweber's own behavior

substantially contributed to the need for litigation and its associated costs. As our Supreme Court has noted, fees awarded on the basis of contempt should not exceed the expense incurred as a result of the contemptuous conduct. *Hanshaw v. Hanshaw*, 55 So.3d 143, 148 (¶17) (Miss. 2011). The chancellor is in "a better position than the Court to judge the veracity of witnesses and credibility of evidence." *Lee v. Lee*, 798 So.2d 1284, 1291 (Miss. 2001).

CONCLUSION

Teresa strongly disagrees with the trial court's decision to hold her in contempt for the nonpayment of college expenses. But if this Court finds the trial court was correct in its analysis on that point, the Court was correct to assess against her only the attorney fees Mr. Zweber expended related to the contempt charge in the amount of \$2,000.

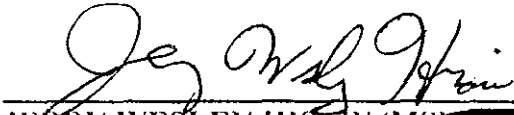
WHEREFORE, PREMISES CONSIDERED. Teresa De Jesus Zweber respectfully prays to this Court to affirm the chancellor's award of partial attorney's fees in the event this Court finds the trial court was correct in its analysis regarding contempt. Teresa De Jesus Zweber further prays that she be awarded her attorney's fees and court costs and any and all other relief as this Court may deem just and proper.

This the 29th day of April, 2011.

Respectfully submitted,

TERESA DE JESUS ZWEBER

By:


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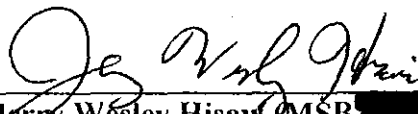
CERTIFICATE OF SERVICE

I, Jerry Wesley Hisaw, hereby certify that I have this day served by United States first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Cross-Appellee on Cross-Appeal to:

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SO CERTIFIED, this the 29th day of April, 2011.


Jerry Wesley Hisaw (MSB [REDACTED])
Certifying Attorney