IN THE SUPREME COURT OF MISSISSIPPI

TERESA DE JESUS ZWEBER — APPELLANT/CROSS-APPELLEE

VS — NO. 2010-CA-01629

EVERETT CHARLES ZWEBER — APPELLEE/CROSS-APPELLANT

APPEAL FROM THE CHANCERY COURT
OF DESOTO COUNTY, MISSISSIPPI

BRIEF OF APPELLEE/CROSS-APPELLANT

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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) Honorable Mitchell M. Lundy Jr., Chancellor
4) Adam A. Pittman, Attorney for Appellee/Cross-Appellant
5) Jerry Wesley Hisaw, Attorney for Appellant/Cross-Appellee
6) Tracy Buster Walsh, Trial Counsel for Appellee/Cross-Appellant
7) Mary Lee Walker Brown, Trial Counsel for Appellant/Cross-Appellee

RESPECTFULLY SUBMITTED, this the 20 day of April, 2011.

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STATEMENT OF CASE

1. NATURE OF CASE

This is an appeal by the Appellant (hereinafter referred to as Teresa) from the entry by the Chancery Court of DeSoto County, Mississippi of that Order Denying Motion for Reconsideration and/or Motion for New Trial and Order Granting Rule 60 Motion entered October 4, 2010 as well as that Judgment entered on August 4, 2010. This is also a cross-appeal from the DeSoto County Chancery Court's August 4, 2010 Judgment.

2. COURSE OF PROCEEDINGS

Pursuant with Mississippi Rule of Appellate Procedure 28(b) the Appellee (hereinafter referred to as Charles) does hereby make a statement regarding the course of proceedings only with regard to those portion's of Teresa's "Course of Proceedings" that he is dissatisfied with.

First Teresa states that Charles' Petition for Citation of Contempt and Modification sought to find her in contempt for non-payment of college expenses "on a clause from the Final Judgment of Divorce which only covered meals, tuition, books and room expenses". (Appellant's Brief 3) This statement is argumentative and misstates one of the underlying issues of the case. Although Charles' Petition did request that Teresa be held in contempt for her failure to pay their child's college expenses, the characterization of what the Final Judgment considered to be "college expenses" was obviously at issue, and therefore Teresa's faulty conclusion as to the meaning of that clause is misleading.

Next Teresa states that the Chancellor, in his ruling, found Teresa in contempt for nonpayment of college expenses including flying lessons, and that he interprets the Final Judgment to cover "anything necessary for the college expenses of the minor children with no scope or restrictions." (Appellant's Brief 4) This statement is a mischaracterization of the Chancellor's ruling and is not supported by the record. To begin with the Chancellor found Teresa to be in contempt because of how she paid (or didn't pay) her daughter's college expenses (Tr. 134-135) Instead of paying the college expenses incurred by her daughter when she received notice of those expenses, Teresa unilaterally decided how much she would pay and then made monthly payments toward that amount even though she had the funds available to pay them "all at one time". As such the contempt came from her implementing a "payment schedule." In the words of the Chancellor "that's not what the Divorce Decree says." (Tr. 134-135)

As to the assertion that the Chancellor interprets the Final Judgment to cover anything necessary for college without restriction there is simply no statement in the record that supports such an assertion. The Chancellor does make a finding that the flight lesson expenses are to be considered a necessary college expense for the parties' daughter (Tr. 135) however there is nothing else stated by the Chancellor that could be considered as interpreting the scope of what would or could later be considered a "college expense" other than to refer to the flying lessons as being "necessary for (the daughter) to get her degree" (Tr. 136)

3. STATEMENT OF RELEVANT FACTS

Pursuant with Mississippi Rule of Appellate Procedure 28(b) Charles does hereby make a statement of the facts only with regard to those portion's of Teresa's "Statement of the Facts" that he is dissatisfied with.

Teresa first claims that, following the parties' first round of post-divorce litigation Charles "conceded he was in contempt of court" and the matter was resolved with the entry of an Agreed Order. (Appellant's Brief 5) A review of the Agreed Order entered by the trial court on April 7, 2008 finds neither a concession nor a finding that Charles was in contempt. (R. 164-165)

Teresa then goes on to discuss issues regarding discovery "problems" which preceded the trial. (Appellant's Brief 6) Teresa makes certain statements ("credit card statements which had no balance" & "Teresa's no-balance credit card statement had no discovery value") which are not supported anywhere in the record. We have no transcript of the hearing on the parties' respective Motions to compel or Teresa's Motion for Protective Order, nor do we have the credit card statements. As such Teresa's self serving statements should be struck to the extent that they are not supported by the record.

Teresa finally turns to the Chancellor's ruling, and as she did in her "Course of Proceedings" she misstates and mischaracterizes the ruling. Teresa begins with the statement that she was found to be in contempt for "the nonpayment of Lindsey's college expenses, specifically private flying lessons". (Appellant's Brief 6) As stated above, the Chancellor found Teresa to be in contempt for her payment of college expenses by a

"payment plan" which she unilaterally imposed, and only took the flying lessons into consideration when determining the amount Teresa should have paid. (Tr. 134-135)

Teresa also indicates that the Chancellor interprets the Judgment of Divorce to cover "anything necessary for the college expenses of the minor children of the parties with no scope or restrictions" (Appellant's Brief 6) As stated above Chancellor does indicate that he considered the flying lessons to be necessary for the daughter to achieve **her degree** (Tr. 136) but makes no other statements or findings as to the scope of the parties respective responsibilities to pay college expenses.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. The Chancellor, while properly awarding Charles attorney fees for having to prosecute Teresa's contemptuous behavior, considered matters that were not properly and fully presented to him in determining the amount of the award. As such the Chancellor abused his discretion in making only a partial award of those attorney fees incurred by Charles in the prosecution of Teresa's contempt.

ARGUMENT ON APPEAL

STANDARD OF REVIEW

Although the different standards of review as stated by the Appellant are substantially correct, several clarifications will only be noted in the responses to his arguments below as needed.

1. **The Chancellor committed no error in his determination of what constituted "college expenses" as that term was used in the Final Decree of Divorce.**

Teresa begins her argument on this issue with a correct statement that when reviewing a Chancellor's interpretation of a divorce judgment the standard for such a review shall be *de novo*. Meek v. Warren, 726 So.2d 1292 (Miss.Ct.App.1998) The Court in Meek was similarly requested to review a Chancellor's interpretation of a clause in a divorce judgment that required the ex-husband to pay "all educational expenses" incurred by the parties child. Unlike this case, the parties in Meek had entered into a property settlement agreement that was subsequently incorporated in the divorce decree. In their settlement agreement (and therefore also in the decree) the parties stated that the ex-husband would be responsible for the payment of all educational expenses "including the expenses incurred by the minor child in obtaining such appropriate college and professional degrees as the child may choose." Meek at 1293 (¶1) The Chancellor, in the underlying post-divorce matter, determined that the ex-husband should continue to pay tuition, room, board, books and lab fees. In affirming the Chancellor's interpretation of the divorce decree the Court found that "lab fees" included all those additional, miscellaneous fees and supplies required for the successful completion of the child's studies, noting "In this day and age one would encounter great difficulties in completing post-graduate course work without, for example, the benefit of a personal computer." Meek at 1294 (¶4)

With the Meek case to contrast with our own, the provision of the Final Judgment of Divorce under consideration states, in whole, as follows:

> The Husband and Wife shall each be required to pay for the cost of the minor children, with the Husband paying two-thirds (2/3) of the expense and the Wife paying one-third (1/3) of the expense, based on the cost 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 costs of meals, tuition, books and room, published in a state supported school catalog and not to exceed the cost of a four year state supported institution. This obligation shall continue even if the child is over twenty-one (21) years of age prior to the completion of college.

(R. 62)

Teresa, in her argument, incorrectly focuses upon only the second sentence of the provision. However if we are truly seeking to determine the intent of the trial Court we must look at the entire provision, and when that is done the question of what was intended by "cost" becomes unclear. The first sentence of the provision appears to indicate that the parties are responsible for the "expense" of each child attending college, designates the parties respective share of the "expense", and then limits (or bases) the "cost" to that of a four year state supported college in the state of the child's residence. Teresa argues that the second sentence (read without reference to the first) clearly limits the costs of college to only meals, tuition, books and room. (Appellant's Brief 10-12) On the other hand, it could also be argued that the second sentence, when read in totality with the rest of the provision, seeks only to place a limit upon those specific costs incurred for meals, tuition, books and room and does not seek to limit the total college "expenses" to only those four things. If the Court had intended for the college "expenses" to be limited to the costs of meals, tuition, books and room then these items would have been in the first sentence of the provision in which the Chancellor placed the responsibility upon the parties. In other words, had the Chancellor intended what Teresa argues, then the first sentence would have said "the parties shall pay the costs of meals, tuition, books and room incurred by the child in attending college" instead of merely saying that the parties are required to pay the

"expense" of college. But if there is any question as to what the judge intended we are blessed with some guidance.

As recognized by Teresa in her Brief, in construing Court decrees or opinions that are ambiguous or unclear, the Mississippi Supreme Court has stated that "the record of proceedings before the court are the principal part of the objective accessible world the construing court may consult en route to construction" Estate of Stamper v. Edward, 607 So.2d 1141, 1145 (Miss. 1992), citing Wray v. Wray, 394 So.2d 1341, 1343-44 (Miss. 1981) And thankfully we have a record of the Judge's oral ruling in the parties' underlying divorce action and so can review the Judge's actual words so as to better understand what her intention was.

The Judge (in this case a Special Master) mentions the issue of college expenses twice in her ruling. First, in stating her decision, the Master states:

> In regards to college expenses – because this is going to be an issue. In Mississippi, it is required when parents divorce that college be provided for children. So in this matter and based on the income – and basically, when I did that, I figured that the father made approximately $61,650 a year gross and the mother makes $19,814.40 gross. That's a difference of about one-third to two-thirds. So accordingly, the college, the mother will be responsible for one-third of the costs, and the father will be responsible for two-thirds of the cost, after all grants and scholarships have been exhausted. That's very hard to do. I just paid off my student loans here recently, so the reality is he probably will have to borrow some money. But you both – I want you both to contribute to his education in that amount."
>
> (R. 73-74)

Then, as the parties and the Judge were attempting to clear up any questions that they may have in regard to the Judge's ruling, the following conversation took place:

> Mr. Zweber: On college expenses, I would like to require that I receive receipts or documentation.
>
> The Court: Anything that you have to pay a portion of, you have to receive receipts.

Mr. Zweber: Just so they understand that.

Ms. Jones: And I could have possibly missed it. Are we talking all college expenses, room, board, books, fees, tuition?

The Court: Yes. One-third and two- thirds. But again, that has to be after all scholarships and grants have been exhausted.

(R. 90)

Obviously the Final Judgment of Divorce contains much more about college expenses than was ordered by the Judge. However her intent as to what expenses were to be paid is clearly stated. When asked by counsel if she meant "**all** college expenses, room, board, books, fees, tuition" the Judge stated clearly "Yes". And as such the question of whether the additional language placed in the Final Judgment of Divorce (namely the second sentence of the provision) is clearly designed to limit the amount of certain costs and was not intended by the Court to limit what costs will be included in "college expenses"

Teresa next argues that the Chancellor's interpretation is flawed because it would lead to Teresa paying one-third of "anything tangentially related to Lindsey's college expenses". (Appellant's Brief 13) This argument does not logically follow from the Chancellor's opinion in which he clearly states that he included the costs that were "necessary for her to get her degree." (Tr. 136) It is hard to understand how anything "tangentially related" Lindsey's college expenses would be "necessary for her to get her degree."

Teresa goes on to argue that the Chancellor's actions were either a wrongful reformation of the Judgment of Divorce or a baseless modification of the child support provisions, however there is no basis for relating an interpretation of a Judgment with it's reformation or modification. The Chancellor was asked to determine whether certain

college expenses were to be paid as contemplated by the Final Judgment of Divorce, not to reform the Judgment or modify it to include those expenses.

It has been clear from the inception of this matter that Teresa has failed to consider what she was actually ordered to pay. This is no where more clear than when Teresa states, in her Brief, that the parties had already clarified the Judges' ruling on expenses, and citing the conversation between the Judge and trial counsel states "from the plain language and the exchange between Mr. Zweber's attorney and the family master, the decree does not cover any and every expense conceivably related to attending college." (Appellant's Brief 21) And yet, as stated above, it was in that very conversation that, when asked if she had intended **all** college expenses, including room, board, books, fees and tuition the Judge responded **"yes"**. (R. 90)

2. **The Chancellor correctly found Teresa De Jesus Zweber to be in contempt and was justified in awarding Everett Charles Zweber attorney fees for having to enforce the terms of the Court Order.**

After stating the correct standard for review of this issue, Teresa states that she was found to be in contempt based upon the Chancellor's flawed interpretation of what constituted "college expenses." As stated above, this argument is based upon a misunderstanding of the Chancellor's ruling. The Chancellor, in his bench opinion, states that Teresa is in contempt because of how she paid her portion of the college expenses, not because of which expenses she paid or didn't pay. (R. 134-135) Teresa explained at trial that, when she receives notice from Charles of the college expenses incurred for their daughter, she decides what of those expenses she will pay, divides that amount by twelve and then makes monthly payments of the one-twelfth to make it "acceptable to my

income". (Tr. 91-93) However, during these times when she's owed these amounts, Teresa has had some $10,000.00 in a savings account. (Tr. 94) There is more than substantial evidence to support the Chancellor's finding that Teresa owed the obligation to pay her share of the college expenses (regardless of whether you include the "fees" associated with Lindsay's flying), she had the ability to discharge that obligation from her accumulated savings, but that she unilaterally, and without the consent of Charles, decided to disregard the order of the Court and instead string out the payment of her obligation over a time period that was convenient to her.

Teresa next argues, on this issue, that the Chancellor erred in awarding Charles attorney fees for her Contempt. In support of her argument Teresa first argues that, for an award of attorney fees to be proper in an action for contempt, she must be found to have been in "willful" contempt. She then states that the Final Judgment of Divorce was too vague to allow for the Chancellor to find her contempt willful. The flaw in Teresa's argument is that there is no "vagueness" as to her obligation to pay expenses, only as to how much. The Chancellor did not find her in contempt for failing to pay certain expenses but instead found her to be in contempt because she willfully, and without authority of the Court nor assent by Charles, decided that she wouldn't pay her share of the college expenses in a timely and reasonable manner.

Teresa goes on to argue, as to the attorney fee issue, that the trial Court was in error for his failure to make factual findings pursuant with McKee v. McKee, 418 So.2d 764, 767 (Miss. 1982). (Appellant's Brief 25). Teresa makes no claim in her brief that the fees were unreasonable, only that there was no consideration (on the record) of McKee. Thankfully

this question has already been faced by the Court in Webster v. Webster, 17 So.3d 602 (Miss.Ct.App. 2009)

In a fact scenario similar to this case, Mr. Webster was found by the Chancellor to be in contempt of the Court's Order and Ms. Webster was, *inter alia*, awarded attorney fees. And as is true in the case at bar Mr. Webster made no objection to the reasonableness of the fees incurred either at trial or in the appellant's brief. Charles presented the Chancellor with a detailed statement reflecting the attorney fees incurred in his bringing of the action as well as affidavits from both the trial counsel as well as another attorney indicating the reasonableness of the fees incurred. (R. 69) Teresa did not object to the reasonableness of the attorney fees incurred by Charles, either at trial or in her appeal brief. In that the facts of this case, as to this issue, are indistinguishable from those found in Webster, the result should be the same and the Court should find no error in the Chancellor's award of attorney fees to Charles.

The remaining arguments posed by Teresa as to this issue center around the idea that the college expense provision constitutes an unenforceable escalation clause, however the disputed provision contains no language anticipating escalation of what is to be paid, and as such her remaining argument is without merit.

3. **The Chancellor was correct in not holding Charles in contempt of Court.**

Teresa argues that Charles should have been found to be in contempt of Court because he did not pay his portion of their son's college expenses but instead deducted the amounts he owed from those amounts owed to him from Teresa for her share of their daughter's college expenses. There was never any argument that Charles was giving Teresa less than the proper amount of credit, merely that he should have paid the amounts

instead of giving Teresa a reduction in what she owed on her obligation. The concern raised by Teresa is that, to allow such action will "open a floodgate", and the example given was that of a party refusing to pay child support but instead applying a credit to some court ordered property division. Teresa's concern, as well as her example, reflects a misunderstanding of what was happening.

Charles was not giving Teresa credit against some obligation she owed him as a result of a property distribution (for which he would personally be the beneficiary). Instead this is a unique situation where both parties actually owe child support to each other (an obligation that belongs to the child, not the recipient party). As such it's not as though Charles was compromising his obligation to pay a benefit for his son in an effort to increase a personal benefit to himself. And there was precedent for this in this very case. In the Final Judgment of Divorce both parties were found to owe an obligation to pay the other child support because they each had custody of one of their children. Instead of making each pay the other child support the Judge Ordered Charles to pay Teresa a reduced amount of child support, the reduction reflecting the "off-set" for the amount of child support owed Charles by Teresa. (R. 61-62)

As such there is substantial evidence to support the Chancellor not finding Charles in contempt of Court.

4. **The Chancellor did not commit error in awarding attorney fees with regard to Charles' Motion to Compel.**

At the beginning of her argument of this issue Teresa correctly states the standard for review regarding discovery violations (i.e. abuse of discretion). She then indicates that there has not yet been adopted a standard of review for Rule 37(a)(4) decisions and cites,

in support of this position, the case of Barnes v. A Confidential Party, 628 So.2d 283 (Miss. 1993). Although the Court in Barnes does indicate that, up until that time, no Mississippi Appellate Court had articulated a standard of review for decisions under Rule 37(a)(4), the Court then went on and applied an "abuse of discretion" standard to such a decision. As such the standard, even for review of a Rule 37(a)(4) decision will be that of abuse of discretion, in other words the Appellate Court will affirm a trial court unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached.

Mississippi Rule of Civil Procedure 37(a)(4) basically **requires** an award of attorney fees in favor of the prevailing party to a motion to compel discovery unless the court finds that the making of or opposition to the motion was substantially justified or that other circumstance make an award of expenses unjust.

The parties each filed against the other Motions to compel discovery. (R. 202 & 208) Furthermore Teresa filed a Motion for a Protective Order generally stating an objection to Charles's discovery requests but not specifying any particular request to which she objected. (R. 213) These Motions were considered by the Chancellor and an Order was issued granting Charles' Motion, denying the Respondent's Motion and holding the matter of attorney fees until the final trial on the merits.

Teresa argues that Charles' intent in his requests were to invade her privacy and claims that she had disclosed in her original discovery responses that she did not carry a balance on the credit cards. Unfortunately the record does not contain Teresa's original responses and so there is no way to determine what they may have said or not said. More importantly there is also no record of the hearing upon the parties respective Motions to

Compel and Teresa's Motion for a Protective Order, and so we have no way of knowing what was presented or considered by the Chancellor other than his Order. As such this issue was not properly preserved by Teresa and should be denied.

Teresa does further argue that the Chancellor did not consider the amount of time Charles' attorney spend seeking the information. This is contrary to the evidence in the record. A detailed affidavit was introduced at trial evidencing the amount of fees incurred by Charles in his making of the Motion to Compel, and there was no objection by Teresa to either its introduction or it's content or to the reasonableness of the fees. (Tr. 66-67)

Finally Teresa again argues that the Chancellor committed error by not addressing the McKee factors in awarding Charles attorney fees pursuant with Rule 37(a)(4), however he presents no authority to indicate that the Chancellor is required to do so. An award under Rule 37(a)(4) is similar to an award after finding a party in contempt, it is not based upon the need of the moving party but is instead intended to make the moving party whole. As such there should be no requirement that a trial court address the McKee factors in making an award such as this, especially when no objection is made to the reasonableness of the award.

ARGUMENT ON CROSS-APPEAL

1. The Chancellor abused his discretion in only awarding Charles a portion of those attorney fees incurred by in the prosecution of Teresa's contempt.

An Award of attorney fees is generally left to the discretion of the Chancellor. Gray v. Pearson, 797 So.2d 387 (¶34) (Miss.Ct.App.2001) Furthermore the Chancellor's findings on the issue of attorney's fees will not be disturbed unless manifestly wrong. Cumberland v. Cumberland, 564 So.2d 839, 844 (Miss. 1990)

In a contempt proceeding, the trial court has the discretion to make the plaintiff whole and to reinforce compliance with the judicial decree. One of the reasons for awarding attorney's fees to compensate the prevailing party for losses sustained by reason of the defendant's noncompliance. Hinds County Bd. of Supervisors v. Common Cause of Miss., 551 So.2d 107, 125 (Miss. 1989) The power to award an **appropriate** attorney's fee serves to make the plaintiff whole. Rogers v. Rogers, 662 So.2d 1111, 1116 (Miss. 1995) In this case the Chancellor appropriately awarded Charles attorney fees, however he failed to make the award adequate to make Charles whole.

During the trial the Chancellor received evidence reflecting the amount of fees incurred by Charles in the prosecution of Teresa's contempt to be $6,184.50. (Tr. 69) Teresa never challenged this amount of fees as being either unreasonable or unnecessary.

The Chancellor, however, in making his award of attorney fees, stated that he was not awarding the full amount of fees incurred by Charles because "I do see there's been a contempt of non visitation with the daughter". (Tr. 139) Based upon this finding the Chancellor awarded Charles only $2,000.00 for having to prosecute Teresa's contempt.

Teresa, in her Counterclaim, never raises the issue of whether or not Charles is in contempt for failure to allow Teresa's visitation rights to their daughter. (R. 178) The only evidence of any problems with Teresa's visitation comes when their daughter explains how she doesn't want to visit with Teresa. (Tr. 37) There was no evidence presented that would indicate that Charles refused or even interfered with Teresa's visitation rights. Furthermore there was just as much evidence presented that the parties' son doesn't visit with Charles either. (Tr. 129)

The issue of whether Charles was in contempt for issues dealing with Teresa's visitation were not properly plead, not adequately presented to the Court and there was inadequate evidence presented to establish any contempt on his part. There was, however, substantial credible evidence presented to the Court of Teresa's contempt as well as in support of an attorney fees award. Where substantial credible evidence is presented to support an award of attorney's fees, the chancellor may not ignore the evidence and arbitrarily award an amount that has no relationship to the evidence. Hensarling v. Hensarling, 824 So.2d 583, 593 (¶ 29) (Miss. 2002)

The Chancellor's failure to award Charles $6,184.50 in attorney fees as a result of Teresa's contempt was manifestly wrong and therefore an abuse of his discretion. A full award of fees would be appropriate given the substantial evidence presented in support thereof, and any reduction of said amount based upon unplead issues of contempt is inappropriate.

CONCLUSION

Charles would respectfully request this Court to deny the relief sought by the Teresa, grant him an award of attorney's fees in connection with defending this appeal equal to one-half of the attorney fee amount awarded by the lower court commensurate with this Court's prior practice in these matters (Lauro v. Lauro, 924 So.2d 584, 592 (¶ 33) (Miss.Ct.App.2006) (citing Monroe v. Monroe, 745 So.2d 249, 253 (¶17)(Miss. 1999))), and reverse and render the Chancellor's partial award of attorney fees, increasing the award from $2,000.00 to $6,184.50

RESPECTFULLY SUBMITTED this the 20 day of April, 2011.

Adam A. Pittman, MS Bar N[redacted]

CERTIFICATE OF SERVICE AND MAILING

I, ADAM A. PITTMAN, attorney for Appellee/Cross Appellant, do hereby certify that I have this day placed this Appellee's brief in the United States Mail with Postage prepaid to the Mississippi Supreme Court Clerk for filing, and do further certify that I have this day mailed a copy of same to the following persons:

Honorable Mitchell Lundy, Jr., Chancellor
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So Certified this the 20 day of April, 2011.

Adam A. Pittman, MS Bar No.[redacted]