

IN THE SUPREME COURT OF THE  
STATE OF MISSISSIPPI

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TERESA DE JESUS ZWEBER, APPELLANT

VS.

EVERETT CHARLES ZWEBER, APPELLEE

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## ARGUMENTS AND DISCUSSION OF LAW

### **I. INTERPRETATION OF DECREE**

The Appellee, Mr. Zweber, cites *Meeks v. Warren*, 726 So.2d 1292 (Miss. Ct. App. 1998) to argue that the Mississippi appellate courts have defined college expenses as encompassing incidentals beyond the traditional expenses of room, board, books, and meals. However, *Meeks v. Warren* is easily distinguishable from this case. In *Meeks*, issue was the interpretation of a Property Settlement Agreement that the parties had each signed where they agreed to pay “all educational expenses” between themselves. The Court had to interpret what the parties themselves meant. Our Courts have regularly held that parties “may agree of their own volition to do more than the law requires of them.” *Rogers v. Rogers*, 919 So.2d 184, 189 (Miss. Ct. App. 2005). In contrast, this case hinges on the interpretation of a contested order.

However, as the Court noted in *Meeks*, all expenditures are tempered by reasonableness under the circumstances. *Meeks v. Warren*, 726 So.2d 1292, 1294 (Miss. Ct. App. 1998) citing *Wiegand v. Wiegand*, 349 Pa. 517, 37 A.2d 492, 495 (Pa.1944). Private flying lessons that cost tens of thousands of dollars are not a foreseeable or reasonable college expense for anyone, much less a person that makes Teresa’s annual income. The record clearly reflects that the Court in the Final Judgment of Divorce made specific factual findings that the decree—as written—was consistent with the Court’s opinion. (R.56). When an order is approved by an attorney for a party as to form without limitation, the Court will not hesitate to enforce it as written. *Klein v. McIntyre*, 966 So.2d 1252, 1256 (¶ 15) (Miss. App. 2007). From the order entered by the trial court, it is clear that the prior trial court reviewed the order and found it was what it intended. This is especially true in light of Teresa’s low income. Mr. Zweber’s argument ignores the last order and gleans an alternate meaning from transcript extracts of the Court’s original ruling.

"[C]ourts are not at liberty to infer intent contrary to that emanating from the text at issue." *One South, Inc. v. Hollowell*, 963 So.2d 1156, 1162 (Miss. 2007). The trial court's order did not cover the expenses for which Teresa was held in contempt.

The chancellor erred in interpreting the clause at issue and impermissibly modified the original order. Therefore, the judgment of the Chancery Court of DeSoto County regarding the chancellor's interpretation of the Final Judgment of Divorce must be reversed and rendered.

## II. CONTEMPT FINDINGS

### a. Contempt findings against Teresa

In reviewing Mr. Zweber's brief, he seems to concede that the trial court had to interpret what the original trial court meant by the language it used in the prior court orders. It is axiomatic that before a person may be held in contempt of a court judgment, the judgment must "be complete within *itself--containing no extraneous references, leaving open no matter or description or designation out of which contention may arise as to the meaning*. Nor should a final decree leave open any judicial question to be determined by others, whether those others be the parties or be the officers charged with execution of the decree...." *Morgan v. U.S. Fidelity & Guaranty Co.*, 191 So.2d 851, 854 (Miss.1966), quoting *Griffith, supra*, § 625; *see also*, Miss.R.Civ.P. 65(d)(2); *Hall v. Wood*, 443 So.2d 834, 841-42 (Miss.1983); *Aldridge v. Parr*, 396 So.2d 1027 (Miss.1981); *Webb v. Webb*, 391 So.2d 981 (Miss.1980).

Teresa cannot be held in contempt of an order that the trial court had to first interpret. At most, the trial court should clarify the ruling and give Teresa an opportunity to pay the amounts due. A contempt finding against Teresa is not supported by the record or the law. As noted by Teresa in her earlier brief, the chancellor erred in finding Teresa in contempt. 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). Mr. Zweber clearly had the means to pay his attorney fees based on his financial declaration at trial, and so the contempt charge against Teresa was not proper. It necessarily follows that the trial court erred in awarding attorney's fees to Mr. Zweber. Since the trial court erred in awarding attorney's fees, Teresa should receive a judgment from Mr. Zweber in the amount of Two Thousand (\$2,000.00) for the attorney's fees erroneously ordered by the trial court to be paid to Mr. Zweber, along with reversing and rendering chancellor's finding of contempt against Teresa.

**b. Lack of Contempt findings against Mr. Zweber**

Mr. Zweber concedes in his brief that he did not comply with the trial court order. . . "No party obligated by a judicial decree to provide support for minor children may resort to self help and modify his or her obligation with impunity." *Cumberland v. Cumberland*, 564 So.2d 839, 847 (Miss.1990). A party making an extra-judicial modification does so at his own peril. *Alexander v. Alexander*, 494 So.2d 365, 367-68 (Miss.1986). Mr. Zweber refused to pay Teresa any of Daniel's college expenses that he was unambiguously liable for, and he sought to offset those support payments against extremely expensive private flying lessons for Lindsey that Teresa was not specifically required to pay in the Order.

As such, the judgment of the trial court failing to find Mr. Zweber in contempt must be reversed and remanded with instructions for the trial court to determine the amount of attorney's fees and expenses owed to Teresa as a result of Mr. Zweber's contempt. The trial court should also determine the amount of fees Teresa expended on appeal in adjudicating Mr. Zweber's contempt.

### III. ATTORNEY FEES ON MOTION TO COMPEL

Contrary to Mr. Zweber's assertions, Teresa's discovery responses are a part of the record and were supplemented as a massive exhibit by order of the trial court to preserve this issue for appeal. (R. 244-245). As such, the responses are properly before the appellate court for review. Teresa disclosed in her original discovery responses that she did not carry a balance on her credit card and rarely used it at all. Mr. Zweber ended up with a full award of attorney's fees even though the Court denied most aspects of his motion to compel (the sole exception being Teresa's zero-balance credit card statements.)

The Mississippi Supreme Court adopted the eight factors set forth in Rule 1.5 of the Mississippi Rules of Professional Conduct and applied them to any award of attorney's fees. *McKee v. McKee*, 418 So.2d 764 (Miss. 1982). The *McKee* court also described a ninth factor, "the relative financial ability of the parties." *Id.* at 767. As that Court has recently noted, the "*McKee* factors are strikingly similar to the factors set out in Miss. R. Prof. Conduct 1.5(a)." *Tupelo Redevelopment Agency v. Gray Corp., Inc.*, 972 So.2d 495, 521 (Miss. 2007). As a result, Mississippi courts have used the *McKee* factors and Rule 1.5 interchangeably. *See Mahus v. Mahus*, 910 So.2d 486, 489 (Miss. 2005) ("The reasonableness of attorneys' fees are controlled by the applicable Mississippi Rule of Professional Conduct 1.5 factors and the *McKee* factors."); *Upchurch Plumbing, Inc. v. Greenwood Utilities Com'n*, 964 So.2d 1100, 1115 (Miss. 2007) (noting *McKee* factors are adopted from Rule 1.5(a)). As such, even an award of attorney's fees under Rule 37 of the Mississippi Rules of Civil Procedure must comply with those requirements set forth in *McKee*.

The court erred in ordering the production of documents not within Teresa's possession and in calculating the amount of attorney's necessary to compel her to do so. Due to his history of

harassment of her, Teresa was uncomfortable with disclosing her credit card number and shopping habits to Mr. Zweber. Attorney's fees were not warranted here, were not substantially justified, and were further unjust. As such, the chancellor's judgment in this regard must be reversed and rendered with Teresa receiving a judgment against Mr. Zweber for the One Thousand (\$1,000.00) in attorney's fees she was ordered to pay to Mr. Zweber.

#### **IV. ATTORNEY'S FEES ON APPEAL**

As discussed throughout Teresa's brief and reply brief, the trial court's finding that Teresa was in contempt for failure to pay for Lindsey's private flying lessons was wrong. As such, Mr. Zweber is not entitled to attorney's fees on appeal. Additionally, the decision whether to award attorney's fees on appeal is discretionary with this Court." *Howard v. Howard*, 968 So.2d 961, 980 (¶ 53) (Miss.Ct.App.2007) (citing *Riddick v. Riddick*, 906 So.2d 813, 829 (¶ 52) (Miss.Ct.App.2004)). In light of the facts and circumstances of this case along with Teresa's limited resources, attorney's fees are not warranted nor proper on this appeal.

#### **CONCLUSION**

**WHEREFORE, PREMISES CONSIDERED**, Teresa De Jesus Zweber respectfully prays to this Court to reverse and render the judgment of the Chancery Court of DeSoto County, Mississippi and order the Appellee, Everett Charles Zweber, to repay the attorney's fees awarded as a result of the contempt, the attorney's fees awarded as a result of a discovery issue, and all amounts of support not covered by the original Final Judgment of Divorce. Additionally, Teresa De Jesus Zweber moves that the failure to find Mr. Zweber in contempt at trial be reversed and remanded for a determination of attorney's fees owed to her from trial for his contempt, along with instructions for the trial court to consider the additional amounts spent on appeal to prove Mr. Zweber's contempt. Teresa De Jesus Zweber also requests this Court deny Mr. Zweber's



request for attorney fees. Teresa De Jesus Zweber further respectfully prays to this Court award her attorney's fees and court costs and any and all other relief as this Court may deem just and proper.


This the 29<sup>th</sup> day of April, 2011.

Respectfully submitted,

TERESA DE JESUS ZWEBER

By:

  
JERRY WESLEY HISAW (MSB )

JERRY WESLEY HISAW, BAR NO   
ATTORNEY FOR THE APPELLANT  
HOLLAND LAW, P.C.  
ATTORNEYS AT LAW  
3010 GOODMAN ROAD WEST, SUITE A  
POST OFFICE BOX 256  
HORN LAKE, MISSISSIPPI 38637  
TELEPHONE: 662-342-1333  
FACSIMILE: 662-342-7321  
E-MAIL: [jwhisaw@hollandlaw.net](mailto:jwhisaw@hollandlaw.net)

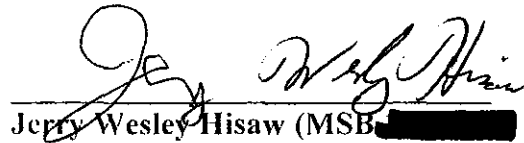
**CERTIFICATE OF SERVICE**

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 Appellant to:

**Chancellor Mitchell M. Lundy, Jr.  
64 1<sup>st</sup> Street  
P.O. Box 471  
Grenada, Mississippi 38901**

**Adam A. Pittman, Esq.  
Law Office of Adam A. Pittman  
121-B Public Square  
P.O. Box 1122  
Batesville, Mississippi 38606**

**SO CERTIFIED**, this the 29<sup>th</sup> day of April, 2011.

  
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Jerry Wesley Hisaw (MSB-[REDACTED])  
Certifying Attorney