2010-CA-01629

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 26th day of January, 2011.

JERRY WESLEY HISAW

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STATEMENT OF THE ISSUES

(1) The chancellor erred in interpreting the provision of the Final Judgment of Divorce concerning what college expenses were to be paid by the parties.

(2) The chancellor erred in holding the Appellant, Teresa De Jesus Zweber, in contempt.

(3) The chancellor erred in not holding the Appellee, Everett Charles Zweber, in contempt for the nonpayment of college expenses.

(4) The chancellor erred in awarding legal expenses to the Appellee with regard to his Motion to Compel.

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

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[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.

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 that Teresa was in contempt for the nonpayment of college expenses which included private flying lessons Lindsey took prior to entering college. 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 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 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 the chancellor make any ruling regarding the retirement accounts due to Teresa.

Teresa obtained new counsel on August 12, 2010 who 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.

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 for him to enforce the nonpayment of college expenses.

SUMMARY OF THE ARGUMENT

The chancellor erred in interpreting the Final Judgment of Divorce between the parties as requiring the Teresa to pay one third (1/3) of all college expenses as opposed to only one third (1/3) of the meals, tuition, books and room as required by the Court order. This has resulted in the Court's order becoming an impermissible modification in excess of the child support guidelines. The trial court further erred in finding Teresa in contempt based on its flawed interpretation of the Final Judgment of Divorce. Even if the Court's interpretation is correct, the record contains no proof that Teresa willfully violated a Court order such that she was in contempt of court.

In contrast, the record does reflect that Mr. Zweber was in contempt of Court for refusing to pay amounts vesting in the spring of 2009 for Daniel's college expenses. In fact, the record reflects that Mr. Zweber intentionally withheld those payments and informed Teresa that he would not pay them and instead give her credit. The Court also erred in awarding attorney's fees with regard to Mr. Zweber's Motion to Compel, which the court itself felt would not lead to relevant information and was unjust under the circumstances.

The chancellor's interpretation of the Final Judgment of Divorce was incorrect, which led to subsequent flaws in his analysis of the discovery violations and contempt charges. Consequently, the judgment of the Chancery Court of DeSoto County, Mississippi must be reversed and rendered with the Appellee, Everett Charles Zweber, ordered to repay the attorney's fees awarded as a result of the contempt, the attorney's fees awarded as a result of the discovery dispute, the child support amounts erroneously awarded to him, and the attorney fees and costs of this appeal.

ARGUMENT

STANDARD OF REVIEW

The case at hand involves a multiple levels regarding the standard of review by this Court. The chancellor is reviewed *de novo* regarding his construction of the lower court's decrees and opinions. *Rogers v. Rogers,* 919 So.2d 184, 187 (¶ 10) (Miss. Ct. App. 2005); *Meek v. Warren,* 726 So.2d 1292, 1293-94 (¶ 3)(Miss. Ct. App. 1998). With regard to the review of the contempt proceedings, the Appellate Court proceeds *ab initio. Wing v. Wing,* 549 So.2d 944, 946-47 (Miss.1989). The standard of review regarding discovery violations is for an abuse of discretion. *Cooper v. State Farm Fire & Cas. Co.*, 568 So.2d 687, 693 (Miss.1990). However, the Appellate Court in Mississippi has not yet adopted a standard of review for Rule 37(a)(4) decisions. *See Barnes v. A Confidential Party,* 628 So.2d 283, 291 (Miss. 1993)(" ...this Court has not articulated a standard of review for decisions under Rule 37(a)(4)...)."

(1) The chancellor erred in interpreting the provision of the Final Judgment of Divorce concerning what college expenses were to be paid by the parties.

The chancellor is reviewed *de novo* regarding the construction of the lower court's decrees and opinions. *Rogers v. Rogers,* 919 So.2d 184, 187 (¶ 10) (Miss. Ct. App. 2005); *Meek v. Warren,* 726 So.2d 1292, 1293-94 (¶ 3)(Miss. Ct. App. 1998). In construing court decrees or opinions which are ambigious or unclear, the Mississippi Supreme Court has stated:

> A judgment decree or opinion of court is a legal text, and, when questions of meaning arise, answers are sought by "the same rules of construction which appertain to other legal documents." *Gillum v. Gillum,* 230 Miss. 246, 255 92 So.2d 665, 668 (1957), quoting *Rayl v. Thurman,* 156 Miss. 8, 15, 125 So. 912, 914 (1930); see also, *Webster v. Webster,* 566 So.2d 214, 215 (Miss.1990); *Bowe v. Bowe,* 557 So.2d 793, 795 (Miss.1990). Courts must give the prior decree the most coherent and principled reading its words will bear. See *Simmons v. Bank of Mississippi,* 593 So.2d 40, 43 (Miss.1992). Of course, 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. *Wray v. Wray,* 394 So.2d 1341, 1343-44 (Miss.1981); *Gillum v. Gillum,* 230 Miss. at 255,

92 So.2d at 669.

Estate of Stamper v. Edward, 607 So.2d 1141, 1145 (Miss. 1992). "The determinative factor is the intent of the court...as gathered...from all parts of the judgment itself." *Balius v. Gaines,* 908 So.2d 791, 798 (¶16)(Miss. Ct. App. 2005), quoting 46 Am. Jur. 2d Judgments §94 (1994).

As the judgment of the Court is subject to the same requirements as any legal document, a three-tiered process for interpretation is used. First, the Court looks to the "four corners" of the agreement and review the actual language the parties used in their agreement. *Pursue Energy Corp. v. Perkins,* 558 So.2d 349, 351 (Miss.1990). When the language of the contract is clear or unambiguous, we must effectuate the parties' intent. *Id.* **Only** when the language of the contract is not clear, will the Court, if possible, "harmonize the provisions in accord with the parties' apparent intent." *Id.* (emphasis added) Next, if the parties' intent remains uncertain, the Court may discretionarily employ canons of contract construction. *Id.* at 352-53 (citing numerous cases delineating various canons of contract construction employed in Mississippi). Finally, after that the Court may also consider parol or extrinsic evidence if necessary. *Id.* at 353.

As a matter of practice,

> A decree 'should be complete within itself-containing no extraneous references, leaving open no matter or description or designation out of which contention may arise as to meaning. Nor should a final decree leave open any judicial question to be determined by others, whether those others be the parties or the officers charges with execution of the decree***."

E.E. Morgan v. USF&G Co. , 191 So. 2d 851, 854 (Miss. 1966), quoting *Griffith,* Mississippi Chancery Practice, § 625, at 676-77(2d. ed. 1950).

In discussing college expenses, the Final Judgment of Divorce states: " **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." (emphasis added) Courts have held this formulation to be proper, especially since Lindsey was not in college at the time of the divorce. See *Kirkland v. McGraw,* 806 So. 2d 1180, 1185 (Miss. Ct. App. 2002)(If college expenses cannot be determined, the Court should couch the order in terms of the percentage of expenses assigned to the payor and ***list the expenses covered*** in the order.) (emphasis added). These are the same expenses that the Mississippi Court of Appeals has found to be encompassed in the terms "educational expenses." See *Meek v. Warren,* 726 So.2d 1292 (¶4) (Miss. App. 1998)(favorably citing *Wiegand v. Wiegand,* 349 Pa. 517, 37 A.2d 492, 495 (Pa.1944) with educational expenses covering tuition, room and board, and fees with all expenditures tempered by reasonableness under the circumstances). The family master noted in her original opinion that the parties' children would likely require loans to fully cover college expenses. (R. 74). Additionally, 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 and that it was approved by the attorneys for both parties, the family master, and the original chancellor. (R. 56).

If the language in the document is clear and unambiguous, the intent of the document must be effectuated. *Pfisterer v. Noble,* 320 So.2d 383, 384 (Miss.1975) *See also Pursue Energy Corp. v. Perkins,*558 So.2d 349, 352 (Miss. I 990). Only when the intent of the parties is not clear should the Court resort to extrinsic evidence. *Perkins,* 558 So.2d. at 353. When a written instrument is clear, definite, explicit, harmonious in all its provisions, and free from ambiguity, a court in construing it will look solely to the language used in the instrument itself. In such a case a court will give effect to all parts of the instrument as written." *Pfisterer v. Noble,* 320 So.2d 383, 384 (Miss. 1975) (citations omitted). It is well settled that extrinsic evidence is **not admissible** to create an ambiguity in a

written agreement which is complete and clear on its face. See *Cherry v. Anthony, Gibbs, Sage,* 501 So.2d 416, 419 (Miss.1987). (emphasis added). As such, the Final Judgment of Divorce as it relates to college expenses for the minor children of the parties **only covered the average cost of meals, tuition, books, and room at a state institution of higher learning.** The language in the order is clear. It was never meant to cover every expense conceivably related to attending college. This is supported by both the plain language of the text and Mississippi case law. "[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 chancellor in the present case held that Teresa is obligated for one third (1/3) of anything necessary for the children's college education. (R. 136). This interpretation opens an unending Pandora's box of potential expenses. For example, does this encompass potentially costly study abroad programs, sorority dues, or financing unpaid internships? Lindsey was not yet attending Delta State when she took the private flying lessons. (Tr. 34, 73 and R. 222). The record reflects that Lindsey took the private flying lessons prior to college in order to help her move through her courses faster. (R. 34-35). If the language is unambiguous, the court should not be concerned with what the parties may have meant or intended, for the language employed in a contract is the surest guide to what was intended. *Davis v. Davis,* 2006-CA-02161-COA (Miss). (citing *Ivison v. Ivison,* 762 So.2d 329, 335 (Miss. 2000).

The Final Judgment of Divorce specifies the payment of average expenses. However, Delta State's commercial aviation program is extremely unique and one of only a few such programs in the country. As the record reflects, it is extremely expensive and **well above average** in terms of what the typical college student pays to attend a public institution in her state of residence.

In *Citizens' Bank vs. Frazier*, 157 Miss 298, 302,127 So 716 (1930); *Rubel vs. Rubel*, 221 Miss 848, 75 So. 2d 59 (1954), and reaffirmed in *Frazier vs. Northwest Mississippi Shopping Center, Inc.* 458 So 2d 1051, 1054 (Miss 1984), the Mississippi Supreme Court instructed that:

> " A construction leading to an absurd, harsh or unreasonable result in a contract should be avoided, unless the terms are express and free of doubt. It is the duty of courts to give a contract that construction or interpretation, if possible, which will square its terms with fairness and reasonableness, each party towards the order ... It is also well settled that the words of a contract should be given a reasonable construction, where that is possible, rather than an unreasonable one; and the should likewise endeavor to give a construction most equitable to the parties, and one which will not give of them an unfair or unreasonable advantage over the other .... Constructions of contracts which would make them unfair or unjust are to be avoided, unless the terms are unambiguous and express. 458 So 2d at 1054.

The chancellor's analysis in this case, taken to its logical end, would have Teresa paying one third (1/3) of anything tangentially related to Lindsey's college expenses. In light of the income disparity of the parties, this result is obviously not what the original trial court intended. The sky would literally be the limit for college expenses, no pun intended.

The Mississippi Supreme Court, in *Wray v. Langston,* 380 So.2d 1262, 1264 (Miss. 1980), stated that "[t]he duty of a parent to provide a college education for his or her child contemplates support ***in addition to tuition and college costs,*** without which, provision for college education would be in vain." (emphasis added). This statement gives little clarification, because what would render an education "in vain" for one child would not do so for another. Looking further for instruction on this issue, the Mississippi Supreme Court in *Wray* stated : "[w]e are of the opinion that a child, if the father is financially able, is entitled to attend college ***in accord with her family standards.*** *" Wray,* at 1262 (Emphasis added). "The quality and quantity of necessities for which a parent is liable has been gauged in American and English Jurisprudence from time immemorial by the parents' station in life. A rich man, well able to pay,

might very well be held liable for a college education of an extended and expensive sort. . . . Voluntary parental sacrifices to enable children to attend college are very common." As such, a person of lower income should not have such obligation placed upon them by law against their will. *Golay v. Golay*, 210 P.2d 1022,1023 (1949) (quoting *Esteb v. Esteb*, 244 P. 264 (Wash. 1926)).

Teresa has limited financial resources. Mississippi Code Ann. § 93-5-23 provides: "[w]here proof shows that both parents have separate interests or estates the court **may** require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each." (emphasis added). The permissive language of the statute indicates that the chancellor does not merely apply a mathematical proportionality formula. It is also important to note that the statute contemplates the "relative financial ability" of each, rather than the "relative net worth" or some other measure.

The Court at trial found that private flying lessons (at Air Venture in Olive Branch and at Delta State) not included in the already-high tuition at Delta State University qualify as "college expenses" for purposes of child support. This interpretation defies a plain reading of the text. The Final Judgment of Divorce as entered reflects and clarifies the final ruling of the court. The Final Judgment of Divorce is now four (4) years old and was approved by the attorneys for both parties. In fact, the parties specifically clarified in the Final Judgment of Divorce—which was signed by counsel for all parties, the family master, and the chancellor—what "college expenses" covered.

Counsel for both parties specifically signed that Final Judgment of Divorce as "Approved as to Form." Therefore, Mr. Zweber cannot, years after the fact, seek to modify the plain language of the text. 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). The chancellor has essentially reformed the prior court order despite the fact that Mr. Zweber did not bring an action to reform the Final Judgment of Divorce. A court must effect a determination of the language used, not the ascertainment of some possible but unexpressed intent of the parties. *Simmons* v. *Bank,* 593 So.2d 40, 42-43 (Miss.l992) (quoting *Cherry* v. *Anthony. Gibbs. Sage,* 501 So.2d 416, 419 (Miss. 1987).

Nor could Mr. Zweber legally maintain an action to reform the judgment. Pursuant to Rule 60(b)(2), he had six months to bring his motion for reformation. He did not do so. He also is unable to reform it under Rule 60(b)(6), which states that relief may be granted from a final judgment for "any other reason justifying relief from judgment," which serves as a catch-all exception for relief when equity demands. M.R.C.P. 60(b)(6). A Rule 60(b)(6) motion for relief does not have a specific time limit as does Rule 60(b)(2). However, the court has repeatedly held that in order to be granted relief under a Rule 60(b)(6) motion, the claimant must show exceptional circumstances existed that warrant a modification and/or reformation to the judgment. *Townsend,* 859 So.2d at 375 (¶ 16) (citing *Moore v. Jacobs,* 752 So.2d 1013, 1017 (¶ 17) (Miss. 1999)); *Bryant, Inc. v. Walters,* 493 So.2d 933, 939 (Miss. 1986). No exceptional circumstances exist here.

Additionally, 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). If Mr. Zweber thought the judgment was inaccurate in some respect, he could have addressed the issue at that time. He did not do so. Equity aids the vigilant and not those who slumber on their rights. *Griffith* Mississippi Chancery Practice, §41, 2000 Ed. Therefore, the judgment must be enforced as written and any attempt to circumvent that is barred by res

judicata. See *Little v. V &G Welding Supply, Inc.*, 704 So.2d 1336, 1337-40 (Miss. 1997)(res judicata bars re-litigation of all issues that were or could have been raised and decided in the first action, plus all issues that were actually decided in the first action).

The judgment held Teresa in contempt for her failure to pay for the flying lessons and also for amounts with no set payment period. The chancellor's order as written is actually an impermissible modification of the Final Judgment of Divorce amounting to a substantial upward deviation of the child support guidelines in violation of Mississippi Code Annotated Section 43-19-101 and 43-19-103 (Miss. Code 1972, as amended). College expenses, though not technically child support, may be awarded by the chancery court. *Lawrence,* 574 So.2d at 1382; *see also Southerland v. Southerland,* 816 So.2d 1004, 1006 (Miss.2002) (recognizing that college tuition is part of child support) (citation omitted). The court may adjudge that one or both parents should provide the means for college education for their minor children. *Rankin v. Bobo,* 410 So.2d 1326, 1328 (Miss.1982) (citing *Pass v. Pass,* 238 Miss. 449, 118 So.2d 769 (1960)).

The law also recognizes that college is expensive and can cause much sacrifice on the part of the parents. *Id.* at 1328-29. Thus, such sacrifice ordinarily cannot be demanded, but must be earned by children through respect for their parents, love, affection, and appreciation of parental efforts. *Id.* at 1329. "When a [parent's] financial ability is ample to provide a college education and the child shows an aptitude for such, the court may in its discretion, after hearing, require the [parent] to provide such education." *Saliba v. Saliba,* 753 So.2d 1095, 1101 (Miss.2000). But the parental duty to send a child to college is not absolute; rather it is dependent upon the proof and circumstances of each case. *Rankin,* 410 So.2d at 1328 (citing *Hambrick v. Prestwood,* 382 So.2d 474 (Miss.1980)).

Although college expenses are considered part of child support, such awards ordinarily

are not calculated separately from child-support awards. *Southerland,* 816 So.2d at 1006; *but see Varner,* 588 So.2d at 435 (noting that funds, unilaterally subtracted from support obligations, to cover the costs of college tuition will seldom qualify as credit against the support obligation, " as they do not diminish the child's need for food, clothing and shelter") (citations omitted).

Child-support awards exceeding the statutory guidelines set forth in Mississippi Code Annotated Section 43-19-101 require the chancellor to consider the following criteria:

(a) Extraordinary medical, psychological, educational or dental expenses.

(b) Independent income of the child.

(c) The payment of both child support and spousal support to the obligee.

(d) Seasonal variations in one or both parents' incomes or expenses.

(e) The age of the child, taking into account the greater needs of older children.

(f) Special needs that have traditionally been met within the family budget even though the fulfilling of those needs will cause the support to exceed the proposed guidelines.

(g) The particular shared parental arrangement, such as where the noncustodial parent spends a great deal of time with the children, thereby reducing the financial expenditures incurred by the custodial parent, or the refusal of the noncustodial parent to become involved in the activities of the child, or giving due consideration to the custodial parent's homemaking services.

(h) Total available assets of the obligee, obligor and the child.

(i) Any other adjustment which is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt.

Miss.Code Ann. § 43-19-103 (Rev.2004); *Chesney v. Chesney,* 910 So.2d 1057, (Miss.2005).

The guidelines are a rebuttable presumption in the award or modification of child support; thus they do "not control per se the amount" of a child-support award. *Clausel v. Clausel,* 714 So.2d 265, 267 (Miss.1998). But in order to overcome the presumption, the chancellor must make an on-the-record finding that it would be unjust or inappropriate to apply the guidelines. *Chesney,* 910 So.2d at 1061 (citing *McEachern v. McEachern,* 605 So.2d 809, 814 (Miss.1992)).

Thus, to modify a decreed support obligation already exceeding the statutory guidelines in order to award college expenses, the chancellor is required to take into consideration the criteria set forth in Mississippi Code Annotated Section 43-19-103, as well as the *Brabham* factors. *See Draper v. Draper,* 658 So.2d 866, 869 (Miss.1995)(" The statutory guidelines are used in conjunction with the *Brabham* factors to establish the appropriate award of child support."); *Brabham,* 226 Miss. 165, 84 So.2d 147. *Brabham v. Brabham,* 226 Miss. 165, 84 So.2d 147 (1955)). For college expenses to exceed the statutory percentage, the award must be supported by findings. *Kirkland v. McGraw,* 806 So. 2d 1180 (Miss. Ct. App. 1980).

The Court's Final Judgment of Divorce already has Teresa paying in excess of the child support guidelines. Teresa pays 14% of her income to the Petitioner in child support. In addition to this, the Court ordered her to pay one-third (1/3) of Lindsey's college expenses as defined in the Final Judgment of Divorce. By classifying private flying lessons as "college expenses," the Court has modified the prior order so that Teresa now pays roughly one-half (½) of her pre-tax income in child support. This calculation is based on the numbers provided by Mr. Zweber.

To justify changing or modifying the original decree, a chancellor must find a material or substantial change in the after-arising circumstances of the parties. *Shaeffer v. Shaeffer,* 370

So.2d 240, 242 (Miss.1979). Mr. Zweber's mistaken interpretation of the meaning of "college expenses" is not a justifiable reason to modify the settlement agreement. *Hopson v. Hopson,* 851 So.2d 397, 400 (Miss. Ct. App. 2003)(mistaken interpretation on the part of one of the parties is not a justifiable reason to modify prior court order). The amount Teresa currently pays is a substantial deviation from the mandatory guidelines. In *Kilgore v. Fuller,* 741 So. 2d 351, 357-58 (Miss. Ct. App. 1999), the Court found that child support payments in the amount of only 23% of a payor's total income was inappropriate, holding that such a deviation would require "extraordinary" circumstances. The percentage of Teresa's income earmarked for Lindsey's child support will rise even higher—to well above 50% of her total income—in Lindsey's sophomore and junior years. Tuition for Lindsey's mandatory classes alone will cost almost $20,000 for her sophomore year and almost $16,000 for the junior year. These figures do not include private flying lessons, which alone are enough to constitute a substantial deviation from the support guidelines.

As the chancellor himself noted, the relationship between Teresa and Lindsey is strained. Of her own volition, Lindsey elects to visit her mother sparingly. (Tr. 38-40 and 132-134). In Mississippi, the duty to send a child to college is not absolute. *Wallace v. Wallace,* 965 So.2d 737, 745(¶ 27) (Miss.Ct.App.2007). Rather, it is dependent upon the child's aptitude for college, the **child's behavior toward and relationship with the parent, and the parent's ability "to pay for the education without affecting his customary lifestyle."** *Id.* (emphasis added) (citing *Saliba v. Saliba,* 753 So.2d 1095, 1101(¶ 21) (Miss.2000); *Lawrence v. Lawrence,* 574 So.2d 1376, 1383 (Miss.1991)). Beyond the fact that Teresa simply lacks the resources to pay for Lindsey's above-average college expenses, her relationship with Lindsey has unfortunately deteriorated to the point that ordering Teresa to pay extraordinary college expenses exceeding

the average amount contemplated in the original decree is not justified.

The expenses the chancellor ordered Teresa to pay are against the plain reading of the text and are an impermissible substantial deviation from the guidelines. The deviation was not supported by factual findings on the record. In *Lowrey v. Lowrey*, 25 So. 3d 274, 280-281 (Miss. 2009), the Mississippi Supreme Court ruled that factor tests must be considered on the record in every case. These factor considerations are not only essential for appellate purposes, but also for trial courts, as they provide a checklist to assist in the accuracy of their rulings. *Id.* Following these guidelines reduces unintended errors that may affect the court's ultimate decision. *Id.* The absence of an analysis of these factors and failure to apply the law to the facts at hand is error. *Id.*

The record lacks any written findings to support the chancellor's determination of Teresa's ability to pay these large sums of child support. In fact, the record shows that Teresa has very limited financial means. In addition, the college expenses that the Court ordered Teresa to pay pre-date Mr. Zweber's Petition. A party cannot obtain support for college expenses which pre-date the filing of a petition. See *Kirkland v. McGraw,* 806 so. 2d 1180 (Miss. Ct. App. 2002)(reversing an order for college support for the year predating the petition).

The college expenses provision of the Final Judgment of Divorce has two possible interpretations: (1) the order only covered meals, tuition, books, and room—in which case any other expenses are not covered; or (2) the term expenses was not adequately defined, requiring the chancellor to interpret the provision, apply the child support guidelines, and support his position with written findings. In this case, the chancellor did neither.

At trial, counsel for Mr. Zweber had Teresa read the original opinion transcript in an effort to reconcile it with the novel interpretation of the term "expenses" that Mr. Zweber

advanced. (Tr. 11-14). However, as earlier noted, the parties had already clarified the family master's ruling on expenses in the final order (R. 56). Mr. Zweber's original attorney specifically asked the family master to clarify what was included under "college expenses."[3] The language of the decree only covered the initial costs of college entrance and the typical administrative fees. 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. The decree was not meant to cover special extraordinary expenses or fees such as those of Lindsey Zweber incurs in Delta State's commercial aviation program. The chair of the Aviation Department at Delta State herself characterized the private flying lessons as special separate expenses. (Tr. 26-28)

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.

(2) The chancellor erred in holding the Appellant, Teresa De Jesus Zweber, in contempt.

The standard of review of a chancellor's finding of ultimate fact is limited. The appellate court upholds such a finding where there is substantial evidence consistent with the finding made by the Chancery Court. *Wood v. Wood,* 495 So.2d 503 (Miss.1986); *Carr v. Carr,* 480 So.2d 1120 (Miss.1985); *Tucker v. Tucker,* 453 So.2d 1294 (Miss.1984). Such finding will not be disturbed unless manifestly wrong. *Wood, supra; Carr, supra.* The inquiry here is limited to whether or not the judgment is violated and this necessarily includes questions of whether or not it was possible to carry out the judgment of the Court. *Ladner v. Ladner,* 206 So.2d 620, 623

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[3] The following exchange took place at the original divorce trial:

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

"The Court: Yes. ....."

(Miss.1968). Whether a party is in contempt of court is left to the chancellor's substantial discretion. *Cumberland v. Cumberland,* 564 So.2d 839, 845 (Miss.1990). However, clear and convincing proof is required. *Id.*

A case for contempt is based on prima facie evidence of failure to comply with a court order. *Newell v. Hinton,* 556 So.2d 1037, 1039 (Miss.1990); *McCardle v. McCardle,* 862 So.2d 1290, 1293 (Miss.Ct.App.2004). This Court has stated that even when a prima facie of contempt is established, the defendant may avoid a contempt judgment by providing a defense. *See Newell,* 556 So.2d at 1044. Besides inability to pay, the Court discussed other defenses to finding of contempt:

> There are other defenses as well. For example, the defendant may show that he was not guilty of *wilful or deliberate* violation of the prior judgment or a decree. *Dunaway v. Busbin,* 498 So.2d 1218, 1222 (Miss.1986) (emphasis added); *Hooker v. Hooker,* 205 So.2d 276, 278 (Miss.1967). The burden of the defendant in raising this defense, however, is not nearly as great as the defendant who claims he is without ability to pay. Consequently, it is appropriate that this defense be viewed against the extremely lenient view this Court and the courts of this state have taken of contempt proceedings in general." *Smith,* 545 So.2d at 727. Furthermore, a contemnor also has available to him the traditional notion of "clean hands" as a defense. *Vockroth v. Vockroth,* 200 So.2d 459, 463 (Miss.1967) cited in *Smith, supra.* ***Vagueness or the lack of specificity of the decree gives the contemnor another avenue for defense as well.*** *Id.*

Newell, 556 So.2d at 1044 (emphasis added).

In *Wing,* 549 So.2d 944 947 (Miss. 1989), the Mississippi Supreme Court held:

> 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).

(emphasis added).

The Mississippi Supreme Court has held that contempt can **only** be willful. *Mizell,* 708 So.2d 55, 64 (¶52) (Miss. 1998)(emphasis added). "A contempt citation is proper only when the contemnor has willfully and deliberately ignored the order of the court." *Id.* (citing *Cooper v. Keyes,* 510 So.2d 518, 519 (Miss.1987)). "It is a defense to a contempt proceeding that the person was not guilty of willful or deliberate violations of a prior judgment or decree." *Id.* (citing *Dunaway v. Busbin,* 498 So.2d 1218 (Miss.1986)).

Likewise, the Mississippi Supreme Court has stated that "[a] person is entitled to be informed with a high degree of clarity as to exactly what [his] obligations are under a court order before [he] can be found in contempt for willingly disobeying that order." *Switzer v. Switzer,* 460 So.2d 843, 846 (Miss.1984). A finding of contempt cannot stand if there is any matter which is left open to contention. *Davis v. Davis*, 829 So. 2d 712, 714 (Miss Ct. App. 2002); *Wing v. Wing* 549 So. 2d 944, 947 (Miss. 1989). One may defend a contempt proceeding with the defense that the court order was unclear. *Ellis v. Ellis*, 840 So. 2d 806, 811 (Miss. Ct. App. 2003); *Davis*, 829 So. 2d at 714. Both *Davis* and *Ellis* stand for the proposition that any order containing language that can come under contention due to ambiguity cannot be the basis for contempt. *Ellis*, 840 So. 2d at 806; *Davis*, 829 So. 2d at 712. Further, a party cannot be held in contempt for failure to comply with a judgment unless the judgment is complete within itself and does not leave open any matter in which a contention may arise as to its meaning. *Bounds v. Bounds*, 935 So. 2d 407, 410 (Miss. Ct. App. 2006).

In this case, the issue of college expenses was certainly open to contention parties and has been the subject of extensive litigation. As outlined in the previous sections of argument, the chancellor's interpretation of the Final Judgment of Divorce was flawed. The Final Judgment

does not reference anything like private flying lessons; it states that Teresa is to pay for **meals, tuition, books, and room.**

The lack of a definitive timeline to comply with the court's order is also a sufficient basis to not find a party in contempt. See *Moses v. Moses,* 879 So.2d 1036, 1040 (¶17) (Miss. 2004)(trial court erred in holding party in contempt for sale of a home as order had no set timeframe for sale and order was open to interpretation). Additionally see *Harmon v. Yarbrough,* 767 So.2d 1069 (Miss. App. 2000) (not finding party in contempt for nonpayment of college expenses not error as was bona fide dispute between parents over meaning and scope of college expenses). The court's order contains no time line or schedule for the support payments. The proof at trial showed that Teresa made payments on the undisputed amounts, but not for the expenses that were disputed and led to this litigation. (Tr. 115-116). The record also showed that Mr. Zweber had taken this approach towards disputed payments himself and that this was how the parties had traditionally operated. (Tr. 115).

The Final Judgment of Divorce does not specifically require Teresa to pay for Lindsey's private flying lessons. Even if a court ultimately held the Final Judgment covered private flying lessons, that result would require the court to interpret an ambiguity in the previous order. Here, the chancellor held Teresa in contempt for the nonpayment of expenses that he applied to her only after interpreting an ambiguous order following extensive litigation over the meaning of the term at issue.

The chancellor awarded Mr. Zweber, Two Thousand ($2,000.00) in attorney's fees for the contempt proceeding against Teresa. In order to award attorney's fees in a contempt matter, the trial court must first find there was a **willful violation** of the court's order. *See Purvis v. Purvis,* 657 So.2d 794, 796-97 (Miss.1994) (emphasis added). As discussed above, the vagueness of the

trial court's Final Judgment of Divorce and the circumstances of the case prevents a finding of willful contempt against Teresa. Additionally, the trial court failed to enumerate the *McKee* factors found in *McKee v. McKee,* 418 So.2d 764, 767 (Miss.1982) in making factual findings of the amount necessary for the prosecution of Mr. Zweber's contempt petition. The failure to make factual findings with regard to factor tests on the record creates error. *Lowrey v. Lowrey*, 25 So. 3d 274, 280-281 (¶7 through ¶12)(Miss. 2009).

Even if the chancellor's interpretation of the decree is correct, the expenses clause is an unenforceable escalation clause. College expenses are considered part of child support, and such awards ordinarily are not calculated separately from child-support awards. *Southerland v. Southerland,* 816 So.2d 1004, 1006 (Miss. 2002); *but see Varner,* 588 So.2d at 435 (noting that funds, unilaterally subtracted from support obligations, to cover the costs of college tuition will seldom qualify as credit against the support obligation, " as they do not diminish the child's need for food, clothing and shelter") (citations omitted). As such, the provision for college expenses must meet the same criteria as any other escalation clause for child support.

Escalation clauses are void when they are uncertain and indefinite with regard to the amount due. *Bruce v. Bruce*, 687 So. 2d 1199, 1202 (Miss. 1996) (affirming the trial court's holding that the escalation clause was invalid because it did not meet the four-part test set forth in *Tedford v. Dempsey,* 437 So. 2d 410, 419 (Miss. 1983) because it did not take into account the custodial parent's contributions or the children's needs). To be valid under Mississippi law, an escalation clause must be tied to (1) the inflation rate, (2) the non-custodial parent's increase or decrease in income, (3) the child's expenses, **and** (4) the custodial parent's separate income. *Id.* at 406.

The pertinent language in the escalation clause is:

> "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."

Enforcing a void escalation clause is manifest error. At the time of the order, Lindsey Zweber was only fourteen (14) and not even in college. The parties did not take into account the possibility that her theoretical college expenses would greatly exceed those of the average student. Therefore, it does not meet the required four-part test set forth in *Tedford* and is void *ab initio*.

If a decree is found void in any respect, the party found in contempt of such decree should be released of his or her obligation. *Chasez v. Chasez*, 957 So. 2d 1031, 1037 (Miss. Ct. App. 2007); *Gadson v. Gadson*, 434 So. 2d 1345, (Miss. 1983) (*quoting Cox v. Cox*, 279 So. 2d 615 (Miss. 1973)). Furthermore, a defendant cannot be held in contempt if he or she continues to make unescalated payments. *Ligon v. Ligon*, 743 So. 2d 404, 407 (Miss. Ct. App. 1999) (upholding the trial court's ruling that the escalation clause that was based solely on the husband's adjusted gross income was void, refusing to hold the husband in contempt, and further refusing to grant attorney's fees to the wife). In *Ligon*, the court again set forth the four-part test that must be met to allow an escalation clause to be enforceable. In the case at hand, Teresa continued to make payments on undisputed expenses.

For all of the above reasons, the chancellor erred in finding Teresa in contempt. 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.

(3) The chancellor erred in not holding the Appellee, Everett Charles Zweber, in contempt for the nonpayment of college expenses.

Civil contempt is a vehicle used to enforce or coerce obedience to a court's order. *Lahmann,* 722 So.2d at 620. Contempt matters are committed to the substantial discretion of the chancellor. *Lahmann v. Hallmon,* 722 So.2d 614, 620 (Miss.1998) (citing *Shelton v. Shelton,* 653 So.2d 283, 286 (Miss.1995)).

College expenses are considered part of child support, and such awards ordinarily are not calculated separately from child-support awards. *Southerland v. Southerland,* 816 So.2d 1004, 1006 (Miss.2002). In a contempt action involving unpaid child support, when the party entitled to receive support introduces evidence that the party charged with paying has failed to pay, a prima facie case of contempt has been made. *Lahmann,* 722 So.2d at 620 (citing *Guthrie v. Guthrie,* 537 So.2d 886, 888 (Miss.1989)). The burden then shifts to the paying party to show, by clear and convincing evidence, an inability to pay or any other defense. *Id.* (citing *Duncan v. Duncan,* 417 So.2d 908, 909-10 (Miss.1982)). "[C]hild support payments vest in the child as they accrue, [and] once they have become vested, just as they cannot be contracted away by the parents, they cannot be modified or forgiven by the courts." *Houck v. Ousterhout,* 861 So.2d 1000, 1002(Miss.2003). See also *Baier v. Baier 2003 –CA-01274-COA* (Miss. Ct. App. 2003).

"Each payment that becomes due and remains unpaid 'becomes a judgment' against the supporting parent.' " *Tanner v. Roland,* 598 So.2d 783, 786 (Miss.1992). **"The only defense thereto is payment."** *Id.* (emphasis added). The Mississippi Supreme Court has stated that once

child support payments become past due they become vested and cannot be modified. *Thurman v. Thurman*, 559 So.2d 1014, 1016 (Miss.1990); *Brand v. Brand*, 482 So.2d 236, 237 (Miss.1986).

Mr. Zweber admitted that he did not pay Teresa for amounts due on Daniel's college expenses. (Tr. 74-75). Even in light of the chancellor granting the Rule 60 Motion of Teresa, Mr. Zweber was still obligated to pay Daniel's Spring 2009 college expenses as required by the Final Judgment of Divorce. Mr. Zweber's only defense was that he gave Teresa credit for the amounts he was obligated to pay towards Daniel's college expenses. In fact, Mr. Zweber did not pay anything to Teresa. (Tr. 74-75).

The trial court erred in not holding Mr. Zweber in contempt. Credit does not equal compliance. To rule otherwise would open a floodgate of potential post-divorce litigation. For example, a party refusing to pay child support could argue that his obligation was discharged by applying a credit to court-ordered property division. This unilateral modification on personal initiative is not acceptable to Mississippi appellate courts. "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).

As such, the trial court erred in not holding Mr. Zweber in contempt. A creditor spouse who successfully prosecutes an action for contempt is entitled to attorney's fees without a showing of need: "To hold otherwise would cause no peril to those restrained from certain conduct if they violate the orders of the Court. *Smith v. Little,*83 So2d 735, 738 (Miss. Ct. App. 2003).

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 owned 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.

(4) The chancellor erred in awarding legal expenses to the Appellee with regard to his Motion to Compel.

The general standard of review regarding discovery violations is for an abuse of discretion. *Cooper v. State Farm Fire & Cas. Co.*, 568 So.2d 687, 693 (Miss.1990). However, Mississippi appellate courts have yet to adopt a standard of review for Rule 37(a)(4) decisions. *See Barnes v. A Confidential Party,* 628 So.2d 283, 291 (Miss. 1993)(" ...this Court has not articulated a standard of review for decisions under Rule 37(a)(4)...)."

Rule 34(a) of the Mississippi Rules of Civil Procedure only requires a party to produce what documents are in the possession, custody, and control of the party upon whom the request is served. M.R.C.P. 34(a).

The chancellor erred in denying Teresa's motion to compel. Teresa was seeking documents from Mr. Zweber to show his financial position, a necessary element of determining college expenses (R. 202-204). *Wallace v. Wallace,* 965 So.2d 737, 745(¶ 27) (Miss.Ct.App.2007), *Saliba v. Saliba,* 753 So.2d 1095, 1101(¶ 21) (Miss.2000); *Lawrence v. Lawrence,* 574 So.2d 1376, 1383 (Miss.1991); and Miss. Code Ann. §93-5-23. The chancellor refused to order the production of the necessary documents while ordering both parties to supplement their discovery.

The chancellor then granted Mr. Zweber's motion to compel only to the extent of Teresa's credit card statements, but denied all the remaining portions of the motion. (R. 219-

220). Teresa's financial declaration was current, and it showed no credit card balance. Teresa objected to Mr. Zweber obtaining her personal credit card information when she had already disclosed that the credit card had no balance, making the statements irrelevant (R. 213). Mr. Zweber did not use the credit card statements in any way at trial, nor did they lead to the production of evidence used at trial.

Appellate courts have yet to construe the meaning of "substantially justified" and/or unjust from Rule 37 of the Mississippi Rules of Civil Procedure. However, general principles of equity make an award of attorney's fees in this matter unjust in accordance with Rule 37(a)(4) of the Mississippi Rules of Civil Procedure. Equity looks to intent and will regard substance rather than form. *Griffith* Mississippi Chancery Practice §39, 2000 Ed.

Teresa's intent was only to prevent Mr. Zweber from improperly using discovery to invade her privacy. Teresa disclosed in her original discovery responses that she did not carry a balance on her credit card and rarely used it at all. Once the court ordered her to produce the statements, she promptly turned them over to Mr. Zweber and they corroborated her discovery response that the card had no balance. Attorney's fees are not warranted here.

Additionally, the proof from the record shows that Teresa did not have the documents in her possession within the meaning of Rule 34 of the Mississippi Rules of Civil Procedure. Rule 34 only requires a party to produce what documents they actually have. (R. 213). Teresa does not receive regular credit card statements because she so rarely uses the card and keeps it only for emergencies. In the case at hand, Teresa actually had to spend time and attorney's fees to acquire the documents from her credit card company. (R. 213). Teresa is not required under the Mississippi Rule of Civil Procedure to conduct Mr. Zweber's investigation for him. He could have subpoenaed the documents if necessary.

In calculating attorney fees, the chancellor did not consider the amount of time counsel for Mr. Zweber spent seeking information that the court ultimately denied. Mr. Zweber elected not to subpoena the documents. Teresa's objection was reasonable, and ordering her to pay attorney's fees is unjust under the circumstances which makes an award of attorney's fees improper. M.R.C.P. 37(a)(4). Additionally, the trial court failed to address the *McKee* factors from *McKee v. McKee*, 418 So.2d 764, 767 (Miss.1982) and make factual findings as to the amount allegedly necessary to produce the credit card statements. The failure to make factual findings with regard to factor tests on the record creates error. *Lowrey v. Lowrey*, 25 So. 3d 274, 280-281 (¶7 through ¶12)(Miss. 2009).

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. 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.

CONCLUSION

The chancellor's Judgment entered in this cause on August 4, 2010 is not supported by the plain reading of the Final Decree of Divorce, clear and convincing evidence in the record, the facts presented, Mississippi case law, or public policy concerns upon which Mississippi precedent is based. Teresa never willfully disobeyed orders of the Court. The chancellor's order requires Teresa to pay amounts which greatly exceed the child support guidelines. The judgment rewards Mr. Zweber for his own failure to comply with discovery and his pattern of harassment regarding unnecessary discovery requests.

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 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 26th day of January, 2011.

Respectfully submitted,

TERESA DE JESUS ZWEBER

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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 Appellant to:

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SO CERTIFIED, this the 26th day of January, 2011.

Jerry Wesley Hisaw (MSB [redacted])
Certifying Attorney