

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-CA-01765

KHARI KAMAU ALEXANDER

APPELLANT

V.

AMANDA GREEN ALEXANDER

APPELLEE

**BRIEF OF APPELLANT,
KHARI KAMAU ALEXANDER**

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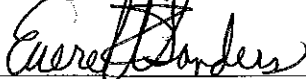
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

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Respectfully submitted,

BY:



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STATEMENT OF ISSUES

- A. THE COURT'S JUDGMENT WAS THE RESULT OF BIAS AGAINST THE APPELLANT AND IN FAVOR OF APPELLEE
- B. THE COURT WAS MANIFESTLY WRONG, ABUSED ITS' DISCRETION AND APPLIED AN ERRONEOUS LEGAL STANDARD IN GRANTING APPELLEE A DIVORCE
- C. THE COURT'S AWARD OF ATTORNEY FEES WAS NOT SUPPORTED BY THE RECORD

STATEMENT OF CASE

Khari and Amanda Alexander were married on October 5, 2001 in Marion County, Mississippi and lived together as husband and wife in Hinds County, Mississippi until their separation on March 6, 2009. There was one child born of the marriage, Amari Elizabeth Alexander, whose date of birth is June 26, 2007. (Rec Ex. 12)

On or about February 28, 2009, Amanda Alexander, discovered certain material on Khari Alexander's, computer from which she concluded that he was guilty of adultery. On March 3, 2009, she consulted with an attorney and on March 5, 2009, Amanda, an officer of this Court, caused to be filed an unverified and unsworn Complaint for Divorce along with an Application for Temporary Restraining Order and Writ of Assistance alleging that Khari had engaged in uncondoned adultery, over the internet, which caused their separation. On March 5, 2009 the Chancery Court, without notice to Khari, entered a Temporary Restraining Order and Writ of Assistance. On March 5, 2009, Amanda aware that a Restraining Order had been issued, slept with her husband in their martial bed. On March 6, 2009, Khari left his home and went to work and later that day was served with a Notice of a Temporary Hearing which was scheduled for

March 17, 2009 at 9:00 a.m. before the Chancery Court and he appeared, but no hearing occurred. Subsequent to March 6, 2009, Khari's previous Counsel sent Amanda's Counsel a letter indicating that he was not willing to agree to the terms which had been proposed. On April 10, 2009, Khari's new Counsel of record served a copy of his Notice of Appearance and a Motion to Dissolve the Temporary Restraining Order on counsel opposite via U. S. Mail with the original being sent to the Clerk of the Court for filing. The Notice of Appearance and Motion to Dissolve the Temporary Restraining Order were received and filed by the Clerk of the Court on 13th day of April, 2009. On April 14, 2009 the Chancery Court, without notice to Khari or his Counsel, and without a hearing, entered Orders granting to Amanda Alexander, Temporary Relief and Withholding of wages from Khari Alexander as well as incorporating the previously entered Temporary Restraining Order.

Upon hearing the Motions, the Court dissolved the Temporary Restraining Order and the Wage Withholding Order on June 17, 2009. During August, 2009, the Honorable Dwayne Thomas recused himself and The Honorable Billy Bridges was appointed Special Chancellor to hear this matter. On December 7, 2009 the Court, among other things, permitted Amanda to amend her Complaint wherein she alleged that she was entitled to a divorce on the grounds of Adultery and Irreconcilable Differences which were the same grounds alleged in the original Complaint. A hearing was scheduled by Order of the Court to begin at 10:00 a.m. on February 8, 2010 because Counsel for Khari had to drive in from out of town, but Amanda's Counsel noticed a Motion to be heard at 9:00 a.m. in spite of the Court's previous Order and attempted to proceed with the Motion in the absence of Counsel for Khari. On February 8, 2010, the Court commenced a

hearing on Khari's Motion to hold Amanda in contempt and at the conclusion of the day Khari did not complete his case and the matter was continued until February 24, 2010. Amanda noticed a Motion in Limine for 9:00 a.m. on February 24, 2010 in spite of the fact that Khari's Motion for Contempt was still pending and scheduled to proceed on that date and at that particular time. Counsel for Khari was approximately 5 to 10 minutes tardy due to the traffic congestion that he encountered in his drive in from Natchez and the difficulty he experienced in locating a parking space, but the Court proceeded with Amanda's Motion in Limine in the absence of Khari's Counsel and without allowing Khari the opportunity to put on any evidence even though he was present in the Courtroom and granted the motion and awarded Amanda attorney fees in the amount of \$1,000.

The Court then proceeded to the final hearing on the divorce without any further consideration of Khari's Motion for Contempt. At the end of the first day of the final hearing on the divorce of the parties, which was held on Thursday, February 25, 2010, the Court indicated that it was going to require Appellant, Khari Alexander, to pay to Appellee, Amanda Alexander, each month beginning March 1, 2010, \$500.00 for child support and \$360.00 for tuition and Counsel for Amanda prepared an Order and presented it to the Court after Khari and his Counsel left the Courthouse.

At the time when the Court indicated that it was going to require Khari to pay the \$860.00 on March 1, 2010, Counsel for Khari advised the Court that because of his current financial circumstances, he was unable to pay that amount on one business day's notice and that he could pay it by the 15th of March, 2010, but the Court summarily rejected his request and required that it be paid by March 1, 2010.

In support of her claim of adultery, three witnesses testified, Appellant, Khari Alexander, called adversely, Reverend Melvin Chapman and the Appellee, Amanda Alexander. After Amanda rested, Khari made a motion to dismiss the Complaint, but the Court denied the motion. Khari dismissed his Counter-Claim after the Amanda rested. After both parties rested, the Court found that Amanda failed to prove by clear and convincing evidence that Khari was guilty of uncondoned adultery and entered an Order to that effect. The Court found that Amanda had plead Adultery and Irreconcilable Difference as the grounds supporting her claim for a divorce. The Court advised Amanda that should she amend her Complaint to allege Habitual Cruel and Inhuman Treatment as a ground for divorce then he might be able to help her out. Amanda did not seek leave to amend her Complaint a second time until advised to do so by the Court. The record is devoid of any evidence that would support a claim of Habitual Cruel and Inhuman Treatment against the Defendant. Amanda has failed to prove any ground that would entitle her to a divorce and therefore the complaint is dismissed.

SUMMARY OF ARGUMENT

On this appeal Appellant argues that the Special Chancellor's judgment and award of relief to Amanda was the result of bias in favor of Amanda and against Khari as shown by his propensity to conduct ex parte hearing with only Amanda and counsel present and by his express declaration that he was "helping her." Appellant argues the Court to review the judgment and finding under the Plain Error Standard.

Appellant further asserts that the Court was manifestly wrong, abused its discretion and applied an erroneous legal standard in granting Amanda a divorce on the ground of Habitual Cruel and Inhuman Treatment, when Amanda's testimony showed that she was not entitled to a divorce on that ground.

Moreover, the Court's award of attorney fees was not supported by the record. It was particularly inappropriate since there was no determination in the record as to what portion of the fees were for work performed pursuing the charge of Adultery, of which she ultimately lost.

ARGUMENT

A. THE COURT'S JUDGMENT WAS THE RESULT OF BIAS AGAINST THE APPELLANT AND IN FAVOR OF APPELLEE

Amanda rested her case, Khari moved to dismiss and the Court denied the Motion. After the Court found that Amanda had failed to prove her charge of uncondoned adultery by clear and convincing evidence, the Court still refused to grant Khari's Motion to Dismiss, although no further ground for divorce was charged in the Complaint other than irreconcilable differences. No divorce could be granted on that ground because the parties had not agreed to a property settlement.

Appellant respectfully submits that these statements by the Chancellor amount to a clear statement of bias in favor of Amanda and against Khari:

The Court: All right. We are at the end of the case. I have heard all the testimony pertaining to the charged grounds for divorce, and I think particularly as to the grounds for adultery, uncondoned adultery, that the plaintiff has not met her proof. She has requested in an amended complaint for a divorce on the grounds of irreconcilable differences, but she has prayed for a divorce on the ground of habitual cruel and inhuman treatment. That's not been charged. I'm helping her, I know, Mr. Sanders, but under the new rules an amendment can be made right up to the final order. And Ms. Brown, if you will conform to the statute and the rules, I can possibly grant a divorce on other grounds, but that's as far as I can go with you. You have prayed for all three grounds but you haven't charged that in the complaint. (Rec.Ex.

Amanda had two opportunities to charge Khari with Habitual Cruel and Inhuman Treatment but did not do so. She did not ask to amend her Complaint a second time in order to charge this ground until the Court advised her to do so and all but promised to grant her a divorce if she did.

The Chancellor kept his word. He granted Amanda a divorce on the ground he suggested. Elsewhere in this brief Appellant, Khari Alexander, argues that the granting of a divorce to Amanda Alexander on the ground of Habitual Cruel and Inhuman Treatment violates established principles of law. Here, however, appellant contends that the very notion of a divorce on that ground originated with the Chancellor which is the epitome of partiality and bias in favor of one party and against the other.

Other decisions of the Court further reflect bias on the part of the Chancellor. These include:

- a. granting alimony to Amanda when she never testified she needed it;
- b. granting child support in an amount greater than allowed by statute;
- d. ignoring Amanda's consistent refusal to allow Khari to visit with the minor child of the parties despite a Court order;
- e. issuing an arrest warrant for Khari after conducting a post judgment *ex parte* hearing when Khari had not been served with process.

(See Motion to Stay filed in this Court on or about April 8, 2011)

- f. the trial court engaged in the following *ex parte* matters:
 - (1) Conducted a hearing on February 24, 2010 prior to Appellant's counsel's arrival in court and held Appellant in contempt and ordered him to pay \$1,000.00 in attorney's fees for an alleged Discovery violation (See Exhibit I; attached hereto Tr. 150-157)
 - (2) Conducted a hearing during Appellant's counsel's illness and in his absence on August 20, 2010 (R 494-504)
 - (3) Entered a wage withholding Order on October 15, 2010 that was presented by Counsel for Appellee and increased the child support payments from \$1,000.00 to \$1,360.00 per month apparently without a hearing. (See Exhibit B attached to Motion to Stay

- (4) On February 2, 2011, conducted a hearing and found Appellant in contempt of Court and issued a warrant for his arrest, both in Appellant's absence and without service of process on Appellant. (See Exhibits C and D attached hereto.
- (5) Without an apparent hearing, or service of process on Appellant, the Court on March 15, 2011 issued an Amended Order holding Appellant in contempt of Court and issuing a Warrant for Appellant's arrest. (See Exhibit E attached hereto)

g. The trial court failed to follow the Rules and/or the law in the following:

- (1) Exercised personal jurisdiction and conducted a contempt hearing regarding Appellant on February 2, 2011 without serving him with process as required by Rule 81 of the Mississippi Rules of Civil Procedure. (See Exhibit C attached hereto.)
- (2) Exercised personal jurisdiction on March 15, 2011 regarding Appellant and amended the Contempt Order without an apparent hearing in violations of Rule 81 of the Mississippi Rules of Civil Procedure. (See Exhibit E attached hereto.)
- (3) Granted a divorce on the ground of habitual cruel and inhuman treatment when:
 - (a) the basis for separation was the purported adultery and not the alleged habitual cruel and inhuman treatment as required by law. Appellee pled and testified that adultery provided the basis for separation (See paragraphs 7 and 9 above). There must be a *causal* connection between the habitual cruel and inhuman treatment and the separation. *Fournet v. Fournet*, 481 So.2d 326, 329 (Miss. 1985)
 - (b) there was no corroboration of Appellee's claim that she was the victim of habitual cruel and inhuman treatment. Although offering no testimony on this issue on direct, Appellee testified on cross examination regarding two isolated incidents which purportedly took place in 2003 and 2007. She indicated that they never separated because of either incident and the police were not called. (See Exhibit K attached hereto; R 363368) Neither Appellant, nor Reverend Chapman, the other fact witnesses, corroborated Appellee's testimony in this regard. A divorce on the ground of cruel and inhuman treatment requires corroboration. *Gardner v. Gardner*, 618 So.2d 108, 114 (Miss. 1993)

Standards of Review:

In cases where there are serious allegations of bias or judicial misconduct, appellate courts give "utmost attention". *Robinson et al v. Burton et al* 2008 - CP 01776-COA (MSCA)

Because of the nature of Robinson's allegations and to ensure there has been no miscarriage of justice, we review for plain error. See *Frierson*, 818 So.2d at 1141 (¶¶ 10-12). In conducting our review, we are mindful that the supreme court has clearly explained there is a presumption that the "trial judge is qualified and unbiased, and this presumption may only be overcome by evidence which produces a reasonable doubt about the validity of the presumption." *Payton v. State*, 897 So.2d 921, 943 (¶72) (Miss. 2003). The scope of this inquiry focuses on whether a "reasonable person, knowing all the facts and circumstances, would harbor doubts about [the trial judge's] impartiality." *Frierson*, 818 So.2d at 1142 ¶¶ 12, 15) (quoting *Summers ex rel. Dawson v. St Andrew's Episcopal Sch., Inc.*, 759 So.2d 1203, 1209 (¶21) (Miss. 2000)).

In *Robinson*, the Court used the plain error test despite the fact that the Appellant, a pro se litigant had failed to object or move to recuse. However, these infirmities are not present here. First, Khari's counsel filed a Motion for the Chancellor to recuse himself (Rec Ex. 07) and second the Court made it clear that any objections would be overruled.

The record here goes way beyond raising "doubts about the trial judge's impartiality. The trial judge's statement on the record that "Im helping her I know...." leaves no room for doubt. This was no minor help. After more than one year of trying, Amanda had wholly failed to make the case she chose to present. She should have been out of Court. It was grossly unfair for the trial Court to suggest, albeit erroneously, another charge on which she should proceed.

B. THE COURT WAS MANIFESTLY WRONG, ABUSED ITS' DISCRETION AND APPLIED AN ERRONEOUS LEGAL STANDARD IN GRANTING APPELLEE A DIVORCE

The law is well settled that this Court will is limited in its review of a Chancellor findings in a divorce case. In *Ladner v. Ladner*, 49 So2d 669671 (Miss. App.2010) this Court stated the following:

“Our supreme court has set out the standard of review that we apply in cases such as this one:

We employ a limited standard of review in domestic relations cases. " [An appellate court] will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous[,] or an erroneous legal standard was applied." *Duncan v. Duncan*, 774 So.2d 418, 419 [(¶ 4)] (Miss.2000) (citing *Kilpatrick v. Kilpatrick*, 732 So.2d 876, 880 [(¶ 13)] (Miss.1999).) " Under the standard of review utilized to review a chancery court's findings of fact, particularly in the areas of divorce, alimony[,] and child support, [an appellate court] will not overturn the [chancery] court on appeal unless its findings were manifestly wrong." *Id.* For questions of law, our standard of review is de novo. *Id.* (citing *Consol. Pipe & Supply Co. v. Colter*, 735 So.2d 958, 961 [(¶ 13)] (Miss.1999).

In re Dissolution of Marriage of Wood, 35 So.3d 507, 512 (¶ 8) (Miss.2010).”

Appellant submits that the Court was manifestly wrong, abused its' discretion and applied an erroneous legal standard in granting Appellee, Amanda Alexander, a divorce on the ground of habitual cruel and inhuman treatment. First, the law is clear that a litigant seeking a divorce on the ground of habitual cruel and inhuman treatment must show that the separation was causally connected to the conduct that constitutes the cruel and inhuman treatment. The Court emphasized this requirement very clearly in *Fournet v Fournet*, 481 So.2d 326,329 (Miss.1985) when it stated:

Additionally, Mrs. Fournet offered no proof as to a causal connection between the cruel treatment of which she complained and her separation from the household. **There is a necessity for this causal relationship to be proved when relying on the ground of habitual cruel and inhuman treatment, and it must be related in point of time to the separation.** *Harrison v. Harrison*, 285 So.2d 752 (Miss.1973); Bunkley and Morse's Amis Divorce and Separation in Mississippi, Sec. 3.14(17) (1957); N. Hand, Divorce, Alimony and Child Custody, Sec. 4.12, (1981); Divorce Habitual Cruel And Inhuman Treatment, 45 M.L.J. 1073 (1974). Mrs. Fournet did testify as to two visits to a psychiatrist over a year prior to the separation. (Emphasis added)

The evidence in the case **sub judice** clearly demonstrates that the reason for the separation of the parties had nothing to do with any alleged conduct associated with a claim of habitual cruel and inhuman treatment. In fact, according to Appellee, Amanda Alexander, the separation was the result of the purported adultery which provided the basis for her divorce complaint. Amanda testified to the following:

Q And you filed a complaint for divorce in this matter; is that correct?

A That's correct.

Q What grounds did you file the complaint for divorce on?

A On the grounds of adultery.

Q And who did you file that complaint for divorce against?

A Against the defendant, Khari Kamau Alexander...

...

Q Why did you all separate?

A I discovered that he had in fact had inappropriate relationships with other women during our marriage

(TR. 296)

It is rather ostensible that from the pleadings and the testimony that adultery was the only thing that Amanda had on her mind with respect to the divorce as well as the separation. In fact, the trial court did not suggest that any habitual cruel and inhuman treatment was in any respect connected to the separation of the parties. This clearly constitutes an erroneous application of the law. For this reason alone, this Court should reverse the trial court's award of a divorce to Amanda Alexander.

Second, there was no corroboration of Amanda's claim that she was entitled to a divorce on the ground of habitual cruel and inhuman treatment. She offered no testimony on the issue of habitual cruel and inhuman treatment during her case. However, on cross-examination Amanda testified that when they were living in Hattiesburg, one night in 2003 while she was asleep Khari pulled the cover off the bed because she would not talk to him.(R364) She stated that attempted to call the police and Khari knocked the telephone out of her hand and the phone hit her face. She indicated that he chased her down the street to a neighbor's house. She further testified that he was not arrested and that she has never filed a domestic violence complaint against him.(R 365) Amanda mentioned another incident where she said Khari came at her forcefully but did not touch her. She was not able to recall just when the event occurred. (R 367) She indicated that it may have been in 2007 when they were living in Rankin County. (R368) However, Amanda testified that they did not separate as a result of these two incidents.

Reverend Chapman, the only witness that was offered to corroborate any of Amanda's allegations, attempted to support her claim of adultery. Reverend Chapman testimony is basically

predicated on what Khari purportedly disclosed to him. Reverend Chapman does not remotely suggest that he knew or Khari had told him anything that touched on a habitual cruel and inhuman treatment claim. Khari did not corroborate the two instances referred to by Amanda in her testimony.

The law in this state is clear that a divorce on the ground of habitual cruel and inhuman treatment can not be granted on uncorroborated testimony. In *Gardner v. Gardner*, 618 So.2d 108 (Miss.1993), the Court stated:

In the judgment entered in this case, the lower court found that "neither the Complaint or Counter Claim establishes grounds for divorce and divorce is hereby denied on behalf of the parties." In the recent case of *Rawson v. Buta*, 609 So.2d 426 (Miss.1992), this Court restated the basis for divorce on the grounds of habitual cruel and inhuman treatment:

A chancellor may grant a divorce on the grounds of "habitual, cruel and inhuman treatment." Miss.Code Ann. Sec. 93-5-1 (1972). Mississippi rules require that "[i]n all uncontested divorce cases, except irreconcilable differences, the testimony of the Plaintiff must be substantially corroborated." Miss.Unif.Chan.Ct.R. 8.03 (1990). According to Mississippi case law, the plaintiff must prove this ground for divorce by a preponderance of the credible evidence. *Cooper v. Cooper*, 518 So.2d 664, 666 (Miss.1988). The chancellor, as the trier of fact, evaluates the sufficiency of the proof based on the credibility of witnesses and the weight of their testimony. *Rainey v. Rainey*, 205 So.2d 514, 515 (Miss.1967).

Evidence sufficient to establish habitual, cruel and inhuman treatment should prove conduct that:

either endanger[s] life, limb or health, or create[s] a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief or, in the alternative, be so unnatural and infamous as to make the marriage revolting to the offending spouse and render it impossible for that spouse to discharge the duties of the marriage, thus destroying the basis for its continuance.

The trial court committed reversible error in granting Amanda a divorce on the uncorroborated testimony. This clearly constitutes a misapplication of the law.

However, even if Amanda's testimony had been corroborated, the facts are insufficient to support a claim for a divorce on the basis of habitual cruel and inhuman treatment. Amanda Alexander's actions as well as her testimony suggest that she had not been exposed to conduct that endangered her life, limb or health or created a reasonable apprehension of such danger, rendering the relationship unsafe for her or conduct so unnatural and infamous as to make her marriage revolting to her and render it impossible for her to discharge the duties of the marriage, thus destroying the basis for its continuance. It can hardly be said that Amanda was in apprehension of danger or that she found Khari Alexander revolting. This is particularly true in light of her following testimony:

Q. Now, did you see Mr. Alexander on March 5th?

A. I did.

Q. Okay. Did you see him after you became aware that the temporary restraining order had been issued?

A. Yes.

Q. Okay. Where did you see him?

A. At our home.

Q. Okay. Did you tell him that you had a temporary restraining order against him?

A. No.

Q. Okay. Where did Mr. Alexander spend the night on March the 5th?

A. He slept in our home at 2043 Branch Creek Drive in Byram, Mississippi.

Q. Did you all sleep in the same bed?

A. We did.

Q. Okay. But you had a restraining order at that time?

A. I did.

Q. Okay. You obviously were not fearful of him?

A. No, because I had the same information that he had had for a year and a half.

Q. Okay.

A. And he was not aware of that.

Q. I'm saying that you were not fearful of Mr. Alexander?

A. There was no need to be fearful at that moment.

It is obvious that Amanda's testimony was insufficient to support the granting of a divorce on the ground of cruel and inhuman treatment. Therefore, Khari Alexander submits that the case should be reversed and rendered.

C. THE COURT'S AWARD OF ATTORNEY FEES WAS NOT SUPPORTED BY THE RECORD

The Court granted Amanda the sum of \$31,705.45 as attorney fees.

"Defendant shall pay all costs herein, as well as the fees of Plaintiff's attorney in the sum of \$31,705.45 as of May 31, 2010 plus any expended or charged to Plaintiff since that date said sum to be paid or before six months from the date of the judgment."

The Court made no specific finding that Amanda could not pay her attorney fees. No such finding is contained in the Court's Findings of Fact Specific findings are required.

the touchstone issue in granting attorney fees is a party's inability to pay her attorney fees. *Fisher v. Fisher*, 771 So.2d 364, 369 (Miss.2000) (citing *Grogan v. Grogan*, 641 So.2d 734, 744 (Miss. 1994); *Gray v. Gray*, 745 So.2d 234, 239 (¶26) (citing *Benson v. Benson*, 608 So.2d 709, 712 (Miss.1992)). However, the chancery court did not make any specific finding as to Deborah's inability to pay her attorney fees. Accordingly, we reverse the chancellor's award of attorney fees and remand this case to the chancery court. *Johnson v. Johnson*, 650 So.2d 1281, 1288-89 (Miss. 1994). On remand, the chancery court must examine Deborah's financial situation and make specif findings as to Deborah's ability to pay her attorney fees.


This action was commenced on March 3, 2009. All of the work performed Appellee's attorney performed to May 24, 2010 was in pursuit of a divorce based on Adultery, a ground that Amanda failed to prove. Under no circumstances should Khari be required to pay the attorney fees related to a failed claim for divorce based on adultery.

In the absence of an itemized statement or affidavit by her attorney, the Court should not have awarded any attorney fees.

CONCLUSION

For the above and foregoing reasons, the judgment below should be reversed and rendered.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I EVERETT T. SANDERS, do hereby certify that I have this day served via United States mail, postage prepaid, a true and correct copy of the foregoing *Brief of Appellant* on:

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This the 6th day of May, 2011.



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