IN THE SUPREME COURT OF THE STATE MISSISSIPPI

ROSEMARY FINCH	APPELLANT/PLAINTIFF/CROSS-APPELLEE
v.	No. 2011-CA-00306-COA
STEWART FINCH	APPELLEE/DEFENDANT/CROSS-APPELLANT

RT

APPEAL FROM THE CHANCERY COURT
OF LAMAR COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT/ BRIEF OF CROSS-APPELLEE ROSEMARY FINCH

JAMES L. ROBERTSON, MSB N[redacted]
WISE CARTER CHILD & CARAWAY, P.A.
Post Office Box 651
Jackson, MS 39205-0651
Telephone: 601.968.5500
Facsimile: 601.968.5593

ALFRED J. LECHNER, JR., *pro hac vice*
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036-2787
Telephone: 212.819.8904
Facsimile: 212.354.8113

ATTORNEYS FOR ROSEMARY FINCH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

I. INTRODUCTION

A. Stewart Finch Did Not Address Issues Raised in Rosemary's Brief of Appellant

Stewart Finch ("Stewart") submitted a Brief on Behalf of Appellee[1] ("Stewart's Brief") which failed to address the issues Rosemary Finch ("Rosemary") raised in her Brief of Appellant ("Rosemary's Brief"). Instead, Stewart's Brief addressed issues that were not properly before the Chancery Court, as they were neither a part of his January 28, 2010 Counter-Petition for Contempt and Modification, C 81-85,[2] or his Amended June 29, 2010 Counter-Petition for Contempt and Modification. C 93-101 and 111-112.

Among the issues Rosemary presents but which Stewart did not address are (i) whether the third Chancery Judge had the authority, *sua sponte*, to in effect set aside an unappealed final judgment which had been entered more than sixteen months earlier by the original trial judge who actually heard the witnesses and the parties, adjudged their credibility and, thereafter, decided the contested issues, (ii) whether the third Chancery Judge had the authority, *sua sponte*, to reduce retroactively previously paid alimony, as well as unpaid child support, rights to both of which were vested, (iii) whether the third Chancery Judge had the authority, *sua sponte,* to set aside much of the final judgment of divorce, entered September 29, 2009 (the "Judgment of Divorce"), C 50-55, which accepted and incorporated the negotiated financial and property settlement agreement of the parties, a/k/a the Consent to Adjudicate, (iv) whether the third Chancery Judge erred in finding fraud on the Court where Stewart neither alleged in either of his Counter-Petitions nor proved that Rosemary intentionally submitted a false Rule 8.05 financial statement, or withheld information concerning her income or marital debts, (v) whether the third

---

[1] Stewart's Brief also presents a Cross-Appeal of Stewart Finch, see Issue No. 5, page 5, and pages 33-36.

[2] As in Rosemary's Brief of Appellant, citation to the documents in the official Clerk's file are designated "C ___"; citations to transcripts of Court proceedings are designated "T___".

Chancery Judge erred in ignoring Stewart's late payments or non-payments of alimony and child support, (vi) whether the third Chancery Judge had the authority to ignore Stewart's resort to self help when he unilaterally stopped paying child support in July 2010, self-changed the date on which alimony payments were ordered to be made and self-reduced judicially awarded alimony, (vii) whether, because of Stewart's unclean hands, the third Chancery Judge should have heard either of Stewart's Counter-Petitions and (viii) whether the third Chancery Judge had the authority to ignore Rosemary's timely filed motion seeking enforcement of the Judgment of Divorce, given (v) and (vi) above.

Stewart also failed to address his untimely filing on June 10, 2011, of a Notice of (Cross) Appeal with regard to the Opinion and Judgment from the Chancery Court, dated February 16, 2011 (the "February 2011 Judgment"), C 348-59, and failed to address, or argue, the asserted error of the third Chancery Judge in not reconsidering her February 2011 Judgment.

B. Stewart Addressed Issues That Were Not Included in Either His January 2010 Counter-Petition for Contempt and Modification or His June 2010 Amended Counter-Petition for Contempt and Modification

In his June 2010 Amended Counter-Petition for Contempt, Stewart alleged, as a basis to reduce alimony, only his American Express Account, the failure of Rosemary to pay his debt on that account and her failure to give notice of receipt of any collection efforts by American Express or a collection agency on behalf of American Express. C 107-08. Significantly, Stewart's Brief does not mention this allegation, though this is the only alimony issue raised in either of his Counter-Petitions in the court below as a basis for reducing alimony. In any event, there is no merit to this allegation.

For years, Stewart had been monitoring his American Express account, as well as monitoring his credit rating. Examples of this are his communications to and from American Express in August/September 2008. A letter Stewart received from American Express, dated

September 22, 2008 (the "American Express Letter"), C 379, was in response to a request from him to remove Rosemary as his account manager.[3]

Stewart's Brief focuses on issues other than those he gave notice of in either of his Counter-Petitions for Contempt. Stewart's Brief focuses on an asserted increased income for Rosemary -- which in fact did not happen, and was not proved. It focuses on an asserted post-divorce decrease in his income -- which did not happen, and was not proved. It focuses on an alleged post-divorce change in circumstances with regard to his relationship with his son, -- which did not happen, and was not proved.

The consequence of Stewart's Counter-Petitions for Contempt and Modification is that Rosemary had no notice – prior to the August 25, 2010, hearing before Judge Billy G. Bridges, the second chancery judge -- that she would have to defend against contentions that she had increased income, that Stewart had decreased income, that he was not aware of credit card debt in his name, or that she would be accused of filing a false Rule 8.05 Statement. Without that notice, she was not able to take pre-hearing discovery from Stewart, from American Express or from the credit rating agencies through which Stewart monitored his credit rating and finances. She was unable to prepare for cross examination concerning money in her accounts which was generated virtually exclusively from Stewart's payment of arrearages in child support, court-ordered attorney's fees, monthly alimony, monthly child support and monthly COBRA payments. Yet at the August 2010 hearing, and in his Brief to this Court, Stewart attempted to say that Rosemary had money other than as paid in alimony, child support, monthly COBRA payments, court ordered attorneys' fees and social security -- which she did not, and that was not proved. T 188-93, Stewart's Brief 21-27; 30-31.

---

[3] As well, see the letters he received from three credit rating agencies in April 2008 -- Experian, Equifax and TransUnion -- all dated April 2008. C 380-82.

C. Stewart Failed to Timely File a Notice of Appeal from the February 2011 Judgment and, While Timely Filing an Appeal from the May 2011 Opinion from the Court Below, Failed to Address that Appeal

On January 26, 2011, third Chancery Judge heard the then pending Petition by Rosemary for Contempt and the Counter-Petitions from Stewart for Contempt and Modification, as well as argument concerning Rosemary's Motion for Enforcement and Stewart's Motion to Strike. On February 16, 2011, the Chancery Court entered the Judgment Rosemary now appeals.

On February 25, 2011 Rosemary filed her Notice of Appeal from the February 16, 2011 Judgment. Not until June 10, 2011, did Stewart file his Notice of Cross-Appeal from the February 16, 2011 Judgment.

On April 11, 2011, Stewart (i) moved to re-open the record pursuant to Rule 60(b)(3), (ii) requested that the Chancery Court reconsider its February 25, 2011 ruling declining to emancipate his son, Sean, and (iii) asked the Chancery Court to reopen his time to file a cross appeal and grant him an extension thereof. C 370-72. On May 10, 2011, the third Chancery Judge held a hearing on Stewart's motion, which included his request for more time to file a cross appeal. On May 19, 2011 the third Chancery Judge issued her Order (the "May 2011 Order"), C 408-09, which did not reopen or grant Stewart an extension of time to file a cross appeal. *Id.* On June 10, 2011, Stewart filed a Notice of Appeal of the May 2011 Order, C 476-77, which, among other things, did not grant a reconsideration of Stewart's emancipation request.

Stewart's Cross-Appeal of the February 2011 Judgment must be dismissed; it was filed too late. Stewart's appeal from the May 2011 Order must also be dismissed. Stewart's Brief did not address any error with regard to the May 2011 Order, including the fact that the third Chancery Judge did not reconsider her February 2011 Judgment concerning Sean's emancipation.

II. REPLY TO THE SUMMARY OF ARGUMENT BY STEWART

A. Stewart Misstated Rosemary's Petition for Contempt

Stewart disingenuously argued that all of the complaints Rosemary set out in her Petition for Contempt "were beyond [his] control ... with the exception of the **retroactive** child support **increase.**" Stewart's Brief at 6 (emphasis added). Initially, as was explained in Rosemary's Brief at 37-45 and, as will be explained hereinafter, the Chancery Court never made a so-called "retroactive" child support, nor was there an increase in child support. On June 2, 2009, Stewart had knowingly agreed in the pre-divorce Consent to Adjudicate to pay child support in the amount of $1300 per month, commencing the first day of June 2009. Consent to Adjudicate 5, C 41. Judge Thomas approved and incorporated that agreement into his Judgment of Divorce entered September 29, 2009. Judgment of Divorce at 4, C 53.

In her Petition for Contempt filed December 15, 2009, Rosemary asked the Chancery Court to address several points. Stewart misstates these. Stewart asserts that Rosemary's Petition for Contempt "attributes to Mr. Finch":

1. [A] failure to execute a quit claim deed of (sic) the marital home;
2. [A failure to] transfer of title to the Infiniti to [Rosemary];
3. [A failure to] transfer title of the Camaro to Shannon, [his daughter];
4. [A failure to] maintain life insurance coverage;
5. [A failure to] pay $7,000 attorney fee awards;
6. [A failure to] maintain COBRA Insurance coverage;
7. Retroactive payment of child support increase (sic).

Stewart's Brief at 6. In point of fact, Rosemary's Petition for Contempt had ten points:

A. Stewart agreed to vest title in the marital estate in her name and refused to do so;
B. Stewart agreed to vest title in the Infiniti in her name and refused to do so;
C. Stewart agreed to vest title in the 2002 Camaro to Shannon Finch and refused to do so;
D. Stewart agreed to, and was ordered by the Court to, maintain (and provide proof of) life insurance on his life for his son and thereafter for Rosemary and refused to do so;

E. Stewart was ordered to pay $7,000 to [Rosemary] as attorneys fees and refused to do so;
F. Stewart was ordered to provide [Rosemary] with 36 months of COBRA coverage and failed and refused to do so;
G. Stewart was required to pay $4,000 a month in alimony on the first of each month and was late in doing so causing financial hardship;
H. Stewart refused to pay child support and at the time of the filing of her Contempt Petition was in arrears in the amount of $5,200;
I. Stewart refused to disclose his current address as required by Rule 8.06; and
J. Stewart failed and refused to authorize [Rosemary] to obtain information regarding the home equity line of credit that [Rosemary] was ordered to pay.

Rosemary's Petition for Contempt at unnumbered pages 1 through 3, C 58-60.

With regard to the deed to the marital residence, the Consent to Adjudicate provided that "Stewart agrees to convey his entire interest in said home unto Rosemary by Special Warranty Deed . . . ." Consent to Adjudicate at 7, C 43. The Judgment of Divorce acknowledged that "[Stewart] has agreed to vest title to the property [the marital residence] in [Rosemary] . . . ." Judgment at 2, C 51. At the time Rosemary filed her Petition for Contempt, on December 15, 2009, the Defendant had not done so. Nevertheless, it appears a deed had been prepared and had been signed by Stewart but was in a file maintained by his attorney, Stewart's Brief at 10; it was not forwarded to Rosemary until June or July 2010, some nine or ten months after the Judgment of Divorce was entered requiring him to do so and about one year after Stewart signed the Consent to Adjudicate. Not knowing what was in Stewart's lawyer's files, Rosemary acted reasonably in making this claim in her Petition for Contempt. Stewart could have mooted this point by promptly forwarding the quit claim deed to Rosemary after he received her Petition for Contempt. *Id.*

Concerning the transfer of the title to the Infiniti to Rosemary and the transfer of the title to the Camaro to Shannon, Stewart agreed to do these "by Certificate of Title, or other appropriate instruments of conveyance." Consent to Adjudicate at 8-9 (emphasis added), C 44-

45. The Judgment recognized the same. Judgment at 2-3, C 51-52. Rosemary never denied that, to obtain the actual Certificates of Title, the loans had to be paid. Stewart nevertheless could have/should have provided a statement to the finance companies and to Rosemary and Shannon that he had disclaimed all interest in and to these vehicles and that the finance companies were to provide titles to each of these individuals upon payment of these debts.

With regard to the maintenance of life insurance coverage, Stewart agreed that he would "provide Rosemary with a copy of said life insurance policy, as well as written verification upon periodic request by Rosemary and/or her representative that Stewart is in fact, maintaining said policy in full force and effect." Consent to Adjudicate at 6-7, C 42-43. The Judgment of Divorce provided that "[t]he life insurance coverage in place shall continue to be maintained by [Stewart] with Sean to be beneficiary until he is emancipated and [Rosemary] is to be named as beneficiary to secure any future alimony payments which may be due." Judgment at 5-6, C 54-55. Stewart never complied with these obligations.

With regard to the payment of the $7,000 attorney fee, the Judgment provides that Stewart "shall pay to [Rosemary] the sum of $7,000 as a contribution toward her attorney's fees." Judgment at 6, C 55 (emphasis added). There is no provision that the fee is to be paid to anyone other than Rosemary; her former attorney had no legal right to interfere with that payment to her. Moreover, Stewart had no right to ignore the terms of the Judgment and delay payment for almost six months after the September 29, 2009, entry of the Judgment of Divorce.

Without contradiction, Stewart was ordered to provide and pay for COBRA commencing October 1, 2009. Rosemary's Affidavit in Support of Motion for Enforcement at ¶¶ 20-24, C 155-56. Stewart carried Rosemary on his work health insurance for the month of October 2009. At that point, she went on COBRA commencing the month of November 2009. Stewart sent a

check for several months of COBRA payments but tried to limit that payment commencing the month of December, rather than November 2009. Stewart sent Rosemary an email on January 5, 2010, and stated that he paid COBRA at that time for seven months but admitted that such payment did not include the month of November 2009. That email from Stewart stated: "As Judge Thomas ordered, I have paid you [Rosemary] for your COBRA monthly costs, now by this week for seven months of total COBRA coverage for December 2009, January 2010, and pre-paid through June 2010 at $550.00 a month." *Id.*, at Exhibit D to Rosemary's Affidavit submitted in support of the Motion to Enforce. C 188. To this day, the amount of $550.00 for COBRA for the month of November 2009 remains due, owing and accruing interest.

In Stewart's Brief at 6, he again misstated his agreement to pay child support and claimed a "retroactive" order that he pay "increased" child support. On June 2, 2009, Stewart "agre[ed] to pay unto Rosemary, as a form of child support, the sum of One Thousand Three Hundred & 00/100 Dollars ($1,300.00) per month, beginning June 1, 2009 and continuing on the first (1st) day of each month and every month thereafter until the minor child's emancipation." Consent to Adjudicate at 5, C 41. Stewart has never had a reasonable basis for claiming or stating that his child support payments were retroactively ordered or that there was an increase in child support payments. Stewart complains to this Court about child support payments in an amount and a date of commencement that were exactly as Stewart had agreed on June 2, 2009.

B. Rather Than Addressing the Facts or the Law Raised by Rosemary in Her Brief, Stewart Used Unprofessional Language to Attack Rosemary and His Son

On several occasions in his brief, Stewart says Rosemary lied. For example, "[Rosemary] is just embarrassed that she got caught." Stewart's Brief at 21.[4] This was in connection with the monthly Social Security payment she received starting in December 2009 some six months after the June 2, 2009 Divorce Trial and some six months after the submission of her Rule 8.05 Statement. As she testified at the divorce trial before Judge Thomas, "... I've sent for those papers [Social Security papers] and they [the Social Security Administration] said it would take 8 to 12 weeks to get here. I haven't gotten them yet, but he knows that I wouldn't be getting anything." T 88, lines 8-18.

Rosemary did not in fact start receiving such payments until more than six months after the trial. Stewart's statement that "she sets a new record for qualifying and receiving Social Security benefits," Stewart's Brief at 21, is unfair. Still, it shows that she did not "get caught" at anything. Rosemary fully disclosed at the Divorce Trial her pre-trial effort to obtain "papers from

---

[4] Stewart also asserts that Rosemary is wrong when she explained that, since the June 2, 2009 Trial, nothing new occurred between Stewart and his son to justify emancipation. Stewart's Brief at 32. Stewart stated that "[Rosemary's] lie is obtruse." *Id.* In point of fact, Rosemary explained in her Brief that, other than the name change where Sean dropped his middle name, nothing new occurred after the Divorce Trial. The March 28, 2008 email exchange between Stewart and Sean was not new; it occurred 15 months before Stewart signed the Consent to Adjudicate, 15 months before the June 2, 2009 trial and 18 months before the Judgment of Divorce.

Stewart's most disappointing argument is his demand that his son be emancipated, and that he no longer be obligated to support his son. *Id.* at 34-38. Stewart berates his son and suggests that Rosemary "fought production" of Sean's transcript of grades for his Fall semester in college "because it showed exactly what [Stewart] suspected [:] Sean made a C, F, no credit, and withdrew from two other classes." *Id.* at 35. Stewart stated that Sean "creatively withdrew from the spring semester a course every few weeks." *Id.* Stewart knew full well that, because of the retroactive reduction in alimony and child support and his refusal to support Sean financially while at college, the financial needs of the family that remained after Stewart's desertion are what forced Sean to withdraw. *See infra* p. 32.

Social Security." Judge Thomas did not require her to inform the Court (or inform Stewart, nor did Stewart ask for such notice) if she received any Social Security payments in the future.

Stewart then asserts that "[Rosemary] misrepresented her bank accounts, income and expenses to the Court during the divorce hearing and continues to this very day." Stewart's Brief at 24. That statement is wrong. At neither the June 2, 2009 Divorce Trial nor the August 25, 2010 Hearing did she have notice (i) that her bank accounts would be a basis for Stewart to ask for a reduction in alimony, (ii) that her mother's bank account would later be offered or (iii) that Stewart would later seek to have alimony reduced on any ground other than his American Express account. Stewart's Amended June 2010 Counter-Petition, at 4th unnumbered page, Section (V), C 107-08. The only alimony-related allegation in either of Stewart's Counter-Petitions asserts circumstances concerning his American Express account. *Id.*

Stewart sought a reduction in his alimony payments only to offset the payments and the damages he alleges were inflicted "upon him by all of the debt [this is a singular, not a plural reference] he has been forced to assume as a result of the fraudulent actions of Rosemary Finch [concerning his American Express Account.]" June 2010 Counter-Petition, Section (IV) at 5th unnumbered page, C 108. Stewart's June 2010 Amended Counter-Petition gave no notice that Rosemary's bank accounts, income or expenses or her Rule 8.05 Financial Statement would be claimed as a basis for reducing Stewart's alimony obligations.

Stewart is simply wrong when he says Rosemary's argument "that Stewart did not request this relief [reducing her alimony payments as a result of all of these misrepresentations to the Court] is another misstatement of facts." Stewart's Brief at 27. Alleged (but never proved) misuse of his American Express card was the only ground Stewart ever suggested for reducing his alimony obligations. Nothing else. Moreover, Stewart never asked for a retroactive

reduction of alimony, no doubt because he knew vested alimony could not be forgiven, only paid. *See e.g., Broome v. Broome*, 2011 WL 6156875, *9 (¶ 36) (Miss. Ct. App. 2011); *McCardle v. McCardle*, 862 So.2d 1290, 1293 (¶ 16) (Miss. Ct. App. 2004). After all, twin policy justifications for this rule are but common sense. Without it, a payor former spouse will be tempted to engage in self-help. With it, the parties are incented to present to such emotionally charged disputes to an objective, competent and impartial arbiter, the chancery court, which already has the parties within its jurisdiction and has the power to award attorneys fees where appropriate.

In contrast to Stewart's empty allegations against Rosemary, his own misstatements are significant. At the time of the Hearing before Judge Bridges, Stewart represented to Judge Bridges the following:

- The lump sum and back payment of the child support takes us both [the attorney and his client, Stewart] by surprise back to June.
- The only difference was the Judge backdated the child support; and
- What threw us for a loop was the judgment authorizing the child support of $1,300 to go back to the date of the trial.

Hearing before Judge Bridges at T 265, Rosemary's Appellate Brief at 14. In point of fact, the Consent to Adjudicate that Stewart signed on June 2, 2009, stated:

> The parties recognize that Stewart is an able bodied man who is willing and capable of making reasonable provisions for the support and maintenance of his minor child. Stewart, therefore, agrees to pay to Rosemary, as form of child support, the sum of One Thousand Three Hundred Dollars and 00/100 ($1,300.00) per month beginning June 1, 2009 and continuing on the first (1st) of each and every month thereafter until the minor child's emancipation.

Consent to Adjudicate at 5, C 41. Not satisfied with this misrepresentation to Judge Bridges during the Hearing, Stewart argued to this Court that: "[Stewart] was ordered to pay $1,300.00 in child support by Judge Thomas in his opinion received in October of 2009.... It was not until

the opinion was received by the Court by (sic) [Stewart] and his counsel realized that the [C]onsent [to Adjudicate] had required the payments to begin on June 1, 2009." Stewart's Brief at 15. These statements, as the statements made to Judge Bridges, are flatly contradicted by the Consent to Adjudicate which Stewart knowingly initialed, signed and filed and for which Stewart was represented by counsel when he did so before and on June 2, 2009.

Misrepresentations to the Court are also found in Stewart's January 2010 Counter-Petition for Citation of Contempt and Modification. At the fourth unnumbered page, at Section (V), Stewart alleges that Rosemary "is guilty of contempt in that the Judgment of Divorce required her to pay the outstanding indebtedness on the Camaro." *Id.*, C 107. On the contrary, Judge Thomas stated: "[Rosemary] should no longer pay for Camero (sic) automobile which is being transferred to Shannon." Judgment at 5, C 54. This is hardly surprising because, on June 2, 2009, prior to the Divorce Trial, Stewart signed the Consent to Adjudicate which provided:

> . . . Stewart agrees to convey to Shannon Finch (hereinafter "Shannon"), the parties' daughter, by Certificate of Title, or other appropriate instruments of conveyance, any and all interest which he might have in the certain 2002 Chevrolet Camaro vehicle in possession of Shannon, and Shannon shall pay, as and when due, any and all monthly car notes until said automobile is paid in full, as well as any and all expenses associated with operating said vehicle, indemnifying and holding Stewart harmless from any liability thereon.

Consent to Adjudicate at 9, C 44-45. The representation in Stewart's January 2010 Counter-Petition for Contempt citation with regard to Rosemary concerning an obligation to pay indebtedness on the Camaro was baseless, and was known by Stewart to be so at the time the Counter-Petition was filed on or about the 26th day of January, 2010.

Not only that, on June 29, 2010, Stewart filed an Amended Counter Petition for Citation of Contempt and Modification in June 2010. In Section 5, on the fourth unnumbered page Stewart once again alleged that Rosemary "is guilty of contempt in that the Judgment of Divorce

required her to pay the outstanding indebtedness on the Camaro." *Id.* Rosemary again denied Stewart's allegations and requested Rule 11 sanctions. C 121-23.

Stewart's June 2010 Amended Counter Petition makes new allegations with regard to Rosemary at Section (VI) and Sean on the fourth and fifth unnumbered pages. C 116-17. To justify a (prospective) reduction of alimony Stewart alleged the following:

> Since the filing of the original answer and counter-petition, Stewart Finch has discovered that Rosemary **fraudulently** represented to the Court at the time of [the divorce] trial that she was continuing to pay all of the marital debts just as she had done throughout the marriage. However, 8 months prior to the trial, she stopped making any payments on the American Express Account, even though the bill was figured into her support payments. She did not forward any of the notices nor collection letters to Stewart Finch from American Express nor the collection companies they hired for 18 MONTHS. . . . All done intentionally and contemptuously, [Stewart] has drained his retirement accounts and borrowed money to pay the american express (sic) account and the camaro that [Rosemary] agreed to pay. [Stewart] requests of the Court to reduce Rosemary's alimony payments as a result of the destruction of his credit and to offset the loan payment he is having to make as a result of her actions.

Id. at fourth unnumbered page, C 116 (emphasis in original). Stewart knew this allegation was baseless.

In September 2008, American Express sent Stewart a letter in response to an earlier communication he sent to American Express requesting that Rosemary be removed as account manager from his American Express account. C 379. After Rosemary was removed from Stewart's American Express account, she had no access to it. Additionally, on November 26, 2008, Judge Thomas entered a Temporary Order for maintenance and support. The Temporary Order is the document referred to in the allegations in the Stewart's June 2010 Amended Counter-Petition for Contempt when he made the representation that the "American Express account . . . was figured into her support payments," C 17-18; it was not.

The Temporary Order directed Stewart to "pay $4,500.00 per month in support for [Rosemary] and the minor child [Sean] beginning November 15, 2008 and continuing on the 15th day of each month thereafter...." Temporary Order at 2, C 17. Rosemary was required to

pay for "the minor child's [high] School tuition and meals," *Id.*, and to pay the mortgages, real estate property taxes and insurance. *Id.* Stewart was ordered to "continue to provide medical insurance for Rosemary and the minor child." These were the only financial obligations Judge Thomas addressed in the Temporary Order.

There was neither a basis for Stewart's allegation made in his June 29, 2010 Amended Counter Petition concerning his American Express account or debt, nor did that allegation justify a reduction of alimony. Other than his baseless American Express allegations, Stewart's Counter-Petition gave no hint of a change in financial circumstances. Stewart made no allegation of a reduction of his income, (which, in fact, did not occur, as he testified), nor did he allege an increase in the income of Rosemary, which in fact did not occur.

Stewart's lack of candor did not end with these examples. As demonstrated at footnote 10, page 23 of Rosemary's Appellate Brief, the statements concerning Stewart's allegation of "unknown" debts and the so-called support thereof are undercut by Stewart's questionable conduct. It was admitted, "[Stewart] ordered a full credit report and we pulled only those portions relevant to show the outstanding debts that he had knowledge of . . . ." *Id.*, citing to T 240. An objection to this evidence (which was taken from the larger document) was overruled. T 238-241. Stewart selectively presented a portion of a document that Stewart never provided to the Court or Rosemary. Rosemary's Brief, note 15 at 42.

III. STATEMENT OF APPELLATE ISSUES RAISED BY STEWART FINCH

A. Stewart Incorrectly Argues That Neither Judge Bridges Nor Judge Gambrell Erred in Failing to Find Stewart Finch in Contempt of Court

Both Judge Bridges and Judge Gambrell should have held Stewart in contempt of court for his willful refusal to comply with the Judgment of Divorce, as well as for the baseless allegations in his January 2010 and June 2010 Counter Petitions for Contempt.

In the argument section of his Brief, Stewart argues under the sub-caption "Issue No. 1" that he "responded [to Rosemary's Petition for Citation of Contempt] with a counter-petition of contempt and modification including the second affirmative defense that [Rosemary] was before the Court with 'unclean hands'". Stewart's Brief at 9 (emphasis added). This is exactly what happened. Both of Stewart's Counter Petitions for Contempt contain allegations that he knew to be untrue (i.e., that Rosemary was obligated to pay for the Camaro) and that were baseless (the demand for a reduction in alimony because of the conduct he attributed to Rosemary with regard to his American Express account). Stewart agreed, and the Court recognized, that Rosemary was not to pay for the Camaro. His argument that "Shannon just stops making payments on the [Camaro] loan," Stewart's Brief at 11, is baseless. As Judge Gambrell recognized, this assertion was not fact, it was merely argument. February 2011 Judgment at 4, C 350 ("Argument at the January 2011 hearing revealed that though Shannon was obligated to pay for the Camaro, she failed to do so . . . .") (emphasis added).

Stewart's decision to pay the loan on the Camaro was a gratuitous act, which in no way involved an obligation of Rosemary. With regard to the Infiniti, Stewart admits that "[t]he note for said vehicle was being paid by [Rosemary] from the alimony she was receiving from [Stewart]." Stewart's Brief at 10. He then argues that [Rosemary] admitted that she was late three months in a row on the note also receiving $4,000.00 a month in alimony." *Id.* This is simply not a fact. At the time Stewart unilaterally reduced Rosemary's alimony and paid the loan on the Infiniti, Rosemary was not late in making payment on the loan. Any previous late payments, as established in Rosemary's Affidavit in Support of her Motion for Enforcement, were caused solely by Stewart's refusal to pay alimony on time. Rosemary's Affi'd at ¶¶ 29-33, C 156-57. Rosemary always paid the Infiniti loan, but in addition to loan payments had to pay

late fees which were caused by Stewart's failure to pay alimony on time. *Id.* As with the gratuitous payment of the loan in connection with the Camaro which had been transferred to Shannon, Stewart made payments with regard to the Infiniti, payments he had no right to make, payments which were in contravention of the Judgment of Divorce and in contravention of the Consent to Adjudicate — each of which required Rosemary to make those payments.

As with several other instances of "self help," Stewart took it upon himself to modify the Judgment of Divorce, unilaterally reduced alimony payments to Rosemary and used those reductions to pay off the loan on the Infiniti which was Rosemary's responsibility. Moreover, Stewart falsely argued, here and as he did to the third Chancery Judge, that he paid the loan on the Infiniti is false. While he may have sent the check, he reduced Rosemary's alimony by the amount he paid for the loan on the Infiniti; Stewart used Rosemary's money to pay this loan. Rosemary paid for the Infiniti, as provided for in the Consent to Adjudicate and as recognized by Judge Thomas in the Judgment of Divorce.

Stewart argues that he never failed to pay the premium on the life insurance coverage. But he agreed in the Consent to Adjudicate, and was ordered by Judge Thomas, to provide proof of such coverage (i) for the benefit of Sean until his emancipation and (ii) thereafter, for the benefit of Rosemary to secure alimony payments; he did not do so. This also shows as baseless Stewart's argument that Rosemary's complaints in her Petition for Contempt were beyond his control. Stewart's Brief at 6. All were within his control.

Stewart also argued that Rosemary was incorrect when she explained that Judge Thomas ordered him to make his $4,000.00 monthly alimony payments on the first day of each month. In fact, Judge Thomas did order Stewart to start paying alimony on the first day of October 2009, with reductions of alimony to go into effect on the first day of the months in September 2012 and

August 2016. Judgment of Divorce at 5, C 54. Judge Thomas did not say Stewart could pay alimony at any time he wished during a month, he ordered payment on the first day of the month. Significantly, Stewart made a point of testifying to Judge Thomas during the Divorce trial that his employer paid him twice a month. Nevertheless, Judge Thomas ordered that alimony be paid on the first day of each month. This is another example of Stewart's "self help" relief from the Judgment of Divorce. He could have gone back to Judge Thomas promptly upon receipt of the Judgment of Divorce and ask for modification so that he could pay alimony at some date other than the first of the month; he did not do so.

In no instance in either of his Counter Petitions for Contempt and Modification did Stewart ask that the Judgment be modified in any way other than with respect to a request "that the [J]udgment of [D]ivorce be modified to require [Rosemary] to submit to a medical examination" to enable Stewart to obtain a policy of life insurance on her. January 2010 Counter Petition for Citation of Contempt and Modification at fourth unnumbered page, C 84, and June 2010 Amended Counter Petition for Contempt at sixth unnumbered page, C 100 and C109. The references in Stewart's Brief that he filed a Counter Petition for Modification based upon material misrepresentations allegedly made by Rosemary concerning her initial Rule 8.05 Financial Statement, her income, financial accounts and debts of the marriage are simply not factual. Stewart's Brief at 5, 16.

Stewart is also wrong when he argues that his failure to pay the attorney's fees that Judge Thomas ordered was beyond his control. Stewart's Brief at 6. Judge Thomas directed that $7,000 be paid to Rosemary, not to any attorney. Judgment of Divorce at 6, C 55. Rosemary had previously paid her prior attorney and there was a fee dispute. Stewart had no right to delay payment of those attorney's fees, as ordered by the Court.

Concerning Stewart's personal property claims, Rosemary did in fact provide Stewart with his personal property, with the exception of certain video tapes. Those tapes have been offered to him several times.[5] Neither he nor his attorney has ever asked for those tapes following the argument before Judge Gambrell in January 2011, but they are available anytime he seeks them.

B. Stewart Incorrectly Argues That the Third Chancery Judge Did Not Err in Granting His Counter-Petition for Modification Based Upon a Material Misrepresentation Made in Rosemary's 8.05 Financial Statement Concerning Her Income Sources, Financial Accounts and Debts of the Marriage

For reasons previously explained, the third Chancery Judge was wrong in reducing vested alimony retroactively, in reducing vested child support retroactively, and in finding that Rosemary committed a fraud on the Court. From a procedural point of view, other than allegations with regard to Stewart's American Express account, Stewart never alleged, or proved, (i) his income decreased, (ii) Rosemary's income increased, (iii) Rosemary made a material misrepresentation on her Rule 8.05 Financial Statement or (iv) that he was unaware of credit card debt in his name.

Stewart testified at the August 25, 2010 Hearing before Judge Bridges that he became aware of the so-called "undisclosed debts" in January of 2010 when he attempted at that time to obtain a credit card in his name. Stewart made this statement despite the fact that, at least since

[5] Under additional cross examination at the time of the Hearing before Judge Bridges, Rosemary explained that the VCR tapes Stewart sought were available to him, that the tapes concerned things about the tugboat in between about six of the VCR tapes, but they were family tapes; there were no VCR tapes that were just tugboat tapes. T at 208. She further testified that when she asked Stewart what she was to do with the tapes and he said, "I don't care what you do with them; throw them in the trash for all I care." *Id.* at 208-09. She agreed on further cross examination that she would make the tapes available but wanted to know where Stewart would take them because she "want[ed] to make sure the tapes would come back to [her], because they are family tapes, when the kids are babies and trips we took and my birthdays and –." *Id.* at 209. When counsel interrupted to ask if Rosemary would follow the Judge's instructions and permit Stewart to take the tapes, Rosemary responded: "correct, if he can find a place." Rosemary made a copy of those tapes at a cost of $100.00.

March of April 2008, he had been monitoring his credit. This is made clear by the three Spring 2008 letters from the Credit Rating Agencies Experian, Equifax and TransUnion which responded to his request and which confirmed the placement of a credit alert on his accounts. C380-82. In September 2008, Stewart removed Rosemary as an account manager for his American Express account and thus precluded her from any further access. C379.

Stewart never testified that he did not open the accounts. He never testified that he did not use the accounts. He never testified that Rosemary opened the accounts. He never testified that Rosemary used the accounts. These letters from credit reporting agencies reveal that Stewart misled the Court when he told Judge Bridges at the August 2011 Hearing that he knew nothing about monitoring his credit and debts. T225. The letters undermine his argument that he was unaware of four credit card debts which were exclusively in his name.

Because Stewart never made this allegation in either of his Counter-Petitions for Contempt and none of this was ever pleaded as a basis to reduce alimony, Rosemary had no opportunity prior to the August 25, 2010 Hearing to seek discovery from Stewart or from these credit rating agencies or American Express. Nevertheless, the letters from the credit rating agencies and American Express, as well as the contradictory testimony of Stewart with regard to his experience in obtaining his own credit reports, undermine his credibility. Simply stated, there was neither a misrepresentation nor credit card deceit by Rosemary. Stewart's attempt to give to Judge Bridges only a portion of his credit report, as reflected in Note 10, on pages 23-24 of Rosemary's Brief further undercuts his arguments and credibility.

The so-called alleged bank account fraud, Stewart's Brief at 21-27, never happened. First, Stewart tried to give the impression that this occurred prior to the June 2, 2009 Divorce Trial. The timing at issue, as represented in his brief, was the first half of 2010. Stewart tried to

suggest a very significant amount of money was involved when in reality it was only the money that he had paid to Rosemary for attorneys' fees, alimony, child support, back child support, monthly COBRA payments and, in one instance, medical bills for Sean. These payments were deposited into and transferred out of three accounts. The summary of these transfers are as follows:

The Regions Bank Account ending in 5679 reflects the following for the periods:

January 7 to February 4, 2010

(i) A deposit on January 7 of $7,250 which includes $1,300 child support, $2,750 Cobra payment, and $3,200 partial payment of back child support.

(ii) A January 7 deposit of $1,250 from an earlier joint account ending 2112 which account was being closed because it was maintained during the marriage.

(iii) A January 11 $7,750 alimony deposit from which Rosemary took $250 in cash.

(iv) A January 19 $122.08 credit from the Beau Rivage for a room that was being held for a friend who could not make the trip; it was not for Rosemary to "spend the night in a world wind fit of gambling" as argued in Stewart's Brief.

(v) A January 19 credit of $.01 from Best Buy.

(vi) A January 27 $728.00 Social Security Deposit.

(vii) A January 29 $2000 child support payment.

These amounts total $19,100.09, the amount Stewart questions.

February 5 - March 9, 2010 deposits into the account ending 5679

(i) A February 11 deposit of $150 from two State Farm Insurance Checks, $75.00 each, that were reimbursement for towing for a 1990 Mitsubishi truck that Stewart left at the marital residence.

(ii) A February 24 $728.00 Social Security Deposit.

(iii) A February 25 $5,300 alimony and child support payment, from which Rosemary took $100 in cash and deposited in the remainder of $5200.

March 10 - April 8, 2010 deposits in account 5679

(i) March 11 deposit of $81.64

(ii) March 13 deposit of $5.41 which were credits from the Venetian/Palazzo. Rosemary was invited by two of her children to visit them; they surprised her with a suite at this hotel that was free because they both work there. Upon arrival, the hotel requested a credit card as a security with regard to incidentals which was credited back to her account after she left. Again, Rosemary was merely visiting her two children.

(iii) A March 16 credit of $116.23 from the Beau Rivage for a room that was being held for a friend who once again did not make the trip. Rosemary did not stay there nor did she gamble, as argued by Stewart.

(iv) A March 18 deposit of $12,100 which includes a $5,300 alimony and child support payment and the $7,000 court-ordered attorney's fees, minus $200 which was taken out as cash at that time.

(v) March 24 a deposit of $728.00 from Social Security.

(vi) April 2, transfer from a checking account 3952 [6] in the amount of $2,400.

April 9 - May 6, 2010 deposits into account 5679

(i) April 12 deposit of $300 from daughter, Shannon Finch, representing money Shannon owed to Rosemary.

(ii) April 15 deposit of $1,800 representing a graduation present given Sean and money previously withdrawn from account 3952.

(iii) April 20 deposit of $5,300 alimony and child support.

(iv) April 28, $728.00 Social Security.

May 7 - June 8, 2010 deposits into account 5679

(i) May 5, deposit $2,750.

(ii) May 26, $728.00 Social Security.

---

[6] Account 3952 was opened because the bank informed Rosemary that Stewart was seeking access to information concerning her account. Therefore, Rosemary transferred the $12,100 March 18 deposit into account 5679 from that account to a new account ending in 3952. Because not all checks written on account 5679 had cleared, Rosemary transferred $2,400.00 back from 3952 into 5679.

(iii) June 3 deposit of $3,700.73 representing alimony minus the payment on the Infiniti which Stewart gratuitously made without authorization deducted from her alimony, and $199.87 as partial payment for some of Sean's medical expenses.

(iv) June 7 deposit of $500 from payment of child support.

See Record Excerpts on Behalf of Stewart ("RE") at Tab 18.

Stewart then argued that Rosemary had a "monthly average income of $9,306.50 or a yearly average of $111,678 annually in just one account alone." Stewart's Brief at 31. He said that "this is more than [his] approximate gross income" for a year. *Id.* This is a misrepresentation of the facts and one with no factual foundation in the record. Rosemary had no income other than that from Stewart via alimony, child support, COBRA payments and Social Security. Stewart argued that "subpoenaed bank records from February 2010 show her breathtaking deposit total of $37,226.01 into Account #5679." *Id.* The over-whelming bulk of the money Rosemary deposited into this account came from Stewart. It represents payment of back child support, alimony and attorneys' fees, together with one or two other incidentals as follows:

- Stewart alleges there was a deposit of $6,078 in February: this was comprised of $150 (two State Farm Insurance checks of $75 each) for the towing of a Mitsubishi truck Stewart left at the marital residence; a Social Security deposit of $728.00 and an alimony and child support deposit of $5,200 (alimony $4,000, child support $1,300 with cash taken of $100). This totals $6,078.

- In March, Stewart alleges an amount of $15,431.28 was deposited into the account. This is comprised of a deposit of $81.64 and a second deposit of $5.41 that were credits from a hotel. There was an additional credit of $116.23 for a room that was not used; there was a deposit of $7,000 representing attorneys' fees that were due in September 2009, a $2,400 transfer back into the account from the new account opened by Rosemary to prevent Stewart from gaining access to it, $4,000 in alimony, $1,300 in child support (minus $200 taken in cash), and $728.00 in Social Security. All this equals $15,431.28.

- Stewart then alleges that there was a deposit of $8,128 in April. This was comprised of $5,300 of alimony and child support, $1,800 representing a graduation present given Sean and money previously withdrawn from account 3952, $728.00 in Social

Security and $300 from Rosemary's daughter, Shannon, representing money Shannon had owed to Rosemary for some time. This totals $8,128.

- Next, Stewart alleges that there were deposits of $7678.73 in May into this account. These deposits were comprised of $2,750 for COBRA payments, $728.00 Social Security, $3,700.73 which represents alimony of $4,000 minus the Infiniti payment which Stewart deducted from this, minus $140 taken in cash and a deposit of $500 in partial payment of child support. All of these add up to $7,678.73.

See RE at Tab 18[7]

The deposits over four months totaling $37,226.01 represent payment of court ordered attorneys' fees, payment of COBRA going forward, payment for damage from a home owner's policy, and miscellaneous refunds or payments, repayment of money by Shannon to Rosemary. It is disingenuous and misleading for Stewart to suggest that these amounts should be extrapolated on a monthly basis and extended to a yearly annual income of more than $111,000. These payments were aberrations, e.g. $7,000 for attorneys' fees, $1,800 for damage to the marital residence from the insurance company, pre-payment of monthly COBRA expenses, etc. Stewart has offered no credible evidence to suggest Rosemary had income from any source other than alimony, the child support and COBRA expenses. This argument should be disregarded . It forms a portion of the basis for the award of attorneys' fees to Rosemary.

The record contradicts Stewart's allegation that a $111,000 yearly income is more than his "gross income from one year's work." Stewart's Brief at 31. In 2008, Stewart made $150,000. In the first six months of 2010, Stewart made approximately $90,000 from his first job alone and admitted on cross examination that his yearly income would be approximately $180,000. T250-52. As well, Stewart testified that he was trying, through a counselor at Sean's

[7] This discussion was necessitated by the out-of-context argument in Stewart's Brief. Although Stewart included certain records from account 5679, Rosemary has based the foregoing discussion on the documents in Stewart's RE, Tab 19, as well as the deposit slips for such records and references in such records to accounts 2112 and 3952.

high school, to get Sean to consider applying for a position as a deck hand.[8] Stewart told Judge Bridges that if Sean took that job that within six months Sean would be making $60,000 to $65,000 every six months T247-48; this would equate to a yearly income of $120,000 to $130,000. And this income would be for a brand new deck hand, not a captain on a tug boat who had had that position for more than two decades. The statements made and argued in Stewart's Brief are not supported by the record, are not otherwise credible and should be disregarded.

Stewart next argued that Rosemary's mother, Jane Dougherty's, bank account in fact belonged to Rosemary. No evidence supports this. Until the time of the August 25, 2010 Hearing, Rosemary was unaware that her mother had put Rosemary's name on the account to facilitate access to the account when her mother passed away. T 188, 204. Rosemary never deposited any money into that account, T 204, never wrote a check on that account, *Id.*, nor used that account in any way. *Id.* This testimony was not further cross examined nor was it contested by Stewart. There is no evidence in the record to the contrary.

Not content with baseless arguments, Stewart further stated:

> [Rosemary] currently has retained a retired supreme court justice and a retired United States federal district judge to represent her. Obviously, [Stewart] was correct in his assertions that [Rosemary] failed to disclose financial resources available to her. How else could she afford the services of these very fine, competent and experienced attorneys? One of whom travels from New York to participate in hearings. (sic) Someone is paying for that expense.

See Stewart's Brief at 29.

In fact, White & Case is representing Rosemary on a pro bono basis. This is consistent with the long tradition of White & Case in representing battered, abused, and victimized women. Last year alone, White & Case provided more than 4,000 hours of legal aid to such women. The Wise Carter Firm is also acting as local counsel and representing Rosemary without any

[8] This effort was only to avoid paying for Sean's educational and other expenses, as well as to avoid paying child support.

expectation of payment, except as attorneys fees may be awarded by the Court.[9] As with virtually all of the other assertions made by Stewart, this pro bono representation does not support his statement that he "was correct in asserting that Rosemary failed to disclose financial resources." *Id.* at 30. On the contrary, it demonstrates that Rosemary is unable to pay all of her bills[10] because of Stewart's conduct and as a result of the retroactive reduction of alimony and child support by the third Chancery Judge.

C. The Third Chancery Judge Did Not Err in Denying An Award of Attorneys' Fees to Stewart but Did Err in Denying Attorneys' Fees and Costs to Rosemary

The Court should award Rosemary attorneys' fees, as well as costs of this representation, including but not limited to, transcript expenses, reasonable travel, etc. The Court is not bound by any duty of deference to a chancery court ruling on this point. Given the tenor of the February 16, 2011, Judgment here appealed, the question of Rosemary's entitlement to attorneys' fees is was never decided. If Stewart can squeeze enough from the Judgment to suggest to the contrary, any such ruling was infected by erroneous legal premises. The impropriety in a subsequent chancery judge revisiting the unappealed Judgment of Divorce

---

[9] This response was made necessary by Stewart's unfounded speculations set out in the middle of page 29 of Stewart's Brief, supported by nothing in the record. This response should not be read as, and in fact is not, a waiver of attorney/client privileged communications, nor should it be taken as compromising Rosemary's right to recover attorneys fees and legal expenses, both at the Chancery Court level and in this Court. As the appellate record plus the briefing to date make clear, a tremendous amount of detailed legal work has been made necessary by Stewart's baseless charges. Moreover, the fact that present counsel for Rosemary have not charged her any fees is no more disqualifying that if she had borrowed money to pay counsel from other family members. *See Armstrong v. Armstrong*, 618 So.2d 1278, 1282 (Miss. 1993) (fees awarded though former spouse "was forced to borrow funds from her parents"), discussed below.

[10] The retroactively reduced alimony of $2000 a month does not cover the mortgage on her residence and the line of credit, which line of credit was taken out by Stewart in his name. Rosemary has not paid either firm anything towards attorneys' fees or costs and expenses. Neither firm expects to be so paid other than pursuant to an order from the Court to assess to Stewart a reasonable amount of these fees, costs and expenses. Rosemary would not have been accepted as a pro bono client if she had money to pay legal fees and expenses.

entered in September 2009, see Rosemary's Brief, at 31-32, is only the beginning of the errors of law below.

Stewart's annual income was erroneously considered by Judge Thomas to be $120,000 instead of $150,000 when he awarded alimony. However, as established from Stewart's testimony and evidence at the time of the Hearing before Judge Bridges that his income for the first 6 months of 2010 was approximately $90,000 from his first job. Annualized, it would have been $180,000. This is 50% more than the figure used by Judge Thomas to calculate alimony. Stewart has never shown that his annual income is less than $180,000. It is within the Court's judicial knowledge that Stewart gets a tax deduction for all alimony he pays.

Rosemary, on the other hand, is and always has been unemployed, and at Stewart's insistence during the marriage. Nothing in the record suggests Rosemary has any source of income in her own right other than what relatively little Stewart has paid her, his obligations under the Judgment of Divorce notwithstanding, plus social security. Whatever funds Rosemary may have access to from her mother's account are of no consequence under *Armstrong v. Armstrong*, 618 So.2d 1278, 1282 (Miss. 1993) (fees awarded though former spouse "was forced to borrow funds from her parents"). Stewart's Brief, at 31, speculates that Rosemary has funds that she could "set aside" and by the middle of the cross-over paragraph slips into fantasy. Even if the record contained evidence that Rosemary has savings, which it does not, a reasonable fee award is still proper under cases like *Weeks v. Weeks,* 29 So.3d 80, 92-93 (¶ 58) (Miss.Ct.App. 2009) (award proper despite retirement account, and where "the only liquid asset is the alimony award").

Not only are Stewart's arguments that Rosemary has additional sources of income baseless; they are not supported by the record. Her mortgage and the line of credit for her

residence, which she is obligated to pay, are approximately $2,000 per month. That equals the amount of the retroactively reduced alimony erroneously ordered, by the third Chancery Judge. Rosemary then has only the child support payments, also erroneously retroactively reduced by the third Chancery Judge, and Social Security payments to pay all bills, including insurance, food, gasoline and other expenses. This does not take into account the federal and state income taxes that Rosemary has to pay on the alimony she receives. (Stewart's resources, on the other hand, are increased by the amount of the alimony deduction he takes every year.)

Rosemary does not have the ability to pay attorneys' fees, and no credible evidence in the record suggests otherwise. Most of the issues involved here were neither novel or difficult by themselves, though many require meticulous attention to detail. The retroactive reduction by one-half of vested alimony previously paid and going forward as well as the retroactive reduction by approximately one-third of vested child support are extraordinary only in the sense that the law is so well settled contrary to ruling Rosemary here appeals. *See e.g., Broome v. Broome*, 2011 WL 6156875, *9 (¶ 36) (Miss. Ct. App. 2011) (alimony); *Evans v. Mississippi Dept. of Human Services*, 36 So.3d 463, 477 (¶ 60) (Miss. Ct. App. 2010), citing and quoting *Burt v. Burt*, 841 So.2d 108, 112 (¶ 12) (Miss. Ct. App. 2001) (child support).

The "fault" in connection with these proceedings falls squarely upon Stewart; he did not abide by either the Judgment of Divorce entered September 29, 2009, critical portions of which incorporated the Consent to Adjudicate that, with the advice of counsel, Stewart had agreed to on June 2, 2009. Stewart also represented he would not appeal the Judgment of Divorce, inducing Rosemary not to appeal points that would probably have been decided in her favor on a direct appeal, such as Judge Thomas' plain factual error in the amount of annual income he attributed to Stewart. In light of Stewart's assertion that he "responded" to the Counter-Petition for

Contempt filed by Rosemary with the filing of his two Counter-Petitions for Contempt and Modification, and the lack of basis for Stewart's allegations in those Counter-Petitions, as well as his willful failure and refusal to abide by the Judgment of Divorce, reasonable attorneys' fees and legal expenses should be assessed against Stewart and awarded to Rosemary.

Reasonable attorneys fees and expenses should be awarded to Rosemary for the reasons set out in her brief, at pages 47-49. While no evidence shows Rosemary has any ability to pay, on today's facts even that would not pretermit a fee award. *See, e.g., Chesney v. Chesney*, 849 So.2d 860, 863 (Miss. 2002) (misconduct causing litigation); *Morreale v. Morreale*, 646 So.2d 1264, 1271 (Miss. 1994) (fees awarded in contempt cases without regard to ability to pay).

D. Stewart Incorrectly Argues That Rosemary Filed an Unsolicited Motion to Enforce Judgment

The Motion to Enforce the Judgment of Divorce filed by Rosemary on December 29, 2010 sought relief for Stewart's intentional violations of the Judgment of Divorce. Proceedings on Rosemary's December 15, 2009, Petition for Contempt has been unavoidably delayed, first by the illness of Judge Thomas, and thereafter by the expiration of Judge Bridges' commission as Special Chancellor. Stewart's violations of his obligations under the Judgment of Divorce, however, had continued unabated. The supporting affidavits of Rosemary, C 238-300, and Sean, C 301-324, show the evidentiary bases for this Motion.

Rosemary's Motion to Enforce Judgment was timely noticed for hearing on January 26, 2010. This motion stressed that Rosemary did not seek prospective relief. Rather, Rosemary sought relief for Stewart's continuing and more recent past violations, for his failure to pay alimony when due, for his failure to pay child support when due, among other things. At no time prior to the January 26, 2011 hearing did Stewart "join issue" with any of the statements in the

affidavits from Rosemary or her son, Sean. All of this is set out in Rosemary's Brief, at pages 16, 46-47.

Stewart filed only a Motion to Strike, to which Rosemary responded on January 25, 2011. C 337-47. Stewart's Motion to Strike in practical effect confesses the factual allegations of Rosemary's Enforcement Motion. In no event should Stewart be allowed now to contest Rosemary's Enforcement Motion via unsupported argument in his Brief based on alleged facts not in the record.

E. Stewart's Cross-Appeal and Appeal Should Be Dismissed

On April 11, 2011, Stewart filed a Motion styled "Motion to Reopen Pursuant to Rule 60(b)(3) ("Stewart's Motion to Reopen"). C 370-71. This Motion is a two-page document which contained six paragraphs; the introductory paragraph asked the third Chancery Judge "to reopen the record in this matter for purposes of the Court to consider newly discovered evidence. . . ." *Id.* at 370. Each of the next four paragraphs was addressed to the hearing before the third Chancery Judge on the 26th of January 2011, the February 2011 Order, *Id.* ¶¶ I, II, and referenced the Junior College Transcript for Sean. See ¶¶ III, IV. The concluding paragraph stated:

> [Stewart] requests that the time to file a cross appeal be reopened and he be allowed to supplement the record with this new evidence in support of emancipation and ask (sic) Court to either reconsider her ruling on the emancipation issue or deny the request but allow the new evidence into the record and reopen the time for [Stewart] to file a cross appeal.

Id. ¶ V. C 71.

Stewart's Motion to Reopen was just that, a request that the Court reopen the record, to include alleged new evidence and reconsider its emancipation ruling, as reflected in the February 2011 Judgment. C 348-59. Stewart also requested "that the time to file a cross appeal be reopened." *Id.* at ¶ V. C. 371. Stewart's Motion makes no reference to the Mississippi Rules of

Appellate Procedure in general, nor Rule 4 in particular. The Motion never alleges "excusable neglect," the only arguable ground on which it might be considered, see Miss. R. App. P. 4(g), nor does it state any other basis for reopening the time within which Stewart might have filed a Notice of Cross-Appeal.

For a notice of appeal to be timely, it must be filed with the Clerk of the Court within thirty (30) days of the entry of the judgment sought to be appealed. Miss. R. App. P. 4.; *see e.g., Dudley v. Harris*, 979 So.2d 692, 693 (¶ 5) (Miss. Ct. App. 2007). Following the filing of a motion for extension, the trial court may grant the time for filing a notice of appeal no later than thirty (30) days after the expiration of the time otherwise prescribed. Miss. R. App. P. 4(g). In effect, this gives a party seeking to appeal sixty days in total to file a motion for an extension of time. *In re A.M.A.*, 968 So.2d 999, 1007 (Miss. 2007) ("the Practical Effect of Rule 4(g) is that a party has a maximum of sixty (60) days from the date of the Judgment or Order appealed from is entered, or ten (10) days from the date the Order granting the Motion for Extension of Time is entered, in which to file a Notice of Appeal.").

The foremost reason why Stewart's cross-appeal should be dismissed is that his Notice was not timely filed and he is not armed with an order of the Chancery Court granting him an extension or otherwise authorizing an untimely appeal. *See, e.g., Redmond v. MDOC*, 910 So.2d 1211, 1212 (¶ 3-4) (Miss. Ct. App. 2005) ("Although the trial court has authority under Rule 4(g) . . . , we do not.") The Judgment Stewart would appeal was entered February 26, 2011. He filed no notice of appeal within the thirty day time provided by Miss. R. App. P. 4(a). His Motion was filed on the 41st day, on April 7, 2011. Rule 4(g) and (h) are addressed to "the trial court." Stewart has no support when he appears in this Court without an order of the Chancery Court

making the required finding per either Rules 4(g) or (h), and with no record providing evidentiary support for any such finding.

A motion for an extension of time to file an appeal which itself is filed after the expiration of the original thirty-day period may be granted *only* upon a showing of "excusable neglect." Miss. R. App. P. 4(g) (emphasis added). Nothing in Stewart's Motion filed April 7, 2011, brings it within Rule 4(g), such that the Chancery Court would have had the authority to extend the thirty-day time period within which to file a cross-appeal in this matter. Nor does anything in the record suggest that there has been the requisite excusable neglect. Stewart has never hinted, or actually suggested, that he failed to receive the February 2011 Judgment. See Miss. R. App. 4(h).

Two passing references in one sentence of a Rule 60(b) Motion are not sufficient. "Filing a notice is a simple act, and a party must do all that could reasonably be expected to do to perfect the appeal in a timely fashion." Miss. R. App. P. 4 cmt. Stewart did nothing to demonstrate that he attempted to file a notice of appeal in a timely manner.

Because more than thirty days had elapsed since the February 2011 Opinion, "the burden rests on [Stewart] to show [his] failure to file a timely Notice of Appeal was a result of 'excusable neglect'." *Id.* The Official Comment to Rule 4 recognizes that courts have refused to find "excusable neglect" where a party fails to learn of the entry of the Judgment, where a party relies on mistaken legal advice from a trial court clerk, or where a busy trial schedule of counsel prevented a timely filing. Miss. R. App. P. 4 cmt. (citing *Campbell v. Bowlin*, 724 F.2d. 484, 488 (Fifth Cir. 1984) (mistaken legal advice); *Pinero Schroeder v. Fed. Nat'l Mtg. Ass'n.*, 574 F.2d 1117 (1st Cir. 1978) (busy trial schedule); *Reed v. Kroger Co.*, 478 F.2d 1268 (T.E.C.A. 1973) (mistaken legal advice)). Mississippi Rules of Court, Vol. 1, State, at page 172 (2011). Even if

Stewart's Motion to Reopen is construed as an appropriate motion for extension of time within which to file a cross-appeal, he failed to allege or show that his request met the higher burden of "excusable neglect."

Stewart misused Miss. R. Civ. P. 60 when he requested more time to file a cross appeal. While "a trial judge has broad authority pursuant to a Mississippi Rule of Civil Procedure 60(b) to grant relief *from the Judgment*, this does not authorize a Trial Judge to extend, toll, reopen, or otherwise grant an Appellant additional time in which to file a Notice of Appeal." *In re A.M.A.*, 968 So.2d at 1008.

As a matter of law, Stewart's Cross-Appeal is from the Chancery Court's Order of May 17, 2011, not the Judgment of February 16, 2011.

Though timely filed, Stewart's appeal of the May 2011 Order does not address the issues he purports to raise. Miss. R. App. P. 28(a)(6) required Stewart to include in his Brief of Cross-Appellant his contentions and "reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on." Stewart did not do so.

Claims without citation to any supporting authority are procedurally barred and courts are under no obligation to consider them. *Jones v. Jones*, 72 So.3d 561 (Miss. 2011) (holding that courts need not consider an assertion of error for which no authority is cited). The reason for this rule is simple; Courts are not required to do a party's work for him or her. This is why, in cases where a party fails to address an issue raised, the issue is deemed waived. *See e.g., Newell v. State*, 754 So.2d 1261, 1266 (Miss. 1999) ("This Court is not required to address any issue that is not supported by reasons and authority...[t]his issue is waived not only for failure to cite authority but for failure to address the issue"); *Cook v. Mardi Gras Casino Corp.*, 697 So.2d 378, 382 (Miss. 1997) ("[T]his Court refuses to consider this issue for the failure to support the

already sparse argument with any authority whatsoever."); *New Bellum Homes, Inc. v. Swain*, 806 So.2d 301, 305 (Miss. 2001) ("[Appellant] then fails to brief the Court as to this issue altogether. Therefore, this Court finds that the issue is waived not only for the failure to cite authority but the failure to address the issue."); *Gaddy v. State*, 21 So.3d 677, 684 (Miss. 2009): ("[Appellant] lists several other arguments in his statement of issues. However, [appellant] fails to brief this Court on these remaining issues. Therefore, this Court finds that the remaining issues are waived for the failure to cite authority, as well as the failure to address the issues.").

Substantively, there is no evidence in the record that Rosemary interfered with Stewart's relationship with his son. In point of fact, there is no evidence in the record that Stewart attempted to "maintain contact with the child and had attempted to provide some career opportunities to the child through the school counselor." Stewart's Brief at 34. As Stewart admitted at the time of the Divorce Trial before Judge Thomas and at the time of the Hearing before Judge Bridges, he walked out on Rosemary and Sean in or about February/March 2008 and had virtually no contact with them since that time. At that time, Sean was 16 years old. The March 28, 2008 email, Stewart's RE, Tab 24 upon which he based his request to emancipate his own son is "old evidence." The email exchange occurred fifteen months before the Consent to Adjudicate was agreed to and signed by the parties, fifteen months before the Divorce Trial took place and some eighteen months before the Judgment of Divorce was issued. The only thing that occurred since the Judgment of Divorce was the fact that Sean sought to, and was successful in, dropping his middle name via legal proceedings. The crass statement made that "I can think of no action short of murdering his father, that could be more clear and extreme than a petition with the assistance and joinder of your mother to remove your father's name from your own," Stewart's Brief at 9, is hyperbole.

As recognized in *Caldwell v. Caldwell*, 579 So.2d 543, 548 (Miss. 1991):

> The amount of money the non-custodial parent is required to pay for the support of his minor children should not be determined by the amount of love the children show toward the parent. The proper inquiry, as we have often stated, is what is in the best interest of the child.

Id. Caldwell recognized that the minor child in that case did not like his father; but the Court explained that "some bitterness should be expected when a father files suit to sell his son's home out from under him, and attempts in the same proceeding to end all support for him." *Id.* at 550. Stewart did worse. He walked out on Sean, and his family, who begged him to return. Stewart tried to stop Sean from going to college by using a high school counselor to persuade Sean to become a deck hand on a tug boat. On June 29, 2010, Stewart filed his Amended Counter-Petition to terminate all support for Sean. Notwithstanding all this, Sean submitted an affidavit which documented the awful treatment at the hands of his father and his medical problems that resulted because of this treatment. Nevertheless, Sean still stated: "I realize he [Stewart] is my father and I realize that time heals most, if not all, wounds. Maybe some day if he treated me like a father who cares for and loves his son, things would be different." Sean's Affidavit at ¶ 62, C at 307.

The record is clear that the reason Sean stopped attending Jones County Jr. College was financial. C 410-11. Sean was a student in good standing at the time of his withdrawal, though his grades were poor. Nothing in the record suggests otherwise. Because of the retroactively reduced alimony and child support, Rosemary could not pay for Sean to continue in college. *Id.*; see also the Affidavit of Sean wherein he stated: "I stopped going to JCJC because of my inability to pay my expenses associated with attending college ..." and "to look for a job to help

support my mother and me as a result of [the February 2011 Order reducing alimony and child support, here appealed]." C 412-13.

IV. CONCLUSION

For all of the reasons set out in Rosemary's Brief and in this brief:

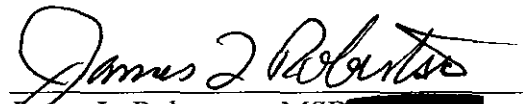
- The relief sought in Rosemary's Motion for Enforcement of Judgment filed December 29, 2010, should be granted;
- Rosemary's Appeal should be granted in all respects including the vacation of the February 2011 Judgment and so much of the May 2011 Order as is based upon the February 2011 Judgment, and particularly the Conclusion of Rosemary's Brief, at pages 49-50 thereof;
- Stewart's Cross-Appeal and Appeal should be dismissed;
- Stewart should be ordered to pay within 14 days:
    - all back alimony, plus interest from the date due, including the retroactively reduced alimony payments
    - all back child support, with interest from the date due
    - COBRA payment for November 2009, with interest
    - all medical and educational expenses of his son Sean, with interest
- Stewart should be ordered to provide continuing proof of the maintenance of life insurance for the benefit of Sean until he is emancipated and then for the benefit of Rosemary to secure payment of alimony;
- Stewart should be directed to authorize Rosemary to obtain access and/or information regarding the mortgage on the home, and the home equity loan;
- For all legal services reasonably and necessarily rendered to and on behalf of Rosemary from and after all services leading up to the filing of her December 15, 2009, Petition for Contempt, and including all services and costs related to this appeal, Stewart should be ordered to pay Rosemary reasonable attorneys' fees and legal expenses and costs, including:

- filing fees,
- transcript expenses,
- duplication expense necessitate by these proceedings, and
- out-of-pocket expenses including travel and housing associated with the representation of Rosemary,

With the quantum of such fees and expenses to be determined in such court and through such processes as the Court deems expedient and proper.

- The court should grant such further relief it deems just and proper.

ROSEMARY FINCH

BY: 

James L. Robertson, MSB[redacted]
WISE CARTER CHILD & CARAWAY, P.A.
Post Office Box 651
Jackson, MS 39205-0651
Telephone: (601) 968-5500
Facsimile: (601) 968-5593
jlr@wisecarter.com

Alfred J. Lechner, Jr., *pro hac* vice
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036-2787
Telephone: (212) 819-8904
Facsimile: (212) 354-8113
jlechner@whitecase.com

OF COUNSEL:

WISE CARTER CHILD & CARAWAY, P.A.
Post Office Box 651
Jackson, MS 39205-0651
Telephone: (601) 968-5500

WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036-2787
Telephone: (212) 819-8904

CERTIFICATE OF SERVICE

I, James L. Robertson, one of the attorneys for Rosemary Finch, do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the foregoing document to:

S. Christopher Farris, Esq.
6645 US Highway 98 W, Suite # 3
Hattiesburg, MS 39402

Hon. Deborah J. Gambrell
Chancery Judge
Lamar County Chancery Court
Post Office Box 872
Hattiesburg, MS 39403

This 27th day of January, 2012.

James L. Robertson