IN THE SUPREME COURT OF THE STATE MISSISSIPPI

ROSEMARY FINCH	APPELLANT/PLAINTIFF
v.	NO. 2011-CA-00306
STEWART FINCH	APPELLEE/DEFENDANT

APPEAL FROM THE CHANCERY COURT
OF LAMAR COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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ROSEMARY FINCH **APPELLANT/PLAINTIFF**

v. **NO. 2011-CA-00306**

STEWART FINCH **APPELLEE/DEFENDANT**

CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of Record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Hon. James H.C. Thomas, Former Chancery Judge (deceased)

2. Hon. Billy G. Bridges, Former Special Chancery Judge

3. Hon. Deborah J. Gambrell, Chancery Judge

4. Rosemary Finch and Sean Finch, a minor, 2 Oak Alley, Hattiesburg, MS 39402, Plaintiff/Appellant

5. Stewart Finch, Maryland, Defendant-Respondent/Counter-Appellant

6. Alfred James Lechner, Jr., White & Case LLP, 1155 Avenue of the Americas, New York, NY 10036, Attorney *pro hac vice* for Rosemary Finch

7. James L. Robertson, Wise Carter Child & Caraway, P.A., Post Office Box 651, Jackson, MS 39205, Attorney for Rosemary Finch

8. S. Christopher Farris, 6645 Highway 98 W, Suite 3, Hattiesburg, MS 39402-7509, Attorney for Stewart Finch

9. M. Craig Robertson, Post Office Box 2055, Ridgeland, MS 39158-2055, former Attorney for Rosemary Finch

10. Candance L. Rickman, Shiyou Law Firm, Post Office Box 310, Hattiesburg, MS 39403-0310, former Attorney for Rosemary Finch

This 27 day of September, 2011.

James L. Robertson, MSB No[redacted]

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    b. Did the second successor chancery judge have the authority to set aside, *sua sponte*, so much of the final judgment that accepted and incorporated the financial and property settlement of the divorced parties, negotiated before trial with each party having competent counsel?

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STATEMENT OF THE CASE

I. Overview of the History and Processes of the Case [1]

[1] References in this brief to the Clerk's File appear as "C __." References in this brief to the transcript of the Divorce Trial before Judge Thomas or the Hearing before Judge Bridges appear as "T ___."

Rosemary and Stewart were married on Feb. 14, 1981; the marriage produced two children - - Shannon (d/o/b: July 11, 1984), and Sean (d/o/b: Aug. 22, 1991), who is still a minor. Stewart was (and is) a tugboat captain. Rosemary (d/o/b: Sept. 13, 1947) was (and is) a stay-at-home mother. He worked two weeks on his tugboat and was then home for two weeks. In March of 2008, the family lived in the Hattiesburg area in Lamar County, Mississippi. After more than twenty-seven years of marriage, Stewart abandoned Rosemary and Sean for another woman. Both Rosemary and Sean pleaded with Stewart to come home. When Stewart would not discuss reconciliation, Rosemary filed a complaint for separate maintenance. Stewart filed an answer and counter-claim for divorce.[2] The Court below entered a temporary order, setting the amount of support payments, not alimony, that Stewart would provide Rosemary *pendente lite*. That order also provided that each party would be responsible for his or her own credit card debt and that no additional debt could be incurred on those cards. The order provided that each party could decide whether he or she would make payments on the debt in his or her name.

Rosemary and Stewart entered into a contract, entitled "Consent to Adjudicate," that memorialized their agreement to an irreconcilable differences divorce, and set out their mutual agreement on property distribution, child custody, and the commencement date for the payment of child support, as well as other related issues. All of the terms and provisions of the Consent to Adjudicate were subject to Court approval.

A divorce trial took place before the Honorable James H. C. Thomas, Jr. on June 2, 2009. Judge Thomas issued a judgment of divorce on September 18, 2009 (the "Judgment"); it incorporated his findings and the Consent to Adjudicate. After they reviewed it, the parties' counsel discussed the Judgment. This discussion included the fact that Judge Thomas had relied on the wrong amount for Stewart's 2008 income ($120,000), rather than $150,000, which was

[2] Stewart's Answer, Affirmative Requests and Counter Claim for Divorce do not appear in the list of the clerk's papers but are referenced in the judgment of divorce. See Judgment, at C 50.

his actual income in 2008. Judge Thomas had not considered a second mortgage debt when calculating equity in the marital residence, which affected the alimony amount. Stewart's counsel advised Rosemary's counsel that Stewart would not appeal.[3] Relying on this representation, and wanting to get on with her life, Rosemary did not appeal. The thirty day time expired, Miss. R. App. P. 4(a), neither party having appealed.

Stewart was immediately in default in his obligations under the final Judgment. On December 15, 2009, Rosemary had no choice but to file a Petition for Contempt ("Rosemary's December 2009 Petition"). On January 29, 2010, Stewart responded with a Counter Petition ("Stewart's January 2010 Petition"). On June 29, 2010, after the six-month period of Miss. R. Civ. P. 60(b) had expired, Stewart filed an Amended Counter Petition ("Stewart's June 2010 Amended Petition"), making new and time barred claims.

On August 25, 2010, there was a hearing before the Honorable Billy Bridges on Rosemary's December 2009 Petition, Stewart's January 2010 Counter Petition, and his June 2010 Amended Counter Petition. Judge Bridges never entered an order adjudging any of the pending Petitions. His appointment as Special Chancellor expired on November 1, 2010. The case was then assigned to the Hon. Deborah J. Gambrell, who heard oral argument on January 25, 2011. Without hearing any testimony from Rosemary, Stewart, or Sean, Judge Gambrell issued an opinion granting Stewart relief that he had not requested.

Judge Gambrell retroactively reduced alimony from $4000 to $2000 per month, retroactively reduced child support (which Stewart had not paid since July 2010) from $1,300.00 to $900.00 per month, relieved Stewart of the obligation imposed by Judge Thomas to pay 100% of Sean's educational expenses (Stewart had previously agreed to pay 50%), and placed new conditions on Sean (who has a learning disability) that he had to satisfy to avoid emancipation.

[3] Stewart also considered asking Judge Thomas for "clarification with regard to the responsibility for payment of certain debts." C 296. He did not do so.

Judge Gambrell also found that certain debts Stewart owed, debts that were exclusively in his name, were "undisclosed" by Rosemary. Judge Gambrell effectively set aside Judge Thomas' Judgment and granted relief unsupported and contradicted by the record.

II. Chronology

1. Rosemary and Stewart were married in Maryland on February 14, 1981.
2. On July 11, 1984 and August 22, 1991, Shannon and Sean were born; Sean remains a minor.
3. In March 2008, Stewart abandoned Rosemary and Sean and left Hattiesburg.
4. In March 2008, Stewart bought a $27,000 truck when he abandoned Rosemary and Sean.
5. In March 2008, Stewart placed credit alerts on his accounts with the three credit reporting agencies Experian, Equifax Information Services LLC, and TransUnion.
6. On March 28, 2008, Stewart and Sean exchanged e-mails wherein Sean told Stewart he would not respond to Stewart.
7. On April 4, 2008, Rosemary filed a complaint for separate maintenance, and custody.
8. Stewart later filed a counterclaim for divorce.
9. In September 2008, Stewart removed Rosemary as account manager from his American Express account.
10. On November 26, 2008, Judge Thomas entered a Temporary Order for maintenance and support.
11. On June 2, 2009, Rosemary and Stewart signed a contract entitled "Consent to Adjudicate."
12. On June 2, 2009, the divorce trial took place before Judge Thomas.
13. On September 18, 2009, Judge Thomas issued his Judgment of Divorce. On September 29, 2009, the Clerk filed the Judgment of Divorce.
14. On October 8, 2009, Stewart's attorney advised Rosemary's attorney that Stewart would not appeal the Judgment.
15. On December 15, 2009, Rosemary filed a Petition for Contempt against Stewart.
16. On January 28, 2010, Stewart filed his Answer to Rosemary's Petition for Contempt and filed a Counter Petition for Contempt and Modification.
17. In June of 2010, Judge Billy Bridges was assigned the pending matters in this case.

18. On June 10, 2010, Stewart filed a Motion for Permission to File Amended Answer/Counter Petition for Contempt and Modification.

19. On June 28, 2010, Stewart filed a second Motion for Permission to File Amended Answer/Counter Petition for Contempt and Modification.

20. On June 29, 2010, Stewart filed his Answer to Rosemary's Petition for Citation of Contempt and his Amended Counter Petition for Citation of Contempt and Modification.

21. On July 19, 2010, Rosemary filed her Answer to Stewart's Amended Counter Petition for Citation of Contempt and requested Rule 11 Sanctions against Stewart.

22. On August 25, 2010, Judge Bridges held a Hearing regarding the pending Petitions.

23. On September 28, 2010, Stewart's counsel sent an *ex parte* email to Judge Bridges which referred to an earlier *ex parte* communication he sent to Judge Bridges.

24. On October 1, 2010, Judge Bridges responded via an *ex parte* email to Stewart's counsel.

25. On October 27, 2010, Stewart's counsel forwarded another email to Judge Bridges, but this time he copied Rosemary's counsel.

26. On October 27, 2010, Rosemary's counsel sent an email to Judge Bridges with a copy to Stewart's counsel objecting to the previous *ex parte* communications between Stewart's counsel and Judge Bridges, and requested Judge Bridges recuse himself from rendering any decision due to these *ex parte* communications.

27. On November 1, 2010, Judge Bridge's term as Special Chancellor ended without his having ruled on the pending Petitions.

28. On December 29, 2010, Rosemary filed a Motion for Enforcement of Judgment and for Other Auxiliary Relief together with supporting affidavits from her and her son, Sean.

29. On January 11, 2011, the Hon. Deborah J. Gambrell assumed office as Chancery Judge.

30. On January 21, 2011, Stewart filed a Motion to Strike Rosemary's Motion for Enforcement but without supporting documentation.

31. On January 21, 2011, Rosemary delivered to Judge Gambrell her Proposed Findings of Fact and Conclusions of Law, Transcripts of the Divorce Trial, Hearing, and a Notice of Hearing.

32. On January 25, 2011, Rosemary filed her Response and Opposition to Stewart's Motion to Strike together with her supporting affidavit.

33. On January 26, 2011, Judge Gambrell heard oral argument concerning Rosemary's Motion for Enforcement, Stewart's Motion to Strike, and the pending Petitions.

34. On February 16, 2011, Judge Gambrell issued her Opinion and Judgment [sometimes "the Decision"]; the clerk filed the Opinion and Judgment on that same date.

35. On February 24, 2011, Rosemary served her Notice of Appeal from the Opinion and Judgment. The clerk filed the Notice of Appeal on February 25, 2011.

36. On April 11, 2011, Stewart filed a Motion to Re-Open Pursuant to Rule 60(b)(3) to include in the record a transcript of Sean's performance at Jones County Junior College, requested that the time to file a Cross-Appeal be extended and that the Court reconsider its ruling on Emancipation.

37. On April 12, 2011, Rosemary filed a Motion to Re-Open to Supplement the Record Pursuant to Rule 60(b) to include four letters, one from American Express and one each from credit reporting agencies. The clerk filed the motion on April 13, 2011.

38. On April 29, 2011, Rosemary filed her Response and Opposition to Stewart's Motion to Expand the Record and to Retroactively Emancipate Sean.

39. On May 10, 2011, Judge Gambrell held a Hearing regarding the two Rule 60(b) motions.

40. On May 17, 2011, Judge Gambrell issued her Order concerning Stewart's Motion to Re-Open the Record and Rosemary's Motion to Re-Open the Record and permitted the record to be supplemented to include Sean's Transcript, and the letters from American Express, Experian, Equifax and TransUnion.

41. On June 10, 2011, Stewart filed his Notice of Cross-Appeal from the Opinion and Judgment from Judge Gambrell which was filed by the clerk on February 16, 2011 and from the Rule 60(b) Order of Judge Gambrell filed on May 19, 2011.

III. Pre-Trial Events

A. The Temporary Order

On November 16, 2008, Judge Thomas entered an order ("Temporary Order"), directing 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 ...." C 17. Rosemary was required to pay for "the minor child's [high] school tuition and meals," see 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." Id. at 17. Concerning the parties' credit card debt, Judge Thomas ordered that:

> The credit cards may not be paid. Each party can determine if there are sufficient funds available to pay cards **in his or her own name**. Neither party shall add any additional charges to the credit cards.

Id. (emphasis added). Rosemary was **not** ordered to pay the American Express account, which was in Stewart's name. Nor were payments on Stewart's American Express account included in the $4500.00 monthly support for Rosemary and Sean. See id.

B. The Consent to Adjudicate

Judge Thomas found the Consent to Adjudicate to be "fair, adequate and sufficient as to the items set forth therein, and adopt[ed], ratif[ied], and incorporate[d] said agreement as part of [his] Judgment to be implemented and executed by the parties...." Judgment, at 4, C 53; Miss. Code § 93-5-2(2). Not agreed upon and left for the Court to decide were the "issues of alimony, equitable distribution of some marital property, medical expenses, school expenses, college education, life insurance coverage and attorneys fees." Judgment, at 2, C 51.

Appeals were available "only insofar as such orders and judgments relate to issues that [they] consent[ed] to have decided by the Court." Consent to Adjudicate, at 1– 2, C 37-38. Neither child support, nor the allocation of liabilities, was among such issues. Id. at 2, C 38-39.

Among the items the parties did **not** dispute are the following:

> [Stewart] . . . **agree[d] to pay unto [Rosemary], as a form of child support, the sum of One Thousand Three Hundred and 00/100 ($1,300.00) per month, beginning June 1, 2009, and continuing on the first (1st) day of each and every month thereafter until the minor child's emancipation.**

Id. at 5, ¶ 4, C 41, ¶ 4. (emphasis added). Stewart did not pay child support from August 2010 to February 2011; he was late paying child support in May 2011. In addition,

> **Stewart agree[d]** to maintain in full force and effect a policy of health, hospitalization, and dental insurance comparable to his current policy for the minor child as long as said policy will allow. **Stewart agree[d]** that he [would] pay the full monthly premiums and deductibles associated with such insurance policy. **The parties agree[d] that Stewart shall pay the percentage adjudicated by the Court for all other medical, doctor, hospital, dental, orthodontic, optical, prescription drugs, psychological and/other health related expenses of the child which are not covered and/or reimbursed by insurance.**

Id. at 5 – 6, C 41-42 (emphasis added). Stewart has not done so. Also, Stewart agreed that he

> **will pay**, as and when due, all premiums associated with said coverage for Rosemary **through payroll deduction or through other efficient means necessitated by Rosemary's election for a period of thirty-six (36) months following the dissolution of the marriage of the parties.**

Id. at 6, C 42. (emphasis added). Stewart has not done so and owes Rosemary for the November 2009 COBRA expense. See Rosemary's Affidavit ("Rosemary's Affidavit") in support of her Motion to Enforce the Judgment filed December 29, 2010 (the "Enforcement Motion"), C 238 at 241-42, ¶¶ 20 to 24; Exhibits D, E; C 273-78.

Stewart agreed "to convey to Shannon Finch ... the parties' daughter, ... [the] interest which he might have in [the] 2002 Camaro . . . and Shannon shall pay, as and when due, any and all monthly car notes until said automobile is paid in full ...." Consent to Adjudicate, at 9, C 45.

IV. The Irreconcilable Differences Divorce Trial Before Judge Thomas

A. Alimony

Judge Thomas considered Stewart's income when awarding Rosemary declining alimony. However, Judge Thomas mistakenly found that Stewart "earn[ed] an annual income of about $121,000.00." See Judgment, at Facts Section at 3, C 52. Stewart admitted his correct 2008 income was approximately $150,000.00 (T 12); See Stewart's W-2 reflecting 2008 income, Exhibit Q attached to Rosemary's Affidavit, C 300, and T 17-18; see also the letter from Rosemary's attorney to Stewart's attorney, dated October 1, 2009, at 2, attached to Rosemary's Affidavit as Exhibit O, C 294-96.[4] Judge Thomas also found that:

> In considering the relative incomes and resources of the parties and the needs and obligations, **the court finds [and Rosemary] is awarded periodic alimony of $4,000.00 for 36 months, beginning October 1, 2009, which, with the child support of $1,300.00 would give her a monthly income of $5,300.00, and leaves [Stewart] $2,890.00 with which to live. On September 1, 2012, the periodic alimony is reduced to $3,700.00 monthly for the next 48 months. On August 1, 2016, the periodic alimony is reduced to $3,400.00 to then be paid indefinitely.**

[4] During the Hearing, it was revealed that Stewart would earn $180,000 in 2010. See Hearing Transcript, at 113 - 114; see also third page of Stewart's Hearing Exhibit 9a.

Judgment, at page 5, C 54. (emphasis added). Judge Thomas did not award Rosemary either lump-sum alimony or rehabilitative alimony. Consent to Adjudicate, Issues 2-3, C 38-9. Even though Stewart testified that his employer paid him every two weeks (T 12), Judge Thomas ordered that the alimony be paid on the first of each month, commencing October 1, 2009.[5] Judgment, at page 5, C 54. Other than the months of February through May 2010, Stewart has never paid alimony on time. This has caused Rosemary to incur various late fees and other charges because of his late alimony payments. See Rosemary's Affidavit, at ¶¶ 34-37, C 243-47. In fact, he did not make the September 2010 alimony payment until October 2010.

Rosemary testified about her monthly expenses, including her medical expenses, two bank accounts, a Fidelity Bank mortgage and a Chase line of credit, totaling approximately $2,000 per month (T 80-99). She also testified about the Regions debt, and the Citi debt (T 79, 83, 84, 99). Rosemary never testified that, as alleged in Stewart's June 2010 Amended Counter Petition, "she was continuing to pay all of the marital debts as she had done throughout the marriage." C 116. Nor, contrary to Stewart's June 2010 Amended Counter Petition, did Rosemary ever testify that she needed a large award of alimony to pay all debts. See id.

B. Child Support

Child support was **not** among the issues the parties identified for the Court to decide. Judgment, at 2, C 51, Consent to Adjudicate, at 5, C 38-39. Stewart agreed to have Judge Thomas decide "[w]hat, if any percentage over 50% of the costs on the minor child's [Sean's] college education, [Stewart] shall pay. 'Expenses' [were] defined as tuition, room and board, registration fees, activity fees, laboratory fees, books, fraternity dues and expenses, transportation and any and all reasonable expenses related to the aforementioned child's education." Consent to Adjudicate, at 2 par 9, C 38 ¶ 9. Judge Thomas found that:

[5] Stewart never moved to modify the Judgment to permit him to pay alimony other than on the first of the month.

> With issues of custody, **support**, and visitation of Sean decided by the parties, **the Court additionally finds [Stewart] shall defray the expense of Sean's attending college**, including tuition, room, board and books should he continue his education after high school, **providing he maintains satisfactory passing grades in a continuing course of study.** His high school expenses shall be paid from the child support as controlled by [Rosemary].

Judgment, at 4, C 53 (emphasis added).

On or about March 28, 2008, and well before the Consent to Adjudicate was negotiated and signed, there was an e-mail exchange between Stewart and Sean. See Stewart's Hearing Exhibit, 8c. That e-mail exchange established that (i) Stewart asked Sean to call him when Sean had time and that (ii) Sean in effect told Stewart not to message him because he, Sean, would not respond. Id. This was more than fourteen months before the June 2, 2009 divorce trial, where Judge Thomas thoroughly considered Sean's relationship with his father.

Stewart admits he abandoned his family. From March 2008 to the time of divorce trial, he and his son had very little contact, see T 13. He spoke with his son only two or three times since March 2008, id. Stewart had not even been in his son's physical presence since March 2008. Id. Stewart "had no relationship with anyone in his family since March 2008." T 15. Stewart never denied Sean begged him to come home. T 131. Stewart admits he only tried to call his son once since the divorce. Id. 259. Stewart did not attend Sean's high school graduation or even send him a card. Sean's Affidavit, at C 303, ¶ 30.

The parties agreed that "[e]vidence of fault may be admissible as relevant to contested issues." Consent to Adjudicate, at 2, C 38. Judge Thomas found that:

> Sean Finch testified that his relationship with his father was good prior to the separation, but has become estranged since **[Stewart] separated himself from [Rosemary], with Sean suffering from a word processing disorder and being emotionally distraught and his necessity of taking medicine for anxiety. ... He [Sean Finch] has not been invited to visit [Stewart] in Maryland or New York.**

Judgment, at 3, C 52. (emphasis added).

V. Post-Divorce Trial Procedural Background and Events

After the Judgment of Divorce was entered September 28, 2009, the parties' counsel discussed its terms before each decided whether to file post-Judgment motions and/or whether to appeal. On October 1, 2009, Rosemary's counsel wrote to Stewart's counsel, stating:

> You [counsel for Stewart] explained to me that you would be seeking clarification with regard to the responsibility for payment of **certain debts** and that you intended to appeal the award of alimony and attorney's fees. I would point out that when the Court identified the equity in the home which Rosemary was to be receiving, he did not take into consideration the line of credit [second mortgage] and he also underestimated Stewart Finch's income which states over $150,000.00 salary according to his 2008 W-2.

October 1, 2009 letter from Rosemary's counsel to Stewart's counsel, Exhibit O, attached to Rosemary's Affidavit (emphasis added) at C 294-96. On October 8, 2009, Stewart's counsel e-mailed Rosemary's counsel: **"My client [Stewart] has decided not to appeal the decision of Judge Thomas."** See Exhibit P, to Rosemary's Affidavit (emphasis added), at C 298.

A. The Parties' Post-Trial Petitions for Contempt: Summary

Rosemary's December 2009 Petition focused on Stewart's failure to pay alimony and child support, as well as his failure to comply with additional directives of the Judgment. Stewart's January 2010 Counter Petition for Contempt concerned the Camaro for which Rosemary had no responsibility, among other matters. Stewart's June 2010 Amended Counter Petition sought the same January 2010 relief, but also demanded new relief alleging, for the first time, that Rosemary committed fraud in her testimony at the divorce trial. This June 2010 Counter Petition did not allege that Rosemary filed a false Rule 8.05 financial statement. Stewart alleged additional facts he said were newly discovered. However, except for Sean's application to drop his middle name, all such facts were well known to Stewart before June 2009 and were part of the divorce trial. Other than what might be implied from the allegation concerning Stewart's American Express account, neither of Stewart's Petitions claimed a change in his financial circumstances as grounds to reduce alimony or to terminate child support.

Stewart never asked for a reduction, much less a retroactive reduction, in child support. Neither of Stewart's Petitions requested a retroactive reduction of alimony.

B. Rosemary's December 2009 Petition

There were ten items to Rosemary's Petition, items 5A through 5J. Several of the items were resolved before the Hearing; the items presented to Judges Bridges and Gambrell included items (5d) Life insurance, (5f) COBRA payments, (5g) Late payment of alimony, (5h) Failure to timely pay child support; and (5i) Stewart's refusal to disclose his current address and telephone number. Rosemary's December 2009 Petition, at 1-3, C 58-60.

C. Stewart's January 2010 Counter Petition

Stewart alleged he "has never not paid [Rosemary] during the 30 to 31 days of the month that [alimony] is due." C 83. The Judgment, however, requires payment on the first of each month, a not insubstantial point. Judgment at 5, C 54. Stewart's late alimony payments caused Rosemary to be late paying monthly bills, incurring late fees and penalties. C 243-47, pars 34-37. Contrary to his negotiated agreement, Stewart alleged the Judgment "required [Rosemary] to pay the outstanding indebtedness on [the] Camaro" (which it did not C 17-18) and that he did not receive certain personal property Stewart's January 2010 Petition, at 4, C 84.

D. Stewart's Amended June 2010 Counter Petition

Nine months after the Judgment of Divorce, Stewart first alleged:

> **Since the filing of the original answer and counter-petition** Stewart Finch has discovered that Rosemary Finch **fraudulently** represented to the Court at the time of the trial [before Judge Thomas] that she was continuing to pay all of the marital debts just as she had done throughout the marriage. However, [in or about November, 2008] eight months prior to the trial [in June 2009] 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.

C 107, 116 (other than "fraudulently," emphasis added). This allegation flies in the face of, and contradicts, the explicit terms of the Temporary Order. That Order assigned certain financial

obligations to Rosemary; it did not require her to pay Stewart's American Express bill, nor were such payments "figured into her support payments." See Temporary Order, C 17-18.

The Temporary Order directed that all credit card accounts were the responsibility of the party in whose name the account existed, C 18, and prohibited additional charges (but permitted payment of such debts by the party in whose name the credit card was issued). Id. Stewart alleged no other debts; he alleged no other reason for reducing alimony, and he did not request a retroactive reduction. Stewart did **not** allege Rosemary intentionally filed a false Rule 8.05 financial statement.

The American Express letter, dated September 22, 2008, C 379 (the "American Express Letter"), shows Stewart was fully aware of, and maintained control over, this account. It also granted his "request to remove Rosemary Finch as [his] Authorized Account Manager" from his American Express account, so that "Rosemary Finch [could] no longer access" the account. Id. After September 22, 2008, Rosemary had no access to Stewart's American Express account. All of this occurred before Judge Thomas issued the Temporary Order. C 17-18.

With regard to his son, Stewart, for the first time, also contended that:

> The minor child does not respond to any attempts of communication by Stewart Finch. **In fact, shortly after the [divorce] trial** the child text (sic) his father and advised him not to text or communicate with him anymore. Just recently, in Cause No. 2010 – 0024 – PR-D, Sean Stewart Finch filed a petition with no notice given to Mr. Finch nor his counsel . . . to remove "Stewart" from his name. It is obvious that the minor child has absolutely no desire to maintain a relationship with his father and that his mother, Rosemary is encouraging the situation.

C 108, 117. Stewart did not assert a financial inability to pay as a basis to terminate child support, nor did he ask that such payments be reduced or reduced retroactively because of a financial inability to pay, or otherwise.

VI. The Hearing Before Judge Bridges On The Post-Trial Petitions

A hearing occurred before Judge Bridges on August 25, 2010 (the "Hearing"). At that

time, Stewart had "unclean hands" (as he did at hearings before Judge Gambrell in January and May 2011). He had not paid child support since July 2010, and did not resume payments until February 2011. Judge Bridges asked if Stewart objected to a withholding order.

> Yes, sir, Your Honor. That would jeopardize his position with the Coast Guard and his employer and that is why he immediately took out the loan. **The lump sum and back payment of the child support takes us both by surprise back to June.** That was a lump sum that he had come up with, along with a dispute over the attorney's fees. He paid everything, even the loan; she did not receive nothing during those months was the point we made here today. **The only difference was the Judge backdated the child support.** He paid her current on all the alimony payments, and he paid the child support as was ordered the temporary order. **What threw us for a loop was the judgment authorizing the child support $1,300 to go back to the date of the trial**; and then the $7000 award of attorneys fees.

T 265 (emphasis added). This statement was factually incorrect. Stewart had agreed to pay child support of $1300 a month, beginning June 1, 2009, and on the first of each month thereafter. See Consent to Adjudicate, at 5, ¶ 4, C 41. Stewart's child support commitments were incorporated into the Judgment. The six-month period for a Rule 60(b) modification had run.

Judge Bridges and Rosemary's counsel had a brief discussion regarding Rosemary's Petition and whether Stewart paid her the money. Counsel for Stewart then stated:

> I would request this of Your Honor. If we could reserve on that portion subject his complying with all future orders, just a finding of the contempt, if the Court could reserve that ruling and **if in fact he violates it in the future, he could be incarcerated for 30 days for doing that. If this man loses his job, he is the only support for this woman and this child.**

T 265-66 (emphasis added).[6] This plea to the Court to refrain from jailing Stewart came after all the evidence was in.[7] Stewart was aware of his jeopardy at that time. His counsel acknowledged that Stewart was the "only support for [the Plaintiff] and this child, [Sean]." T 266. In response, the Court stated:

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[6] This statement is consistent with Rosemary's testimony that she is "totally dependent upon [Stewart] for her support" T 87.

[7] Rosemary's counsel while asking that Stewart be held in contempt, withdrew the request that he be incarcerated but asked that he be ordered to comply with the Judgment. T 263.

> I would hold him in contempt for nonpayment of the child support on time, and that is the only thing in here that I can see was to be paid at a time. It was to be paid by June 1st of the year; and I don't know whether he paid that or not; he has paid that up now.

T 266. Again, Stewart complained to Judge Bridges that he was "ordered" to pay child support starting June 1, 2009. Id. ("[T]he order was entered September 29 **ordering** that [the child support] be paid June 1st" (emphasis added)). Yet, Stewart **agreed** to pay $1,300.00 per month as child support commencing June 1, 2009, and this agreement was a part of the Judgment, which had been final for eleven months. See Consent to Adjudicate, at 5, ¶ 4, C 41.

After saying Stewart was not in willful and obstinate contempt, Judge Bridges commented on Stewart's request "that child support payments be **discontinued**." T 267 (emphasis added):

> ... I think there is enough testimony to follow the Supreme Court's ruling in cases like this for him to discontinue the child support unless he wants to voluntarily pay for the Young man's school. But this Young man on the stand testified that he did not want to have anything to do with his daddy and didn't want his daddy to have anything to do with him. I think that pretty well satisfies the case law **unless you lawyers can show me where I am in error.**

T 267. Rosemary's counsel responded that she would provide case law within ten days. See id. However, a few moments later there was a further exchange and agreement by Stewart that there would be a simultaneous submission of proposed findings of fact and conclusions of law. T 268. Judge Bridges never entered an order relieving Stewart of his agreed obligation to pay child support. Judge Bridges never ruled on either of Stewart's Petitions.

Notwithstanding the representation made on October 8, 2009 that Stewart would not appeal, his counsel made a remarkable statement: he told Judge Bridges that he and his client were seeking to re-try this matter. Stewart's counsel asked for a "fair hearing," he wanted the Judgment to be set aside, and he wanted a new trial. All of this was well after the six-month time limit in Rule 60(b) had expired. Specifically, Stewart's counsel stated:

> Your Honor, from our standpoint, **we felt like the financial picture of the parties (sic) income, debts and expenses were not properly presented to the Court at the time that the [J]udgment was entered**, and we would ask that **the financial obligations on that be reevaluated, the judgment be set aside**, based upon misrepresentations, not proper disclosure of income or entitlement to Social Security. ... [A]ll **we are asking for** is a fair hearing with full disclosure of the income and expenses and **a reevaluation of the evidence.**

T 267-68. (emphasis added).[8] Neither Judge Bridges nor Judge Gambrell ever granted, or even addressed, this informal request.

VII. Rosemary's Enforcement Motion

On December 29, 2010, Rosemary filed a Motion seeking enforcement of the Judgment to the date of the hearing, *not prospectively*. Stewart had not paid child support since July 2010, had not paid any of his son's educational expenses, had not paid all of his portion of his son's medical expenses, had not paid all monthly COBRA expenses for Rosemary, had not provided proof of life insurance, had not paid alimony on time, and had unilaterally reduced monthly alimony on three occasions. See Enforcement Motion, at C 147-51. Rosemary sought relief "up to and including the date of the hearing and decision." See Enforcement Motion, at C 149, ¶ 6.

Other than filing an unsupported Motion to Strike the Enforcement Motion, Stewart did not join issue with or submit opposition to the Enforcement Motion or to Rosemary's Affidavit, C 238-300, or to an affidavit filed by Sean ("Sean's Affidavit"), C 301-324. Rosemary filed her opposition to Stewart's Motion to Strike on January 25, 2011. C 337-47.

VIII. The Motions to Expand the Record

On February 16, 2011, the Court below entered the Opinion and Judgment here appealed. The Judgment retroactively reduced vested alimony and child support, among other errors, all of which are explained below.

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[8] This request for a fair hearing, a reevaluation of the evidence, etc., is based only upon Rosemary's income, entitlement to Social Security and expenses but nothing else. There is no reference to Rosemary's 8.05 Financial Statement or to Stewart's debts.

On April 11, 2011, Stewart filed a Motion to Reopen Pursuant to Rule 60(b)(3) regarding his request to emancipate Sean. Stewart asked this "to allow submission of the full copy of the transcript [for his son] through May 2011 and *terminate the child support obligation from August 2010 to the present due to the child's poor performance and lack of full time attendance.*" C. 371-373 (emphasis in original).

On April 13, 2011, Rosemary filed her Motion to Reopen to Supplement the Record Pursuant to Rule 60(b). Specifically, she requested that the record include four letters addressed to Stewart, one from American Express and one from each of three credit reporting agencies. See Motion, at C 74-78 and Exhibits A, B, C and D - - the American Express letter, C 379, the Experian letter, C. 380, the Equifax Information Services LLC letter, C 381 and the TransUnion letter, C. 383. Rosemary asked for leave to serve a subpoena on American Express and the three credit reporting agencies for the calendar years 2006 through 2009. She also opposed Stewart's Motion to Retroactively Emancipate Sean. C 387-407.

On May 19, 2011, the Court below ordered proof of Sean's college enrollment and Sean's transcript, and stated that her Order of February 17, 2011, retroactively reducing child support remained effective. The Court allowed Rosemary to supplement the record with the letters from American Express and the three credit reporting agencies, but did not address the request for leave to serve document subpoenas on these entities. C 409-09.

SUMMARY OF THE ARGUMENT

This divorce case has had three judges at the trial level. The last of the three judges, without the benefit of hearing testimony from anyone, including either of the parties, in substance, set aside an agreement between the parties, reconsidered evidence and in effect reversed the first trial judge's findings. Judge Thomas' findings and the Consent to Adjudicate had been incorporated into the Judgment, which had not been appealed. The time for a Rule

60(b) motion had expired. The Court below made the decision here appealed, granting relief never requested and without prior notice to Rosemary that she was at risk of such relief. Rosemary did not have an opportunity to defend against findings concerning her Rule 8.05 financial statement, which Stewart never included in any pleading, or mentioned to Judge Bridges as a basis for reevaluation of the evidence or for setting aside the judgment.

The purpose of this appeal is: (i) to restore the trial judge's findings and Judgment and to acknowledge respect for the doctrines of claim and issue preclusion, as well as law of the case, in domestic relations cases, (ii) to limit the role of Miss R. Civ. P. 60(b) as recognized in its text and the decisions of this Court, and (iii) to restrict post-final judgment of divorce proceedings not only to the limits of Rule 60(b), but, within that rule, only to claims that were pleaded and of which a litigant had appropriate notice.

While Stewart knew of the "debts" at issue in January 2010, he did not make claims about such debts in either his January 2010 Counter Petition or his June 2010 Amended Counter Petition. His amended June 2010 Petition referenced only his American Express account. Stewart did not allege that Rosemary committed fraud or fraud on the Court regarding her Rule 8.05 Financial Statement. On the contrary, he alleged only that she fraudulently represented to the Court, during the divorce trial, that she was paying all the marital debts but stopped making payments on his American Express account eight months before the June 2009 divorce. This would have been in or about November 2008 at the time Judge Thomas issued the Temporary Order. Significantly, Stewart removed Rosemary's access to his American Express account in September 2008, two months before the Temporary Order was issued.

The third of the three trial judges had no basis to find Rosemary committed fraud on the Court, had no basis to order a retroactive reduction in alimony, had no basis to retroactively reduce agreed upon child support, had no basis to in effect set aside the Consent to Adjudicate,

had no basis to review the findings, set them aside, and in effect reverse Judge Thomas' judgment and had no basis to ignore Rosemary's Enforcement Motion.

The Court below had no legally sufficient grounds for --- in practical effect --- vacating the essential terms of the September 2009 Judgment of Divorce. The Court below had no authority to revise retroactively the terms of that Judgment. Rather, the second successor judge was bound by the prior Judgment, save for conditions not established here. The prior Judgment was protected from revision, retroactive or otherwise, by Rule 60(b)(1)'s six month time limit.

The elements of fraud were not supported by evidence in the record, much less were any of those elements found by clear and convincing evidence. Nothing in the decision here appealed suggests that Court below was aware of the clear and convincing standard. This is **not** a case like Trim v. Trim, 33 So.3d 471 (Miss. 2010), where "[i]t was within the chancellor's discretion to weigh the credibility of the conflicting testimony and to choose between competing interpretations of the evidence." Id. at 479 (¶ 20). The second successor chancery judge never assessed credibility, even had the law of fraud otherwise been properly applied.

Court ordered payments, whether for alimony, child support or otherwise, become vested on the day after they become due and are unpaid. The court may not thereafter forgive or modify such payments, only order them paid, and with interest. Here the Court below not only refused to order vested rights enforced and all past due monetary sums paid, she retroactively reduced significant financial obligations imposed by the September 2009 Judgment.

ARGUMENT

I. Substantial Factual and Legal Errors Infect the Decision of the Court Below

Judge Gambrell recognized the parties' Consent to Adjudicate, the divorce trial on remaining issues, and the Judgment entered September 18, 2009. Opinion and Judgment (some times "the Decision") at 1, C 348-49. That said, the Court below ignored the testimony and

evidence at the hearing, ignored Judge Thomas' opportunity to hear the parties and weigh their credibility, did not regard her duty to respect the final Judgment, and granted Stewart relief he did not request.

The Court below acknowledged that the Enforcement Motion was before her on January 26, 2011, id., at 4, 6, but made no ruling though the Motion was ripe for decision.

A. The Court Below Misstated What Occurred at the Divorce Trial and at the Hearing

The Decision here appealed incorrectly recites that Stewart was "**ordered**" to do a number of things he had agreed to without trial. Id. at C 349. Stewart agreed in the Consent to Adjudicate to transfer title of the Camaro automobile to his then almost 24 year old daughter, Shannon. C 45.[9] He agreed to give the marital residence to Rosemary, C 43, to pay COBRA for 36 months via payroll deductions, C 42, and to pay child support of $1,300 commencing June 1, 2009. C 41, ¶ 4. In addition, the Court made incorrect statements concerning retroactive child support. Judge Thomas did not make findings on these issues after hearing conflicting evidence on contested issues. They were "orders" only in the sense that they were irrevocable pre-trial commitments Judge Thomas found reasonable and incorporated into the Judgment.

The Court below began its "findings" by stating:

> At the time of the August 2010 hearing, "[Judge Bridges] **found** that two (2) of the provisions involving the transfer of title to [Rosemary] for her Infiniti automobile and the adult daughters Camaro, were impossible to perform until such time that the encumbrances (car loans) were paid in full.

Decision, at 4, C 351. (emphasis added). There was no such "finding" or even a related comment by Judge Bridges. Nevertheless, the Court below continued:

> **Argument** at the January 2011 hearing revealed that though Shannon was obligated to pay for the Camaro, she failed to do so and the Plaintiff (sic) made those payments in

[9] There was no evidence that Shannon did not pay the loan on this vehicle; in fact, Judge Gambrell recognized that this assertion was based on argument to her by Stewart. C 351.

> order to protect (sic) his credit and to comply with transferring said vehicle to Shannon. (Exhibit 16 – August 2010 hearing).

Id. (emphasis added). There was no evidence showing such non-payment; argument is not evidence. There was no agreed date for passing title. Moreover, the Camaro was solely a matter between Stewart and his emancipated adult daughter. It was Stewart who introduced the Camaro into these proceedings and sought, without basis, to have Rosemary held in contempt for failure to pay that loan. Rosemary had no such obligation. In fact, Judge Thomas found, per the Consent to Adjudicate, that Rosemary "should no longer pay for the Camaro automobile ...." Judgment at 5, C 54.

The Court below commented that:

> The Special Chancellor [Judge Bridges] at the conclusion of the August 2010 hearing **found**: a.) that the alimony payments ordered were paid within the month due and [Stewart] was not in contempt based on his method of payment which was in fact based on the method used by his company in paying him.

Decision, at 5, C 352. (emphasis added). This comment by Judge Bridges was not a "finding," even a legally impermissible one. Though Stewart testified he was paid twice a month, Judge Thomas ordered Stewart to pay alimony on the **first of the month**. Judgment, at 5, C 54. Stewart never moved to modify the Judgment to permit him to pay at any other time.

The Court below stated that Judge Bridges found that "the COBRA coverage was paid and the same was in effect." Decision, at 5, C 352. Judge Bridges made no such finding. The Enforcement Motion and Rosemary's Affidavit established that Stewart started paying for COBRA in December 2009. He did not pay for COBRA for November 2009. Stewart also ignored his judicially accepted agreement to pay for COBRA through payroll deductions. Consent to Adjudicate, at 6, C 42.

The Court below stated that Judge Bridges found:

> [Stewart] was in contempt for his failure to pay child support *on time* (Transcript pg. 130) but that he was not in willful and obstinate contempt. (Transcript pg. 131). The Special

Chancellor concluded by saying, *"But I don't think anything that was deduced here today in connection with the nonpayment of any amounts except the child support that I can hold him in willful and obstinate contempt for"* (Transcript pg. 133).

Decision, at 5, C 352 (italics in opinion). These comments by Judge Bridges may well have been a result of the misrepresentations by Stewart where, through his attorney, he told Judge Bridges that both of them were "thrown for loop" and "taken by surprise" with the "retroactive application of child support" to June 1, 2009. T 265. These statements misrepresent what Stewart agreed to in the judicially accepted Consent to Adjudicate.

B. The Court Below Ignored Testimony Before Judge Thomas and Found "Changed Financial Circumstances" Even Though Stewart Never Requested Any Such Finding in His Pleadings

The Court below stated:

A review of the transcript and exhibits of the August 25, 2010 hearing reveal that several serious changes occurred since the rendition of the September 28, 2009 judgment which affects the ability of [Stewart] to comply with the **mandates** of said Judgment, namely:

1.) Though Judge Thomas **found** that [Stewart] was to convey the 2002 Camaro vehicle to Shannon . . . and directed her to assume the indebtedness, Shannon . . . failed to make said payments; in order for [Stewart] to comply with the Court's mandate to convey said vehicle, he paid $9211.95 to Wells Fargo to satisfy the indebtedness on said vehicle after [Shannon] failed to do so.

Decision, at 6, C 353. On the contrary, Stewart agreed to give this car to Shannon; it was neither a "finding," nor was it mandated, by Judge Thomas. There was no evidence that Shannon did not pay the loan on the Camaro, only argument, as the Court below recognized. Id. at 4, C 351. Argument by counsel is not evidence.

The Court below further stated:

2.) Though Judge Thomas's order indicated "*credit cards may not be paid. Each party can determine if there are sufficient funds available to pay cards in his or her own name,*" the record reflected that [Rosemary] handled all the financial business and bill paying for the household while [Stewart] worked over 1200 miles away. In addition to the credit cards listed on the Rule 8.05 Financial Declaration of [Rosemary], [Stewart] learned of credit cards to Sam's Club, Best Buy and other creditors (Exhibits 11, 12, 13, 14 – Transcript August 2010.) in addition to the American Express debt resulting in his borrowing $38,000 (Exhibit 17 – August 2010 Transcript) to pay off undisclosed debts.

Decision, at 6 – 7, C 353-54 (italics in original).The evidence was to the contrary.

Rosemary testified (without contradiction or even cross-examination) she never did anything without consulting with Stewart and obtaining his approval when it came to finances. T 83, 92, 174. Moreover, Rosemary testified that Stewart from time-to-time would handle the finances. He never testified to the contrary. Before abandoning his family, Stewart worked two weeks on his tugboat and was then home for two weeks. T 18.

The credit card debts the Court referred to ("Sam's Club, Best Buy and other credit cards," reflected on Exhibits 11, 12, 13, and 14) are in Stewart's name at his Stevensville, Maryland address. He effected the change of address from the marital residence well before these documents were sent to him in Maryland. In addition, Stewart testified before Judge Bridges that he was aware of these debts in January of 2010. T 234-35; 237.

Among the facts showing Stewart knew of these debts are the credit reporting agency letters he received in April 2008, all of which referred to credit alerts Stewart placed on his credit file, and refer to credit reports he apparently obtained. These letters demonstrate that Stewart monitored his credit rating and his debts. They further show that he lied about not monitoring his credit and debts when cross-examined at the Hearing.[10] T 255.

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[10] The record indicates that at the very least, Stewart began monitoring his credit accounts in 2008. That year, he received letters from the three main credit reporting agencies, Equifax, Experian, and TransUnion, which stated the agencies placed an initial fraud or security alert on his credit file. See Letters, C 379, 380, 381 and 382. These alerts place potential creditors on notice that Stewart suspected he was the victim of identity theft; potential creditors were required to take additional precautionary measures before opening new accounts in his name. Under the Fair Credit Reporting Act, credit reporting agencies issue fraud alerts only if the consumer, or someone acting on the consumer's behalf, requests the alert. 15 U.S.C. § 1681(c)-(1)(a). The three credit reporting agency letters from April 2008 demonstrate that Stewart was monitoring his credit card debts, which contradicts his testimony that he was not monitoring his credit.

Stewart admitted that he did a credit report in January 2010, T 235, even though he did not petition the Court about these "unknown" debts for another eight months. Hearing Exhibits 11 and 13 are each portions of a larger document. Stewart's counsel admitted, "[Stewart] ordered a full credit report and we pulled out only those portions relevant to show the

Stewart testified that at or about the time of the Temporary Order, he never ran a credit report on himself. T 254-55. When asked whether it would have been easy to obtain a comprehensive credit report at that time, he said: "Well, I didn't know anything about it; the only reason that I did that report [the January credit check, T 235] is that I tried to get a credit card and I found out." T 255. Stewart bought a truck in March 2008 and financed that purchase. It strains credulity to suggest that he was not aware of these debts when the finance company would have rejected his application as incomplete if he had not listed such debts. Moreover, it is more than mere coincidence that Stewart placed a credit alert via Experian, Equifax, and TransUnion the month he purchased this truck. Stewart never said Rosemary ever incurred a charge on any of these accounts, or that she opened any of these accounts.

The Court below continued:

> Because [Rosemary] handled all the finances of the family, paid all the bills and secured credit, she was acutely aware of the lingering undisclosed indebtedness that would plague [Stewart] and due to her failure to disclose the same, **she committed a fraud upon the court** and therefore no time limit constrains the court's ability to modify the divorce judgment to remedy the **fraud on the court**. Miss. R. Civ. P. 60 (b), (Trim v. Trim, 33 So. 3rd 471. (sic)

Decision, at 7, 354 (emphasis added). Stewart never alleged this in his June 2010 Amended Counter Petition, which relied on his American Express account.

Nothing in the record establishes, much less implies, that Rosemary "was acutely aware of the lingering undisclosed indebtedness," to the exclusion of Stewart. The uncontradicted evidence is to the contrary, as explained above. Stewart never denied that he opened or used any of these accounts. He offered no evidence that Rosemary opened or used any of these accounts. Stewart carefully limited his testimony to saying that he was unaware of these debts. The evidence is to the contrary.

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outstanding debts that he had knowledge of ...." T 240. An objection to the documents and this procedure was overruled. T 238-241. This was an intentional and material attempt to selectively present a portion of a document that Stewart never provided to Rosemary.

The Court below continued that:

> It is obvious to this Court that [Rosemary] is **much more astute at financial matters** than [Stewart]. It is clear that she knew of the existence of the aforementioned debts, her **access to additional funds, and her entitlement to Social Security benefits and chose to intentionally not disclose this to [Stewart] or to the Court.**

Decision, at 7, C 354 (emphasis added). Nothing in the record supports this "finding". The evidence is to the contrary.

The so-called "access to additional funds" finding is never explained. If the Court meant the bank account which belonged to Rosemary's mother, this finding is without record support. Rosemary did not know her mother added her name to that account (which account belonged exclusively to her mother) T 188, 204. This was done only to facilitate access to the account if Rosemary's mother died. Rosemary explained she "knew nothing about that" bank account. T 188. She never deposited anything into the account, T 204, never wrote any checks on the account, id., and never transacted any business with the account. Id. None of this testimony was contradicted or challenged. At the end of the Hearing, when Stewart's counsel was pleading with Judge Bridges not to jail his client, he admitted that Stewart "is the only support [for Rosemary] and [his] child [Sean]." T 266.

Regarding "her entitlement to Social Security benefits," Rosemary testified before Judge Thomas that she was unaware of any such entitlement but had written to the Social Security Administration. T 88. Rosemary first received Social Security benefits six months later, in December 2009, and those benefits were based on her first husband's employment, not her own employment. Stewart, who was home two weeks of every month, T 18, would not permit her to work while they were married. If she had an obligation to go back to the Court when she started receiving these benefits in December 2009, Stewart also had an obligation to apprise the Court that he would then be making $180,000 per year, as he testified before Judge Bridges and as his

own documentary evidence proved.[11] See T 250-52; see also Stewart's Hearing Exhibit 9a, at 3. This is 50% more than the $120,000.00 Judge Thomas mistakenly found as Stewart's 2008 income. Stewart did not disclose this to the Court, or to Rosemary. This is a $5,000.00 per month ($60,000.00 annually) increase over the (incorrect) annual income used by Judge Thomas to compute alimony. The Court below ignored this fact.

The Court below continued:

> In light of Mrs. Finch's failure to adequately disclose income (social security payments of $728.00, debts (Best Buy, Sam's Club, etc.) tangible assets (joint account with her mother) ... **Mr. Finch's having to pay for the Infiniti and Camaro, in order to comply with this Court's Order to transfer to [Rosemary] and his adult daughter, respectively,** as well as his obligation to pay over $800.00 per month for the loans made against his retirement fund in order to satisfy marital debts, this Court is going to modify the Judgment of Divorce by reducing [Stewart's] alimony obligations.

Decision, at 8, C 355. (Emphasis added). The evidence is to the contrary.

Stewart contractually agreed to give the Infiniti to Rosemary and give the Camaro to his adult daughter. Stewart did not "pay off" the Infiniti; while he sent a check to the finance company, he unilaterally deducted this amount from Rosemary's April, May and June 2010 alimony (without her consent or approval from the Court). Otherwise, Rosemary paid the Infiniti loan, which was never in default. The payment of the Camaro loan was a gratuitous act by Stewart; it had nothing to do with Rosemary.

The Court below then, retroactively to November 2010, reduced alimony from $4,000 a month to $2,000 a month. Decision, at 8-9, C 355-56. The two mortgages on the residence have a combined obligation of approximately $2000 per month. There are other debts assigned to Rosemary in the Judgment. The entire amount of the retroactively reduced alimony has to be used for the first and second mortgages; there is nothing left for the other debts, utilities, household expenses, food, and other obligations. Rosemary and Sean cannot live on $728

[11] Stewart admitted that his earnings for the first half of 2010 were $89,111.43. T 250, 252.

monthly social security. The lack of a basis to do so aside, the Court below never went through the exercise of considering the debts, income, assets and obligations of the parties.

The Court below then commented, contrary to Rosemary's uncontradicted Affidavit:

> The court is also taking into consideration that Mr. Finch conveyed all interest in the marital home of the parties to Mrs. Finch resulting in the transfer of $93,577.91 in equity (Exhibit 1 – August 10, 2000 hearing).

Decision, at 9, C 356. Judge Thomas also made this incontrovertible mistake and as he, too, failed to consider the second mortgage debt. (See October 1- 8, 2009 letter/e-mail exchange between Rosemary's counsel and Stewart's counsel, attached as Exhibit O to Rosemary's Affidavit, C 295-98). Rosemary did not appeal this error in reliance on Stewart's assurance that he would not appeal. This was not part of Stewart's January or June 2010 petitions. Rather, the Court below was *sua sponte* retrying the case, just as Stewart had asked Judge Bridges to do. Neither Judge Bridges nor Judge Gambrell formally granted this oral request. T 267-68.

C. The Court Below Never Considered Credible, Uncontested, and Unchallenged Evidence and Effectively Reversed the Judgment, and Retroactively Reduced Child Support, Even Though Stewart Requested No Such Relief

Regarding Stewart's request that he be relieved of child support payments, educational and related expenses concerning his son, the Court below stated: "A review of both transcripts reveals that the relationship between father and son deteriorated after the [parties] separated." See Decision, at 9, C 356. At best, this statement is incomplete. The "separation" occurred in March 2008. The record establishes without contradiction that the deterioration occurred fifteen months **before** the June 2009 trial. Stewart was aware of this and still agreed to pay child support for $1300 per month commencing June 1, 2009; he also agreed to pay a portion of Sean's educational expenses and his medical expenses.

Remarkably, it is the March 2008 e-mail exchange with his son that Stewart cites in his June 2010 Amended Counter Petition, charging a change that occurred *after* the June 2, 2009

divorce trial. But Stewart had admitted that, from March 2008 to June 2009, he and his son had very little contact, that he has spoken with his son only two or three times, and that he has not even been in his son's physical presence since March 2008.

The Court below then stated:

> Sean further testified that he [Sean] did not desire to have any contact with his father **and** prior to the August 2010 hearing, joined with his mother (Plaintiff) and petitioned the Chancery Court of Lamar County, Mississippi to change his name due to his father having abandoned him. (Exhibit 8a - August 2000 transcript). The Order Granting Name Change further indicated that "the petitioner has full support of his mother, Rosemary Finch, the custodial parent, in this matter."

See Decision, at 9-10, C 356-57. (emphasis in original) This statement is incorrect.

During the June 2009 divorce trial, Stewart admitted it was his decision to leave the family, even though Sean begged him to come home. He further testified that, since he left in March of 2008, he had no relationship with anyone in his family, spoke to Sean only three times, and was never in his physical presence. Sean said since his father left, family life was not nearly as good, that it was pretty much a mess, and that he did know what to do. T 42. Before Stewart abandoned him, they used to do "father-son stuff," like working in the yard or on the car and family life was very good. T 42, 56. These were the days when Stewart worked two weeks on his tugboat and was home for two weeks. T 18. Since he walked out on his family in March 2008, Stewart never invited Sean to visit him in any place he resided. T 56-57. All of this made Sean feel like his father did not care about him; he felt unwanted. T 43-44.

At the Hearing, Sean testified that his father sent him an e-mail in March of 2008 asking Sean to call him when he had time. T 211-13. Sean said that at that time he did not want to talk to his father because he was still upset with him for leaving. He told his father not to bother messaging him. T 211. Again, Sean explained that his father did not invite him to spend any time with him since March 2008, did not visit him in Hattiesburg, and other than the March 2008 e-mail, did not attempt to re-establish a relationship with him. Id. at 211-12.

To imply or suggest that Rosemary was the moving, efficient, force behind Sean's application to drop his middle name is, at best, inaccurate. Sean decided to do this more than two years after Stewart abandoned him; he did not "join his mother" in petitioning the Court to drop his middle name. Sean testified that the name change decision "was completely [his] idea." T 213. The fact that his mother, and the custodial parent, Rosemary, supported her son does not mean that Sean "joined her" in his petition, as stated by the Court. In addition, Stewart had proper notice of Sean's Petition to drop his middle name. See T 205-06.

Sean never testified that he did not love his father. When cross-examined concerning his relationship with his father before Stewart walked out on his family, Sean was asked "you told him [Stewart] you loved him?" Sean responded: "Yes, sir." T 55.

This is objectively different from the statement the Court below made, without citation to a transcript, on page ten of her Decision, and it is misleading. Moreover, in his affidavit in support of the Enforcement Motion, Sean did not foreclose reconciliation with his father. See Sean's Affidavit, at 7, C 307 at ¶ 62.

The Court below stated that:

> Though the record was replete with failures to visit, etc. it appears that during the length of this marriage, [Stewart] has been employed away from the Hattiesburg area and has come home the week that he is not working. The geographic distance that exists *now* between father and son has existed for at least two decades.

See Decision, at 10, C 357. (emphasis in original). This statement also ignores the record. Significantly, from the time of Sean's birth, Stewart worked two weeks on his tugboat and was then home for two weeks. T 18. Sean testified things were good before Stewart abandoned his family; Sean used to do things with his father when he was home. T 55.

There was no evidence that Rosemary did anything to motivate her son in a negative way toward his father. There was no basis in the record for the Court below to state:

> it is obvious from a review of the transcript and the filing of the Petition for Name Change, that the minor child is conflicted and may be motivated to exhibit this type of behavior against his father due to his mother's feelings (mother joined in Petition to Change Name). Mrs. Finch, the adult, joined in the Petition alleging that the "*petitioner has full support of his mother, Rosemary Finch, the custodial parent, in this matter. ... and that the petitioner (Sean) has been abandoned, and has not had contact with his father, Stewart Finch, for over 2 years*"

See Decision, at 10-11, C 357-58 (italics in original). When asked by Stewart's counsel, "What was Sean's situation?" Rosemary stated: "His father left him; his father cared nothing about him and he had a lot of problems and they knew." T 197-98. "... I do not have to poison my children. He is the one that walked out on them." T 198. There is no evidence to the contrary.

II. Preliminary Considerations

A. Standard of Review

A chancery judge's findings of fact are reviewed for substantial evidence and manifest error, except where the product of an incorrect legal standard. A.B. v. Y.Z., 60 So.3d 737, 739 (Miss. 2011); Weeks v. Weeks, 29 So.3d 80, 86 (¶20)(Miss.Ct.App. 2009). Questions of law, including findings of fact infected by an incorrect legal standard, are reviewed de novo. Estate of Davis v. O'Neill, 42 So.3d 520, 524 (Miss. 2010). Failure to respect the correct burden of proof is an error of law. Brooks v. Brooks, 652 So.2d 1113, 1117 (Miss. 1995); cf. Daniels v. Peco Foods, 980 So.2d 360, 364 (¶12) (Miss.Ct.App. 2008).

In this case, findings of fact were made by a second successor Chancery Judge who never heard from the first live witness. In the Decision here appealed, the Court below "found" Rosemary guilty of intentional fraud upon Judge Thomas, and other unsupported conduct, though never observing Rosemary's demeanor or listening to her testify under oath. The Court below had no access to the basic intangibles so crucial to credibility and among the core reasons for the substantial evidence/manifest error rule on appeal. This is **not** a case like Trim v. Trim, 33 So.3d 471, 479 (¶20) (Miss. 2010) where "[i]t was within the chancellor's discretion to weigh

the credibility of the conflicting testimony and to choose between competing interpretations of the evidence." The Court below was not one "who hear[d] the witnesses live, observe[d] their demeanor and in general smell[ed] the smoke of the battle . . . ." Pinecrest, LLC v. Harris, 40 So.3d 557, 562 (¶10) (Miss. 2010) (quoting cases).

B. Clear and Convincing Evidence Should Have Been Required

Several issues are governed by a clear and convincing evidence burden of proof. Parra v. Parra, 65 So.3d 872 (Miss. Ct. App. 2011) explained that clear and convincing evidence

> "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case."

Id. at 878 (¶16) (citation omitted). Stewart never alleged that Rosemary committed fraud on the court with regard to her Rule 8.05 Financial Statement, or otherwise. The evidence does not support such a finding under any standard. Here, the Court below did not recognize its duty to make such a "finding" by clear and convincing evidence. Joel v. Joel, 43 So.3d 424, 437 (¶52) (Miss. 2010) (Appendix), correctly stating the holding in Brooks, 652 So.2d at 1117, *viz.*, "Instead of the proper 'clear and convincing evidence' standard, the chancellor used the lesser standard of 'a preponderance of the evidence.'"

C. The Second Successor Chancery Judge is Bound by the Judgment of the First Chancery Judge Who Tried the Case

Judge Thomas presided over the divorce trial and entered final judgment, from which no appeal was taken. This includes all proceedings related to the parties' substantial financial and property settlement prior to the divorce, labeled Consent to Adjudicate. Miss. R. Civ. P. 60(b)'s six-month time limit had run before first successor chancery judge entered the case.

Save for legal error on the face of the record **and** sufficient to satisfy the criteria of Rule 60(b)(4)- (6), the second successor chancery judge was bound by the final judgment. See Nelson

v. Baptist Mem. Hosp., 972 So.2d 667, 671 (¶ 10) (Miss. Ct. App. 2007). More certainly than in Pinecrest, cited above, and Amiker v. Drugs For Less, Inc., 796 So.2d 942, 947-48 (Miss. 2000), the second successor judge here had no authority to revisit the unappealed rulings of the judge who tried the case. The practical and policy reasons why this is so are even stronger in a bench trial than where a jury is the primary fact finder, as in Pinecrest and Amiker.

Judge Thomas' decision that the Consent to Adjudicate should be accepted and incorporated into the final judgment of divorce is enforceable both as a contract and as a judgment that was final for more than six months. A court from a sister state, well within the law and policy of our Rule 60(b), properly concluded that "it is not for the successor judge to go behind Judge [Thomas's] ruling," Webb v. Webb, 729 So.2d 430, 431 (Fla. App. Dist. 5, 1999).

III. The Lack of Evidence, Rules of Court, and Passage of Time Preclude Any Fraud Claim

A. Fraud on the Court Was Never Alleged, Proved, or Properly Found

"To constitute fraud there must be (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury." Stringfellow v. Stringfellow, 451 So.2d 219, 221 (Miss.1984) (citing Gardner v. State, 235 Miss. 119, 108 So.2d 592 (1959); see also Trim v. Trim, 33 So.3d 471, 478 (¶19) (Miss. 2010)). All nine elements must be shown by "clear and convincing evidence." Trim, 33 So.3d at 478 (¶19); Stringfellow, 451 So.2d at 221. Trim holds such proof must have been made to establish fraud on the Court.

The Court below never made findings on any these nine elements of fraud. Decision, at 7, 354. Even on the facts she purported to find, these are not found by clear and convincing

evidence. Nothing in the Decision suggests the Court below was aware of the law's mandate that each element of fraud be found by clear and convincing evidence.

Here, no credible evidence in the record, much less clear and convincing evidence, establishes the elements of fraud. Rosemary had no knowledge of any "falsity" of any "omission" because the Temporary Order allocated to each of the parties responsibility for their respective debts. Rosemary could have no intent to induce reliance because nothing was misstated or omitted.[12] There was no justifiable reliance because Stewart knew of these debts, checked his credit history, and revoked Rosemary's status as account manager for his American Express account. Under the Temporary Order, Stewart was responsible for the American Express debt which was in his name alone, and he could not justifiably have relied on Rosemary, especially after he removed her as account manager. There is no resulting damage because the debt under the American Express account was negotiated down to around $8,000 and this is the only debt that Stewart asserts in his June 2010 Counter Petition. There was no proximate cause because, as shown by the letter from American Express and in the three credit reporting agency letters, Stewart was in full control of his finances, his credit ratings and his accounts. See generally Stringfellow, 451 So.2d at 221; Trim, 33 So.3d at 478.

B. Rule 60(b) Properly Construed and Applied Precludes All Fraud Claims

The issue of fraud "is generally raised in a Rule 60(b) motion." Walton v. Snyder, 984 So.2d 343, 350 (¶ 20) (Miss. Ct. App. 2008). Rule 60(b) may be utilized in two ways: (1) a motion alleging fraud on an individual or (2) a motion alleging fraud on the court. The latter is "reserved for only the most egregious misconduct" which "defile(s) the court itself," Trim, 33 So.3d at 477 (¶15); Parra, 65 So.3d at 877 (¶15). "The mere non[-]disclosure to an adverse party

[12] In addition, Rosemary was fully aware that Stewart was (i) monitoring his credit and (ii) placed a fraud alert upon request to all of the three main credit reporting agencies.

and to the court of facts pertinent to a controversy before the court does not add up to 'fraud upon the court. . . .'' Parra, 65 So.3d at 877 (¶15), quoting Trim, at 477 (¶15).

A practical difference between the two is the associated time constraints. Fraud on an individual "requires a motion for relief from judgment be filed . . . not more than six months after the judgment." Id. at 350 (¶ 22). On the other hand, fraud on the court is "not subject to such time constraints." Id. (citing Tirouda v. State, 919 So.2d 211, 214-15 (¶ 8) (Miss. Ct. App. 2005). Walton distinguished the Tirouda case on the issue of fraud on the court:

> In Tirouda, it was determined that fraud upon the court was committed by numerous witnesses in a deliberate scheme to influence the court, thus the judgment could be set aside by the chancery court, within a reasonable time, and did not fall within the Rule 60(b) six-month time constraints. In contrast, the perjured testimony of merely one witness, as Tirouda discussed, would not trigger relief for fraud upon the court.

Id. at 350-51 (¶ 22).

The testimony of an individual, even perjured, cannot constitute fraud on the court; rather, it is fraud on an individual. Id. at 351 (¶ 23). Price v. Price held that plaintiff's withholding of her intention to file for Chapter 7 bankruptcy was not fraud. 5 So.3d 1151, 1156 (¶ 10) (Miss. Ct. App. 2009). Non-disclosure of a plan to leave Vicksburg and move the children to California was not fraud upon the Court in Parra, 65 So.3d at 878 (¶17). To be relieved under Rule 60(b)(1) after six months, a party must show the judgment was obtained by "a deliberate scheme to influence the court." Walton, 984 So.2d at 351 (¶ 22). Such a scheme concerning the Rule 8.05 Statement was neither alleged nor was it shown.

C. The Court Erroneously Held that *Trim v. Trim* Supported Its Decision

In Trim, the Court upheld a chancery court finding on the facts of that case that intentionally filing a substantially false Rule 8.05 financial disclosure statement constituted fraud on the court. 33 So.3d at 478-79 (¶¶ 17-20). The Trim couple agreed to divide their marital assets; George, the husband, disingenuously said the "value of his stock in [his company] was

worth $100,000" and listed the stock at that amount in his Rule 8.05 statement. Id. at 473. In a separate action, an expert testified that George's stock was actually worth over $1.1 million. Id. at 474. Undisputed evidence showed that in December 1999 George submitted a financial statement to a bank valuing this stock at $1.1 million; he submitted another financial statement to the same bank in December 2000 valuing his stock at $1.8 million. Id. at 475.

Today's facts are significantly different from Trim. There is no clear and convincing evidence that Rosemary intentionally filed a substantially false Rule 8.05 statement - - Stewart never even made this allegation. His June 2010 Amended Counter Petition for Contempt only mentioned the American Express account; it did not address the additional four "debts" he asserted were unknown to him. Moreover, Stewart admitted that he knew of the alleged debts at least by January 2010; yet, he never included that information in his June 2010 Counter Petition.

Stewart was monitoring his financial status via the three credit agencies. He was monitoring his accounts by at least the spring of 2008, which is fourteen months before the parties filed their Rule 8.05 statements. Furthermore, in September 2008, Stewart contacted American Express, the only account listed in his June 2010 Counter Petition, and successfully removed Rosemary as an account manager.

There is simply no evidence -- clear and convincing or otherwise -- that Rosemary intentionally submitted a false Rule 8.05 financial statement.[13] Unlike the husband in Trim, Rosemary did not intentionally undervalue any assets she owned. Nor is there any credible basis to conclude that Rosemary intended Stewart be misled by any error on her Rule 8.05 statement or that Stewart did not know of his debts. Rosemary, in fact, knew Stewart was monitoring his

[13] Indeed, such intent would defy logic because Rosemary knew of the April 2008 credit agency letters, the fact that Stewart monitored his credit rating, the fact that he requested a fraud alert from the three credit agencies and the fact that he removed her as an account manager from the American Express credit account.

finances. Stewart, furthermore, has not proven a "consequent and proximate injury" that occurred because he relied on Rosemary's Rule 8.05 statement.

Judge Thomas heard from Rosemary and Stewart extensively and under oath in June of 2009. There is no evidence that Rosemary either "intended to misrepresent some fact in order to influence the decision by the finder of fact, . . . [or] that the fact finder [Judge Thomas] did rely upon the misrepresentation in . . . [his] decision." Parra, 65 So.3d at 878 (¶16), quoting Seghini v. Seghini, 42 So.3d 635 at 642 (¶25) (Miss. Ct. App. 2010).

At worst, the facts suggest that Rosemary mistakenly relied on the Temporary Order which said each party was responsible only for those debts issued in his or her name. This does not even rise to the level of "mere non[-]disclosure to an adverse party and to the court of facts pertinent to a controversy . . . [much less] does . . . [it] add up to 'fraud upon the court. . . .'" Parra, 65 So.3d at 877 (¶15), quoting Trim, at 477 (¶15). In addition to an absence of notice, there simply was no clear and convincing evidence for the Court below to have relied on that proved Rosemary knew she submitted a false statement, that she intended to submit a false statement, that Stewart did not know about his debts, that Stewart relied on intentional error, if any, in Rosemary's financial statement, or that Stewart was injured thereby.

The reliance by the Court below on Trim is misplaced and incorrect. In Trim, the husband personally submitted two financial statements to lenders, confirming that on his Rule 8.05 statement he intentionally undervalued his company's stock by at least $1 million and as much as $1.7 million. Id. at 475. In a separate action, an expert testified that the husband's stock was actually worth over $1.1 million. Id. at 474. This is **not** a case like Trim, Id. at 479 (¶20), where "[i]t was within the chancellor's discretion to weigh the credibility of the conflicting testimony and to choose between competing interpretations of the evidence." The

second successor chancery judge was never in a position to assess credibility, even had the law of fraud otherwise been properly applied, which, as shown above, it was not.

IV. The Court Erroneously Retroactively Reduced Alimony and Child Support Contrary to Law

A. Alimony

"[P]ast-due support payments become vested when due and cannot be modified." Chapman v. Ward, 3 So. 3d 790, 798 (¶ 25) (Miss. Ct. App. 2009). "[P]eriodic alimony becomes fixed and vested on the date in which the payment is due and unpaid." McCardle v. McCardle, 862 So.2d 1290, at 1293 (¶ 16). As a matter of law, interest accrues on each payment from the date it is due and is not paid. Rubisoff v. Rubisoff, 133 So.2d 534, 537 (Miss. 1961); Rainwater v. Rainwater, 110 So.2d 608, 610-11 (Miss. 1959); Dorr v. Dorr, 797 So.2d 1008, 1015 (¶ 22) (Miss. Ct. App. 2001). "More importantly, a court cannot give relief from civil liability for any payments that have already accrued." McCardle, 862 So.2d at 1293 .

A person may be held in civil contempt for failure to comply with an order to provide alimony. "Civil contempt orders enforce a private party's rights or compel compliance with a court's order." Hanshaw v. Hanshaw, 55 So.3d 143, 147 (¶ 13) (Miss. 2011) (citing Purvis v. Purvis, 657 So.2d 794, 796 (Miss. 1994)). In the case of alimony and child support, a prima facie case of contempt is made when the party entitled to the payment offers evidence that it was not paid. Weeks, 29 So.2d at 88 (¶32)(Miss.Ct.App. 2009) (citing cases). "The burden then shifts to the paying party to prove a defense by clear and convincing evidence." Id. Stewart never proved a defense, by clear and convincing evidence, or otherwise.

Stewart's alimony obligations were fixed and vested; nevertheless, the Court below, *sua sponte,* retroactively reduced alimony back to November 2010, from $4000 per month to $2000 per month, and gave Stewart a credit going forward for "over-payment" of alimony since November 2010. Stewart's June 2010 Amended Counter Petition only sought a prospective

reduction in alimony. The law does not permit such a retroactive reduction. See id. Stewart's only basis for seeking such prospective reduction in alimony payments was the American Express debt, which, as shown, he knew of no later than September 22, 2008.[14] Contrary to the finding below, the American Express debt was not figured into Rosemary's support payments. The Temporary Order made clear that each party was responsible for paying his or her own debts, and the American Express debt was in Stewart's name.

Stewart's claims that he drained his retirement account to pay his American Express debt and debts on the Camaro are not supported in the record. First, he negotiated and reduced the payment on his American Express to around $8,000. Because the American Express account was never Rosemary's responsibility (see the Temporary Order, C 17-18), she should not be penalized for Stewart's failure to pay his own debts. Second, Stewart agreed to convey title to the Camaro to Shannon, the parties' adult daughter, who would be responsible for making payments on it. There is no evidence in the record that Shannon did not make such payments, or that, if she did not, it in any way affected Stewart's credit. This again was not Rosemary's responsibility and should not affect her alimony. There were no material changes in Stewart's circumstances to justify any reduction of alimony, much less a retroactive reduction.

Any changes in Stewart's circumstances should have led to an increase in alimony. The trial evidence and the discussion between counsel after the September 2009 Judgment make clear that the original alimony award relied on the wrong annual income for Stewart ($120,000 rather than $150,000 for 2008). Also, Judge Thomas did not consider the second mortgage debt when he calculated equity in the marital residence. The evidence before Judge Bridges established that Stewart was to have earned $180,000.00 in 2010.

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[14] The American Express Letter and the credit reporting agency letters also demonstrate that Stewart had lied before Judge Bridges. He was monitoring his credit, contrary to his assertion otherwise. C 379.

B. Child Support

In Nichols v. Tedder, the Supreme Court explained that:

> In the context of childcare and maintenance orders, regular child support refers to the sums of money which the particular parent is ordered to pay for the child's basic, necessary living expenses, namely, food, clothing and shelter. Other sums which a parent may be ordered to pay for the care and maintenance of the child are expenses of a college, or other advanced education.

547 So.2d 766, 769 (Miss. 1989).

In Caldwell v. Caldwell, the Court specifically recognized that:

> The amount of money that the noncustodial 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 that parent. The proper inquiry, as we have often stated, is what is in the best interest of the child.

579 So.2d 543, 548 (Miss. 1991). Dykes v. Murry, 938 So.2d 330, 333 (¶ 8) (Miss. Ct. App. 2006) is to like effect.

Caldwell recognized that the minor 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." 579 So.2d 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 tugboat. On June 29, 2010, Stewart filed an Amended Counter Petition to terminate all support for Sean, notwithstanding his pre-divorce agreement to pay $1,300.00 per month as child support. As well, Stewart has not supported Sean in college.

The Court below *sua sponte* retroactively reduced Stewart's child support obligation. With assistance of counsel, Stewart agreed to pay for his son's basic necessary living expenses in the Consent to Adjudicate, signed June 2, 2009. This is an obligation Rosemary bargained for and relied upon. Without Court authorization, Stewart stopped paying child support in July 2010 through February 2011. Stewart never asked the Court to reduce his child support payments.

Stewart's request to emancipate Sean or terminate child support is based solely on the alleged changed relationship between Stewart and his son. The complained of change had occurred in March of 2008 because of Stewart's callous conduct towards his son.

C. Vested Child Support Cannot Be Reduced, Only Paid

As with alimony, a court may not modify vested child support. "[C]ourt-ordered child support payments vest in the child as they accrue and may not thereafter be modified or forgiven, only paid." Smith v. Smith, 20 So.3d 670, 674 (¶ 13) (Miss. 2009). A number of notable cases follow this view. See Houck v. Ousterhout, 861 So.2d 1000, 1002 (¶ 2) (Miss. 2003); Hailey v. Holden, 457 So.2d 947, 951 (Miss.1984); Bolton v. Bolton, 63 So.3d 600, 613 (¶ 47) (Miss.Ct.App. 2011); Andres v. Andres, 22 So. 3d 314, 317-318 (¶ 8) (quoting Houck v. Houck, 812 So. 2d 1139, 1143 (¶ 11) (Miss. Ct. App. 2002); Chapman, 3 So. 3d at 798 (¶ 28); Keith v. Purvis, 982 So.2d 1033, 1039 (¶ 20) (Miss. Ct. App. 2008); McCardle, 862 So.2d at 1293 (¶ 16).

As with periodic alimony, interest accrues on each child support payment from the date it is due and remains unpaid. Houck, 861 So.2d at 1003 (¶ 15); Brand v. Brand, 482 So.2d 236, 238 (Miss. 1986); Dorr, 797 So.2d at 1015 (¶¶ 22-23). The pendency of litigation has no effect on these vested rights. The automatic vesting rule applies to all unpaid child support and does not allow support payments to be reduced retroactively to the time of filing. "[P]ayments that accrued during the pendency of litigation [are] nevertheless vested the same as any others." Cumberland v. Cumberland, 564 So.2d 839, 847 (Miss. 1990). Even if a subsequent action results in a reduction of child support, this reduction cannot apply retroactively to payments that have accrued. Evans v. Evans, 2011 WL 1566017 at *8 (¶42) (Miss. Ct. App., Apr. 26, 2011).

D. The Court Below Sanctioned Stewart's Illegal Self-Help

No party may unilaterally modify vested payments. Andres, 22 So.3d at 317-18 (citing Crow v. Crow, 622 So.2d 1226, 1231 (Miss. 1993)). In Burt v. Burt, the Court commented that

"[i]t is significant that Bruce [the father] never petitioned the chancery court for a modification of his child support obligations. [The father] merely stopped making payments . . ." 841 So.2d 108, 112 (Miss. 2001). The Court continued:

> The law is unequivocal on this issue. Once a child support payment becomes due, that payment vests in the child. Once the payments are vested, "they cannot be modified or forgiven by the Courts," . . . [And] **the delinquent parent is liable also for the interest which has accrued on each unpaid support payment from the time it was due.**

Id. at 112. (emphasis added) In Cumberland, the Court emphasized that resort to self-help was impermissible. The court held that Mr. Cumberland was obligated to pay support at the original rate through final judgment in the chancery court, adding "[n]o party obligated by a judicial decree to provide support for minor children may resort to self help and modify his or her obligation with impunity." 564 So.2d at 847. In Strack v. Stricklin, 959 So.2d 1, 6 (Miss. Ct. App. 2007), the Court of Appeals similarly held that self-help reduction of child support payments is not permitted. If the father "desired to be relieved of his obligation to pay child support, due to the alleged emancipation of the children, it was his responsibility to bring the matter to the attention of the chancellor. " Id.

Stewart asserts that "Judge Bridges made an oral ruling from the bench that Sean Finch was emancipated and that Mr. Finch did not have to pay any more child support, medical or educational expenses." See Motion to Strike, at 1, C 329. This simply did not happen. Judge Bridges, following the hearing on August 25, 2010 (the "Hearing"), stated:

> Now you did, Mr. Farris, ask that the child support payments be discontinued, and I think there is enough testimony to follow the Supreme Court's ruling in cases like this for him to discontinue the child support unless he wants to voluntarily pay for the young man's school. But this young man on the stand testified that he did not want to have anything to do with his daddy and he didn't want his daddy to have anything to do with him. I think that pretty well satisfies the case law **unless you lawyers can show me where I am in error.**

See transcript of the Hearing (the "Hearing Transcript") at page 132. (emphasis added).[15]

Judge Bridges did not rule that Stewart "did not have to pay any more child support," nor did he address Stewart's obligation to pay for his son's medical or education expenses. Judge Bridges never ruled at all. Nevertheless, Stewart unilaterally stopped paying child support to Rosemary in July 2010. "A party making an extra-judicial modification does so at his own peril." Crow, 622 So.2d at 1231; see also Andres, 22 So.3d at 318; Moore v. Moore, 372 So. 2d 270, 271-72 (Miss. 1979) (holding that father was not authorized to reduce child support payments pro-rata without first securing modification of child support decree when one of his

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[15] Stewart has asserted that he "promptly filed his proposed findings of facts and conclusions of law but [the Plaintiff] did not." See Motion to Strike, at 1, C 329. What Stewart has not stated is that his attorney did not submit his proposed findings of fact and conclusions of law simultaneously with Rosemary's counsel, as he agreed to do. On the contrary, he engaged in *ex parte* communications with the Court, prior to September 28, 2010 and sent documents to the Court (but did not provide Rosemary's counsel with the relevant documents), and that the Court responded to Stewart's counsel on October 1, 2010, without copying Rosemary. See the *ex parte* exchange of e-mail messages between Stewart's counsel and the Court attached to Rosemary's Opposition to the Motion to Strike as Exhibit A, C 345-47.

On October 27, 2010 at approximately 3:26 PM, Stewart's counsel again wrote to the Court, but this time he copied Rosemary's counsel ("I am copying Candance Rickman on this e-mail"), and referred to his previous submissions of proposed findings to the Court, among other things. See Exhibit A, C 345-47.

Within an hour of receipt of the October 27, 2010 e-mail message to the Court, Rosemary's counsel stated: "I disagree with Mr. Farris' opinion as to what the testimony revealed. His client showed no financial hardship, and in fact showed higher earnings for this year than last year. He continues to disregard the Judgment in failing to pay the support obligations which become due each month." See id.

Significantly, Rosemary's counsel complained to Judge Bridges about the ex parte communications between him and Mr. Farris:

> I see that Mr. Farris communicated with you via email on September 28, presenting a proposed "Order", of which I was unaware and had never received a copy. I believe **Your Honor should recuse himself from rendering any decision on this matter due to this ex parte communication between Mr. Farris and the Court.** Please advise.

See id. (emphasis added). Any asserted so-called "delays" were the result of Stewart's *ex parte* communications with Judge Bridges. Before receiving a copy of the e-mail from Stewart's counsel to the Court, Rosemary was unaware that he filed anything. Moreover, to the knowledge of Rosemary, Judge Bridges did not respond to then counsel for Rosemary as she requested when she said: "Please advise." See id.

children became emancipated) (abrogated on other grounds by Dept. of Human Services v. Fillingane, 761 So.2d 869 (Miss. 2000)). Stewart did not resume child support payments until the Court below *sua sponte* retroactively reduced such payments in February 2011.

Stewart also resorted to self-help in reducing Rosemary's alimony payments. The Consent to Adjudicate provided that Rosemary would receive title to the Infiniti if she made the payments on it. Rosemary has always made monthly payments on the Infiniti. However, Stewart, without consulting Rosemary or the Court, paid off the Infiniti debt early. He then reduced alimony payments to Rosemary. Stewart's self-help in reducing her alimony is unjustified and illegal. Stewart's payment of the Infiniti loan was gratuitous.

E. No Material Change of Circumstances Occurred Concerning Child Support or Alimony

Both parties signed the Consent to Adjudicate. Judge Thomas found it "fair, adequate and sufficient . . . and adopt[ed], ratif[ied], and incorporate[d] said agreement as part of [his] Judgment . . ." Judgment, at 4, C 53; Miss. Code § 93-5-2(2). The Judgment placed no conditions on Stewart's obligation to pay child support, only on his duty to pay Sean's educational expenses. Stewart **agreed** to pay **half** of Sean's educational expenses; whether he would pay more than half was one of the issues to be decided by Judge Thomas. Consent to Adjudicate, at 2, C 38. In this regard, the Judgment states:

> With issues of custody, support, and visitation of Sean decided by the parties, the Court additionally finds [Stewart] shall defray the expense of Sean's attending college, including tuition, room, board and books should he continue his education after high school, providing he maintains satisfactory passing grades in a continuing course of study.

Judgment, at 4. The Judgment made Stewart's obligation to pay Sean's educational expenses conditional on Sean maintaining satisfactory passing grades in a continuing course of study. Judge Thomas did not impose any minimum number of courses or academic hours per semester

as a condition for Stewart's obligation to pay such expenses. However, Judge Thomas did recognize Sean's learning disability.

"When the parties have reached agreement and the chancery court has approved it, we ought to enforce it and take as dim a view of efforts to modify it, as we ordinarily do when persons seek relief from their improvident contracts." Steiner v. Steiner, 788 So. 2d 771, 776 (Miss. 2001) (quoting Bell v. Bell, 572 So.2d 841, 844 (Miss. 1990)); McLeod v. McLeod, 2011 WL 2811459, *3 (¶15) (Miss.Ct.App. 2011).

Furthermore, "[w]hen a divorce becomes final, 'the custody, support, alimony, and property settlement agreement becomes a part of the legal decree for all legal intents and purposes.'" Riddick v. Riddick, 906 So.2d 813, 819 (Miss. App. Ct. 2004) (quoting Switzer v. Switzer, 460 So. 2d 843, 845 (Miss. 1984), construing Miss. Code § 93-5-2(2)); McLeod, 2011 WL 2811459, *3 (¶15) "Consequently, the agreement can be modified only if a party can show 'a substantial or material change in the circumstances of one or more of the interested parties: the father, the mother, and the child or children, arising subsequent to the entry of the decree to be modified.'" Riddick, 906 So.2d at 819 (quoting Tedford v. Dempsey, 437 So. 2d 410, 417 (Miss. 1983)). Generally, such a change must be a matter not "anticipated at the time of the entry of the original decree." Trunzler v. Trunzler, 431 So. 2d 1115, 1116 (Miss. 1983). "[T]here is no significance to the fact that we are here concerned with a court ratified child support agreement, made incident to an irreconcilable differences divorce." Tedford, 437 So. 2d at 417. In Tedford, "the child support provisions of the separation agreement became incorporated into the decree. [This means that the child support provisions] became a part of the decree. They are subject to modification only upon showing of a substantial or material change in circumstances since [the date the divorce decree was entered]." Id.

Sean's graduation from high school, as well as his matriculation in college, were anticipated in June/September 2009. The Court below's reliance on these factors to modify Stewart's child support obligation and condition them on Sean achieving a certain grade point average is misplaced. See Riddick, 906 So.2d at 820 ("[W]e are unable to see how these expenses were unanticipated at the time of the divorce decree.")

F. The Child Support and Alimony Rulings Below Should Be Reversed Because Stewart Did Not Come to Court with "Clean Hands"

The clean hands doctrine prevents a complaining party from obtaining equitable relief in court when the party is guilty of willful misconduct in the transaction at issue. See Calcote v. Calcote, 583 So.2d 197, 199-200 (Miss. 1991). The exception to the rule is an inability to pay, where the party is in arrears for the support payment for which he seeks modification. Stewart made no such allegation when requesting to emancipate Sean, or when Stewart requested termination of his child support payments. Stewart never claimed a financial inability to pay when he asked that his child support payments be reduced.

At the Hearing before Judge Bridges, Stewart had unclean hands because he had not paid child support for August 2010. After that Hearing, Stewart paid no child support until March 2011. Accordingly, Stewart had unclean hands at the January 26, 2011 argument before Judge Gambrell. At the time of the May 10, 2011 argument before Judge Gambrell, Stewart again had not paid child support and again had unclean hands.

On each such occasion, only a judgment against Stewart for all unpaid sums, including interest, could have given Stewart standing to proceed. Chapman held that "[the father's] hands were cleansed by the entry of judgment against him for the arrearages." 3 So.3d at 799 (¶ 29). The Court below noted Stewart's unclean hands but entered no cleansing order. This Court should set matters right; the order appealed from must be vacated. Only once judgment is finally entered against him for all of his many self-help arrearages --- including each time he

deliberately paid alimony or support only "within the month due" rather than on the first day of each month --- may Stewart be heard regarding a modification, prospective only, of the duties Judge Thomas imposed on him in August 2009. See Brennan v. Brennan, 605 So.2d 749, 753 (Miss. 1992); Chapman, 3 So.3d at 799 (¶ 29); Howard v. Howard, 968 So.2d 961, 976 (¶ 35) (Miss. Ct. App. 2007).

G. Rosemary's Enforcement Motion Was Timely Filed, Its Merits Documented, and Should Have Been Granted

Not only should the Court below have ordered Stewart to pay all arrearages up to date as a condition of his right to proceed at all on his petitions, the matter of Stewart's arrearages should have been addressed and remedied on its own merits in the Decision. At the January 26, 2011, hearing, the Court had before it Rosemary's Enforcement Motion which had been timely filed and noticed, see Miss. R. Civ. P. 81(d)(2),with legally sufficient supporting evidence and other documentation, and was otherwise ripe for decision and judgment.

Stewart had not paid child support since July 2010, had not paid any of his son's educational expenses, had not paid all of his portion of his son's medical expenses, had not paid all monthly COBRA expenses for Rosemary, had not provided proof of life insurance, had not paid alimony on time, and had unilaterally reduced monthly alimony on three occasions. See Enforcement Motion, at C 147-51. Rosemary sought relief "up to and including the date of the hearing and decision." See Enforcement Motion, at C 149, ¶ 6.

Other than filing a Motion to Strike, on its face lacking merit, Stewart did not join issue with or submit opposition to the Enforcement Motion or to Rosemary's Affidavit, C 238-300, or to an affidavit filed by Sean ("Sean's Affidavit"), C 301-324. Rosemary filed her Response and Opposition to Stewart's Motion to Strike. C 337-47.

The Decision has the practical effect of denying the Enforcement Motion, given that alimony and child support were retroactively reduced, instead of being ordered paid. No

findings were made or other explanation offered why there was any inadequacy in the procedure or substance of, or evidentiary support for, the Enforcement. It should have been granted. By reason of the arguments above, and supporting authorities, the Court on this appeal should direct the Court below now to grant the Enforcement Motion, with relief updated to the arrearages and other circumstances at the time of this Court's decision.

H. The Court Should Order Stewart to Pay Rosemary's Attorneys Fees and Litigation Expenses, and Remand to Determine the Amount

Stewart did not have a reasonable, good faith or substantial basis for the allegations in either his January 2010 Counter Petition or his June 2010 Amended Counter Petition. In Re Spencer, 985 So.2d 330, 338 (Miss. 2008); Little v. Collier, 759 So.2d 454, 458 (Miss.Ct.App. 2000); see also, Collins v. Koppers, 59 So.3d 582, 589-92 (Miss. 2011). Stewart alleged that Rosemary was "guilty of contempt in that the Judgment of Divorce required her to pay the outstanding indebtedness on the Camaro." The facts and law are otherwise. This allegation is contradicted by the Consent to Adjudicate, C 44-45, and the Judgment. C 54 ("[Rosemary] should no longer pay for the Camaro automobile which is being transferred to Shannon."). Stewart made this claim "without hope of success." Spencer, 985 So.2d at 339.

Stewart alleged in his amended June 2010 Counter Petition that Rosemary fraudulently represented to the Court that she was continuing to pay all the marital debts (which she did not say), that she stopped making payments on his American Express account even though the bill was figured into her support payments and that she did not forward any notices or collection letters to him from American Express. See C 116. The Temporary Order provided otherwise when it assigned responsibility for credit card debt to the person in whose name such debt was issued. Nothing supports Stewart's charge that his American Express bill "figure[d] into her support payments." See C at 18. There is no hint of a showing of the amount Stewart owed American Express in November 2008. After all, Stewart had removed Rosemary as account

manager from his American Express account in September 2008, see C 379. He made this claim with no reasonable hope of success.

With regard to the Petition to Declare Sean Emancipated, Stewart alleged in his amended June 2010 Counter Petition that "shortly after the trial, the child [Sean] text (sic) his father and advised him not to text or communicate with him anymore." See 117. This communication actually occurred on March 28, 2008 some 15 months **before** Stewart signed the Consent to Adjudicate and before the divorce trial. Stewart never had a reasonable or good faith basis to allege that this occurred "shortly after the [divorce] trial" in June 2009. On December 15, 2009, Rosemary first petitioned that Stewart be held in contempt and asked that Stewart be ordered to "pay all of [her] attorney's fees and costs of court in being forced to bring this action. [Rosemary] has no income except that awarded to her by the Court . . . , and it is of no fault of [Rosemary] that this pending action [contempt petition] is required." C 60. On July 19, 2010, Rosemary filed her Answer to Stewart's Amended Counter Petition for Citation of Contempt and requested Rule 11 Sanctions against Stewart.

The facts just noted and set out extensively above show objectively that Stewart should have been ordered to pay all of Rosemary's reasonable attorneys' fees and litigation costs beginning with her December 2009 Petition for Contempt. The facts show that Stewart was and is in contempt for not discharging his duties under the September 2009 Judgment in the numerous particulars outlined above. The Court has plenary authority to award such fees and costs in cases such as this. Gregg v. Montgomery, 587 So.2d 928, 934 (Miss. 1991) (wife entitled to attorney fees for having to defend husband's unsuccessful petition); Cumberland, 564 So.2d 839, 845 (Miss. 1990).

The Court's authority in the premises is augmented by Rule 11 and/or the Litigation

Accountability Act. Miss. Code § 11-55-5(1)..[16] See Collins, 59 So.3d 582, 591-94 (¶¶ 26-36) (Miss. 2011) The Court should hold that Rosemary is entitled to all reasonable and necessary attorneys fees and litigation expenses, beginning with those to which she was entitled in her December 2009 Petition through and including the present appeal. The Court should remand with instructions to the Court below that the quantum of such fees and expenses be considered and assessed against Stewart under the settled criteria therefor. Evans, 2011 WL 1566017 at *4-5 (Miss. Ct. App., Apr. 26, 2011); McKee v. McKee, 418 So.2d 764, 767 (Miss. 1982).

CONCLUSION

With respect, for the reasons set forth above, considered singly or in the aggregate, the Judgment of February 16, 2011, should be reversed and judgment rendered here for Rosemary; provided, however, so much of the judgment as ordered Stewart to pay his own attorney's fees. Decision, at 12, C 359, should be affirmed.

Stewart did not allege and has not established, by clear and convincing evidence, and there was no basis for the Court below to have found, that Rosemary intentionally failed to disclose debts that were exclusively in Stewart's name, that only Rosemary knew of those debts, or that Rosemary intended to deceive Stewart and that Stewart reasonably relied on any such deception. In addition, Stewart did not allege or prove, by clear and convincing evidence, that any such deception was a substantial fact that caused him harm. Nothing shown here even rises to the level of mere non-disclosure to an adverse party and to the court of facts pertinent to a controversy, much less does it add up to fraud upon the Court.

The record demonstrates that Stewart knew or should have known of these "unknown debts," especially in light of the Temporary Order, the letters from American Express, Experian,

[16] For a full discussion of the texts of Rule 11 considered in conjunction with the Litigation Accountability Act, see Robertson, *Discovering Rule 11 of the Mississippi Rules of Civil Procedure*, 8 Miss. College L. Rev. 111 (1988).

Equifax, and TransUnion, the fact that he applied for and received a loan to purchase a truck in March 2008, and the overall manner that Stewart monitored his finances.

In addition to reversing the Judgment here appealed, Rosemary's Motion for Enforcement of the Judgment should be granted in all respects. Stewart should be Ordered to comply with the Judgment of September 29, 2009, in all respects, within fourteen (14) days of this Court's Order. By reference to the September 2009 Judgment, this Court should require Stewart to pay, with interest from the date first due and unpaid: (i) all back COBRA payments, (ii) all back alimony payments he deducted from the April, May and June 2010 alimony payments, (iii) all late and related penalty fees Rosemary incurred because of Stewart's late alimony payments, (iv) all late and unpaid child support, and (v) all of Sean's educational and medical expenses. This Court should also grant Rosemary reasonable attorneys' fees and expenses and court costs for all proceedings since her December 15, 2009, Petition for Contempt, including the costs of transcripts and any other relief the Court deems just and equitable. The Court should instruct that on remand the Court below consider and determine the quantum of such fees and expenses be assessed against Stewart under the settled criteria therefor.

Respectfully submitted, this 27th day of September, 2011.

ROSEMARY FINCH

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CERTIFICATE OF SERVICE

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

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

This 27th day of September, 2011.

James L. Robertson