IN THE SUPREME COURT OF MISSISSIPPI

CASE NO: 2011-CA-00732

JONATHAN P. O'BRIANT — APPELLANT

VS.

OLIVIA A. O'BRIANT — APPELLEE

APPEAL FROM THE CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF FOR APPELLEE OLIVIA A. O'BRIANT

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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. Jonathan P. O'Briant - (Appellant)

2. Jeffrey B. Rimes - (Counsel for Appellant)

3. Olivia A. O'Briant - (Appellee)

4. Melissa A. Malouf
   William E. Ballard
   Casey J. Rodgers - (Counsel for Appellee)

5. Honorable Cynthia Brewer - (Chancellor, Madison County Chancery Court)

DATED this the 6th day of February, 2012.

RESPECTFULLY SUBMITTED

BY: William E. Ballard

William E. Ballard, Attorney for Appellee

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STATEMENT OF THE CASE

A. Procedural History

On August 21, 2009, Olivia O'Briant ("Olivia") obtained a *Temporary Restraining Order* against Jonathan O'Briant ("Jonathan") in Texas. (R. 157) On August 28, 2009, Jonathan O'Briant filed his *Petition for Divorce and Other Relief* against Olivia in the Chancery Court of Madison County, Mississippi. (*Id.*) Jonathan subsequently petitioned the Chancery Court and was granted an *Emergency Temporary Restraining Order* on September 1, 2009. (*Id.*).

On September 10, 2009, Olivia's Texas action was dismissed and the parties entered into an *Agreed Preliminary Injunction* whereby the parties agreed to alternate custody of Maguire until a temporary hearing could be held. (*Id.*). On October 15, 2009, a temporary hearing was held, and the chancellor granted Jonathan temporary sole custody of Maguire subject to Olivia's visitation. (*Id.*).

On August 31, 2010, the parties entered into a *Joint Consent to Divorce on the*

Grounds of Irreconcilable Differences, and to Trial of Contested Issues whereby the parties agreed to submit child custody issues to the court for trial. (*Id.*). The trial of this matter began on August 31, 2010 and continued through September 1, 2010. (*Id.*). On October 15, 2010, an *Opinion and Final Judgment* was entered in this cause wherein the parties were granted a divorce with Olivia being granted sole physical custody of Maguire subject to Jonathan's liberal visitation schedule. (R. 162).

On October 25, 2010, Jonathan filed his *Motion for Rehearing and to Alter and Amend Judgment* alleging that the chancellor misapplied the *Albright* factors in granting sole physical custody to Oliva. (R. 167-175). Subsequently, Jonathan filed his *Supplemental Motion for Rehearing and to Alter and Amend Judgment* and a *Second Supplemental Motion for Rehearing and to Alter and Amend Judgment* alleging "newly discovered evidence" not previously available at trial. (R. 193-196).

On March 23, 2011, a hearing was held on Jonathan's post trial motion. On May 19, 2011, the chancellor entered its *Order Denying* said motion. On May 25, 2010, Jonathan filed his Notice of Appeal. (R. 208-209).

B. Statement of the Facts

Jonathan and Olivia O'Briant were married on August 13, 2004 after a three-month courtship. (R. 156, Tr. 162). Olivia testified that prior to her and Jonathan's marriage, she was unaware of Jonathan's extensive history of mental illness. (Tr. 71, 162). Prior to the marriage, Jonathan was committed to the Mississippi State Hospital at Whitfield for three months following a suicide attempt. (Tr. 71).

Jonathan has remained under psychiatric care since his release from Whitfield in 2000. (Tr. 69). Jonathan's psychiatrist, Dr. Cook, noted in his records that Jonathan displayed the symptoms and signs of borderline personality disorder and bipolar disorder. (Tr. 69, 109-110). Dr. Cook continues to treat Jonathan's mental illness with a regimen of prescription drugs, which include Lisinopril, Adderal, Prozac, and Wellbutrin. (Tr. 79). Although Jonathan has made progress through treatment, he has gone for extensive periods of time without taking his medication. (Tr. 114; Exhibit 8 at 11, 19, 23).

In 2006, Olivia became pregnant with the couple's only child, a son, Maguire O'Briant. (R. 156). During her pregnancy, Olivia spent one month at home on bedrest, and another five weeks in the hospital. (R. 125, 177). Jonathan rarely visited Olivia at the hospital despite the fact that he was unemployed during this time. *Id.*

Olivia gave birth to Maguire on June 23, 2007. (R. 156). Maguire was born twelve (12) weeks premature, and was required to stay in the NICU for about eleven (11) weeks following his birth. (R. 177). Olivia visited Maguire in the NICU at least once each day. (*Id.*). Jonathan, however, did not visit Maguire in the NICU every day despite being unemployed at the time. (Tr. 126-27, 178). On September 7, 2007, Maguire was discharged from the hospital. (Tr. 178).

Jonathan, Olivia and Maguire lived together in a home owned by Jonathan's mother, Ann Necaise ("Ann"). (Tr. 17). Jonathan's mother and grandmother live in a house next door to the marital home. (Tr. 16). Olivia testified that, prior to the separation, she assumed the role of stay-at-home mother and Maguire's primary caregiver. (Tr. 161-

62). Olivia further testified that on a daily basis, she was responsible for waking Maguire up in the mornings, preparing his food, feeding him, brushing his teeth, bathing him, and putting him to bed. (Tr. 161, 261). Olivia's friend and former co-worker, Stephanie Holbrook, described Olivia as a "great mom." (Tr. 146). At trial, Mrs. Holbrook testified that she had left her own children under Olivia's care. (Tr. 147). Likewise, Olivia's sister, Lindsey Long, testified that Olivia had cared for Mrs. Long's children "too many times to count." (Tr. 325).

On the other hand, both Mrs. Holbrook and Mrs. Long recalled that Jonathan rarely interacted with Maguire. (Tr. 147, 325). Mrs. Holbrook testified that she had mainly seen Jonathan in the back room of his house playing World of Warcraft on the computer. (Tr. 147). Mrs. Long testified that, when she was at the O'Briant residence, Jonathan was generally either sleeping or playing World of Warcraft on his computer. (Tr. 325). However, she did testify that shortly before the O'Briant's separated, Jonathan spent a lot of time at the library studying for the MCAT. (*Id.*). Olivia testified that in April 2009, she left Maguire with Jonathan so she could go to the library and study. (Tr. 202). Upon returning home, she discovered that Jonathan had left to go study for the MCAT and that Jonathan had left Maguire home alone. (*Id.*).

Jonathan and Olivia separated on or about August 14, 2009. (R. 156). Jonathan remained in the former marital home. (*Id.*) Olivia moved into her parent's home in Whitehouse, Texas. (Tr. 176). When Jonathan had custody of Maguire after the separation, the evidence showed that Jonathan's mother, Ann, was primarily responsible

for Maguire's daily care. (Tr. 18-19, 261-265, 291, 310-311). Ann took Maguire to and from daycare each day and cared for him until Jonathan got home from work. (*Id.*). At trial, Ann testified that she played an "integral role" in Maguire's medical treatment. (Tr. 273). During trial, Maguire's toothbrush and medications were next door at Ann's house. (Tr. 258-260, 310-311).

SUMMARY OF THE ARGUMENT

This Court should affirm the chancellor's *Opinion and Final Judgment* and the denial of Jonathan's *Motion for Rehearing and to Alter and Amend Judgment; Supplemental Motion for Rehearing and to Alter and Amend Judgment;* and *Second Supplemental Motion for Rehearing and to Alter and Amend Judgment.* In his brief, Jonathan incorrectly argues that the chancellor misapplied the *Albright* factors; reached a conclusion not supported by the evidence; and erred in denying his motion for rehearing. However, the chancellor did, in fact, conduct a proper *Albright* analysis. Her judgment lists which factors favor Olivia, which factors favor Jonathan, and which factors are neutral. Jonathan further incorrectly argues that the chancellor misapplied the *Albright* factors by "recasting" the "stability of home environment and employment of each parent *Albright* factor into two separate factors." *Appellant's Brief* at 12. The Court of Appeals, has affirmed *Albright* determinations where the court styled the Albright factors in the exact manner as the chancellor styled them in the instant case.

Further, the chancellor's *Albright* analysis and *Opinion and Final Judgment* was supported by substantial, credible evidence. In his brief, Jonathan incorrectly argues that the chancellor reached conclusions that were not supported by any real evidence. However, Jonathan ignores the substantial credible evidence Olivia presented at trial. Jonathan appears to take issue with the credibility determinations made by the chancellor, and this Court has routinely held that the chancellor, as trier of facts, is charged with determining the credibility of witnesses. Therefore, Jonathan's argument is without

merit.

Moreover, the chancellor properly denied Jonathan's post trial motion. His motion was based primarily on his alleged "newly discovered evidence." However, Jonathan fails to satisfy the four requirements that must be met before a new trial based on "newly discovered evidence" may be granted. The unsubstantiated allegations contained in his motion are not "newly discovered evidence." In fact, they are the same type of allegations that he has made from the outset of this litigation. Therefore, this Court should affirm the chancellor's *Opinion and Final Judgment* and the denial of Jonathan's motion for rehearing.

ARGUMENT

I. Standard of Review

The Standard of Review in domestic relations cases is abuse of discretion. The Court of Appeals has held,

> The standard of review employed by this Court in domestic relations cases is abundantly clear. Chancellors are vested with broad discretion, and this Court will not disturb the chancellor's findings unless the court's actions were manifestly wrong, the court abused its discretion, or the court applied erroneous legal standard.

Rodgers v. Taylor, 755 So. 2d 33, 36 (Miss. App. 2000). "The chancellor has the sole responsibility to determine the credibility of witnesses and evidence, and the weight to be given each." *Lee v. Lee*, 798 So. 2d 1284, 1288 (Miss. 2001).

Moreover, the chancellor's denial of Jonathan's motion for rehearing is reviewed

by this Court under an abuse of discretion standard. "A motion for reconsideration is treated as a motion to alter or amend judgment pursuant to Mississippi Rule of Civil Procedure 59(e)." *Wilburn v. Wilburn*, 991 So. 2d 1185, 1191 (Miss. 2008). "This Court reviews a trial court's denial of a Rule 59 motion under an abuse of discretion standard." *Brooks v. Roberts*, 882 So. 2d 229, 233 (Miss. 2004).

II. The Chancellor properly applied the Albright factors in awarding custody of the parties minor child to Olivia.

In the instant case, the Chancellor properly applied the *Albright* factors in awarding custody of the parties' minor child to Olivia, and the record reveals that substantial evidence supports the chancellor's *Albright* analysis. Therefore, this Court should affirm the chancellor's order granting Olivia custody of Maguire.

Under Mississippi law, it is well settled that the polestar consideration in all child custody cases is the best interest of the child. *Sellers v. Sellers*, 638 So.2d 481, 484 (Miss. 1994) (*citing Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983)). In *Albright*, this Court set forth the following factors which must be considered in determining child custody:

> (1) age, health and sex of the child; (2) a determination of the parent that has had the continuity of care prior to the separation; (3) which has the best parenting skills and which has the willingness and capacity to provide primary child care; **(4) the employment of the parent and responsibilities of that employment;** (5) physical and mental health and age of the parents; (6) emotional ties of parent and child; (7) moral fitness of parents; (8) the home, school and community record of the child;(9) the preference of the child at the age sufficient to express a preference by law; **(10) stability of home environment and employment of each parent;** (11) and other factors relevant to the parent-child relationship."

Albright at 1005. (emphasis added).

In the instant case, the *Opinion and Final Judgment* entered by the chancellor makes clear that the *Albright* factors were properly considered and applied when determining custody. The judgment lists which factors favor Olivia; which factors favor Jonathan; and which factors were neutral. Jonathan's argument that the Chancellor misapplied the *Albright* factors is without merit. *Appellant's Brief* at 12. The Court of Appeals has stated,

> In *Smith v. Smith*, 614 So. 2d 394, 397 (Miss. 1993), the Mississippi Supreme Court held that if the chancellor properly considered and applied the Albright factors when making the child-custody determination, the appellate court 'cannot say [the chancellor] was manifestly wrong' in his determination.

Wilson v. Wilson, 53 So.3d 865, 868 (Miss. App. 2011). In reality, it appears that Jonathan's real qualm is with the credibility determinations made by the chancellor at trial. The majority of Jonathan's argument hinges on the credibility of he and his mother's testimony, and fails to acknowledge what evidence the chancellor did or did not find credible.

In the instant case, the record contains substantial evidence supporting the chancellor's order granting sole physical custody of Maguire to Olivia. Therefore, this Court should affirm the chancellor's decision.

A. The chancellor did not abuse her discretion in her analysis of the "Employment Responsibilities and Stability of Employment" factor and the "Stability of Home Environment" factor.

In his brief, Jonathan argues that the chancellor misapplied the *Albright* factors "with its recasting of the stability of home environment and employment of each parent *Albright* factor into two separate factors." *Appellant's Brief* at 12. However, Jonathan fails to cite any authority supporting same, and his argument is without merit. In *Curry v. McDaniel*, 37 So. 3d 1225,1236 (Miss. App. 2010), the trial court analyzed the "stability of home environment" and the "stability of employment" factors separately, and the Court of Appeals affirmed the decision. *See also Woodham v. Woodham*, 17 So. 3d 153, 158 (Miss. App. 2009) (affirming the chancellor's decision analyzing the "stability of home environment" and "stability of employment" factors separately). Furthermore, Miss. R. App. P. 28(a)(6) requires that arguments advanced on appeal contain citations to legal authority. Therefore, Jonathan's argument is procedurally barred for failing to comply with said rules. *See Sandlin v. Sandlin*, 906 So.2d 39, 42 (Miss. App. 2004).

In the instant case, the chancellor's *Opinion and Final Judgment* merely styled the fourth *Albright* factor as **"Employment Responsibilities and Stability of Employment,"** and the tenth *Albright* factor as the **"Stability of Home Environment."** The chancellor found the fourth factor favored Jonathan and the tenth factor favored neither party. The Court of Appeals has affirmed *Albright* determinations where the fourth and tenth *Albright* factors were styled in the exact same manner as the learned chancellor styled them in the instant case. *See Benal v. Benal*, 22 So.3d 369, 375-76 (Miss. App. 2009) and *Phillips v. Phillips*, 45 So. 3d 684, 693 (Miss. App. 2010); *See also, M.H. v. D.A., et. al.*, 17 So. 3d 610, 618 (Miss. App. 2009) and *Jones v. Jones,* 19

So. 3d 775, 779 (Miss. App. 2009) (chancellor styled and analyzed the tenth *Albright* factor as "stability of home environment,"and the Court affirmed the decision).

Moreover, the "baseball" analogy and *Albright* factor scoring system advanced in Jonathan's brief is not supported by this Court's longstanding legal precedent. *Appellant's Brief* at 13. To the contrary, the Court of Appeals has specifically rejected this argument. In *Rodgers v. Taylor*, 755 So. 2d 33, 37 (Miss. App. 2000), the Court of Appeals stated,

> [W]e find inappropriate the chancellor's convoluted effort to weigh the Albright factors by assigning random values to each factor for Karen and Rodney and **basing his decision on a total score of the numbers**. We find this troubling and riddled with danger of inconsistent application of these important factors. **Child custody matters are of too grave importance to rely on the random nature inherent in such a scoring system.** (emphasis added)

This Court has made it clear that "[w]hile the *Albright* factors are extremely helpful in navigating what is usually a labyrinth of interests and emotions, they are certainly not the equivalent of a mathematical formula." *Mabus v.* Mabus, 890 So.2d 806, 816 (Miss. 2003) (*quoting Lee v. Lee*, 798 So.2d 1284, 1288 (Miss. 2001)). "[*A*]*lbright* was not meant to supplant those principles found in equity with any type of rigid mathematical formula. *Curry v. McDaniel*, 37 So. 3d 1225, 1234 (Miss. App. 2010).

In his brief, Jonathan further argues that "there is no evidence in the record of the present case to show that Jonathan does not provide a stable environment for the child." *Appellant's Brief* at 14. However, the chancellor never found that "Jonathan does not provide a stable environment for the child." Clearly, the chancellor found that both

parties could provide a stable home environment for Maguire inasmuch as she found this factor to be neutral. (R. 162). Additionally, the chancellor's neutral determination of this factor was supported by the testimony that both Olivia and Jonathan depend heavily on their extended families for support. (R. 161-162). The Court of Appeals has held that the strong presence of extended family weighs in favor of the 'stability of home environment' factor. *Neville v. Neville*, 734 So.2d 352, 355 (Miss. App. 1999). In the present case, Olivia lives at home with her parents in the town where she grew up. (Tr. 176) She is surrounded by her parents, sisters, and grandmother. (Tr. 176). Likewise, Jonathan lives next door to his mother and grandmother in a home owned by his mother. (Tr. 16-17). Given the testimony at trial, the chancellor did not abuse her discretion by finding that the "stability of home environment" factor is neutral.

B. Substantial evidence supports the chancellor's finding that the "continuity of care prior to the separation" factor favors Olivia.

In her *Albright* analysis, the chancellor found that while Jonathan did assist with bathing and some doctor visits, Olivia was Maguire's primary care giver prior to the separation. (R. 158; Tr. 324). The chancellor's determination was supported by the testimony that, prior to the separation, Olivia had been a stay-at-home mother charged with the daily care of Maguire. (R. 158). The chancellor properly exercised her discretion in determining the credibility of the witnesses, and her conclusion was supported by substantial evidence in the record.

Olivia testified she and Jonathan had decided that instead of working, it would be

better if she stayed at home to care for Maguire. (Tr. 161, 261). As a stay-at-home mother, Olivia woke Maguire up in the mornings, prepared his meals, brushed his teeth, bathed him, and put him to bed. (*Id.*). Olivia was responsible for taking care of Maguire prior to the separation. (Tr. 162). Olivia's sister, Lindsey Long, testified that Olivia was Maguire's primary care giver, and that prior to the separation, Jonathan spent much of his time studying for the MCAT. (Tr. 324-325).

In his brief, Jonathan erroneously claims the chancellor's findings "unambiguously conflict with the substantial weight of the evidence." *Appellant's Brief* at 15. Although the chancellor's findings regarding the "continuity of care prior to the separation" conflict with Jonathan's testimony, they certainly do not conflict with Olivia's testimony. The chancellor is charged with determining the credibility of the witnesses at trial.

Jonathan further argues that "both parties testified that the other was significantly involved in Maguire's rearing." *Appellant's Brief* at 14. To the contrary, Olivia testified that she was Maguire's primary care giver prior to the separation. (R. 162). Additionally, Jonathan argues the chancellor erred in finding that "after the separation, Jonathan's mother, Ann, provided most of Maguire's care." *Appellant's Brief* at 14. However, the chancellor did not mention Jonathan's mother in her analysis of the "continuity of care" factor. (R. 158). While the chancellor was correct in her subsequent finding that Ann provided most of Maguire's care **after** the separation, that finding is irrelevant to the instant *Albright* Factor. The instant *Albright* factor concerns itself with the "continuity of

care **prior** to the separation" not **after** the separation.

C. The chancellor correctly found that the "parenting skills" factor weighed in favor of Olivia.

There is substantial evidence in the record regarding Olivia's parenting skills, and the chancellor correctly found that the "parenting skills" factor weighed in favor of Olivia. Stephanie Holbrook testified that Olivia was a "great mom." (Tr. 146). However, regarding Mr. O'Briant's parenting skills, she testified that she rarely saw Jonathan "interacting with Maguire" because he was mainly in the back room playing World of Warcraft on the computer. (Tr. 147). She further testified that she has left her own children with Olivia on numerous occasions. (*Id.*). Additionally, Olivia's sister, Lindsey Long, testified that Olivia had cared for Mrs. Long's children "too many times to count," and that she has never seen Olivia do anything detrimental to Maguire. (Tr. 325).

Prior to the separation, Olivia was a stay-at-home mother and Maguire's primary care giver. (Tr. 161, 261). Based in part on this evidence, the chancellor found that Olivia had "significantly more time to develop her parenting skills." (R. 158). And this was a reasonable conclusion given Jonathan's testimony that prior to the separation he had worked and spent a great amount of time studying outside of the marital home. (Tr. 23, 79). Additionally, after the separation, Jonathan's mother was generally responsible for taking Maguire to doctor visits, taking him to and from daycare each day, and caring for him until Jonathan got home from work. (Tr. 18-19, 261-265, 291). The chancellor correctly found that Jonathan "relied heavily on his mother as a caretaker since the

separation" inasmuch as, during the trial of this matter, Maguire did not even have a toothbrush at Jonathan's house. (R. 159; Tr. 310-311). Maguire's toothbrush and medications were at Jonathan's mother's house. (Tr. 258-260, 310-311). Olivia further testified that Maguire is "always with his grandmother." (Tr. 240).

In his brief, Jonathan argues that the chancellor "ignored the substantial evidence in favor of Jonathan's parenting skills." *Appellant's Brief* at 15. In support of his argument, Jonathan relies solely on his own testimony as well as his mother's testimony. *Id.* at 15- 16. Jonathan further fails to acknowledge the substantial evidence of his bad parenting skills. Olivia testified that in April 2009, she left Maguire with Jonathan so she could go to the library and study. (Tr. 202). When Olivia returned home, Jonathan was not at the house and Maguire was home alone. (*Id.*) Yet again, Jonathan makes clear that his real qualm is with the chancellor's credibility determinations. However, this Court has routinely held that "[t]he credibility of the witnesses and the weight of their testimony, as well as the interpretation of evidence where it is capable of more than one reasonable interpretation, are primarily for the chancellor as the trier of facts." *Johnson v. Gray*, 859 So.2d 1006, 1014 (Miss. 2003) (*citing Chamblee v. Chamblee*, 637 So.2d 850, 860 (Miss.1994)).

Moreover, Jonathan correctly asserts that "the presence of extended family is a reasonable consideration in analyzing the *Albright* factors." *Appellant's Brief* at 15. However, Jonathan fails to point out that the presence of extended family weighs in favor

of the "stability of home environment" factor, and **not** the "parenting skills factor." In support of his argument, Jonathan cites *Neville v. Neville*, 734 So.2d 352 (Miss. App. 1999). However, in *Neville*, the Court considered the presence of extended family under the "stability of the home environment" factor rather than under the "parenting skills" factor. Additionally, Jonathan incorrectly contends that he was "penalized for the presence of his mother." *Appellant's Brief* at 15-16. There is nothing in the record to support this contention. Further, it was both correct and reasonable for the chancellor to discount Jonathan's parenting skills given the evidence that Jonathan's mother was largely responsible for Maguire's daily care. (Tr.18-19, 195, 261-265, 291, 310-311) . Thus, the chancellor properly found, based on substantial credible evidence, that the "parenting skills" factor favors Olivia.

D. Substantial evidence supports the chancellor's finding that Olivia has the greater capacity to provide primary child care.

The chancellor correctly determined that Jonathan has "very limited experience as a primary caregiver" and that "Jonathan's mother clearly assumes that role." (R at 159) In fact, it was Jonathan's mother, rather that Jonathan, who took Maguire to and from daycare each day. (Tr. 19, 273). It was Jonathan's mother who testified that she played an "integral role" in Maguire's medical treatment. (Tr. 273). And, it was Jonathan's mother who kept Maguire's toothbrush and medications. (Tr. 258-260, 310-311). However, Jonathan claims that he was Maguire's primary giver and that his mother only assisted. *Appellant's Brief* at 17.

The chancellor, as trier of fact, properly interpreted the evidence in light of the conflicting testimony at trial. Given Jonathan's reliance on his mother to provide care for Maguire after the separation, it was not unreasonable for the chancellor to determine that Olivia has the greater capacity to provide primary childcare. Therefore, the chancellor did not err in finding that the "Willingness and capacity to Provide Primary Care" factor **slightly** favored Olivia.

E. The chancellor did not abuse her discretion in concluding that age, and physical and mental health slightly favors Olivia.

The chancellor's findings of Jonathan's mental illness are supported by substantial, credible evidence. At trial, Jonathan testified that he was committed to the Mississippi State Hospital at Whitfield for three months following a suicide attempt. (Tr. 71). He has since remained under the care of a psychiatrist, Dr. Cook, whose records indicate that Jonathan shows symptoms and signs of borderline personality disorder and bipolar disorder. (Tr. 69, 109-110). Currently, Jonathan's mental conditions are being treated with a regimen of prescriptions, which includes Lisinopril, Adderal, Prozac, and Wellbutrin. (Tr. 79). Jonathan has also gone extensive periods of time without taking his medications, and has been prescribed Xanax as late as August 2010. (Exhibit 8 at 11;19; 23; 26.)

After considering all of the evidence regarding Jonathan's history of mental illness, the chancellor determined that age, physical and mental health "**slightly** favors Olivia." (R.E. 7). Nevertheless, on appeal, Jonathan argues that the chancellor

"inappropriately analyzed this factor against him by weighing "too heavily on the evidence regarding Jonathan's three month commitment in the Mississippi State Hospital in June of 2000..." *Appellant's Brief* at 17. However, it is clear the chancellor's determination was supported by evidence that Jonathan's mental illness has required continuous treatment since he was discharged from Mississippi State Hospital in August of 2010. In fact, Jonathan has been under the care of a psychiatrist ever since he was discharged. Exhibits 8 and 9.

Moreover, Jonathan cites *McGraw v. McGraw*, 841 So.2d 1181, 1184 (Miss. App. 2003), to support his argument that prior commitment to a mental facility should not weigh against a parent who has recovered from the illness. *Appellant's Brief* at 19. In *McGraw*, the mother had previously been committed to a mental health facility for depression. *McGraw*, 841 So.2d at 1184. The *McGraw* Court found that at the time of trial the mother was no longer prescribed medication for her depression. The facts in the instant case are clearly distinguishable from *McGraw* inasmuch as Jonathan is still under psychiatric care for his mental illness. (Tr. 69). In fact, Jonathan has been under psychiatric care ever since he was released from Mississippi State Hospital in August, 2000. Also, unlike the mother in *McGraw*, Jonathan continues to take a regimen of prescription drugs for treatment of his mental conditions. (Tr. 79).

Jonathan further rationalizes that, notwithstanding his extensive history of mental illness, he should be awarded custody of Maguire because he "receives counseling and consistently takes his medication." *Appellant's Brief* at 19. While the chancellor opined

that Jonathan has made remarkable progress through continued psychiatric treatment, evidence in the record also reveals that Jonathan has gone for long periods of time without taking his medications as prescribed, and has missed appointments with his psychiatrist. (Tr. 113-114).

Still, Jonathan attempts to advance his argument by misreading and misquoting the Court of Appeals decision in *Passmore v. Passmore*, 820 So.2d 747, 751 (Miss. App. 2002). *Appellant's Brief* at 18. Jonathan states in his brief, "[i]n *Passmore v. Passmore*, the Court held that 'a parent [whom] has experienced mental or emotional problems is not a bar to custody without a showing that the parent's present ability to care for the child is affected.'" First of all, the mental health of the parties is merely one of the *Albright* factors that courts consider when awarding custody. Second of all, regarding mental illness, *Passmore* merely held that the chancellor was not required to defer to a guardian ad litem's findings, and that the chancellor was not required to "detail the reasons for rejecting the guardian ad litem's recommendations..." *Passmore*, 820 So.2d at 751.

In the instant case, the chancellor did not find that Jonathan's past mental health issues barred an award of custody to Jonathan. Neither did the chancellor weigh this factor too "heavily" as Jonathan would have this Court believe. *Appellant's Brief* at 18. To the contrary, the chancellor gave this factor the appropriate amount of weight, and correctly found that this factor **slightly** favors Olivia. (R at 160).

III. The chancellor did not abuse her discretion in denying Jonathan's motion for rehearing and to present "newly discovered evidence."

Jonathan's motion for rehearing and to present newly discovered evidence did not warrant a new trial, and this Court should affirm the chancellor's denial of Jonathan's motion. In his brief, Jonathan cites *Chroniger v. Chroniger,* 914 So. 2d 311 (Miss. App. 2005) to support his contention that this case should be remanded for the chancellor's failure to provide an explanation for the "dismissal of Jonathan's request for rehearing." *Appellants Brief* at 20. However, *Chroniger* does not support this argument. In *Chroniger*, the Court merely held that chancellors should be reluctant to enter orders that do not require a non-custodial parent to pay child support. *Chroniger*, 914 So.2d at 316. The Court further held that "[t]he Chancellor must additionally include detailed findings when entering an order denying child support from a noncustodial parent." *Id.* In the instant case, it is undisputed that the chancellor did in fact order Jonathan, the non-custodial parent, to pay child support. (R. 165). Therefore, Jonathan's reliance on *Chroniger* is misplaced.

In his motion for rehearing, Jonathan alleged that the chancellor should grant him a new trial based on her misapplication of the *Albright* factors and based on alleged newly discovered evidence. Mississippi Rule of Civil Procedure 59 governs Jonathan's motion for rehearing. Rule 59(a) states in relevant part:

> On a motion for a new trial in an action without a jury, the court **may** open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. (emphasis added)

By using the word "may," the plain language of Rule 59 gives the chancellor discretion in

deciding whether to grant a new trial. Moreover, "[t]his Court reviews a trial court's denial of a Rule 59 motion under an abuse of discretion standard." *Brooks v. Roberts*, 882 So. 2d 229, 233 (Miss. 2004).

In the instant case, Jonathan's motion for new trial is based in large part on his alleged "newly discovered evidence." Jonathan alleges that, (1) on more than twenty seven occasions, Olivia has refused to allow Jonathan to exercise his phone visitation with Maguire; (2) that Olivia shows an "inattention and lack of discretion" regarding Maguire's health; and (3) that Olivia has a non-compliant attitude toward the Court's order of divorce. (R. 199-200, 206); *Appellant's Brief* at 21. However, the only "evidence" in the record regarding these allegations is Jonathan's conclusory post trial affidavit. (R. 206). In the affidavit, Jonathan states that he continues "to have difficulties experiencing telephone visitation with my son, Maguire, despite my repeated efforts to address this with Olivia." (*Id*). Jonathan further states that "I continue to be concerned about the physical wellbeing of Maguire." (*Id*). Regarding the phone visitation, Jonathan attached an unsworn phone log as an exhibit to his post trial motion. (R. 199-200). The phone log purportedly contained twenty seven instances where Jonathan was allegedly unable to exercise his phone visitation with Maguire. However, when the phone log was checked against Olivia's phone records, it was found that none of the calls on the phone log were actually made. (Tr. 385). After being presented with Olivia's phone records, Jonathan's attorney conceded the inaccuracy of the phone log at the hearing of this matter. (Tr. 393).

This Court has previously held that a motion for a new trial based on newly discovered evidence may not be granted unless all of the following conditions have been satisfied.

> (1) the evidence was discovered following the trial; (2) due diligence on the part of the movant to discover the new evidence is shown or may be inferred; (3) the evidence is material and not cumulative or impeaching; (4) the evidence is such that a new trial would probably produce a new result.

Goode v. Synergy Corp., 852 So.2d 661, 663 (Miss. App. 2003) (*citing Moore v. Jacobs*, 752 So. 2d 1013, 1017 (Miss. 1999)).

In the instant case, Jonathan cannot satisfy the above conditions, and the chancellor did not abuse her discretion in denying his motion for a new trial. Regarding the first condition, Jonathan's mere allegations are not evidence, and these type of allegations were certainly not first "discovered following the trial" as the first condition requires. Jonathan has made these same type of allegations throughout the course of this litigation. At trial, Jonathan testified that, since the parties separation, he has had difficulty speaking with Maguire while he was under Olivia's care. (Tr at 133-134, 137, 140). Jonathan stated under oath in his August 31, 2009 affidavit that "I have repeatedly called my wife's cell phone and her father's home telephone number, but I have not received an answer." "Olivia told me that she will not allow me to have any contact with Maguire, even though I have been caring for Maguire as much, if not more than Olivia." (R. at 25). However, at trial Jonathan admitted that Olivia has never told him she would not let him see Maguire. (Tr. 133).

At trial, Jonathan further testified that Olivia is inattentive to Maguire's medical needs. (Tr. 30-32, 35-39, 44-45, 47-48, 50-52). In his August 31, 2009 affidavit, Jonathan stated "I am very concerned about Olivia's indifference to Maguire's medical needs. Approximately 3 months ago, Maguire had an infection which required me to take Maguire to the E.R. He was less than two years old at the time." (R. 26). Moreover, his August 31, 2009 affidavit is replete with unfounded allegations of Olivia's inattention to Maguire's medical needs. (R. 24-32).

Allegations regarding lack of telephone communication with Maguire and Olivia's inattention to Maguire's medical care were clearly part of Jonathan's theory at trial for why he should be awarded custody. He made these allegations throughout this litigation. Therefore, Jonathan cannot satisfy the first condition.

Regarding the second condition, as pointed out by Jonathan in his Brief, Olivia has no evidence that Jonathan has failed to use due diligence in uncovering his alleged "newly discovered evidence." However, Olivia strongly contends that Jonathan's allegations do not constitute "newly discovered evidence."

Regarding the third condition, Jonathan's allegations are extremely cumulative. As previously stated, Jonathan's purported"newly discovered evidence" is nothing more than allegations that Olivia refused to allow Jonathan to speak to Maguire by telephone and allegations that Olivia is inattentive to Maguire's medical needs. Jonathan made these same unfounded allegations at the trial of this matter. Moreover, Jonathan's

allegation that Olivia has a "non-compliant attitude" toward the chancellor's judgment of divorce arises out of his unsubstantiated allegation of telephone visitation abuse.

Regarding the final condition, a new trial would not produce a new result. As previously stated, the chancellor has already heard the arguments Jonathan made in support of his motion for new trial. Therefore, a new trial would not produce a different result.

Of course there are factual scenarios where a new trial is warranted based on newly discovered evidence. In *Goode v. Synergy Corp.*, 852 So.2d 661 (Miss. App. 2003), the Court of Appeals correctly found that a new trial was warranted based same. In *Goode*, the plaintiffs alleged that a propane gas leak in a water heater caused a house fire that killed their minor child. The defendant was the supplier of propane gas. The defendant argued the actual cause of the fire was a "homemade ventura plate" that was attached to the water heater, and the defendant denied knowing about or attaching the plate to the water heater. At the close of evidence, the jury returned a verdict for the defendant. After trial, one of defendant's former employees heard of the litigation and approached the plaintiffs. The former employee told the plaintiff's that he installed the "homemade ventura plate" and that he was directed by the defendants to do so. The former employee signed a sworn affidavit so stating. *Id.* at 663. The plaintiff's filed a motion for new trial based on "newly discovered evidence." The trial court denied the motion, and the plaintiff's appealed. Applying the four conditions above, the Court of Appeals reversed the trial court's decision and remanded for a new trial.

Jonathan further relies on *Smullins v. Smullins*, 2011 WL 6215564 (Miss. App. November 29, 2011) in support of his argument for a new trial. However, since the filing of Jonathan's brief, the *Smullins* opinion he relied on has been withdrawn and a new opinion has been substituted. In *Smullins*, the husband filed for divorce and sought custody of the parties minor child. The chancellor granted the divorce and awarded custody of the minor child to the husband. Subsequently, the wife obtained a DNA test conclusively establishing that husband was not the biological father of the parties minor child. The wife filed a motion for new trial based on this "newly discovered evidence." The chancellor denied the motion, and wife appealed. In the substituted opinion, the Court of Appeals affirmed the chancellor's denial of the motion. The Court reasoned that the wife did not use due diligence to uncover the "newly discovered evidence." The Court further reasoned the evidence was not "newly discovered" inasmuch as the wife admitted in her brief that, at the time of the minor child's birth, she knew her husband was not the minor child's father. The *Smullins* opinion does not support Jonathan's contention that the chancellor abused her discretion by denying his motion for a new trial.

CONCLUSION

For the above reasons and those contained in the record, Olivia respectfully requests that this Court affirm the chancellor's *Opinion and Final Judgment*, and affirm the chancellor's denial of Jonathan's *Motion for Rehearing and To Alter and Amend Judgment*; *Supplemental Motion for Rehearing and to Alter and Amend Judgment*; and *Second Supplemental Motion for Rehearing and to Alter and Amend Judgement.*

RESPECTFULLY SUBMITTED this the 6th day of February, 2012.

OLIVIA A. O'BRIANT

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CERTIFICATE OF SERVICE

I, William E. Ballard, Attorney for Appellee, do hereby certify that I have this day mailed by U. S. Mail, first-class postage prepaid, a true and correct copy of the above and foregoing *Brief For Appellee Olivia A. O'Briant*, to:

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Honorable Cynthia Brewer
Madison County Chancery Court Judge
Post Office Box 404
Canton, Mississippi 39046

DATED this the 6th day of February, 2012.

William E. Ballard