

2016-CA-0313

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

BRIDGET WARREN HOLMAN, APPELLANT

VS.

DAVID SCOTT HOLMAN, APPELLEE

ON APPEAL FROM
THE CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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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. Bridget Warren Holman, Appellant
2. David Scott Holman, Appellee
3. Kirk Tharp, Rachael Putman, Malenda Meacham, Vaness Price Trial

Attorneys of Record for the Appellant

4. Jerry Wesley Hisaw, Appellate Attorney of Record for Appellant
5. John S. Farese, Attorney for the Appellee
6. Honorable Percy Lynchard Jr., Chancellor

THIS 6th day of June, 2016.

/s/ Jerry Wesley Hisaw

JERRY WESLEY HISAW

IN THE SUPREME COURT OF THE
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STATEMENT OF THE ISSUES

- (1) The chancellor erred in failing to find that David Scott Holman submitted a materially false 8.05 financial statement.
- (2) The chancellor erred in failing to divide David Scott Holman's retirement account.
- (3) The chancellor erred in awarding attorney's fees to the Appellee.
- (4) The chancellor erred in failing to account for \$7,500.00 in child support arrearages.

STATEMENT OF ASSIGNMENT

The Appellant is not aware of any provisions that would necessitate this case being retained by the Mississippi Supreme Court at this time pursuant to Rule 16 of the Mississippi Rules of Appellate Procedure.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition

This is an appeal from an Order Denying Motion for Reconsideration and/or New Trial entered on February 22, 2016 (R. 446-447) determining issues raised by the Appellant, Bridget Warren Holman (hereafter “Bridget”) and the Appellee, David Scott Holman (hereafter “Scott”).¹

Bridget filed a Complaint for Divorce on the grounds of adultery, habitual cruel and inhuman treatment and/or irreconcilable difference on January 15, 2013 which sought custody of the parties’ minor children and a division of the parties’ assets. (R. 22-26). Scott filed an Answer and Counter-Complaint on March 15, 2013 seeking a divorce on the grounds of habitual cruel and inhuman treatment and/or irreconcilable differences along with custody of the parties’ minor children and a division of the parties’ assets. (R. 35-42). An agreed temporary order was entered on August 23, 2013 which provided for custody and child support to Bridget. (R. 64-65).

The case lingered a number of years with changes in attorneys and various contempt issues. A trial was ultimately held on the issues of custody, support, attorney’s fees, contempt, alimony, and property division.

The case was tried on June 16, 2015 and October 12, 2015. The trial court ultimately dismissed Bridget’s complaint for divorce, awarded Scott a divorce on the grounds of habitual cruel and inhuman treatment, awarded Bridget custody of the

¹ Citations to the Record are designated as (R. ___), the Transcript of Testimony as (Tr. ___) and Exhibits as (Ex. ___).

minor children along with making a division of the property of the parties. (R. 321-358).

Bridget obtained new counsel and filed a Motion for Reconsideration and/or in the Alternative a New Trial Pursuant to Rule 59 of the Mississippi Rules of Civil Procedure. (R. 379-411). Scott filed a similar motion. Both were ultimately denied. (R. 446-447).

Aggrieved, Bridget now appeals the chancery court judgment.

B. Statement of the Facts

Bridget and Scott were married on July 10, 2003 in Jamaica. (R. 23). The separated on or about January 4, 2013. The parties had two (2) children together. (R. 11). Bridget has a daughter from a prior relationship.

The parties had been married close to ten (10) years at separation but had been separated for an additional three (3) years during the litigation. Bridget filed a Complaint for Divorce on the grounds of adultery, habitual cruel and inhuman treatment and/or irreconcilable difference on January 15, 2013 which sought custody of the parties' minor children and a division of the parties' assets. (R. 22-26). Scott filed an Answer and Counter-Complaint on March 15, 2013 seeking a divorce on the grounds of habitual cruel and inhuman treatment and/or irreconcilable differences along with custody of the parties' minor children and a division of the parties' assets. (R. 35-42). An agreed temporary order was entered on August 23, 2013 which provided for custody and child support to Bridget. (R. 64-65). Scott was ordered to pay \$2,500.00 per month in child support. The parties agreed that Bridget would have custody of the minor children.

The case lingered a number of years with changes in attorneys and various contempt issues. Scott did not pay his child support as he was supposed to. The parties had various discovery disputes. Scott denied he was committing adultery and Bridget was unable to get sufficient proof regarding the same. A trial was ultimately held on the issues of custody, support, attorney's fees, contempt, alimony, and property division on June 16, 2015 and October 12, 2015. During the hearing on June 16, 2015, Bridget testified about an incident where Scott spanked on the children. The chancellor construed this as an allegation of abuse, appointed a guardian ad litem, and reset the trial date.

During the trial, Scott submitted two 8.05s on different hearing dates. Neither showed he had a retirement account nor did they show his true income. (Ex. 3, 15, R. 457-460, 416-436). Once the trial resumed at a later date, the trial court ultimately dismissed Bridget's complaint for divorce, awarded Scott a divorce on the grounds of habitual cruel and inhuman treatment based on her inability to prove Scott's adultery, awarded Bridget custody of the minor children along with making a division of the property of the parties. (R. 321-358).²

Bridget obtained new counsel and filed a Motion for Reconsideration and/or in the Alternative a New Trial Pursuant to Rule 59 of the Mississippi Rules of Civil Procedure. (R. 379-411). Scott filed a similar motion. Both were ultimately denied. (R. 446-447).

Aggrieved, Bridget now appeals the chancery court judgment.

² For purposes of appeal, Bridget is not going to challenge the granting of a divorce due to the lack of evidence that she was able to obtain for various reasons.

SUMMARY OF THE ARGUMENT

The chancellor erred in failing to find that David Scott Holman submitted a materially false 8.05 financial statement. The Appellee represented that he did not even have a retirement account when in fact he had over \$50,000.00 in retirement. Additionally, Scott grossly misrepresented his income. This affected the amount of child support award and the property division as a whole.

The chancellor erred in failing to divide Scott's retirement account after it was determined that he had one.

The chancellor erred in awarding attorney's fees to the Appellee for defending an accusation of abuse. The actual fees were for many items unrelated to defending the accusation, the conduct alleged did not rise to the level of abuse, and furthermore the prerequisites necessary to award attorney's fees under the statute were not met.

The chancellor erred in finding that another \$7,500.00 in arrearages were due to Bridget as no action or inaction on the part of a parent can result in the arrearages just vanishing.

For the reasons as noted above, the chancery court judgment must be reversed and rendered.

ARGUMENT

STANDARD OF REVIEW

The case at hand involves multiple levels regarding the standard of review by this Court. "Chancellors are afforded wide latitude in fashioning equitable remedies in domestic relations matters, and their decisions will not be reversed if the findings of fact are supported by substantial credible evidence in the record." *Henderson v. Henderson*, 757 So.2d 285, 289 (¶ 19) (Miss. 2000). "A chancellor's findings of fact will not be disturbed unless manifestly wrong or clearly erroneous." *Sanderson v. Sanderson*, 824 So. 2d 623, 625 (Miss. 2002) (quoting *Consol. Pipe & Supply Co. v. Colter*, 735 So. 2d 958, 961 (Miss. 1999)). "However, the Court will not hesitate to reverse if it finds the chancellor's decision is manifestly wrong, or that the court applied an erroneous legal standard." *Owen v. Owen*, 928 So. 2d 156, 160 (Miss. 2006). A chancellor's conclusions of law are reviewed de novo. *Chesney v. Chesney*, 910 So. 2d 1057, 1060 (Miss. 2005) (citing *Southerland v. Southerland*, 875 So. 2d 204, 206 (Miss. 2004)). The issue of whether to award attorney's fees is a discretionary matter left to the chancellor, the appellate court is 'reluctant to disturb' such a finding." *Id.* (citing *Young v. Young*, 796 So.2d 264, 268 (¶ 11) (Miss.Ct.App.2001)).

(1) The chancellor erred in failing to find that David Scott Holman submitted a materially false 8.05 financial statement.

Mississippi Rule of Civil Procedure 60(b) states in part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding" Miss. R. Civ. P. 60(b). The rule

further provides that " This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." *Id.*

A substantial misrepresentation of facts upon which a judgment is based is " a fraud on the court, for which there is no limitation of time restricting the court from affording a remedy." See *Trim v. Trim*, 33 So.3d 471, 473 (¶ 3) (Miss. 2010) (holding that " submission of a substantially false [Uniform Chancery Court] Rule 8.05 financial disclosure statement constituted a fraud on the court, and no time limit was applicable to the court's ability to remedy the fraud by modifying the final judgment of divorce").

In *Trim v. Trim*, the Mississippi Supreme Court held that any party found to have deliberately filed a " substantially false" financial statement pursuant to Rule 8.05 will have committed a fraud on the court; thus no time constraints will limit the court's ability to remedy such fraud. *Trim v. Trim*, 33 So.3d 471, 473 (Miss. 2010). In *Finch v. Finch*, 137 So.3d 227 (Miss. 2014), the Mississippi Supreme Court found fraud found where party knew of the existence of the additional debts, had access to additional bank accounts, had additional funds available from social security benefits, and that those disclosures prevented the court from equitably dividing the assets and liabilities of the marriage.

In the case at hand, Scott's financial was substantially false. First, Scott failed to disclose the fact that he even had a retirement account much less how much was in it. (Ex. 3, Ex. 15). It should be noted that he left it off both his first and amended financials which were introduced at trial. Bridget raised this in her

motion for reconsideration. (R. 381). In fact, the retirement was discussed by Scott's counsel at the hearing on the motion to reconsider that he in fact had an account that was not on the financial declaration. (Tr. 418-419). Ironically, the afternoon after the reconsideration was denied, the records came in from Scott's retirement that had been requested. (R. 457-460) They showed Scott had a retirement account worth \$53,701.14 which the trial court never considered, classified, or divided.

Additionally, and more importantly, Scott grossly misstated his income. In Exhibit 3 and Exhibit 15 Scott stated that his income was approximately either \$6,300.00 or \$6,000.00 per month. His pay records which came in with a records custodian affidavit after trial told a radically different story. See Exhibit 2 from February 18, 2016 hearing. The records further reflect that in just the two years through the date of trial the Defendant has earned \$446,370.55 which is three (3) times the amount he represented to the Court as his income. Furthermore, taking the average of his income from January 1, 2013 to the September of 2015 results in an average monthly income of \$13,526.38. (R. 416-436).

Ironically, the trial court refused to consider the evidence and marked it for ID only. (Tr. 406). This is despite the fact that they were offered as self-authenticating document with no objection filed as required by Rule 902 of the Mississippi Rules of Evidence in order to contest their admissibility. (R. 414-436).

The failure to disclose the retirement and the misstatement of income had a number of effects on the property division and child support.

(a) Effect on Child support

First, pursuant to Mississippi Code Annotated §43-19-101, there is a rebuttable presumption that child support for two (2) children is 20% of the adjusted gross income of the noncustodial parent. The chancellor used this in setting child support. (R. 325). Due to the adjusted income of Scott being represented to be only \$4,536.00, the court set the child support at \$907.20. The trial court had struggled with why a prior chancellor who heard the temporary hearing set the child support at \$2,500.00 per month. (R. 393). Based upon Scott's earnings even in the year of trial, the child support was grossly low. (R. 431-436).

(b) Effect on Property Division

The failure by Scott to properly disclose his income affects the entire property division, debt allocation, and potential for alimony. Because of Scott cancelling a number of insurance bills, Bridget had incurred close to \$21,375.03 in medical bills which she was having to pay and assigned by default. (Tr. 185-186). Additionally, with Scott's correct income, there is a gross disparity in lifestyle when considering Scott's and Bridget's true income. Furthermore, the trial court failed to even acknowledge that Scott had a retirement account while summarily dividing Bridget's based on the period the parties were married. The Mississippi Supreme Court has held that failure to classify a material asset is grounds for reversal upon appeal. *Reddell v. Reddell*, 696 So.2d 287, 288 (Miss.1997).

The fairness of property division can be determined only in conjunction with alimony. As the Mississippi Supreme Court stated in *Ferguson*, "Alimony and equitable distributions are distinct concepts, but together they command the entire

field of financial settlement of divorce. Therefore, where one expands, the other must recede. *Ferguson v. Ferguson*, 639 So.2d 921,929 (Miss. 1994). In *Brooks v. Brooks*, 652 So.2d 1113, 1124 (Miss. 1995), the Mississippi Supreme Court found that in order to achieve equitable and fair results incident to a divorce, awards of alimony and any division of property should be considered together by a chancellor.

All property division, lump sum or periodic alimony payment, and mutual obligations for child support should be considered together. In the final analysis, all awards should be considered together to determine that they are equitable and fair. 652 So. 2d at 1124 (citing *Ferguson*, 639 So. 2d at 929). (Emphasis in original).

Ultimately, Scott's failure to properly disclose his income and assets was a fraud on the court which resulted in an improper property division. The child support as set is in direct violation of Mississippi Code Annotated §43-19-101 since it is too low based on Scott's income and the property division cannot be found to be adequate without the consideration of Scott's retirement. As such, the decision of the trial court must be reversed and remanded for a consideration of these on the record.

(2) The chancellor erred in failing to divide David Scott Holman's retirement account.

With regard to the division of property "A chancellor's findings of fact will not be disturbed unless manifestly wrong or clearly erroneous." *Sanderson v. Sanderson*, 824 So. 2d 623, 625 (Miss. 2002) (quoting *Consol. Pipe & Supply Co. v. Colter*, 735 So. 2d 958, 961 (Miss. 1999)). "However, the appellate court will not hesitate to reverse if it finds the chancellor's decision is manifestly wrong, or that

the court applied an erroneous legal standard.” *Owen v. Owen*, 928 So. 2d 156, 160 (Miss. 2006). A chancellor’s conclusions of law are reviewed de novo. *Chesney v. Chesney*, 910 So. 2d 1057, 1060 (Miss. 2005) (citing *Southerland v. Southerland*, 875 So. 2d 204, 206 (Miss. 2004)).

In making an equitable distribution of property, the chancellor must first classify each asset and debt as either marital or separate. *Fitzgerald v. Fitzgerald*, 914 So.2d 193, 197 (¶ 17) (Miss.Ct.App.2005). The trial court failed to address, classify, divide, or make any findings with what was to be done with Scott’s retirement account as noted in the preceding section. Scott never listed it on his financials but he certainly had one. (Ex. 3, 15, R. 457-460). The Mississippi Supreme Court has held that failure to classify a material asset is grounds for reversal upon appeal. *Reddell v. Reddell*, 696 So.2d 287, 288 (Miss.1997).

For these reasons, the chancellor’s decision must be reversed for an equitable division of Scott’s retirement account.

(3) The chancellor erred in awarding attorney’s fees to the Appellees.

The issue of whether to award attorney's fees is a discretionary matter left to the chancellor, the appellate court is ‘reluctant to disturb’ such a finding.” *Id.* (citing *Young v. Young*, 796 So.2d 264, 268 (¶ 11) (Miss.Ct.App.2001)). However, the Mississippi Supreme Court has stated "unless a statute or contract provides for the imposition of attorney fees, they are not recoverable." *Grisham v. Hinton*, 490 So.2d 1201, 1205 (Miss. 1986). When there is no contractual provision or statutory authority providing for attorney fees, they may not be awarded as damages unless punitive damages are also proper. *Central Bank v. Butler*, 517 So.2d 507, 512 (Miss.

1987); 757 So.2d 165 *Century 21 Deep S. Properties, Ltd. v. Corson*, 612 So.2d 359, 375 (Miss. 1992).

In the case at hand, the chancellor awarded Scott \$15,135.00 in attorney's fees after the trial was continued on the court's sua sponte appointment of a guardian ad litem. (Tr. 150-151, R. 330, R. 374). The chancellor relied on Mississippi Code Annotated §93-5-23 in order to award Scott attorney's fees.

Mississippi Code Ann. § 93-5-23 provides, in pertinent part, as follows: "Whenever in any proceeding in the chancery court concerning the custody of a child a party alleges that the child whose custody is at issue has been the victim of sexual or physical abuse by the other party, the court may, on its own motion, grant a continuance in the custody proceeding only until such allegation has been investigated by the Department of Human Services. At the time of ordering such continuance the court may direct the party, and his attorney, making such allegation of child abuse to report in writing and provide all evidence touching on the allegation of abuse to the Department of Human Services. The Department of Human Services shall investigate such allegation and take such action as it deems appropriate and as provided in such cases under the Youth Court Law (being Chapter 21 of Title 43, Mississippi Code of 1972) or under the laws establishing family courts (being Chapter 23 of Title 43, Mississippi Code of 1972).

If after investigation by the Department of Human Services or final disposition by the youth court or family court allegations of child abuse are found to be without foundation, the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegation." Miss. Code Ann. § 93-5-23 (Supp. 2000).

There are two issues with this. First, Bridget did not make an abuse allegation but merely talked about Scott's bad parenting and had an incident of excessive spanking of one of the parties' minor children. The court construed this spanking as abuse which triggered the above statute. (Tr. 150-151). What Bridget stated happened is specifically defined as not being abuse by statute. Mississippi Code §43-21-105 defines an abused child as follows:

*“(m) "Abused child" means a child whose parent, guardian or custodian or any person responsible for his care or support, whether legally obligated to do so or not, has caused or allowed to be caused upon said child sexual abuse, sexual exploitation, emotional abuse, mental injury, **nonaccidental** physical injury or other maltreatment. **Provided, however, that physical discipline, including spanking, performed on a child by a parent, guardian or custodian in a reasonable manner shall not be deemed abuse under this section.**”*
(emphasis added).

The statute provides specific exceptions for spanking or discipline of a child as not being abuse. The statute ironically states as written that physical discipline includes spanking, but appears to not be limited to that. Additionally, the statute provides that the injury is to be nonaccidental. What Bridget alleged is that Scott got a little heavy-handed with in disciplining one of the children to show his lack of control and parenting skills. Even the guardian ad litem thought this was the correct analysis of the spanking. (Ex. 17). It was uncontradicted that the spanking occurred, there was just no photos of the back. (Ex. 17). Bridget specifically stated it was not abuse, just bad parenting. (Ex. 17). As such, Mississippi Code Annotated §93-5-23 was not triggered to awarded attorney’s fees.

Additionally, the Court of Appeals has interpreted this statute to only authorize the payment of fees actually incurred in defending the abuse allegations not anything related to the case in general. *Tidmore v. Tidmore*, 114 So.3d 753, 757-759 (Miss. Ct. App. 2013). The chancellor in this case awarded all the fees and simply noted that he felt equitably all fees should be accessed to Bridget due to the trial being continued. (Tr. 425-426). No affidavit was produced at trial to show these fees and the chancellor let it be submitted post trial. (R. 330-331, R. 366-374). In the event Scott is entitled to an award of attorney's fees for defense against the

allegations made, it is not clear that the total amount of \$15,135.00 is only for the defense against the abuse allegations. In fact, the record shows that at least part of the fees awarded were for the divorce case, financial issues, visitation, and several other unrelated matters. As such, the court erred in awarding the full amount of the attorney's bill if the same was even proper under the statute.

The chancellor had no legal authority to award attorney's fees nor was there was no allegation that rose to the level of abuse as defined by statute. Even if it was proper, the amount awarded would not be as much of the bill had nothing to do with defending the allegations. The chancellor's decision to order Bridget to pay attorney's fees was not supported by the law nor substantial credible evidence in the record. Thus, the chancellor was not within his discretion to award attorney's fees. The chancellor's decision to award attorney's fees must be reversed and rendered.

4. The chancellor erred in failing to account for \$7,500.00 in child support arrearages.

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

In a contempt action involving unpaid child support, when the party entitled to receive support introduces evidence that the party charged with paying has failed to pay, a prima facie case of contempt has been made. *Lahmann*, 722 So.2d at 620 (citing *Guthrie v. Guthrie*, 537 So.2d 886, 888 (Miss.1989)). The burden then shifts

to the paying party to show, by clear and convincing evidence, an inability to pay or any other defense. *Id.* (citing *Duncan v. Duncan*, 417 So.2d 908, 909-10 (Miss.1982)). “[C]hild support payments vest in the child as they accrue, [and] once they have become vested, just as they cannot be contracted away by the parents, they cannot be modified or forgiven by the courts.” *Houck v. Ousterhout*, 861 So.2d 1000, 1002(Miss.2003). See also *Baier v. Baier 2003 –CA-01274-COA* (Miss. Ct. App. 2003).

In the case at hand, the chancellor appeared to only rely on his notes from the first hearing on the case and not the arrearages that had vested by the time of the second hearing. The chancellor in the final decree only noted \$14,103.67 in arrearages. (R. 329). Bridget testified that Scott had arrearages that had accrued in child support in the amount of \$21,603.67. (Tr. 185). Bridget through new counsel filed a motion to reconsider and raised this issue. (R. 381). In the hearing on the motion, the chancellor noted he did not remember it and the burden was on Bridget to bring it forward. (Tr. 427). He ultimately denied the motion to reconsider and essentially “forgave” these arrearages. (Tr. 428).

With regard to child support, each payment that becomes due and remains unpaid ‘becomes a judgment’ against the supporting parent.’” *Tanner v. Roland*, 598 So.2d 783, 786 (Miss.1992). **“The only defense thereto is payment.”** *Id.* (emphasis added). The Mississippi Supreme Court has stated that once child support payments become past due they become vested and cannot be modified. *Thurman v. Thurman*, 559 So.2d 1014, 1016 (Miss.1990); *Brand v. Brand*, 482 So.2d 236, 237 (Miss.1986).

Bridget brought forth and there was no rebuttal that the \$7,500.00 was due. (Tr. 185). This was for the three (3) months of child support due from the time of the first trial to the second trial. (Tr. 408). It is well-settled, that child support is for the benefit of the minor, and the custodial parent is only a conduit for the support. *Durr v. Durr*, 912 So.2d 1033, 1038(¶ 14) (Miss.Ct.App.2005). Therefore, “***no action or inaction*** on the part of the custodial parent can relieve the defaulting parent of that parent's obligation to pay support.” *Id.* (emphasis added).

The decision to not award Bridget the \$7,500.00 in arrearages must be reversed and rendered.

CONCLUSION

The chancellor’s findings regarding the false 8.05 financial statement, child support, property division, and attorney’s fees is not supported by the evidence in the record, the current Mississippi case law, and public policy concerns upon which Mississippi precedents are based. Therefore, for the reasons set forth herein, the chancellor’s rulings must be reversed and Bridget should be granted all other relief to which she may prove entitled.

WHEREFORE, PREMISES CONSIDERED, Bridget Warren Holman, respectfully prays to this Court to reverse the orders of the trial court as prayed for herein. Bridget Warren Holman further prays for any and all other relief as this Court may deem just and proper.

This the 6th day of June, 2016.

Respectfully submitted,

BRIDGET WARREN HOLMAN

By: */s/ Jerry Wesley Hisaw*
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CERTIFICATE OF SERVICE

I, Jerry Wesley Hisaw, hereby certify that I have sent a true and correct copy of the foregoing Brief of Appellant to:

**Chancellor Percy Lynchard, Jr.
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Hernando, Mississippi 38632 via U.S Mail**

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SO CERTIFIED, this the 6th day of June 2016.

/s/ J. Wesley Hisaw _____
**Jerry Wesley Hisaw (MSB 101767)
Certifying Attorney**