

**ORIGINAL**

SUPREME COURT AND COURT OF APPEALS  
STATE OF MISSISSIPPI

**FILED**

No. 2017-CP-00828

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MICHAEL T. GERTY AND STATE OF  
MISSISSIPPI, JIM HOOD ATTORNEY  
GENERAL, APPELLANTS

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

VERSUS

JOESIE R. GERTY, APPELLEE

APPEAL FROM

THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI  
FIRST JUDICIAL DISTRICT

HONORABLE JENNIFER SCHLOEGEL, PRESIDING TRIAL JUDGE

**APPELLANT'S REPLY BRIEF**

**ORAL ARGUMENT REQUESTED**

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## ARGUMENT I:

**The Chancery Court was Manifestly Wrong, Applied the Wrong Legal Standard, and Erred in Finding, “it is Incumbent Upon it to Determine the Best Interests for the Custody of the Child Herein Despite the Prior Agreement of the Parties.” (*Dkt. 45* Page 39)**

From Joesie’s brief:

- Page 7 of 49 – In fact, the Court urged the parties to resolve their issues without putting on Albright evidence for temporary custody.

The Court asked for the parties to reach an agreement... The undeniable fact of the matter is that Michael and Joesie already had an agreement that was in the best interest of Jayden and had been living by that agreement for nearly two years before Joesie filed her motion for withdrawal. Jayden had flourished under this agreement. Jayden’s health and well-being were not questioned by Joesie in her Motion for Temporary Relief. The Court’s direction, prior to the Temporary Hearing, for the parties to reach an agreement when they already had been living by an agreement was in all actuality direction for Michael to agree to Joesie’s complete reversal of the parties’ Child Custody Agreement. Why would the Court agree to allow Joesie to withdrawal from her agreement to an Irreconcilable Differences Divorce only to later rule Mississippi Law unconstitutional and grant the Irreconcilable Differences Divorce but completely reverse the parties’ agreed upon child custody agreement? There was no threat to Jayden’s well-being and therefore the Court could have refused to hold a temporary hearing on custody and waited for the full trial to make a ruling.

Joesie’s brief claims that Michael was the sole architect of the parties’ original Child Custody and Property Settlement Agreement. Joesie, however, Joesie testified that the Agreement was a result of mutual negotiations. (*T.* 80, 109, 110, 323, 347, 348) Joesie’s brief also claims that Joesie did not agree to give Michael permanent custody of Jayden:

- Page 12 of 49 – Further, Joesie believed that the parties were going to reconcile and this custody agreement would never had divested her of custody of her child. [R.519, 587, 608, 870, 890, 891; Joesie R.E. 131-136]

But the transcripts show that Joesie did know that she had agreed to give Michael permanent custody of Jayden. (T. Page 325)

*Michael's Attorney:* Well, you knew that he was going to keep Jayden under that agreement, forever he would have custody of Jayden. You knew that; didn't you?

*Joesie:* Yes.

Joesie's brief repeatedly distorts the context and meaning of Michael's arguments in an attempt to poison this Court's opinion of Michael.

- Page 5 of 49 – Michael disagrees with the Court making a determination in regards to custody.
- Page 8 of 49 – Michael has problems with the Court deciding the custody of the child in a contested divorce.
- Page 9 of 49 – Michael takes issue with the court making a custody determination in this cause.
- Page 9 of 49 – Michael now believes that the Court could not make a decision regarding custody, but had to go by the decision that he and Joesie made previously.
- Page 10 of 49 – Michael takes exception to the authority cited by the Court for making its custody determination.
- Page 10 of 49 – Michael would have this Court subordinate its judgment to Michael's judgment regarding custody.
- Page 10 of 49 – Michael would say that his contract and his judgment outweighs the judgment of the Court.

Michael never claimed that the Court lacked the authority to make a child custody ruling. Joesie's brief is shamelessly trying to invent an adversarial relationship between Michael and the judicial system that simply does not exist. Michael swore an oath and dedicated 20 years of his life to the defense of the Constitution of the United States of America and the institutions that support that cherished document. The parties' original agreement includes wording which recognizes the Court's authority.

Michael argues that the Court erred in not following *Cheek v. Ricker*, 431, So. 2d 1139 (Miss 1998) regarding who is more capable of devising a child custody arrangement. The Court cannot ignore the fact that Michael and Joesie already reached an Agreement as to the best interest of Jayden and that the parties had been abiding by the Agreement for nearly two years prior to the temporary

hearing. The Court must weigh custody decisions considering the totality of circumstances. *Ash v Ash*, 622 So.2d 1264 , 1266 (Miss. 1993)

## **ARGUMENT II:**

### **The Chancery Court was Manifestly Wrong, Applied the Wrong Legal Standard, and Erred in its Analysis of the Albright Factors which should have Favored the Father**

From Joesie's brief:

- Page 7 of 49 – Michael contends the Court did not complete a full Albright analysis in either the Temporary hearing or in the Final Judgement of Divorce. [See Appellant's Brief page 11]

Joesie's brief completely falsifies Michael's statements in order to drive a wedge between Michael and the judicial system. At no time did Michael's brief claim that the Court did not complete a full Albright analysis in its Final Judgment. The Court did clearly state, however, that a Full Albright analysis was not completed at the temporary hearing acknowledging amongst other irregularities that discovery had not taken place. (*T*. Pages 155 – 156, 518 – 519)

#### **A. Age, Health and Gender of the Child**

From Joesie's brief:

- Page 16 of 49 – Michael said the Court of Appeals and the Mississippi Supreme Court had agreed that the Father should be favored in this factor if all thing are neutral. That is not what the Court said. In *Flowers* the Court never said that. In *Mercier* the Court was discussing the tender years doctrine. In *Montgomery* again the Court was discussing the tender years doctrine.

From *Flowers v Flowers*, No 2010-CA-01957-COA (2010)

- Thus, when the health aspect is neutral, the child's gender in relation to that of the parent is clearly relevant. Furthermore, this Court has upheld a chancellor's determination on this factor based solely on gender. See *Reed v. Fair*, 56 So.3d 577, 578 (para 22) 584 (para 36)(Miss CT. App 2010)

B. Parenting Skills and Willingness and Capacity to Provide Primary Care

Joesie continues to question Michael's willingness to communicate with Joesie. (Joesie's Brief Page 19) Michel testified that he submitted his phone records to the Court. (T. 489) (To be correct Michael submitted his phone records to Joesie and her attorney as part of discovery.) There was no objection from Joesie's attorney at that time that Michael testified about the details of the phone records because Joesie's attorney knew that he indeed did have a copy of Michael's phone records. Michael's testimony was very specific. Michael said the phone records show 161 phone calls between him and Joesie between August 2014 and December 31<sup>st</sup> 2014. (T. 489) Again, Joesie's lawyer did not object or dispute Michael's testimony because he had the phone records and knew Michael's testimony to be truthful.

Joesie continues to make false claims that Michael did not tell Joesie of his communication with Jayden's school or his teacher. (Joesie's Brief Pages 19 and 21) Michael submitted text messages between him and Joesie that specifically address Michael's communication with both Jayden's teacher and his counselor. (Ex. 24 Page 2) On November 6, 2015 Michael writes: "I called Jayden's school to set up a phone conference with his teacher but I am not listed as a "contact". Please fix this so that I can check on the well being of my son. On November 10, 2015 Michael writes: "I spoke with Mrs. Halstead. Thank you for adding me to the list." On December 2, 2015 Michael writes: "I wanted to send you a copy of an email I sent to Jayden's teacher. I am concerned that he is using "I am doing my best" as an excuse for behaving poorly. Please read the attached email and tell me if you agree or not with my concerns." As a matter of fact Michael submitted 15 separate text messages that were sent between October 2015 and February 2016 in which Michael specifically asks about Jayden's well-being. (Ex 24 Pages 1 – 8)

Joesie's brief accused Michael of lying about Jayden's medical history. Specifically about Jayden having ear infections.

- Page 30 of 49 – Michael is the one who, to use his work, lied to the Court about Jayden’s ear infection. He said that Jayden did not have an ear infection while in his care. [R. 750, 751; Joesie R.E. 155, 156]

This is the testimony in question: (T. Page 584)

*Joesie’s Attorney:* Well, did he ever have any ear infections?

*Michael:* Not – No.

*Joesie’s Attorney:* No. So when he was up there you, he never had any ear infections?

*Michael:* He had a fever one time. They gave him penicillin for it. It’s possible it was for an ear infection.

Michael did initially testify that he had not taken Jayden to the doctor’s office for any ear infections but immediately corrected his testimony to say that he remembered taking Jayden to the doctor’s for fever symptoms which turned out to be related to ear infections. Michael had previously related to the Court that he had taken time off of work on more than one occasion to take Jayden to see the doctor. (T. Page 522) There was no attempt on Michael’s part to deceive the Court.

To compound Joesie’s exaggeration of Michael’s incomplete memory of Jayden’s ear infections Joesie’s brief accuses Michael of lying about what doctors had written in Jayden’s medical record and falsifying the evidence Michael submitted which showed wax build up in Jayden’s ears. Michael has no control over what Jayden’s doctors say or write in their medical reports. The pictures Michael presented were taken 3 days into Jayden’s visit with his father. During testimony, Joesie’s attorney questioned whether Michael falsified the evidence by presenting photos taken while Jayden lived with Michael full time and claiming that the photos were more recent. Michael offered to show Joesie’s attorney the date of the photographs but Joesie’s attorney was not interested in the truth. (T. Page 595) Joesie’s brief doubles down by making a bald accusation that Michael falsified evidence but provides absolutely no proof to back up such an incendiary comment.

Joesie’s brief continues to make claims that Michael is not to be trusted to take care of Jayden’s medical well-being.



- Page 20 of 49 – Another incident that Michael testified about was lesions on Jayden’s body. Michael testified that the lesions were there when he moved up to Wisconsin in 2013. He did not have the medical problem treated until August 27, 2014. Michael did not tell us about those matters. It was not until Jayden’s medical records were obtained that this matter came to the attention of the Court. [R. 830, 831; Joesie R.E. 144-145]

The “lesions” on Jayden’s body were very small, almost imperceptible, bumps. Michael described them in testimony as very small wart like marks. (T. Page 586) The small marks were not swollen, red, or giving discomfort to Jayden. Joesie was aware of these marks and was also not concerned about them posing any danger to Jayden. The doctor told Michael that the marks were harmless and would go away on their own. The doctor did prescribe a topical ointment to speed the process. (T. Page 586)

There is no evidence or testimony to support Joesie’s allegation that Michael cannot be trusted to take care of Jayden. To the contrary all testimony from Joesie, her witnesses, and doctors’ statements were that Michael was a good father and Jayden was a happy healthy boy.

Joesie argues that Jayden’s poor behavior at school was a direct result of visiting his father. (Joesie’s Brief Page 19) Jayden exhibited poor behavior in school throughout the school year while in Joesie’s custody. Jayden was suspended from kindergarten on three separate occasions: October 22<sup>nd</sup>, 2015; February 15<sup>th</sup>, 2016; and February 24<sup>th</sup>, 2016. None of these dates correspond to Jayden visiting Michael. In fact none of these dates are within 6 weeks of Jayden visiting his father.

Joesie was appalled by Michael’s response to her congratulations for his promotion. Less than two months after Joesie had convinced the Court to take Michael’s most precious love away from him by falsely accusing Michael of adultery, when it was in fact her that was committing adultery, and repeatedly lying to the Court about Michael’s character and his parenting of Jayden Joesie sent Michael a text message of congratulations as if she and Michael were still part of a loving relationship. Michael’s response was very honest but did not contain any foul language. Michael was shocked that Joesie had such a lack of understanding of how her actions affect those around her. For the record Joesie did use

Michael's work responsibilities against him and also asked for more financial support because of Michael's pay raise.

### C. Moral Fitness

From Joesie's brief:

- Page 29 of 49 – All of these little immaterial things that Michael raises to try to show that Joesie is incredible, do not show anything except that he dwells on the immaterial rather than the substantive issues.

The inconvenience of the truth is a common complaint for people with something to hide. It is very difficult to try to remember the background of all the lies and the details of all the deceit. It is much easier to classify these truths as “immaterial” than it is to deal with reality. One or two mistakes in remembering the exact details of events that happened up to a year prior are to be expected, especially when the trial is stretched out over months as this one was. Joesie's testimony, on the other hand, is filled with inconsistencies and admitted lies on almost all subjects. Joesie's brief follows this same pattern.

Joesie's brief argues that Michael's only reason for calling off the parties' reconciliation was that he was not satisfied with the sex that he had with Joesie in December 2014. (Joesie's Brief Pages 5, 6, 26, 36) In a vacuum this lack of intimacy might seem trivial but given the history of Joesie's adultery with Kyle and the fact that Joesie had chosen to live apart from Michael and Jayden, for over a year at that point, the lack of intimacy is very significant. Michael explained in his testimony and again in his brief that the lack of intimacy between him and Joesie was a big part of his decision to call off the parties' reconciliation but he clearly explained that it was not the only factor. (Michael's Brief Page 26)

- After many reconciliation attempts Michael came to the realization that Joesie was not truly repentant for the damage she had done to the marriage and to Jayden's wellbeing. (T. Pages 477 – 478) Michael felt a lack of intimacy for and from Joesie.

(T. Pages 473, 568) Michael felt Joesie would soon grow to resent being in the marriage and would once again commit adultery. (T. Pages 149, 474)

Michael was interested in reconciliation and made many honest attempts to fix his relationship with Joesie. Michael was also not as focused on completing the divorce because Jayden was in his care where Michael could ensure Jayden was receiving the best care possible. These ideas are not mutually exclusive. Michael's primary focus has always been the well-being of Jayden. Since Jayden was living with Michael there was not a pressing need to finalize the divorce. The fact that Jayden was with Michael directly affected Michael's willingness to discuss reconciliation with Joesie. Joesie writes in her brief that Michael could have hired an attorney at any time after September 2013 to finalize the divorce. What Joesie fails to mention is that she could have reunited with Michael at any time after September 2013 but choose not to. Joesie testified that all she had to do was to submit a simple request with her work to have her transfer to the Great Lakes area approved. As she stated she would receive preferential treatment because she was a military spouse. But Joesie never rejoined Michael and Jayden.

Joesie's brief repeatedly uses deceit and misdirection to try to create a rift between Michael and the judicial system.

- Page 31 of 49 – Michael also uses the term "Team Joesie". Apparently he thinks that the Judge and Joesie are team mates.

No reasonable person could read Michael's brief and construe that Michael's use of the phrase "Team Joesie", on page 29 of his brief, was intended to include the Judge. Joesie's brief is deliberately misleading and intentionally inflammatory with hopes of creating an adversarial relationship between Michael and the justice system. The term "Team Joesie" used by Michael very clearly refers to Joesie, her witnesses and her attorney. Joesie testified in court that she conspired with her attorney to defraud the court with regard to Jayden's residence. Joesie clearly stated that her attorney advised her to wait until Jayden was visiting her during the summer of 2015 before filing her *Withdrawal of Consent to Divorce on Irreconcilable Differences* and subsequent *Complaint for Divorce* request in which she and her attorney just a plainly stated that Jayden had resided at the Pass Christian home since January 2014 and occasionally

visited his father. (T. Page 317) We know that both Joesie and her attorney knew these to be false statements. While Joesie may have some trouble with the English language she has lived in the United States for nearly 20 years and her attorney is clearly learned and understands the difference between an occasional visit and residing in an area for multiple years. On Page 32 of 49 of Joesie's brief he acknowledges Jayden's residence in the Great Lakes area - "Jayden lived in Harrison County all of his life except the brief time he was with his father in the Great Lakes area."

Joesie's brief repeatedly says that Joesie never lived with Kyle's mother but only rented a room for storage. (Joesie's Brief Pages 3, 17, 18, 32) Joesie claimed not to be living with Kyle's family but instead with her friend Marion Haffner. Why would Joesie keep this a secret from Michael? It makes no sense for Joesie to pretend to be living at one person's house who turns out to be the mother of Joesie's paramour while actually living at her friend's house. Michael was very aware that Joesie was not staying at the Pass Christian house between September of 2013 and January 2014. There is no reasonable explanation as to why Joesie would need to keep living with Marion a secret from Michael. On the other hand, Joesie would have many reason's to hide the fact that she was living with Kyle's mother. Joesie claims to have rented a room for storage purposes only. Wouldn't an actual storage unit be easier, cheaper, and have the added benefit of not belonging to your boyfriends mother? Joesie testified that she kept Kyle's mother's identity a secret from Michael. (T. Page 368)

Joesie's brief claims that because Jayden called Amy "Auntie Amy" that somehow confirmed that Michael was committing adultery with Amy. (Joesie's Brief Page 31) The truth is much less salacious; the correct term is Ate, or Ateh, (pronounced Ah-Tay). This is a very common term in the Philippine language which reflects respect to a female who is older than the speaker, whether sister, cousin, or family friend). This is how Joesie, not Michael, taught Jayden to refer to Amy.

Joesie's brief stated that even though Joesie lied to the Court about sending money to the Philippines that it was not a concern of Michael's because "[s]he did not send Michael's money,

because he gave her none of his money.” (Joesie’s Brief Page 29) Joesie was asked about sending money to the Philippines because it is a regular expense of hers and did not appear on her financial disclosure. Whether the money came from her paycheck, from her savings since Michael was paying her mortgage, insurance, and taxes on her house, or from the alimony or child support money that Michael sent her is not a concern of Michael’s. (T. Page 109) The larger issues revolves around Joesie’s propensity to lie. Why would she leave the regular expense off of her financial disclosure? Why, when asked, would she claim that she did not send any money? Why would she say in her brief that Michael did not send her any money when she had already testified that she had received alimony payments from the time of the parties’ separation? (T. Page 109)

Joesie’s brief states that Joesie’s admitted adultery should not be as decisive as Michael believes. It seems that malicious and false allegations of adultery absent any evidence were enough for the Court to remove Jayden from Michael’s care.

#### D. The Home, School and Community of Record

Joesie’s brief mischaracterizes the arguments from Michael’s brief:

- Page 32 of 49 – Michael criticizes the Court for saying that there are friends available and family to help Joesie with Jayden.

Michael’s brief did not criticize the Court for saying that Joesie had friends and family available. Michael did raise the concern that the Court credited Joesie for having friends and family available but then criticized Michael for having Amy and Cherry available to help when needed. (Michael’s Brief Pages 33 – 34) After Michael moved to Grayslake, as a direct reaction to the Court’s unhappiness with him living with Amy and Cherry, the Court did make note that Michael no longer had help available. (Dkt. 45 Page 49)

- Michael relied upon child care assistance from the two women, Amy and Cherry, living in the home with him. Michael lives alone presently.

Joesie's brief continues:

- Page 32 of 49 – Michael wants to blame the Court for his sense of helplessness in not having someone at his home to take care of Jayden when he is not there. Yet, he would criticize Joesie if she had someone at her home to help with the child.

These statements are pure conjecture and invention on the part of Joesie's attorney. The truth is Michael did not mention, neither in his brief nor in his testimony, feelings of helplessness nor did he say he would criticize Joesie for having a friend at the house to help with Jayden.

Again, Joesie's brief resorts to make-believe and conjecture:

- Page 32 of 49 – Amy Malatag's testimony shows that she was against Joesie. In fact she made some pretty derogatory statements regarding Joesie and her living with another man instead of her son. That kind of testimony translates into actions and talking in front of the child that is bad for the child.

This is fantasy made up by Joesie's lawyer after the fact. Joesie never complained that Amy, Michael, or anyone for that matter had ever talked negatively about her to Jayden. Amy was asked by Joesie to help take care of Jayden when Joesie made the choice to be with her boyfriend and his family instead of with Michael and Jayden. Joesie shared with Amy the details of her affairs and her intentions to continue to have an affair with Kyle while Amy cared for Jayden. Joesie then made false accusations against Amy. There is little wonder why Amy would not be fond of Joesie and would be rightly critical of her actions and disregard for Jayden's well-being but at no time during the testimony did any one suggest or show evidence that Amy spoke ill of Joesie in front of Jayden.

Joesie's brief minimizes the time that Jayden lived with Michael in the Great Lakes area. We should recall that at the time of the Temporary Hearing Jayden was 5 years old. He spent nearly two full years living with his father in the Great Lakes area. Two years out of 5 qualifies as more than a "brief time" for a small boy.

The Court's findings on the Albright factors were not supported by the evidence. The Court allowed unsupported accusations of Michael's adultery to taint her analysis of the testimony and skewed her findings to support and rationalize her Albright analysis. When viewed in the light of

Michael's innocence the Albright analysis made by the court is not correct. Every decision that Michael made; whether it was moving in with Amy and Joe, continuing that arrangement with Amy and Cherry after Amy and Joe's divorce, moving out on his own as a direct result of the Court's disapproval of his arrangement with Amy and Cherry, or holding on to hopes of reconciliation well past a rational time were made in the best interest of Jayden.

The totality of the Albright analysis overwhelming favors the father.

- Age, Health, and Sex of the Child – Favors the Father
- Continuity of Care Prior to the Separation – Favors the Father
- Parenting Skills and Willingness and Capacity to Provide Primary Child Care – Overwhelmingly Favors the Father.
- Employment of the Parents and Responsibilities of that Employment – Neutral
- Physical and Mental Health and Age of the Parents – Neutral
- Emotional Ties of the Parent and Child – Neutral
- Moral Fitness of the Parents – Overwhelmingly Favors the Father
- Home, School, and Community of Record – Strongly Favors the Father
- Preference of the Child – Not Applicable
- Stability of Home Environment and Employment of Each Parent – Favors the Father
- Other Factors – Overwhelmingly Favors the Father

### **ARGUMENT III:**

**The Chancery Court Employed the Wrong Legal Standard and Erred in Not Granting Michael a Divorce on the Grounds of Adultery; The Chancery Court's *Notice of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as Amended* is Moot**

Joesie's brief contains contradictory arguments. Joesie argues that Michael condoned Joesie's adultery with Kyle but Joesie's brief also argues that Michael lacked the proper motivation for wanting a divorce on the grounds of adultery when Michael decided that reconciliation with Joesie was no longer possible in January of 2015.

- Page 3 of 49 – Joesie was forgiven of adultery and the parties worked on reconciliation and got together many times. [R.281, 282, 283,287, 324, 235, 328, 611, 14, 717, 811; Joesie R.E. 108, 118]
- Page 4 of 49 – The parties had attempted to reconcile on numerous occasions.
- Page 37 of 49 – Michael knew all about Kyle and when the relationship terminated.
- Page 37 of 49 – It is incongruent that Michael would be talking about reconciliation and Joesie coming to live with him and having sex with her and not talk about her prior sexual relationship with Kyle and whether or not it was still ongoing.

The Court made this same mistake in its Final Judgment for Divorce. (*Dkt. 45* Page 21) Michael does not argue that he condoned Joesie's adultery between the summer of 2013 until September 18, 2013. Joesie's argument and the Court's ruling, however, incorrectly apply the rule of condonation citing *Lindsey v. Lindsey*, 818 So. 2d 1191, 1195 (Miss. 2002). (*Dkt. 45* Page 21) Joesie argued and the Court incorrectly ruled that the act of Michael and Joesie having sex in December of 2014 meant that Michael condoned any and all of Joesie's marital indiscretions prior to the last date of marital sex regardless of Michael's knowledge of these indiscretions or not.

In an attempt to persuade this Court that Michael lacked the proper motivation to call off the parties' reconciliation in January 2015, Joesie correctly reminds us that Michael did not know of Joesie's marital indiscretions following August 2013.

- Page 36 of 49 – Michael said the reason that they finally did not reconcile was due to the sex that they had in December 2014. [R. 817, 821; Joesie R.E. 129, 130] **It was not, as Michael would have this Court believe. The pictures and other items that Michael found and either introduced in evidence or talked about, he did not know about until the time that the divorce proceeding was ongoing.** [R. 817, 821; Joesie R.E. 129-130] [Emphasis Added]
- Page 27 of 49 – Michael continues to find fault with the Lower Court and say the Court was one sided. Michael talks about continuing and undisclosed contacts by



Joesie with her paramour. However, at the time Michael moved in with Amy Malatag and decided to call off the reconciliation and the marriage, **he did not know about the things that he alleges and discusses in his brief.** [See Michael's brief at page 25] [Emphasis Added]

Joesie's brief is correct that in January 2015, when Michael decided to call off the parties' reconciliation, he did not know Joesie and Kyle had continued in a sexual relationship after August 2013. (*T.* Pages 267, 332 – 336, 345 – 346, 364 – 365, 394, 570, 573 – 576, 638, 666 – 667) Michael did not know that Joesie and Kyle were posing for photographs in warm embraces on Kyle's mother's couch (May 2014) (Ex 19 Page 6) and cheek to cheek. (October 2014) (Ex 16 Page 28) Michael did not know that Joesie was still referring to Kyle as "Babe" as late as October 22, 2014. (*T.* Page 667) and again on December 20, 2014. (*T.* Pages 666 – 667) Michael did not know that Joesie had phone conversations with Kyle while on the parties' trip to California to work on their marriage. (*T.* Page 667) Michael did not know that Joesie had lied about the start of Joesie and Kyle's sexual relationship, because, as Joesie's brief correctly states, Michael did not have all those photos and the dates from those photos at the time he asked Joesie to finalize the parties divorce. **It must be remembered, however, that in January of 2015 Michael did not ask the Court to grant him a divorce on the grounds of adultery.** In January of 2015 Michael asked Joesie to finalize the parties' Irreconcilable Differences divorce because as Joesie's brief states, Michael did not know of Joesie continued adulterous behavior. By definition Michael cannot condone what he does not know. The Court erred when it ruled that Michael condoned Joesie's adultery through December 2014. (*Dkt. 45* Page 21)

Additionally, legal precedence is very clear that once a person has committed adultery that they are placed on a notional probation. *Lee v. Lee*, 232 So. 370, 373 (Miss 1970) The burden of proof is lowered to the point of only having to prove an intention not to be faithful. Joesie's brief does not address this part of Michael's argument because there is no escaping the facts that Joesie continued to not only communicate with Kyle and his family but pose for pictures while in warm embraces together.

Joesie brief is very clear that Joesie kept these interludes a secret from Michael which removes any possibility that Michael could have condoned Joesie's behavior.

Michael does not have an opinion on whether the *Mississippi Code 93-5-2* is constitutional or not. Neither does Joesie for that matter. The Attorney General for the State of Mississippi has clearly laid out that the Court's creation of a constitutionality question was improper. Michael agrees and as stated there is no need to discuss the constitutionality of Mississippi Law because the Lower Court was presented with clear and convincing evidence of Joesie's uncondoned adultery. The Lower Court choose to ignore this evidence so as to create a vehicle for the constitutionality argument. The Court's decision to use this case to further its own cause and legislate from the bench led to many other inconsistencies in the court's findings which naturally bled into the Court's Albright analysis.

#### **ARGUMENT IV:**

##### **The Chancery Court was Manifestly Wrong, Employed the Wrong Legal Standard and Erred when it Amended the Agreed Upon Property Settlement Agreement**

Joesie's brief assumes that Michael and Joesie did not discuss the parties' respective retirement plans at the time the parties negotiated their original Property Settlement Agreement. (Joesie's Brief Pages 6 and 39) Joesie's brief goes so far as to say that since Michael's military retirement was not explicitly mentioned in the parties' original Property Settlement Agreement that Michael hid his military retirement from Joesie.

- Page 44 of 49 – Further, Michael attempted to hide a marital asset by not listing it, in his Property Settlement Agreement and not addressing it whatsoever.

It should be remembered that Joesie's 401k retirement plan was also not explicitly mentioned in the parties' original Property Settlement Agreement. It is not reasonable to assume that Michael and Joesie did not discuss each other's retirement plans during their negotiations. Joesie clearly said that the Property Settlement Agreement was a result of negotiations and not a mandate by Michael. (T. 80,

109, 110, 323, 347, 348) There is absolutely no proof that Michael was trying to hide his military retirement just as there is no proof that Joesie was trying to hide her retirement plan. Joesie worked on a military base, had many friends with military husbands, and had been a military wife for more than 8 years. She was well aware of Michael's military retirement and was just as aware that it was not in the Property Settlement Agreement because she and Michael had made a mutual decision to keep their respective retirement plans after the divorce.

The reason that there is no testimony regarding the parties' negotiations concerning their respective retirement plans is that the Court upheld Joesie's attorney's objection and Michael was not allowed to discuss the details of the parties' negotiations but could only testify that negotiations had taken place. (T. Pages 324 – 325) There is no doubt that Joesie and Michael were both well aware of each other's respective retirement plans at the time that they created their original Property Settlement Agreement.

Joesie's brief argues that:

- Page 41 of 49 – When the Court uses the three tier approach to contract interpretation and the terms of the contract are found to be ambiguous the contract will be interpreted in a reasonable manner. In re: Dissolution of Marriage of Wood, 35 So. 3d 507, 513 (paragraph 9)(Miss. 2010)

Michael argues that awarding Joesie a substantial portion of his military retirement plan while at the same time ruling that an identical marital asset, namely Joesie's 401k retirement plan, will not be equitably divided but will instead remain the sole property of Joesie does not qualify as interpreting the parties' Property Settlement Agreement in a reasonable manner.

Joesie's brief continues:

- Page 42 of 49 – Michael states that it is inconsistent with Hemsley and Ferguson for the Court to award Joesie a part of Michael's military retirement.

Joesie's brief improperly abridges Michael's statement. Michael's statement from Page 43 of his brief:

- It is not consistent with Hemsley, Ferguson, or Myrick for the Court to award Joesie part of Michael's retirement plan and 100% of her own 401k retirement plan.

Hemsley v Hemsley, 639 So. 2d 909 (Miss 1994); Ferguson v. Ferguson, 639 So. 2d 921, 929 (Miss 1994); Myrick v. Myrick, 186 So. 3d 429, 433 (Miss Ct. App 2016)

When discussing the equitable distribution of the parties' marital assets, Joesie's brief argued that Michael wanted the Court to uphold the parties' original Property Settlement Agreement but then did not want the Court to award him the Steeplechase Property.

- Page 44 of 49 – Michael wants the Court to uphold the Separation and Child Custody and Property Settlement Agreement, but he says the Court erred by giving him the Steeplechase Drive property as he had provided in his Separation and Child Custody and Property Settlement Agreement.

Joesie's rendition of Michael's argument goes beyond spinning the truth to favor a particular point of view. This retelling is pure fiction. Michael did not make any such claims that the Court erred by giving him the Steeplechase Drive property. Michael was pointing out that according to the original Property Settlement Agreement the parties agreed that Michael would take on the Steeplechase property and other marital debts. Michael believes that the value of these debts should be considered by the Court when making decisions to further burden Michael financially.

Joesie's brief disagrees with Michael's assessment that Michael's requirement to pay alimony should be reduced because the Court ruled to give Joesie a larger portion of the parties' marital assets than what the parties had originally agreed upon.

- Page 45 of 49 – Further, in his Separation and Child Custody and Property Settlement Agreement, he agreed to pay her Three Hundred Dollars (\$300.00) per month from the time the agreement was ratified. [R. 202; Joesie R.E. 68]
- Page 45 of 49 – Neither Michael or Joesie was receiving Military retirement at the time the divorce was granted. Therefore his argument that the alimony should be reduced by the amount of Military retirement that Joesie receives is without merit.

The fact that the Court added the stipulation that Joesie was to share part of Michael's military retirement after the parties had already decided on the proper amount of alimony is precisely the situation Helmsley discusses. Hemsley v Hemsley, 639 So. 2d 909 (Miss 1994); Ferguson v. Ferguson, 639 So. 2d 921, 929 (Miss 1994); Once Joesie begins receiving the additional benefit of a portion of

Michael's military retirement then Michael's obligation to pay alimony should be reduced by the same amount.

Joesie's brief argues that the Court was correct in determining the start date of the parties Property Settlement Agreement as the date the Court signed the Final Judgment for Divorce. *Ferguson v. Ferguson* is very clear, however, that the contract start date is not dependent on a divorce being finalized or even taking place at all. *Crosby v. Peoples Bank of Indianola*, 472 So.2d 951, 955 (Miss 1985) Joesie began accepting the \$300 per month alimony payment upon the parties' separation in September 2013. Joesie acknowledged in court that she had been accepting the payments and referred to the payments as alimony. (T. Page 109)

#### **ARGUMENT V:**

#### **The Chancery Court was Manifestly Wrong for Significantly Limiting the Father's Summer Visitation**

Michael does not argue that the Court has the authority to make the final determination as to visitation but just as with other aspects of custody decisions the Court needs to be fair and equitable and take the parties' preference into consideration. The Court's ruling on visitation is unjustifiably limited, open to interpretation, and points the finger at Michael for behavioral problems that Jayden experienced while in Joesie's care. Additionally, Michael and Joesie already had agreed to a detailed visitation plan for the non-custodial parent. Michael and Joesie used the same visitation plan when Michael had custody prior to the temporary hearing as they did when Joesie had custody following the temporary hearing. Neither Joesie nor Michael requested for the Court to make adjustments to the parties' agreed upon visitation schedule. The Court is aware that Michael does not live in Mississippi and therefore weekend visitations are not practicable. Limiting Michael's visitation to a single month during the summer effectively limits Jayden's time with his father to one month during

the summer, one week for spring break, and one week for either Thanksgiving or Christmas. (44 days per year). This arrangement is not fair to Jayden who deserves to spend time with both his parents.

### CONCLUSION

Appellant Michael Gerty submits that the Chancery Court employed the wrong legal standards, was manifestly wrong, and committed error as regards to the matters set forth above. Appellant Michael Gerty urges this Court as follows:

1. That this Court reverse the Chancery Court and find the parties' Child Custody and Property Settlement Agreement not only "adequate and sufficient" but also in the best interest of Jayden.
2. That this Court reverse the Chancery Court as regards to Child Custody.
  - a. If not then remand to the Chancery Court with instructions to follow the parties' agreed upon summer visitation schedule.
3. That this Court reverse and grant Michael a divorce on the grounds of adultery.
4. That this Court reverse as regards the distribution of Michael's military retirement.
  - a. If not then remand to the Chancery Court with instructions to adjust the amount of alimony that Michael must pay to Joesie equivalent to Joesie's share of Michael's military retirement.
5. That this Court reverse as regards to the ratification date of the parties' Property Settlement Agreement as it applies to alimony.

Appellant Michael Gerty asserts that this Court should do the following: reverse and render.

RESPECTFULLY SUBMITTED, this the 14th day of April, 2018.

  
MICHAEL T. GERTY, APPELLANT

CERTIFICATE OF SERVICE

I, Michael T. Gerty, Defendant/Appellant, do hereby certify that I have on this date filed this Reply Brief of the Appellant with the Clerk of this Court, and have served a copy of same via US Mail to the Honorable Jennifer Schloegel, Chancellor, Harrison County Chancery Court, to Michael C. Powell, Attorney for the Plaintiff/Appellee, and to Justin Matheny, Counsel for the State of Mississippi ex rel.

So certified this the 14th day of April, 2018.

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MICHAEL T. GERTY, APPELLANT

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