IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00513 COA

LARRY L. ADAMS

APPELLANT

v.

VIRGINIA K. ADAMS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. WILLIAM H. MYERS

COURT FROM WHICH APPEALED: JACKSON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

DEMPSEY M. LEVI

ATTORNEY FOR APPELLEE: ROBERT H. OSWALD

NATURE OF THE CASE: CHILD SUPPORT

TRIAL COURT DISPOSITION: FATHER HELD IN CONTEMPT FOR FAILURE TO DELIVER CHILDREN'S FURNITURE AND CLOTHING TO MOTHER AND JUDGMENT OF $2,000 AWARDED TO MOTHER AGAINST FATHER

BEFORE FRAISER, C.J., BARBER, COLEMAN, AND SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT:

Larry L. Adams appeals from an order of the Jackson County Chancery Court in which the chancellor held him in contempt because he failed to return to his former wife, Virginia K. Adams,

the furniture, clothing, and personalty for her and his children's use. In that same order the chancellor also awarded Virginia Adams a judgment against her former husband in the amount of $2,000 for replacement of the items of furniture and clothing which her former husband did not return to her. We affirm the order of that court from which Larry Adams appeals.

I. Facts

A. Prior to this litigation

The Family Court of the Parish of East Baton Rouge in the State of Louisiana granted a divorce to the Adamses by its judgment dated April 8, 1985. Five children, Laurie Anne Adams, Mica Tobias Adams, Sarah Kathleen Adams, Levi Jacob Adams, and Jana Noel Adams, were born to their marriage. The Louisiana Family Court amended its judgment of divorce on July 23, 1986, and later on January 10, 1991, to allow changes in the Adamses' custody of and visitation with their five children. The Amended Judgment of January 10, 1991, awarded "the permanent care, custody and control" of the Adamses' five children to Larry Adams, with him "to remain as the domiciliary parent of said children and with Virginia Kuhn Adams exercising reasonable visitation rights."

Shortly after January 10, 1991, Larry Adams, who had married Sally Ann Adams, a doctor of chiropractic, after his divorce from Virginia Adams, moved to Pascagoula where his second wife practiced her profession of chiropractic therapy and healing. Soon after her former husband had re-located in Pascagoula, Virginia Adams delivered various items of furniture and some clothing which her five children had used when she had their custody from May 31, 1987, until January 10, 1991, when Larry Adams again gained custody of all five of their children. Sometime after January 10, 1991, Virginia Adams moved to Pensacola, Florida, where she was employed by Bayou Chiropractic as a chronic pain therapist. Her relationship to Bayou Chiropractic was that of "an outside contractor."

B. Current litigation

On October 7, 1994, Virginia Adams filed a Petition for Modification in the Chancery Court of Jackson County by which she sought that court's award of custody of the Adamses' three younger children, Sarah Kathleen Adams, then fifteen years old, Levi Jacob Adams, then thirteen years old, and Jana Noel Adams, then twelve years old. By that date, the Adamses' oldest child, Laurie Anne Adams, had married, and their next oldest son, Mica Tobias Adams, preferred to remain with his father because he was a senior in high school that year.

After the chancellor heard Virginia Adams' Petition for Modification on October 14, 1994, he rendered an Order on October 17, 1994. by which he changed the custody of the Adamses' three younger children Sarah Kathleen, Levi Jacob, and Jana Noel, from their father to their mother. The chancellor granted both of the Adamses additional relief, the only portion of which that is relevant to the issues in this appeal is the following relief granted to Virginia K. Adams:

> The childrens' furniture, clothing, and other personal belongings are to go with the children."

On January 31, 1995, Virginia Adams filed a Motion for Contempt in which she prayed of the chancery court that it hold her former husband in contempt because he was "currently in arrearage of child support payments in the amount of $600.00." As an additional ground for holding Larry Adams in contempt, Virginia Adams charged that he had "willfully and deliberately failed to comply with the provision [in the Order rendered on October 17, 1994, that he pay one-half of any medical, dental and ocular expenses for the children within thirty (30) days after having received such notice]." She specifically alluded to some dental bills which she had incurred since the Order of October 17, 1994, which had returned custody of her three younger children to her.

Simultaneously with filing her Motion for Contempt, Virginia Adams filed a Motion to Modify Support Order in which she moved the chancery court "to modify its order of October 17, 1994," "to require [Larry Adams] to pay the sum of $3,885.31 for the cost of furniture which movant had to purchase as a result of [Adams'] failing to deliver over to movant any usable furniture to the children as ordered by the Court." She also sought modification of the earlier Order to require Larry Adams to pay all the costs of dental care for Jana Noel in the amount of $1,141.00 because she had incurred these dental expenses "as a direct consequence of the failure and refusal of [Adams] to provide any dental care for Jana while Jana lived with [her father]. On March 9, 1995, Larry Adams filed a Supplemental Motion, the purpose of which was to amend the October 17, 1995, Order "to award custody of [Jana Noel] to [Larry Adams]" because she was failing school since her mother had received custody of her.

On March 28, 1995, the chancellor conducted a hearing on all of these motions, pursuant to which hearing he rendered an Opinion of the Court on April 4, 1995, in which he opined and found as follows:

I

> This Court is of the opinion that the minor child born of the parties, Jana Noel Adams, shall remain with the mother and Larry L. Adams shall pay the dental expenses incurred by Jana Noel Adams in the amount of $755.00, and shall provide a copy of his medical insurance policy which covers all the children, as well as any insurance card provided with that policy of insurance.

II

> The Court is of the opinion that Mr. Adams shall deliver or cause to be delivered to Mrs. Adams all clothing in his possession, belonging to the children of the parties who reside with Virginia K. Adams. The Court is further of the opinion that Mr. Adams is in contempt of this Court for his failure to abide by the orders of this Court dated October 17, 1994, wherein, he was to return the children's furniture, clothing and other personal belongings at the time they went with Mrs. Adams. The court finds that Mr. Adams failed to comply with this provision of that Court Order, and that as a result thereof, Mrs. Adams was forced to purchase furniture and clothing for the minor children to replace the

> items that she did not receive from Mr. Adams. Therefore, the Court is of the opinion that Mr. Adams shall pay the sum of $2,000.00 to Mrs. Adams within 6 months from the date of the Judgment, to reimburse Mrs. Adams for replacement of those items.

In accordance with his opinion, from which we have just quoted, the chancellor entered an Order on May 10, 1995, by which he ordered, *inter alia*, that Larry Adams surrender to Virginia Adams "all clothing in his possession belonging to the children of the parties who reside with Virginia K. Adams." The chancellor further found Larry Adams "to be in contempt of this Court for his failure to return to Virginia K. Adams for use by the children the furniture, clothing, and personalty as previously ordered by this Court." The chancellor then awarded Virginia L. Adams judgment against Larry L. Adams for the sum of $2,000.00 for replacement of such items.

Larry L. Adams appeals from the Order rendered and entered on May 10, 1995.

II. Issues and the law

In his brief, Larry Adams presents two issues for this Court's consideration, analysis, and resolution. These two issues are:

> 1. The lower court erred by finding Appellant in contempt of court for failing to return the children's furniture and personal items.

> 2. The lower court erred by awarding Appellee $2,000.00 to replace the children's furniture and personal items.

We review these issues in the order in which Larry Adams presented them to us.

> **A. First Issue:** 1. The lower court erred by finding Appellant in contempt of court for failing to return the children's furniture and personal items.

The following quotation from Larry Adams brief summarizes his argument on this issue:

> Larry contends that the Chancellor was manifestly wrong in giving Virginia's testimony greater consideration than the testimony provided by Larry, Sally and Toby. Thus, the Chancellor erroneously found Larry to be in contempt of court for failing to return the children's furniture, linens, and clothing.

Adams then devotes three pages of his brief to arguing solely the evidence and the testimony which Virginia Adams and he presented to the chancellor for his review, analysis, and resolution. Adams does not include in his argument on this issue so much as one case or, for that matter, any other authority, on which he rests his argument on this issue In *Gerrard v. State*, 619 So. 2d 212, 216 (Miss. 1993), the Mississippi Supreme Court reiterated, "We have repeatedly held that when a litigant fails to cite authority for his claim of error, we will not address [it]." *See Wright v. State*, 540 So. 2d 1, 4 (Miss.1989) (claims with no citation to authority in support are not properly before the court). Thus, this Court need not consider Adams' first issue.

Nevertheless, we will review and resolve this issue. In *Wing v. Wing*, 549 So. 2d 944, 946 (Miss. 1989), the Mississippi Supreme Court advised that when it reviewed a judgment for contempt, it "proceed[ed] *ab initio.*" Thus, this Court will proceed *ab initio* in its review and resolution of this issue. We begin our review of this issue with the chancellor's finding in his opinion which he rendered on May 10, 1995, that "Larry Adams is found to be in contempt of this Court for his failure to return to Virginia K. Adams for use by the children the furniture, clothing, and personalty as previously ordered by this Court. The chancellor's finding that Larry Adams had failed "to return to Virginia K. Adams for use by the children the furniture, clothing, and personalty as previously ordered by this Court" was the basis of his finding Adams to be in contempt.

The Mississippi Supreme Court has frequently recited the standard of review which it applies to a chancellor's findings of fact. For example, in the quite recent opinion of *Cummings v. Benderman*, No. 95-CA-01090-SCT, slip op. at 2 (Miss. Sept. 12, 1996), the supreme court wrote:

> This Court will always review a chancellor's findings of fact, but the Court will not disturb the factual findings of a chancellor when supported by substantial evidence unless the Court can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard. Even if this Court disagreed with the lower court on the finding of fact and might have arrived at a different conclusion, we are still bound by the chancellor's findings unless manifestly wrong.

Pursuant to the foregoing standard of review for a chancellor's finding of fact, we consider the evidence which the Adamses adduced at the hearing on March 28, 1995, to determine whether it was substantial enough to support his finding that Larry Adams had failed "to return to Virginia K. Adams for use by the children the furniture, clothing, and personalty as previously ordered by this Court." If the evidence were substantial to support this finding of fact, then we are bound by it, unless we can further declare that the finding was "manifestly wrong." We must emphasize that this latter standard of review deals with the chancellor's finding of fact on which he based his further finding that Adams was in contempt of court.

Larry Adams emphasizes that after the first hearing on October 14, 1994, Virginia Adams and her children returned to his and his present wife's home, where she and her children packed all three of the childrens' clothes that they wanted into black garbage bags. Virginia Adams and the three children put as many of the bags filled with clothes that they could into the trunk of her car. They then put the rest of the bags into the trunk of Toby's car. Sally Adams testified that all three children

told her that they had gotten all of their possessions that they wanted.

Adams stresses that he and his son Toby "carefully placed the children's furniture and personal belongings into the rented storage unit." They placed the bags which contained the childrens' clothes on top of the furniture. Adams testified that after his son Toby and he locked the storage unit, he gave the only key to the storage unit to Toby, so that neither he nor his wife Sally Adams had access to the unit. Larry Adams then accentuates Toby's testimony that when he went with his mother, Virginia Adams, one week later to retrieve the furniture and clothing from the storage facility, the furniture was in the same condition in which it had been when it was in his father's and his stepmother's home. While Toby recalled that there was some water outside the storage unit, the inside of the unit was dry. In his brief, Adams suggests that Virginia Adams may have gotten the furniture and clothing wet when she moved it from inside the storage unit into the truck which she had driven from Pensacola to get these items.

Adams concludes his argument by asserting that he complied with the first order rendered on October 17, 1994, by placing the furniture and clothing in the rented storage unit and then allowing his first wife to have access to it. He contends that because some of the furniture was given away after Virginia Adams left it behind in the storage unit, she exaggerated the condition of the furniture as she found it. He further stresses that neither he nor anyone in his family hid nor intentionally damaged the furniture. Thus, Adams proposes to persuade this Court to substitute our judgement for that of the chancellor by finding that he was not in contempt of court.

In *Newsom v. Newsom*, 557 So. 2d 511, 514 (Miss. 1990), the Mississippi Supreme Court repeated the instruction to the bench and bar that "[o]n appeal the Supreme Court is required to respect the findings of fact made by a chancellor supported by credible evidence and not manifestly wrong." The supreme court has repeatedly stated that "[t]he weight and worth of [a] witness' testimony is solely for the chancellor to determine." *Doe v. Doe*, 644 So. 2d 1199, 1207 (Miss. 1994) (citing *Mullins v. Ratcliff*, 515 So. 2d 1183, 1189 (Miss. 1987)). In *Kavanaugh v. Carraway*, 435 So. 2d 697, 700 (Miss. 1983), that same court, as though to admonish itself, observed that it "should not sit as reviewing chancellors." Neither should this Court.

We have already reviewed the sum and substance of Virginia Adams' testimony, which was that when she went to retrieve the furniture and bags of clothing from the rented storage area, water had collected in the floor of the unit, that the garbage bags had holes in them which allowed the water and dampness to penetrate the clothes in the bags, and that much of the furniture, including the mattresses, and her childrens' clothing had been ruined by mildew and the damp conditions inside the rented storage unit. The chancellor found her testimony to be more credible and therefore more persuasive on the issue of whether Larry Adams had complied with the Order rendered on October 17, 1994. We find no suggestion in the record that Virginia Adams' testimony had been impeached. Therefore, pursuant to our standard of review for reviewing the chancellor's finding of fact that Larry Adams failed to return to Virginia K. Adams for use by the children the furniture, clothing, and personalty as previously ordered by this Court, we affirm the chancellor's finding of this fact.

We must note that even though the chancellor found Adams to be in contempt of its earlier Order rendered on October 17, 1994, he imposed no punishment on Adams for his contempt. Virginia Adams describes the chancellor's finding of contempt as "a conclusion without a punitive

consequence." Thus, we interpret the chancellor's finding that Larry Adams was in contempt as the chancellor's manner of adjudicating that Adams had not complied with the Order rendered on October 17, 1994. *Cf. Fidelity Fin. Servs., Inc. v. Hicks*, 642 N.E.2d 759, 761 (Ill. App. Ct. 1994) (An order that accomplishes no more than implementing prior orders of the court, occasioning no new liability on the part of the alleged contemnor, does not "prejudice, disable, or penalize" the contemnor).

As we earlier noted, the standard of review for a chancellor's holding a litigant in contempt allows us to review his decision *ab initio*, or *de novo*. Our review of the record in this case *ab initio* confirms that the chancellor did not err when he held Larry Adams in contempt for his failure to deliver the furniture and clothing for his three younger children to his former wife, Virginia Adams.

B. Second Issue: 2. The lower court erred by awarding Appellee $2,000.00 to replace the children's furniture and personal items.

Larry Adams' introduction to his argument on this issue is strikingly similar to his introduction on the first issue. Again we quote from Adams' brief:

> The lower court relied more heavily on the testimony provided by Virginia regarding the children's furniture and personalties than the testimony given by Larry, Sally, and Toby.

Adams then proceeds to argue that the chancellor should have considered the estimated value of the furniture at the time it was delivered to the storage facility in accordance with *Harper v. Hudson*, 418 So. 2d 54 (Miss. 1982), in which Adams asserts that the Mississippi Supreme Court enunciated the general rule -- and we quote Adams brief -- "that if the damaged property has any remaining value, then the measure of damages is the difference between the value of the property immediately before the loss and the value after the damage occurred to the property." He argues that the furniture was used when Virginia Adams delivered it to her former husband's home some four years earlier and that it had suffered wear and tear at the hands of teen-aged children for four years. It is true that Larry Adams testified that his children had placed many stickers on the beds when his former wife brought them to his home, but Virginia testified that the beds were practically new when she delivered them to Larry Adams. She further testified that the bunk bed was still in good condition when she retrieved it from the storage unit although the hardware to assemble it was missing.

Larry Adams also cites *Teledyne Exploration Co. v. Dickerson*, 253 So. 2d 817 (Miss. 1971), in which the Mississippi Supreme Court held that where property is repairable, the cost of its repair is a proper measure of damages. Thus, Adams seems to concede that his former wife was entitled to be compensated for the expense of replacing the hardware to assemble the bunkbed, although he suggests that the sum of $126.00, which Virginia Adams testified she spent to buy the necessary hardware to assemble the bunkbed "seems a bit extravagant for hardware." The Court observes that the record does not reveal that Larry Adams offered any evidence to show what the reasonable cost of this hardware ought to have been. Adams contends that it is "unfair" to require him to do more

than pay for the damages to the furniture. He further notes that during the hearing, "very little testimony was given as to the estimated value of the furniture at the time it was taken to the storage facility."

Adams then quibbles with Virginia Adams' testimony that she bought a double bed with mattresses, a single bed with mattresses, and two mattresses to go with the bunk beds which she took from the storage facility. He argues that she bought enough beds for five people to sleep in whereas she only needed beds for three children. He suggests that "[a] more economical purchase would have been to buy one single bed and three single mattresses." He argues that "Virginia should not be compensated for buying new clothes and personalties for the children;" and he complains that she bought clothes and underwear for their three children "from the most expensive stores in the area, Parisian, Dillard's, and Gayfers." Adams concludes his argument on this issue as follows:

> By allowing Virginia $2,000.00 to buy furniture, she was able to replace the five-year-old furniture with brand new furniture, In addition, Virginia was generously reimbursed for purchasing new comforters, pillows and clothes for the children despite Toby's contention that the clothes and other personalties were not wet inside the storage facility. As a result, Virginia has been unjustly enriched at the Appellant's expense.

In her brief, Virginia Adams counters her former husband's argument with the proposition that "[t]his judgment as well as the $755.00 judgment for dental care for Jana, was a routine exercise of chancery jurisdiction to provide for the needs of children." She argues:

> Appellant created a situation of distress for the children by failing to return their furniture, clothing, and personal items. Confronted with an urgent need for these necessities of life, Appellee responded in a reasonable manner by purchasing furniture and clothing for the children. For Appellant to complain now that he has been wronged by the judgment is an unconscionable assertion.

She then cites Section 159 of the Mississippi Constitution as the base authority for chancery courts to deal with matters of divorce, including the maintenance of children; and she notes the relevancy of Sections 93-5-23 and 93-11-65 of the Mississippi Code of 1972 to matters of chancery court provisions for the support of children.

With the foregoing recitation of both Larry and Virginia Adams' arguments in mind, we note from the record that Virginia Adams established that she had spent $5,080.16 for clothes, furniture, and bedding for her three children. She produced receipts from Rhodes Furniture Company, Montgomery Ward, and the three stores to which we have already referred to establish these expenditures; and of course Larry Adams' counsel cross-examined her at some length about whether those expenditures were really necessary. In the end, the chancellor found that the sum of $2,000.00 was adequate compensation from Larry Adams, and he awarded Virginia Adams a judgment in this amount.

In *Gambrell v. Gambrell*, 644 So. 2d 435, 441 (Miss.1994): the Mississippi Supreme Court

described the chancellor's power in matters of child support in the following language:

> In child support modification proceedings, as elsewhere, the chancellor is accorded substantial discretion and is charged to consider all relevant facts and equities to the end that a decree serving the best interests of the children may be fashioned.

The case *sub judice* does not strictly involve a modification of existing child support; but it does concern the chancellor's providing for the support of three children, the provisions for whose support the chancellor had addressed in an earlier Order which he rendered on October 17, 1994. This Court relies on the foregoing quotation to undergird its determination that the chancellor did not err when he awarded Virginia Adams a judgment against her former husband in the amount of $2,000.00, a sum that was less than forty percent of the amount of $5,080.16 which she testified she had spent as the result of Larry Adams' failure to deliver to her the furniture and clothing which the chancellor had earlier ordered him to do.

We remain unpersuaded by Larry Adams' arguments that the chancellor erred when he failed to adopt any sort of specific standard by which to determine the amount of damage to the furniture and clothing which he had ordered to be made available for the Adamses' three younger childrens' use. First of all, Larry Adams did not submit this issue to the chancellor; thus, the chancellor had no opportunity to consider whether a before-and-after criteria or a cost-of-repair criteria for determining damages was appropriate. In *Fleming v. State*, 604 So. 2d 280, 293 (Miss. 1992), the Mississippi Supreme Court reminded the bar:

> This Court has continuously adhered to the rule that questions will not be decided upon appeal which were not presented to the trial court and that court given an opportunity to rule on them.

We further observe that Larry Adams sought no post-judgment relief pursuant to Mississippi Rules of Civil Procedure 59(e) or 60. Therefore, this Court again concludes that the chancellor's award of a judgment in the amount of $2,000.00 to Virginia Adams against her former husband, Larry Adams, was an exercise of his "substantial discretion" which was the result of his consideration of "all relevant facts and equities in order to serve the best interests of the[se] child[ren];" and we affirm that judgment.

III. Summary

As the Mississippi Supreme Court would not do so, neither will this Court disturb the factual findings of a chancellor when those findings are supported by substantial evidence unless this Court can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or applied an erroneous legal standard. The weight and worth of a witness' testimony is solely for the chancellor to determine. In this case, the chancellor determined that the testimony of Virginia Adams had greater weight and worth than did the testimony of Larry Adams, Sally Ann Adams, and/or Mica Tobias Adams. Our standard of review requires us to honor the chancellor's

findings of fact based upon his assessment of the weight and worth of the witnesses' testimony; and we do so in this case.

The chancellor's holding Larry Adams in contempt of court, even though he did not penalize him for his contempt, was supported by evidence that the chancellor found to be substantial and was not manifestly wrong nor clearly erroneous. We have already explained that we found the chancellor's award of a judgment against Larry Adams in the amount of $2,000 to Virginia Adams to be an exercise of his "substantial discretion" which was the result of his consideration of "all relevant facts and equities in order to serve the best interests of the[se] child[ren]." We therefore affirm the Order which the Jackson County Chancery Court rendered on May 10, 1995.

THE JUDGMENT OF THE JACKSON COUNTY CHANCERY COURT IS AFFIRMED. THE COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

FRAISER, C.J., BARBER, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. BRIDGES, P.J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, P.J.

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BRIDGES, P.J., CONCURRING:

While I agree with the majority's result on issue one, I feel that because no authority was offered by Larry Adams in support of his argument, the majority should not have reviewed the argument at length, especially in an effort to affirm the trial court. Rule 28(a)(6) of the Mississippi Rules of Appellate Procedure contains the following concerning the contents of an appellate brief:

> *Argument.* The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on.

M.R.A.P. 28(a)(6). I read this to *require* support by some legally sufficient authority. Furthermore, the law is clear in Mississippi that failure to cite authority in support of assignments of error precludes this Court from considering the issues on appeal. *Grey v. Grey*, 638 So. 2d 488, 490 (Miss. 1994); *Estate of Mason v. Fort*, 616 So. 2d 322, 327 (Miss. 1993) (citing *R.C. Petroleum, Inc. v. Hernandez*, 555 So. 2d 1017, 1023 (Miss. 1990)); *see also Turner v. Turner*, 612 So. 2d 1141, 1143 (Miss. 1993).

This is not to say that this Court should not undertake to search the record in each case for plain error or some other reversible error relating to the issues argued. My point is that we should limit our treatment of clearly affirmable issues that are not supported by some legal authority. I do not feel the majority did this in its opinion. My fear is that eventually, if we continue to lend our ears and our pens to these unsupported arguments, we will seriously undermine many years of statutory and common law in this State. I contend that we should strictly adhere to the precedent set by our supreme court as far back as 1929 when Justice Griffith stated:

> It is a strange case upon which, in these days of tens of thousands of law books, no authority can be found, and when none is presented and the proposition is not manifestly well taken, there is the practical presumption that the authorities do not sustain the proposition, else they would have been cited. The courts frequently speak of such unsupported propositions as having been waived because of the failure to properly present them. There are several reasons which make it necessary to give weight to the foregoing considerations, one of which is that no supreme court could ever keep up with its docket if the judges were put to the tasks of briefing those cases of which the parties themselves have thought too little to brief.

Johnson v. State, 154 Miss. 512, 122 So. 529, 529 (1929).

THOMAS, P.J., JOINS THIS SEPARATE WRITTEN OPINION.