

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

CHARLES BOUGARD

APPELLANT

VS.

CAUSE NO. 2007-CA-00835

MARY BOUGARD

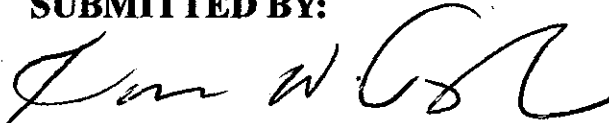
APPELLEE

REPLY BRIEF OF APPELLANT, CHARLES BOUGARD

**ON APPEAL FROM THE CHANCERY COURT
OF MARSHALL COUNTY, MISSISSIPPI**

(ORAL ARGUMENT IS REQUESTED)

SUBMITTED BY:



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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would be helpful this case as it could aid in offering Additional facts, law or argument in support of these issues. The issues before the Court are issues of both law and fact. Some of the significant facts in this case in this case must emphasized in this case and are significant in the appeal of this case.

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STATEMENT OF THE ISSUES

- 1. The Chancellor erred in failing to consider all relevant evidence in this case.**
- 2. The Chancellor erred in failing to make specific written findings of fact at any point in the case.**
- 3. The Chancellor erred in seeking to enforce a divorce settlement that was not clearly voluntary and did not address all relevant issues.**
- 4. The procedures applied in the temporary hearing in the case were not consistent with principles of basic due process under the United States Constitution and Mississippi Rules of Civil or Criminal Procedure.**

STATEMENT OF THE CASE (Supplemental)

Appellee, Mary Bougard, filed her Complaint For Divorce And Temporary Relief on or about June 16, 2004. (Rec. 10-15) Rule 81(d) Summons was served on Mr. Bougard on or about June 17, 2004. (Rec. 16-19). On or about July 30, 2004 an Order For Temporary Relief whereby Mr. Bougard was ordered to pay \$505.57 plus \$2,500 for payments made by Mary Bougard since the date of the parties separation. (Rec. 21-22).

On or about August 26, 2004, Mr. Bougard filed an Answer to Complaint for Divorce and Temporary Relief by and through Attorney Sidney Beck. (Rec. 24-27). On or about September 29, 2004 Appellee filed a Motion For Citation For Contempt. (Rec.29-31). Said motion does not specify whether civil or criminal contempt is sought. However, said motion asks for incarceration of Mr. Bougard among other relief. On or about October 13, 2004, Mr. Bougard by and through Attorney Sidney Beck filed a Motion To Reconsider (the Order for Temporary Relief). In said motion, Mr. Bougard stated that he had no part in accruing the debts on the house at 838 St. Paul, Byhalia, Mississippi and did not own or have interest in the home.

(Rec. 33-35). Notice was given that this motion would be heard in Marshall County Chancery Court on November 12, 2004 at 9:30 a.m. by Attorney Sidney Beck with notice to Attorney Amanda Smith Whaley on October 13, 2004. (Rec. 37-38). Thereafter, there is notice that this same motion is set in Benton County, Ashland, Mississippi for November 16, 2004 at 9:30 a.m. (Rec. 39-40). Next in the record at page 41 is the Order of Setting by Chancellor Roberts whereby the Motion for Citation of Contempt filed by Appellee is set to be heard on the same date and time of November 16, 2004 in the Benton County Courthouse in Ashland, Mississippi. (Rec.41). The Order of setting does not mention Mr. Bougard's prior Motion for Reconsideration of The order For Temporary Relief. However, on or about November 16, 2004, a Response to Defendant's Motion to Reconsider was filed by Appellee. (Rec. 47-49).

On or about November 29, 2004, a second Order of setting is issued by Chancellor Roberts setting Appellee's Motion for Citation for Contempt and Mr. Bougard's Motion to reconsider at the Marshall County Courthouse for December 16, 2004 at 9:30 a.m. (Rec. 50).

On December 16, 2004, Channcellor issued a Contempt Order . This

order did not address Mr. Bourgard's Motion for Reconsideration of the original Temporary Order. (Rec. 52-54). The next order in the record is signed by Chancellor Roberts on January 14th, 2005 releasing Mr. Bougard from Marshall County jail. Mr. Bougard never got a hearing on the matter of the loan on the property at 838 St. Paul, Byhalia Mississippi or his Motion to Reconsider the Order for Temporary Relief.

STANDARD OF REVIEW

It is well established that Chancellors are vested with broad discretion in domestic relations matters. Additionally they shall not be overturned “ unless the court’s actions were manifestly wrong, the court abused its discretion, or the court applied an erroneous legal standard“. Ory v.Ory, 936 So. 2d 405, cert, denied 936 So. 2d 367 (Miss. 2006).

The Chancellor is required to make factual findings of fact regarding the major issues in a domestic case as follows:

Under standard of review in domestic cases, Chancellors are vested with broad discretion, and the court of Appeals will not disturb the Chancellor’s findings unless the Court was manifestly wrong, the court abused its discretion, or the chancellor applied an erroneous legal standard. Young v. Young, 796 So 2d 264 (Miss. 2000).

SUMMARY OF THE ARGUMENT

Prior to the entry of Divorce the court made an entry of a Order For Temporary Relief on or about July 30, 2004. Despite efforts by Mr. Bogard's attorney to get reconsideration of the temporary Order, the chancellor ignored such efforts and did not make any specific findings or rulings regarding the matter of the legality or fraud regarding the loan at 838 St. Paul. In failing to properly review the legality of this loan with respect to Mr. Bogard's affiliation with it and despite his assertions of fraud was a denial of Mr. Bogard's due process rights. This matter was never even heard before Mr. Bogard was made responsible for its payment.

In rendering a contempt order, even though it is called "temporary in nature" without specifying whether it is criminal or civil was a violation of Mr. Board's due process rights. He was not in a position to know the gravity of the charges being waged against him. If the contempt action was criminal in nature, Mr. Bougard was entitled to have legal representation or appointed legal council if he could not afford an attorney before the order was rendered. He also was entitled to a whole host of procedural protections afforded to criminal

defendants. Even if the contempt action was civil in nature, Mr. Bougard was entitled to have it clearly explained that the case could result in his incarceration.

Thirdly, there were never any clear findings of fact prior to make the alimony award in the Order For Temporary Relief. The case law is clear that the chancellor must make some findings of fact prior to rendering an alimony award or an award of property, even though it is disguised as a "temporary order".

Lastly, with respect to the Final Divorce decree, it must be clear that all of the issues aof the divorce have been resolved by the parties. In the instant case, Mr. Bougard raised additional issues in his Amended Answer To Complaint For Divorce And Temporary Relief, Motion To Dismiss, And Defendant's Counter Complaint For Relief. Filed on March 6, 2007. (Rec.115-117). He also filed a Motion To Set Aside Contempt Order on or about the same date. (Rec. 118-119). Additionally, Mr. Bougard filed the Civil Warrant in Shelby County, Tennessee regarding the fraudulent loan on property at 838 At. Paul, Byhalia, Mississippi. (Rec. 120). All of these filings were after the

**Agreed Order For Withdrawal of Grounds And Stipulation To Allow
Court To Resolve Property Issues on February 15, 2005. (Rec. 82).**

**All of these filings indicate that the stioulation or settlement was not
Complete or final and binding.**

ARGUMENT AND AUTHORITIES

1. The Chancellor erred by failing to consider all relevant evidence in the case or to make a ruling on significant motions.

At least two times motions were filed to set aside or dismiss the Order For Temporary Relief (Rec. 21). Mr. Bougard's Motion To Reconsider was filed on October 13, 2004 (Rec. 33) Attorney Sidney Beck.

Secondly, the Motion to set Aside Contempt Order was filed by Attorney Karen Tyler on or about March 14, 2007. (Rec. 118-119).

The Chancellor failed to make a ruling on either filing or make a finding with respect to them. In essence, these requests were ignored by the court. The court was so consumed with finding contempt of court, that these motions were ignored and no ruling or order was placed in the record.

The Mississippi Court of Appeals has held that:

A court is better equipped to review disputed issues if the chancellor make a specific findings in granting a divorce; however, a reviewing court should reverse and remand only where the failure to make sufficient findings of fact and conclusions of law constitute manifest error. Caldwell v. Caldwell, 805 So. 2d 659 (Miss. 2002)

The court's failure to make a conclusion of law here was a manifest error. In addition to being a manifest error, Mr. Bougard was denied

basic due process in that his defenses were not heard or considered.

The Mississippi Court of Appeals has held that :

**In a domestic relations cases the appellate court
Must affirm the chancellors decision unless the
Chancellor's decision is manifestly wrong , and the word
"manifest" as defined in this context means unmistakable,
clear, plain, or indisputable. Lowrey v. Lowrey, 919 So. 2d
1112, rehearing denied, certiorari denied 921 So. 2d 1279
(Miss. App. 2005)**

**In failing to hear these motions, the threat of incarceration was held
over Mr. Bougard's head in every court setting. And the matter evaded
appeal since no order was rendered. Appellee states at page 9 of her
brief that:**

**"[T]he finding the Court constituted that of a
Temporary one. Any further presentation of evidence
In contradiction of the Court's finding was reserved for a
final trial of the matter."**

**However, in negotiations at the final trial stage, Appellee's counsel used
the threat of contempt which was not addressed despite Appellant's
prior motions which were ignored by the Chancellor after the
temporary hearing.**

II. The Chancellor erred in failing to make specific written findings of fact in the case.

Mr. Bougard had raised issues of fraud in his pleadings. This is a significant issue of fact in this case as it reflects on the equity issues in any award of alimony or property distribution. Mr. Bougard also stated fraud on the part of Appellee. The chancellor failed to make specific findings on the issue of fraud at any point during this case.

Chancellor's failure to make record of his findings of fact and conclusions of law regarding equitable distribution of marital estate was manifest error, requiring remand to make specific findings of fact and conclusions of law to support equitable division of assets. Gray v. Gray, 909 So. 2d 108 (Miss. App. 2005)

Appellee states in her brief that the parties entered a voluntary settlement agreement, negating the need for any analysis or award by the court. However, it should be noted that the court had already made an award in its earlier temporary order. As a result of this, the threat of contempt was held over Mr. Bougard in any settlement negotiations.

This is the same Order for Temporary relief that had evaded any further review after its being placed in motion on July 30, 2004.

(Rec.21).

III. The Chancellor erred in signing and seeking to enforce a settlement Agreement that did not address all relevant issues in the case.

The law is clear that where the circumstances in a case indicate that the settlement agreement was not clearly voluntary, but was motivated by strong arm tactics, fraud, or fear as in the instant case, it is not binding.

Wife could not have been forced to abide by agreement to irreconcilable differences divorce even though both parties stated that they agreed to divorce on ground of irreconcilable differences, and wife's answer and counterclaim amounted to a contest or denial until withdrawn or cancelled by leave and order of Chancery Court. Heatherly vs. Heatherly, 914 So. 2d 754 (Miss. App. 2005)

Ex-husband and ex-wife were bound by their agreement announced in open court as to modification of original divorce decree even before it was reduced to formal written order, where intention to be bound by agreement was reflected by circumstances of announcing it in open court, reciting terms of settlement into record, and agreeing to end hearing and there was no showing that final written order did not reflect agreement announced in court or that mutual mistake or fraud permitted modification of agreement. McDonald v. McDonald, 850 So. 2d 1182 (Miss. App. 2002)

In the instant case, Mr. Bougard filed an Amended Answer to Complaint for Divorce and Temporary Relief on March 6, 2007.

(Rec. 115-117). Although Appellee's attorney filed a Motion To strike, there was no hearing on the motion or order by the court.

IV. The procedures applied in rendering the Order for Temporary Relief were violative of Mr. Bougard's due process and the Sixth Amendment of the United states Constitution.

First, the temporary relief order is rendered on July 30, 2004. (Rec. 21-22). Mr. Bougard was not represented by an attorney. The Chancellor rendered an order with respect to monies owed. The evidence which he used was hearsay and not credible. Despite Mr. Bougard's subsequent motions to set aside the order, his efforts were ignored. The court subsequently found contempt in this case without ruling whether the same was criminal or civil contempt. Mr. Bougard served 13 days in jail without having a right to a fair trial or legal representation prior to the rendering of the temporary order. Because this matter was disguised as a temporary order, the gravity of the ruling was not evident to Mr. Bougard. Moreover, the Chancellor did not make a ruling as to the equity or basis for his order of alimony and property distribution.

Once Mr. Bougard was incarcerated for contempt, this matter Became quasi-criminal in nature. He was not provided proper notice of the charges against him or sufficient notice of the potential incarceration. Because the temporary order was put in place on Mr.

Bougard's first appearance in court, he did have proper notice or time to defend himself at the hearing. Even after obtaining Mr. Beck, the Chancellor refused to hold a subsequent hearing to reconsider the temporary order.

CONCLUSION

For all of the reasons herein stated, Mr. Bougard requests that the order of divorce and the temporary order in this case be set aside with a remand for appropriate hearings consistent with due process requirements and principles of equity in the award of alimony and property distribution. Appellant also requests a refund of all costs payments, and attorney fees paid in this case.

CERTIFICATE OF SERVICE

THIS WILL CERTIFY THAT I, THE UNDERSIGNED ATTORNEY FOR Appellant, Charles Bougard, have this date delivered a true and correct copy of the above and foregoing Reply Brief to all counsel of record by placing a copy in the United States Mail, postage prepaid addressed as follows:

**Attorney Amanda Smith Whaley
Post Office Drawer 849
Holly Springs, Mississippi 38635**