NO. 2007-CA-00868

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PATRICK DELIMAN AND JANE DELIMAN
Appellants

Vs.

ANTHONY CLARKE THOMAS AND ACT ENVIRONMENTAL, INC.,
Appellees

On Appeal from the Chancery Court
of Madison County, Mississippi
Docket No. 2005-0744

REPLY BRIEF OF APPELLANTS

Oral Argument is not requested

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules and Other Authorities

REBUTTAL

I. The Defendants offer no response to the fact that they engaged in arguments estopped by the doctrine of judicial estoppel when they denied default after expressly acknowledging in pleadings and testimony that they understood default meant the actual failure to timely deliver payment, and that occurrence of default would immediately lift the stay of execution under Chancellor Lutz's final judgment

Chancellor Brewer heard the testimony of Thomas indicating he understood Judge Lutz's final judgment to impose a strict requirement that installment payments in satisfaction of the judgment had to be at Tyner Law Firm, P.A. on or before the 30th of each month. [T. at 350, 358]. The court record contained the Defendants' election acknowledging that the consequence of failure to ensure that payment was timely delivered to Tyner Law Firm, P.A. was that the execution stay would immediately lift and the Delimans would be able to proceed with execution to collect the judgment. [R. at 321]. The Delimans asked Chancellor Brewer to dismiss the Defendants' motion in light of this overwhelming evidence, but the Court inexplicably denied the request. [T. at 369].

In their Brief the Defendants do not even attempt address the fact that they engaged in conduct subject to judicial estoppel when they argued that they did not default under the provisions of Chancellor Lutz's final judgment. However, the Defendants would not be able to offer a meritorious response even if they had bothered to do so, because Thomas by his testimony and pleadings admitted default. His testimony and election clearly indicated to the Court and the Delimans that the Defendants understood the strict nature of the obligation and that mere mailing without successful timely delivery would not suffice. Accordingly, the Defendants' arguments suggesting that "good faith efforts" to comply, without actual compliance, were sufficient, or that some

two-step process was required after default in order for the execution stay to lift, fly directly in the face of their previous positions on these issues.

Chancellor Brewer inexplicably failed to apply the doctrine of judicial estoppel in the instant case in circumstances where the Defendants were basically playing legal games with the Delimans and the Court. This is the sort of ruse the doctrines of estoppel were designed to prevent, and the Chancellor erred in not estopping and dismissing the Defendants' motions.

II. Whether the chancellor did equity in the case is an issue that is properly before this Court

The Defendants suggest that the issue of whether they were proceeding with their motions in proper observance of the maxims of equity was not before Chancellor Brewer, and therefore, not preserved for appeal. They suggest that considerations of equity were not an issue decided, or to be decided, by the Chancellor. Respectfully, this argument evokes the appearance that the Defendants have been and continue to be completely blind to the reality that Mississippi's Chancery Courts are fundamentally courts of equity. They do not bother to present a case for why equity was served by their motions, where the Defendants' admissions and pleadings to the contrary indicate that they had defaulted on the December payment.

Mississippi's chancery courts are courts of equity, and under the clean hands doctrine, anyone that comes before "a court of equity ... must do equity as a condition of recovery." *Dill v. Dill,* 908 So.2d 198, 202 (Miss. Ct. App. 2005); *Galloway v. Inglis,* 138 Miss. 350, 359, 103 So. 147, 149 (1925); *see also* Billy G. Bridges & James W. Shelson, GRIFFITH MISSISSIPPI CHANCERY PRACTICE §§ 42-43 (2000 ed.). The Mississippi Supreme Court has stated, "[T]he principles of equity and righteous dealing

[are] the purpose of the very jurisdiction of the [chancery] court to sustain." *R.K. V. R.K.*, 946 So.2d 764, 774 (Miss. 2007)[1]; *Shelton v. Shelton,* 477 So.2d 1357, 1358-59 (Miss.1985).

Respectfully, the Delimans submit that Chancellor Brewer, as a judge presiding over a court of equity, did not need them to constantly remind the Court that equity was the underlying purpose and responsibility of the Court in adjudicating the Defendants' motions. However, Chancellor Brewer essentially put down every attempt made by Delimans' counsel to point out that the Defendants, given their prior conduct in the case, admissions and pleadings were coming to the Court in offense to equity. On cross-examination of Defendant Thomas, the Delimans' counsel attempted to ask questions about previous events in the case, including Thomas' prior testimony. [T. at 364]. Upon objection, the Court asked Delimans' counsel why he was asking the questions. [*Id.*]. He responded that his purpose was to test Thomas' veracity, and before he could even explain that prior events in the case bore heavily upon the merit and equity of Thomas' motions, Chancellor Brewer cut counsel off and curtly stated that these considerations did not matter to her. [*Id.*]. This however did not deter the Defendants from discussing the

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[1] The Mississippi Supreme Court further elaborated in *R.K. V. R.K.*, 946 So.2d 764, 774 (Miss. 2007) that:

It is one of the oldest and most well known maxims that one seeking relief in equity must come with clean hands or face refusal by the court to aid in securing any right or granting any remedy. *Id.; See also Cole v. Hood,* 371 So.2d 861, 863-64 (Miss.1979) (those who seek equitable relief must do so with clean hands); *Thigpen v. Kennedy,* 238 So.2d 744, 746 (Miss.1970) (same); *Taliaferro v. Ferguson,* 205 Miss. 129, 143, 38 So.2d 471, 473 (1949) (same). In other words, whenever a party seeks to employ the judicial machinery in order to obtain some remedy and that party has violated good faith or some other equitable principle, "the doors of the court will be shut against him" and "the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." *Shelton,* 477 So.2d at 1359.

"totality of the circumstances" in arguing that Thomas "tried to make his payments on time" and was "trying to be a good soldier in this...." [T. at 376.]. Mr. Tyner explained to the Court that Chancellor Lutz's judgment was necessitated by the dishonesty and manipulations of the Defendants, with the Court pursuant to objection once again cutting him off when he was attempting to explain the impropriety of the Defendants' motions. The Chancellor stated she would not consider what counsel was attempting to bring to her attention, because that would involve "going behind the judgment." [T. at 382]. This ruling ignored the fact that Chancellor Lutz memorialized in his written findings and orders as discussed in the Delimans' Principle Brief the dishonest and inequitable conduct of the Defendants.

The Delimans' counsel correctly asserted that the Defendants were arguing a shift of burden upon the Delimans to make sure Thomas would meet his obligation to ensure payment was at Tyner Law Firm, P.A. on or before the 30th of each month. [T. at 383]. He further pointed out that it would be inequitable to the Delimans to be at risk for three more years. [T. at 387].

Between counsel's interrupted attempts to ask questions and arguments bearing on considerations of equity and clean hands, even if equity were not an intrinsic consideration in every cause before the Chancery Court, it is clear the Delimans asked the Court to consider these issues. Further, the totality of the circumstances in this case show the Chancellor erred in failing to shut the door on the Defendants' motions which were brought in disservice and offense to equitable principles.

III. The meaning of the term "make payment" as set forth in Chancellor Lutz's final judgment was understood by all parties, including the Defendants, to mean engagement in or performance of the judgment payment obligation by actual delivery of the money on or before the 30th of each month

The Defendants suggest this Court should consider the case of *Lynch v. Miss. Farm Bureau Cas. Ins. Co.*, 880 So.2d 1065, 1071 (Miss. Ct. App. 2004) and apply a contract law construction upon the clear language of Chancellor Lutz's final judgment.

The Appellees' reliance on *Lynch* is misplaced. First, the Court recognized that a contractual instrument could establish that a payment be made by delivery on or before a certain date. *Id.* at pg. 1069. In *Lynch* the Court interpreted the terminology "paid on or before...expiration of the current term..." to mean payment would be timely upon delivery, not deposit in the mail. *Id* at pg. 1070.

The Defendants admit that the Chancellor was constrained to interpret the language of the applicable judgment in accord with the "intent of the court...as gathered...from all parts of the judgment itself." *Balius v. Gaines,* 908 So.2d 791, 798 (¶16) (Miss.Ct.App. 2005). The Defendants never actually analyze all parts of the judgments to determine if Chancellor Lutz's intent was to equate the term "make monthly payments to the Tyner Law Firm of $1,500 a month, on or before the 30th of each month" to mean placing the check in the mail. The entire language of the operative provisions is as follows:

> IT IS FURTHER ORDERED AND ADJUDGED that Patrick N. Deliman and Jane M. Deliman are awarded a judgment of $44,163.75 plus interest at eight percent (8%), Execution of which is stayed, to allow Anthony Clarke Thomas and ACT Environmental, Inc., to pay the entire the amount or before October 30, 2006; or, elect to make monthly payments to the Tyner Law Firm of $1,500 a

> month, on or before the 30th of each month, until paid in full. Anthony Clarke Thomas and ACT Environmental, Inc. shall select a plan of payment by no later than October 20, 2006; by making an election in writing to the Tyner Law Firm and filing a copy of the election with the Court. Should Anthony Clark Thomas or ACT Environmental, Inc. Miss one (1) payment or default on any payment or fail to make an election by October 20, 2006, the stay of execution will immediately lift and the Delimans may execute this judgment." [R. at 320].

The Defendants insist that there is ambiguity in Chancellor Lutz's judgment concerning what he meant by the term "make payment." As the Defendants note in their Brief, when questions of meaning are present as to a judgment, the rules of construction applicable to other similar legal documents may be applied. *Estate of Stamper v. Edwards,* 607 So.2d 1141, 1145 (Miss. 1992). Without explanation, the Defendants announce that this Court should analogize Chancellor Lutz's judgment to contracts of insurance and attempt to resolve the "ambiguity" as if the judgment were some sort of contract. This suggestion ignores the fact that the judgment, as the source of law for this case, is much more analogous to a statutory writing than a contract which is the product of a bargaining relationship between two parties. Rules of construction applied to contract interpretation disputes, such as the assumption that ambiguous and unclear insurance policy language must be resolved in favor of the non-drafting party (*See Anglin v. Gulf Guar. Life Ins. Co.*, 956 So. 2d 853 (Miss. 2007)), have no proper application in the context of interpreting judgment language. The Defendants seek to convince this Court that the clear language of the Chancellor's judgment is "ambiguous," so they can attempt to extrapolate piece meal some favorable, inapplicable assumption from arena of contract law.

Chancellor Lutz's judgment is the document from which the law of this case springs; his promulgations should be interpreted by application of the ordinary rules governing statutory construction. As discussed in the Delimans' Principle Brief, the first rule of construction in this case is to apply the provisions of Judge Lutz's judgment literally according to the plain meaning of the judgment language. If after analysis of all parts of the judgment the language of the provisions is plain, unambiguous, and clear and definite in meaning, there is no occasion to apply the inferential rules of statutory construction. However, if the conditions necessitating the application of inferential rules of construction are present, then the meaning of all words and phrases contained in the promulgations will be construed in accordance with their ordinary acceptance and meaning. The Court should endeavor to discern meaning of words in their "popular sense." Inferential rules of construction cannot be used to create exceptions to the promulgations, where no exception appears plainly from the express words and necessary application of the provisions.

The Defendants' entire argument rests on two assumptions: (1) that Chancellor Lutz did not plainly say payment must be actually paid on or before the 30th of each month, meaning, in Defendant Thomas' own words, "[i]t's something that has to be there at a certain time...." [T. at 350], and (2) that it is appropriate to ignore the language in the judgment in applying rules of construction; instead, the Court should borrow a contract law assumption and avoid resolving any ambiguities by considering the language of the judgment as a whole.

A thoughtful analysis of Chancellor Lutz's judgment reveals his plain intent that "making payment" on or before the 30th of each month meant actually paying it; not good

faith efforts to try and timely pay, and certainly not some vague mail-in safe-harbor for the wrongful party in this case, with some shift of burden upon the Delimans to make sure the Defendants would meet their obligations. First, it is clear that Chancellor Lutz gave the Defendants the option to pay the entire amount of the judgment plus interest on or before October 30, 2006. Payment ordinarily means "performance of an obligation, usu. by the delivery of money." Black's Law Dictionary 1150 (7th ed. 1999). Therefore, the Defendants could have performed payment by delivery of funds equal to the entire amount of the judgment on or before October 30, 2006. There is no reasonable indication in this provision that the Chancellor meant anything other than actual performance. However, the Defendants argue that adding the word "make" suddenly changes actual performance into a mail in requirement. A commonly accepted definition for the word "make" is to "engage in" or "to perform" an act. The American Heritage Dictionary of the English Language 788 (1975). Therefore, the ordinary meaning of the words "make payment" is to engage in or perform a monetary obligation by the delivery of money.

It is helpful to consider how the Court and the parties understood the term "making election in writing to the Tyner Law Firm and filing a copy of the election with the Court." [R. at 320]. If the Defendants, who now argue that mere mailing equated to making payment, understood that making an election and filing the same with the Court as mandated by the judgment meant simply dropping these documents in the mail by October 20, 2006, then at least their arguments would be consistent. However, it is clear by their actions that the Defendants interpreted both "making election" and filing the same with the Court to mean the actual acts of election and filing had to be completed by October 20, 2006. The Defendants' Notice of Election was stamped filed on October 20,

2006. [R. at 321]. Further, the Defendants made "an election in writing to Tyner Law Firm" by making certain the writing was actually delivered by hand to Tyner Law Firm on October 20, 2006. [R. at 322, 323]. Why did the Defendants do this? It was because they knew "making election" did not mean mailing it, it meant the actual act of election had to be completed by October 20, 2006.

Consistent with the meaning of the term "make election" in the judgment, the Defendants also understood that "make payment" meant actually paying the $1,500 on or before the 30th of each month, not simply mailing it. This is clear when Thomas testified that "[t]his is a legal matter. It's not a car note or mortgage payment or whatever. It's something that *has to be there at a certain time.*" (emphasis added)[T. at 350]. Mr. Thomas was asked, "[y]ou understand that you are supposed to make these payments, and they are to be at Tyner Law Firm before the 30th of the month; is that correct?" [T. at 358]. He responded, "That's correct. Yes." [*Id.*].

Apparently, when Thomas sent the December payment by certified mail, a problem with the mail interfered with the payment being at Tyner Law Firm by December 31. However, Thomas, knowing he had selected a form of mailing that he could check and the he would receive a delivery confirmation card, never tracked the status of mailing even after he failed to get the confirmation card back. [T. at 359-60]. Although the failure to get the card back should have alerted Thomas to the possibility that his mailing had gone awry, he decided to do nothing to see if a problem had occurred until some six weeks after the payment was due. [T. at 360]. The Defendants knew from the outset "make payment" meant performing the actual act, not simply mailing it, and

their testimony and arguments in the trial court are completely contradictory to their current attempt to flee the clear terms of the Chancellor's judgment regarding payment.

IV. Rebuttal to miscellaneous issues

The Defendants inaccurately suggest that the Delimans do not cite the record, or transcript, or case law in support of their arguments that the Defendants knew they were obligated to actually pay by the end of month, and that failure to do so would constitute a default. With due respect, this assertion is absurd. The Defendants tell this Court they can legitimately ignore "the facts contained in pages 2-13 of Delimans' Brief" because they deem the briefing to "convolute the issues." [Brief of Appellees, pg. 3, footnote 3]. The Defendants tell this Court that they will only address facts "pertinent and necessary" to the issues they are comfortable briefing, but conveniently forget that the issues involved in this case extend to considerations of equity, estoppel and alleged improper acts of Delimans' counsel requiring a *de novo* review of the entire record of the case.

The Delimans on pages 2-3 of their Principle Brief present the nature of the underlying lawsuit. Pages 2-12 discuss the conduct of the Defendants in the course of litigation to illustrate a simple fact; the Defendants, particularly Thomas, have acted inequitably towards the Delimans and the Court. Chancellor Brewer apparently regarded consideration of the entire record of the case as "going behind the judgment," notwithstanding the fact that Chancellor Lutz expressly set forth his findings on issues of equity and credibility in multiple orders filed in the case. In his Order Denying (Second) Amended Motion to Set Aside Default Judgment Judge Lutz noted his firm belief that Thomas had lied under oath in the April 12, 2006 hearing. Judge Lutz also discerned a pattern of dishonesty by Thomas through out the case, in pleadings and before the Court,

and noted that Thomas through his deception and manipulation made the litigation necessary. By ignoring these facts, the Defendants tacitly confess that they cannot dispute their lack of equity and questionable credibility.

The Defendants misconstrue the Delimans' arguments about the right to pursue garnishment proceedings on Chancery Court money judgments. They think the Delimans "admit" the law is "not exactly clear" regarding garnishment proceedings. The Deliman's discuss some of the applicable laws, Miss. Code Ann. §§ 11-5-81, 11-5-79, and 11-35-1, in pages 24-25 of their Principle Brief. The Defendants fail to discuss the force and effect of Sections 11-5-79 and 11-35-1, mainly because these provisions clarify that Chancellor Lutz's judgment had the same force, operation, and effect of a judgment at law in the circuit court, and that the same would be subject to writ of garnishment.

The Delimans have assiduously argued that Chancellor Lutz's provision of an immediate right to execute upon default was in complete conformity with the statutory provisions governing execution in cases of this type; hence, when the stay lifted in these cases, the Delimans by statute could cause execution to issue as provided for under Miss. Code Ann. §§ 11-5-81, 11-5-79, and 11-35-1 for the amount of the judgment. Further, the Plaintiffs met the burden set forth in *State Farm Mut. Auto. Ins. Co. v. Eakins,* 748 So.2d 765, 767 (Miss. 1999), because it is clear the Defendants were indebted to the Delimans' owing to Chancellor Lutz's final judgment. *See State Farm Mut. Auto. Ins. Co. v. Eakins,* 748 So.2d 765, 767 (Miss. 1999).

A submission of supporting evidence is required for a court to award damages and attorney's fees and to determine what amount is appropriate. *Rich ex rel. Brown v. Nevels,* 578 So.2d 609, 617 (Miss.1991); *Indymac Bank, F.S.B. v. Young,*

966 So.2d 1286, 1291 (Miss. Ct. App. 2007). In order to meet this requirement, even if an award of some amount of attorney fee were justified, Chancellor Brewer was required to conduct an evidentiary hearing to determine the appropriate amount of attorney's fees to be awarded. *Indymac,* 966 So.2d at 1291. Chancellor Brewer considered nothing more than the arguments of counsel, and no supporting evidence, in arriving at an assessment of attorney's fees. Of course, the Delimans would continue to submit that their counsel, in light of the facts of this case, did not violate any provision the Litigation Accountability Act as discussed in their Principle Brief. There was certainly a colorable basis and reason for the Delimans to proceed with execution. Accordingly, the Chancellor's findings concerning violation of the Litigation Accountability Act and attorney's fees were clearly in error.

CONCLUSION

The Defendants were not entitled to any relief from the Chancery Court. They admitted default and their motions should have been dismissed under the doctrines of equity, unclean hands and judicial estoppel. Further, the uncontroverted evidence before the Chancellor showed the Defendants knew the strict nature of the payment obligation and that they had failed to comply with it. The Chancellor manifestly and clearly erred in holding the Defendants had complied with Chancellor Lutz's final judgment, that alleged good faith efforts to comply were sufficient, and that the Delimans did not benefit from immediate rights of execution upon default. The Chancellor erred in finding that Delimans' counsel had acted in bad faith in light of the fact that there was a colorable claim that the Defendants had defaulted and that the stay of execution had immediately lifted. Accordingly, this Honorable Court should reverse the Chancellor on all grounds

presented and render an order granting entitlement of the Delimans to immediately execute on the full of amount of the judgment remaining, together with all the interest and recoverable costs the Delimans are entitled to under the law. Further, the basis for this appeal is meritorious and this Court should deny any and all relief the Appellees seek under the provisions of Miss. R. App. P. 38.

RESPECTFULLY SUBMITTED, this the 12th day of May, 2008.

By: _____
Mark T. McLeod, Esq. (MSB NO. [redacted]
Tyner Law Firm, PA
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I, the undersigned counsel for Patrick and Jane Deliman do hereby certify that I have this day mailed a true and correct copy of the above and foregoing document by U.S. Mail, postage prepaid thereon, to the following:

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THIS, the 12th day of May, 2008.

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