

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-TS-00414

JOHN BOYCE TALBERT, III

APPELLANT

VS.

DEBORAH A. TALBERT

APPELLEE

APPEAL FROM
CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI
CAUSE NO. 2002-0943

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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ADDENDUM

Court Annexed Mediation Rules for Civil Litigation

REPLY OF THE APPELLANT JOHN BOYCE TALBERT, III

Arguments of The Appellee Deborah A. Talbert ("Debby"):

- I. THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION IN DENYING BOYCE TALBERT'S MOTION FOR TERMINATION OR MODIFICATION OF HIS SUPPORT OBLIGATIONS.

BOYCE'S REPLY TO DEBBY'S ISSUE I:

The trial court abused its discretion, committed manifest error and erred as a matter of law in denying a modification for John Boyce Talbert, III ("Boyce"). In support of her argument, Debby takes the position in her brief that because Boyce agreed to pay the sums set out in the divorce judgment, Boyce's effort to modify the divorce judgment obligations should be subjected to heightened scrutiny.

This argument is dangerous, because if heightened scrutiny is to be applied to modification requests for agreed obligations, attorneys will be reluctant to advise clients to agree to anything of substance in any family law case. This reluctance to agree will surely result in more cases being litigated in chancery courts that are already struggling with overcrowded dockets. It is well settled and axiomatic that "Mississippi law encourages compromise and settlement of litigation in order to, *inter alia*, expeditiously resolve conflicts between parties." *Fortenberry v. Parker*, 754 So.2d 561, 564 (¶13) (Miss.Ct.App.2000), citing *McBride v. Chevron U.S.A.*, 673 So.2d 372, 379 (Miss.1996). When the trial and appellate courts require a more onerous modification burden for litigants who settle, the courts are discouraging agreements and settlements.

The practical result is that litigants would be faced with higher litigation costs and the courts would be burdened with more trials and would be forced to devote limited time

and resources to writing more opinions. Agreed and modifiable obligations, especially between adults in a divorce setting, should be treated no differently than obligations imposed on a spouse after litigation. The concept that litigants should be encouraged to settle their differences and minimize costly and time-consuming litigation is set out in *Fortenberry v. Parker* and in this Court's jurisprudence over many years. A higher scrutiny for modification of agreed obligations discourages, rather than encourages, agreements and settlements.

In further support of Boyce's argument that the trial court should not have subjected his modification request to higher scrutiny because he agreed to the obligations, one need look no further than the *Court Annexed Mediation Rules for Civil Litigation*. The stated policy of courts in Mississippi is set forth at the beginning of the mediation rules:

I. POLICY

It shall be the policy of the courts of the State of Mississippi
(1) to encourage the peaceable resolution of disputes and early settlement of pending litigation by voluntary action of the parties, and (2) to identify cases appropriate for referral to mediation pursuant to the guidelines set out in these rules.

See *Court Annexed Mediation Rules for Civil Litigation*, section I (copy attached).

Boyce and Debby settled their case by agreement following a mediation. Now, the trial court and Debby seek to punish Boyce for agreeing to a peaceable and early resolution of Boyce and Debby's divorce disputes by requiring Boyce to now meet some sort of amorphous heightened scrutiny standard. The trial court clearly used a heightened standard of scrutiny, which is evident in the trial court's citing with favor the case of *Morris v. Morris*, 541 So.2d 1040 (Miss.1989) for the proposition that "When, as in this case, a provision for periodic alimony is based upon the agreement of the parties, that provision

should not be modified without close scrutiny.” R.E. 33. Subjecting Boyce and other similarly-situated litigants to heightened scrutiny in a modification action discourages peaceable and early resolution of disputes. The trial court abused its discretion, was manifestly in error, and erred as a matter of law by denying Boyce’s modification petition using a heightened scrutiny standard. With all due respect, the trial court’s abuse of discretion, manifest error, and error as a matter of law requires reversal.

This Court should abandon any requirement and overrule any and all precedent that subjects spouses and litigants who reach agreements and settlements in divorce cases to a higher level of modification scrutiny. To continue to allow trial courts to, in effect, punish litigants who reached an agreement with their spouse by subjecting settling spouses to higher levels of modification scrutiny flies in the face of the stated public policy of this Court that litigants should be encouraged to settle their differences.

Debby then admits [at least tacitly] in her brief on page five (5) that the trial court did not make the requisite findings using the *Armstrong* factors. Debby then claims that the trial court’s failure to conduct an *Armstrong* analysis is not fatal. It is well settled that the *Armstrong* factors should be considered in both an initial alimony determination and a modification proceeding. *Jones v. Jones*, 917 So.2d, 95, (¶11) (Miss.Ct.App.2005) (internal citations omitted). With all due respect, the trial court’s opinion and judgment is almost totally devoid of any substantive *Armstrong* analysis. R.E. 32-36. This argument by Debby is misplaced, because the trial court in the instant case almost totally failed to engage in any substantive *Armstrong* analysis at all. The trial court totally ignored unrebutted expert and lay evidence regarding the relative financial positions of Debby and Boyce at the time of the divorce and at the time of the modification proceeding. It is manifest error and

error as a matter of law for a trial court to ignore Boyce's unrebutted, substantial credible evidence that is set forth in this record. The manifest error and error as a matter of law by the trial court requires reversal.

Debby argues that Boyce based his request for a modification on his severe glaucoma and on market conditions. In fact, Debby argues incorrectly that "The only other factor upon which Boyce relied at trial is the general condition of the market". See Debby's brief at page seven (7).

The substantial and credible evidence presented to the court shows that Boyce's request for a modification of his obligations was based on much more than severe glaucoma and market conditions. For example, the record contains substantial and credible evidence of a material change in circumstances not only in Boyce's circumstances, but also in Debby's circumstances. The record contains specific and unrebutted evidence of the material changes in the relative financial positions of Boyce and Debby. For example, the trial court totally ignored the unrebutted evidence that the after tax costs to Boyce of his alimony and medical insurance obligations more than doubled between 2003 and June of 2007 from \$2,376.00 per month to \$4,868.00 per month. R.E. 63-64. The trial court also totally ignored the critical and unrebutted evidence that Boyce's current obligations exceeded his total income at the time of trial. R.E. 63-64.¹ The trial court also ignores the clear and unrebutted evidence that Debby's standard of living and monthly expenses dropped by sixty percent (60%) since the divorce. R.E. 54-56. Further, the trial court never addresses and totally ignores the unrebutted evidence from Boyce's expert that in the last full year leading up to the modification proceeding, Debby's income from her occupation

¹ Even without a full blown *Armstrong* analysis, this factor alone strongly supports a modification in the absence of bad faith by Boyce to avoid his obligations.

(emphasis added) was \$67,000.00 more than Boyce's 2006 income from his occupation.

R.E. 96, lines 2-13.

The trial court never cites any specific example of any bad faith or any attempt by Boyce to shirk his obligations. Critically, the trial court makes the following finding without citing any specific evidentiary support for this finding: "The evidence presented revealed that Boyce is more a victim of his poor business decisions catching up with him than a victim of unforeseeable forces". See R.E. 37. The trial court never cites to any specific evidence in the record regarding what the trial court means by "...evidence presented revealed...". Therefore, the trial court's opinion and judgment is not based on substantial credible evidence and the trial court abused its discretion in denying Boyce's request for a modification.

Debbie then argues that "...it was proper for the trial court not to consider the same (i.e. increase in premiums) in ruling upon Boyce's petition". See Debby's brief at page 10. With all due respect to counsel opposite, this claim by Debby misses much, if not all, of the point. One of the *Armstrong* factors is "The tax consequences of the spousal support order." *Jones v. Jones*, 917 So.2d, 95, 99 (¶10)(Miss.Ct.App.2005). The un rebutted evidence in the record shows that Boyce's after-tax cost of his alimony and medical insurance obligations more than doubled between 2003 and June of 2007 from \$2,376.00 per month to \$4,868.00 per month. See R.E. 63-64. Clearly, the evidence showed that the after-tax cost of his obligations doubled, and the trial court and Debby simply refuse to acknowledge that the tax issue plays a vital role in the analysis of this case.

To illustrate this point, one can pose the following hypothetical question: What if Boyce's income had doubled, and the after-tax cost of Boyce's obligations had dropped

materially? Debby could then make the argument that she was entitled to a modification that increased Boyce's obligations because Boyce's after-tax cost of his obligations dropped. In order to prevail on this hypothetical argument, Debby would be required to present evidence of Boyce's lower after-tax cost to support her hypothetical claim for an increase in alimony. Therefore, for the trial court and Debby to focus only on the increasing premium and to totally ignore the actual after-tax cost of Boyce's obligations misses the point, and totally ignores the critical tax factor that is inherent in a proper *Armstrong* analysis.

Debby then argues that Boyce's petition was barred by his contempt. First of all, this argument by Debby was never raised in any post-trial motion or in a cross-appeal. Secondly, the trial court obviously did not bar Boyce's petition under the clean hands doctrine, because the trial court denied Boyce's petition on grounds that have nothing to do with the clean hands doctrine. If the trial court was of the opinion that Boyce's petition was barred by the clean hands doctrine, then the trial court could simply have denied and dismissed the petition on that ground, rather than rendering an opinion and judgment on the merits (or in this case the perceived non-merits) of Boyce's petition.

Further, Debby's clean hands argument in her brief at pages 10-11 totally fails to point out to this Court that Boyce was current on all of his alimony and insurance obligations at the time of the trial. Debby never argues that Boyce was entering the court with unclean hands with regard to alimony and insurance obligations. Therefore, Debby's argument that Boyce should be barred from seeking a modification of obligations for which he was current is without merit.

In support of this reply argument, the case of *O'Neill v. O'Neill*, 551 So.2d 228, 233 (Miss.1989), cited by Debby at page eleven (11) of her brief, stands for the proposition that Boyce would be barred from relief "...with respect to the matter in question...". See *O'Neill* at 233. The matter(s) in question, at a minimum, was (were) Boyce's alimony and medical insurance obligations, all of which were current at the time of trial. Therefore, *O'Neill* actually supports Boyce's argument that his modification claims were not barred, because Boyce was current on his alimony and medical insurance obligations. This argument by Debby, with all due respect to counsel opposite, is without merit. The trial court did not utilize the clean hands doctrine to deny Boyce's requested relief, and Debby simply can not argue at the appellate level that the trial court should have barred Boyce's petition under the clean hands doctrine.

Debby then argues that Boyce is asking the court to penalize Debby for working and earning an income. This argument is misplaced and fails to point out that Debby's income of \$0.00 at the time of the divorce was "truthful", by Debby's own admission. R.E. 47 and R.E. 51 ("Acknowledgement of Truthfulness"). Further, this argument fails to recognize the substantial evidence in the record showing that Debby's standard of living decreased by roughly sixty percent (60%) since the divorce, and her income increased from \$0.00 to more than \$1,800.00 per month. One end result of the change in circumstances since the divorce is that in the divorce agreement, Debby agreed to alimony that was equal to approximately 31.5% of Debby's monthly expenses and monthly standard of living. See Transcript page 37, lines 1-18. At the modification trial, Debby admitted that her standard of living was now roughly \$4,000.00 per month. R.E. 78. Therefore, Boyce's alimony of \$3,300.00 per month now pays for more than 80 % of Debby's monthly expenses and standard of

living. Debby's much lower standard of living is clearly a material change in circumstances since the divorce. The trial court totally ignored this critical and unchallenged material change that Boyce presented at trial.

II. THE TRIAL COURT DID NOT MODIFY OR RE-WRITE THE PARTIES' DIVORCE JUDGMENT REGARDING THE PAYMENT OF MEDICAL EXPENSES.

BOYCE'S REPLY TO DEBBY'S ISSUE II:

Debby argues that the trial court did not modify the parties' agreement as it pertains to uninsured medical expenses. The record reveals that the trial court added a number of additional provisions and requirements to the agreement. In fact, the record reveals that the trial court specifically stated that the parties' agreement is "...hereinafter modified...". R.E. 43. Debby argues that in the 2004 agreed modification, Boyce agreed to "...raise his monthly obligation for the deductible and other expenses by \$250.00." See page 14 of Debby's brief. Debby supports her argument by citing *Creekmore v. Creekmore*, 651 So.2d 513, 516 (Miss.1995), and claiming that *Creekmore* holds that "...expenses not covered by the policy...includes deductibles." See page 14 of Debby's brief.

Debby's reading of *Creekmore* is misplaced. *Creekmore* does not equate "uninsured" medical expenses with "uncovered" medical expenses. In addition, in *Creekmore*, the court only reiterates the apparent lower court ruling that the parties' in *Creekmore* were to each pay ½ of expenses not covered by insurance, including deductibles [emphasis added]. Unlike *Creekmore*, there is no provision in any agreement between Debby and Boyce that uninsured medical expenses includes deductibles. In addition, there is no mention anywhere in any agreement between Debby and Boyce that requires Boyce to pay "uncovered" medical expenses. In fact, *Creekmore* seems to support Boyce's argument

that if Boyce is to pay deductibles, then the agreement (or the prior judgment) should specifically contain such a provision. Neither Boyce or Debby asked the trial court to re-write or interpret their prior agreements. This Court should reverse the trial court's opinion and judgment as it relates to the parties' agreements regarding medical expenses.

V. THE TRIAL COURT PROPERLY CONSIDERED THE TESTIMONY OF BOYCE TALBERT'S EXPERT.

BOYCE'S REPLY TO DEBBY'S ISSUE V:

Debby argues that the trial court considered the testimony of Boyce's expert witness, a certified public accountant. The record reflects that the trial court made only one (1) fleeting reference to Boyce's expert, even when faced with substantial, unrebutted evidence from the expert witness. The trial court totally disregarded substantial and unrebutted evidence from Boyce's expert witness that totally conflicted with the chancellor's ruling. With all due respect, the trial court's rulings should be reversed because the trial court disregarded evidence that conflicted with the trial court's ruling. "This Court may overturn the chancellor's ruling only if it is clear that he (she) must have disregarded glaringly obvious evidence conflicting with his (her) ruling."

DeGeorge v. Oakes, 740 So.2d 312, 315 (¶9)(Miss.1999).

The holding in *DeGeorge* is another way of stating the abuse of discretion and manifest error standard of review. In the instant case, the trial court clearly disregarded evidence that was not only glaringly obvious, the trial court disregarded expert testimony and evidence that was never rebutted or challenged, and which conflicted with the results of the trial court's ruling. The trial court abused its discretion, committed manifest error and erred as a matter of law by disregarding Boyce's expert witness.

This Court should therefore reverse the trial court's opinion and judgment and remand or reverse and render this case on such terms as the Court deems appropriate.

RESPONSE TO MOTION FOR ATTORNEY FEES INCURRED ON APPEAL

Debby is not entitled to an award of attorney fees on appeal. If this Court reverses and/or remands this case to the trial court on any or all of the issues presented by Boyce, Debby is not entitled to an award of attorney fees at the appellate level. Further, a reversal of some or all of the trial court's rulings would negate Debby's award of attorney fees by the trial court.

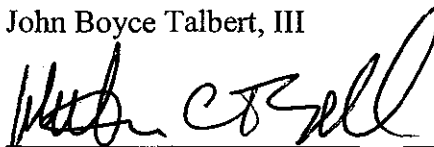
CONCLUSION

For the reasons set forth in this Reply Brief and in Boyce's Appellant's Brief, this Court should reverse the opinion and judgment of the trial court on such terms as this Court deems appropriate, and assess all costs of this appeal to Debby.

Respectfully submitted, this 9th day of March, 2009.

John Boyce Talbert, III

By:



William C. Bell

ADDENDUM

COURT ANNEXED MEDIATION RULES FOR CIVIL LITIGATION

These rules shall govern the referral of cases by the Circuit, Chancery and County courts of this state to mediation.

I. POLICY

It shall be the policy of the courts of the State of Mississippi (1) to encourage the peaceable resolution of disputes and early settlement of pending litigation by voluntary action of the parties, and (2) to identify cases appropriate for referral to mediation pursuant to the guidelines set out in these rules.

II. CASES APPROPRIATE FOR REFERRAL TO MEDIATION

All Civil cases shall be considered appropriate for referral to mediation in the discretion of the court, giving consideration to such facts as the subject matter of the case, the amount in controversy, the complexity of the case, the number of parties, the interest of the parties in pursuing mediation, the availability of mediation, and the likelihood of settlement by mediation.

III. REFERRAL OF CIVIL CASES

Civil Cases may be referred to mediation in the following manner:

A. Any circuit, chancery and county court in this state may, either on its own motion or on the motion of any party, determine that a case is appropriate for mediation. A court may not order a case to mediation more than one time.

B. If the court on its own motion determines that a pending dispute is appropriate for referral to mediation, the court shall enter its order which shall direct the clerk or court administrator to notify the parties to complete a mediation as set forth in this rule within a time period as the court may specify. Any party, within 10 days of the date of entry of the court's order, may file written objection to the referral order and request a hearing by the court.

C. Any party may apply to the courts of this state for referral of a case to mediation by motion upon giving notice to all other parties. A hearing may be conducted on the motion at which the court shall make a determination as to whether mediation is appropriate and if the case is referred shall enter its appropriate order.

D. Upon the court entering its final order referring a case to mediation all objections having been heard by the court, the parties shall have a period of 20 days from the date of entry of the court's final order to schedule the mediation. If the parties are unable to agree on a convenient date and mediator, the clerk or administrator of the court shall assign a date, time, location and mediator to conduct the mediation procedure, which assignment will be binding on the parties upon their being notified by the clerk or court administrator of the court. Any objections any party may have with regard to the date, time or location assigned for the mediation or the selection of the mediator shall be

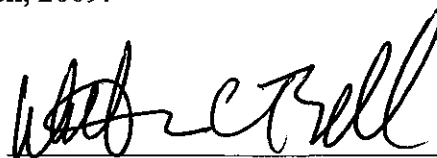
CERTIFICATE OF SERVICE

I, William C. Bell, the attorney for the Appellant John Boyce Talbert, III, do hereby certify that I have this day filed this Reply Brief of the Appellee with the Clerk of this Court to be received on behalf of the Supreme Court of Mississippi and/or the Court of Appeals and have served a copy of this Reply Brief by first-class U.S. Mail, postage prepaid, upon the following:

Honorable Cynthia L. Brewer
Chancellor, Eleventh Chancery District
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So certified, this 9th day of March, 2009.

A handwritten signature in black ink, appearing to read 'W.C. Bell', written over a horizontal line.

William C. Bell
Attorney for John Boyce Talbert, III