

**COURT OF APPEALS OF THE STATE OF MISSISSIPPI
2008-CA-00471**

WILLIE COMMON

DEFENDANT--APPELLANT

VS.

YOLANDA COMMON

PLAINTIFF--APPELLEE

**ON APPEAL FROM THE CHANCERY
COURT OF HOLMES COUNTY, MS
Cause No. 06-0001**

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

**ANGELA GIVENS WILLIAMS
188 East Capitol Street, Suite 500
Jackson, MS 39201
MS Bar No. [REDACTED]
Counsel for Appellant-Defendant Willie Common**

**COURT OF APPEALS OF THE STATE OF MISSISSIPPI
2008-CA-00471**

WILLIE COMMON

DEFENDANT--APPELLANT

VS.

YOLANDA COMMON

PLAINTIFF--APPELLEE

**ON APPEAL FROM THE CHANCERY
COURT OF HOLMES COUNTY, MS
Cause No. 06-0001**

REPLY BRIEF OF APPELLANT

**ANGELA GIVENS WILLIAMS
188 East Capitol Street, Suite 500
Jackson, MS 39201
MS Bar No. [REDACTED]
Counsel for Appellant-Defendant Willie Common**

TABLE OF CONTENTS

| | |
|--|-----|
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| ARGUMENT..... | 1 |
| I. The Trial Court Erred in Granting Temporary Alimony Based on a Non-existent Agreement and Absent Consideration of Defendant's Ability to Pay and Other Factors. | 1 |
| II. The Trial Court Erred in Its Determination of What Was Marital Property and the Proper Value of that Property. | 2 |
| III. The Trial Court Erred in Awarding Alimony | 6 |
| A. The trial court erred in awarding lump sum alimony. | 7 |
| B. No award of alimony is appropriate where Defendant does not have the ability to pay | 9 |
| C. The court erred in not considering evidence of Plaintiff's post-separation, extra-marital affair in determining alimony | 11 |
| CONCLUSION | 11 |

TABLE OF AUTHORITIES

CASES:

| | |
|---|-------|
| <i>In re McLaney</i> , 314 B.R. 228, 237-38 (M.D. Ala. 2004) | 10 |
| <i>Hammond v. Hammond</i> , 641 So. 2d 1211 (Miss. 1994) | 11 |
| <i>Holley v. Holley</i> , 892 So.2d 183, 186 (Miss. 2004) | 7, 8 |
| <i>Kergosien v. Kergosien</i> , 471 So. 2d 1206 (Miss. 1985) | 9, 10 |
| <i>Neely v. Neely</i> , 52 So. 2d 501 (Miss. 1951) | 1 |
| <i>Retzer v. Retzer</i> , 578 So. 2d 580 (Miss. 1991) | 1 |
| <i>Amacker v. Amacker</i> , __ So.3d __, 2009 WL 3086392, (Miss. Ct. App. Sept. 29, 2009) | 2 |
| <i>Fleishhacker v. Fleishhacker</i> , __ So.3d __, 2009 WL 1856732 (Miss. Ct. App. June 30, 2009) . | 2 |
| <i>Haney v. Haney</i> , 788 So. 2d 862 (Miss. Ct. App. 2004) | 7 |
| <i>Lewis v. Lewis</i> , __ So.3d __, 2009 WL 4591384 (Miss. Ct. App. Dec. 8, 2009) | 4, 5 |
| <i>McIntosh v. McIntosh</i> , 977 So.2d 1257 (Miss. Ct. App. 2008) | 8 |
| <i>Pittman v. Pittman</i> , 791 So. 2d 857 (Miss. Ct. App. 2001) | 7 |
| <i>Ward v. Ward</i> , 825 So. 2d 713 (Miss. Ct. App. 2002) | 3 |

ARGUMENT

I. The Trial Court Erred in Granting Temporary Alimony Based on a Non-existent Agreement and Absent Consideration of Defendant's Ability to Pay

Plaintiff Yolanda Common contends that the trial court did not base its decision on temporary alimony on the alleged agreement between the parties. Appellee Br. at 2-8. However, the trial court's order demonstrates otherwise. While there is no doubt that the court iterated that it would not rely the alleged agreement between the parties, the record demonstrates otherwise. In the first instance, the court's September 14, 2006, Order expressly finds that there was an agreement, and then concludes that the Defendant Willie Common failed or refused to sign the agreement. *See* 9/14/06 Order. Second, the court made no findings on the defendant's ability to pay, the necessity of the award or the legitimate nature of the Plaintiff's expenses as required by *Neely v. Neely*, 52 So.2d 501, 504 (Miss. 1951). Third, and the clearest evidence that the court simply enforced the alleged agreement is that the trial court awarded exactly what it was that Plaintiff contended Defendant agreed to pay. *See, e.g.,* Tr. at 4:4-6; 9/14/06. Plaintiff contends that there was no testimony of what the alleged agreement was, and therefore, the court could not have based its opinion on the alleged agreement. However, according to the trial court's Order, the attorneys announced the agreement before the court, which the court contended consisted of an agreement on "temporary custody, temporary support, temporary exclusive use and possession of the parties' furniture, dwelling house and lot, payments on house and lot, payment of delinquent taxes, payment of health insurance premiums of the parties' children and the plaintiff and a temporary restraining order." 9/14/06 Order. And notably, the court ordered exactly what it was that the parties allegedly agreed. The record is clear that the trial court did not consider the appropriate factors, but instead relied on an alleged agreement that never

existed. Accordingly, the award of temporary alimony/support was improper, and should be reversed.

II. The Trial Court Erred in Its Determination of What Was Marital Property and the Proper Value of that Property.

The record and the case law clearly demonstrate that the trial court erred in its identification of marital property as well as its valuation and distribution of that property. The court erred in two respects: (1) the court improperly determined that the 2003 GMC Envoy purchased by Plaintiff after separation by the parties and an award of temporary support was marital property; and (2) the court's valuation of the property simply is not supported by the record.

There is no dispute that the 2003 GMC Envoy was acquired after the court entered the September 14, 2006, temporary support order. Moreover, this Court, in *Pittman v. Pittman*, 791 So. 2d 857, 864 (Miss. Ct. App. 2001), clearly provided that property acquired after separation and entry of a temporary order of support is not marital property. Yet, Plaintiff would have this Court ignore *Pittman*, arguing that a separate maintenance order or final judgment of divorce are the only events which form the demarcation between marital and non-marital assets. However, this Court has reiterated in several recent decisions that its holding in *Pittman*, which extended the line of demarcation of marital and non-marital assets to temporary support orders. *See, e.g., Amacker v. Amacker*, __ So.3d __, 2009 WL 3086392, * 2 (Miss. Ct. App. Sept. 29, 2009) (“Until the formality of the court order on *temporary support* or separate maintenance, the effect of each spouse’s earnings remains the same as if the couple were still physically and even happily residing in the marital home[.]”) (citation omitted) and emphasis added); *Fleishhacker v. Fleishhacker*, __ So.3d __, 2009 WL 1856732, *8 (Miss. Ct. App. June 30, 2009). Therefore, Plaintiff’s contention that the court’s September 2006, Order awarding temporary support to

Plaintiff was insufficient to constitute the line of demarcation between marital and non-marital property is not supported by case law. And the trial court committed error by deeming this property marital property.

Moreover, the court's error was not harmless as Plaintiff contends. In the first instance, the court compounded the error by concluding that there was \$22,000 owed on the vehicle without any record support for this finding. Plaintiff's Financial Statement does not note the debt owed on the vehicle, and Plaintiff provided no testimony regarding the debt owed on the vehicle. The court's erroneous assumption of the debt, combined with accepting Plaintiff's valuation of the vehicle, created a negative equity in the vehicle. This error is not harmless because the court included the negative value of GMC Envoy in determining the distribution of marital property. Because a proper determination of what is marital property is essential in valuation and distribution of marital property, the trial court's decision must be reversed. *See Ward v. Ward*, 825 So. 2d 713, 718 (Miss. Ct. App. 2002).

The court also erred in its valuation of marital assets. Plaintiff contends that the court's determination of the value of the property was proper because the parties did not produce additional evidence of fair market value. However, Plaintiff's contention is based on a misplaced examination of the law and record.

At the outset, Plaintiff is wrong when she asserts that neither party offered evidence of the fair market value of any specific piece of marital property. Defendant attempted to offer the court an appraisal on the mobile home, but the court would not accept the appraisal, but instead indicated it only wanted to hear Defendant's own opinion of the value of the house. *See Tr.* at 100:14-22. Moreover, when Plaintiff was being cross-examined on her widely varied estimations of the value of the house---from \$59,000 in September 2004, *see* Pl.'s 2004 Financial

Statement, Def. Ex. 7, to \$30,000 in August 2007, *see* Pl.'s 2007 Financial Statement, Def. Ex. 9, to \$22,000 in January 2008, *see* Tr. at 145:22-149:2---the court indicated that it would request an appraisal of the property. *See* Tr. at 146:22-25. The parties should be able to rely on the court's assertions. Similarly, with respect to the 1998 Mitsubishi, Defendant offered the Kelly Bluebook value, which provided that the vehicle in good condition was worth \$3,330, and in fair condition was worth \$2,778. *See* Def. Ex. 2.

Moreover, while the parties should endeavor to introduce evidence sufficient to substantiate the value of the marital assets, the court cannot abdicate its responsibility to obtain the fair market value of marital property, which is a prerequisite to division of marital property. *See Lewis v. Lewis*, __ So.3d __, 2009 WL 4591384 (Miss. Ct. App. Dec. 8, 2009). *Lewis* presents a case that is markedly similar to the instant case. In *Lewis*, the trial court relied on the wife's financial statement to determine the value of the business, which was marital property. *Id.* at *1-6. The husband contended that the valuation of the asset was erroneous. *Id.* at *1. This Court agreed. In so ruling, the Court stated:

Having reviewed all of the aforementioned exhibits, it appears that the chancellor chose to use exhibit four as a valuation of Legacy's worth, as the value that he assigned to Legacy is the same as the value of Legacy in exhibit four. We find that this decision was in error. First, Tonia admitted that this document, as well as her other submitted documents, was inaccurate in several respects. More troubling is the fact that exhibit four does not indicate, in any way, how the value of Legacy was determined. Of course, this would have been acceptable if Tonia was able to testify as to how the value was calculated. However, Tonia essentially testified that she did not enter the data in question; rather, she simply hit the "print" button on the family's home computer to obtain exhibit four. Essentially, she did not know what the valuation of Legacy in exhibit four included or did not include. Despite the deference due to a chancellor's findings, we find that the chancery court abused its discretion in using the valuation from exhibit four. For all intents and purposes, the value of Legacy in exhibit four was pulled out of thin air.

Id. at *5. The Court determined that despite that the wife's financial statement and other documents purportedly provided the value of the property, the evidence was contradictory and unreliable. *Id.* at *5-6. The Court thus required the chancery court to properly value the property using market factors. *Id.*

This case is no different, and in many respects more problematic, than *Lewis*. First, with respect to the house, as noted above, Plaintiff offered widely varying valuations of the marital home, each time further depreciating the value of the home without any support thereof, in nothing more than a transparent attempt to devalue the property for purposes of distribution of assets. Instead of ordering an appraisal as the trial court had indicated it would do, the court simply averaged the values offered by the parties, without any regard to the true value of the home. Similarly, with respect to the lot on which the home sat, the court again just averaged the amounts offered by the parties, despite that Plaintiff incredibly valued the property at \$0 on her 2007 Financial Statement, *see* Def. Ex. 9, the same property which she had valued at \$7000 in 2004, *see* Def. Ex. 7. Moreover, as to the 1998 Mitsubishi, the court awarded it a value of \$500, despite that it had a Kelly Blue Book value of a minimum of \$2,775, Def. Ex. 2. Moreover, with respect to Plaintiff's retirement account, the record demonstrates that she has one but did not reveal the value of the account. Her check stub, however, indicated that Plaintiff had accumulated for \$4,146.85 from January to July 2007 alone. Def. Ex. 8. While Plaintiff failed to list this retirement account as an asset on her financial statement, she admitted that she had the account since 2003, and contributions were being made since then. Tr. at 164:22-165:21. Despite Plaintiff's clear attempt to hide assets, the court delineated Plaintiff's retirement account value at \$2500 with no support for that finding.

In addition, just as in *Lewis*, the trial court should not have relied on Plaintiff's August 2007 Financial Statement when she admitted that there were numerous errors on it. *See* Tr. at 131:13-28; 135:7-29; 138:8-16; 142:22-26. There were also numerous inconsistencies between the unexplained valuations of the property that Plaintiff offered in 2004 and in 2007, and in many instances, by 2007, Plaintiff simply did not account for the property at all despite that it still existed. *Cf.* Def. Ex. 9 with Def. Ex. 7. Plaintiff's inconsistent information was so confusing that the trial court indicated it would require that Plaintiff complete a new, complete (and presumably accurate) Financial Statement. *See* Tr. 158:19-159:1 ("So you-all are going to have to – apparently the 8.05 need to be redone to reflect what is really going on here. You-all need to prepare some updated 8.05s that say what you are trying to say. Otherwise, I'm not going to have information I need to render a decision. . . . So, therefore, they need to be withdrawn and 8.05s that are right need to be admitted into the record. Because what I have are 8.05s that aren't right."). Nevertheless, the court did not order updated Financial Statements, and erroneously relied upon unreliable information.

Consequently, the trial court's distribution of marital assets was clearly erroneous. And the error was particularly apparent here because the court awarded all of the marital debt to Defendant with the exception of the marital home. Indeed, even with the erroneous valuation of the marital home, lot and 1998 Mitsubishi, Defendant had a negative deficit that far exceeded that of Plaintiff.

III. The Trial Court Erred in Awarding Alimony.

The trial court erred in awarding alimony. First, the court failed to consider the *Cheatham* factors in awarding lump sum alimony, requiring reversal on this basis alone. Second,

no award of alimony in any form is appropriate because Defendant does not have the ability to pay.

A. The trial court erred in awarding lump sum alimony.

The trial court clearly erred in awarding lump sum alimony because it did not consider the *Cheatham* factors, which requires reversal alone *Haney v. Haney*, 788 So. 2d 862, 866 (Miss. Ct. App. 2001). Plaintiff attempts to avoid this error by arguing two points: (1) Defendant submitted a notice of authority that did not apply the *Cheatham* factors in arguing that Plaintiff was not entitled to alimony; and (2) the trial court was really awarding rehabilitative alimony. Neither argument has merit.

The “common thread” in the award of lump sum alimony is that the “wife had through her efforts been a material economic benefit in the creation of her husband’s wealth, such as quitting her job to help him in his business or profession, helping him through college, working in his business or profession, and frequently offering him valuable counseling in his business or investments.” *Retzer v. Retzer*, 578 So. 2d 580, 591 (Miss. 1991). In other words, this case simply is not the type of case where lump sum alimony should be at issue. Consequently, the Notice of Authority submitted by Defendant assumed that the Court would be evaluating the case for permanent periodic alimony, not lump sum alimony. Moreover, the suggestion by plaintiff that the trial court can ignore the clear precedent of this Court and the Supreme Court is simply incredible.

Plaintiff’s argument that the trial court was really awarding rehabilitative alimony is equally unavailing. First, the trial court was clear that it was ordering lump sum alimony. Thus, Plaintiff’s belated argument is simply not supported by the record. Second, “[r]ehabilitative alimony is awarded to parties who have put their career on hold while taking care of the marital

home. Rehabilitative alimony allows the party to get back into working world . . .” *Holley v. Holley*, 892 So.2d 183, 186 (Miss. 2004). Plaintiff never put her career on hold to take care of the marital home, and she maintained a stable job in law enforcement. Thus, this was not the type of case where rehabilitative alimony was appropriate. *See id.*; *McIntosh v. McIntosh*, 977 So.2d 1257, 1272 (Miss. Ct. App. 2008) (“Clearly, Gay’s contention that she is entitled to rehabilitative alimony is flawed, as the record is devoid of any evidence indicating that she ‘put her career on hold’ to take care of the marital home. At the time of both of the hearings, Gay was employed full-time as a school teacher, and there is nothing in the record to suggest that Gay sacrificed here career for the marriage.”).

The record simply does not support an award of alimony under the *Cheatham* factors. At the outset, because the court did not properly value the marital property, lump sum alimony by its nature could not have been properly determined using the *Cheatham* factors. Moreover, Plaintiff’s argument that the record does support a finding of lump sum alimony under *Cheatham* is based on a mischaracterizations of the record. For instance, Plaintiff erroneously contends that Defendant had amassed as savings of \$12,000. (Appellee Br. at 14.) However, the record clearly indicates and the court held that the \$12,000 was not savings, but rather was Defendant’s Thrift Savings Plan, which is a retirement account. *See* Tr. at 74:18-75:11. Moreover, asking this Court to consider Defendant’s retirement account to justify the award of lump sum alimony necessarily indicates the trial court’s erroneous valuation of Plaintiff’s retirement account discussed above.

Plaintiff next contends that the Court should compare the parties’ gross income. First, the proper comparison is the parties’ adjusted gross income, which is \$3,227.00 for Defendant and \$1,939.43 for Plaintiff. (Appellant Br. at 5, 8.) Moreover, when adjusted for the child support

Plaintiff receives from Defendant in the amount of \$774.48, (*Id.* at 8), the Plaintiff's income is \$2,713.91, and Defendant's income is \$2,452.52. Moreover, simply comparing the parties' income does not answer the question. The Court must look to the parties' respective estates. In that regard, the record would indicate, even accepting the trial court's erroneous valuations of the marital property, that Defendant had a net estate with a deficit of -\$40,629, whereas Plaintiff would have a net estate with a deficit of only -\$2,255. Plaintiff can hardly argue that ordering Defendant to pay plaintiff lump sum alimony in the amount of \$28,000 is equitable under these circumstances. Moreover, this Court cannot, as Plaintiff asks it to, rely on the expenses Plaintiff lists in her Financial Statement. As noted above, Plaintiff repeatedly enumerated instances where that Financial Statement was in error. Moreover, a review of the transcript makes clear that Plaintiff was simply inflating her expenses. In addition, the court's finding that Plaintiff would be desolate absent Defendant's payment is belied by the fact that after the Court awarded Plaintiff temporary support of \$305.00, Plaintiff acquired a vehicle with a monthly payment of \$515.00, when she previously did not have a car note. *See* Appellant Br. at 9.

The trial court's award of lump sum alimony was manifest error, and the decision must be reversed.

B. No award of alimony is appropriate where Defendant does not have the ability to pay.

Plaintiff asks this Court to ignore clear, supported evidence of Defendant's inability to pay any sum of alimony, and certainly the sum of alimony awarded by the trial court. Plaintiff's argument is erroneous.

First, without addressing each of them, Plaintiff asks this Court to ignore the cases cited by Defendant. The only case Plaintiff attempts to distinguish is *Kergosien v. Kergosien*, 471 So. 2d 1206 (Miss. 1985). However, even the language Plaintiff quotes from *Kergosien* makes clear

that alimony cannot be awarded in the absence of an ability to pay it. Moreover, Plaintiff does not even address the remaining cases cited by Defendant. Each of these cases amply support Defendant's argument that alimony is not proper in this case.

Plaintiff's attempt to argue that Defendant does have the ability to pay is also without merit. Defendant submitted documentary evidence supporting every bill he had, and none of his expenses were challenged in the court below. Plaintiff now contends that Defendant's tithing is not a necessary expense, and that he should forego it. (Plaintiff makes this argument despite that she claimed expenses for magazines, entertainment, memberships in organizations, church and charitable donations. *See* Def. Ex. 9.). Foremost, Plaintiff calls Defendant's tithes simply a charitable contribution, when tithing is a tenement of his religious faith, which Defendant pays in the exercise of his religious freedom. Tithing is a religious tenement that requires payment of 10% of one's earnings. Indeed, in an analogous situation, courts have determined that tithing is a reasonable and necessary expense. *Cf., e.g., In re McLaney*, 314 B.R. 228, 237-38 (M.D. Ala. 2004). Additionally, however, Defendant's expenses totaled \$3,714, Def. Ex. 1; thus, even subtracting Defendant's tithing \$300 month (the tithing amount was changed to \$470.00 but this amount is not reflected in the total of Defendant's expenses, which would have increased to \$3884 per month), his expenses would still far surpass his monthly adjusted gross income (after alimony) of \$2452.52 (an amount which does not include other subtractions from his take home pay including health insurance). Defendant is entitled to maintain a reasonable standard of living, and he is unable to do so when he constantly has to borrow to even survive. Because Defendant cannot afford to pay alimony, any award of alimony, in any form, would be improper.

C. The court erred in not considering evidence of Plaintiff's post-separation, extra-marital affair in determining alimony.

Plaintiff is correct that fault is not a consideration of in an award of lump sum alimony, and Defendant expressly acknowledged this point in his brief; however, Plaintiff is simply incorrect in her argument that adultery is not a factor in awarding periodic alimony, either rehabilitative or permanent. If the court is going to award periodic alimony under the *Armstrong* factors, it must consider that Plaintiff engaged in an extra-marital affair after the parties separated. *Hammond v. Hammond*, 641 So. 2d 1211 (Miss. 1994) (reversing award of alimony to former wife who had after separation started a relationship with another man).


Moreover, there is no evidence, as Plaintiff contends, that the court in fact considered Plaintiff's extra-marital relationship. While the court made much of Defendant's relationship after separation, the court made no mention even of the testimony or documentary proof on the issue of Plaintiff's extra-marital, thus, Plaintiff can hardly argue that the court considered this issue in its ruling. The record simply does not support it.

CONCLUSION

For the foregoing reasons and authorities and based upon the entire record, Defendant respectfully requests that the Court reverse the trial court's grant of temporary alimony, alimony and distribution of property. The trial court's order directing the deduction of alimony payments from Defendant's wages must be vacated.

Respectfully Submitted,

By:


ANGELA GIVENS WILLIAMS
188 East Capitol Street, Suite 500
Jackson, MS 39201

(601) 973-2822
MS Bar No. [REDACTED]

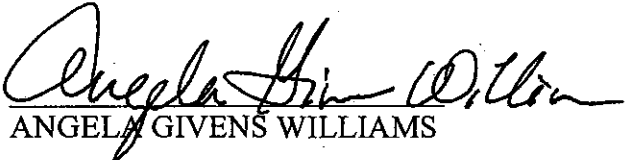
CERTIFICATE OF SERVICE

I, Angela Givens Williams, do hereby certify, that I have this day mailed via FIRST CLASS U.S. MAIL, postage prepaid, a true and correct copy of the foregoing Brief to the following counsel:

Kimberly P. Turner, Esq.
Post Office Box 4681
Jackson, MS 39296

The Honorable Janace Harvey-Goree
Holmes County Chancery Court
Post Office Box 39
Lexington, MS 39095

This the 5th day of February, 2010.


ANGELA GIVENS WILLIAMS