

IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2008-CA-01296

JUANITA (NORRIS) DAY

APPELLANT

VERSUS

RICHARD SCOTT DAY, JR.

APPELLEE

APPEAL FROM THE CHANCERY COURT OF
LAMAR COUNTY, MISSISSIPPI

APPELLANT'S BRIEF

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal:

1. Juanita (Norris) Day, Appellant
2. Thomas T. Buchanan, Esq. and John D. Smallwood, Esq. of TUCKER BUCHANAN, PA (Laurel, MS), attorneys for Appellant
3. Richard Scott Day, Jr., Appellee *Pro Se*
4. Honorable James H.C. Thomas, Jr., Chancery Court Judge of Lamar County, Mississippi

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STATEMENT OF ISSUES

- I. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FAILED TO DIVIDE THE FORMER MARITAL HOME AS CLEARLY DEFINED IN THE PARTIES' PROPERTY SETTLEMENT AGREEMENT.
- II. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FAILED TO DIVIDE THE PARTIES' RV AS CLEARLY DEFINED IN THE PARTIES' PROPERTY SETTLEMENT AGREEMENT.
- III. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IF FAILED TO REQUIRE RICHARD DAY TO PAY JUANITA'S ATTORNEY FEES AFTER FINDING RICHARD IN WILFUL CONTEMPT OF COURT.

STATEMENT OF THE CASE

The basis of this appeal is a Judgment [RE-63] and subsequent Judgment on Reconsideration [RE-75] entered by the Lamar County Chancery Court based upon testimony and evidence presented in support of an Amended Complaint for Modification, Contempt and Related Relief [RE-53] filed by Juanita (Norris) Day (*hereinafter* “Juanita”) and a Petition for Modification, Contempt and Clarification [RE-42] filed by Richard Scott Day (*hereinafter* “Richard”). The issues at trial were focused upon the terms of the Amended Child Custody, Child Support and Property Settlement Agreement Richard’s failure to comply therewith and enforcement of said terms.

Aggrieved by the Judgment and Judgment on Reconsideration, Juanita timely filed her Notice of Appeal [RE-77]. Richard did not file a cross appeal.

STATEMENT OF THE FACTS

The parties filed a Joint Complaint for Divorce [RE-15] on May 8, 2003 and thereafter entered into an Amended Child Custody, Child Support and Property Settlement Agreement (*hereinafter* "Property Settlement Agreement") [RE-18]. On July 10, 2003, a Final Judgment of Divorce based upon irreconcilable differences was entered [RE-29] by the Lamar County Chancery Court. The Final Judgment of Divorce approved and ratified the parties Amended Property Settlement and Child Custody Agreement [RE-18]. At all times leading up to the Final Judgment of Divorce, Juanita was represented by Carol Ann Bustin, Esq. and Richard represented himself [Tr. at 5-6; 178]. Nonetheless, Richard had considerable input into the language and terms of the Property Settlement Agreement [Tr. at 5-6; 75-77; 179].

Two years after the Divorce was final, on July 6, 2005, Juanita filed her Complaint for Contempt, Modification and Related Relief [RE-32]. On December 1, 2005, Richard filed his Petition for Contempt, Modification and Clarification [RE-42]. At the time of these filings, Juanita was living in the former marital residence and a resident of Lamar County, Mississippi while Richard had remarried and was a resident of the State of Ohio¹.

After the initial filings, Juanita obtained new counsel and, in September 2006, also moved to the State of Ohio with the two minor children of the parties [Tr. at 175]. Due to her financial status, she moved into the home of her brother. Trial on the Complaint and Petition was begun on December 14, 2006. Shortly after Richard was called as an adverse witness, Richard admitted to failing to comply with several provisions of the

¹ Richard testified that he moved to Ohio in January 2004 [Tr. at 119].

Property Settlement Agreement which were not a part of Juanita's initial Complaint, such as failure to pay alimony and removal of items from the former marital residence. [Tr. 49-52]. When Juanita's counsel orally sought to amend the pleadings to conform to the evidence, Richard objected and the matter was continued to allow Juanita to file an Amended Complaint. [Tr. at 51-61]. On January 18, 2007, Juanita filed her Amended Complaint for Contempt, Modification and Related Relief [RE-53].

On November 27, 2007, the trial resumed and was completed on February 22, 2008 [RE-10]. On May 9, 2008, the Court entered its Judgment [RE-63]. On May 20, 2008, Juanita filed her Motion to Reconsider [RE-72]. On June 25, 2006, the Court conducted a hearing on Juanita's Motion to Reconsider. On July 3, 2008, the Court entered its Judgment on Reconsideration [RE-75].

There were numerous issues raised by the parties at trial and ruled upon by the trial court. For purposes of this appeal, the ruling of the trial court was in error on the following issues: (1) amount of equity Juanita is entitled to from the former marital residence; (2) amount of equity Juanita is entitled to from the 2000 Coachman RV; and (3) failing to award Juanita attorney fees after finding Richard in willful contempt of court.

The terms of the Property Settlement Agreement are clear and unambiguous. As to the marital residence, the Property Settlement Agreement provides, in pertinent part,

The parties agree that if said marital residence has not been sold within twenty-four months of the date of the Final Judgment of Divorce, that the parties shall secure an appraisal (by a mutually agreeable appraiser) of the home, and RICHARD SCOTT DAY, JR. shall pay unto JUANITA NORRIS DAY her remaining one-half equity in the residence. In other words, JUANITA NORRIS DAY's remaining equity in the home shall be determined as one-half of: (the appraised value of the home) minus (the debt (payoff) owed on the home prior at re-financing of May-June 2003), with a credit given for the \$40,000.00 already disbursed to JUANITA NORRIS DAY at the time of divorce. [R. at 25]

The debt/payoff of the marital residence in June 2003 was \$98,544.55 [Tr. at 36, 160]. The May 25, 2006 Appraisal done by Nace Appraisal Service, submitted and uncontradicted at trial, reflected an appraised value of \$260,000.00 [Trial Ex. #5; Tr. at 32]. Based upon the formula in the Property Settlement Agreement, Juanita should have received \$40,727.73. The trial court awarded Juanita only \$6,000.00 from the proceeds.²

As to the parties Coachman RV, the Property Settlement Agreement provides, in pertinent part,

The parties agree that the 2000 Coachman RV will be listed for sale, and that after payoff of the loan amount on said vehicle, that all proceeds will be equally divided between the parties. While said Coachman RV is awaiting sale, neither party shall loan or rent or lease the RV to anyone without prior written consent from the other. [R. at 24]

Richard has maintained possession of and in fact use of the parties RV since the divorce. Richard paid off the marital loan amount on the RV on October 22, 2004 and borrowed \$35,000 against the RV after payoff and in contradiction to the Property Settlement Agreement [Trial Ex. #14; Tr. at 18-20; 84-86; 138-140]. The trial court awarded

² When Richard refinanced the former marital home into his name, he personally borrowed more money on the home. As a result, when the home finally was sold and his personal mortgage paid, the proceeds totaled \$36,000.00.

Richard the RV and made no award to Juanita for her equity.

The trial court found Richard in willful contempt of court as to the division of sky miles and division of his 401K plans as mandated by the Property Settlement Agreement. Juanita incurred attorney fees of \$7,000.00 in seeking to enforce the parties Final Judgment of Divorce [Tr. at 168]³. The court awarded her no attorney fees.

Aggrieved by the Judgment and the Judgment on Reconsideration, Juanita timely filed her Notice of Appeal [RE-77].

³ The trial court also awarded Juanita a judgment totaling \$7,929.29 for past due moving costs and storage, past due medical bills, past due costs for sports and extra-curricular activities [RE-70]. Also, between the time Juanita filed her original complaint and the final trial date, Richard had paid past due amounts of child support, alimony and pet care expenses [Tr. at 115-116].

SUMMARY OF THE ARGUMENT

The Chancery Court of Lamar County, Mississippi committed reversible error in the Judgment and Judgment on Reconsideration entered on May 9, 2008 and July 3, 2008 respectively. The terms of the Property Settlement Agreement are clear and unambiguous. The trial court's failure to enforce the specific provisions of the Property Settlement Agreement, in reference to the former marital home and the marital RV was error. A trial court cannot modify the clear and unambiguous terms of a Property Settlement Agreement previously adopted and ratified by Final Judgment of Divorce. Additionally, the trial court's failure to award Juanita attorney fees after finding Richard in willful contempt and based upon the other findings of the court was error.

ARGUMENT

STANDARD OF REVIEW

Findings of the Chancellor will not be disturbed nor set aside on appeal “unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Sandlin v. Sandlin*, 699 So.2d 1198, 1203 (Miss. 1997). “Nonetheless, if manifest error is present or a legal standard is misapplied, this Court will not hesitate to reverse.” *Flechas v. Flechas*, 791 So.2d 295, 299 (Miss. COA 2001); *Tilley v. Tilley*, 610 So.2d 348, 351 (Miss. 1992).

However, a property settlement agreement is a contractual obligation. *Daley v. Carlton*, 2009-MS-0408.158, ¶6 (Miss COA 2009); *East v. East*, 493 So. 2d 927, 931-32 (Miss. 1986). Contract interpretation is a question of law and is reviewed de novo. *Daley* at ¶6; *Warwick v. Gautier Util. Dist.*, 738 So. 2d 212, 215 (Miss. 1999); *Morreale v. Morreale*, 646 So.2d 1264, 1267 (Miss. 1994).

A court may not go beyond the text to determine the parties' true intent unless the contract is unclear or ambiguous. *Daley* at ¶6; *Turner v. Terry*, 799 So. 2d 25, 32 (Miss. 2001). “The mere fact that the parties disagree about the meaning of a contract does not make the contract ambiguous as a matter of law.” *Daley* at ¶6; *Id.* (quoting *Cherry v. Anthony*, 501 So. 2d 416, 419 (Miss. 1987)).

I. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FAILED TO DIVIDE THE FORMER MARITAL HOME AS CLEARLY DEFINED IN THE PARTIES' PROPERTY SETTLEMENT AGREEMENT.

The terms of the Property Settlement Agreement are clear and unambiguous.

As to the marital residence, the Property Settlement Agreement provides, in pertinent part,

The parties agree that if said marital residence has not been sold within twenty-four months of the date of the Final Judgment of Divorce, that the parties shall secure an appraisal (by a mutually agreeable appraiser) of the home, and RICHARD SCOTT DAY, JR. shall pay unto JUANITA NORRIS DAY her remaining one-half equity in the residence. In other words, JUANITA NORRIS DAY's remaining equity in the home shall be determined as one-half of: (the appraised value of the home) minus (the debt (payoff) owed on the home prior at re-financing of May-June 2003), with a credit given for the \$40,000.00 already disbursed to JUANITA NORRIS DAY at the time of divorce. [R. at 25]

The debt/payoff of the marital residence in June 2003 was \$98,544.55 [Tr. at 36, 160]. The May 25, 2006 Appraisal done by Nace Appraisal Service, ordered by the trial court, submitted and uncontradicted at trial, reflected an appraised value of \$260,000.00 [Trial Ex. #5; Tr. at 32]. Based upon the clear and unambiguous formula in the Property Settlement Agreement, Juanita should have received \$40,727.73 [$\$260,000.00 - \$98,544.55$ (payoff) = $\$161,455.45 / 2 = \$80,727.73 - \$40,000.00$ (paid to Juanita at refinance) = $\$40,727.73$]. The trial court award to Juanita of \$6,000.00 was error.⁴

The calculations of the trial court indicate that the trial court based Juanita's equity

⁴ When Richard refinanced the former marital home into his name, he personally borrowed more money on the home. As a result, when the home finally was sold and his personal mortgage paid, the proceeds totaled \$36,000.00.

as being the remaining proceeds after the house was sold and credit given to Richard for the \$30,000.00 discussed in the Property Settlement Agreement. This calculation also indicates that the trial court based Juanita's equity on the sale price less Richard's personal mortgage he incurred at the time he refinanced the former marital residence. The trial court's calculations are erroneous on two fronts.

First, Juanita's equity in the former marital residence was to be based upon the difference from the appraisal of the residence and what the payoff was in June 2003. There is nothing in the four corners of the Property Settlement Agreement in which Juanita's equity is to be determined from the sale price of the former marital residence.

Second, the only deductions from the appraised value, for determination of Juanita's equity, is the payoff as of June 2003 of \$98,544.55 and the credit for the \$40,000.00 Richard gave Juanita at the time he refinanced the home [Tr. at 36, 160]. There are certainly no provisions within the four corners of the Property Settlement Agreement which entitle Richard to deduct his personal mortgage on the marital residence nor the trial court.

Richard executed the Property Settlement Agreement on his own free will. He had considerable input into the terms and conditions of said contract [Tr. at 5-6; 75-77; 179]. A property settlement agreement is a contract. *In re Estate of Hodges*, 807 So.2d 438 (Miss.2002); *East v. East*, 493 So. 2d 927, 931-32 (Miss. 1986). Mississippi law clearly mandates that a party is bound by what they promise in writing. *Crisler v. Crisler*, 963 So.2d 1248 (Miss. COA 2007); *Frazier v. Northeast Mississippi Shopping Ctr., Inc.*, 458

So.2d 1051, 1054 (Miss. 1984). Richard is bound by the terms of the Property Settlement Agreement and the trial court cannot alter or modify those provisions.

"[W]hen parties in a divorce proceeding have reached an agreement that a chancery court has approved, we will enforce it, absent fraud or overreaching, and we take a dim view of efforts to modify it just as we do when persons seek relief from improvident contracts." *Iverson v. Iverson*, 762 So.2d 329, 333 (Miss. 2000), citing, *Bell v. Bell*, 572 So.2d 841, 844 (Miss. 1990)).

As a matter of law, the Chancery Court committed error in the amount of equity awarded to Juanita for the former marital residence for which reversal is proper.

II. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FAILED TO DIVIDE THE PARTIES' RV AS CLEARLY DEFINED IN THE PARTIES' PROPERTY SETTLEMENT AGREEMENT.

As to the parties 2000 Coachman RV, the Property Settlement Agreement provides, in pertinent part,

The parties agree that the 2000 Coachman RV will be listed for sale, and that after payoff of the loan amount on said vehicle, that all proceeds will be equally divided between the parties. While said Coachman RV is awaiting sale, neither party shall loan or rent or lease the RV to anyone without prior written consent from the other. [R. at 24]

Richard has maintained possession of and in fact use of the parties RV since the divorce. Richard paid off the marital loan amount on the RV on October 22, 2004 and borrowed \$35,000 against the RV after payoff [Trial Ex. #14; Tr. at 18-20; 84-86; 138-140]. The trial court awarded Richard the RV and made no award to Juanita for her equity. The

trial court seems to base this decision on that fact that neither party submitted the value of the RV at the time Richard paid it off in October 2004. [RE-72 & 75; Tr. at 140].

The language referencing the division of equity in the RV is clear and unambiguous: “[a]fter the payoff of the loan amount on said vehicle, that all proceeds will be equally divided between the parties.”. The trial court determined that Richard “has had the use and possession of the RV.” [RE-67]. Richard paid off the RV in October 2004 [Tr. at 140]. Richard has not paid Juanita her one-half of the equity in the RV at the time the loan was paid in full.

The trial court’s reliance upon neither party showing the value of the RV at the time the loan was paid off is flawed. First, as the court found, Richard has had use and possession of the RV since the divorce of the parties in 2003. At trial in November 2007, Richard testified that “[t]his RV is in storage at a KOA campground in Rochester, NY. Actually, Canandaigua, New York, to be exact.” [Tr. at 86]. Juanita could not provide the court with a value of the RV when she has had no access to it. Second, Richard claimed at trial that in an attempt to sell the RV, he has listed it for sale “four different times” [Tr. at 85]. Richard failed to produce any proof thereof and expected the court to believe that he could not sell an RV over a four and a half (4 1/2) year period. Of course he lived in it for some period after the divorce and used it to obtain his own personal loan of \$35,000.00, but could not find a buyer for it [Tr. at 18-20; 84-86].

Richard executed the Property Settlement Agreement on his own free will. He had considerable input into the terms and conditions of said contract [Tr. at 5-6; 75-77; 179].

A property settlement agreement is a contract. *In re Estate of Hodges*, 807 So.2d 438 (Miss.2002); *East v. East*, 493 So. 2d 927, 931-32 (Miss. 1986). Mississippi law clearly mandates that a party is bound by what they promise in writing. *Crisler v. Crisler*, 963 So.2d 1248 (Miss. COA 2007).

As a matter of law, the Chancery Court committed error in failing to award any equity to Juanita for the RV for which reversal is proper.

III. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FAILED TO REQUIRE RICHARD DAY TO PAY JUANITA'S ATTORNEY FEES AFTER FINDING RICHARD IN WILFUL CONTEMPT OF COURT.

The trial court held, "Petitioner [Richard] was to transfer the sky miles and 401(k) to Respondent within 30 days of July 10, 2003. That was not done and **he is in wilful contempt of court** (*emphasis added*) for not having complied with that provision of the agreement which he is to be confined in the Lamar County, Mississippi jail until he may purge himself by compliance." [RE-69]. The trial court further held that Richard was responsible for all amounts owed on the Toyota lease [RE-69]; that he owed past due amounts totaling \$7,929.29 for past due moving costs and storage, past due medical bills, past due costs for sports and extra-curricular activities [RE at 69-70]. The trial court held that Richard has had use and possession of the Coachman RV, that he lived in it, that he paid it off and refinanced it and now wants to give it to Juanita, "apparently debt and all" [RE-67]. Richard's actions as to the RV, as determined by the court, are clearly in contradiction of the terms of the Property Settlement Agreement.

The trial court further finds that “[p]etitioner [Richard] has paid nothing toward Respondent’s moving expenses, opining he did not know when she moved to Ohio but that he has offered to pay reasonable moving expenses of gas charges and truck rental.”. The evidence was clear that Juanita and the parties’ two boys moved to Ohio, just 2 hours from Richard, in September 2006 [Tr. at 175]. The final date of trial of this matter was February 22, 2008 at which time, Richard had still not paid Juanita the moving and storage expenses as outlined in the Property Settlement Agreement. Likewise, at the hearing held on December 14, 2006, Richard admitted that he had failed to pay rehabilitative alimony as required in the Property Settlement Agreement. [Tr. at 52].

As with most of the past due expenses awarded to Juanita by the trial court, Richard maintained that the expenses were either unreasonable, not approved by him before incurred or not covered by the clear terms of the Property Settlement Agreement. No provision in the Property Settlement Agreement requires Richard’s pre-approval for such expenses. Furthermore and most amazingly, as to medical bills incurred, Richard even goes so far as to claim that “[t]he monies that were not paid are all basically co-pays or prescriptions, which are covered under Mississippi law by child support and, therefore, the responsibility of Juanita.” [Tr. at 102].

“When a party is held in contempt for violating a valid judgment of the court, then attorney's fees should be awarded to the party that has been forced to seek the court's enforcement of its own judgment.” *Yelverton v. Yelverton*, 961 So.2d 48 (Miss COA 2007); *Elliott v. Rogers*, 775 So.2d 1285, 1290 (Miss.COA 2000); *Varner v. Varner*, 666

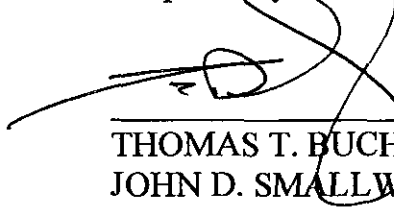
So.2d 493, 498 (Miss.1995). In the case at hand, not only did the trial court find Richard to be in contempt, but the court found him to be in **"wilful contempt"**.

If there was ever a case for a plaintiff in a contempt action to receive her attorney fees, this was it. The testimony was uncontradicted that Juanita incurred attorney fees of \$7,000.00 in seeking to enforce the parties Final Judgment of Divorce [Tr. at 168]. The refusals of Richard to make various payments due under the terms of the Property Settlement Agreement are uncontradicted. As a matter of law, the Chancery Court committed error in failing to award Juanita attorney fees. Likewise, the trial court abused its discretion in failing to award Juanita her attorney fees. As a result, reversal is proper.

CONCLUSION

Based upon the foregoing the Judgment and Judgment on Reconsideration should be reversed and rendered as to Juanita's equity in the former marital home and her attorney fees as addressed hereinabove. Additionally, said decisions should be reversed and remanded to the trial court for a full consideration of Juanita's equity in the Coachman RV.

Respectfully submitted:

A handwritten signature in black ink, appearing to be "T. Buchanan", is written over a horizontal line. The signature is stylized with a large loop and a long horizontal stroke extending to the left.

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Attorneys for Appellant

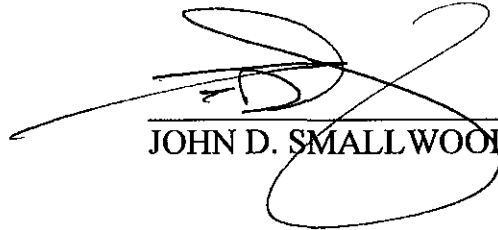
CERTIFICATION OF SERVICE

I do hereby certify that I served a copy of the foregoing Appellant's Brief on all parties to this matter by first class mailing to the attorneys and on the date listed below:

Hon. James H. C. Thomas, Jr.
LAMAR COUNTY CHANCERY COURT JUDGE
P.O. Box 807
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This the 22nd day of May, 2009.



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