

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHARLES TIMOTHY WEST

APPELLANT

VERSUS

NO. 2008-CA-01700

DEBORAH GAYLE THORNTON WEST

APPELLEE

APPEAL FROM THE CHANCERY COURT OF
JONES COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
CAUSE NO. 94-0191

THE HONORABLE FRANKLIN C. MCKENZIE, JR., CHANCELLOR
PRISIDING

BRIEF OF APPELLANT WEST ENTITIES

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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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

Charles Timothy West

Appellant

Terry L. Caves
Jerry D. Sharp

Attorneys for Appellant

Deborah Gayle Thornton West

Appellee

Patrick A. McAllister
William B. Pemberton, II

Attorneys for Appellee

Honorable Franklin C. McKenzie, Jr.

Chancellor

West Quality Food Services, Inc.

West Leasing, Inc.

Coastal Express, Inc.

West Family Leasing

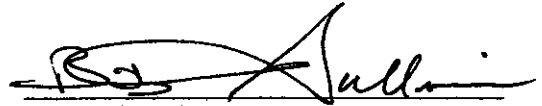
West Brothers Leasing

James Robert Sullivan, Jr.

Attorney for West Companies

This the 38th day of May, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bob Sullivan", written over a horizontal line.

BOB SULLIVAN

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I.

STATEMENT OF ISSUES ON APPEAL

1. The Chancellor erred in failing to void the provisions of the PSA transferring Tim's stock and partnership interest due to the shareholder and partnership restrictions on transfer agreements.

II

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below

The Chancellor in this case awarded a judgment in favor of Debbie West against Tim West in the total sum of \$1,066,594.53. (CP 2072) (R.E. 19)

This case involves an appeal of the Chancellor's decision of issues on remand from the Supreme Court in *West v. West*, 891 So.2d 203 (Miss. 2004).¹ Following remand of this case from the Supreme Court, Debbie filed her amended complaint for contempt and sued West Quality Food Services, Inc., West Leasing, West Family Leasing, West Brothers Leasing, and West Investments.² (CP 903) Debbie alleged that Tim was in contempt for failing to pay alimony, failing to keep Debbie informed of financial affairs of the West entities, breaching the life insurance provisions of the PSA, and making fraudulent conveyances.³ (CP 903) (R.E. 114)

Tim filed his answer, defenses and counterclaim to the amended complaint on June 20, 2006. (CP 995) (R.E. 127) The West Entities entered their answer and defenses to Debbie's amended complaint on September 7, 2006. (CP 969) Tim filed his motion to bifurcate the trial requesting that the court determine which property was marital or non-marital. (CP 1019) Tim also filed a motion for summary judgment requesting that the court void the division of assets provision because of a restriction on transfer of Tim's interest as set forth in the West entities

¹The first West case decided by the Supreme Court will be referred to herein as *West I*.

²These companies hereinafter will be referred to as the West entities.

³Reference to (T1) are references to pages within the transcribed testimony prepared by the court reporter for *West I*; reference to (T2) are references to pages within the transcribed testimony prepared by court reporter for *West II*; references to (R.E. __) are references within the record excerpts; references to (Ex. __) are references to exhibits within the records; references to (CP __) are references to the clerk's papers.

bylaws and stock restriction agreements. (CP 1192) (R.E. 132) The court denied Tim's motion for summary judgment and denied his request to bifurcate the hearing. In overruling Tim's motion for summary judgment, the Chancellor held that Debbie owned a "contingent interest" in Tim's stock and partnership interest in the West entities. (T2 163-171)

On February 7, 2007, the Chancellor entered his order dismissing the West entities finding that there was no conspiracy to commit fraud or any fraudulent conveyance between the West Entities and Tim West. (CP 1716)

The West entities were no longer parties to this action and therefore did not participate further in the trial process. The West entities did, however file post trial motions which were denied.⁷ The Chancellor entered his final judgment on May 9, 2008. (R.E. 19) (CP 2072) Both parties filed post trial motions for reconsideration, a new trial and amendments to findings of fact and conclusions of law. (R.E. 88) (CP 2138) The Chancellor entered his order denying all post trial motions on September 18, 2008. (CP 2310-2315) (R.E. 27-35)

Tim filed his notice of appeal on October 6, 2008 followed by Debbie's cross-notice of appeal. The West entities also filed their notice of appeal October 10, 2008.

The Chancellor held the following:

1. Certain loans made by West Quality to Tim and characterized as 123, 125, and 113 ledger account payments were loans and not income as asserted by Debbie.
2. Certain loans made to Tim West from West Quality⁴ and loaned from Tim to Coastal Express, Inc., were loans and not income to Tim as asserted by Debbie.
3. Tim was in contempt of court for his continued refusal to pay Debbie any portion of his distributions.
4. Tim was in contempt of court for failing to keep Debbie informed of the affairs of the West entities.
5. Tim breached his obligations to maintain life insurance policies as required by Article III (J) of the PSA.
6. Denied Tim's request to modify his alimony obligations.

⁴West Quality Food Services, Inc. will be referred to as West Quality.

7. Awarded Debbie attorney's fees.
8. Awarded pre-judgment interest on past due alimony.
9. Found that Tim did not breach the December 12, 1993 death benefit agreement.
10. Denied Debbie's claim to any interest in West Investments, LLC.
11. Awarded Tim child support from Debbie.
12. Awarded the West entities attorney's fees from Debbie. (R.E.19)

B. Statement of Facts

(The West entities adopts and incorporates the Statement of Facts of Appellant Charles Timothy West.)

Debbie and Tim West were married in Jones County, Mississippi, on July 28, 1979 and remained married until November 8, 1994. (CP 30) The parties signed a separation and property settlement agreement ("PSA") and the PSA was attached as Exhibit "A" to the Final Judgment of Divorce entered on November 11, 1994. (R.E. 98) During the marriage, the parties had three daughters. Two of the daughters are adults. (T2 901) The third child, Marcy, was 18 years old at the time the court entered its final judgment. (T2 901)

In 2000, Tim, in reliance upon advice of counsel, reduced his payments to Debbie because he and his attorneys believed he had overpaid alimony to Debbie. (T2 1014-1019) Debbie filed her first complaint for citation for contempt on June 12, 2000. *West I* was tried on April 10, 2001 and continued for four days. The Chancellor in *West I* ruled that the PSA was ambiguous, contained conflicting provisions, contained illegal escalation clauses and was devoid of a meeting of the minds and voided the PSA. The Chancellor did not rule on the other defenses raised by Tim to the complaint for contempt. (CP 66, 105) He did not address the validity of Tim's attempted transfer as violating the stock and partnership agreement between Tim and the West Entities. Debbie petitioned for interlocutory appeal and the Supreme Court granted Debbie's petition by order dated January 27, 2003.

The Supreme Court reversed the Chancellor, decided *West v. West*, 891 So.2d 203 (Miss. 2004) and remanded for the Chancellor to consider among other issues: (1) whether there was a material change in circumstances which clearly resulted in an inability to pay, justifying Tim's refusal to pay periodic alimony to Debbie, (2) whether under the property settlement agreement, Debbie was entitled to a portion of the \$411,000.00 in loans from West Quality to Tim, (3) whether Tim breached his obligation to Debbie under a pre-divorce death benefit agreement, and (4) whether Debbie was entitled to attorney's fees in the contempt action and for fees she incurred on appeal.

Following remand, Debbie filed her amended complaint suing the West Entities and raising more issues for the Chancellor to consider. (CP 903) (R.E. 114) Tim filed his answer and amended counter-claim against Debbie. (CP 995)

West I was decided on interlocutory appeal. The Chancellor in *West I* and the Supreme Court never ruled on Tim's defenses to Debbie's claims because he found the entire PSA void due to ambiguity.

Tim raised the following issues in *West II* that were not considered by the Supreme Court in *West I*:

1. The Chancellor should determine which property was marital and non-marital;
2. The restrictions on transfer of Tim's stock and partnership interest contained in the bylaws and partnership agreements voided the equitable lien and purported transfer by Tim of his interest in the West entities;
3. Distributions to Tim from the West entities should not be included in the alimony computation. The PSA does not mention the word "distributions."

The Chancellor refused to consider these issues raised by Tim because of his reliance on "the Law of the Case Doctrine." (R.E. 43-45) Tim contends that the law of the case doctrine is inapplicable and the Chancellor should have considered and ruled on these issues on the merits.

At trial, Debbie claimed the following relief:

- A. Loans characterized as account ledger 123, 125, and 113 on the books of West Quality and made to Tim were actually distribution income that should be shared with Debbie;
- B. Loans from West Quality to Tim and that Tim in turn loaned to Coastal Express, Inc. were actually distribution income that should be shared with Debbie;
- C. Tim was in contempt for failing to pay her one-half of all distributions and failing to provide her with financial information from the West entities;
- D. Failed to pay life insurance premiums;
- E. Breached the December 12, 1993 death benefit agreement;
- F. Judgment against Tim for past due alimony;
- G. Judgment against Tim for fraudulent conveyances to West Investments, LLC and for loans from West Quality to Tim;
- H. Attorney's fees and prejudgment interest.

At trial, Tim claimed the following relief:

- A. The provisions in the PSA whereby Tim attempted to convey his interest in the West Entities and place a lien on his stock and partnership interest are void in violation of the bylaws and partnership agreements of the West entities;
- B. The Chancellor should have bifurcated the hearing to determine marital versus non-marital property;
- C. Debbie is not entitled to distributions to Tim from the West entities because distributions were never mentioned in the PSA;
- D. Tim's alimony obligation should be modified and reduced to a fixed amount based upon a material change in circumstances;
- E. Debbie should pay child support for their child, Marcy;
- F. Debbie was in contempt for withdrawing Tim's cash value in the life insurance policies;
- G. Tim is not in contempt of court because he relied on advice of counsel and the Chancellor's voidance of the PSA in *West I*.

Tim's health condition materially declined after the divorce. Dr. Wood Hiatt, a psychiatrist, treated and examined Tim on several occasions. (Ex. 157) (Ex. 97) Dr. Hiatt's final diagnosis of Tim was major depressive disorder which is recurrent. (Ex. 157, P. 80-81) He described Tim's depression as chronic and a cyclical disorder. He opined that Tim's major depressive disorder was contributed in part by stress related to this litigation and that Tim had an impairment of earning capacity as a result of his condition. (Ex. 157, P. 81-82) Tim's health has progressively deteriorated and his inability to perform the functions of his job is evidenced by his

removal as general manger and director of the corporation. (Ex. 157, P. 83) Dr. Hiatt testified that Tim is not capable of performing the duties he did before as general manager. (Ex. 157, P. 84) He testified that Tim's chronic depression and anxiety results in part from the uncertainty of trying to figure out how much money he owes to Debbie each month. (Ex. 157, P. 87) He further testified that Tim's anxiety and depression will continue indefinitely into the future. (Ex. 157, P. 88-89) Tim will continue to incur medical expenses in the future. Dr. Hiatt's testimony was corroborated by Dr. Joseph Robert Danford, Jr., Tim's family physician. (T2 955-965) (Ex. 95) Dr. Danford diagnosed Tim with chronic hypertension, substance abuse being tobacco, alcohol, insomnia, generalized anxiety, and chronic depression. (T2 968) Dr. Danford's opinions are based upon his personal observations and treatment of Tim and his observation of Tim's depressed mood, diminished interest, sleep disturbance, fatigue, cognitive dysfunction, suicidal ideations, and psychomotor agitation. (T2 968-969)

Two psychiatrists at Pine Grove Recovery Center treated Tim for suicidal ideations. (Ex. 96) Tim was admitted for eight days to Pine Grove Recovery Center for suicidal ideation and chronic depression. Both psychiatrists at Pine Grove Recovery Center diagnosed Tim with major depressive disorder. (Ex. 96)

Debbie's own medical expert, Jessie Dees, a psychologist diagnosed Tim with having a mental illness. (T2 1332, 1334-1335) He agreed that Tim was experiencing a significant amount of anxiety that was directly related to his financial difficulty. Dr. Dees only saw Tim on one occasion for a medical evaluation for litigation purposes. (T2 1327-1328)

Dick West, president of West Entities, testified that Tim's health condition had deteriorated substantially since 2002. (T2 264-267) He verified that Tim was not capable of performing his duties adequately as general manager or director of the corporation. (T2 266-269) Tim testified that his health condition was good between 1994 and 2000. (T2 933-938)

His health started declining between 2001 and 2002. He testified that his medical condition affected the profitability of the company and the litigation adversely affected his relationship with his brothers and family members. (T2 931-938) He testified that when Debbie filed her lawsuit against the West Entities, he was unable to cope with the conflict between the family members. At the time of the trial, Tim was not doing anything at West Quality. His income with West Quality was paid to him out of charity from his family.

Tim was removed as director and manager of the corporation which resulted in Tim's loss of board fees in the sum of \$5,000.00 per month or an annual loss of \$60,000.00. (T2 267, 930-933) Tim was removed from the board because of his health condition and the conflict of interest created by Tim's breach of the stock agreement and the limited partnership agreement by executing the PSA. (T2 348)

In addition to Tim's loss of \$60,000.00 in board fees, he incurred a major reduction in distribution income from West Quality between 2000 and 2005. (T2 304-312) Dick West testified that West Quality paid the shareholders distributions prior to 2000. However, between the period of 2000 and 2005, very few cash distributions have been paid by West Quality to the shareholders.⁵ (T2 304-312) Dick West explained that the shareholders received few distributions between 2000 and 2005 because the KFC Franchise System was involved in litigation with KFC Corporation over territorial rights. (Ex. 102, Appendix B, Schedule 2) The cost of the litigation and a lawsuit settlement against KFC resulted in significant increases in capital expenditures for the West Entities. The West Entities have been required to spend millions of dollars in upgrades of the restaurant facilities. (T2 304-312) West Entities bought a corporate market in New Orleans involving eight (8) stores. Schwegmann's stores closed near some of those restaurants resulting in substantial losses at the restaurants. KFC changed their recipe for their chicken resulting in losses for the company. The West Entities suffered losses in

⁵Between 2003 and 2005 only West Leasing Co. paid distributions.

Hattiesburg as a result of poor management at the stores. The financial condition of the West Entities became so bad that in 2003, they were not in compliance with their covenants with the banks. (T2 304-312) Adding to the financial problems was Hurricane Katrina that hit the gulf coast on August 29, 2005. Forty-four of the sixty-four stores were closed for several days. The West Entities lost three of the stores which have not reopened. A substantial portion of the losses was not insured. West Entities had trouble making payments to the bank. Because of financial problems, the company refinanced its debt and lowered its payment which resulted in a huge penalty. (T2 304-312)

David Childress, Chief Financial Officer, for the West Entities corroborated Dick and Tim's testimony that the primary reason cash was not available between 2000 and 2005 was to fund construction projects that were mandated by the franchisor and because of the unforeseen problems related above. (T2 385-390, Ex. 155) Mandated upgrades of the West Entities facilities created a huge cash flow problem. (Ex. 155) (T2 385-390)

Tim's monthly expenses substantially exceed his monthly income. (Ex. 3) The parties changed custody of Marcy on April 12, 2001. (T2 901) Tim has been the sole supporter of Marcy since that time. (T2 902) Marcy's expenses substantially increased after April 12, 2001. (T2 902-905) (Ex. 145) Tim has paid for Marcy's private school tuition and all of her extracurricular activities. (T2 903 – 904) At the time of trial, she was attending cosmetology college at Jones Junior College. (T2 907) Tim's expenses increased and his income decreased. (Ex. 3, T2 910-912) Income that Tim received from Gerhsen Lehman Group had significantly decreased. (T2 909) Tim does not have the financial ability to pay the money that Debbie is

demanding that he owes. (T2 917-922) He depleted his savings to pay attorney's fees, expert witness fees, and cost of litigation. He has liquidated his personal property such as his motor home, Harley Davidson motorcycle, and primary residence. (T2 917-922) Tim does not have the financial resources to pay his attorney fees to defend him in this litigation. He liquidated all of his retirement accounts which included an IRA and 401(k) to pay his legal expenses. He sold all rental properties to pay his debts. (T2 917-922)

Debbie is in good health. (T2 1585) Debbie's expenses since the divorce have substantially decreased. At the time of the divorce, Debbie was granted primary custody of the parties' three minor children. Debbie has not supplied any financial support for Marcy. (T2 902)

Debbie's Rule 8.05 Financial Statement reflects that her adjusted gross income is \$7,300.00. (Ex. 86) However, she is currently receiving over \$5,000.00 per month in alimony payments. (Ex. 86) She also testified that she is capable of earning a net business income of \$60,000.00 per year as a realtor in addition to her alimony payments. (T2 1588) Debbie West's earning potential as a realtor together with her adjusted gross income is a material change in her income since the divorce judgment. (T2 1525-1533) At the time of the divorce, Debbie was not working outside the home and had no income. She had three minor children living with her and the only income she received between 1994 and 2002 was from Tim. (T2 1551- 1556) She also testified that Tim's child support payment during that period of time was not sufficient to pay all the children's expenses. She paid extracurricular activity expenses for all the girls, bought them clothes, and paid other out-of-pocket expenses for the children. All of these expenses have been eliminated. (T2 1533-1556) While having primary custody of the children, she testified that she paid at least \$1,100.00 a month for the expenses for the children. (T2 1555-1556)

In the year 2000, Tim consulted with Dennis Sharp and Mark Chinn with Chinn & Associates, a reputable law firm in Jackson, Mississippi. (T2 883) Tim believed he was overpaying alimony to Debbie. Before reducing his alimony payments, Tim received advice from Dennis Sharp that he had in fact been overpaying alimony to Debbie. (T2 884-885, Ex. I, 146) Mr. Sharp reviewed the Property Settlement Agreement and found that there were many ambiguities in the agreement. (T2 884) He also testified that there were a lot of different ways to interpret various provisions and sections of the agreement. Mr. Sharp found that sizeable overpayments had been made by Tim and setoffs in the future could be utilized to recoup the overpayments. (T2 884-888) Mr. Sharp determined the agreement was unconscionable. (T2 888-889) After Tim received a letter from Dennis Sharp and Mark Chinn, he contacted Mr. Chinn about their findings and whether he should reduce his alimony payments. Tim testified that he relied on the advice of Mark Chinn and Dennis Sharp when he reduced the alimony payments to Debbie in 2000 through 2002. (T2 1028, 1014-1019) Tim further testified that he believed he was acting in an appropriate manner when he followed advice of Mr. Sharp and Mr. Chinn. (T2 1014-1019) Tim was represented by Jim Becker with Watkins & Eager during the trial on April 10, 2001. After the court entered its final judgment in 2002, Mr. Becker advised Tim that he should wait for a court order before making anymore payments to Debbie. (Ex. 185, P. 15-18) (T2 1014-1019) Tim testified that he relied on Mr. Becker's advice and the Chancellor's order voiding the entire property settlement agreement. Tim had no idea what he should pay after the court voided the agreement. (T2 1018) Tim only stopped making payments to Debbie after the court voided the agreement. (T2 1018) All of Tim's actions with regard to payment of support were based upon reliance of counsel and the Chancellor's decision. Tim was not in contempt of court by relying on the advice of three attorneys and the Chancellor's judgment voiding all the provisions of the property settlement agreement.

The Chancellor found that Tim breached the life insurance provisions of the PSA. (R.E. 72-74) However, Tim was paying the life insurance and did not stop writing a check for the premiums until the court entered an order voiding the agreement. (T2 1025-1031) The policies remained in effect until Debbie, in violation of the agreement, withdrew all cash value from the insurance policies causing the policies to lapse. (T2 1571-1572) Debbie admitted to withdrawing \$80,914.54 from three life insurance policies without Tim's consent as required by the PSA. (T2 1566-1574)

The Chancellor found that Tim breached his obligation to share financial information with Debbie. However, the Chancellor made no findings of fact or explanation of the basis for his conclusion. (R.E. 71-72) The evidence was undisputed that Tim furnished Debbie copies of his tax returns and K-1's. The chief financial officer of the West entities, for over a six year period, met with Debbie approximately every two weeks to discuss specific financial information about Tim. Tim kept her informed in accordance with the PSA.

Debbie has the financial ability to pay her attorneys in this case. (T2 1541-1549) Debbie testified that she was paying her attorneys \$3,000.00 per month for attorney's fees. (T2 1550) She had paid close to \$200,000.00 in the past seven years in attorney fees. (T2 1541-1549) It is undisputed that Debbie has the ability to pay her attorney fees. Because Tim is not in contempt of court and Debbie is financially able to pay her attorney fees, Tim should not be required to pay Debbie's attorney fees in this case.

C. Summary of the Argument

The Chancellor should have granted the West Entities Motion To Void Certain Portions of the PSA purporting to transfer Tim's stock and partnership interest to Debbie and those provisions purporting to convey an equitable lien on Tim's stock and partnership interest or

encumber same in any way. The stock agreement and limited partnership agreements void any attempted transfer or lien of a shareholder or partner's interest.

1. The Chancellor erred in his application of the "law of the case doctrine."

The Chancellor held that the law of the case doctrine applied in this case since it involves the same parties, the same facts, and the same issues. (R.E. 43)

As a general rule, a mandate issued by the Supreme Court is binding on the trial court on remand, unless the case comes under one of the exceptions to the law of the case doctrine. This "mandate rule" is a specific application of the law of the case doctrine. Because a question of law is presented, this Court should conduct a *de novo* review of the Chancellor's decision not to reopen issues decided in *West I. Simpson v. State Farm Fire & Cas. Co.*, 564 So.2d 1374, 1377 (Miss. 1990)

The law of the case doctrine is not a rule of substantive law. This doctrine provides as follows:

The doctrine of the law of the case is similar to that of former adjudication, relates entirely to questions of law, and is confined in its operation to subsequent proceedings in the case. Whatever is once established as a controlling legal rule of decision, between the same parties and the same case, continues to be the law of the case, so long as there is a similarity of facts. This principle expresses a practice of the Court's generally to refuse to reopen what has previously been decided. It is founded on public policy and the interest of orderly and consistent judicial procedure. *TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So.2d 991 (Miss. 1997)

This Court has repeatedly held "but if the facts are different, so that the principles of law announced on the first appeal are not applicable, as where there are material changes in evidence, pleadings or findings, a prior decision is not conclusive upon questions presented on the subsequent appeal. *id.* at 1376.

One further exception of the doctrine can be found in *Brewer v. Browning*, 115 Miss. 358, 364, 76 So. 267, 269 (1917) where this Court stated:

We do not think, however, that this rule is so fixed and binding upon the Court that it may not depart from its former decision on a subsequent appeal if the former decision and its judgment after mature consideration is erroneous and wrongful and would lead to unjust results. Where the facts are the same, and where there has been no change of conditions or situations as that a change of decision would work wrong and injustice, the court may, on subsequent appeal, correct its former decision where it is manifestly wrong. *Simpson v. State Farm Fire and Cas. Co.*, 564 So.2d 1374, 1377 (Miss. 1990)

If there is a need for the Court to depart from its earlier decision to avoid unjust results, the Court is not bound by the law of the case doctrine. *Southland Enterprises, Inc. v. Newton County*, 940 So.2d 937 (Miss. Ct. App. 2006)

A. The law of the case doctrine is not applicable to the Supreme Court's ruling in *West I* from a Chancellor's interlocutory order.

This Court's ruling in *West I* was predicated upon the Chancellor's sole finding that the property settlement provisions and alimony provisions were ambiguous, unconscionable, contained illegal escalation clauses, and lacked a meeting of the minds of the parties. The Chancellor further declined to enter specific findings of fact or conclusions of law holding that it would "make further and more specific findings at such time as the Court holds its final evidentiary hearings on the questions of alimony and property division as of the time of the divorce."

The Chancellor in *West I* was never given the opportunity to address the following issues that were presented in *West II*:

1. What were the existing marital assets of the parties at the time of the divorce?;
2. Did the Property Settlement Agreement include distributions since distributions are not mentioned in the PSA and the parties never received distributions at the time of the divorce?; and,
3. Was the provision regarding Tim's purported transfer of stock and placement of an equitable lien on his stock and partnership interest unenforceable because of

preexisting restrictions on transfer and encumbrances contained in the corporate and partnership agreements?

This Court in *West I* found that the provisions addressing division of property were unambiguous. This Court found that the provision addressing alimony was ambiguous and held that the nature of the alimony award was periodic. *West v. West*, 891 So.2d 203, 212 (Miss. 2004) Although the PSA states as to marital property, that Debbie is entitled to one-half of all existing marital assets, including but not limited to stocks, limited partnerships, and business assets, this Court in *West I* held that “this provision clearly manifested an intent that Tim and Debbie equally share all marital assets. *id.* at 211.

The Chancellor interpreted this language in *West I* to prohibit him from determining the marital assets of the parties at the time of the divorce. Tim and the West entities contend that the following language by the Supreme Court in *West I* was dictum:

During the course of the marriage and at the time of the divorce, Tim owned stock interests in West Quality Food Services, Inc. and Coastal Express, Inc. He also held limited partnership interests in West Leasing Company, West Brothers Leasing Company, and West Family Leasing Company. Pursuant to the terms of the Property Settlement Agreement, Debbie is entitled to equally share these assets, she is authorized to review financial information, including corporate documents relating to distribution or salary which would positively or negatively affect her agreed entitlement to his various forms of income. *id.* at 211.

There was no issue presented to the Supreme Court in *West I* concerning a definition of marital assets. The parties never defined marital assets in their agreement. (R.E. 98) West Quality Food Services, Inc. was owned by Tim prior to the marriage and other stock in West Quality was gifted to Tim after the marriage. (Ex. 136) (R.E. 299) (T2 1055-1056) None of the West Quality stock was commingled. (T2 1056) Likewise, West Leasing Company was not marital under the common definition given by this Court in *Hemsley v. Hemsley*, 639 So.2d 909 (Miss. 1994) and *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994). (T2 1056) (R.E. 299) Other interest owned by Tim were marital assets including Coastal Express, Inc., West Brothers

Leasing Company, and West Family Leasing Company. (T2 1056-1058) The Chancellor was never given the opportunity in *West I* to reach this issue because of the interlocutory appeal.

Dictum has been defined as expressions in a court's opinion "which go beyond the facts before the court and therefore, are individual views of the author of the opinion and are not binding in subsequent cases as legal precedence." *Ameristar Casino-Vicksburg v. Rawls*, No. 2007-WC-01434-COA, 2008 WL 3311882 (Miss. Ct. App. August 12, 2008)

Likewise, the issue of whether or not the parties' agreement included distribution income was not considered nor ruled upon by the Chancellor in *West I*. If the PSA is unambiguous as this Court found in *West I*, a plain reading of the agreement reveals that distributions are not mentioned or referred to as an alimony obligation of Tim. This was yet another issue that was before the Chancellor who did not have the opportunity to consider this issue because of the interlocutory appeal. For example, Tim and Debbie had never received any distribution income from the time of their marriage through the date of their divorce. "Distribution income" was not considered nor contemplated by the parties at the time the divorce was entered. (T2 1062-1064) The Chancellor refused to address this issue because of his application of the law of the case doctrine in *West II*. The PSA clearly uses the term marital assets and marital property but does not define the terms.

This Court has held on more than one occasion that a statement which qualifies as dictum does not have a binding effect. *Collins by Smith v. McMurry*, 539 So.2d 127, 130-31 (Miss. 1989)

In *West I* Debbie raised six issues (1) whether the trial court erred in voiding the alimony and division of marital asset provisions of the Property Settlement Agreement; (2) whether the trial court erred in failing to determine that \$411,000.00 in corporate loans made to Tim were distributions to which Debbie was entitled under the Property Settlement Agreement; (3) whether

the trial court erred in failing to determine that Tim breached his obligation to Debbie under their pre-divorce death benefit agreement; (4) whether Debbie is entitled to attorney's fees for the contempt action and subsequent appeal; (5) whether the trial court lacked jurisdiction to determine alimony and division of marital assets anew in the absences of the parties' voluntary written consent; and (6) whether the trial court erred in granting Tim's motion to quash Debbie's subpoenas of West Quality documents. *West v. West*, 891 So.2d 203 (Miss. 2004)

Because this case was appealed from an interlocutory order, the Supreme Court in *West I* never had the opportunity to review the Chancellor's findings of fact and conclusions of law with regard to the definition of marital assets, exclusions of distributions, and the validity of the provision placing an equitable lien on Tim's stock and partnership interest in view of the corporate and partnership bylaw restrictions. Because of the interlocutory order, the Supreme Court did not enter a ruling on the merits of the case in *West I*. The law of the case doctrine does not apply and this case should be reversed and remanded for the Chancellor to consider the issues set forth above.

B. The law of the case doctrine is not applicable because the parties and facts in *West II* are substantially different from the parties and facts in *West I*.

One of the exceptions to the law of the case doctrine is that if the facts are different so that the principles of law announced on the first appeal are not applicable, or whether there is material changes in the evidence, the pleadings or findings, a prior decision is not conclusive upon questions presented on the subsequent appeal. *Continental Turpentine & Rosin Co. v. Gulf Naval Stores Co.*, 244 Miss. 465, 479, 142 So.2d 200, 206-207 (1962)

The facts in *West II* are substantially different from those in *West I*. This Court's mandate in *West I* was as follows:

We instruct the trial court, on remand, to consider whether Tim acted in contempt of the Property Settlement Agreement. In examining whether Tim was in

contempt of the agreement, the trial court must consider, among other issues: (1) whether there was material change in circumstances which clearly resulted in an inability to pay, justifying Tim's refusal to pay periodic alimony to Debbie; (2) whether, under the property settlement agreement, Debbie was entitled to a portion of the \$411,000.00 in "Loan" from West Quality to Tim; (3) whether Tim breached his obligation to Debbie under a pre-divorce death benefit agreement; and (4) whether Debbie was entitled to attorneys fees on her contempt action and for fees she incurred on appeal. *West I* at 219.

This Court clearly authorized the Chancellor to consider all other issues involved in this case, particularly in light of the fact that *West I* was decided based upon an interlocutory order that had not considered all of the evidence at a final adjudication on the merits before the Chancellor.

The facts before the Court in *West I* focused solely on ambiguity of the agreement. This is evident by the Supreme Court in *West I* focusing its decision on the Chancellor's ruling that the agreement was ambiguous, unconscionable, contained illegal escalation clauses and lacked a meeting of the minds.

The facts and issues that are substantially different in *West II* included the following:

Tim's stock ownership in West Quality Food Services, Inc. was gifted to him by his parents. (R. E. 299) This stock had never been commingled. (T2 1055-1056) Tim's interest in West Leasing Company, a partnership, was created before the marriage and was never commingled. (T2 1056-1058) (R. E. 299) Tim did have stock and partnership interest at the time of the divorce that would be considered marital property as referenced in the parties' agreement. Those interests include Tim's stock ownership in Coastal Express, Inc. and his partnership in West Family Leasing Company and West Brothers Leasing Company. (T2 1056-1058) The restrictions on transfer contained in the bylaws of West Quality Food Services, Inc. and the partnership agreements of West Leasing Company and Coastal Express, Inc. were not considered in *West I*. (T2 1058-1063) (R.E. 163-294) Testimony and documents concerning

loans made to Tim and other stockholders of West Quality that were classified as 113 account loans on the books of West Quality were not considered in *West I*. Debbie claimed that these loans were distributions and the Chancellor found that these loans were properly classified as loans to Tim West. (R.E. 53) West Investments, LLC was created in 2000. There was significant testimony and facts concerning West Investments and its ownership of property. The facts were significantly different in *West II* with regard to the method for determining how the alimony was to be calculated and if so, how much would be owed in accordance with each calculation. (R.E. 47-50) Three different calculations were presented to the court by the parties. (R.E. 47-50) Three experts provided testimony concerning the proper method according to the PSA for calculation of alimony. (R.E. 47-50) The facts relating to the modification of alimony were never presented in *West I* but were presented in detail in *West II*. (See Statement of Facts).

The parties in *West II* were not the same parties in *West I*. In addition to Tim being named as a defendant, Debbie also sued West Quality Food Services, Inc., Coastal Express, Inc., West Leasing Company, West Brother Leasing Company, West Family Leasing Company and West Investments, LLC. Debbie alleged that the West entities made advances to Tim for the purpose of cheating Debbie out of her one-half equitable ownership interest in distributions. (R.E. 114) Additional allegations and evidence concerning Tim's obligation to carry life insurance, Debbie's breach of her obligations to pay life insurance premiums, facts and evidence concerning Debbie's child support obligation were not considered in *West I*. (R.E. 114) *West I* was tried in four days with the court considering limited issues. *West II* was tried in 12 days with numerous issues that were never raised or considered by the Chancellor or the Supreme Court in *West I*. The facts, issues, and the parties were substantially different in *West II* than they were in *West I* when decided by the Supreme Court. The pleadings filed in *West II* were substantially different than the pleadings filed in *West I*. This case began as a contempt action filed by Debbie

West in 2000. This case has evolved into claims by Debbie of fraud by the West entities, breach of fiduciary duties by Tim, counterclaims for modification and contempt involving significantly more issues than *West I*. (R.E. 114) In addition, the findings of the Chancellor in *West II* were substantially different and more extensive than the one finding of ambiguity by the Chancellor in *West I*. (R.E. 36) (CP 523-524)

C. Applying the law of the case doctrine in this case would be erroneous and would lead to unjust results or manifest injustice.

Tim presented his motion to bifurcate the trial for the court to make an initial decision concerning the classification of the parties' property. (CP 1019) Tim also brought before the court his motion for summary judgment for the court to determine that Debbie did not have an interest in Tim's non-marital stock and partnership interest because of the restrictions on transfer in the West Quality and Coastal Express bylaws and the restrictions on transfer in the West Leasing Company partnership agreements. (CP 1192) The Court denied both of these requests based solely on the law of the case doctrine. (CP 1709) The court's finding that Debbie is entitled to ownership of one-half of Tim's non-marital interest in his family businesses violates the restriction on transfer and encumbrance provisions of the agreements. The restrictions were designed to keep non-West family members from being involved in the West family business. (R.E. 164, 165-167, 196, 199, 207, 221, 223, 234, 292-300)

The West entities also brought before this court its motion to void certain portions of the PSA in violation of the by-laws and stock agreements which was denied based on the law of the case doctrine. The Court's ruling in *West I* has allowed Debbie to entangle the West entities in this divorce litigation in violation of the stock and partnership agreements. To find that Debbie is an owner, equitable owner, contingent owner or lien holder is manifestly unjust. This is true in view of her knowledge of the restrictions when she signed the PSA. (T2 1556-1566) The West

entities never agreed to recognize the PSA nor furnish her with any financial information. (T2 272-273) The law of the case doctrine should not be applied in this case.

2. The Chancellor erred in failing to void the provisions of the PSA transferring Tim's stock and partnership interest due to the shareholder and partnership restrictions on transfer agreements.

The Chancellor should have voided the provision of the PSA whereby Tim attempted to transfer and lien his interest in West Quality Food Services, Inc., West Leasing, West Family Leasing, West Brothers Leasing, and Coastal Express, Inc. for violating the shareholder and partnership agreements. In addition, the provisions of the PSA placing an equitable lien on Tim's stock under the partnership agreement are void as a result of the shareholder and partnership agreements. (R.E. 134-154, 164-167, 185-188, 196, 199, 201, 202, 210, 212, 221, 223, 226)

The Chancellor never considered whether the transfers by Tim and the granting of a lien on his interest were void due to the shareholder and partnership restrictions on transfer provisions. The Chancellor found that the Law of the Case Doctrine prohibited him from reaching this conclusion. However, the Chancellor did find that Debbie owned a "contingent interest" in Tim's stock and partnership interest. (R.E. 19-20) (T2 167-169) In essence, the Chancellor re-wrote paragraph III (H) of the Property Settlement Agreement by granting Debbie a "contingent interest." (T2 168)

Paragraph III (H) of the PSA provides that Debbie shall have a vested interest in one-half of Tim's stock and limited partnership interest. (Ex. 1, R.E. 106) The PSA further provides that the Wife obtains a present transfer of one-half vested equitable ownership interest in said properties. (R.E. 106) The PSA further provides that Debbie has an equitable lien of one-half of Tim's stock and limited partnership interest. (R.E. 107) The West Entities have corporate agreements that prohibit any type of transfer or encumbrance from a shareholder or a limited

partner to any other person without following the guidelines set forth in the agreements. (R.E. 163-244)

The West Quality shareholder agreements provide that a shareholder may not dispose of his stock nor can the shareholder lien his interest in the stock. (R.E. 164) The agreement further provides that a transferee acquires no rights in the shareholder's stock absent compliance with the agreement. (*West II* Ex. 72, *West I* Ex. 29) (R.E. 165)

West Leasing's limited partnership agreement provides any sale or transfer or purported sale or transfer of any partnership interest, except as provided in this Article XI shall be null and void unless made in strict accordance with the provisions of this Article XI. (*West II* Ex. 67, *West I* Ex. 30) (R.E. 188) The agreement further provides that no partnership interest shall be subjected to a security interest or to being otherwise assigned as collateral by any partner without the unanimous written consent of the general partners. (R.E. 196) West Family Leasing and West Brothers Leasing also provide that any sale or purported sale or transfer of the partner's interest is null and void and that no partner may place a lien on his partnership interest. (*West II* Ex. 68, 69; *West I* Ex. 31, 32) (R.E. 201-202 & 215)

The bylaws of Coastal Express, Inc. provide that all sales or transfer of stock are subject to the prior approval by the board of directors of Coastal. (R.E. 226) The bylaws further provide that transfers of stock shall be made only on the books of the corporation and the certificate properly endorsed shall be surrendered and cancelled before a new certificate is issued. (*West II*, Ex. 70) (R.E. 226) Debbie claims that she owns a vested one-half interest in Tim's stock and partnership interest and further claims that she has a lien on said stock and partnership interest. (T2 156-158) This provision of the PSA directly violates the shareholder and partnership agreements of the West Entities. Debbie and her attorneys were aware of the stock and

partnership transfer restriction before she signed the PSA. Debbie **admitted** she knew the West entities had to approve any transfer. (Ex. 1) (T2, 1562) (T2 1062-1063, 1556-1566)

The issue of whether the PSA is void, or any portion thereof, because it violates the shareholder and partnership agreements is one of first impression in Mississippi. In *Fayard v. Fayard*, 293 So.2d 421 (Miss. 1974), the Supreme Court recognized that several types of restraints on stock transfers have emerged as reasonable under the circumstances is persuasive of validity. Among these are (1) consent restraint, i.e., restrictions requiring the consent of the directors or of other shareholders or a designated percentage of one of these groups for transfer, (2) provisions limiting transfers to a specified class of persons, (3) first option provisions, or (4) options empowering a corporation, its officers, directors or other shareholders to purchase shares of a holder on the happening of a specified event. *id* at 423 and 424. The Chancellor should have determined whether the restrictions on transfer and prohibition against security interest and liens were reasonable by applying the reasonableness test set forth in *Fayard*, 293 So.2d at 424.

In *Burns v. Burns*, 789 So.2d 94 (Miss. Ct. App. 2000), the Court of Appeals citing *Fayard* stated that a majority of courts sustain the restrictions on transfer in closed corporations which were “determined to be reasonable in light of the relevant circumstance. The underlying test for determining reasonableness is whether the restraint is sufficiently needed by the particular enterprise which justify overriding the general policy against restraints on alienation.” *Burnes v. Burnes*. Neither the *Fayard* court nor the *Burns* court were presented with restrictions on transfer like the restrictions in this case. The restrictions in this case for West Quality, West Leasing, West Family Leasing and West Brothers Leasing specifically state that the transferee acquires no rights and that the transfer or lien is null and void. (R.E. 165, 166, 188, 201-202, 215)

Debbie has used this court's decision in *West I* as a springboard to drag the West entities in this litigation as leverage to force payments from Tim. By suing the West family businesses, she has damaged the West family relationships and caused Tim's loss of income from board fees. The Chancellor should have voided the provision of the PSA transferring or encumbering Tim's stock and partnership interest.

D. Conclusion

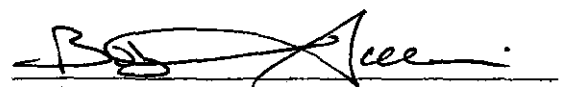
The Chancellor's interpretation of this Court's decision in *West I* resulted in his erroneous application of "the law of the case" doctrine. By applying the "law of the case" doctrine, the Chancellor failed to entertain the West entities request that the property settlement provisions concerning his transfer of assets and liens is void due to the stock and partnership agreements of the West Entities

Therefore, for the reasons stated in this Brief, the West entities respectfully requests that this court reverse the decision of the Chancellor and remand the case consistent with the West entities prayer for relief.

Respectfully submitted,

WEST QUALITY FOOD SERVICES,
NC., COASTAL EXPRESS, INC., WEST
LEASING COMPANY, WEST
BROTHERS LEASING COMPANY,
WEST FAMILY LEASING COMPANY,
and WEST INVESTMENTS, LLC, the
West Entities

BY:


BOB SULLIVAN

CERTIFICATE OF SERVICE

I Bob Sullivan, Attorney for West Entities, do hereby certify that I have this date sent via U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing documents to the following:

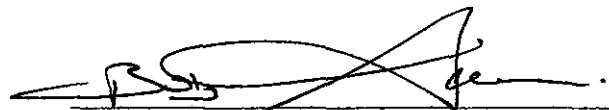
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This the 35th day of May, 2009.


BOB SULLIVAN