

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN CHMELICEK

APPELLANT

VERSUS

CASE NO. 2008-CA-01736

R+

DIANNA CHMELICEK


APPELLEE


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 conflicts, disqualifications, or recusal:

- | | | |
|----|--|----------------------------|
| 1. | JOHN CHMELICEK | Appellant |
| 2. | DIANNA CHMELICEK | Appellee |
| 3. | Renee McBride Porter
Porter Law Firm, P.A.
P.O. Box 982
915 Main Street
Columbia, Mississippi 39429 | Attorneys for
Appellant |
| 4. | Samuel Farris
607 Corinne St Ste A2
Hattiesburg, Mississippi 39401 | Attorney for
Appellee |
| 5. | Honorable Judge H. C. Thomas, Jr.
Chancellor, 15 th District
P.O. Box 807
Hattiesburg, Mississippi 39403 | Lower Court
Judge |

Respectfully submitted, on this the 2nd day of December, 2009.



Renee McBride Porter
MSB: 

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN CHMELICEK

APPELLANT

VERSUS

CASE NO. 2008-CA-01736

DIANNA CHMELICEK

APPELLEE

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	1
TABLE OF CONTENTS	2
TABLE OF CASES AND AUTHORITIES.....	3
ARGUMENT.....	4
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

TABLE OF CASES AND AUTHORITIES

Burge v. Burge, 851 So.2d 384 (Miss.Ct.App. 2003)

REPLY TO THE STATEMENT OF CASE

Appellee argued proposed facts to the Statement of Case. John would show that the Court should not consider the proposed facts Dianna is arguing and read the record which speaks for itself in this matter. However, in reply John would further show as follows.

1. In the Statement of Case, Dianna argues that she was not working at the time of the marriage, and she had quit college prior to the marriage. John would show that Dianna was full time employed and in college when the parties met. She, herself, quit both college and work prior to the marriage. John would show that he frequently asked Dianna to work and helped her set up her photography business.

2. Dianna argues that John worked 190 hours with his employer. The brief does not show when the 190 hours is supposed to occur. A week has only 168 hours total, and therefore there is no way John could have worked 190 hours per week. John would show that he worked excessively because of family debt. John worked to the extent that he eventually burned out. John was paid (as all doctors, in Hattiesburg Clinic) on a fee for service (i.e., He was only paid if he worked.) John was not on salary.

3. Dianna argues that John lived above his means. John would show that the family lived above their means which was found by the Court.

4. Dianna argues that John should be solely responsible for the tax debt. The Canadian income tax problem was acquired during the marriage. Dianna fully participated in all marital expenditures, investments, etc. It was Dianna who did all accounting, taxes, etc. (Dianna admitted that she knew about the tax lien with Canada, (Record page 32, lines 1-5) and that she had actually saw that the taxes were done each year. (Record page 120, lines 23-29, page 121, lines 17-

20).

5. Dianna argues that John withdrew from Fidelity and wasted marital assets. The withdrawals from Fidelity were court ordered to pay Dianna and in addition to pay bills. (The Court recognized that there was much more debt than there was cash flow to satisfy the debt and therefore, allowed John Chmelicek to access the only available line of credit that the parties had, that being his retirement account.) As the Judge noted, there was insufficient money each month to pay the bills John had to work the hours he worked to attempt to pay the bills and assess the Fidelity account..

6. Dianna argued that the house was refinanced to give John money. The house was refinanced to pay for the bills plus the huge marital debt. John did not receive cash.

7. Dianna argues that John never requested one-half of the household personal properties, and therefore he should not receive the same. John requested an equitable division of all assets including personal property. He never received the same.

8. Dianna argues that her lifestyle has changed. John's lifestyle has changed more drastically than Dianna's. Dianna has all marital assets and the children (she has not encouraged visitation between John and his children. Thus the good relationship that John had with his children is now destroyed. Dianna has incarcerated John and taken away his medical license. John would suggest his life style has changed more dramatically than Diannas.

9. Dianna argues that John always told her the parties would be out of debt with the next bonus. The parties had debt of over \$1,000,000.00., and therefore John would never say that parties would be out of debt with the next bonus.

10. Dianna argues John voluntarily resigned. John did not voluntarily resign. He

was forced to resign due to the fact he could no longer work the hours.

11. Simple math calculates that the Judgment entered herein is not possible. John was forced into bankruptcy by the size of marital debt (jointly acquired), by Dianna having his medical license suspended, and by his being unable to work because of being jailed stress and burnout.

RESPONSE TO ARGUMENT

1. That the Court has placed an obligation on John that is impossible for him to perform.

There is no way that John can perform the obligation placed upon him by the Court. The Court looked at one year and determined his income to be \$20,000.00., per month. John would suggest that the more appropriate procedure for the Court would be to average his income. This Court has upheld the use of averages for fluctuating income. Burge v. Burge, 851 So.2d 384 (Miss.Ct.App. 2003), “we upheld the use of averages for fluctuating income as acceptable.” In the six months prior to trial John’s income was averaged and was \$15,487.00, per month. John had the best financial year he has ever had in 2007 when he grossed \$437,550 (Record page 208, Line 11), but that takes into account the 260 to 290 hours he would work a month. John’s average income over the past five years was \$363,050. (Trial Exhibit #1). The Court should base it’s Judgment on that average income.

Appellee’s brief states” John presents no proof or authority for his inability to meet the obligation place upon him.” Simple math proves the fact that John is unable to perform the obligations.

\$20,000.00

-Child support in the amount of \$4,400.00 a month;

-Life insurance policies

-\$500.00 Canadian Tax debt (which will never be paid at the rate of \$500.00., per month

-John's vehicle payment-\$875.00
-\$1360.00 credit cards of the parties
-\$6,000.00 alimony
-\$1721.26 (this is the monthly lump sum alimony broken into months as \$61965.47., has to be in three years

Total left to pay all other bills and live: \$5143.74

\$15487.00 (average income over the past three years)
-Child support in the amount of \$4,400.00 a month;
-Life insurance policies
-\$500.00 Canadian Tax debt (which will never be paid at the rate of \$500.00., per month
-John's vehicle payment-\$875.00
-\$1360.00 credit cards of the parties
-\$6,000.00 alimony
-\$1721.26 (this is the monthly lump sum alimony broken into months as \$61965.47., has to be in three years

Total left to pay all other bills and life: \$630.74

This does not consider the marital home mortgage of \$481,000.00. The Court did not consider the fact that the Canadian Tax debt will never be paid at the rate of \$500.00., per month. This monthly calculation does not consider the fact that John has to pay Dianna \$9,500.00 for her half of the existing equity in the marital home. This monthly obligation does not consider the fact that John has to pay his father \$150,000.00. This monthly obligation does not consider the fact that John has to pay Dianna \$151,622.22, being one-half of the 401(k) funds with John paying 87.5% of any tax consequences. This monthly obligation does not consider the fact that John has to pay Dianna's attorney's fees in the amount of \$20,000.00. This monthly obligation does not take into consideration the college expenses of the children.

The sum of \$5,143.74., is left if John earns \$20,000.00., which he has only earned one year out of twenty-one years. From this amount John has to pay college expenses, debts to his

father, the insurance premiums and all of his living expenses. The sum of \$630.74., is left if John earns what he has earned as an average over the past three years.

Dianna's expenses are as per her financial statement, which was introduced as Exhibit 2, \$10,297.48 which includes two house notes totaling over \$3500.00., food and household supplies over \$1300.00., utilities of over \$1,000.00, and auto payments of over \$1700.00 per month. First of all this figure is not accurate as it includes two house notes and expenses for the children as though they live at home and from the record one is living on campus at college. Secondly, even with this figure the Court has ordered John to pay all of Dianna's expenses by his monthly ordered payments to her. The award by the Court does not consider her ability to work nor her expenditures and is grossly unfair.

In the Brief filed by Appellee it is argued that John wasted assets. The record is clear in that the parties (both of them) had spending problems. Dianna certainly has wasted more assets than John. Dianna received a total of \$72,500.00 in support and payments from John from October, 2007, until March, 2008, (Record page 151, lines 10-23) in which she only made two payments on the marital home and did not make any payments on the outstanding debts; she left all that for John to pay. Further, Dianna admitted that after the Court held the first Temporary Hearing John had sold a motorcycle, R.V., Porsche, and a jeep to reduce debts. Dianna also admitted that she had moved out of the marital domicile without conferring with John and had moved into a home owned by her brother with rent of \$2,200.00 per month. (Record page 101, line 9). There is no way that John could be found to have wasted assets and leave Dianna alone with that finding.

2. That the Court's award of both lump sum and periodic alimony is manifestly in error and contrary to the factors in Armstrong v. Armstrong.

John's assertion that Dianna can make money is based upon her income earning ability. It is not fair or equitable that John be the only wage earner. As per the tax returns, Dianna's gross income for her photography business is \$31,480.00 per year (as per the 2006 income tax return) and thus \$2,623.33 per month. Dianna admitted that she only worked 15% of the time. If you were to calculate Dianna's gross income, if she worked the other 85% of the time, you arrive at \$17,488.89 per month, which Dianna could be earning now. Dianna should be charged with some income or income earning ability.

It is not proper to go through each Armstrong factor in this Reply Brief, however, if this Honorable Court will look at Appellant's brief they will see that when you consider and weigh the factors the amount of the award of alimony both periodic and lump sum was grossly unfair.

3. That the Court's division of property is unfair, not equitable, and contrary to the law in Ferguson v. Ferguson.

In Appellee's brief she states, "Even if John did not receive one-half of the assets accumulated during the marriage." John would assert that it is grossly unfair for him not to at least receive one-half of the of the assets because of the fact that the assets were acquired through his employment and working efforts.

When you analyze the asset division as Appellant did in his brief you find that Dianna received the bulk of the assets and the Ferguson factors were not properly considered. John argued the values from Dianna's financial statement which is introduced into evidence as Exhibit 2. Therefore, no appraisal is needed as Dianna admits herself the values of which John received is almost nothing.

4. That the Court's division of debts is unfair and not equitable.

John was ordered to pay ninety-three percent of the parties debt which is unfair and not equitable. In the reply to this argument in her Brief of Dianna, she provides "The Court did not allude at all to John's previous conduct as far as adultery is concerned." John would move to strike this language as there was no proof of previous adultery in the record and the Court did not find the same.

5. That the Court made specific findings that were against the overwhelming weight of the evidence.

The Appellee's brief provides that John fails to advise this Court that he had an agreement with the IRS to pay \$500.00., per month on the Canadian tax lien. The Court can find that the \$500.00., a month was simple interest and the lien would never be satisfied with only paying \$500.00., per month.

CONCLUSION

Dianna argues in her brief statements that are not in the record and are not proper on this appeal. John prays that this Court will review the record and his Brief and find that there is no way he can perform this obligation placed upon him by the Court and the award and division of both property and debt was not equitable.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN CHMELICEK

APPELLANT

VERSUS

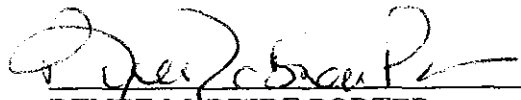
CASE NO. 2008-CA-01736

DIANNA CHMELICEK

APPELLEE

CERTIFICATE OF SERVICE

This is to certify that I, Renee McBride Porter, on the 2nd day of December, 2009, furnished a true and correct copy of the above and foregoing **REPLY BRIEF OF APPELLANT** to the Honorable Judge H.C. Thomas, Jr., Chancellor, 15th District, P.O. Box 807, Hattiesburg, Mississippi 39403, 10th District, by placing same in the United States Mail, postage prepaid, and mailing it to his usual office address of Post Office Box 1664, Hattiesburg, Mississippi 39403, and to the Honorable Samuel Farris, 607 Corinne St Ste A2, Hattiesburg, Mississippi 39401, Attorney for Appellee.


RENEE McBRIDE PORTER
MSBN [REDACTED]
PORTER LAW FIRM, P.A.
POST OFFICE BOX 982
COLUMBIA, MISSISSIPPI 39429
(601) 731-1886
ATTORNEY FOR APPELLANT
JOHN CHMELICEK