IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2008-TS-00414

JOHN BOYCE TALBERT, III **APPELLANT**

VS.

DEBORAH A. TALBERT **APPELLEE**

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

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Mississippi Rules of Appellate Procedure 28(a)(1) and 28(b), 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 Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

1. John Boyce Talbert, III, Appellant

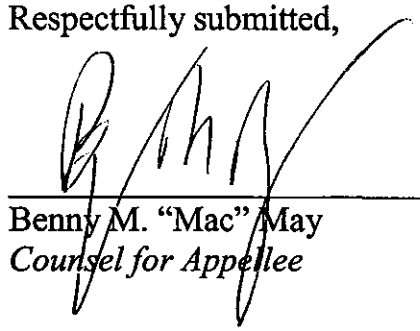
2. Deborah A. Talbert, Appellee

3. William C. Bell, Esq.
   Counsel for Appellant

4. Benny M. "Mac" May, Esq.
   DunbarMonroe, P.A.
   Counsel for Appellee

5. Hon. Cynthia Brewer
   Trial Court Judge

Respectfully submitted,



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STATEMENT OF THE CASE

John Boyce Talbert, III ("Boyce") and Deborah A. Talbert ("Debby") were married on or about February 20, 1988. R. at V. 1, p. 000002. After over fourteen years of marriage, Deborah filed for divorce on December 9, 2002, on various fault grounds, and on the alternative ground of irreconcilable differences. R. at V. 1, p. 000001. Following a successful mediation of all issues, the parties agreed to a divorce based upon irreconcilable differences. On joint motion, all fault grounds were withdrawn, and a Final Judgment was entered on May 30, 2003. R. at V. 1, pp. 30, 31.

On February 4, 2004, Boyce filed his *Petition for Declaratory Judgment, to Find Deborah A. Talbert in Contempt and for Other Relief.* R. at V. 1, p. 49. Deborah filed her on *Petition for Citation of Contempt* against Boyce on February 23, 2004. R. at V. 1, p. 83. The parties resolved the differences set forth in their respective petitions, and an *Agreed Order* was entered on March 8, 2004. R. at V. 1, p. 89.

Boyce filed his *Petition for Modification of Final Judgment* on October 27, 2006. R. at V. 1, p. 92. In his petition, Boyce sought an elimination, or in the alternative, a reduction, of his obligations to Debby under the Court's previous Judgment and Order. In support, Boyce stated that he had experienced significant health problems, and that he had sustained a loss of income "due to forces beyond [his] control." R. at V. 1, p. 93. The principal change in circumstances cited by Boyce in his petition was his purported diagnosis of reversible glaucoma, which he claimed "resulted in lost work time and lower

income." R. at V. 1, p. 94.

Debby filed her *Petition for Citation of Contempt and for other Relief* on February 5, 2007. R. at V. 1, p. 127. In her petition, Debby sought to have Boyce held in contempt for failure to pay an installment of lump sum alimony still due and owing, failure to pay numerous medical expenses as required in the decree and failing to meet his obligations regarding life insurance benefits for Debby.

Trial was held on two non-consecutive days, April 26, 2007, and July 19, 2007. Following post-trial briefing by the parties, the court issued its *Opinion and Final Judgment* on September 26, 2007. R. at V. 2, p. 197. Boyce filed his *Motion for New Trial and for other Relief*, on October 8, 2007. Following a hearing, that motion was denied by the trial court on February 11, 2008. R. at V. 2, p. 289. Boyce then filed his *Notice of Appeal* on March 6, 2008.

STANDARD OF REVIEW

The standard of review for cases such as this is well settled:

> Domestic relations matters are reviewed by the substantial/manifest error standard. *Stevison v. Woods*, 560 So.2d 176, 180 (Miss.1990). "This Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Bell v. Parker*, 563 So.2d 594, 596- 97 (Miss.1990).

Hackman v. Burkes, 910 So.2d 1212, 1213-14 (¶5) (Miss. Ct. App. 2005). "Suffice it to say that we have no authority to grant appellant any relief if there be substantial credible evidence in the record undergirding the determinative findings of fact made in the

with the trial court's judgment regarding life insurance benefits, and notifications regarding same, to Debby. The award of attorney fees to Debby was appropriate both under the *McKee* factors, and under current authority regarding attorney fees in contempt actions. Lastly, the trial court gave due regard to the testimony of Boyce's accountant, but found that the underlying reasons for Boyce's financial condition did not entitle him to any relief.

ARGUMENT

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

A party seeking a modification of a divorce decree must demonstrate that there has been "a material change in circumstances occurred as a result of after-arising circumstances not reasonably anticipated at the time of agreement." *Dix v. Dix*, 941 So. 2d 913, 916 (¶15) (Miss. Ct. App. 2006) (citing *Varner v. Varner*, 666 So.2d 493, 497 (Miss. 1995).

It should be noted from the outset that, until litigation was commenced by the filing of Boyce's *Petition for Modification of Final Judgment*, in October 2006, no issue had been decided by the trial court on the merits of this action. Rather, the parties had resolved all issues between them. This began with their entry of an *Agreed Order* regarding temporary support in March 2003, continued with the entry of and agreed *Final Judgment of Divorce* in May 2005 which incorporated their mediated *Property Settlement*

Agreement, and then finally culminated with an *Agreed Order* of modification in March 2004. R. at V. 1, pp. 14, 31, 89. Boyce has made repeated reference, both at trial and in his brief to this Court, regarding the amount of money that he has paid either to Debby or for her benefit since the parties' divorce in 2003. Debby asks that, in evaluating this matter, the Court consider the fact that Boyce agreed to pay all of these amounts. He was not forced to pay them by way of a judgment rendered by the trial court following a trial on the merits of this matter. This Court has stated the following regarding a party's efforts to modify the terms of a divorce settlement to which he previously agreed:

> In property and financial matters between the divorcing spouses themselves, there is no question, that absent fraud or overreaching, the parties should be allowed broad latitude. When the parties have reached agreement and the chancery court has approved it, we ought to enforce it and take a dim view of efforts to modify it, as we ordinarily do when persons seek relief from their improvident contracts.

Speed v. Speed, 757 So. 2d 221, 224-25 (¶8) (Miss. 2000). Indeed, "[w]hen, as in this case, a provision for periodic alimony is based upon the agreement of the parties, that provision should not be modified without close scrutiny." *Morris v. Morris*, 541 So. 2d 1040, 1043 (Miss. 1989) (citations omitted).

Boyce first argues that the trial court erred in failing to make an on-the-record analysis of the *Armstrong* factors in denying his petition. The lack of such findings does not render the trial court's judgment on the issue *per se* reversible. *Moore v. Moore*, 803 So. 2d 1214, 1219 (¶19) (Miss. Ct. App. 2001) (quoting *McNally v. McNally*, 516 So. 2d 499, 501 (Miss.1987)). Rather, "[r]eversal requires manifest error." *Id.* A review of the

facts presented in this matter, and the trial court's findings thereon, demonstrates that the trial court's judgment was supported by substantial, credible evidence, and did not constitute manifest error.

Boyce offered two purported changes in circumstances in support of his petition. The first was his diagnosis of "severe glaucoma." It was contended that Boyce's glaucoma prevents him from earning the income that he earned previously, and that it warranted modification of his obligations. However, Boyce failed to show that his glaucoma has progressed to such a level as to affect his ability to sustain his earning level. No testimony was presented from any medical professional to support any such assertion. On cross-examination at trial, Boyce testified that the only long term affect that the glaucoma has had on him is his loss of the ability to read fine print. T. at V. 1, p. 43. The trial court noted in its opinion that Boyce was observed at trial reading documents with no trouble. R. at V. 2, p. 199. Furthermore, Boyce testified that he was diagnosed with glaucoma in 1999, some four years prior to the parties' divorce. T. at V. 1, p. 26. Thus, his glaucoma could not be considered a material change in circumstances arising after the parties' divorce. *Dix v. Dix*, 941 So. 2d 913, 916 (¶15) (Miss. Ct. App. 2006) (citing *Varner v. Varner*, 666 So.2d 493, 497 (Miss. 1995).

Boyce did testify that he had undergone several surgeries during 2005 and 2006 to correct his glaucoma, and that each of those surgeries caused him to be "out of commission" for approximately two to three weeks. T. at V. 1, p. 43. No evidence was

presented which would indicate the need for future surgeries, and the Court will not speculate as to whether any such future surgeries will be necessary. Therefore, to the extent that these surgeries could have conceivably supported a modification of Boyce's obligations, such a modification would only have been temporary in nature. The trial court correctly found that Boyce's glaucoma, was essentially a non-issue.

The only other factor upon which Boyce relied at trial is the general condition of the market. Boyce testified that Hurricane Katrina had negatively affected his business, and also testified generally that there had been a "downturn" in the market. However, on cross-examination, Boyce mentioned that he had recently participated in a meeting with other industry professionals and that they hoped to "turn all of that around." On further examination, Boyce would not provide specifics regarding that meeting or the future prospects that came from the meeting.

It is common knowledge that the financial market fluctuates and goes through "highs and lows." The Court was within its discretion in taking judicial notice of the same. *Enroth v. Memorial Hosp. at Gulfport*, 566 So. 2d 202, 205 (Miss. 1990). Although Boyce testified that prior to 2005, he had never made less money than the year before, he quickly recanted that brazen statement when presented with his own accountant's analysis showing that he made less in 2003 than he did in 2002. T. at V. 1, pp. 81-82. It is notable that it was during 2003, in which he was making less than he did the year before, that Boyce agreed to most of the obligations that he now seeks to have

the time of agreement" will be considered in ruling upon a request for modification. *Dix v. Dix*, 941 So. 2d 913, 916 (¶15) (Miss. Ct. App. 2006) (citations omitted). Here again, it is just common knowledge that health insurance premiums increase with time and as insureds grow older. The parties should have reasonably anticipated that Debby's health insurance premiums would escalate significantly in between the time of divorce and the time at which Debby would qualify for Medicare. There is no question that Boyce was fully aware that Debby's health insurance premium was on the rise at the time that he signed the Agreed Order which was entered by the Court on March 8, 2004. In fact, the increase in Debby's health insurance premium was one of the main reasons cited in Boyce's Petition for Declaratory Judgment, to find Deborah A. Talbert in Contempt and for other Relief which was filed on February 4, 2004. R. at V. 1, p. 49. In that petition, Boyce stated that Debby's premium had increased approximately 35% in the seven months following the entry of the Final Judgment of Divorce. R. at V. 1, p. 53. Knowing that, Boyce agreed to continue paying the premium. Given that any increase in Debby's health insurance premium since April 2004 was foreseeable, it was proper for the trial court not to consider the same in ruling upon Boyce's petition.

Furthermore, the trial court found Boyce to be in contempt. As noted countless times by our appellate courts and other authorities,

> [i]t is well settled in Mississippi that modification should not be allowed where the petitioner is not in the proper position to seek relief from the court. "He *464 who doeth fraud, may not borrow the hands of the chancellor to draw equity from a source his own hands hath polluted." Billy G. Bridges & James W. Shelson,

> Griffith Mississippi Chancery Practice § 42 (2000 ed.), citing *Thigpen v. Kennedy*, 238 So.2d 744 (Miss.1970) (equitable maxim that a litigant must come into equity with clean hands). No person as a complaining party can have the aid of a court of equity when his conduct with respect to the matter in question has been characterized by willful inequity. *O'Neill v. O'Neill*, 551 So. 2d 228, 233 (Miss.1989).

Harris v. Harris, 879 So. 2d 457, 463-64 (¶27) (Miss. Ct. App. 2004). Therefore, even if Boyce had met his burden for modification, his petition would have nevertheless been barred from consideration due to his contempt.

The case cited by Boyce for the proposition that modification is appropriate upon showing of an unanticipated material change in circumstances also provides that, when a reduction in income has been caused by a party's voluntary actions, modification is not appropriate. *Varner v. Varner*, 666 So. 2d 493, 497 (Miss. 1995).

Boyce also makes repeated reference to the fact that Debby's reported income on her 8.05 in 2003 was $0.00, and that she is now earning a steady income. This is true. However, Boyce was aware at the time of settlement that Debby was working part time. T. at V. 2, p. 202. Furthermore, Debby was advised by the trial court very early on in the divorce proceedings that she could not expect to be wholly dependent upon Boyce after the divorce, and that she would have to find a job, regardless of her problems with fibromyalgia. T. at V. 1, pp. 128-129. Debby also knew that she would have to lower her standard of living and decrease her monthly expenses significantly. T. at V. 1, p. 129. Obviously, if her monthly expenses were $10,000.00, and she was receiving $3,300 per month from Boyce, something would most certainly have to change.

This Court has held that the law of alimony does not contemplate penalizing an alimony recipient "for being industrious and endeavoring to accomplish something rather than depend on [the alimony payor] regardless of future circumstances." *Spradling v. Spradling*, 362 So. 2d 620, 624 (Miss. 1978). However, Boyce asked the trial court, and now asks this Court, to do just that. Because Debby has done what everyone had anticipated that she would have to do, i.e. – significantly reduce her standard of living and obtain gainful employment, Boyce expects that she should be penalized. This is incomprehensible and, further, adverse to clear authority.

The trial court did not abuse its discretion in denying Boyce's petition for modification.

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

Contrary to Boyce's assertion, the trial court did not modify the parties' divorce agreement as it pertains to "uninsured medical expenses." Rather, it clarified the meaning of that term. At trial, each party asserted that a different meaning was to apply to the term. The court had no choice but to clarify what the term means. Boyce attempts to frame this as error on the part of the trial court by asserting that, in order to receive the relief that she was requesting, it was necessary for her to obtain relief from the March 2004 order. However, as noted above, the court did not modify the order, but rather, explained the order.

On March 8, 2004, the trial court entered an agreed order modifying its Final Judgment of Divorce in this matter. R. at V. 1, p. 89. Pursuant to Paragraph 1 of the agreed order, Boyce was required to pay all of Debby's "uninsured medical and dental expenses up to $750.00 per month," or $9,000.00 annually. *Id.* The testimony at trial revealed that the parties had different expectations regarding the impart of this provision. Boyce testified that he believed that the provision only applied to expenses that were not eligible for coverage under the policy, while Debby testified that she believed that "uninsured" expenses would also include those expenses which she was obligated to pay by way of her deductible and/or co-pay. T. at V. 1, pp. 92, 126. Debby testified that she would have never agreed to the amended language if she thought that the interpretation now being offered by Boyce would apply. T. at V. 1, p. 127.

"A true and genuine property settlement agreement is no different from any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character." *East v. East*, 493 So. 2d 927, 931-32 (Miss. 1986). There is a three-tiered approach that courts use in interpreting a contract: the "four corners" of the document, the " 'canons' of contract construction," and extrinsic or parol evidence. *Tupelo Redevelopment Agency v. Abernathy*, 913 So. 2d 278, 284 (¶13) (Miss. 2005) (citations omitted). The four corners approach looks only at the language used in the contract. *Id.* The canons are to be used only if the four corners of the document are insufficient to interpret the contract, and extrinsic or parol evidence

is to be used only if the contract remains ambiguous after application of the four corners and the canons. *Id.* In this case, it is not necessary to go beyond the four corners of the contract between the parties.

The original health insurance provision in the parties' contract provides, in pertinent part, that "Husband shall pay Wife's health insurance and all uninsured medical and dental expenses until such time as Wife is eligible for Medicare benefits. Husband's responsibility for uninsured expenses shall be limited to $500 per month." Property Settlement Agreement attached to and incorporated in Final Judgment of Divorce, ¶VII. R. at V. 1, p. 39. This language was later amended to provide that "Husband shall pay Wife's health insurance premium and all uninsured medical and dental expenses up to $750.00 per month until such time as Wife is eligible for Medicare benefits. The deductible on Wife's health insurance policy shall be set at not more than $4,000.00." Agreed Order of March 8, 2004, ¶1. R. at V. 1, p. 89

The language of the contract as a whole clearly supports Debby's interpretation. Boyce testified that Debby's interpretation makes no sense, because there was no benefit provided to him. However, he was allowed to raise the deductible upon Debby's policy, and in exchange, he agreed to raise his monthly obligation for the deductible and other expenses by $250.00. This Court has found that "expenses not covered by the policy. . .includ[es] deductibles." *Creekmore v. Creekmore*, 651 So. 2d 513, 516 (Miss. 1995). The trial court correctly found that, based upon the four corners of the contract and the

applicable law, "uninsured medical and dental expenses" includes deductible amounts.

III. THE TRIAL COURT'S FINDING OF CONTEMPT ON THE PART OF BOYCE TALBERT IS SUPPORTED BY SUBSTANTIAL, CREDIBLE EVIDENCE.

While Boyce testified that his failure to fulfill his lump sum property settlement obligation to Debby was an "bookkeeping error," it is undisputed that he failed and refused to correct this oversight in the nine months between Debby's filing of her petition and the Court's judgment, and in the four months between his undisputably learning of the actual "oversight" and the time of the entry of the Court's judgment. The Court was well within its discretion in finding Boyce in contempt under the circumstances. Furthermore, the Court also found Boyce in contempt for failure to meet his life insurance obligations. Boyce was questioned about this issue extensively during trial and fully admitted that he had failed and refused to comply with the requirements placed upon him by the plain terms of the trial court's order. T. at V. 1, pp. 93-96. From Boyce's testimony, it appears that he never had any intention of fulfilling the obligations regarding life insurance that he accepted by way of the March 2004 Agreed Order. He has not sought to amend the trial court's judgment regarding these issues, but has indicated only that he cannot obtain a separate policy and that keeping Debby apprised of the status of her coverage under his current policy would be a bother to him. Boyce's willful, contumacious attitude towards his agreed, court ordered obligations in this regard are astounding, and yet he completely fails to address this separate, independent basis

upon which he was found in contempt.

IV. THE TRIAL COURT'S AWARD OF ATTORNEY FEES TO DEBORAH TALBERT IS SUPPORTED BY SUBSTANTIAL, CREDIBLE EVIDENCE.

Debby requested that the Court award her the attorney fees that she incurred in defending against Boyce's petition and in pursuing her own petition for citation of contempt against Boyce. She presented substantial evidence to support an award of her attorney fees. *McKee v. McKee*, 418 So.2d 764 (Miss.1982). Debby submitted evidence that she had expended some $10,763.41 in attorney fees and expenses during the course of the litigation. Her attorney, Mac May, advised the Court that of that amount, he estimated that $1,500.00 was expended in the prosecution of Debby's contempt action, leaving $9,263.41 directly attributable to the defense of Boyce's petition. Boyce's counsel conceded that the amounts charged were reasonable under the circumstances. T. at V. 2, 206-207.

"Generally, attorney's fees should only be awarded where the moving party has demonstrated an inability to pay." *Stuart v. Stuart*, 956 So. 2d 295, 299 (¶20) (Miss. Ct. App. 2006) (citing *Watson v. Watson*, 724 So. 2d 350, 357 (¶ 29) (Miss. 1998)). Debby testified that she was forced to take out a home equity loan to pay her attorney's fees. T. at V. 1, pp. 144-145. Her 8.05 financial statement confirms this. Ex. 7. Debby's 8.05 further indicates that after paying her reasonable living expenses, Debby has virtually no disposable income. *Id.* Furthermore, unlike Boyce, Debby does not have an income capacity higher than that which she is currently earning. The trial court acted well within

its discretion in finding that Debby was entitled to the fees and expenses incurred by her in defending against Boyce's petition for modification.

The Court also found that Debby was entitled to the fees and expenses incurred in prosecuting her contempt action. "In a contempt proceeding, the trial court has discretion to award reasonable attorney's fees to make the plaintiff whole and to reinforce compliance with the judicial decree." *Hinds County Bd. of Supervisors v. Common Cause of Mississippi*, 551 So.2d 107, 125 (Miss. 1989) (citations omitted). One of the purposes for awarding attorney fees is to compensate the prevailing party for losses sustained by reason of the defendant's noncompliance. *Id.*

The award of all attorney fees to Debby was supported by substantial, credible evidence, and was well within the trial court's discretion. At a minimum, Debby was clearly entitled to, and was correctly awarded the $1,500.00 in attorney fees attributed to her enforcement of the Court's previous judgment and order.

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

Boyce's expert, Ken Walker, C.P.A., did indeed paint a grim picture of Boyce's financial situation. However, as noted above, the trial court found that the evidence demonstrated that Boyce is the victim of nothing more than his own poor business and financial decisions. When a reduction in income has been caused by a party's voluntary actions, modification is not appropriate. *Varner v. Varner*, 666 So. 2d 493, 497 (Miss. 1995). This issue is without merit.

MOTION FOR ATTORNEY FEES INCCURED ON APPEAL

Debby now moves this honorable Court to grant her an award of the attorney fees that she has incurred in addressing the appeal filed herein by Boyce. "[T]he appellate court will generally award attorney's fees on appeal in the amount equal to one-half what was awarded in the lower court." *Pool v. Pool*, 989 So. 2d 920, 929 (¶31) (Miss. Ct. App. 2008) (citing *Lauro v. Lauro*, 924 So. 2d 584, 592 (¶ 33) (Miss. Ct. App. 2006)). Based upon the Court's prior precedent, Debby requests that she be awarded attorney fees on appeal in the amount of $5,381.70.

CONCLUSION

For the reasons set forth above, Debby requests that the decision of the lower court be affirmed. Debby further requests that she be awarded $5,381.70 in attorney fees on appeal.

Respectfully submitted,

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By Her Attorneys

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CERTIFICATE OF SERVICE

The undersigned certifies that he has this day served a copy of this *Brief of Appellee* via United States mail, postage prepaid on the following persons at these addresses:

Hon. Cynthia L. Brewer
Chancellor, Eleventh Chancery District
Post Office Box 404
Canton, Mississippi 39046;

and

William C. Bell, Esq.
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This the 20th day of January, 2009.

Benny M. "Mac" May