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REBUTTAL ARGUMENT

Appellant listed five issues for review, two of the issues were combined for argument. Appellant argues that the standard of review was "de novo" when interpreting a chancellor's written opinion and Judgment (*Warren vs. Derivaux*, 996 So.2d 729).

Appellee responded and identified only one issue and suggested that it was "can the monetary award be paid by a QDRO". Appellee then argued that the standard of review was a manifest error standard rather than a de novo review when reviewing the four corners of the Judgment.

Appellant reasserts her position that there is more than one issue, to-wit: (1) should this be treated as a Rule 59 or Rule 60 motion?; (2) was sufficient evidence submitted for Judge McKenzie to impose a QDRO?; (3) was Appellee entitled to interpret Judge Thomas' judgment as providing for a QDRO?; (4) was Appellant entitled to interest on her judgment?;(5) was Appellee's actions contemptuous and entitling appellant to attorney fees?.

Appellant continues to assert and argue to the court that the standard of review to interpret a written opinion and judgment by a chancellor is a de novo review.

Appellee's failure to respond to Appellant's issues argued should amount to a concession of those points.

Herbert has offered little insight to support Judge McKenzie's decision. Special Chancellor Thomas' Judgment was clear and unambiguous when he divided the marital assets using the Ferguson factors and granted appellant her portion by means of a money judgment, normally referred to as lump sum alimony. The Court's original Judgment to

award appellant an amount certain with interest until paid is exactly the method by which a chancellor can effectively grant an equitable division Judgment. The appellant can pay in full the Judgment with accrued interest in any method which would fully satisfy that Judgment. An oral offer to partially pay the Judgment is not a satisfaction of his obligation. As clearly noted in Holmes vs. Bates, 67 So. 2d 273 (Miss.1953), as cited by Appellant "a tender, however, of less that the full amount due will not stop the running of interest" and as was the result in Holmes. The Court should reverse the erroneous ruling of Special Chancellor McKenzie. His ruling amounted to an amendment to Special Chancellor Thomas' Judgment.

Additionally, the motion of appellee was untimely under Rule 59. The Court of Appeals in 2009 in *Anderson v. Anderson, 8 So.3d 264*.

> "The supreme court has held that a motion to reconsider is treated as a motion to amend a judgment pursuant to Mississippi Rule of Civil Procedure 59(e). *Boyles v. Schlumberger Tech. Corp.*, 792 So.2D 262, 265(6) (Miss.2001) (citing *In re Estate of Stewart,* 732 So.2d 255, 257(8) (Miss.1999). Pursuant to Rule 59(e), "[a] motion to alter or amend the judgment *shall be filed not later than ten days after entry of the judgment.*" (Emphasis added). Therefore, a motion to reconsider must also be filed within ten days after the entry of the judgment.

Appellant is entitled to her Judgment fully satisfied without a reduction together with her accrued interest and reasonable attorneys fees. Appellee's continued assertion, which was adamantly denied at trial, that Appellee offered to satisfy his obligation is unfounded. Appellee telephoned the Appellant to ascertain if she would sign QDRO papers for a reduced amount and stated she would have to discuss same is set out in T. p 63, 1-14:

"I understood you to say you had requested papers to affect the QDRO from one of the companies where you had some money invested; is that right?

A. That's correct.

Q. And you said that you requested them so Darlene could sign them?

A. So she could open an account. She would have to sign, to open an account.

Q. Did you give the papers to her?

A. I tried to give the papers.

Q. Well, did you meet with her?

A. I called her up, and she said she didn't' want the papers, she wanted cash, so there was no reason to meet.

T. page 64, 5-14

Q. (By Mr. Palmer) Did the Judge, as you understood it, indicate any particular dated that - - effective, that that was supposed to be Darlene's date to determine her interest in - - in any kind of account that you had the money invested in for retirement? It didn't did it?

A. No.

Q. It just said "a judgement at six percent from this day forward, "didn't it?

A. That's correct.

T. p. 64-65, 20-13

Q. (By Mr. Palmer) Well, tell me the extent to which you tried to get Darlene to sign a QDRO, other than you say you called her and told her you had papers

for her to open up her an account, and she said she wasn't going to do that, she wanted cash.

Did you have any other contact with her or conversations with her about signing a QDRO.

A. Before the sale of the house.

Q. Sir?

A. Before the sale of the house. Before the sale of the house, when i called her about the lien, I said, "You should – you had the chance to take this in a QDRO in February right after the judgment came out," and she said she wanted cash, again.

Q. So those two times?

A. Yes, sir.

Q. Any other times?

A. Called her, no.

Q. Okay. And do you know whether or not a QDRO was ever drafted or prepared?

A. No, it was not prepared because she said she wanted cash.

No papers were sent for review before any hearing hereon. And in any event, it was not a full payment offer. As provided in *Weeks vs. Weeks, 29 So.3d 8, 2009* citing *Tingle vs. Tingle, 573 So.2d 1389, 1391 (Miss. 1990)*

"To justify changing or modifying an original divorce decree, there must be a material or substantial change in circumstances of the parties.... The material or substantial change is relative only to the after-arising circumstances of the parties to the original decree. *This change, moreover, must also be one that could not have been anticipated by the parties at the time of the original decree.*"

An interpretation of Judge Thomas' Judgment requires a de novo standard of review by this Court, rather than the manifest error standard Appellee suggests. Appellee believes Rule 60 MRCP is a substitute for a Rule 59 request if the Rule 59 deadline has passed. That is not the law of this state as stated in the Appellant's original brief.

Appellee has absolutely failed to offer any credible case law to dispute the law cited by Appellant that she had a valid Judgment with accruing interest and is entitled to a reasonable attorney fees. This case should be reversed and rendered by this Court. Special Chancellor Thomas' Judgment does not divide the assets by use of a QDRO, nor did he hear any evidence at trial to so rule, i.e., plan administrator, plan name or plan address. Thus, to suggest that Judge Thomas intended a QDRO is contrary to the evidence and the law.

Special Chancellor Thomas ruled:

> "The Court awards Darlene the sum of $36,488.50 as an equitable distribution of the marital assets. This award is a judgment against Herbert and will bear interest at the rate of Six Percent (6%) per annum from the date of the this Opinion and Final Judgment until satisfied in full."

A de novo review should not result in an interpretation that would alter this clear meaning.

This the 1st day of June, 2010.

TERESA DARLENE JONES, APPELLANT

HENRY PALMER

CERTIFICATE OF SERVICE

I, Henry Palmer, do hereby certify that this date the original and three copies of the Reply Brief of Appellant has been mailed by federal express to the Supreme Court Clerk, Kathy Gillis at 450 High Street, Jackson, Mississippi and that true and correct copies of same have been mailed postage prepaid by United States mail, to the following:

Chancellor Franklin C. McKenzie, Jr.
Post Office Box 1961
Laurel, Mississippi 39441

Hon. Robert R. Marshall
525 Corinne Street
Hattiesburg, Mississippi 39401

SO CERTIFIED, this the 1 day of June, 2010.

HENRY PALMER
ATTORNEY FOR APPELLANT