IN THE SUPREME COURT OF MISSISSIPPI

LIONEL BARNES **APPELLANT**

V. **CAUSE NO. 2009-CA-01985**

BETTY R. HOLDEN BARNES **APPELLEE**

BRIEF OF APPELLEE

BETTY R. HOLDEN BARNES

ORAL ARGUMENT NOT REQUESTED

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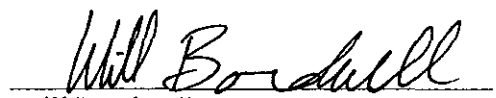
STATEMENT OPPOSING ORAL ARGUMENT

Rule 34(a)(3) of the Mississippi Rules of Appellate Procedure commands that oral argument shall not be granted in any case where "the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." The above-styled matter is such a case.

The issues central to this case are whether the chancery court committed a mathematical error and whether the chancery court acted in ignorance of the doctrine of *res judicata*. Neither question presents a novel or complicated concept on which argument by counsel would aid the Court.

Therefore, oral argument should not be granted.

RESPECTFULLY SUBMITTED this NINETEENTH day of November 2010,



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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(b) and Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, 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.

(1.) Mr. Lionel Barnes, *Appellant.*
(2.) William Carl Miller, Esq., *Counsel for the Appellant.*
(3.) Ms. Betty R. Holden Barnes, *Appellee.*
(4.) David C. Morrison, Esq., *Counsel for the Appellee.*
(5.) Will Bardwell, Esq., *Appellate Counsel for the Appellee.*
(6.) Hon. Carter O. Bise, *Harrison County Chancery Court Judge.*

RESPECTFULLY SUBMITTED this NINETEENTH day of November 2010,

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B. THE DOCTRINE OF *RES JUDICATA* DID NOT PREVENT THE DIVORCING HUSBAND AND WIFE FROM REACHING AN AGREEMENT THAT TOOK THEIR FIRST MARRIAGE INTO ACCOUNT.

II.

STATEMENT OF THE CASE

On July 10, 1976, Lionel Barnes (hereinafter "Lionel") married Betty Holden ("Betty") in New Orleans, Louisiana. Later that year, in August 1976, Lionel joined the United States Air Force and began vesting into a retirement fund. That retirement fund is the subject of the case at bar.

With Lionel still a member of the Air Force, he and Betty divorced in April 1998. The two reconciled and remarried on January 25, 2000, but ultimately, they divorced again on June 18, 2004.

In rendering its Judgment of divorce, the chancery court incorporated the parties' Child Maintenance and Property Settlement Agreement, under which Lionel and Betty reached the following accord:

> VI.
> RETIREMENT
>
> Husband and Wife agree that both are entitled to 50% of the other's retirement as of the date of divorce. Husband shall maintain the Survivor's Benefit Plan with Wife as beneficiary. Wife shall reimburse Husband for the cost of the Survivor's Beneficiary Plan. Wife shall maintain the Survivor's Benefit Plan with Husband as beneficiary. Husband shall reimburse Wife the cost of the Survivor's Beneficiary Plan.

Plaintiff's Record Excerpts at No. 6.

In time, clarification of this provision proved itself necessary. As counsel for Lionel Barnes explained in his brief to this Court, the federal agency that administers military retirement funds requires a finding of the number of months of military service during which the benefiting spouse was married to the servicemember.

Therefore, on February 4, 2009, Betty Holden filed a Petition for a Clarifying Order. The chancery court ruled in June 2009 that her Property Settlement Agreement entitled her to 50 percent of benefits stemming from service in the length of 313 months – a figure representing the number of full months from the date of Lionel Barnes' enlistment to the time of the first divorce, combined with the number of full months during the second marriage. The chancellor memorialized his findings in a final Judgment in November 2009, and Lionel Barnes appealed therefrom.

III.

SUMMARY OF THE ARGUMENT

The chancellor's decision should be affirmed for two reasons.

First, as a matter of arithmetic, the chancellor correctly calculated the total number of full months of marriage between Lionel Barnes and Betty Holden during which Barnes was an active Air Force serviceman. Lionel Barnes' argument to the contrary is based on an incorrect end date for the first marriage.

Second, the doctrine of *res judicata* carried no force in the chancery court proceedings. *Res judicata* applies only within identical proceedings, and although the parties to the first and second divorces undoubtedly were identical, the subject of the dispute was fundamentally different. Lionel Barnes and Betty Holden were not estopped from reaching the Property Settlement Agreement on which they contracted.

IV.

STANDARD OF REVIEW

"[The] scope of review in domestic relations matters is limited by the familiar substantial evidence/manifest error rule. [Appellate courts] will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." ***R.K. v. J.K.***, 946 So. 2d 764, 772 (Miss. 2007).

V.

ARGUMENT

A. THE APPELLANT HAS MISCALCULATED THE TOTAL NUMBER OF MONTHS OF THE PARTIES' FIRST MARRIAGE BY RELYING ON AN INCORRECT END DATE.

Rare is the occasion when a question confronts a court and provides an opportunity for a singularly "right" answer.[1] The presentation of this issue marks such an occasion.

Lionel Barnes argues that the chancery court erred when it calculated the total number of months during which Lionel served in the military while the parties were married. Lionel is incorrect.

Specifically, Lionel contends that the chancellor committed a mathematical miscalculation when he held that the parties' first marriage lasted for 259 months rather than 248 months. *Compare* Brief of Appellant at Section IV(A) *with* Appellant's Record Excerpts at No. 2 (Judgment). The stark difference between those two figures, though, is explainable upon review of the two calculations' reference points.

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[1] *See* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to Be Construed*, 3 Vand. L. Rev. 395 (1950) ("The major defect in that system is a mistaken idea which many lawyers have about it – to wit, the idea that the cases themselves and in themselves, plus the correct rules on how to handle cases, provide one single correct answer to a disputed issue of law.").

In its Judgment dated November 17, 2009, the chancery court determined the number of full months of Lionel's service during the first marriage by beginning at the date of Lionel's enlistment and counting to the time of the first divorce. Between August 1976 and April 1998, 259 full months elapsed – four full months to end 1976, three full months at the beginning of 1998, and 12 months for each of the 21 years in between.[2]

A review of Lionel's brief reveals that his calculation uses an end date not of April 1998 but of March 1997, the time of the parties' first separation. But the Property Settlement Agreement reached by Lionel and Betty calls for calculation of retirement benefits "as of the date of divorce," not as of the date of separation. *See* Plaintiff's Record Excerpts at No. 6.

Moreover, Lionel's brief to this Court appears to concede that the relevant timeframe is not the length of cohabitation but the term of marriage. *See* Brief of Appellant at Section IV(A) ("[T]he Defense Finance Accounting System cannot proceed to divide pensions without a specific finding of how many months of *marriage* overlapped the months of creditable military service.") (emphasis added); *id.* ("Mr. Barnes served for 248 months *during the first marriage* . . . . .") (emphasis added).

Lionel incorrectly calculated the length of the first marriage by considering the date of separation, rather than the date of divorce, as the marriage's end point. The chancellor did not make this mistake and correctly observed that the first marriage spanned 259 full months. Combined with the 54 full months during which Lionel and Betty undertook their second marriage, the total number of marriage is 313 months, and the chancellor's holding thereof should be affirmed.

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[2] $(12 \times 21) + 4 + 3 = 259$.

B. THE DOCTRINE OF *RES JUDICATA* DID NOT PREVENT THE DIVORCING HUSBAND AND WIFE FROM REACHING AN AGREEMENT THAT TOOK THEIR FIRST MARRIAGE INTO ACCOUNT.

Lionel also argues that the doctrine of *res judicata* forbade the conclusion that the Property Settlement Agreement took into account any retirement benefits that accumulated during Lionel's first marriage to Betty. Lionel is incorrect.

As an initial matter, it is important to view this assignment of error for what it is and for what it is not. Lionel has not accused the chancellor of improperly interpreting the Property Settlement Agreement. Therefore, Lionel has not asked this Court to engage in contract interpretation by determining whether the parties intended to address benefits that accumulated during only their second marriage. Lionel has argued only that, as a matter of law, *res judicata* forbids parties divorcing for a second time from reaching an agreement that addresses property accumulated during the first marriage. That question is answerable only in the negative.

The Supreme Court has illustrated the proper application of *res judicata* by explaining that

> [g]enerally, four identities must be present before the doctrine of *res judicata* will be applicable: (1) identity of the subject matter of the cause of action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of a person against whom the claim is made.

Dunaway v. W.H. Hopper & Associates, Inc., 422 So. 2d 749, 751 (Miss. 1982). *See also* ***Harrison v. Chandler-Sampson Ins., Inc.***, 891 So. 2d 224, 232 (Miss. 2005) ("We have held that the absence of any one of the elements is fatal to the defense of *res judicata*.").

In the case at bar, only the third element is satisfied. Undoubtedly, the parties to the second divorce between Lionel Barnes and Betty Holden are identical to the parties to the couple's first divorce. However, the subject matters of the two disputes are not identical. The divorces each addressed separate marriages, one that began in July 1976 and another that began

in January 2000. Likewise, the causes of the actions are not identical. The parties mutually ended their second marriage for irreconcilable differences, *see* Appellant's Record Excerpts at No. 6, but the Louisiana divorce appears to take root in that state's "living separate and apart" ground.[3] Finally, the quality and character of the parties were no longer identical. At the time of the second divorce, the parties existed in a marriage created by an entirely separate legal framework than that which began the first marriage. *Compare with* ***Harrison***, 891 So. 2d at 237 ("[T]he character and status of Chandler-Sampson has remained intact. It is the same company which was named in the two prior lawsuits filed by the Harrisons . . . .").

Moreover, a review of the Mississippi Supreme Court's jurisprudence on the subject reveals no case standing for the proposition that *res judicata* forbids parties from entering a new contract together. "A divorce 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." ***Ivison v. Ivison***, 762 So. 2d 329, 335 (Miss. 2000) (quoting ***East v. East***, 493 So. 2d 927, 931-32 (Miss. 1986)). Lionel's view of *res judicata* would forbid parties from contracting on a subject when they previously executed an agreement that could have addressed the subject matter of the new contract.

Imagine that Lionel and Betty were not husband and wife but, rather, lawyers entering into a law practice together. And imagine that Lionel's retirement fund was, instead, a couch for

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[3] The Amended Judgment from the parties' Louisiana divorce, recorded at Appellant's Record Excerpt No. 4, cites Article 102 of the Louisiana Civil Code as the basis for the first divorce. That statute permits divorce upon proof, *inter alia*, "that the spouses have lived separate and apart continuously for at least the requisite period of time, in accordance with Article 103.1," which requires separation of 180 days if the parties have no minor children or 365 days if they do. By contrast, Mississippi's ground of irreconcilable differences, although perhaps not subject to easy definition, does not necessarily entail a minimum period of separation and is, at any rate, not identical to the grounds in which the Louisiana divorce took root. *See* Miss. Code Ann. § 93-5-2.

placement in the lobby of the law practice. In time, the two wound down their law practice, and Lionel kept his couch. Years later, though, the two came together again in a new private practice, but after a few more years, they again wound down business.

Under Lionel's view of the case at bar, *res judicata* would forbid him from giving his couch to Betty at the time of the second winding down.

But neither a specific case holding nor the general concept of *res judicata* supports such a conclusion. "[T]he doctrine of *res judicata* bars litigation in a second lawsuit on the same cause of action . . . ." ***Dunaway***, 422 So. 2d at 751. Lionel's retirement fund is not a cause of action. *See* ***Tillman v. Tillman***, 716 So. 2d 1090, 1094 (Miss. 1998) ("a spouse's retirement plan funded solely by his employer [is] subject to equitable division, because the asset [is] marital property accumulated during the marriage").

If Betty had followed the couple's first divorce with a new complaint for divorce in an attempt to pursue some portion of Lionel's retirement fund, then obviously, *res judicta* would have barred her efforts. But the couple's second divorce was a new proceeding, focused on a new subject matter, based on a new cause of action, and litigated by parties of a different character than those present in the first divorce.

Therefore, the doctrine of *res judicata* has no applicability in the case at bar, and the chancellor's ruling should be affirmed.

VI.

CONCLUSION

Lionel's assignments of error are without merit. His misgiving with the chancellor's calculation of the length of the parties' marriage is rooted in a mathematical error, and his

suggestion that *res judicata* precluded the chancellor's decision ignores the lack of identity between the first and second divorces. Therefore, the chancellor's decision should be affirmed.

Moreover, given that "no reversible error of law appears" within the challenged Judgment and "an opinion would have no precedential value," the Court may wish to consider a *per curiam* affirmance in accordance with Rule 35-A(c) of the Mississippi Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I, Will Bardwell, hereby certify that I have, on this day, via United States Postal Service mail, postage prepaid, served true and correct copies of the foregoing *Brief of Appellee* on the following interested parties:

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Hon. Carter O. Bise
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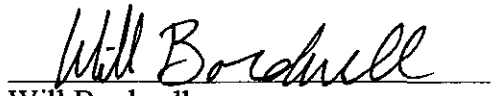
RESPECTFULLY SUBMITTED this NINETEENTH day of November 2010,



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