

MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

COPY

SUPREME COURT CAUSE NO. 2010-TS-01003

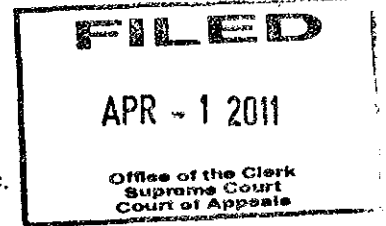
GREGORY EUGENE JANSSEN

Appellant,

VERSUS

ELIZABETH JANE JANSSEN

Appellee.



APPELLANT GREGORY EUGENE JANSSEN'S BRIEF

ON APPEAL FROM THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT OF HARRISON COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

TOM PAYNE
BILLIE JO WHITE

Tom Payne & Associates, PLLC
Attorneys at Law
280 Rue Petit Bois
Post Office Box 4956
Biloxi, MS 39535
(228) 388-0007 (Phone)
(228) 388-3177 (Fax)
tplaw@bellsouth.net

Attorney for Gregory Eugene Janssen

IN THE MISSISSIPPI SUPREME COURT

MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

SUPREME COURT CAUSE NO. 2010-TS-01003

GREGORY EUGENE JANSSEN

Appellant,

VERSUS

ELIZABETH JANE JANNSSEN

Appellee.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby 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. Chancellor, Honorable Carter Bise, Gulfport, Mississippi
2. Appellant, Gregory Eugene Janssen, Gulfport, Mississippi
3. Appellee, Elizabeth Jane Janssen, Wiggins, Mississippi
4. Attorney for Appellant, Tom Payne, Biloxi, Mississippi
5. Attorney for Appellee, Jack Parsons, Wiggins, Mississippi

So certified, this the 1st day of April, 2011.

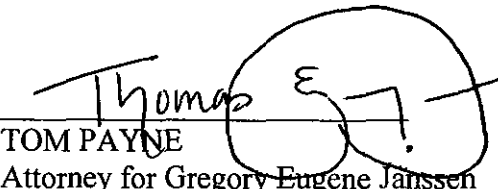

TOM PAYNE
Attorney for Gregory Eugene Janssen

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	iii
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF ISSUES.....	v
STATEMENT REGARDING ORAL ARGUMENT.....	vi
STATEMENT OF THE CASE.....	1
I. Procedural History.....	1
II. Statement of the Facts.....	7
SUMMARY OF THE ARGUMENT.....	20
ARGUMENT.....	21
I. Standard of Review	
II. Whether the Chancellor erred as a matter of law in holding Greg Janssen in criminal contempt of court and ordering his incarceration for (30) days.	
II. Whether the Court erred by finding Greg Janssen in contempt.	
IV. Whether the Chancellor erred in awarding attorneys fees or in the alternative was the award of attorney's fees duplicative and excessive.	
V. Whether the Chancellor erred in awarding estimated replacement costs to the Plaintiff when the valuation she provided was unsupported by any credible evidence.	

STATEMENT REGARDING ORAL ARGUMENT

Gregory Eugene Janssen believes this appeal involves complex issues of fact and law, has a long history of litigation and an extensive record, warranting the grant of this request for oral arguments.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

A. On August 4, 2000, Elizabeth Jane Janssen (“Ejane”) filed her Complaint for Divorce in the First Judicial District of the Harrison County Chancery Court against Gregory Eugene Janssen (“Greg”) on the grounds of habitual cruel and inhuman treatment, habitual drunkenness, and alternatively irreconcilable differences, and requesting custody of the two minor children, child support, alimony and equitable division of marital property. [R: 1]

C. On August 25, 2003, the Chancery Clerk’s office issued a Motion to Dismiss for Want of Prosecution. [R: 26]

D. On March 2, 2004, Ejane filed her Amended Complaint for Divorce against Greg alleging nearly identical causes of action, except no longer seeking custody of their older child, who turned 21 years old in January of 2004, and on the same day, Ejane filed an Amended Motion for Temporary Relief. [R: 27]

E. On April 1, 2004, Greg filed his Answer to Amended Complaint for Divorce and Counterclaim, also on the grounds of habitual cruel and inhuman treatment, habitual drunkenness, and alternatively irreconcilable differences, and for specific performance of a written contract for complete division of the marital estate. [R: 54]

F. On April 23, 2004, Ejane filed her Plaintiff’s Answer and Defenses to Defendant’s Counterclaim. [R:66]

G. In June of 2005, Greg suffered the first of a series of three strokes or “cerebral vascular accidents that left him permanently disabled, unable to work, and resulted in mental confusion, reduced memory function and speech difficulty. [R.E.: 6]

H. Hurricane Katrina struck the Mississippi Gulf Coast on August 28, 2005 and the marital home on Kathy Road in Gulfport was badly damaged in the storm. [R.E.:142, Tr: 296]

J. On February 15, 2006, nearly three years after Ejane and Erica moved out of the marital residence, and after the previous filing of a Joint Motion for the Dismissal of Fault Grounds for Divorce and the subsequent issuance of an Order by the Court granting said motion, the Court held a trial on the merits on the remaining monetary issues and division of property. The Court entered a Judgment in favor of Ejane. Among the findings of the Court was that Ejane was entitled to take the "Walker heirlooms" and that she was entitled to a division of the remaining marital personal property items still located in the marital home that were not specifically awarded and excluding bank accounts. The Court noted that there was no description of the items referred to as the "Walker heirlooms" provided to the Court by either party. Further, to effectuate this division, the Court directed Ejane to make two lists of the remaining personal property items, and then Greg would have his choice between those two lists. [R: 84, R: 86, R: 88]

K. On September 26, 2007, Ejane filed her first Complaint for Citation of Contempt against Greg, alleging that Greg had failed to comply with the Judgment of the Court on six separate issues, one of which being his failure to allow Ejane to retrieve her as yet unspecified personal property items and the "Walker heirlooms" awarded to her by the Court. The Court later entered an order denying and dismissing the Complaint against Greg. [R: 159]

L. In an effort to maintain compliance with the orders of the Court, Greg requested, and by letter dated February 25, 2008, Ejane sent the first of three different lists of personal property items she wanted Greg to provide to her, showing most of the items she wanted listed under "attic." [R.E.:88] The next list provided was not two lists as the Chancellor had directed

but was a document entitled “replacement costs” listing her estimates of these various items totaling \$9,748.98. [R.E.:91]

L. On April 10, 2008, Ejane sent another single list of items under cover letter of her attorney, Jack Parsons. Mr. Parsons stated in the letter that the attached list of items consisted of what “is owed to her,” while the list itself had a notation at the bottom that said, “This is to the best of Ms. Janssen’s recollection.” [R.E.91]

M. On May 8, 2008, Greg received letter from Gov. Hailey Barbour, notifying him that he had received an award for a homeowner assistance grant from FEMA to help cover the costs incurred by him for repairs of his home and property due to damage done by Hurricane Katrina. [R.E. :142]

L. On June 24, 2008, pursuant to the Judgment of the Court, Greg duly filed a completed Qualified Domestic Relations Order (QDRO) in good faith and in full compliance with the final Judgment previously entered by the Court. [R:191]

M. On August 20, 2008, Greg filed his Answer to Complaint for Citation of Contempt and Counterclaim for contempt. His Counterclaim was for a reduction in alimony and support based on his daughter’s emancipation and on the fact that she had dropped out of college, relieving him of some support liability under the original Judgment. Further, he answered Ejane’s complaint for contempt, detailing the total lack of merit in her claims and explicitly stating that “Respondent does not have some of the items that Petitioner requested” in reference to the several lists of personal property forming the basis of her demands. [R: 199]

N. On August 22, 2008, Ejane filed her Answer to Greg’s Counterclaim for Contempt when the parties appeared in Court for a hearing on the September 2007 Complaint for Contempt. [R: 228] After docket call, the parties met and worked out an agreement in the form

of an Agreed Order wherein Greg agreed to pay Ejane an additional \$18,500.00 for the settlement of all pending claims, including the upfront payment of all alimony due under the Judgment for divorce. Greg believed that the Agreed Order and lump sum payment resolved all pending contested issues; however, the retrieval of the remaining personal property that had yet to be identified and agreed upon by the parties remained outstanding according to the terms of the Agreed Order. Although the agreement was fully executed by Ejane and fully performed by Greg, Mr. Payne inadvertently neglected to send it to the Chancellor for final approval and filing with the clerk. [R.E.:94]

P. On October 10, 2008, in an attempt to resolve the remaining issue contained in the contempt complaint, Greg's attorney, Tom Payne, sent a letter to Mr. Parsons explaining that Greg had allowed Ejane to come into his home, per their August 22 agreement, later that same day. She was granted access to the entire residence, with the exception of the attic. Mr. Payne relayed that Greg did not want her in the attic because it was dangerous and assured her that there was nothing at all still stored there and there had not been since Katrina. [R.E.:]

L. Despite Greg's efforts to resolve these matters out of court, on March 6, 2009, Ejane filed another Complaint for Citation of Contempt against Greg, again alleging that Greg had failed to comply with the Judgment of the Court on six separate issues, one of which was again her assertion that he had not allowed her to retrieve the personal property items she had previously listed and valued, along with the "Walker heirlooms." Greg could not agree to give her these items because she had apparently stored these keepsakes in the attic, and then had not taken them with her when she moved out of the marital home to the farm in Perry County. As far as Greg knows, these items were still in the attic when Hurricane Katrina struck and had evidently been lost or destroyed either in the storm or the clean-up and rebuilding that followed.

M. Ejane filed this Complaint for contempt despite the fact that the September 2007 contempt action she had filed was still pending before the Court. The Court later entered an order denying five of the six requests by Ejane seeking a finding of contempt against Greg. [R.E.:104]

Q. On May 11, 2009, Greg filed his answer to Ejane's duplicative Complaint for Citation of Contempt and the Court heard arguments and evidence regarding the two pending Contempt Complaints. [R: 251]

R. On September 25, 2009, the Court issued a Judgment on Contempt, ruling in favor of Greg on all but one of Ejane's claims. The Court denied five of her six requests for a finding of contempt against Greg, but holding Greg in contempt for failing to provide the list of personal property items that she alleged were still located somewhere in Greg's home. Greg did not know the status or whereabouts of these items. [R.E.:61]

S. On October 14, 2009, Greg duly filed a Motion for Extension of Time and to Establish Parameters for Court Ordered Retrieval of Petitioner's Remaining Belongings from his residence in a good faith effort to strictly abide by the September 25 judgment of the trial court. [R:303]

T. On December 11, 2009, less than two months previous contempt judgment, Ejane filed a third Complaint for Citation of Contempt again regarding the personal property and "heirlooms" alleged to be stored somewhere in Greg's residence. [R: 306]

U. On December 21, 2009, the Court issued a Judgment establishing parameters, previously requested by Greg in the October 14 motion, regarding the retrieval of this list of personal property and "Walker family heirlooms" that Ejane continued to insist must be stored somewhere in the attic or elsewhere in Greg's residence or on his property. [R: 314]

V. On December 21, 2009, by agreement of the parties and direction by the Court to be cautious to avoid injury, Greg had the nails removed from the attic entrance and allowed Ejane full access to the attic. It was no surprise that nothing remained stored in the attic and, aside from a few cookbooks that she found stored in the kitchen, the other items on the various lists created were never located. [R.E.16]

V. On May 25, 2010, after yet another hearing on this issue, the Court entered a Judgment holding Greg in civil and criminal contempt for “thwarting” Ejane’s ability to retrieve this list of personal property items that she believed had been located somewhere on the Kathy Road property. [R: 321]

W. On this same day, pursuant to this singular finding of contempt, the Chancellor ordered Greg be immediately jailed for (30) days for willful and contumacious contempt of court, despite the physical and mental disabilities he continued to have from the multiple strokes he had suffered several years prior. Further, the Court ordered Greg to pay to Ejane an additional \$5,761.56 in attorney’s fees plus \$9,748.98 as “replacement costs” of the list of personal property items that he was unable to produce. The Court inexplicably ruled that Ejane had been unable to retrieve these things due to Greg’s willful refusal to abide by the orders of the Court. [R: 325]

Y. On June 17, 2010, Greg, by and through his attorney, filed his Notice of Appeal with this Court. [R: 339]

X. On June 8, 2010, after Greg had been in jail for (14) days, Ejane’s attorney, Jack Parsons, had a Capias issued by the Clerk of the Court seeking Greg’s indefinite incarceration, without cause, approval of the Judge, or notice to Greg. This action by Mr. Parsons and his client Ejane, caused Greg to remain in jail for an additional six days, and this action was taken

without just cause or valid legal authority. On June 29, 2010, Mr. Payne notified the Chancellor of the situation and the Court issued an Order vacating the improper Capias and releasing Greg from incarceration. [R: 329]

II. STATEMENT OF THE FACTS

Greg and Ejane Janssen were married on June 26, 1981, in Gulfport, Mississippi. The couple first separated on July 28, 2000. They briefly reconciled but in 2003, after (22) years of marriage, Greg and Ejane separated for the last time. [R: 88] Ejane and the parties' teen-aged daughter, Erica, moved out of the marital home on Kathy Road in Gulfport, Mississippi and moved to a mobile home situated on a parcel of property owned by the parties in Perry County, Mississippi that the family calls the farm. [Tr: 74] They had two children – one son who was emancipated at the time of that the divorce was filed and Erica, who was 17 years old at the time of the first trial. [R: 89] Erica is now 25 years old and continues to be estranged from her father. [Tr: 269]

Before this matter came on for hearing, the parties, with the approval of the Court, agreed to a divorce on the grounds of irreconcilable differences and further agreed on custody and child support, with Greg agreeing to maintain Erica on medical insurance and as the beneficiary of his life insurance policy, and agreeing to pay child support until and after her 21st birthday in the form of tuition payments for college – he acceding that the extension of payments of child support benefits was warranted as long as she was enrolled as a full-time college student. [R: 90] The issues remaining for resolution by the Court was an equitable division of the property, and a determination of whether awards of alimony, attorneys' fees and court costs were proper under these facts (and if so, how much). [R: 89]

During the couples' marriage, Greg was the primary breadwinner, working as a big rig truck driver, while Ejane, aside from some occasional part time work, was a full time homemaker. [Tr: 93-94] As required by Rule 8.05 of the Uniform Rules of Chancery Court, the Janssens each submitted a verified Financial Statement to each other and the Court, listing their various real properties, financial holdings, motor vehicles, tools, watercraft, heavy equipment, lawn and garden machinery, furniture and appliances, guns and other assets. Neither party provided a complete list of their assets. Ejane's form included some joint and separate assets in her financial declaration, including bank accounts, retirement accounts, other investments, and motor vehicles, but she only listed "Farm Equipment and associated items" at \$4,000.00 and "home furnishings" at \$1,000.00 in the portion of the form "Statement of Assets, Other Personal Property" and she listed nothing in the section titled "Other Assets" [R.E.:44] Nowhere in her 8.05 form does she include any reference, description or notation of the personal property once housed in containers, foot lockers and bins the attic of the marital home. On the contrary, Greg complied with the requirements of law and listed the majority of the marital and non-marital personal property assets that the Court used to determine the assets available for classification and distribution. (He did not fill out the forms by himself and had to have substantial assistance, usually from his sister Connie and/ or his attorney.) [R.E.:32] His list of "other items of personal property" included 4 computers, 2 riding lawn mowers, 2 push mowers, 1 tractor with mower, household furnishings and miscellaneous tools. [R.E.:32]

A relatively brief hearing was held on January 3, 2006, wherein the evidence and testimony was centered around the Janssens' assets, income and debt. On February 15, 2006, the Court issued the final Judgment in the cause in Ejane's favor, granting the parties a divorce on and affecting the distribution of the marital property not already divided by agreement of the

parties. [R: 88] In the final Judgment, the Court divided the marital estate from the information provided by the Janssens' in their financial disclosure forms and also relied on the testimony of Ejane for the information. [R: 90 - 96] The Court awarded the Kathy Road residence (the marital home) valued at \$96,000.00 to Greg and the farm in Perry County valued at \$78,000.00 to Ejane. The Court also ordered Greg to pay \$8,000.00 to Ejane to cover the difference in the disparity of the values of the real estate. [R: 95]

The Judgment also ordered the equal division of Greg's 401(k) worth \$124,000.00 and the IRA, tasking Ejane with drafting the Qualified Domestic Relations Orders and requiring their subsequent execution by both parties. [R: 92] Further, the Court allowed Greg to keep the bank accounts that were in the marital estate, including a joint checking account, a savings account, and a savings CD, but required that he pay half of the total balance as of the date of separation to Ejane. [R: 95, 96] The balances reported by them on their 8.05 declarations and their testimony about those figures did not match. [R:6] While Ejane estimated that the combined balance at the time she left was \$30,000.00, Greg's forms showed a total balance of approximately \$16,000.00. [R: 95, 96] (Greg's testimony was very limited regarding the bank accounts and financial matters, and he was unsure of balances on the accounts unless he was able to read from his 8.05 form. [Tr: 107 – 134] He answered many questions about his finances with "I don't know" or "I don't know where I got that from," or "I don't have no idea." [Tr: 132] There were very few financial records produced by either party at the trial, and certainly a complete set of financial records was not provided to the Court during the first trial. [R: 95, 96] Despite the lack of definitive evidence available, the Court ordered that these accounts be equally divided, and to that end ordered Greg to pay to Ejane \$8,000.00 immediately, in addition to the \$9,000.00 he was required to pay to cover the difference in the value of the real property. [R: 96] However,

the Court also ordered Greg to provide Ejane with the complete bank statements for the accounts from the time of separation to the date of trial. [R: 96] The Judge further held that if the actual bank statements showed any excess in value over what was reflected in Greg's 8.05 financial declaration, then he was ordered to pay her half the difference in order to effectuate an equal division of those funds. [R: 96]

All of the assets that the Court found were joint, marital property were listed on one or both of their 8.05 forms with the exception of an eighteen to twenty year old horse that had no positive cash worth, but was instead a liability costing about \$14.00 in feed and hay per week. [R: 90 – 91] Most of the assets of the parties identified by the Court as non-marital were listed on Greg's 8.05 form (Ejane only listed heavy equipment and a motor vehicle that were later classified as non-marital) [R: 46, 80, 92] The non-marital property determined by the Court to be Ejane's separate property was based exclusively upon Ejane's testimony, as the record does not reflect receipts, documents or other evidence of the source of these assets. Specifically, the Court designates as non-marital property the "heirlooms from the Walker family" and a "Benjamin pellet gun that belongs to Elaine's father." [R: 92]

The Judge expands his analysis of these things when he notes under the heading "Emotional value of assets" that "there was no testimony on this factor, other than Greg had no objection to Ejane taking as hers those items that were Walker heirlooms, **although there was no description of such items.**" [R: 92, 94] Furthermore, Greg was never asked if he knew what or where the "Walker heirlooms" were and no evidence was offered by either party that these items were still in existence since a hurricane and more than three years had passed since anyone had seen these items. There was no evidence regarding the condition or value of the mysterious "Walker heirlooms" and they were not included on Ejane's 8.05 declaration as personal property

assets. [R: 92, 94] This vague and unfounded ruling by the Court is in stark contrast to the Court's opinions relating to Greg's purchase of two items of non-marital property Greg neglected to include on his 8.05 declaration. [R: 92] The Court harshly states that Greg seemed "to lack trustworthiness and/ or candor" because of his omission of a used motorcycle and boat, (both of which were purchased on credit with balances due) despite the uncontroverted evidence that Greg made these purchases well after the marital separation. [R: 92]

It is clear from a reading of the original Judgment's division of the Janssens' assets and liabilities that the Court held the parties to different standards regarding their required financial disclosures. The Court made no mention at all of Ejane's omission of significant personal property from her 8.05 form or her subsequent failure to properly identify and value these things as the first notice and mention of them was in her testimony at trial. Instead, the Court awarded the omitted and vaguely described personal property requested by Ejane, while the Judge only includes Greg's separate property in the Judgment as a vehicle for chastising Greg. [R:92]

The inequitable approach to these litigants is clearly illustrated by the Court's award of "the Walker heirlooms" to Ejane despite the lack of minimal identification, description or valuation provided. [R: 92] In contrast, the Court failed to award Greg his boat that was not on his 8.05, even though it was specifically described and accounted for and it was undisputed that it was Greg's separate property. [R: 92, 94, 95] The Court's two findings in the Judgment quoted below regarding the division of personal property is the unforeseen catalyst that gave rise to the protracted contempt litigation that unfolded between these people, ultimately culminating in this appeal: "Each will claim the non-marital personality **as found by the Court as his or hers,**" and "Ejane will make two lists of the remaining personal property items dividing the marital

personal property (excluding bank accounts), and Greg shall have his choice of those lists.” [R: 95]

The Court discusses Greg’s mental state as part of his findings in the Judgment. The Chancellor found that Greg had suffered a series of three strokes in 2005 and was hospitalized for five days, the first stroke striking in June of that year. [R: 89] The Court concluded that Greg had been rendered “totally disabled” from the date he suffered his first stroke through the present day. [R: 89] Because the strokes had caused lasting and marked physical and mental deficiencies, the Court addressed the issue of whether Greg had the requisite mental capacity to act on his own behalf without the benefit of a conservator: “At trial, counsel for Greg examined him as to his ability to act on his own behalf without the appointment of a conservator. There was no medical testimony that Greg was incapable of acting on his own behalf.” [R: 89] The Judge noted that on a weekly income benefits claim form introduced into evidence, Greg “demonstrated ‘mild confusion’” and suffered from speech difficulty on his functional capacity assessment. [R: 89] Additionally, Greg had been placed on long-term disability by his employer and to date, had not and will not likely ever be able to return to work. The Court’s assessment of Greg’s mental capacity as articulated in the Judgment was that, “Based upon the demonstrated ability to respond to questions, the Court allowed the matter to continue.” [R: 89] The Court went on to find as follows:

The Court notes that Greg is not reliable in his testimony. His memory is faulty. Regarding his 8.05, he was hopelessly confused as to numbers and amounts. At best, he was not deceptive, but he was not reliable. Needless to say, the Court, having observed his demeanor, is of the opinion that he is not trustworthy. [R: 89]

Greg’s mental capacity has been the topic of several other discussions between the Court and the attorneys during the course of this extended post-divorce litigation, although no experts

were ever consulted regarding the true mental capacity of the Appellant. [RE:6] Greg's disabilities and diminished capacity for memory, comprehension and expressing himself verbally, particularly in the high anxiety brought on from testifying as a witness, becomes obvious through a review of his testimony over the course of the multiple hearings held in this case in which it was necessary for him to participate. A survey of Greg's testimony indicates distinct patterns: his responses to a majority of the questions posed to him, despite who is posing them, tend toward general agreement with the examiner. He rarely responded to any question with more than a one or two word response. He regularly became easily confused, and he seemed to manifest a lack of ability to understand some simple terminology and concepts. He seemed to be unable to completely comprehend the situation at times, even when such understanding was crucial so that he could adequately aid in his own defense, particularly facing the stream of Complaints for Contempt filed against him by Ejane by Mr. Parsons – each one seeking his incarceration for contempt.

There were many occasions during his testimony that illustrate his diminished capacity resulting from those multiple strokes in 2005. In the initial trial, he was certain that he had been married to Ejane for 22 years, when they had actually been married 25 years. [Tr: 7] When the question was repeated several times, he was still unable to recognize his error; in fact, he could not recall the month or the year that he was married. [Tr: 7] He testified that his daughter was 20 years old and insisted he was correct (she was 17), despite opposing counsel's attempts to point out his mistake. [Tr: 8] Another example is when he was asked, "Could you answer yes or no?" and he responded, "Yes or no" or when he could not give the approximate time period that he had his strokes without assistance from his attorney. [R: 129]

One issue central to this appeal is the Appellant's lack of comprehension regarding the clearly erroneous award to Ejane of unspecified and unidentified personal property items still in Greg's home. [R.E.:6] The Court issued the first Judgment in favor of Ejane, and therein, directed that she make two lists of "personal property," then he would be allowed to choose between the lists, leaving the items on the other for her. [R.E.:6] This order of the Court was the beginning point in the chain of events that led to the Chancellor's illogical conclusion that Greg's failure to comply with that Court order was contumacious, defiant, knowing and intentional.

Mr. Parsons, questioned Greg extensively in the third contempt trial about his knowledge of and selection of one of the two lists of personal property that the Court had directed that Ejane make to effectuate the division of any personal property not specifically awarded in the final judgment of divorce. [Tr: 147 - 177] Mr. Parsons asked Greg yet again about whether he had chosen one of the "personal property" lists for himself leaving the other list of items and things for Ejane, and Greg response indicated he was confused by the questions, he stated, "she got the farm. I got the house." [Tr: 147] In the third and final hearing on the contempt complaints, the claims in said complaint being essentially the same as the claims in the two previously filed complaints for contempt, Mr. Parsons asked over two dozen consecutive questions regarding Greg's understanding and knowledge of the existence of these two lists. [Tr: 176, 177] Greg answered the great majority of those questions that he not seen the lists or did not remember having seen them and had not picked one. [Tr: 176, 177] (Mr. Payne eventually objected to the repetitive inquiries on the basis that that they had been "asked and answered," but the Court overruled this properly made objection. [Tr: 177] These lists had been the subject of much

discussion with the players referring to them as the “personal property lists” by the attorneys and the Court in three separate hearings, yet he continued to be genuinely confused.

Greg’s confusion regarding these items later identified by Ejane that he was supposed to then provide to her was not surprising considering Ejane never seemed certain herself. When Ejane was asked in the May 11, 2009 hearing whether the items on the list were still in Greg’s attic after the storm, she answered, “as far as I know.” [Tr: 181] When asked at that same hearing if Greg had chosen one of the lists for himself, she replied “as far as she understood.” [Tr: 183] Ejane was never certain exactly what items had been stored in the attic all those years prior to their separation:

MR. PARSONS: Okay. Now if you would, tell us, pursuant to the court order, did you make two lists of personal property, two lists of all the personal property, one for Mr. Janssen to select and one for you to select?

EJANE: As to my best knowledge of what was in the house, yes, I made it. [Tr: 181]

In the April 23, 2010 hearing on the Complaint for Contempt, Ejane continued to be less than certain. When asked when she prepared the list, she responded that “I had to just put there were container items... and items in containers and foot lockers, and what I tried to do was recall was what in the foot lockers, in the containers, so they would have specifics as they requested.” [Tr: 280] Ejane also valued the items, arriving at the \$9,748.98 figure that formed the basis of the Court’s award, but did not provide any evidence or testimony to support these valuations. Her statement was that “I estimated...” “It’s just an estimate.” [Tr: 188] Her only other explanation of the numbers she generated was to say that it was “an estimated replacement cost” that she came up with, noting that she used some books she bought and “the other value came from eBay and WorthPoint.com.” [Tr: 189] She did not provide any evidence of the use of these sources other than her testimony. [Tr: 189] The Court allowed her valuation admitted into

evidence over the objection of Greg's attorney; he also stated that there is no evidence aside from her memory of these things from many years ago that she even owned the items alleged in the replacement costs list. [Tr: 189, 190]

In the original Judgment of divorce, the Court stated that the marital home on Kathy Road "apparently received no damage due to Katrina," although this determination appears to have been irrelevant in the Court's division of the marital assets. However, this opinion formed by the Judge lays the predicate for the Judgment of Contempt entered May 5, 2010 finding that Greg had committed criminal contempt of the Court, and ordering his incarceration for (30) days. [R.E.:6] Judge Bise stated unequivocally in the final May 2010 Judgment in support of his findings of civil and criminal contempt (this is the Judgment that was appealed to this Honorable Court) that he believed that Greg had "engaged in an intentional course of conduct designed to thwart E. Jane Janssen's retrieval of her personal property." [R.E.:6] This opinion was formed by the Chancellor, despite significant evidence to the contrary throughout the history of this litigation. The parties separated and filed for divorce prior to Hurricane Katrina, but the trial was held only five months after the storm. There was only minimal testimony in the original trial relaying the impact of Katrina and the damage to the Janssen's property, mostly in relation to the Kathy Road residence, which was awarded to Greg. [RE: 6]

When Ejane was asked in the January 2006 hearing if she had been to the Kathy Road house since Katrina, she replied that she had not, but went on to explain that she spoke to her husband about it after the storm when she saw him at her mother and daddy's house. [Tr: 100] She stated, "... he said something about a tree fell on it [Kathy Road residence] and that there was flooding, but he was okay, and he was living in one room. And I hugged his neck, told him I was thankful he was alive, and pretty much left." [Tr: 100, 101] This testimony is crucial to the

claims Greg makes in this appeal regarding his request for reversal of the Court's later holding that he was in criminal contempt of Court, resulting in his incarceration. Further, in the last contempt hearing in April of 2010, Ejane testified that she thought that she had been to the Kathy Road house after Katrina, but then reversed that statement. [Tr: 284, 287] She helped Greg some after he got out of the hospital, going to his laundry on several occasions; and she thought that it could have been after Hurricane Katrina [Tr: 284] However, she corrected herself, recalling that it was probably the birth of their granddaughter that could have been the last time that she had been there – and her birthday was July 23. [Tr: 284, 287] This testimony that she had not likely gone to Greg's during the months following the hurricane was consistent with what she stated in the first trial.

MR. ATCHISON: Okay. Have you been to your husband's home since the hurricane?

EJANE: No. sir.

MR. ATCHISON: Okay. You've been to his home since the separation?

EJANE: I went by there – last time I remember going by was after our granddaughter was born, and we stayed there for a little while, and –

Ejane went on to say that she really could not be certain when she had been there last because they sat mostly outside because it was summertime. [Tr: 288] Ejane went into the attic again by order of the Court in December of 2009, but had to pry the nails out to get the door open, but found it empty. [Tr: 291] She ended her testimony with an admission that it was she and her attorney who came up with the "lists" of personal property that are at issue. [Tr: 292]

Erica, the Janssen's daughter, who testified on behalf of her mother and who displayed some non-specific animus towards her father, stated under direct examination that there was only one occasion when she went over to her father's house after Hurricane Katrina – to drop off her

new puppy to stay with her father while she went on vacation in Texas. [Tr: 71] She stated that she did not notice any damage to the property, but she added, "If anything, I think I noticed new roofing because of the metal strips that he put on the side when they add a new roof," but that "honestly" she could not tell because it was nighttime. [Tr: 71] She was asked in the first trial how much she visited her father after his strokes in 2005, and she said she saw him ""right around the hurricane" but then stated that she "didn't see him over the hurricane." [Tr: 67] She said after that statement, that she "didn't see him when I got my job." [Tr: 67] The new job she got was at the restaurant, O'Charley's, two or three weeks after the hurricane. [Tr: 61, 62]

Erica's testimony at the final contempt hearing conflicted with that from four years earlier. At one point she says that she ceased all communications with her Dad since the divorce trial in 2006, then she states that she went to her father's in the summer of 2007 and that he had taken her up to the attic and everything was in there just like it had been before Katrina. [Tr: 266] This is contradictory to her later statements that she had "dropped communications" with him after the divorce and had "quit visiting with him." [Tr: 267, 268] Moreover, her mother testified in the May 2009 hearing that the attic was kept nailed shut. [Tr: 193] She stated that it was nailed shut when she went there in 2006 after the divorce trial and she had to pry it open in December of 2009 when she went over there to look for these items. [Tr: 291] Further, the 2008 letter from the Governor notifying Greg of an award of a Homeowner Assistance Grant for home repairs supports the position that the house and roof were severely damaged by Hurricane Katrina.

Greg and Ejane's son, Eric, who states he has a good relationship with both parents, lives in Meridian, and was not told by either parent about the two prior contempt actions. [Tr: 312, 313] He came to help his father after Hurricane Katrina and provided him with some materials to help with rebuilding and repair. [Tr: 298] He testified that the roof had major damage and was

not just “a leak” but was a “removal of the whole roof.” [Tr. 308] Eric gave details about the collapsed ceilings that had fallen all the way to the floor below in the kitchen, garage, and laundry room and there were damaged shingles, rafters and sheetrock. [Tr: 299] When Eric looked in the attic, he said the insulation was ruined, the rafters were damaged and wet, and most of it was collapsed. [Tr: 298] He testified that he saw none of the items that were on his mother’s list in the attic or anywhere at his father’s; and in fact had never before heard her speak of the glassware or silver the Court calls, the “Walker heirlooms.” [Tr: 312, 313]

Greg also testified in the April 2010 hearing that those things must have been lost in the destruction caused by Hurricane Katrina. Greg had consistently responded to inquiries and questioning over the course of the previous two contempt hearings, i.e., that **he did not know** where these items were, when or where they had been moved, the last time anyone had seen them, or whether their disappearance was the result of Katrina or something else.

The Chancellor ruled that Greg was in willful and contumacious contempt, ordered that he be incarcerated for (30) days, that is he failed to deliver the items on the list within 10 days, that the Plaintiff would be awarded a judgment against him in the amount of \$9,748.98 “representing the replacement cost of those items.” Further, he awarded the Plaintiff \$5,761.56 in attorneys’ fees.

Mr. Parsons submitted a detailed invoice totaling \$5,761.56 for services rendered to Ejane from August 31, 2007 through May 11, 2009. [R.E.:143] This bill covered the two prior Complaints for Contempt had already been heard and ruled on and an attorneys’ fee award had already been entered for the Plaintiff on September 25, 2009 for \$1,000.00, and the matter of attorneys fees on all prior litigation had already been addressed and resolved by the Court.

[R.E.61] In fact, the invoice presented shows the \$1,000.00 payment made by Greg in satisfaction of that order of the Chancellor. [R.E.:61]

SUMMARY OF THE ARGUMENT

The Chancellor was manifestly wrong in finding that Greg Janssen's home and specifically his attic had not been severely damaged due to Hurricane Katrina, resulting in a total loss of all property that had been stored there by his ex-wife. It was an abuse of discretion to find that Greg was in willful and contumacious, criminal contempt and ordering he be incarcerated for (30) days. Greg maintained, throughout the seven years of litigation and the four years of post-divorce litigation, that he did not possess the items demanded under the judgment by the Plaintiff. Greg complied with every other order of the Court, and this fact, along with the chancellor's finding that a series of strokes in 2005 have left Greg totally disabled, resulting in confusion and reduced memory function, will not allow for the necessary finding that he willfully and deliberately ignored the order of the Court.

The award of attorneys' fees in the amount of \$5,761.56 was excessive and an abuse of the chancellor's discretion, especially when the statement of charges spans nearly three years and covers work done on contempt complaints that were resolved by final judgment under previous orders. Further, attorney's fees had already been awarded to the Plaintiff for the same charges billed to the Defendant in his defending himself in a third contempt charge filed against him in less than three years. This award is even more egregious in light of the fact that the three contempt complaints assert nearly identical claims.

The award of \$9,748.98 for estimated replacement costs for items of personal property where the valuations were not supported by any credible evidence and based entirely on the uneducated opinion of the alleged former owner of the goods is a clearly erroneous award.

STANDARD OF REVIEW

The Supreme Court reviews a trial court's judgment of criminal contempt ab initio. In Re Spencer, 985 So. 2d, 330. The chancellor's finding of civil contempt is subject to review under a manifest error standard. Chasez v. Chasez, 935 So. 2d 1058 (Miss. App. 2006) (citing Dennis v. Dennis, 824 So.2d 604, 608 (Miss.2002)). However, the chancery court's interpretation and application of the law is reviewed under a de novo standard. Id. (citing Isom v. Jernigan, 840 So.2d 104, 106 (Miss.2003)). The factual findings of the chancellor in civil contempt cases are affirmed absent manifest error and a civil contempt citation will not be reversed where the chancellor's findings are supported by substantial, credible evidence. Elliot v. Elliot, 877 So. 2d 450 (Miss. App. 2004) (Internal citations omitted). The award of attorneys' fees in contempt matters are committed to the substantial discretion of the trial court. Riddick v. Riddick, 906 So. 2d 813 (Miss. App. 2004).

In the absence of manifest abuse of discretion, coupled with the presence of substantial credible evidence, we should not disturb the learned chancellor's decision substituting our judgment for that of the chancellor. Holloman v. Holloman, 691 So.2d 897, 898 (Miss.1996) (collecting authorities).

ARGUMENT

There are two forms of contempt – civil and criminal contempt, and there is an important distinction between the two. Moulds v. Bradley, 791 So.2d 220 (Miss. 2001). “Civil contempt is to coerce action while criminal contempt is to punish for violation of an order of court.” Id. at 224. A civil contempt order may include a jail sentence, but the jail sentence is terminated upon the contemnor's purging himself of the contempt. Id. A criminal contempt is to vindicate the authority of the court or for punishment of the offender for his public violation of a court order.

Id. (internal citations omitted). “Constructive criminal contempt punishes a party for noncompliant conduct outside the Court’s presence.” Hanshaw v. Hanshaw, 2011 WL 167467 (Miss. 2011) (citing Moulds v. Bradley, 791 So.2d 220 (Miss. 2001)). “Along with proper notice and a hearing, criminal-contempt actions require additional procedural safeguards and a heightened burden of proof. Id. (citing In re Willimson, 838 So. 2d 226, 237 – 38 (Miss. 2002)).

“A citation of contempt is proper only when the contemnor has willfully and deliberately ignored an order of the court. Riddick v. Riddick, 906 So. 2d 813 (Miss. App. 2004). (citing Cooper v. Keyes, 510 So. 2d 518, 519 (Miss. 1987) (citing Mills v. State, 106 Miss. 131, 63 So. 344 (1913)). In that case, the Court upheld the chancellor’s refusal to find the party in willful contempt, although he found him in contempt for not paying, citing the Defendant’s inability to pay for the expenses and based on a good faith belief that he could delay paying until clarification was provided regarding a related issue. Id.

The trier of fact must find, beyond a reasonable doubt, that the party held in contempt has done so intentionally, contumaciously, willfully, without valid defense of his actions and be given notice of the charges and an opportunity to be heard. Davis v. Davis, 17 So. 3d 114 (Miss. App. 2009).

Clearly, the chancellor found Greg in constructive criminal contempt. The incarceration was for a definite period, the chancellor used the terminology that the contempt was “willful and contumacious” and the actions were outside of the presence of the court. The burden of proof for the contempt then becomes beyond a reasonable doubt. Although there was no doubt that Greg did not turn over the “list” of personal property items to Ejane, there was substantial, credible evidence offered in this hearing and the previous hearings before the Court that Greg was not in possession of these items. There was evidence and testimony by Ejane and Erica in the first trial

on the divorce that indicate that Hurricane Katrina had severely damaged the roof on Greg's house. Greg's son, Eric, who had a good relationship with both parents and had no animus towards his mother, unlike Erica, testified at length about the major damage to the house, roof, and attic. Eric further testified that the attic had been empty, wet, and unstable when he viewed it only a few months after the storm. Ejane stated on several occasions and as was noted one of her "lists" that these items had been stored in the attic when she left the marital home in 2003 and she had not seen them since that time. Although Erica testified that she was in the attic in the summer of 2007 and there were many items there that appeared to be her mother's "stuff" this testimony was directly contradictory to the rest of her testimony that she had completely terminated her relationship with her father after the divorce hearing in 2006. Further, her testimony showed that she had a clear animus towards her father and she directly stated as much. Further, the chancellor believed that since Greg had not mentioned the loss of these items in any of the previous hearings, his testimony about their loss in Katrina was not truthful. However, Greg had stated in previous hearings and his attorney had previously pled, according to the transcripts and record that Greg was not in possession of some or most of these items. In addition, Ejane never asserted with certainty that these items were there when she left. She did not include them on her 8.05 financial declaration and did not testify with any specificity in the trial as to their existence, condition or any other such thing. The chancellor found in the first judgment that he was awarding "the Walker heirlooms" to Ejane, but noted that no description of these items had been given.

Further, Greg, by the chancellor's own findings of fact, suffered confusion and memory loss and had a diminished capacity. His failure to clearly articulate what had happened to these items or form an opinion and understanding of such was very likely due to his medical problems,

not any direct intent to violate the orders of the court. As evidence of this, Greg complied with every other Court order, paying every cent he was ordered to pay, and executing every document he was ordered to execute. The Court, despite his ex-wife asserting many other contempt violations in three separate contempt petitions, found Greg to be in full compliance of all other orders, except the turning over of these items which had only emotional value to Ejane and no real monetary value.

The punitive and severe remedy of criminal contempt is reserved for the most egregious of violators of the orders of a court. Greg clearly did not comply because he could not comply. The record and transcripts, taken as a whole, prove this fact.

One of the purposes for awarding attorney fees is to compensate the prevailing party for losses sustained by reason of the defendant's noncompliance. Hinds County Bd. of Supervisors, 551 So.2d at 125. The award of attorneys' fees is contingent on a finding of contempt and contempt can only be willful. Morris v. Morris, 5 So.3d 476 (Miss. App. 2008). No attorneys fees should have been awarded since Greg should never have been found in contempt of court. It is highly unlikely that these items in the attic that Ejane wanted ever made it through the Hurricane or the clean-up and hauling off of damaged and wet things inside Greg's home. It is further highly unlikely that Greg would have willingly and promptly made all the payments to his ex-wife, as originally ordered by the Court and then refused to turn over things that were junk to anybody but Ejane. In any event, the attorneys' fees awarded covered a contempt hearing that had been held and attorneys' fees already awarded and other work done for Ejane that had no relation to the contempt action. The \$5,700 plus attorneys' fee bill covered nearly three years of work done for Ejane. Also, no testimony was offered by Ejane that she had an inability to pay

her own fees. It would be manifestly unfair to maintain this excessive award of attorneys' fees to Ejane.

Finally, when Greg wrote Ejane an additional check to Ejane for \$18,500 (much more than he actually owed her) pursuant to the Agreed Order that was never filed, he believed that this payment resolved all pending issues with his ex-wife. It is a reasonable belief. It seems that Ejane continuing to come after Greg for contempt over these items she "estimated" to be worth over \$9,000.00 (when she hadn't even seen them for over a decade and they had been in the attic), when she knew that the roof had been damaged in the hurricane and the house flooded, was just plain mean.

CONCLUSION

Appellant Greg Janssen fell victim to an unfortunate confluence of events... a natural disaster, lingering and duplicative post-divorce litigation, numerous strokes, disability and diminished capacity, loss of employment, advancing age, a zealous opposing attorney, and a Judge whose judgments were flawed, all converging on him, culminating in an unfair and unlawful loss of his freedom for 36 long days and nights in the undesirable environment of the Harrison County Jail. Now, this Court has the opportunity to right this series of wrongs and see to it that Greg Janssen gets the justice he has been previously denied.

Gregory Eugene Janssen does respectfully request that this Honorable Court reverse and remand the Judgment of contempt issued by the Chancery Court of the First Judicial District of Harrison County and order the reversal and return of all monetary awards entered against him in said judgment, including the award of attorney's fees assessed against him on the finding of civil and criminal contempt. Further, he requests that this Court remand this matter for a determination of damages incurred as a result of his wrongful incarceration and for enforcement

of the settlement between the parties, and that he be awarded costs and attorney's fees for all actions initiated and prosecuted after the execution and full performance of the settlement agreement between the parties. Finally, Gregory Eugene Janssen does request that Elizabeth Jane Janssen be assessed with all costs of this appeal and that he be awarded attorneys' fees incurred in this prosecution of this appeal.

Respectfully submitted,

GREGORY EUGENE JANSSEN

BY:


BILLIE JO WHITE (MSB # [REDACTED])
TOM PAYNE

Attorneys for the Appellant

Tom Payne & Associates, PLLC
Attorneys at Law
280 Rue Petit Bois
Post Office Box 4956
Biloxi, Mississippi 39535
(228) 388-0007 (Phone)
(228) 388-3177 (Fax)
tplaw@bellsouth.net
Attorney for Appellant

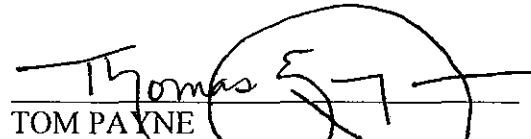
CERTIFICATE OF SERVICE

I, Tom Payne, attorney for the Appellant, Gregory Eugene Janssen, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing, as well as a 3.5 WP Disk, to the following:

Hon. Carter Bise
Gulfport, Mississippi

Jack Parsons
Parsons Law Office
Wiggins, Mississippi

THIS the 1st day of April, 2011


TOM PAYNE
Attorney for Gregory Eugene Janssen