IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2005-CA-01680-COA

SHIRLEY ANN JAMES HANSHAW **APPELLANT**

v.

LARRY HANSHAW **APPELLEE**

DATE OF JUDGMENT:	7/29/2005
TRIAL JUDGE:	HON. EDWIN H. ROBERTS, JR.
COURT FROM WHICH APPEALED:	LAFAYETTE COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	RALPH STEWART GUERNSEY
ATTORNEY FOR APPELLEE:	THOMAS HENRY FREELAND
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	APPELLANT FOUND IN CONTEMPT OF COURT AND ORDERED TO PAY $500 PER HOUR FOR NON-COMPLIANCE WITH COURT ORDER, NOT TO EXCEED TWENTY-FOUR HOURS
DISPOSITION:	REVERSED AND RENDERED – 02/13/2007
MOTION FOR REHEARING FILED:	02/27/2007 – GRANTED; AFFIRMED IN PART, REVERSED AND RENDERED IN PART, AND REMANDED – 04/15/2008
MANDATE ISSUED:	

EN BANC.

IRVING, J., FOR THE COURT:

MODIFIED OPINION ON MOTION FOR REHEARING

¶1. The motion for rehearing is granted and the original opinion of this Court is withdrawn and this opinion is substituted therefor. Shirley Ann James Hanshaw and Larry Hanshaw were divorced by the Lafayette County Chancery Court, which also divided up the marital estate. Pursuant to the division, Shirley was ordered to vacate the marital residence so that it could be sold. When she failed to do so, she was cited for contempt of court and fined $12,000, which was paid to Larry from

Shirley's proceeds from the sale. Shirley raises the following issues on appeal, which we list verbatim:

> I. THE TRIAL COURT ERRED BY GRANTING AN UNNOTICED OR IMPROPERLY NOTICED CONTEMPT CITATION AGAINST PLAINTIFF/APPELLANT, SHIRLEY HANSHAW;
>
> II. THE TRIAL COURT ERRED IN ASSUMING JURISDICTION OF A CONTEMPT CHARGE WITHOUT PROPER NOTICE;
>
> III. THE TRIAL COURT ERRED IN AWARDING $500 PER HOUR CONTEMPT PENALTY AGAINST PLAINTIFF/APPELLANT, AS SUCH PENALTY IS EXCESSIVE.

¶2. We find that the first two issues are without merit, as the court had continuing jurisdiction over Shirley and no additional notice was required. However, we find that the court's fine is excessive, especially in light of the fact that it was paid to Larry rather than to the court. Therefore, we affirm the court's finding of contempt, reverse and render the court's twelve thousand dollar fine, and remand this case for further proceedings to determine an appropriate and reasonable fine that may be paid for Shirley's contempt.

FACTS

¶3. Shirley filed for a divorce in 1998. Eventually, the parties agreed to an irreconcilable differences divorce, leaving the issue of property division for the chancery court's determination. On June 23, 2004, the chancery court entered a judgment dividing the property and requiring that if the house was not sold within ninety days, it would be sold at auction. On September 3, 2004, the court entered a final judgment regarding the division of the marital estate, which Larry sought clarification of pursuant to Rule 59 of the Mississippi Rules of Civil Procedure. Larry filed his motion for clarification on September 13, 2004. The court did not rule on the motion until October 14, 2004.

¶4. A buyer was found for the house, and closing was scheduled for September 30, 2004. At Shirley's request, the closing was rescheduled to October 5, 2004. On October 4, 2004, both Shirley's and Larry's attorneys appeared before the chancellor and expressed concern that Shirley would not vacate the residence in time to complete the sale. Consequently, at both attorneys' request, the chancery court issued an order on October 5, 2004, order providing that if Shirley did not vacate the residence by 2:00 p.m. on October 5, she would be fined $500 per hour every hour until 2:00 p.m. on October 6, at which time she could be held in contempt and would be subject to incarceration. While the court referred to a potential finding of contempt and called the $500 per hour penalty a "fine," it was a fine payable to Larry rather than to the court or the State. No summons was issued to give Shirley notice of the attorneys' appearances before the chancellor on October 4, 2004, but it is clear from the record that Shirley's attorney called her and related what had happened before the chancellor.

¶5. On October 4, 2004, Shirley was hospitalized due to "chronic fatigue." She was not discharged until approximately 5:00 p.m. on October 5, and she did not fully vacate the marital residence until sometime after 2:00 p.m. on October 6. On October 7, 2004, the chancery court entered an order requiring that Shirley vacate by close of business on October 7 and requiring Shirley and Larry to sign an addendum extending the closing date until October 8, 2004. There were additional provisions fining Shirley $12,000, payable to Larry, and ordering Shirley arrested until she vacated the residence, but these provisions were struck out by the chancellor. Eventually, the sale of the house took place without incident. It is undisputed that there was no loss of value in the sale as a result of Shirley's delay in vacating the marital residence.

¶6. Sometime after this, the court held a hearing on Larry's Rule 59 motion for clarification. At the hearing, the parties and the court discussed what should be done regarding Shirley's contempt

of court. It is undisputed that Shirley and her counsel attended and asked the chancery court to "reconsider [its] ruling concerning contempt." In an October 14, 2004 order, the court clarified its judgment and denied Shirley's request for reconsideration of contempt. A "settlement sheet" attached to the October 14 order shows that Shirley paid Larry $12,000 of her share of the proceeds from the sale of the marital residence as a fine for her late removal from the residence.

¶7. On October 15, 2004, Shirley's attorney[1] filed a Rule 59 motion, contending that jurisdiction had not been properly obtained in the contempt matter. However, Rule 81 of the Mississippi Rules of Civil Procedure, which has been raised on appeal, was not specifically mentioned. Shirley did not address Rule 81 specifically until June 7, 2005, when she filed her reply to Larry's response to her Rule 59 motion. The chancellor denied Shirley's Rule 59 motion in a July 29, 2005, order, finding that her "general appearance" at the hearing leading to the October 14 order waived any issue going to the lack of a Rule 81 summons. The July 29 order stated that Shirley had produced evidence that she was hospitalized with chronic fatigue on October 4, 2004, and was discharged the next day. The court found that it was "unable to accept" Shirley's explanation that her hospitalization made her move impossible. The court noted that Shirley had scheduled movers for October 4, 2004, well in advance of the October 6, 2004, deadline, but had cancelled the move. In fact, it appears from the record that Shirley cancelled the move before she ever became ill.

¶8. Neither of the Rule 59 hearings was transcribed, nor is there any record of what transpired at the October 4 appearance by both counsel before the chancellor. Our record is limited to the pleadings by the parties in the chancery court and the court orders themselves.

ANALYSIS AND DISCUSSION OF THE ISSUES

[1] The attorney who filed the Rule 59 motion was actually the first attorney hired by Shirley. However, she had dismissed him and retained another attorney during the events surrounding her dispossession of the marital residence. She then rehired her first attorney sometime around October 15, 2004, without notice to the interim attorney.

1. Jurisdiction and Notice of the Contempt Citation

¶9. Shirley's first two assertions of error go to the same issue and will be discussed together. We will not disturb a chancellor's findings of fact unless the findings are "manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Isom v. Jernigan*, 840 So. 2d 104, 106 (¶6) (Miss. 2003) (quoting *Bell v. Parker*, 563 So. 2d 594, 596-97 (Miss. 1990)). However, we review the court's findings of law de novo. *Id.*

¶10. The first two issues raised by Shirley turn upon whether she received proper notice of the court's contempt action. The court's final judgment was entered on September 3, 2004, and Larry filed a Rule 59 motion for clarification on September 13, 2004. Because Larry's motion was filed timely, the court retained jurisdiction over the case until it finally ruled on Larry's motion. The court did not rule on the motion for clarification until October 14, 2004. Therefore, there was no need for the court to issue a summons and notice to Shirley, as the court had continuing jurisdiction over the case.

¶11. This contention of error is without merit.

2. Propriety of Contempt Fine

¶12. In reviewing a judgment for contempt, our review of a chancellor's finding of ultimate fact is limited, and the finding will be upheld where there is substantial evidence consistent with the finding and manifest error has not occurred. *Moses v. Moses*, 879 So. 2d 1036, 1039 (¶11) (Miss. 2004). Our inquiry is limited to whether a judgment has been violated, a question that necessarily includes a review of whether it was possible to carry out the judgment of the court. *Id*. *See also Wing v. Wing*, 549 So. 2d 944, 947 (Miss. 1989).

¶13. The record does not disclose precisely what evidence or argument was presented to the chancellor at the hearing where Shirley first requested relief from the contempt finding. The court's

October 14 order simply states that, "[h]aving heard argument," relief is denied. However, at a prior hearing on April 14, 2004, Shirley testified that she had twice been treated for cancer, had been diagnosed with chronic fatigue syndrome, and had been determined to be fully disabled by the Social Security Administration. The court's prior order dividing the marital estate explicitly referenced the disability: "[t]he plaintiff's ability to work is diminished by her illness; however, she has earned a Ph.D. during that period of illness and the Court feels that she will be able to gain gainful employment at sometime in the future." It is therefore probable that Shirley raised the issue of her inability to move due to her illness at the hearing.

¶14. However, Shirley's claims of inability are belied by the record, which reveals that she had hired movers to move her at 6:00 a.m. on October 4 but later cancelled the movers and rescheduled for October 7. Shirley stated by affidavit that she did not begin to feel ill until she left for a doctor's appointment on October 4. This Court finds it highly unlikely that her doctor's appointment was scheduled any earlier than 8:00 a.m. Since the movers were scheduled for 6:00 a.m., it appears that Shirley cancelled the scheduled move before she ever began to feel ill. Therefore, we do not find that the court erred in finding Shirley in contempt. However, we find that the fine was excessive and that it was improper for the chancellor to order that the fine be paid to Larry rather than to the court without first addressing whether Larry suffered any injuries as a result of the contempt.

¶15. We note that the settlement sheet appended to the October 14, 2004, order denying relief indicates that the residence had been sold. Larry does not claim that Shirley's delay resulted in any reduction in the sale price of the house. Moreover, the settlement sheet shows that after debts, attorney's fees, and other costs, including the $12,000 fine, were paid, Larry was credited with $65,213.21, while Shirley was credited only with $11,633.21. Therefore, regardless of what evidence

Shirley produced regarding her inability to move, the chancellor knew that Larry had suffered no financial loss in the sale of the marital residence.

¶16. It is unclear to this Court what the chancellor here was attempting to do when he fined Shirley $12,000. Because the fine was intended to compel compliance with the court's order, the contempt appears to be civil in nature. However, while civil contempt fines are sometimes payable to the opposing party, they "are related to, and ordinarily should not exceed, the injured party's proved losses and litigation expenses, including counsel fees." *Ill. Cent. R.R. Co. v. Winters*, 815 So. 2d 1168, 1180 (¶47) (Miss. 2002) (overruled on other grounds) (quoting *Hyde Constr. Co. v. Koehring Co.*, 387 F. Supp. 702, 715-16 (S.D. Miss. 1974)). From the record, it appears that Larry received the lion's share of the marital estate. It also appears that Larry's proceeds from the house were not affected by Shirley's tardiness in vacating the residence, as there has been no suggestion that the house sold for less than it would have otherwise sold. While attorney's fees may be assessed as part of a contempt finding, there is no suggestion here that the court was attempting to order Shirley to pay Larry's attorney's fees. In fact, nothing in the record indicates what additional attorney's fees, if any, Larry incurred as a result of Shirley's contempt. Therefore, in the absence of any evidence that the $12,000 was even remotely related to any injury suffered by Larry, we find that the court's decision to levy such a large fine and then make that fine payable to Larry was in error.

¶17. We reach the same result if we view Shirley's contempt as criminal. There are two forms of criminal contempt – direct and indirect. Direct contempt occurs in the presence of the court, while indirect contempt occurs outside the presence of the court. *Mingo v. State*, 944 So. 2d 18, 32 (¶50) (Miss. 2006). Shirley's contemptuous actions would necessarily be indirect, because her refusal to vacate occurred outside the presence of the court. However, a person accused of indirect criminal contempt "must be provided with procedural due process safeguards, including a specification of

charges, notice, and a hearing." *In re Smith*, 926 So. 2d 878, 888 (¶14) (Miss. 2006) (quoting *In re Williamson*, 838 So. 2d 226, 237 (¶31) (Miss. 2002)). Those safeguards include the right to have "a different judge . . . hear the contempt proceedings." *Id.* Clearly, Shirley was not afforded the safeguards that would accompany a charge of criminal contempt. Additionally, criminal contempt charges are only payable to the court, not to an opposing party. *Winters*, 815 So. 2d at 1180 (¶47).

¶18. Therefore, we find that whether Shirley's contempt was civil or criminal, it was improper for her to pay the sum of $12,000 to Larry in the absence of any proof regarding any injury to Larry as a result of Shirley's contempt. In addition, $12,000 was an excessive fine to levy against Shirley, regardless of to whom the fine was payable. The sanctions levied against a party must be reasonable. Twelve thousand dollars for a twenty-four delay is clearly excessive and was an abuse of the chancellor's discretion. Although Shirley's contempt did not constitute direct criminal contempt, we note that Mississippi Code Annotated section 9-1-17 (Rev. 2002) limits the fines for direct criminal contempt to one hundred dollars per offense. Even had each hour of Shirley's tardiness been considered a separate offense, her fine would have been limited to $2,400 rather than $12,000.

¶19. For the reasons above, we affirm the court's finding of contempt, although we reverse and render the $12,000 fine levied against Shirley. On remand, the court is to consider a more reasonable amount of sanctions and to whom those sanctions should properly be paid. If the court still chooses to make Shirley's fine payable to Larry, such a finding will necessarily entail a study of Larry's injuries, if any, as a result of the contempt. If the purpose of the fine was to punish Shirley on the court's behalf, the court must reassess a reasonable amount for the fine, as $500 per hour was clearly excessive.

¶20. **THE JUDGMENT OF THE LAFAYETTE COUNTY CHANCERY COURT IS AFFIRMED IN PART, REVERSED AND RENDERED IN PART, AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL**

ARE ASSESSED ONE-HALF TO THE APPELLANT AND ONE-HALF TO THE APPELLEE.

LEE AND MYERS, P.JJ., CHANDLER, GRIFFIS, BARNES AND ISHEE, JJ., CONCUR. KING, C.J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. ROBERTS AND CARLTON, JJ., NOT PARTICIPATING.