

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00489 COA

WILLIAM JAMES COSTAS

APPELLANT

v.

MARY H. COSTAS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JASON H. FLOYD, JR.

COURT FROM WHICH APPEALED: HANCOCK COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

WALTER W. TEEL

ATTORNEY FOR APPELLEE:

DEAN HOLLEMAN

NATURE OF THE CASE: DOMESTIC RELATIONS -- POST-DECREE MODIFICATION OF
PROPERTY SETTLEMENT AGREEMENT

TRIAL COURT DISPOSITION: ORDERED MR. COSTAS TO PAY MS. COSTAS AN
ADDITIONAL SUM OF \$31,448.92, WHICH INCLUDED AN ATTORNEY'S FEE OF \$7,655.48

MANDATE ISSUED: 6/10/97

EN BANC

COLEMAN, J., FOR THE COURT:

William James Costas appeals from a judgment of the Hancock County Chancery Court by which

that court ordered him to pay his former wife, Mary H. Costas, a total amount of \$31,448.92, which included an attorney's fee of \$7,655.48. The chancery court rendered this judgment separately after it had entered its decree granting Mr. and Ms. Costas a divorce on the ground of irreconcilable differences. The judgment was the consequence of Ms. Costas' motion for citation for contempt, to amend final judgment, to modify final judgment, and for other relief (motion for contempt citation). In her motion for contempt citation, Ms. Costas had alleged that "there were misrepresentations made by [William J. Costas] as to the marital assets and/or there were mistakes as to the status of certain marital assets requiring th[e] court to amend the final judgment." This Court affirms the judgment from which Mr. Costas had appealed.

I. FACTS

William James Costas and Mary H. Costas were married on December 11, 1960, in Cleveland, Ohio. After Mr. Costas graduated from the University of Ohio with a Bachelor of Science degree in mechanical engineering, he and Ms. Costas moved to California where they lived until Rockwell International, Mr. Costas' employer, transferred him, first, to Louisiana and then to Mississippi in 1989. In Mississippi, Mr. Costas served Rockwell International as director of the facility for testing the main engines for space shuttles at the John C. Stennis Space Center in Hancock County. In early 1990, Ms. Costas left Hancock County to return to the Costases' home in California, and Mr. Costas remained as director of the Rockwell International testing facility in Hancock County. In June, 1990 Mr. Costas filed for divorce in the Chancery Court of Hancock County, and that court rendered and entered its judgment of divorce on August 7, 1990. However, this judgment of divorce did not provide for the disposition of the Costases' property, the value of all of which exceeded one million dollars.

In the meantime, Ms. Costas had filed for separation and separate maintenance in the State of California in July 1990. With the consent of both Mr. and Ms. Costas the judgment of divorce granted on August 7, 1990, by the Hancock County Chancery Court was set aside on October 29, 1990. Mr. and Ms. Costas had agreed to litigate all unresolved issues in the Hancock County Chancery Court. After full discovery and depositions, Mr. and Ms. Costas reached a comprehensive settlement on all issues at a hearing before the chancellor on November 4, 1991. As a result, the Costases executed their property settlement agreement on or about May 8, 1992. The chancery court incorporated the property settlement agreement into its judgment of divorce which it rendered and entered on May 11, 1992.

Pursuant to the terms of their property settlement agreement, Mr. Costas granted Ms. Costas title to their marital home and all of its furnishings in California, certain country club stock, her IRA, bonds, and other items of personalty. Ms. Costas granted Mr. Costas their home in Hancock County, Mississippi, approximately ten acres of land in Antelope Valley, California, and other items of personal property. A savings for retirement plan (the plan) that Mr. Costas established with Rockwell, when he began to work for it in 1959, was necessarily included in the property settlement agreement. At the time of the Costases' settlement, the savings plan was valued at \$558,500.00. The property settlement agreement contained the following section:

O. FULL DISCLOSURE

Both parties hereby submit that they have made a full and complete disclosure of any and all property, real or personal, which is subject to disposition by the Court, and that this Agreement comprises a full, complete, and final division and disposition of such property.

Later in the property settlement agreement, the parties included this additional provision:

It is agreed and understood that both parties have made a full and complete disclosure of any and all assets in the possession and/or control of either which are or may be the subject to division or other disposition as part of the dissolution of their marriage.

Mr. and Ms. Costas agreed that the mortgage which encumbered their California home, to which Ms. Costas had returned from Mississippi in 1990 and in which she continued to live afterwards, would be fully paid from the "after-tax" monies in that account. The unpaid balance of the Costases' debt which was secured by their California home mortgage was approximately \$30,400. The Costases also owed a balance of approximately \$49,000 which was secured by a mortgage on their home in Hancock County. Mr. Costas had assumed full liability for paying the balance of the \$49,000 debt which was secured by the Hancock County home mortgage. After the balance of the debt secured by the California home mortgage was paid from the "after-tax" money in the plan, Mr. and Ms. Costas had agreed that the remaining balance in the plan would be divided between them as follows: Ms. Costas would receive 30.65% of the balance, and Mr. Costas would receive 69.35% of the balance.

On August 7, 1992, Ms. Costas learned that while the amount of her distribution from the plan was \$188,255.42, only \$676.79 was from "after-tax" money in the plan. The sum of \$676.79 was woefully inadequate to pay the balance of the debt of approximately \$30,400 which was secured by the California home mortgage. When Ms. Costas began to suspect that money was missing from the savings plan, she requested of her former husband that he advise her whether he had in fact made any withdrawals from the plan. These withdrawals, had Mr. Costas made any, would have violated the terms of their property settlement agreement. Mr. Costas did not respond to Ms. Costas' request for this information until she filed her motion for contempt citation in the chancery court. During the process of discovery which followed her filing of the motion for contempt citation, Ms. Costas discovered that her former husband had withdrawn \$41,529.94 from the savings plan on September 18, 1990. The administrator of the savings plan had made the withdrawal check in the amount of \$41,529.94 payable to Mr. Costas, who then negotiated the withdrawal check with a local bank to exchange it for individual cashier's checks in the amounts of \$5,000.00 and \$10,000.00. Mr. Costas testified in his deposition which Ms. Costas took on November 20, 1992, after she had filed her motion for contempt citation that he had placed these cashier's checks in his dresser drawer. Almost all of the \$41,529.94 which Mr. Costas withdrew from the plan was "after-tax" money, and was thus free from the imposition of income tax. This was the money which the terms of the Costases' property settlement agreement contemplated would be used to pay the balance of the California home mortgage.

As of September 18, 1990, the date of Mr. Costas' withdrawal of the sum of \$41,529.94 from the plan, the process by personal service on Ms. Costas had been quashed by order dated August 6, 1990, one day before the chancery court had rendered the first judgment of divorce on August 7, 1990. On September 13, 1990, only five days before Mr. Costas' withdrawal of \$41,529.94, the chancery court had denied his motion to set aside the order which had quashed the personal service

of process on Ms. Costas, and on September 17, the day before the withdrawal, Mr. Costas had filed a motion for the chancery court to reconsider its denial of his motion to set aside the order which had quashed the personal service of process on Ms. Costas. Moreover, on the date of withdrawal, Ms. Costas' separate maintenance proceedings were ongoing in California. Finally, the first time Ms. Costas deposed Mr. Costas on July 18, 1991, he testified that "because of the impending settlement and everything I've got, you know -- it was going to be split."

II. TRIAL

During the discovery process, Ms. Costas deposed her former husband on July 18, 1991, which deposition contains the following examination of Mr. Costas by Ms. Costas' attorney:

Q. Have you ever had to make a withdrawal --

A. No.

Q. -- from the savings plan?

A. When you put it in, the thing it's primarily for is long term retirement, you know. And you also notice in the plan that if you -- if you take it out before [age] 59 and , you incur a 10-percent penalty.

Later it became apparent that Mr. Costas had withdrawn this sum of \$41,529.94 from the plan on September 18, 1990, about eight months before his former wife deposed him.

During the trial, Mr. Costas testified that he had committed no fraud nor misrepresentation because he had withdrawn \$41,529.94 from the plan after the chancery court had rendered the first judgment of divorce on August 7, 1990. He further contended that he had answered Ms. Costas' counsel's question, "Have you ever had to make a withdrawal?" correctly because he claimed he did not have to take the money out of the plan. Mr. Costas justified his withdrawal of this sum because he used portions of it to pay: (1) attorneys' fees stemming from the divorce proceedings, (2) other assorted bills and expenses, and (3) a "loan" of \$16,000 to the Costases' son in his time of financial need. However, Mr. Costas produced no documentation as evidence of any of these several uses of the \$41,529.94 which he had withdrawn from the savings plan on September 18, 1990.

After both Mr. and Ms. Costas rested, the chancellor took the matter under advisement and subsequently rendered his opinion on April 6, 1994. In his opinion, the chancellor found: "Mr. Costas did in fact misrepresent that he had not taken any funds from this savings account prior to the distribution of these funds on August 4th of 1992." The chancellor awarded Ms. Costas one-half of the \$41,529.94 which Mr. Costas had withdrawn from the plan on September 18, 1990, or \$20,764.97, one-half of a Mississippi state income tax return in the amount of \$717, or \$358.50, and one-half of a federal income tax return in the amount of \$5,340, which was \$2,670. In addition, the chancellor awarded Ms. Costas an attorney's fee in the amount of \$7,655.48 which she had incurred since she had filed her motion for contempt citation. The total of these various sums which the chancellor awarded Ms. Costas was \$31,448.92. It is from the judgment which incorporated these awards made by the chancellor in his opinion to Ms. Costas that Mr. Costas appeals.

III. ISSUES

In his brief, Mr. Costas sets out the following four issues for this Court's review, analysis, and resolution:

1. The lower court erred in partially setting aside the divorce settlement and awarding Ms. Costas a judgment against Mr. Costas in the amount of \$20,076.94, because there was no fraud, overreaching, or inequity in the settlement agreement and [Ms. Costas] failed to sustain the burden of proof necessary to set aside or alter the judgment.
2. The trial court was in error in requiring a division of the income tax refund.
3. The court was in error in awarding Ms. Costas, the Appellee, attorney's fees in the amount of \$7,655.48 or any fees whatsoever.
4. The court erred in not requiring the Appellee, Ms. Costas, to repay Mr. Costas, the Appellant, \$14,000.00 which was overpaid to her from the pension plan distribution.

IV. REVIEW. ANALYSIS, AND RESOLUTION OF THESE FOUR ISSUES

The standard of review this Court must employ in its analysis and resolution of these four issues has long been established by the Mississippi Supreme Court's reiteration of that standard. In *Denson v. George*, 642 So 909, 913 (Miss. 1994), that court expressed it thusly: "This Court always reviews a chancellor's findings of fact, but we do not disturb the factual findings of a chancellor unless such findings are manifestly wrong or clearly erroneous." (citations omitted). However, "Where a lower court misperceives the correct legal standard to be applied, the error becomes one of law, and we do not give deference to the findings of the trial court." *Brooks v. Brooks*, 652 So. 2d 1113, 1117 (Miss. 1995). With these standards of review in mind, this Court now reviews and resolves the four issues which Mr. Costas has presented to it in this appeal.

Issue 1. The lower court erred in partially setting aside the divorce settlement and awarding Ms. Costas a judgment against Mr. Costas in the amount of \$20,076.94, because there was no fraud, overreaching, or inequity in the settlement agreement and [Ms. Costas] failed to sustain the burden of proof necessary to set aside or alter the judgment.

Rule 60(b) of the Mississippi Rules of Civil Procedure reads in part:

(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

....

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken.

M.R.C.P. 60(b). The property settlement was entered into and filed on May 11, 1992, and Ms. Costas's Rule 60(b) motion was filed on October 27, 1992, approximately five months after the final judgment and within the time restrictions set forth in Rule 60(b).

In her motion, Ms. Costas alleged, *inter alia*, that Mr. Costas misrepresented the amount of money in the savings plan and testified he never made a withdrawal from the plan when in fact he did make such a withdrawal. In deciding this issue, the chancellor wrote in his opinion:

It is alleged that Mr. Costas misrepresented the amount of money in his Rockwell Federal Credit Union immediately prior to the divorce. The Court finds that, in his deposition of July of 1991, the Respondent stated, in response to the question concerning withdrawals from his savings plan, as follows: Question. "Have you ever had to make a withdrawal --" Answer. "No." Question. "-- from the savings plan?"

Further in his deposition of November 20, 1993 [sic], in reply to the question, "When did you make a withdrawal from your savings plan, if at any time, prior to the divorce?" Answer. "After the divorce. I can't tell you the exact date. It was approximately the end of October or the beginning of November 1990."

From these statements of the Defendant, William James Costas, under oath the Court finds that Mr. Costas did in fact misrepresent that he had not taken any funds from this savings account prior to the distribution of these funds on August 4th of 1992. As a result of this misrepresentation, the Movant, Ms. Costas, acted to her detriment and did not receive the funds anticipated from this disbursement. The Court finds that Ms. Costas should be awarded a judgment of and from Mr. Costas for a sum equal to one-half of the withdrawal made by Mr. Costas in September of 1990 being \$20,764.94. Together with legal interest of 8 percent from and after August 8, 1992.

Mr. Costas asserts that he made no misrepresentation to Ms. Costas because he answered her counsel's question as he presented it to him. Mr. Costas maintains that her counsel asked if he *had* to withdraw the money from the savings plan. Mr. Costas criticizes this question as being of an inarticulate nature, to which he was compelled to answer "No," because he had not been compelled by circumstance to withdraw the money. Instead, he freely withdrew it by choice. Mr. Costas put it best in his brief when he wrote, "[w]e realize that this is a question in semantics;" however, the chancellor found Mr. Costas's negative answer to this question to have been his misrepresentation of the truth.

This Court affirms the chancellor's finding of Mr. Costas' misrepresentation by his answer of "No" to this question. Mr. Costas understood that Ms. Costas's attorney intended to discover if Costas had withdrawn any money from the savings plan, which, of course, he had done. When he answered "No" to that question, he knew that he was misrepresenting to his former wife's counsel that, in fact, he had withdrawn the sum of \$41,529.94 from the plan. Mr. Costas continued by explaining the savings plan was for long-term retirement and a 10-percent penalty would be incurred for early withdrawal. He did not respond honestly to the question and his explanation of the nature of the plan added to his attempted cover-up of the \$41,529.94 withdrawal. This Court finds no error in the chancellor's judgment regarding Mr. Costas's misrepresentation.

Mr. Costas also argues that Ms. Costas did not meet the burden of proof necessary to set aside or alter the final judgment of the chancery court. The Mississippi Supreme Court has stated that clear and convincing evidence is required to amend a final judgment and that the burden of producing that clear and convincing evidence rests on the movant. *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984). In *Stringfellow*, the supreme court opined:

Rule 60(b)(1) deals with relief from judgment obtained by fraud, misrepresentation, or other misconduct of the adverse party. In those circumstances, the burden is upon the movant to prove fraud, misrepresentation or other misconduct, and to do so by clear and convincing evidence. *Rozier v. Ford Motor Company*, 573 F.2d 1332 (5th Cir.1978). To constitute fraud there must be (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury. *Gardner v. State*, 235 Miss. 119, 108 So.2d 592 (1959).

Id. at 221.

While this Court acknowledges that litigants whose cases come before it for adjudication may frame the issues as they perceive them, it doubts that Ms. Costas' motion was really to amend or to modify the final judgment of divorce. Indeed, in the judgment on Ms. Costas' motion which the chancellor rendered on April 20, 1994, and entered on April 22, 1994, he did nothing to amend or to modify the original judgment of divorce which the chancery court had entered on May 11, 1992. Instead, as we previously explained, the chancellor entered judgment against Mr. Costas in the amount of \$20,764.94, which he found to be "sum equal to one-half of the withdrawal made by [Mr. Costas] in September of 1990, together with legal interest of eight (8%) percent from and after August 8, 1992." This judgment entered on April 22, 1994, did nothing to change the text or terms of the judgment of divorce, including the Costases' property settlement agreement which the chancellor had incorporated into the terms of the judgment of divorce. In fact, the property settlement agreement provided:

The Court shall retain jurisdiction over the parties and the Plan until such time as all obligations of the Plan to MARY H. COSTAS under this Order have been fully paid and discharged.

The foregoing provision bestowed on the chancery court continuing jurisdiction to resolve whether Mr. Costas had fully paid and discharged his obligation to Ms. Costas regardless of any question about amending or modifying the judgment of divorce pursuant to Rule 60(b).

However that may be, this Court holds that Ms. Costas' evidence of her former husband's fraud within the premises of this case was clear and convincing, even under what may be the more stringent nine elements set forth in *Stringfellow*, which we previously quoted. We analyze these nine elements as follows:

(1) a representation

We earlier quoted the provision in the Costases' property settlement agreement by which Mr. Costas submitted that he "ha[d] made a full and complete disclosure of any and all property, real or personal,

which is subject to disposition by the Court" Yet on September 18, 1990, Mr. Costas had withdrawn the sum of \$41,529.94 from the plan; but he did not divulge this withdrawal to Ms. Costas. His failure to divulge the withdrawal violated this provision and thus became a misrepresentation itself. As the Mississippi Supreme Court explained in *Guastella v. Wardell*, 198 So. 2d 227, 230 (Miss. 1967):

A party to a business transaction, under these circumstances, is under a duty to disclose to the other party, before the transaction is consummated, information which will correct previous representations made to the other party which are untrue or misleading.

Moreover, while this Court need not deal with the matter, Mr. Costas' agreement that Ms. Costas would be allocated the sum and amount of \$30,402.00 from the "after tax" portion of the Plan for the express purpose of paying off the mortgage debt" on the California residence was an implicit representation that there was that amount of "after tax" money in the Plan which could be used for that purpose.

(2) its falsity

The falsity of this representation is manifest from the evidence because Mr. Costas had withdrawn the sum of \$41,529.94 from the Plan so that the money simply was not there.

(3) its materiality

The representation that there was enough "after tax" money to pay the balance of the California mortgage was material to Ms. Costas' being able to pay the balance of that debt and thus to her financial status following the divorce as both she and Mr. Costas had contemplated it.

(4) the speaker's knowledge of its falsity or ignorance of its truth

Because Mr. Costas acknowledged that he had withdrawn the sum of \$41,529.94 from the plan, he knew that the representation was false.

(5) his intent that it should be acted on by the person and in the manner reasonably contemplated

The very nature and purpose of the property settlement agreement demanded that Ms. Costas act upon its contents and Mr. Costas' representations made about it. They both reasonably contemplated that one purpose of the property settlement agreement was to divide their property in accordance with its terms.

(6) The hearer's ignorance of its falsity

On direct examination, Ms. Costas testified that she first believed that there was \$139,000 in after-tax money that could be used to pay both the California and the Mississippi home mortgages. The record reflects that Mr. Costas proposed to pay the balance of the Mississippi home mortgage from these "after tax" sums of money, but he later decided not to pay the balance of the Mississippi home mortgage. Hence the property settlement agreement provided only for paying the California home mortgage with "after tax" money in the Plan. On or about August 7, 1992, more than two months

after the chancery court had entered its judgment of divorce on May 11, 1992, Ms. Costas received a written explanation from the Plan administrator in which she was notified that the amount of the "after tax" money was only \$676.79. She testified that her receipt of this explanation was the first time she knew that there was only \$676.79 in the net employee "after tax" contributions. Mr. Costas offered no evidence to rebut Ms. Costas' testimony which established that she was ignorant of the falsity of Mr. Costas' representation to her.

(7) her reliance on its truth

On this point, Mr. Costas points to the following testimony of his former wife:

Q. Prior to May 11, 1992, date of the divorce, what, if any, representations were made to you as to whether or not there had been any withdrawals from the savings plan?

A. There were none.

Based on the foregoing testimony, Mr. Costas argues that "[s]ince Mrs. Costas had no representation made to her, she could not possibly have relied on a false representation and her claim of fraud fails. To counter this argument, Ms. Costas invites this Court's attention to this portion of her testimony which followed the portion we previously quoted:

Q. During the pendency of the divorce do you know whether he was ever asked if he made any withdrawals?

A. Oh, yes, he had. I'm sorry. I misunderstood your question.

Q. And was that in his deposition of July 1991?

A. Yes, it was.

Q. Were you present?

A. Yes, I was.

Q. And was Mr. Costas asked about whether or not withdrawals had ever been made from the savings plan?

A. Yes, he was.

Q. And what was his response?

A. He had not withdrawn any monies from the savings plan.

Q. Okay. And did you rely upon that statement that he made?

A. I definitely relied on that statement.

Q. Why did you rely upon the statement that he made that he had not made any withdrawals?

A. After 30 years of marriage, raising his family and cleaning his home.

Given the foregoing testimony by Ms. Costas that she did rely on her former husband's representation that he had not withdrawn any monies from the Plan and the representations contained in the property settlement agreement which we have previously quoted, we again find the evidence of her reliance on his representation to be clear and convincing.

(8) her right to rely thereon

In *Streeter v. State*, 180 Miss. 31, 41, 177 So. 54 (1937), the Mississippi Supreme Court opined that a person who deals with another may assume that the representations which the other person makes are true. Moreover, "[I]f the facts are peculiarly within the knowledge of one party, there may be a duty of disclosure under particular circumstances." *American Nat. Ins. Co. v. Murray*, 383 F.2d 81, 87 (5th Cir., 1967). In the case *sub judice*, the information about the Plan was entirely within Mr. Costas' knowledge. Therefore, this Court holds as a matter of law that he owed Ms. Costas the duty to disclose that he had withdrawn the sum of \$41,529.94 and that because he owed her that duty of disclosure, she was entitled to rely on that representation. Ms. Costas could "assume that the representations which [Mr. Costas made were] true." *See Streeter*, 180 Miss. at 41.

(9) her consequent and proximate injury

Ms. Costas testified that to avoid paying a penalty on her share of the Plan, she was compelled to "roll it over," *i. e.*, reinvest it. Therefore, she had only the monthly sum of \$2,000 which Mr. Costas had agreed that she should receive both from his retirement benefits (\$1,686.50) and his personal supplementation of that "carve-out" in the amount of (\$313.50). Because the "after tax" money in the amount of \$676.79 was pathetically inadequate to pay the balance of the home mortgage in California, Ms. Costas was also compelled to pay the monthly installments on this mortgage as they accrued. Thus, Mr. Costas' withdrawal of \$41,529.94 from the Plan and his failure to divulge his withdrawal contrary to his representation that he had made a full and complete disclosure of any and all property that was subject to disposition by the Court became the proximate cause of Ms. Costas' financial injury.

Our foregoing analysis of the nine elements required to constitute fraud establishes clearly and convincingly that pursuant to Rule 60(b) Ms. Costas met her burden of proof on this issue, even when the reason to amend or modify that judgment was fraud, rather than misrepresentation. Thus, the chancellor did not err when he included in the judgment which he awarded her the sum of \$20,076.94 to satisfy fully her share of the Plan, which share was to have included enough "after tax" money to pay the balance of the mortgage which encumbered her home in California. This Court resolves Mr. Costas' first issue against him and affirms the chancellor's award of the sum of \$20,076.94 to her.

Issue 2. The trial court was in error in requiring a division of the income tax refund.

The Mississippi Supreme Court has defined marital property for the purpose of divorce as being "any and all property acquired or accumulated during the marriage." *Hemsley v. Hemsley*, 639 So. 2d 909, 914 (Miss. 1994). "Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the chancellor." *Id.* "As to the division of marital assets, it is the broad inherent equity powers of the chancery court that give it the authority to act. General equity principles of fairness undergird this authority." *Ferguson v. Ferguson*, 639 So. 2d

921, 927 (Miss. 1994).

Mr. Costas filed joint tax returns in the name of Mr. and Ms. William J. Costas with the State of Mississippi and the Internal Revenue Service for the tax year 1991. Due to overpayment, the State of Mississippi mailed a refund check, payable to both parties, in the amount of \$717. The IRS also returned a refund check in the amount of \$5,340, payable to both parties. While these checks, which were refunds from jointly filed tax returns, were marital assets as defined by the supreme court, the Costases' property settlement agreement was silent about the division of income tax refunds that either of them might receive. Regardless of the party who contributed the most financially in the overpayment of taxes, "[w]e assume for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic or otherwise are of equal value." *Hemsley* at 914. "It is well-established by this Court that the chancery court has the authority to order an equitable division of property that was accumulated through the joint efforts and contributions of the parties." *Ferguson*, 639 So. 2d at 927.

Ms. Costas was unaware of the refund checks until after the property settlement was entered into and filed with the court. The money received in those refunds was a part of the marital assets and, thus, subject to equitable division by the chancery court. In his opinion, the chancellor held that the refunds of \$717 and \$5,340 "should be divided equally between [the Costases] since they are joint payees on the checks." This Court holds that the chancellor's so holding was proper, and thus it affirms his equal division of the federal and state income tax refunds between Mr. and Mrs. Costas.

Issue 3. The court was in error in awarding Ms. Costas, the Appellee, attorney's fees in the amount of \$7,655.48 or any fees whatsoever.

In support of his position on this issue, Mr. Costas offers the following argument:

It is the Appellant's position that because there was no fraud or overreaching, because Mrs. Costas, the Appellee, received far in excess of 50% of the marital assets, and because the court was manifestly in error in amending or altering the judgment of divorce agreed upon by the parties, Mrs. Costas is entitled to no reimbursement for attorney's fees.

However, Mr. Costas acknowledges that "[u]nquestionably, the award of attorney's fees can be proper in a contempt citation." We have already disposed of Mr. Costas' objection to the award of an attorney's fee "because the court was manifestly in error in amending or altering the judgment of divorce agreed upon by the parties," by affirming the chancellor's award of \$20,076.94 to Ms. Costas.

The chancellor awarded Ms. Costas attorney's fees in the amount of \$7,655.48 which she incurred as a result of filing the motion for contempt citation. The motion for contempt citation was the direct result of Mr. Costas's misrepresentation during the discovery phase of the property settlement matter that he had not withdrawn any money from the plan. The Mississippi Supreme Court has said, "The question of attorney fees in a divorce action is largely entrusted to the sound discretion of the trial court." *Ferguson*, 639 So. 2d at 936. (citations omitted). However, "[i]f a party is financially able to pay her attorney, an award of attorney's fees is not appropriate." *Id.* In his opinion, the chancellor opined "that Ms. Costas in not currently able to pay those fees" At the time of the hearing on her motion for contempt citation, Ms. Costas had no savings, and she owed approximately \$54,204

in outstanding bills. She was working two jobs, with her gross monthly earnings totaling \$1,496 per month.

In the case *sub judice*, the chancellor specifically found that Ms. Costas was unable to pay her attorney's fees which she incurred in filing her motion for contempt citation. The amount of the fee and Ms. Costas' inability to pay her attorney his fee have been established by appropriate evidence. It is to the award, not the amount, of the fee to which Mr. Costas objects. Therefore, we need not review the factors which the Mississippi Supreme Court has enumerated for the appellate review of the award of an attorney's fee in a domestic relations case. See *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982). The chancellor's award of fees to Ms. Costas was proper, and we affirm the chancellor's award of attorney's fees to Ms. Costas in the amount of \$7,655.48.

Issue 4. The court erred in not requiring the Appellee, Ms. Costas to repay Mr. Costas, the Appellant, \$14,000.00 which was overpaid to her from the pension plan distribution.

In his one-paragraph argument on this issue, Mr. Costas writes:

The Appellee [Ms. Costas] was overpaid \$14,000.00 from the Appellant's savings or pension plan. This was due to accounting errors by the Plan Administrator. We do not wish to belabor the point, however, in fairness this overpayment does not belong to Mrs. Costas under the principles announced in *Hemsley v. Hemsley*, 639 So. 2d 909 (Miss. 1994). . . .

The chancellor ignored the Appellant's claim for these funds and the Appellant urges this Court to reverse the Chancellor on this point.

If Mr. Costas does not "wish to belabor the point," then neither does this Court. The only evidence in the record which supports Mr. Costas on this issue is his assertion in his deposition which Ms. Costas took on November 20, 1992, that the plan administrator's overpayment to Ms. Costas "was in excess of \$14,000."

The record further reflects that while Mr. Costas included this claim in the counterclaim which he filed in response to Ms. Costas' motion for contempt citation, he presented no evidence to support this assertion during the chancellor's hearing on Ms. Costas' motion. The chancellor did not address Mr. Costas' claim for reimbursement of the sum of \$14,000 in his opinion, and the judgment which he entered pursuant to that opinion is silent about it. In short, the chancellor did not resolve this issue for Mr. Costas; neither did Mr. Costas seek any post judgment relief such as Rules 59 and 60 of the Mississippi Rules of Civil Procedure might have afforded him to request the chancellor's adjudication of this issue.

In *Estate of Johnson v. Adkins*, 513 So.2d 922, 925 (Miss. 1987), the Mississippi Supreme Court declined to decide an issue which it found the appellant had raised for the first time on appeal. That Court opined:

In the trial below, appellant did not plead or raise at any point the question of undue influence and fiduciary relationship. That issue is assigned, argued and presented for the first time on appeal. It is elementary that this Court will not review on appeal those issues which were not raised in the court below.

Id. While it is true that Mr. Costas included this issue in his counterclaim and asserted in his deposition that the plan administrator had paid Ms. Costas approximately \$14,000 more than the amount to which she was entitled pursuant to the terms of their property settlement agreement, he did nothing, according to the record, to request the chancellor to resolve this issue.

Even if Mr. Costas had requested the chancellor to decide whether the plan administrator had made an error of \$14,000 in the amount of the distribution from the plan to Ms. Costas, he presented no evidence to support his position that the plan administrator had indeed made such a mistake. We conclude from our review of the state of the record in the case *sub judice* that Mr. Costas did not raise this issue in the court below for the chancellor's adjudication; thus, pursuant to *Estate of Johnson v. Adkins*, this court declines to review this fourth issue, the result of which is to resolve it adversely to Mr. Costas.

V. SUMMARY

Mr. Costas violated the provisions contained in the property settlement agreement that he had made a full and complete disclosure of any and all property which was subject to disposition by the Court when he withdrew \$41,529.94 from the plan on September 18, 1990, without advising Ms. Costas that he had done so. From our analysis of the evidence in this case, we hold that Ms. Costas satisfied by clear and convincing evidence all nine of the components necessary to establish that Mr. Costas had committed fraud by failing to advise her of his withdrawal. Thus, we have affirmed the chancellor's inclusion of the sum of \$20,076.97, which represents one-half of the amount of Mr. Costas' withdrawal, in the judgment which he rendered against Mr. Costas for the benefit of Ms. Costas. Moreover, the property settlement agreement provided that the chancery court would retain jurisdiction of the matter "until such time as all obligations of the plan to [Ms. Costas] under this [judgment of divorce] have been fully paid and discharged."

Neither did the chancellor err when he divided equally the federal and state income tax refunds equally between Mr. and Ms. Costas since their property settlement agreement made no provision for the apportionment between them of these refunds. The chancellor's finding in his opinion that "Mrs. Costas is not currently able to pay those fees," which was necessary to support his award to Ms. Costas of an attorney's fee in the amount of \$7,655.48, was proper, especially since Mr. Costas challenged only the award and not the amount of the fee. Because Mr. Costas failed to obtain the chancellor's determination of whether the plan administrator had erred by distributing \$14,000 more than was required to Ms. Costas, this Court need not consider his fourth issue, the subject of which was this supposed error. Because we have resolved all four issues which Mr. Costas has raised in his appeal adversely to him, we affirm the judgment of the Hancock County Chancery Court from which he has appealed.

Because this Court has affirmed the Hancock County Chancery Court's judgment, which was in the total amount of \$31,448.92, it awards the Appellee, Mary H. Costas, damages in the amount of \$4,717.34 in accordance with the provisions of Section 11-3-23 of the Mississippi Code of 1972. The portion of Section 11-3-23 which is relevant to this award reads as follows:

In case the judgment or decree of the court below be affirmed, . . . the supreme court shall render

judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment or decree affirmed be for a sum of money, the damages shall be upon such sum. If the judgment or decree be for the possession of real or personal property, the damages shall be assessed on the value of the property.

Miss. Code Ann. 11-3-23 (1972). This amount of \$4,717.34 is in addition to the amount of the judgment and the payment of all costs of court, both in this Court and the Hancock County Chancery Court.

THE JUDGMENT OF THE HANCOCK COUNTY CHANCERY COURT IS AFFIRMED. THE APPELLEE, MARY H. COSTAS IS AWARDED DAMAGES PURSUANT TO SECTION 11-3-23 OF THE MISSISSIPPI CODE OF 1972. THE APPELLANT, WILLIAM JAMES COSTAS, IS TAXED WITH ALL COSTS OF THIS APPEAL.

BRIDGES, C.J., McMILLIN, P.J., DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

THOMAS, P.J., AND HINKEBEIN, J., NOT PARTICIPATING.