

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 1999-M-00532**

***IN RE: JOHN R. NICHOLS***

**ON PETITION FOR WRIT OF PROHIBITION**

ATTORNEY FOR APPELLANT: PRESTON D. RIDEOUT

ATTORNEY FOR APPELLEE: W. DEAN BELK

NATURE OF THE CASE: CIVIL - OTHER

DISPOSITION: PETITION FOR WRIT OF PROHIBITION GRANTED; ORDER OF CONTEMPT  
VACATED - 10/21/1999

MOTION FOR REHEARING FILED:

MANDATE ISSUED:

**EN BANC.**

**WALLER, JUSTICE, FOR THE COURT:**

**STATEMENT OF THE CASE**

¶1. John R. Nichols was held in contempt and ordered incarcerated by the Sunflower County Chancery Court for failure to make court-ordered payments pursuant to an agreed judgment. Nichols filed a petition for extraordinary relief with this Court seeking to have the chancery court's order vacated, arguing that the order violates Article 3, § 30 of the Mississippi Constitution of 1890, which prohibits imprisonment for debts. After consideration of Nichols' request and the pleadings filed by the respondents, we conclude that the order violates Article 3, § 30 of the Mississippi Constitution of 1890. Therefore, we grant the petition and the writ and vacate the chancery court's contempt order.

**FACTS**

¶2. Clyde and Elsie Rutledge were the sole owners of RCR, Inc., a small closely held farming corporation. John R. Nichols and his wife Robbie (the Rutledges' daughter) entered into an agreement with the Rutledges

wherein they would transfer half their interest in the corporation to the Nichols. The Rutledges conveyed title to approximately twenty-five acres to the corporation in order for the corporation to develop a subdivision on the property. Only eleven of the lots were sold, and apparently no houses were ever built on the property. The Nichols subsequently defaulted on a note to the Bank of Commerce which was secured by the property, and Robbie Nichols' two sisters, Kay R. Causey and Clydean R. Thomason, purchased the promissory note from the bank in order to avoid foreclosure.

¶3. The Rutledges thereafter filed suit against the Nichols seeking an accounting and the re-conveyance of the property back to them. On the day of trial a settlement was reached, and the agreement was read into the record. The agreed judgment required the Nichols to: (1) re-convey certain property back to the Rutledges; (2) make an initial lump sum payment of \$11,281.30 on or before February 8, 1999; and (3) pay the remaining balance of the note in thirty-six monthly installments in the amount of \$1,235.23 beginning March 1, 1999, to Causey and Thomason because they had purchased the promissory note from the bank. The judgment also specifically acknowledged that the chancery court would retain jurisdiction over the matter for purposes of enforcing the judgment.

¶4. After failing to receive the required payments for February and March, the Rutledges filed a motion for citation of contempt against the Nichols. The Nichols moved to dismiss the motion for citation of contempt because it violated Article 3, § 30 the Mississippi Constitution of 1890, which prohibits imprisonment for debt. The chancery court denied the motion to dismiss and found the Nichols to be in willful contempt of its order. The trial court gave the Nichols five days in which to pay the delinquent sums due under the judgment in order to purge themselves of contempt. The trial court further ordered that if the delinquent sums were not paid on or before March 30, 1999, John Nichols<sup>(1)</sup> would be "incarcerated under such terms and conditions as the Court shall then determine . . . ."

¶5. On March 25, 1999, John Nichols sought extraordinary relief in this Court in the form of a petition for writ of prohibition in which he asked this Court to vacate the chancery court order finding him in contempt and ordering him to be incarcerated. Nichols alleged that to incarcerate him would amount to imprisonment for a money debt in violation of Article 3, § 30 the Mississippi Constitution of 1890. A response to the petition was filed on April 8, 1999. This Court stayed enforcement of the order pending a decision on this matter. Pursuant to a motion filed by the Rutledges, we subsequently modified the stay to allow for collection of the judgment by any lawful means other than incarceration of Nichols.

## **DISCUSSION**

### **A. Constitutional Prohibition**

¶6. Article 3, § 30 the Mississippi Constitution of 1890 provides "[t]here shall be no imprisonment for debt." "To be a debt within the meaning of the Constitution, the obligation existing between the parties must be either purely contractual or arise from some legal liability growing out of the debtor's dealings with another." *Ex parte Diggs*, 86 Miss. 597, 600, 38 So. 730 (1905).

### **B. Exceptions to the Constitutional Prohibition**

¶7. There are, however, exceptions to this prohibition. In *Fanchier v. Gammill*, 155 Miss. 316, 124 So. 365 (1929), the Court found support paid by a husband to his wife was an exception to the constitutional prohibition based on public policy.<sup>(2)</sup>

The obligation of the husband to support his wife is not a contractual one, that is, it is not founded exclusively in contract, but is founded, as stated in the former opinion, partially upon public policy. It is a public duty established by law, and is not a debt in the ordinary sense of that term, or in the sense of the Constitution prohibiting imprisonment for debt. It is an obligation which the defendant may be forced to perform by contempt proceedings or by criminal statute.

155 Miss. at 322, 124 So. at 366. However, regarding such obligations, we have held that an individual must be given the opportunity to show he or she is without the present ability to discharge the obligation, and thereby avoid being held in contempt. *Jones v. Hargrove*, 516 So. 2d 1354 (Miss. 1987). Finally, This Court has also found that the prohibition against imprisonment for a debt found in Article 3, § 30, of the Mississippi Constitution of 1890 does not extend to a pecuniary obligation imposed by the state as a punishment for crime. See *Payne v. State*, 462 So. 2d 902 (Miss. 1984); *Ex parte Diggs*, 86 Miss. 597, 38 So. 730 (1905).

### C. Civil or Criminal Contempt

¶8. We must determine whether the chancellor held Nichols in civil or criminal contempt. This Court distinguished between the two in *Hinds County Bd. of Supervisors v. Common Cause*, 551 So. 2d 107 (Miss. 1989), where we stated:

A civil contempt penalty is coercive, while a criminal contempt penalty is punishment.

The landmark case which distinguishes civil and criminal contempt is [Gompers v. Bucks Stove & Range Co.](#), 221 U.S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1911), which states the following:

Contempts are neither wholly civil nor altogether criminal. And "it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both." [Bessett v. Conkey](#), 194 U.S. [324], [24 S. Ct. 665, 667, 48 L. Ed. 997 (1904)]. It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. *If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. . . .* [I]mprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

\* \* \*

On the other hand, if the defendant does that which has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.

[221 U.S. at 441, 443, 31 S. Ct. at 498, 55 L. Ed. at 806.](#)

*Hinds County Bd. of Supervisors*, 551 So. 2d at 120-21 (emphasis added).

¶9. In this case, it appears that the chancellor held Nichols in civil contempt. This is not a case where the court is punishing the individual for conduct committed in the presence of the court as in *Varvaris v. State*, 512 So. 2d 886 (Miss. 1987), where the defendant was incarcerated for threatening an assistant district attorney in the courtroom. Nor is this a case of constructive or indirect contempt that this Court was faced with in *Terry v. State*, 718 So. 2d 1097 (Miss. 1998), where the defendants were incarcerated for disseminating information regarding a pending criminal trial in the local newspaper. Rather the chancellor's order allowed for Nichols to avoid incarceration by bringing the payments on the judgment current, which provision is characteristic of civil contempt.

#### **D. Application of the Constitutional Prohibition to Nichols**

¶10. We now turn to the validity of the order holding Nichols in contempt. Nichols argues that the judgment is not one for alimony, child support or the result of a criminal proceeding against him; therefore, the chancery court does not have the authority to order him to be imprisoned for failure to make the payments as required under the judgment. The Rutledges argue that the agreed judgment was the result of a fully negotiated agreed settlement; therefore it is not the ordinary type of money judgment contemplated by Article 3, § 30 of the Mississippi Constitution of 1890.

¶11. We find the Rutledges' argument to be unpersuasive. It has not been shown that the debt at issue is anything but an ordinary civil debt in the form of an agreed judgment. While the debt may be anything but ordinary to the Rutledges, or to the Nichols for that matter, it is not the sort of debt which implicates the public policy of this state and does not fall into any of the exceptions stated above. We therefore find that to imprison Nichols for the non-payment of this judgment would violate Article 3, § 30 of the Mississippi Constitution of 1890. Seeking an extraordinary writ pursuant to [M.R.A.P. 21](#) was an appropriate remedy in this case, see *Ex parte Burchinal*, 571 So. 2d 281 (Miss. 1990) (trial court order holding petitioner in contempt vacated pursuant to a petition for interlocutory appeal treated as a petition for extraordinary relief), and accordingly we vacate the order of the chancery court finding Nichols in contempt and ordering him incarcerated. The Rutledges are free to collect the judgment by execution, garnishment or any other available lawful means so long as it does not include imprisonment.

¶12. **PETITION FOR WRIT OF PROHIBITION GRANTED; ORDER OF CONTEMPT VACATED.**

**PRATHER, C.J., PITTMAN, P.J., BANKS AND McRAE, JJ., CONCUR.  
SMITH, J., DISSENTS WITH SEPARATE OPINION JOINED BY  
SULLIVAN, P.J., MILLS AND COBB, JJ.**

**SMITH, JUSTICE, DISSENTING:**

¶13. This case had its genesis in an agreed judgment between the Nicholsons and Rutledges, with notable language contained within the judgment that the Chancery Court of Sunflower County was retaining jurisdiction of the case for enforcement purposes. The Nicholsons did not abide by the terms and conditions of the chancellor's judgment. The Rutledges filed a request for the chancellor to enforce the chancery court's judgment and for a contempt citation of the Nicholsons.

¶14. After a hearing on the contempt, the learned chancellor found the Nicholse in contempt and allowed five days to pay the delinquent payments to purge the contempt, or alternatively, for John Nichols to be incarcerated. Perhaps the chancellor should have also decided to incarcerate Nichols's wife along with him, but for what ever reason she did not do so and should not be faulted for using such discretion.

¶15. Nichols elected to file in this Court a Petition for Writ of Prohibition rather than appeal from an order that was clearly appealable. This Court stayed the proceedings and called for a response from the Rutledges who timely did so.

¶16. The majority vacates the chancellor's order of contempt and grants Nichols's Petition for a writ of prohibition, finding that the debt at issue here "is anything but an ordinary civil debt in the form of an agreed judgment." Additionally, finding that the petition for a writ of prohibition was in actuality a petition for extraordinary relief pursuant to [M.R.A.P. 21](#), the majority holds that, "We find that to imprison Nichols for the non-payment of this judgment would violate Article 3, § 30 of the Mississippi Constitution of 1890." In my view the chancellor could enforce this chancery court judgment by applying contempt, including incarceration. Therefore, disagree with the majority and accordingly, I respectfully dissent.

¶17. The Rutledges correctly point out that the agreed judgment was the result of a fully negotiated agreed settlement, and therefore, it is not the ordinary type of money judgment contemplated by Article 3, § 30 of the Mississippi Constitution of 1890.

¶18. This Court, in *Hinds County Democratic Executive Comm. v. Muirhead*, 259 So. 2d 692, 695 (Miss. 1972), stated that mandamus "is not a substitute for, nor intended to serve, the purpose of other modes of review." *City of Jackson v. McPherson*, 158 Miss. 152, 156, 323, 130 So. 287, 288 (1930), states when there is a right to an appeal, "this is ordinarily deemed an adequate remedy so as to preclude the issuance of mandamus to coerce such tribunal in respect to such matter." *See also In re Validation of Bonds of McNeill Special Consol. Sch. Dist.*, 185 Miss. 864, 188 So. 318 (1939).

¶19. Clearly the judgment rendered by the trial court is a final judgment which is appealable. In *Common Cause of Mississippi v. Smith*, 548 So. 2d 412, 415 (Miss. 1989), this Court held that "[a] person convicted of criminal or civil contempt may, of course, appeal to this Court. Miss. Code Ann. §§ 11-51-11, 11-51-12 (Supp.1988)." In addition, Miss. Code Ann. § 11-51-12 (Supp. 1999) provides for a stay of incarceration upon the execution of an appearance bond. It states in relevant part:

(1) A person ordered by any tribunal, except the Supreme Court, to be punished for a civil contempt, may appeal to the court to which other cases are appealable from said tribunal. If jail confinement is ordered to compel the payment of any monetary sum, the contemnor shall be allowed to appeal upon the execution of an appearance bond, payable to the appellee, with sufficient sureties, in the penalty of one hundred twenty-five percent (125%) of such sum as he has been adjudicated in contempt for failure to pay, unless the court shall determine that a lesser bond should be required. The bond shall be conditioned to abide the results of the appeal.

\* \* \*

(3) All appeals allowed in accordance with the provisions of this section shall operate as a supersedeas.

\* \* \*

¶20. There is no doubt that the order finding Nichols in contempt and ordering his incarceration is a final appealable order, and therefore, this Court should dismiss the petition as seeking improper review of a final order. However, notwithstanding the fact that Nichols improperly seeks review by means other than an appeal from the final order as he should have done, the petition should also be denied by the Court on the merits.

¶21. As previously stated, Nichols agreed to the settlement, and as part of the settlement an agreed judgment would be entered by the chancery court. Unlike an ordinary money judgment, the agreed judgment in this case provided that payments were to be made at specific times. In addition, the agreed judgment provided in part:

16. This Court shall retain jurisdiction of this cause for the purpose of enforcing the terms herein; and,

17. Except for the enforcement of the provisions as set forth in Paragraphs 1 through 16 hereinabove, this cause should be, and it hereby is, dismissed with prejudice with each party to bear their own costs and attorney's fees.

Miss. Code Ann. § 9-1-17 (Supp. 1999) provides:

The Supreme, circuit, chancery and county courts and the Court of Appeals shall have power to fine and imprison any person guilty of contempt of the court while sitting, but the fine shall not exceed One Hundred Dollars (\$100.00) for each offense, nor shall the imprisonment continue longer than thirty (30) days. If any witness refuse to be sworn or to give evidence, or if any officer or person refuse to obey or perform any rules, order, or judgment of the court, such court shall have power to fine and imprison such officer or person until he shall give evidence, or until the rule, order, or judgment shall be complied with.

¶22. In my view by entering into the agreed judgment, which required payment of the judgment at specific times, and which also specifically stated that the chancery court retained jurisdiction over the case for the enforcement of the judgment, Nichols waived any claim he might have under Article 3, § 30 of the Mississippi Constitution of 1890.

¶23. More importantly, the majority ignores *Payne v. State*, 462 So. 2d 902, 904-05 (Miss. 1984), where this Court specifically stated:

The defendant's assertion here is that an imprisonment for a fine is tantamount to imprisonment for a debt in violation of Article 3, Section 30 of the Mississippi Constitution. This position is meritless as the constitutional section does not extend to a pecuniary obligation imposed by the state as a punishment for crime. **The constitution is a prohibition of imprisonment for a personal obligation from one person to another, other than civil contempt of court.** *Ex Parte Diggs*, 86 Miss. 597, 38 So. 730 (Miss.1905).

(Emphasis added.) And in *Jones v. Hargrove*, 516 So. 2d 1354 (Miss. 1987), the Court stated:

The law is well settled that upon establishment of a prima facie case of contempt, the defendant may avoid judgment of contempt by establishing that he is without present ability to discharge his

obligation, but he has the burden of proving his inability to pay, and such a showing must be made with particularity and not in general terms. *Clements v. Young*, 481 So.2d 263, 271 (Miss.1985). Nothing in this opinion should be construed to challenge these basic principles. It is also a well-settled rule in this state that the court's power to commit a person to jail until he complies with the terms of a decree depends upon his present ability to comply with the decree. *Wilborn v. Wilborn*, 258 So. 2d 804, 805 (Miss.1972).

516 So.2d at 1357.

¶24. Nichols was given the opportunity at the contempt hearing to put on evidence of his inability to pay the obligation; however he declined to do so. Although he did state in general terms that he was unable to pay, he did not make the showing with specificity as required by *Clements*. Nichols was therefore afforded all of his rights under the constitution, and the petition should be denied by this Court on the merits.

¶25. Contrary to the majority view, this case is not an imprisonment for a private debt, but rather is merely the chancellor's attempt to enforce her valid judgment. I fear that the majority's abridgment of our chancellors' ability to enforce their valid orders, decrees and judgments will have long range, extreme consequences.

¶26. I respectfully dissent.

### **SULLIVAN, P.J., MILLS, AND COBB, JJ., JOIN THIS OPINION.**

1. We find it interesting that John Nichols was ordered to be incarcerated, but his wife Robbie was not, even though the chancellor found them both to be in contempt.

2. However, regarding such obligations, we have held that an individual must be given the opportunity to show he or she is without the present ability to discharge the obligation, and thereby avoid being held in contempt. *Jones v. Hargrove*, 516 So. 2d 1354, 1357 (Miss. 1987).