

ORIGINAL



FILED  
SUPREME COURT  
STATE OF OKLAHOMA

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA AUG 30 2017

IN RE THE MARRIAGE OF: )  
)  
[REDACTED] )  
)  
Petitioner/Appellee, )  
)  
and )  
)  
[REDACTED] )  
)  
Respondent/Appellant. )

Case No. [REDACTED]

Washington County District Court

Case No. [REDACTED]

Received: 8/30/17  
Deelated:  
Marshal:  
CDA/DKC:  
CDA/TUL:

MOTION TO DISMISS APPEAL

COMES NOW, the Petitioner/Appellee, [REDACTED] by and through his attorneys of record, N. Scott Johnson and Patrick H. McCord of N. SCOTT JOHNSON & ASSOCIATES, P.L.L.C., and pursuant to Rule 1.6 of the Oklahoma Supreme Court Rules and the authorities cited herein, hereby moves for dismissal of the above-styled and numbered cause. In support thereof, Appellee would show the Court as follows:

I.

A party may request dismissal of an appeal at any stage of the proceedings. OKLA. SUP. CT. R. 1.6(c)(1). Grounds for dismissal include "mootness, waiver . . . or other grounds deemed appropriate by the Court." *Id.*

II.

At the trial court level, the District Court of Washington County rendered a *Journal Entry and Decree of Dissolution of Marriage* which, among other things, awarded Appellant

[o]ne-half (1/2) of [Appellee's] 'Call Pay' (\$158,700) and Chairman of the Board payments (\$29,000) as stipulated by the parties in the amount of \$93,850;

...

One-half (1/2) of the Morgan Stanley Account X285 ( $\$85,262.00 \div 2 = \$42,631.00$ ); [and]

...

\$36,000 in alimony, paid in full or at the rate of \$3,000 per month for twelve (12) months, with the first payment to commence on May 1, 2017.

*See, Journal Entry and Decree of Dissolution of Marriage*, filed July 18, 2017, pp. 6, 8.

### III.

That as of the filing of this *Motion*, the property division judgments in favor of Appellant have been paid in full. On or about July 21, 2017, Appellee tendered checks to Appellant in the amounts of \$93,850.00 and \$24,300.65, which Appellant freely accepted. Same were deposited by Appellant on August 4, 2017. *See, Exhibit 1*. Furthermore, Appellant has accepted numerous support alimony installments. *See, Exhibit 2*.

### IV.

That Respondent's voluntary act of accepting the aforementioned payments constitute a waiver of her right to appeal the trial court's decision pursuant to the "acceptance of benefits" doctrine. This doctrine is firmly rooted in Oklahoma jurisprudence and holds that "a party [who] freely and without protest or qualification accepts the benefits of a judgment . . . thereby confesses its validity and waives his right to appeal therefrom." *McCarty v. Lumry*, 1935 OK 817, 49 P.2d 188. *See also, Robert L. Wheeler, Inc. v. Scott*, 1991 OK 95, 818 P.2d 475, 477 ("The rule is well established that any act by an appellant that recognizes the validity of a judgment either expressly or by implication, operates as a waiver of the appellant's right to appeal from the judgment"); *Adams v. Unterkircher*, 1985 OK 96, 714 P.2d 193 ("[L]itigants who voluntarily accept the fruits of a judgment cannot bring an appeal to reverse it because

acceptance of the benefits of a part of the judgment favorable to an appellant waives the right to appeal its detrimental parts”).

#### V.

Oklahoma Courts have developed two (2) distinct exceptions to the acceptance of benefits doctrine. First, a party may be permitted to proceed with an appeal, even after accepting some or all of the benefits of the challenged judgment, if accepting the judgment was “necessary for the support and maintenance of the receiving spouse and minor children.” *Stokes v. Stokes*, 1987 OK 56, 738 P.2d 1346. Second, an appeal may proceed where there is absolutely no risk whatsoever to the appellant that the appeal will result in a less favorable outcome. *See, United Engines, Inc. v. McConnell Constr., Inc.*, 1980 OK 139, 641 P.2d 1101.

#### VI.

The doctrine and the application of the foregoing exceptions was most recently articulated in *Hamm v. Hamm*. There, Wife was awarded a substantial sum in property division judgments. Prior to satisfaction of same, Wife appealed the trial court’s decision. Approximately one month into the appellate process, Husband tendered one-hundred percent (100%) of all judgments to Wife, and Wife freely and voluntarily accepted same. Thereafter, Husband filed a Motion to Dismiss the appeal, citing the acceptance of benefits doctrine. The Oklahoma Supreme Court sustained Husband’s Motion and dismissed Wife’s appeal. *Hamm v. Hamm*, 2015 OK 27, ¶¶ 1-2, 350 P.3d 124. In so doing, the *Hamm* Court specifically determined that Wife could not satisfy the requirements of either exception to the doctrine. *Id.* at ¶ 4-5. The first exception was inapplicable insofar it applies only to situations where the appellant “must choose between food and the right to appeal.” *Stokes*, 738 P.2d at 1347. The second was similarly inapplicable because in an action of equitable cognizance, there is always some risk inasmuch as the appellate

Court is charged with rendering “the judgment which should have been rendered.” *Marshall v. Marshall*, 1961 OK 86, 364 P.2d 891. The appellant in *Hamm* even admitted that there was some risk. The Court clarified that the “no-risk exception means no risk, not negligible risk.” *Hamm*, 2015 OK 27 at ¶ 5.

#### VII.

The circumstances in the instant matter are analogous to *Hamm*. Here, Appellant was awarded certain property division judgments. Appellee paid said judgments in full and Appellant freely and voluntarily accepted those monies. See, Exhibit 1. Further, Appellee has dutifully paid his support alimony installments, and by the time this case reaches the decisional stage, the entirety of Appellee’s \$36,000.00 support alimony obligation will have been paid in full. See, Exhibit 2.

#### VIII.

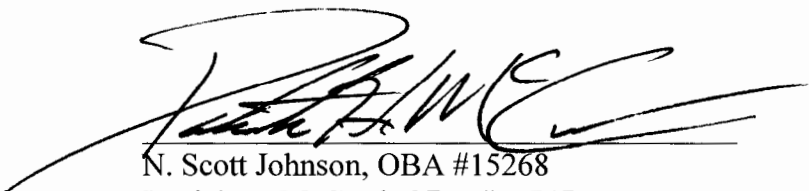
By accepting the benefits of the trial court’s decision, Appellant has waived her right to challenge that decision under the acceptance of benefits doctrine. Neither exception applies here. Appellant is a gainfully employed professional earning in excess of \$4,000.00 per month and receives over \$1,200.00 per month in child support. Furthermore, this action is one of equitable cognizance. If this Court elected to reverse and/or remand the judgment, this Court “will render or cause to be rendered the judgment which should have been rendered” by the trial court. *Marshall*, 364 P.2d 891. Thus, there is inherent risk that this Court may render a judgment that is less favorable to Appellant.

#### IX.

Appellee suggests that the acceptance of benefits doctrine operates to prohibit the appeal of any issues raised in Appellant’s *Petition in Error*. However, should this Court determine that

said issues are severable, and that the doctrine only applies to the property division and support alimony provisions of the trial court's judgment, Appellee requests this Court render a limiting Order narrowing the issues on appeal and prohibiting any challenges to the property division and support alimony provisions of the *Journal Entry and Decree of Dissolution of Marriage*, filed July 18, 2017. Specifically, said limiting Order should strike and/or prohibit Appellant from addressing the issues numbered one (1) through four (4), six (6), and eight (8) in Appellant's "Exhibit C" to her *Petition in Error*, "ISSUES TO BE RAISED ON APPEAL."

**WHEREFORE**, premises considered, Appellee prays for an Order dismissing Appellant's *Petition in Error*; alternatively, for a limiting Order narrowing the issues on appeal as is more fully set forth hereinabove; for all other relief requested herein; and for all further relief the Court deems just and equitable.



N. Scott Johnson, OBA #15268  
Patrick H. McCord, OBA #21747  
N. SCOTT JOHNSON & ASSOCIATES, P.L.L.C.  
302 East 10<sup>th</sup> Street  
Tulsa, Oklahoma 74120  
Telephone: (918) 794-3333  
Facsimile: (918) 794-3336  
*Attorneys for Petitioner/Appellee*

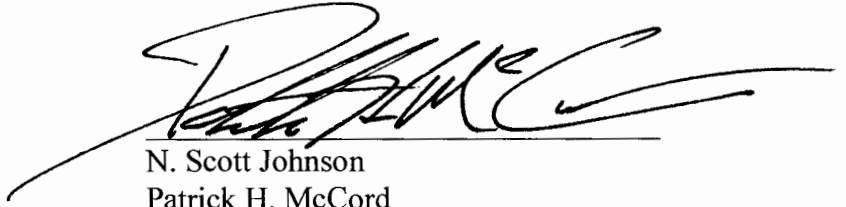
**CERTIFICATE OF MAILING TO PARTIES AND COURT CLERK**

I certify that a true and correct copy of the Petitioner/Appellee's *Motion to Dismiss*

*Appeal* was mailed this 30 day of August, 2017, to:

Bryan J. Nowlin, Esq.  
Richard A. Wagner, II, Esq.  
Hall, Estill, Hardwick, Gable,  
Golden & Nelson, P.C.  
320 South Boston Ave., Suite 200  
Tulsa, Oklahoma 74103  
*Attorneys for Respondent/Appellant*

by depositing same in the U.S. Mail, postage prepaid.



N. Scott Johnson  
Patrick H. McCord







BB-371039 4879

DATE 6/20/17

PAY TO THE ORDER OF Annex Cochran \$ 3000.00

Three Thousand and 00/100 DOLLARS

**BANK OF OKLAHOMA**  
www.bok.com

BOK CLUB ACCOUNT

MEMO Annex for July

ENDORSE HERE  
For Deposit Only #1059858

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DATE \_\_\_\_\_

*Annex Cochran*

**FEDERAL RESERVE BOARD OF GOVERNORS REG. CC**

86-2/1039 4866

DATE 5/2/17

PAY TO THE ORDER OF June Cochran \$ 3882.00

Three Thousand Eight Hundred Eighty Two and 00/100 DOLLARS

**BANK OF OKLAHOMA** BOK CLUB ACCOUNT

www.bok.com

MEMO St. Mary May 2017

ENDORSE HERE

Deposit to Acct 1059858

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DATE \_\_\_\_\_

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FEDERAL RESERVE BOARD OF GOVERNORS REG. CC



A division of BOKF, NA  
P.O. Box 2300  
Tulsa, OK 74192-0001  
Member FDIC

PRIMARY ACCOUNT  
517958

Statement Period:  
03-27-17 to 04-26-17

Direct Inquiries To:  
24-Hour ExpressBank  
918-588-6010

INVESTOR CHECKING - 517958

4848 3/26/17

PAY TO THE ORDER OF Orkin \$ 101.25  
One Hundred One and 25/100

BANK OF OKLAHOMA  
MEMO: 29958809

4848 \$101.25

4849 3/26/17

PAY TO THE ORDER OF N Scott JOHNSON & Associate \$ 1,921.40  
One Thousand Nine Hundred Twenty One and 40/100

BANK OF OKLAHOMA

4849 \$1,921.40

4850 3/25/17

PAY TO THE ORDER OF Laura Firlon PhD \$ 600.00  
Six Hundred and no/100

BANK OF OKLAHOMA  
MEMO: Patricia K. Terenty

4850 \$600.00

4851 3/21/17

PAY TO THE ORDER OF J & K Storage \$ 480.00  
Four Hundred Eighty and no/100

BANK OF OKLAHOMA  
MEMO: Unit 00 C20

4851 \$480.00

4852 3/31/17

PAY TO THE ORDER OF State Farm Insurance Company \$ 1,215.20  
One Thousand Two Hundred Fifteen and 20/100

BANK OF OKLAHOMA

4852 \$1,215.20

4853 4/11/17

PAY TO THE ORDER OF Anna Carlson \$ 2,118.00  
Two Thousand One Hundred Eighteen and no/100

BANK OF OKLAHOMA  
MEMO: Anthony April

4853 \$2,118.00

4854 4/1/17

PAY TO THE ORDER OF Kelsey & Ben Reynolds \$ 100.00  
One Hundred and no/100

BANK OF OKLAHOMA  
MEMO: Woody Reese

4854 \$100.00

4855 4/12/17

PAY TO THE ORDER OF Event Loan Care \$ 7,250.00  
Seven Thousand Two Hundred Fifty and no/100

BANK OF OKLAHOMA  
MEMO: (Address)

4855 \$7,250.00

4856 4/14/17

PAY TO THE ORDER OF Orkin \$ 220.44  
Two Hundred Twenty and 44/100

BANK OF OKLAHOMA

4856 \$220.44

4857 4-20-17

PAY TO THE ORDER OF UNITED STATES TREASURY \$ 50,170.00  
Fifty Thousand One Hundred Seventy and no/100

BANK OF OKLAHOMA  
MEMO: 2016 Form 1099

4857 \$50,170.00





A division of BOKF, NA  
P.O. Box 2300  
Tulsa, OK 74192-0001  
Member FDIC

PRIMARY ACCOUNT  
517958

Statement Period:  
03-27-17 to 04-26-17

Direct Inquiries To:  
24-Hour ExpressBank  
918-588-6010

www.bok.com

13 Images Provided Page 3 of 6

INVESTOR CHECKING (cont.)

WITHDRAWALS

Date	Description	Amount
04-18	COLAWFITNESSLLC AUTOPAY M01076742028	26.14
04-26	CAPITAL ONE ARC CHECK PYMT 4861	992.19
04-26	AMER ELECT PWR CPPWDRAWAL *****06020	115.00

CHECKS

(\* Indicates a break in check number sequence)  
(RTND Indicates a RETURNED CHECK)

Date	Number	Amount	Date	Number	Amount
04-03	4848	101.25	04-18	4855	7,250.00
03-30	4849	1,921.40	04-19	4856	220.44
03-29	4850	600.00	04-26	4857	50,170.00
04-11	4851	480.00	04-26	4858	5,609.00
04-06	4852	1,215.20	04-24	4859	150.00
04-05	4853	2,118.00	04-18	4860	11,863.75
04-11	4854	100.00			



DAILY ACCOUNT BALANCE

Date	Balance	Date	Balance	Date	Balance
03-26	297,621.80	04-03	303,790.60	04-14	306,210.86
03-28	297,507.80	04-05	301,672.60	04-18	287,070.97
03-29	296,907.80	04-06	300,457.40	04-19	286,850.53
03-30	294,986.40	04-10	300,387.06	04-24	286,700.53
03-31	304,509.63	04-11	299,607.06	04-26	229,816.85

