

to the appellee-husband (plaintiff) and divided the marital property between the parties. The plaintiff was, among other things, required to pay rehabilitative alimony for twenty-four months and to pay the appellant-wife (defendant) for certain items of household furnishings that she had given up because of the marriage. Additionally, the court required the plaintiff to pay the defendant's attorney fees in the amount of \$5,000.00.

A multiplicity of issues has been presented to this court for review. We, however, will go directly to the heart of the issue that we find to be dispositive of this appeal and requires a reversal of the judgment of the trial court.

The defendant charges the court with error in awarding the plaintiff a divorce on the grounds of inappropriate marital conduct based upon a motion for judgment on the pleadings and evidence heard at the alimony pendente lite hearing.

The plaintiff filed his complaint on August 11, 1994, seeking an absolute divorce from the defendant. He charged that the defendant was guilty of inappropriate marital conduct. In the alternative, he sought a divorce on the grounds of irreconcilable differences. On August 15, 1994, the defendant filed a counter complaint for separate maintenance. On August 29, 1994, the defendant filed an answer to the original complaint wherein she

denied that she had been guilty of inappropriate marital conduct. She further denied that irreconcilable differences had arisen between the parties. An answer to the counter complaint was filed on September 27, 1994.

On October 21, 1994, an order was entered which directed the plaintiff, at his costs, to ship to the defendant all of the defendant's personal belongings. The plaintiff was ordered to pay certain dental bills incurred by the defendant and required the plaintiff to pay to the defendant \$2,100.00 per month as alimony pendente lite. The order required the defendant to return an automobile to the plaintiff and further required the plaintiff to pay to the defendant \$10,000.00 with which to purchase a replacement vehicle. A request for attorney's fees pendente lite was reserved.

The parties filed various intermediate motions, none of which are relevant here. On January 10, 1995, the plaintiff filed a "Motion for Judgment on the Pleading" in which he asked the court to award him a divorce from the defendant and determine the property rights and/or reserve the property rights of the parties pending further orders of the court. On January 20, 1995, the court held a hearing on the motion for judgment on the pleadings. The court granted the plaintiff a divorce on the grounds of inappropriate marital conduct "based on the testimony that the

court did hear and part of which is contained in the pleadings because this is truly, is a sad situation."¹

In the transcript of the January 20 hearing, we find the following colloquy between Mr. Flynn, attorney for the defendant, and the court:

MR. FLYNN: Your honor, just for the record, as I understand it, you are granting Mr. Pershing McCarter a divorce or [sic] inappropriate marital conduct based on the testimony you heard at the pendente lite hearing?

THE COURT: Right.

MR. FLYNN: At which time the issue was not really before the court and we did not come prepared for that hearing to litigate grounds or to try to prove the truth as to who had done what. We were here merely on a financial matter and I know my client is going to be rather surprised when I inform her that she — that her husband has been granted a divorce, because we thought that was a trial that was coming in the future. I just want the court to know that I'm going to have problems.

THE COURT: Without a doubt that may be hard to explain. And, you know, so the record will be clear, the primary motivating factor in me doing that is to put these parties where they need to be put and, then, simply to resolve the remaining issues.

If I did not do that as this record exists today, I don't think I would sleep good tonight.

¹No evidence was received at the hearing which resulted in the divorce being awarded to the plaintiff. The evidence referred to was evidence adduced at the pendente lite hearing. The defendant was present only by counsel at the hearing on the motion for judgment on the pleadings.

Subsequently, the court's pronouncements from the bench were transcribed and incorporated into an order by reference. The order recites that "[a]s to the plaintiff's motion for a judgment on the pleadings, the court grants a divorce to the plaintiff, Pershing McCarter, on the grounds of inappropriate marital conduct based on the testimony that the court heard previously at the alimony pendente lite hearing, and a part of which they contain in the pleadings." All other matters were reserved until the "final hearing." The court declined to make the order final and appealable. On March 15, 1996, a "Final Judgment of Divorce" was entered wherein the court resolved the remaining issues but made no reference to the granting of a divorce.

We cannot immediately perceive of a situation in an action for divorce where a judgment on the pleadings would be an appropriate procedure to obtain affirmative relief. T.C.A. § 36-4-114 provides as follows:

36-4-114. Proof required. —If the defendant admits the facts charged in the bill or petition and relied upon as the ground for divorce or the bill is taken as confessed, the court shall, nevertheless, before decreeing a divorce, except a divorce on the ground of irreconcilable differences, hear proof of the facts alleged as aforementioned, and either dismiss the bill or petition or grant a divorce, as the justice of the case may require.²

²T.C.A. § 36-4-129 allows the court to grant a divorce on stipulated grounds, however, such is not the case here. Further, we are of the opinion that T.C.A. § 36-4-129 is not in conflict with T.C.A. § 36-4-114 since under the provisions of the former, the stipulations constitute evidence.

We hold it to be reversible error to award a divorce by a judgment on the pleadings even if coupled with the evidence taken at the pendente lite hearing. The issues addressed by the court at the pendente lite hearing are not the same issues that must be addressed at the trial on the merits of a divorce case.

We do note that the parties introduced much evidence at the pendente lite hearing which was irrelevant to the issue then before the court but possibly relevant on the issue of divorce. Nevertheless, we think that, absent a stipulation by the parties, evidence presented at a trial on the issue of alimony pendente lite cannot be used as a substitute for evidence at a divorce trial. The parties are entitled to a full and fair hearing on all material issues presented in the pleadings.

While we understand the trial court's concerns, and as meritorious as they may be, the court nevertheless is required to apply the law properly, both procedural and substantive, before entering a judgment affecting the rights of either party. Such was not done in this case.

We reverse the judgment of the trial court and remand the case for a trial on all issues properly raised by the pleadings. In so doing, we do not express any opinion on the merits of any issue. Costs are taxed to the plaintiff.

Don T. Mc Murray, J.

CONCUR:

Houston M Goddard, Presiding Judge

Charles D. Susano, Jr., Judge

IN THE COURT OF APPEALS

PERSHING McCARTER,)	SEVIER CIRCUIT
)	C. A. NO. 03A01-9606-CV-000196
)	
Plaintiff - Appellee)	
)	
)	
)	
)	
vs.)	HON. BEN HOOPER, II
)	JUDGE
)	
)	
)	
)	
BARBARA McCARTER,)	REVERSED AND REMANDED
)	
Defendant - Appellant)	

ORDER

This appeal came on to be heard upon the record from the Circuit Court of Sevier County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was reversible error in the trial court.

We reverse the judgment of the trial court and remand the case for a trial on all issues properly raised by the pleadings. Costs are taxed to the plaintiff.

PER CURIAM