

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO.: 2005-CA-00494

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SUPREME COURT
COURT OF APPEALS

Appeal from the
Chancery Court of Jackson County, Mississippi
Cause No.: 2000-0597-JB

REPLY BRIEF OF APPELLEE, JUDY LYNETTE LISTER (MILLER)

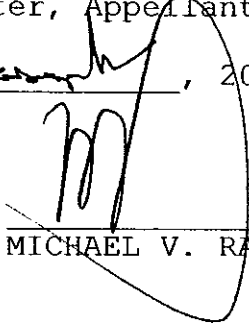
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellee certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Honorable Jaye A. Bradley, Jackson County Chancellor,
2. Judy Lynette Lister Miller, Appellee,
3. Gary L. Roberts, Esquire, and
3. Orville McDavid Lister, Appellant

This, the 6th day of March, 2007.



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STATEMENT OF THE ISSUES

- 1) The Chancery Court of Jackson County was justified in granting Judy Lister Miller a divorce from Orville McDavid Lister on the ground of uncondoned adultery.

STATEMENT OF THE CASE

The Appellee, Judy Lynette Lister (Miller) ("Judy"), files this Appellee's Brief in response to the Appellant's Brief filed by Orville McDavid Lister ("Orville"). She asks this Court to affirm the ruling of the Chancery Court of Jackson County that she is entitled to a divorce from Orville on the statutory ground of adultery.

It is black-letter law that an appellate court employs a limited standard of review when reviewing a Chancellor's decision in domestic relations cases. The standard of review is limited to the substantial evidence/manifest error rule.

Due to the inherently secretive nature of adultery, the ground may be proven by circumstantial evidence. Evidence of inclination and opportunity as shown either by an infatuation with a particular person or general adulterous propensity is sufficient to establish that ground.

Judy proved that Orville committed adultery under the standards required by Mississippi law. Although Orville denied this conduct, the chancellor accepted Judy's proof and rejected Orville's. The trial court had the chance to review the testimony of the parties and their witnesses and to assess credibility to that testimony. During the trial, the chancellor determined that Orville had deliberately attempted to conceal assets and allowed Judy to re-open the record to identify assets subsequently

discovered by the court-appointed expert. The Court was justified in finding Orville's credibility to be zero on every issue to which he testified.

The chancellor awarded Judy a substantial portion of the marital estate. The court found Orville's denial of adultery consistent with his likewise non-credible testimony regarding his disposition of marital assets. Significantly, Orville has not appealed from the division of the marital assets. The only issue before this Court is whether to affirm the granting of the divorce on the ground of adultery.

This Court should uphold the ruling of the Chancery Court of Jackson County and find that court justified in granting Judy a divorce from Orville for his adulterous conduct.

SUMMARY OF THE ARGUMENT

An appellate court will reverse the findings of a chancellor in cases of divorce only where it finds the chancellor was manifestly wrong, clearly erroneous, or applied an erroneous legal standard. *Stein v. Stein*, 641 So.2d 1167 (Miss. 1994). In this case, Judy proved adultery by Orville to the Court's satisfaction, acknowledging the burden required under Mississippi law. *Curtis v. Curtis*, 796 So.2d, 1044 (Miss. App. 2001) and *McAdory v. McAdory*, 608 So.2d, 695 (Miss. 1992).

The Court was satisfied that Judy met her burden. The proof showed that Orville gave Sheila Walters, his paramour, money, provided her with a place to stay, and traveled out of town with her, including trips to Daytona, Florida and New York City. Judy testified that she saw Orville and Sheila kissing. Judy confronted Orville with his having broken their marriage vows, which Orville did not deny. Admissions implied from silence are well-established in this State. See, e.g., *Duck v. State*, 247 So.2d 689 (Miss. 1991).

Finally, the Court was justified in rejecting all of Orville's testimony concerning his denial of adultery with Sheila. The Court found that he had lied about hiding marital assets and allowed Judy to re-open the record for the Court to consider distribution of assets that Orville failed to reveal. For these reasons, the Court was justified in granting Judy a divorce on the ground of adultery.

As Orville did not appeal from the distribution of marital assets or alimony, those findings will stand.

ARGUMENT

The Court will reverse a chancellor's findings of fact only where there is no substantial credible evidence to support its findings, unless a Chancellor was manifestly wrong, clearly erroneous, or erroneous legal standard was applied. *Stribling v. Stribling*, 906 So.2d 863 (Miss. App. 2005).

A party may prove adultery by demonstrating an adulterous inclination and an opportunity to consummate that inclination. This inclination may be shown either by an infatuation with a particular person or a general adulterous propensity. And the party seeking divorce must prove adultery by clear and convincing evidence. *Curtis, supra*. Adultery may be shown by evidence or admission and either is sufficient to support a decree of divorce. The plaintiff is not required to present direct testimony as to the event complained of due to the secretive nature of adultery. *McAdory, supra*. A plaintiff may prove based on circumstantial, rather than direct, evidence. *Dillon v. Dillon*, 498 So.2d, 328 (Miss. 1986).

Adultery may be established by showing an adulterous inclination coupled with an opportunity to consummate the inclination. The finding of adultery is justified upon a showing that a man had danced on numerous occasions with a particular female at various social establishments, that the man had paid the woman a lot of attention, and that the man seemed to be "taken

with" the woman. This is the case even though the man denies having sexual intercourse with the woman. *Reynolds v. Reynolds*, 755 So.2d 467 (Miss.App.,1999.).

A review of the record shows that the Court was justified in its ruling that Orville committed adultery. In its Findings of Facts and Conclusions of Law, the Chancellor found that Orville began spending a great deal of time with Sheila Walters ("Sheila"), a receptionist in a construction business owned by Orville and Judy. Judy testified that Orville and Sheila began spending an excessive amount of time together, that they were frequently absent from the office at the same time, and she became suspicious of an adulterous affair.

Judy had discovered that Orville had given Sheila Twenty-Five Hundred dollars (\$2,500), which Orville admitted doing. Judy fired Sheila, but Orville rehired her and fired Judy. He put Sheila in Judy's office, provided Sheila with Judy's cell phone and allowed Sheila to drive corporate vehicles.

Judy subsequently observed Orville and Sheila in a bar kissing together. Orville required Judy's daughter to move out of a mobile home and allowed Sheila and her two children to move into the mobile home. Orville subsequently loaned Sheila another Five Thousand dollars (\$5,000).

Sheila and her husband divorced. She admitted riding Orville's motorcycles and going to bike rallies in Daytona, Florida

with him on at least two occasions. She further testified that she accompanied Orville and other employees out-of-town on overnight trips three or four times. She testified that she used Orville's "Harley truck" to pull motorcycles for her personal use and testified that she rode on the motorcycle with Orville on weekends when her children were with their father.

Sheila's former husband testified that Sheila began spending evenings at Orville's house and moved into the house with Orville. He testified that he watched Sheila go to and from Orville's home. The Court ruled that even though Orville failed to admit adultery, Judy had established clear and convincing evidence through the testimony of several witnesses that established the adulterous relationship.

The record reveals the following:

1. Under cross-examination by Judy's attorney, Sheila admitted going to a motorcycle rally in Daytona, Florida with Orville in March of 2000. She stayed in a motel for approximately one week the first time she went and for approximately three days the second time she went. She stayed with Orville on overnight trips "probably three or four times," in places other than Daytona (R. 44-46);
2. Orville let Sheila drive a Crown Victoria owned by the construction company, including on personal business (R. 47-47);

3. Sheila also used a Harley-Davidson truck owned by the company for her own personal business (R. 50);
4. Sheila and Orville rode together in a motorcycle group called "The Misfits." She and Orville rode together frequently, making dozens of trips (R. 52-54);
5. Sheila admitted that friction existed between her and Judy because Judy thought there was something between Sheila and Orville. Part of the friction involved Orville's having given Sheila the original \$2,500. Neither Judy nor Sheila's husband knew of this transaction (R. 58-61);
6. Sheila admitted that Orville gave her a check drawn on a construction company account payable to Sheila's divorce lawyer (R. 83-84);
7. Sheila's husband, Joseph Walters ("Joseph"), testified that Sheila left him and moved in with Orville. Joseph sat in the field across the road from Orville's house and watched her come and go. When their relationship began, he saw her stay five straight days with Orville. Joseph filed for divorce on the grounds of adultery on the part of Sheila. He had no doubt in his mind that Sheila and Orville had been having an affair for two years at the time he testified. He testified that they were together more than most married people, that Orville furnished her

- with a car and a gas card (R. 94-97);
8. The construction company hired Sheila as a secretary and hired her mother, Annie Petersen, as an employee as well (R. 391);
 9. Orville admitted that when he was out of town, Sheila and her children spent the night at his home (R. 395);
 10. Orville admitted that after Judy fired Sheila, he hired Sheila back, rented a trailer for Sheila and loaned her money. He was not willing to fire Sheila for Judy to come back into the business. Nor was he willing to quit riding motorcycles with Sheila (R. 399-401);
 11. Christopher Loper, the former office manager and bookkeeper for the construction company, testified that Sheila and Orville went to New York together, where Orville bought between \$3,000 and \$6,000 worth of boots for himself (R. 494-495);
 12. In a recorded telephone conversation between Judy and Orville, he told her that, "All I want is a damn divorce . . . I do not love you anymore and I want a damn divorce . . . " He did not deny it or challenge the allegation when Judy said, ". . . You are the one who crossed that line or you broke our marriage vow." He responded, "Hey I am going to do more than that, you are going to have a broke ass before I am through . . . you really ain't

going to have nothing, you ain't going to have a pot to piss in and a window to throw it out of before I am through and I ain't either." (See Findings of Fact and Conclusions of Law, page 9 of 42, incorporated into the Judgment of Divorce).

Orville cites the case of *Spence v. Spence*, 930 So.2d 415 (Miss.App. 2005) for the proposition that proof did not exist to justify a divorce on the ground of adultery. The proof in *Spence* showed only the husband's admission that he hugged a woman not his wife, kissed her and loved her as a friend. Both the husband and the alleged paramour denied a sexual relationship. The man's daughter testified that she did not see them do anything improper. The wife's cousin testified that the husband and the other woman's vehicles were parked at the same apartment complex overnight. She testified that she saw the woman leave the husband's apartment one time. Further, the husband and the alleged paramour had several lunches in public together.

The Chancellor found proof of adultery while the Court of Appeals reversed. It held that the evidence presented did not rise above mere suspicion and held that the wife was not entitled to a divorce on the ground of adultery. *Spence, supra*.

Before applying the facts of this case to the law, this Court should consider other cases where adultery has been proven with evidence far weaker than that produced by Judy in this case. In

Curtis, supra, the Court of Appeals held that the wife had proven adultery, by showing both opportunity as well as the infatuation/inclination to act on that opportunity. The proof showed that the husband paid the alleged paramour's monthly rent and stayed at her house to avoid the chaos at home. He denied having sexual relations with the woman but the Court found otherwise. No investigators or others saw displays of affection between the man and the alleged paramour. Nonetheless, the Court of Appeals held that the reasonable view of evidence was that adultery was occurring. *Curtis, supra*.

In *Reynolds, supra*, the proof showed that the husband had danced on numerous occasions with the paramour at various social establishments, and that he paid her a lot of attention. Witnesses testified the he "seemed to be taken with" the woman. Photographs and videos showed his vehicle parked at her house on two occasions. The husband admitted staying overnight with the woman but denied having sexual intercourse with her. He stated that they only talked about his marital problems. However, he did have every opportunity to consummate the relationship. The Court found that the wife proved adultery by the heavy burden required through logical evidence tending to prove the allegation inconsistent with a reasonable theory of innocence.

Now, let us apply the facts established at the trial of this case to the law as discussed in *Curtis* and *Reynolds*.

Here is a recap of the findings by the Court to support the finding of adultery:

1. Sheila and Orville worked in the office together and were frequently absent at the same time;
2. Orville gave Sheila numerous loans and rehired her after Judy fired Sheila. He gave her special perks such as providing her with Judy's cell phone and giving her corporate vehicles to drive;
3. Judy personally saw Orville and Sheila kissing in a bar;
4. Orville moved Judy's daughter out of a mobile home and moved Sheila and her children into it;
5. Orville and Sheila went out of town together to Daytona, Florida to motorcycle rallies as well as on spending sprees to New York;
6. Witnesses saw that Sheila spent evenings at Orville's house and actually moved into his house;
7. He did not deny to Judy that he had broken their marriage vow; and
8. Orville's credibility is non-existent. As he lied to the Court by hiding marital assets so that the Court allowed Judy to re-open the record on the issue of distribution of marital property, the Court was justified in rejecting Orville's testimony that he did not commit adultery.

The evidence produced by Judy substantiates, to the extent

required by Mississippi law, circumstantial evidence that she is justified in receiving a divorce on the ground of adultery. Further, Orville's failure to deny the accusation that he had broken his marital vows constitutes an admission, and direct proof, that he committed adultery.

CONCLUSION


For the reasons stated in this Brief, the Chancellor was justified in granting Judy a divorce on the ground of adultery. Under this Court's limited review in domestic cases and based on the credible evidence produced by Judy and the non-credible evidence produced by Orville, this Court should sustain the finding of the Chancery Court of Jackson County.

Respectfully submitted on this 6th day of March, 2007.

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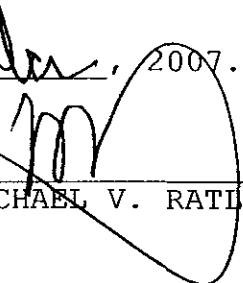
CERTIFICATE OF SERVICE

I, Michael V. Ratliff, have this day served a true and correct copy of the above and foregoing Appellee's Brief to the following at their usual business addresses, by placing same in the United States mail, postage prepaid:

Honorable Jaye A. Bradley
Chancellor
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This 20 day of November, 2007.



MICHAEL V. RATLIFF