

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ORVILLE McDAVID LISTER

APPELLANT

VERSUS

NO. 2005-TS-00494

JUDY LYNETTE LISTER

APPELLEE

APPEAL FROM THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

GARY L. ROBERTS
Gary L. Roberts, P.A.
1034 Jackson Avenue
Post Office Box 237
Pascagoula, MS 39568-0237
(228) 762-7104
State Bar No. [REDACTED]

ATTORNEY FOR APPELLANT

(ORAL ARGUMENT NOT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Orville McDavid Lister, Appellant
2. Gary L. Roberts, Attorney for Appellant
3. Judy Lynette Lister, Appellee
4. Earl Denham, Attorney for Appellee at trial
5. Michael V. Ratliff, Attorney for the Appellee on appeal

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STATEMENT OF THE ISSUE ON APPEAL

WHETHER THE CHANCERY COURT COMMITTED REVERSIBLE ERROR IN GRANTING JUDY LYNETTE LISTER A DIVORCE FROM ORVILLE McDAVID LISTER ON THE GROUND OF UNCONDONED ADULTERY.

References in this Brief are as follows:
T- Court Reporter's Transcript
RE- Record Excerpts

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal arises from the February 11, 2005 Final Judgment of Divorce entered in the Chancery Court of Jackson County, Mississippi. In that Judgment, the Plaintiff/Appellee, JUDY LYNETTE LISTER (hereinafter "Judy"), was awarded a divorce from the Defendant/Appellant, ORVILLE McDAVID LISTER (hereinafter "O.M.") on the statutory ground of uncondoned adultery pursuant to subparagraph 2 of §93-5-1 of the Mississippi Code of 1972, as amended. The Court, accordingly, divided the marital estate. O.M. asserts that adultery was not proven at trial by clear and convincing evidence, as Mississippi law requires. He therefore contends that the divorce, along with the distribution of the marital estate, should be set aside and held for naught.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE LOWER COURT

The present civil action was initiated on March 10, 2000 by the filing of Judy's Complaint for Divorce in the Chancery Court of Jackson County. Her Complaint references the marriage on November 18, 1982, and a separation on or about February 1, 2000. There are no minor children. Judy's Complaint asked for a divorce on the ground of adultery, but also on the ground of habitual cruel and inhuman treatment, or, in the alternative, on the ground of irreconcilable differences. She requested certain temporary relief, an equitable division of the marital assets, lump sum

alimony, periodic alimony, attorney's fees and other relief. On March 24, 2000, she filed a Motion for Temporary Relief.

O.M. filed a timely Answer to the Complaint admitting the jurisdictional allegations, but denying everything else.

On March 24, 2000, an Order was entered, awarding Judy use and possession of a home in Ocean Springs, Mississippi, a vehicle, and \$700.00 per week (net) to be paid to her from the corporation operated by O.M., along with other relief.

On April 3, 2000, O.M. filed an Objection to the Special Master's Recommendation, which, by that time, had already assumed the form of a temporary Order signed by both the Special Master and the Chancellor.

After lengthy discovery, along with numerous pre-trial proceedings (none of which are germane to this appeal), the case came on for trial. After all evidence was presented, and both sides rested, the Court entered on December 16, 2004, its Findings of Fact and Conclusions of Law. Pursuant thereto, the Court entered a final Judgment of Divorce on February 11, 2005, awarding Judy a divorce on the ground of uncondoned adultery and dividing the marital assets. Being agreed by that determination, O.M. has now appealed to this Court for relief.¹

PROCEDURAL NOTE: Hurricane Katrina struck the Mississippi Gulf Coast on August 29, 2005, flooding not only the office of O.M.'s attorney but the Jackson County Courthouse as well. This catastrophe has significantly delayed the preparation of the record on appeal.

SUMMARY OF THE ARGUMENT

WHETHER THE CHANCERY COURT COMMITTED REVERSIBLE ERROR IN GRANTING JUDY LISTER A DIVORCE FROM ORVILLE McDAVID LISTER ON THE GROUND OF UNCONDONED ADULTERY

The party seeking a divorce bears the burden of proof. Burnette v. Burnette, 271 So.2d 90 (Miss. 1973). Because of the public interest in preserving marriage, a trial Court has the duty to "fully inquire into the facts and circumstances" before permitting a divorce. Rawson v. Buta, 609 So.2d 426 (Miss. 1992). Adultery as a ground for divorce must be proven by clear and convincing evidence. Brewer v. Brewer, 919 So.2d 135 (Miss. Ct. App. 2005).

The record established is inadequate to sustain a Judgment for Divorce based upon the ground of adultery and it should therefore be set aside.

Further, inasmuch as the principles of equitable distribution do not apply except at divorce, the distribution of the marital estate made by the Chancellor at the conclusion of the trial should also be set aside.

ARGUMENT

WHETHER THE CHANCERY COURT COMMITTED REVERSIBLE ERROR IN GRANTING JUDY LISTER A DIVORCE FROM ORVILLE McDAVID LISTER ON THE GROUND OF UNCONDONED ADULTERY

Preliminary Statement on Standard of Review

A Chancellor's Findings of Fact will not be disturbed unless manifestly wrong or clearly erroneous. Sanderson v. Sanderson, 824 So.2d 623 (Miss. 2002). Put differently, the appellate Court will not disturb the findings of a Chancellor on a fact issue unless the Chancellor abused his or her discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Kilpatrick v. Kilpatrick 732 So.2d 876 (Miss. 1999).

Argument

In order to prevail on a claim of adultery, a party must prove his or claim by clear and convincing evidence. Dillon v. Dillon, 498 So.2d 328 (Miss. 1986). This showing must demonstrate both an adulterous inclination and a reasonable opportunity to satisfy that inclination. *Id.* Although circumstantial evidence may aid in proving such a claim, the party claiming that his or her spouse committed adultery carries the burden of presenting satisfactory evidence which is sufficient to lead the trier of fact to a conclusion of guilty. Rodgers v. Rodgers, 274 So.2d 671, 673 (Miss. 1973).

It has been held that the burden of proof when alleging adultery is "a heavy one... because the evidence must be logical, tend to prove the facts charged, and be inconsistent with a

reasonable theory of innocence". Owen v. Gerity, 422 So.2d 284, 287 (Miss. 1982); citing Banks v. Banks, 118 Miss. 783, 787-788, 79 So. 841, 842 (1918) (emphasis added).

Moreover, it has been recently held that "Trifles light as air may be sufficient to convince the jealous or the suspicious, but they do not impress the Court with the same degree of credulity. Before accepting charges so seriously affecting the character of a person, the evidence must be clear and convincing." Spence v. Spence, 937 So. 2d 415 (Miss. 2005), citing Banks, *Id.*

In a divorce action based upon the ground of adultery, the trial Court must make specific findings of fact. A mere conclusion that a party committed adultery is not adequate. Curtis v. Curtis, 796 So.2d 1044, 1049 (Miss. Ct. App. 2001); Dorman v. Dorman, 737 So.2d 426, 429-30 (Miss. Ct. App. 1999). In the present case the trial Court's findings with respect to the allegation of adultery are contained intermittently on pages 8-14 of the Findings of Fact and Conclusions of Law filed on December 16, 2004. While these findings fulfill the Court's procedural requirement to make formal findings, the findings made by the Court do not rise to a substantive level that is sufficient to justify the Court's conclusion that Judy met her heavy burden of proof. The record certainly does not prove the facts charged by clear and convincing evidence. Moreover, the evidence adduced at trial is not inconsistent with a reasonable theory of innocence.

Judy alleged adultery between O.M. and Sheila Walters (hereinafter "Sheila"). Both O.M. and Sheila testified at trial

and repeatedly denied the adultery charge. In fact, O.M. claimed at trial, and continues to claim, that he does not want a divorce from Judy. The evidence relied upon by the trial Judge the Court's formal Findings can be fairly described as follows:

- A. Sheila was hired in 1999 as a receptionist at O.M.'s business, and Judy claimed that O.M. and Sheila began spending an excessive amount of time together. She alleges that they were frequently absent from the office at the same time, and she, Judy, became suspicious. (Findings, p. 8)
- B. O.M. had given \$2,500.00 in cash to Sheila, and when Judy confronted her, she admitted it. Judy ordered Sheila to return the money, and then fired Sheila from her job. This incident occurred while O.M. was out of town. Upon his return to the business, O.M. discovered that his wife had fired Sheila, and he fired Judy and re-hired Sheila. (Findings pp. 8-9)
- C. Judy claimed that she witnessed O.M. and Sheila in a bar kissing each other. (Findings, p. 9)
- D. Judy testified that O.M. ordered her to move out of the marital home and threatened her with physical violence and financial ruin, but O.M. denied the allegations. According to the trial Court's findings, an audio tape of a recorded conversation between Judy and O.M. corroborated Judy's testimony. (Findings, p. 9)
- E. Judy moved out of the marital home and into another home owned by the parties in Ocean Springs, while O.M. continued to live in the marital homestead. (Findings, p. 9)
- F. O.M. allowed Sheila and her two children to move into a mobile home located adjacent to the marital homestead, which had been previously been occupied by Judy's mother. Moreover, O.M. had loaned Sheila a total of \$5,000.00. O.M. asserted that the loans he provided for Sheila were no different than loans that he has provided over the years for other company employees, and that Sheila was repaying the loans through payroll deduction. Moreover, although she had received several raises during the tenure of her employment, the raises were

consistent with other raises received by other company employees. (Findings, p. 10)

- G. Sheila was having marital difficulties herself, which began prior to her employment at O.M.'s business. She denied making sexual harassment charges against O.M., but her former mother-in-law and her ex-husband at the time of trial testified that she (Sheila) had told him (the ex-husband) that O.M. had been sexually harassing her. He claimed that she was paid a bonus to remain employed with O.M. while Sheila claims it was a Christmas bonus received like all other employees. (Findings, pp. 10-11)
- H. Sheila admitted riding one of O.M.'s motorcycles and going to a bike rally in Daytona, Florida with a group of employees. The group went on several out of town overnight trips, but Sheila stated that she stayed in a motel room with another woman and did not have sexual relations with O.M. on any occasion. She admitted that she drove company vehicles, but testified that all employees are allowed to do so. She also acknowledged that she rode on the back of O.M.'s motorcycle with him. (Findings, p. 11)
- I. Sheila acknowledged that O.M. had employed her mother, Annie Pederson, as a housekeeper and cook after Judy had moved out. After she moved into the mobile home next door to the Lister residence, she and her children ate some meals at O.M.'s house that were prepared by her mother. (Findings, p. 11)
- J. Sheila became confused, according to the Court's Findings, with respect to all the loans made to her, and the Court concluded that "her credibility with this Court is damaged". Sheila testified that the loans were repaid through wage withholdings. (Findings, p. 12)
- K. Joe Walters, Sheila's former husband, testified that she spent evenings at O.M.'s house and that Sheila moved into the house with O.M. Both Sheila and O.M. denied this. (Findings p. 12)

The Court accordingly concluded (page 14 of the Findings), that there is clear and convincing evidence that establishes the adulterous relationship between O.M. and Sheila Walters.

In actuality, the record made at trial falls significantly short of establishing the ground of adultery by clear and convincing evidence. The record shows:

a. Sheila has ridden on O.M.'s motorcycles (T, 42). She has gone to several rallies, with O.M., other employees, and some sub-contractors. She (Sheila) stayed in a motel with someone referred to as "Ms. Betty) (T, 45).

b. Sheila denied having ever spent the night at O.M.'s house (T, 55). She also denied that he ever spent the night in the trailer that she was living in (T, 55, 56). She denied having sexual relations with O.M. at any time (T, 56). When she rides on O.M.'s motorcycle, it is with the "same usual people", a small group of friends (T, 56).

c. Sheila admitted that she had been given \$2,500.00 in cash as a loan by O.M., and that it was for adding on to her home with her husband (T, 59, 60). O.M. had loaned money to other company employees on prior occasions (T, 353-354)

d. When Judy Lister fired Sheila, she thought "something was going on", but Sheila told her that there wasn't anything going on. (T, 64). About a month after Judy moved out of the Lister home, Sheila got hired back, because O.M. needed someone to do the job that she had been doing (T, 66, 67).

e. Annie Pederson, Sheila's mother, was hired to clean O.M.'s office, clean his house and cook some meals. At the time of the trial, she had been working about three weeks (T, 68-69). Sheila in fact testified that she ate one of the meals that her

mother fixed for O.M. at his house, and that her children have eaten their grandmother's cooking at O.M.'s house as well (T, 70).

f. O.M. got back the initial \$2,500.00 that had been loaned to Sheila, but when she was re-hired, he loaned another \$2,500.00 to pay her divorce lawyer, Bill Jones. Sheila was paying the loan back (T, 82-85). Sheila also testified that she was paying rent on the trailer that she was occupying, a total of \$63.00 a week (T, 86).

g. Joe Walters, Sheila's husband (they were not divorced at the time of the Lister trial, but a divorce was pending) testified that he would sit in the field across the road from the Lister household and watch his wife "come and go" (T, 96). He stated that she stayed over there for five days straight. However, when asked about his observations, it was readily apparent that he only made assumptions. He stated:

"Well, you know, they are together, you know, like any-- you know, most -- they're together more than most married people. How many people you know -- how many men do you know furnishes a woman with a car, gives her a gas card and -- you know, how many men you know of takes care of a woman like he has been taking care of her without getting something in return. It just -- you know, it don't happen" (T, 97).

When asked on cross-examination what date it was that he saw his wife leave O.M.' house, he said "I don't know the date". (T, 99). When asked again, he stated "I don't know what day it was. I don't keep up with dates". (T, 99). When pressed about the time, Joe Walters stated "it was in the evening. I can't going to be

specific about a date because -- I mean time, because I really don't know. It was between probably five and six, because she was suppose to pick up the kids that evening". (T, 100). When asked at trial when this particular episode occurred, he stated that it was approximately two and a half years earlier (T, 100). He went on to admit, however, that everything he had been saying was just an assumption (T, 101).

h. Myrtis Walters, Joe Walters' mother, was also called as a witness. She testified that the job Sheila had with O.M.'s company was the best job she had ever had (T, 105). Over objection she stated that Sheila had told her that O.M. was sexually harassing her (T, 105). She also testified that she saw her daughter-in-law on O.M.'s motorcycle and that she had seen them buying groceries together (T, 110).

i. O.M. Lister denied having committed adultery (T, 296; T, 348). When asked if Sheila had ridden on his motorcycle, he admitted that she had, along with probably fifteen or twenty other people (T, 349). When asked about a bike rally or a bike fest in Florida, he stated that "I didn't go with her. Her and another lady went together and then a bunch more of us from our office went. There is a whole bunch of us from our office went". (T, 349). When asked further about it, O.M. testified that his wife, Judy, was in fact suppose to make the trip to Daytona, but that she left him while he was gone, and filed for divorce that day (T, 349, 350). Again he denied any affair with Sheila. O.M. went on to state that he was willing to resume the marriage with his wife, that he hadn't had a relationship with Sheila or any other women,

and that Judy is welcome to come home if she would just do so (T, 352, 353).

j. O.M. admitted that he had loaned Sheila some money to help her with the divorce, a total of \$2,500.00, and that he had done that with other employees on other occasions (T, 353-354). The first \$2,500.00 that had been loaned to Sheila was given back to Judy, and the second \$2,500.00 to help her with attorney's fees with her own divorce, was being withheld out of her paycheck (T, 355).

k. As far as the audio tape is concerned O.M. stated that he might have said something in the heat of argument "just to shut them up or something", but that he never meant anything like trying to get his wife out of the house, and his mother-in-law (T, 380).

l. O.M. denied that Sheila's children ever spent the night at his house (T, 395). When pressed further about it, however, he did remember that he did want somebody to stay at his house to watch the place when he was not around on one particular prior occasion (T, 395).

When taking the testimony as a whole, O.M.'s alleged infidelity has not been proven by clear and convincing evidence. Judy's testimony is mere surmise, and the testimony of Joe Walters whose bias and lack of objectivity is readily apparent, is admittedly only assumptions.

The sum total of the evidence against O.M. is:

- (1) He was good to Sheila, just as he was to many, if not all of his employees;

(2) Judy was suspicious; and

(3) Joe Walters made unwarranted assumptions.

This evidence, when viewed in its entirety, cannot be viewed to be sufficient to prove adultery. This is particularly true when considering the very high burden of proof the law places upon a Plaintiff in cases of this nature. What was demonstrated at trial did not rise to the level of clear and convincing proof.

In Spence v. Spence, Id., this Court reversed a Chancellor who awarded a divorce based upon alleged adulterous conduct. In that case, this Court noted that "There are several instances of testimony which at first blush would lead one to believe that such a relationship was indeed present, but when viewing the testimony as a whole, it becomes readily apparent that such a determination was manifest error". Spence v. Spence, Id.

In the present case, the facts upon which the Chancellor relied are not clear and convincing in nature. Nor are they inconsistent with a reasonable theory of innocence. Accordingly, the Judgment of Divorce should be set aside in its entirety. Moreover, and as previously noted, there can be no division of the marital estate in the absence of a divorce.

CONCLUSION

Our Legislator, as well our Courts, have established and clarified the lengths two people must go through in order to create a valid marriage. Because of the public interest in preserving that marriage, the law, for good reason, requires strict proof of grounds for divorce. Moreover, a divorcing Plaintiff's testimony must be supported by corroborating evidence. The evidence must rise to the level that it is sufficient to convince a prudent person that the testimony is true and not "the exaggerated product" of the desire for a divorce. Anderson v. Anderson, 200 So. 726, 728 (Miss. 1941). A divorce has been denied in an untold number of cases where there is a lack of corroborating evidence. For instance see, Hassett v. Hassett, 697 So.2d 1140 (Miss. 1997); Chamblee v. Chamblee, 637 So.2d 850, 860 (Miss. 1994); Gardner v. Gardner, 618 So.2d 108, 114 (Miss. 1993); Reed v. Reed, 839 So.2d 565, 571 (Miss. Ct. App. 2003); Stennis v. Stennis 464 So.2d 1161 (Miss. 1985).

In the instant case, Judy Lister's burden goes even further. Mere corroboration is not sufficient to sustain a divorce on the ground of adultery, unless the evidence rises to a level of clear and convincing proof. It is the same burden required of a Plaintiff alleging fraud. It is, in fact, the highest burden any Plaintiff must face in any civil action.

Judy Lister failed to meet her burden. Accordingly, this


Court should set aside the divorce and the distribution of the marital estate.

Respectfully submitted,

ORVILLE McDAVID LISTER

BY: 

GARY L. ROBERTS

GARY L. ROBERTS
Gary L. Roberts, P.A.
1034 Jackson Avenue
Post Office Box 237
Pascagoula, MS 39568-0237
(228) 762-7104
State Bar No. 

CERTIFICATE OF SERVICE

I, GARY L. ROBERTS, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid and properly addressed, a true and correct copy of the above and foregoing **Brief of Appellant** to Michael Ratliff, Esq., and hand delivered a copy of same to the Hon. Jaye Bradley, Chancellor on this the 16 day of August, 2007.


GARY L. ROBERTS