

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NUMBER 2006-CA-01237

THOMAS WILLARD POOL, JR.

APPELLANT

VS.

SHERRY CLAY POOL

APPELLEE

BRIEF OF THE APPELLEE

Appeal from the Chancery Court of Lauderdale County
State of Mississippi

COUNSEL FOR THE APPELLEE:

ROBERT J. BRESNAHAN

Attorney At Law

1108 - 19th Avenue

P.O. Box 826

Meridian, MS 39302

Telephone: 601/693-6386

Facsimile: 601/693-6401

MISSISSIPPI STATE BAR NO. [REDACTED]

CERTIFICATE OF INTERESTED PARTIES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NUMBER 2006-CA-01237

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. This representation is made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal:

1. Honorable Judge Sarah P. Springer
Chancellor, Lauderdale County
P.O. Box 534
Pattison, TX 77466
2. Mrs. Sherry Clay Pool
7342 Pineridge Drive
Meridian, MS 39305
3. Mr. Thomas W. Pool, Jr.
2217 36th Street
Meridian, MS 39305
4. Robert J. Bresnahan, Esquire
Attorney for Appellee
P.O. Box 826
Meridian, MS 39302
5. J. Stewart Parrish, Esquire
Attorney for Appellant
P.O. Box 823
Meridian, MS 39302-0823

This the 15th day of March, 2007.



ROBERT J. BRESNAHAN
ATTORNEY FOR APPELLEE

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STATEMENT OF THE ISSUES

PROPOSITION 1: THE APPELLEE RESPONDED TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS OVER A YEAR PRIOR TO THE TRIAL OF THIS MATTER.

PROPOSITION NO. 2: THE CHANCELLOR PROPERLY DENIED A DIVORCE ON THE GROUND OF ADULTERY.

PROPOSITION NO. 3: THE CHANCELLOR PROPERLY GRANTED SEPARATE MAINTENANCE.

PROPOSITION NO. 4: THE CHANCELLOR WAS CORRECT IN GRANTING ATTORNEY FEES. THE APPELLANT WAS UNABLE TO PROVE ANY OF THREE SEPARATE GROUNDS FOR DIVORCE.

REQUEST FOR FEE: APPELLATE COURT IS REQUESTED TO AWARD ATTORNEY FEES IN AN AMOUNT EQUAL TO ONE-HALF OF AMOUNT AWARDED IN LOWER COURT.

STATEMENT OF THE CASE

1. NATURE OF THE CASE

Sherry Clay Pool (Sherry) and Thomas Willard Pool, Jr. (Buddy) have been married twice for a total of forty years. The second marriage was on December 19, 1981, and they separated in November of 2003. On October 10, 2003, Buddy came to Sherry and told her that he was leaving her in two weeks. He told Sherry that she had been a good wife, had been a good mother, was a good cook, and an excellent housekeeper. He recognized that she did not drink, did not smoke, had never put him in debt, but was a “bitch to live with.” (Transcript (hereinafter T. 91-92))

Sherry actually got on her knees and begged Buddy to stay. She agreed to go to counseling and to do whatever was necessary to keep the marriage together. His response was “after 22 years, you aren’t worth counseling”. (T. 92)

Buddy did not leave in two weeks. Sherry found out that he had leased an apartment and she suspected that he was staying at the martial home for the purpose of removing articles during the day while she was at work. She was fearful that if she did not have him leave immediately, she would have nothing left but the bed and t.v. when she returned home from work. (T. 94)

Buddy purchased a home at 2217 36th Street in Meridian, Mississippi. (T.

17) Buddy advised the court that he had no intention of moving back into the

marital home. (T. 18) It is his intention never to live with Sherry again. (T. 39)

He acknowledged that in anticipation of leaving, he had withdrawn items from the safe deposit box, including \$20,000.00 worth of bonds. (T. 27) He placed everything from the safe deposit box in another deposit box with his daughter Shelby as a joint tenant. (T. 29) He withdrew money from a joint checking account with Sherry and placed it in joint tenancy with Shelby. (T. 30)

Daughter Shelby helped Buddy move away from the marital home. (T. 262) Shelby helps Buddy pay his bills, keep up his finances and his bank statements. (T. 231) It is Buddy's intention to leave Shelby's son his prized Kaizer automobile. (T. 263)

Most curious is that since the separation, Buddy has had a penile implant and has taken up companionship with an individual who is openly gay. (T. 41)

Shelby drove Buddy to the hospital for the penial implant procedure, stayed with him in the hospital and brought him home. (T. 81) Sherry did not know about the implant until later. (T. 81)

Sherry testified that she has never had a sexual relationship with anyone other than Buddy, nor has she had an infatuation with anyone other than Buddy. (T. 110) She professes her love for Buddy and states that he is not a well man as "could be seen by anyone in the court room." She opines that all in his family have died of Alzheimer's and that Buddy is in the early stages. (T. 110)

Sherry contends that Buddy will need her assistance in the future because he suffers from epilepsy (T. 223), is forgetful, arriving at places and not remembering why he came to that particular place, not remembering meeting people, not remember saying things, not remembering doing things, and sometimes becoming lost. (T. 111) When this matter was heard on a temporary hearing, Buddy had to ride to court with Sherry. (T. 117-118)

At some point Buddy's health will be so bad that he will need someone to take care of him. Sherry wants to be that caretaker. After the separation, Buddy continued to have contact with Sherry by going to the home each week to have lunch with Sherry. (T. 245) They would sometimes go out to eat. (T. 244) Sherry has since the separation told Buddy she loves him, and Buddy acknowledges that fact. (T. 228) After the separation he had an operation for prostate cancer and Sherry stayed with him. (T. 243) Sherry does not want to be divorced from Buddy. (T. 132)

SUMMARY OF THE ARGUMENT

Buddy, without any prior warning, told Sherry on October-10, 2003, that he was leaving her in two weeks. Although she begged him to stay, she could not change his mind.

He did not leave in that two week period of time, but it became apparent to Sherry that he was using the time at the marital home to prepare for his eventual move. To protect herself and her personal property, Sherry asked Buddy to leave and filed an action for separate maintenance.

After the action for separate maintenance was filed, Buddy countered for divorce and discovery was propounded to Sherry. She answered the discovery, and produced documents, leaving only a voluminous number of bank statements at her attorney's office for inspection by Buddy's attorney. No inspection was ever made for over a year until less than one week prior to trial. Buddy requested a continuance on the first day of trial so that he could seek more discovery. As the case was two years old, the bank statements had been available for over a year and the matter had been set for trial by agreement, the court declined to grant a continuance.

Buddy had no grounds for divorce, but over the course of his divorce action, he alleged three separate grounds: habitual cruel and inhuman treatment which he withdrew; adultery which he was unable to prove by clear and convincing

evidence; and desertion for a period of one year which he withdrew. The court granted separate maintenance of \$500.00 per month, \$250.00 of which was to replace the obligation Buddy had at the temporary to provide yard care at the marital home, and awarded Sherry attorney fees.

ARGUMENT

PROPOSITION 1: THE APPELLEE RESPONDED TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS OVER A YEAR PRIOR TO THE TRIAL OF THIS MATTER.

Because of the amount of information required to be produced in one, and only one, response to Request for Production of Documents by Appellee (hereinafter Sherry), those documents (bank statements) were kept at Sherry's attorney's office for inspection. These bank records languished there for over a year before Appellant's (hereinafter Buddy) attorney appeared to review the documents, a point in time less than one week before trial. The documents purported to be available, were available. It was Buddy's lack of due diligence in inspecting the documents that caused Buddy to request a continuance in a case that had been previously set for trial by agreement of the parties (Record Excerpts (hereinafter R.E.) 174, Clerk's Papers (hereinafter C.P.) 132).

A REVIEW

In response to Buddy's Request for Production of Documents, Sherry provided all documents in her possession with the exception of bank statements requested in Request No. 2. Because of the amount of documents to produce, those statements were left at her attorney's office. That Request No. 2 and her Response to Request No. 2 were as follows:

REQUEST FOR PRODUCTION NO. 2: All documents

pertaining to each bank, savings and loan, or other checking accounts in which any interest whatsoever is or was held or claimed by or for your benefit, alone or with your spouse or any other person, at any time from January 1999 through 2004, to-date and through the date thirty (30) days prior to the date of trial in this case, including without limitation, all canceled checks and bank statements.

RESPONSE TO REQUEST NO. 2: The following documents are available for copying and inspection at the office of Robert J. Bresnahan, 1108 - 19th Avenue, Meridian, Mississippi upon reasonable notice.

AMSOUTH BANK (DEPOSIT GUARANTY)

ACCOUNT #9103025439 BANK STATEMENTS

1. January 15, 2000 - February 11, 2000
2. February 12, 2000 - March 16, 2000
3. March 17, 2000 - April 13, 2000
4. April 14, 2000 - May 16, 2000
5. May 17, 2000 - June 15, 2000
6. June 16, 2000 - July 17, 2000
7. July 18, 2000 - August 16, 2000
8. August 17, 2000 - September 15, 2000
9. September 16, 2000 - October 17, 2000
10. October 18, 2000 - November 15, 2000
11. November 16, 2000 - December 15, 2000
12. December 16, 2000 - January 16, 2001
13. January 17, 2001 - February 13, 2001
14. February 14, 2001 - March 15, 2001
15. March 16, 2001 - April 16, 2001
16. April 17, 2001 - May 15, 2001

17. May 16, 2001 - June 14, 2001
18. June 15, 2001 - July 17, 2001
19. July 18, 2001 - August 15, 2001
20. August 16, 2001 - September 14, 2001
21. September 15, 2001 - October 16, 2001
22. October 17, 2001 - November 15, 2001
23. November 16, 2001 - December 14, 2001
24. December 15, 2001 - January 16, 2002
25. January 17, 2002 - February 14, 2002
26. February 15, 2002 - March 15, 2002
27. March 16, 2002 - April 15, 2002
28. April 16, 2002 - May 15, 2002
29. May 16, 2002 - June 14, 2002
30. June 15, 2002 - July 16, 2002
31. July 17, 2002 - August 15, 2002
32. August 16, 2002 - September 16, 2002
33. September 17, 2002 - October 17, 2002
34. October 18, 2002 - November 15, 2002
35. November 16, 2002 - December 13, 2002
36. February 14, 2003 - March 14, 2003
37. March 15, 2003 - April 16, 2003
38. April 17, 2003 - May 15, 2003
39. May 16, 2003 - June 16, 2003
40. June 17, 2003 - July 15, 2003
41. July 16, 2003 - August 15, 2003
42. September 17, 2003 - October 16, 2003
43. October 17, 2003 - November 14, 2003

AMSOUTH BANK (DEPOSIT GUARANTY)

ACCOUNT #9105218441 BANK STATEMENTS

1. December 16, 1999 - January 18, 2000
2. February 15, 2000 - March 16, 2000
3. April 15, 2000 - May 17, 2000
4. May 18, 2000 - June 16, 2000
5. June 17, 2000 - July 18, 2000
6. July 19, 2000 - August 17, 2000
7. August 18, 2000 - September 18, 2000
8. October 19, 2000 - November 16, 2000
9. December 16, 2000 - January 17, 2001

10. February 15, 2001 - March 16, 2001
11. March 17, 2001 - April 17, 2001
12. April 18, 2001 - May 16, 2001
13. May 17, 2001 - June 15, 2001
14. June 16, 2001 - July 18, 2001
15. July 19, 2001 - August 16, 2001
16. August 17, 2001 - September 17, 2001
17. September 18, 2001 - October 17, 2001
18. October 18, 2001 - November 16, 2001
19. November 17, 2001 - December 14, 2001
20. January 18, 2002 - February 15, 2002
21. February 16, 2002 - March 18, 2002
22. March 19, 2002 - April 16, 2002
23. April 17, 2002 - May 16, 2002
24. June 18, 2002 - July 17, 2002
25. July 18, 2002 - August 16, 2002
26. September 18, 2002 - October 18, 2002
27. October 19, 2002 - November 15, 2002
28. November 16, 2002 - December 16, 2002
29. February 15, 2003 - March 17, 2003
30. March 18, 2003 - April 17, 2003
31. May 17, 2003 - June 17, 2003
32. June 18, 2003 - July 16, 2003

(RE 165-167)

Buddy was advised that these documents, and ONLY these documents, were available for copying and inspection at the office of Robert J. Bresnahan. (Exhibit (hereinafter Ex.) #9, RE 165) Buddy had no reasonable expectation that any other documents would be available at that law office other than those listed. Those documents continued to be available for inspection up through the date of trial, but it was less than a week prior to trial that the attorney for Buddy arrived to review them. All documents purported by the response to be in the possession of

the attorney, were in fact in his possession and were available for inspection.

The Appellant in his brief makes allegations with scant thought given to the truth of the matter. Examples of such in the Brief of the Appellant are as follows:

1. Appellant appeared to inspect the documents, they were not present. (pg. 6)
2. Because Mr. Pool's counsel relied upon his misleading answers to interrogatories and requests for production of documents (pg.10)
3. Because Mrs. Pool misleading (sic) answered discovery and represented that certain documentary was available when in fact it had not been produced (pg. 14)
4. He did not have the necessary documentary evidence to impeach her with, because she had not provided it (pg. 15)
5. Because of Mrs. Pool's failure to properly and fully answer interrogatories and request for production of documents (pg. 17)
6. Mrs. Pool failed to truthfully and completely answer interrogatories and request for production of documents (pg. 24)
7. Upon finding that the discovery had not been fully, completely and truthfully answered (pg. 24)

These and other allegations completely misrepresent the facts. The facts are that Mr. Pool's attorney had possession of all documentary evidence identified in Sherry's response (RE 154) with the exception of bank statements. When Mr Pool's attorney came to inspect the documents, all bank statements listed in the Response to Request for Production were in fact available for inspection. To

allege otherwise is intentionally misleading.

One might note that on March 6, 2006, an Order was entered setting this matter for trial on May 30th and 31st, 2006 (CP - 132, RE 174). The order setting the matter for trial was prepared by Buddy's attorney and was an agreed Order. At that point in time, Sherry's bank statements had been available for inspection and review for over ten months. Buddy's attorney knew what items were available for inspection, but delayed his inspection for another two months. Upon finding that the documents were just as they were purported to be, he requested a continuance on the first day of trial, alleging a "discovery violation."

The court considered the argument of the parties with regard to the purported "discovery violation," analyzed the situation and ruled as follows:

"We have a case that was initiated February 6, 2004. That is over two years ago. Discovery was initiated in February of 2004. There was a settlement announcement with regard to temporary matters that was made in April of 2004. Additional discovery was made in July of 2004.

The discovery request about which Mr. Parrish complains is the request for bank statement with checks since January 1, 2000. Mr. Bresnahan had available in his office bank statements from January 2000 through October 2003 and July 2003, and those banks statements have been available in his office since April of 2005. The production did not meet the request in that all bank statements were requested. Certainly there should be some information provided after the separation and that is not provided in the answer to the discovery request.

The Court granted leave for Mr. Pool to amend his complaint in March 2006 and he did so. Additional

discovery was initiated in April 2006.

This matter has been set for trial since March 2006, and two days of this Court's docket are devoted to the trial of this matter.

The information about which Mr. Pool is complaining today has been available for over a year and this matter has not been brought to the attention of the Court until today. I believe that the problems with the failure to properly provide the discovery information and to properly respond to the request can be dealt with through restrictions in the presentation of evidence and that will not prejudice either party as Mrs. Pool will be restricted to the information that she provided in discovery and Mr. Parrish can make appropriate objections should she attempt to present information that was not provided in discovery.

In view of the fact that this case has been pending since 2004 and has been set for trial for a considerable period of time and the information available since 2005, the Court is of the opinion that the case should proceed this morning."

(T.11-13; RE 41-43)

That denial of a continuance was reasonable since it was Buddy's lack of due diligence in not reviewing the information available until after the case had been set for trial by agreement for over two months.

With regard to the issue of discovery, the court touched on that subject a second time in Buddy's request for a new trial:

"With respect to Paragraph 1, the Court has already ruled that there was ample time to complete discovery prior to the trial. Any complaints with regard to that discovery should have been made sufficiently in advance of the trial date for the Court to appropriately address them. No problems with the discovery were addressed or raised by the parties prior to the date of the trial which had been set for a considerable

period of time and this case was pending since February 2004 and the trial was conducted in May of 2006. So, certainly the case had been pending long enough for the parties to resolve all discovery disputes prior to the trial on the merits and to ask for this Court to address discovery disputes on the eve of the trial or the day of the trial was inappropriate and the Court does find that it was appropriate to deny the continuance request that was made on the date of trial.” (RE 183-184; T. 341-342)

The cases cited by Buddy regarding “ambush” generally have to do with failure to provide the name and qualifications of an expert witness prior to trial and then attempting to utilize the testimony of that witness at trial. These cases include *Nichols v. Tubb*, 609 So.2d377 (Miss.1992); *Choctaw Maid Farms, Inc. v. Hailey*, 822 So.2d911 (Miss. 2002); *Hudson v. Parvin*, 582 So.2d 403 (Miss. 1991); and *Bowie v. Montfort Jones Memorial Hospital*, 861 So.2d 103. (Miss. 2003)

The case at bar has nothing to do with expert witnesses. It deals with the court’s refusal to continue a case set by agreement of the parties for trial for over two months.

The decision to grant or deny a continuance is within the discretion of the trial judge and on appeal that decision cannot be reversed without showing of manifest injustice or abuse of discretion. *Serton v. Serton*, 819 So.2d 15 (Miss. App. 2002), *New v. Comola*, 881 So.2d 369 (Miss. App. 2004).

The trial court has the inherent right to control its docket and is afforded reasonable latitude regarding the setting and continuance of cases. *Watts v. Pennington*, 598 So.2d 1308 (Miss. 1992).

More importantly is the fact that it was Buddy's attorney who provided the order setting the matter for trial and the fact that the matter was set for trial by agreement. Consider:

Even if Dew was not procedurally barred from asserting this assignment of error, a trial court has the inherent right to control its trial docket and is afforded reasonable latitude regarding the setting and continuing of cases. *Watts v. Pennington*, 598 So.2d 1308, 1312 (Miss. 1992) "This Court will not reverse the denial of a continuance unless it is satisfied that prejudice resulted." *Cherry v. Hawkins*, 243 Miss. 392, 397, 137, So.2d 815, 816 (1962). Therefore, **ESPECIALLY IN LIGHT OF THE FACT THAT THE CASE WAS SET BY AN AGREED ORDER**, it does not appear that the trial court abused its discretion in denying Dew's continuance. (emphasis added)

Dew v. Langford, 666 So.2d 739. (Miss. 1995)

What the court may be saying is that if you agree to an Order setting the matter for trial, you should be prepared for trial on the day the matter is set.

PROPOSITION 2: THE CHANCELLOR PROPERLY DENIED A DIVORCE ON THE GROUND OF ADULTERY.

In order to prevail on a claim of adultery, a party must prove his or her claim by clear and convincing evidence. *Dillon v. Dillon*, 498 So.2d 328, 330 (Miss. 1986). This showing by clear and convincing evidence 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 proponent retains the burden of presenting satisfactory evidence which is sufficient to lead the trier of fact to a conclusion of guilty. *Id.* (citing *Rodgers v. Rodgers*, 274 So.2d 671, 673 (Miss. 1973)).

Spence v. Spence 930 So.2d 415 at 417 (Miss. App. 2005)

In his attempt to find a ground to divorce Sherry, Buddy hired a private investigator who followed Sherry off and on for a period of over one year. (T. 194, 208) During that one year of surveillance, that private investigator found only one incident that was worthy of note concerning Sherry i.e. her spending three evenings at the apartment of Vince Miller in Meridian, Mississippi. (T. 209) It was Sherry's testimony that she was never alone in the apartment with Vince Miller. (T. 142) Also present in the apartment was Shirley McKee, who was the subject of a subpoena in this matter (RE 175) and who was at court available to testify. She did not testify, because the divorce on the ground of adultery was dismissed prior to Sherry presenting her defense.

The testimony of Bobby House, the detective hired by Buddy to follow Sherry, reveals that the apartment of Vince Miller has two entrances (T. 204, 205),

that he worked alone (T. 204, 205), and that while he was watching the back door, no one was watching the front door which opens into the pool-area.(T. 210) When asked if he could tell the court under oath that there was absolutely no one in the apartment with Sherry and Vince, his response was, "I can't state that unequivocally, no sir." (T. 215) Additional information revealed by Bobby House at trial was as follows:

I was hired by Mr. Pool to survey Sherry Pool. (T. 194)

I was hired approximately a year ago. (T. 194)

She stayed there Thursday night, Friday night, and Saturday night at Mar Ray Apartments with an individual that I identified as Vince Miller. They were in the apartment together overnight. (T. 196)

During the time that I was there that weekend, I saw no other third parties entering or exiting the apartment. They are the only two people I saw. (T. 201-202)

I did not see them together any time prior to that. (T. 202-203)

I did not see Sherry Pool with Vince Miller at any time prior to that and I never saw her with Vince Miller after that. (T. 203)

I know the layout of apartment 385 from talking to people and I know that there is a door on the other side that opens up into the pool. (T. 204 -205)

Many people use that door that opens into the pool area as the main door in and out. (T. 205)

I began working on this surveillance in May or June of 2005. (T. 207-208)

I made no report in May of 2005 because there was nothing to report on. (T. 208)

And that is the same for June, July, August, September and October of 2005. (T. 208)

During that six months there was nothing that happened that I needed to make a written report on. (T. 208)

I surveiled her for four or five times after November 20 of 2005 which ended in the month of May of 2006. (T. 208)

I have had her under surveillance for a period of an entire year off and on. (T. 208)

The only thing I made a report on are the three days in November of 2005. (T. 209)

There is no show of affection between Sherry and Vince Miller to the extent that they are not embracing. (T. 209)

They did not embrace. (T. 209)

They did not kiss. (T. 209)

They did not hug. (T. 209)

Over the course of my investigation, I have never seen any show of affection by Ms. Pool to Mr. Miller or by Mr. Miller to Ms. Pool. (T. 209)

There is no way that I can physically look at the front (entrance) and the back (entrance) at the same time. (T. 210)

For fifteen minutes at a time I would surveil the front. (T. 211)

If they went out the front door, and I was looking at the back, I would not know that. That's correct. (T. 213)

The first, second, and third nights Sherry pulled right up to Mr.

Miller's truck. (T. 213)

I did not see any affection between the two of them, between Sherry Pool and Vince Miller. (T. 215)

I cannot state unequivocally that there was absolutely no one else in the apartment with them. (T. 215)

The apartment complex is a square with a patio and pool in the middle of it. (T. 216)

Sherry gave the following testimony with regard to the claim against her:

Since my marriage to Buddy, I have not had a sexual relationship with any male. (T. 110)

Since my marriage to Buddy, I have not had an infatuation with any male. (T.110)

I love Buddy very much. He is the father of my child. Buddy is not a well man. You can tell by watching him on the stand. At his age, it is fixing to get worse. All his family have died of Alzheimer's. He is in the early stages of it. (T.110)

I do not want to be divorced from Buddy. (T.132)

I have spent three nights at Vince Miller's residence. (T.134)

I have not committed adultery with Vince Miller. I wasn't alone in the house at Vince's. I have a witness that was with me at all times. (T. 142)

That witness is Ms. Shirley McKee. (T. 142)

I have known Shirley McKee about a year, a year and a half, somewhere along in there. (T.181)

The three nights that they have video, Shirley McKee was with me in the apartment with Vince Miller. (T.181)

Shirley McKee was with me each of those three nights. (T. 182)

Vince Miller slept in the living room and Shirley McKee and I slept in the bedroom in the back. (T.182)

No one was having sexual relations with anyone else. (T. 182)

I have never had sexual relations with Vince Miller those three nights or at any other time. (T.182)

Although Buddy testified the first day of trial, he has never seen Sherry be affectionate with any other man (T. 87), his testimony on the second day of trial was that he had seen Vince Miller and Sherry together three times (T. 222), and on one occasion, they were holding hands. (T. 223)

Buddy's statements at trial were as follows.

Using my own senses, I don't recall ever seeing Sherry being affectionate with anyone else. (T. 87)

I recollect you asking me the question yesterday have you ever seen Sherry show any affection towards anyone and that my answer was no, I have not. (T. 241)

I have not seen Sherry kiss anyone. (T. 242)

I have not seen Sherry hug anyone. (T. 242)

When I saw Sherry and Vince Miller at Old Farm Beef House, they were sitting together with other people. (T. 242)

In the case of *McAdory v. McAdory*, 608 So.2d 695 (Miss. 1992), a case concerning allegations of adultery, the lower court was confronted with a photograph of wife's scantily clad co-worker lying on the parties' bed. The wife

denied any romantic involvement with her co-worker. Specifically, she testified that they were not having an affair and not sexually involved. The chancellor in that matter found that photograph to be a “smoking gun” of sorts and granted a divorce on the ground of adultery. In reversing, the Mississippi Supreme Court stated the following:

In Mississippi, one seeking a divorce on the grounds of adulterous activity must show by clear and convincing evidence both an adulterous inclination and a reasonable opportunity to satisfy that inclination. *Owen v. Gerity*, 422 So.2d 284, 287 (Miss. 1982); *Magee v. Magee*, 320 So.2d 779, 783 (Miss. 1975); *Rodgers v. Rodgers*, 274 So.2d 671, 673 (Miss. 1973).

(McAdory at page 699)

Nevertheless, the burden of proof is a heavy one in such cases because the evidence must be logical, tend to prove the facts charged, *and be inconsistent with a reasonable theory of innocence*. *Owen*, 422 so.2d at 287 citing and quoting *Banks v. Banks*, 118 Miss. 783, 79 So. 841 (1918).

(McAdoray at page 699)

It seems important to remember that the Court must always keep in mind that this is a two prong test which must be viewed as interrelated. The *opportunity to satisfy* part of the test is meaningless if the first part, especially the infatuation test, is not met.

(McAdory at page 700)

A charge of adultery may be grounds for divorce upon a showing of either an infatuation for a particular person of the opposite sex of a generally adulterous nature on the part of the defendant. *Owen v. Gerity*, 422 So.2d 284, 287. Proof of either of these elements must be supported by evidence of a reasonable opportunity to

satisfy the infatuation or proclivity before divorce on grounds of adultery will be granted. (McAdory at page 700)

The picture showing a scantily clad Hughes lying on Kimberly's and James bed, in James' absence is more troubling, especially on the issue of opportunity to commit adultery. As evidence of infatuation, however, the photograph is less convincing. Kimberly testified that when this picture was taken, she was in another room. In accordance with the standard, [i]f there are two or more reasonable theories which may be drawn from the facts proven, the proof will be insufficient because, to invest mere circumstance with the force of truth, the conclusion must not be logical, and tend to prove the facts charged, but must be inconsistent with a reasonable theory of innocence. Although here the conclusion of adultery appears logical, it is not inconsistent with a reasonable theory of innocence.

(McAdory at page 700)

Although in the case at bar the conclusion of adultery appears logical, it is not inconsistent with a reasonable theory of innocence.

"Trifles light as air' may be sufficient to convince the jealous of 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. *Banks v. Banks*, 118 Miss. 783, 79 So.841 (1918).

(McAdory at page 701)

Although Sherry's appearance in the video tape might suggest opportunity to satisfy an adulterous inclination, there has been no showing by clear and convincing evidence that there was an adulterous inclination.

Sherry's testimony was that Vince was sick and although her presence in the apartment was not fully developed, because the ground for divorce on adultery was dismissed before she could present her defense, her presence in the apartment with another witness who was available to testify, is consistent with a reasonable theory of innocence.

Buddy has the right to believe what he wants to believe and it should be obvious from a reading of the record that for whatever reason he thinks he wants a divorce from Sherry. Nevertheless, the evidence presented to the court is insufficient to grant a divorce on the grounds of adultery.

In the case of *Mitchell v. Mitchell* 767 So.2d 1037 (Miss. App. 2000), wherein a divorce was granted in the lower court on the ground of adultery and was reversed by the Court of Appeals of Mississippi, the court restated the standard that the conclusion sought to be established must follow logically from the facts and must be inconsistent with a reasonable theory of innocence.

Where one seeks to prove a claim of adultery using circumstantial evidence, "the conclusion sought to be established must follow logically from the facts and must be inconsistent with a reasonable theory of innocence." *Dillon*, 498 So.2d at 330.

(*Mitchell* at page 1041)

Eddie alleged that Debbie spent her money on hotel rooms, but did not produce any records showing how many times she stayed in hotel rooms, the dates or how much she spent. He stated that she spent time on the phone with her "boyfriend", but did not show to whom she may have been talking, nor did

he prove any telephone records evincing the time she spent on the phone or the number of pages she received. The chancellor found that Debbie's absences from the home were not sufficiently explained. However, the burden remained on Eddie to prove his claim of adultery. *Dillon*, 498 So.2d at 330. This burden cannot be met with only "he said, she said" testimony alone. The circumstantial evidence presented by Eddie does not lead one only to the conclusion of guilt as required by case law. See *McAdory*, 608 So.2d at 699. (Mitchell at page 1041)

In *Holden v. Frasher-Holden*, 680 So.2d 795 (Miss. 1996) the court reiterated the well established rule that the reviewing court will not set aside a chancellor's findings of facts on the issue of adultery unless they are manifestly wrong.

There was insufficient evidence to prove adultery based upon the standards outlined above and the court had no option but to dismiss the complaint on those grounds.

PROPOSITION 3: THE CHANCELLOR PROPERLY GRANTED SEPARATE MAINTENANCE.

Separate maintenance is a judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance of her until such time as they may be reconciled.

Kennedy v. Kennedy 650 So.2d 1362

The goal of separate maintenance is to provide the normal support a wife would have received in the intact marriage without unduly depleting the husband's estate.

Thompson v Thompson 527 So.2d 617 (Miss. 1988)

Sherry has a clear recollection of the events of October 10, 2003, when Buddy advised her that he was leaving in two weeks. He told her she had been a good wife, a good mother, a good cook, and an excellent housekeeper. He acknowledged that she did not drink, did not smoke, and never put him in debt. He contended that she was a "bitch to live with". (T. 91-92)

Sherry begged him to stay, getting on her knees, crying and advising that she would go to counseling if that would keep the two together. His response was that after twenty two years she wasn't worth counseling. (T. 92)

After two weeks Buddy had not left, but was still planning on leaving and was in the process of moving assets. Sherry was fearful that if she did not have him leave, she would have nothing left but the bed and t.v. when she returned home. (T. 94)

Buddy appears adamant about not returning to the marital home. He purchased a new residence at 2217 36th Street in Meridian, Mississippi, (T. 17, 230) and furnished it. (T. 231) He has vowed that he has no intention of moving back into the marital home. (T. 18) He does not want to have anything else to do with Sherry. (T. 44) He wants a divorce. (T. 238)

The following information was provided by Buddy at trial:

The address at 2217 36th Street in Meridian has been my permanent address for the past two months. (T. 17)

My wife and I once lived at 7342 Pineridge Drive in Meridian. (T. 17)

I do not have any intentions of moving back into that house. (T. 18)

I remember the time that I told my wife that I was leaving back in November of 2003. (T. 24)

I don't remember where the conversation took place. It could have been inside the house or it could have been outside the house. I know that I told her that I was leaving. (T. 25)

In anticipation of leaving, I had signed a lease on an apartment. (T. 26-27)

In anticipation of leaving, I had withdrawn items from the safety deposit box, including bonds. (T. 27)

Twenty thousand dollars of bonds are now in a safety deposit box in the same bank. Sherry's name is not on that safety deposit box. (T. 28)

I got everything out of the safety deposit box and put it in another one with my name and my daughter's name on it. (T.29)

Before telling Sherry that I was leaving, I closed a checking account. (T. 29)

I withdrew the money and put it in an account with my name and my daughter's name. (T. 30)

My daughter signed the joint account (signature card) and she was with me at one time. (T. 30)

My daughter, Shelby Lynn Slade, is also on the joint checking account. (T. 35)

It is absolutely my intention not to return to home at this time to live with Sherry. (T. 35)

I had a penile implant installed, and I am going to have two more surgeries. (T. 35)

One day I may remarry, and in anticipation of that, I got the penile implant. (T. 36)

I knew Harold Gaylean prior to the separation. We have been together at his mother's house. (T. 41)

Harold says that he is a homosexual. (T. 41)

His sister has told me that he is a homosexual. (T. 41)

I knew that prior to the time of the separation. (T. 42)

Since the separation, he has been at my house. (T. 42)

When Sherry and I were living together, we had two accounts and they were both joint. (T. 43)

Out of one account, we paid the expenses of utilities, groceries and everyday things that were required. (T. 43)

During the course and time of our marriage, money that I earned was used for family expenses. (T. 43)

Some of the money was used for utilities. (T. 43)

If we divorce, I don't want anything else to do with her. (T. 44)

I will not provide health insurance if the court tells me to, if we are not divorced. (T. 44)

If the court grants the divorce, I am not willing for the 1954 Kaiser automobile to be sold and split the proceeds with Sherry, no. (T. 46)

I have income of \$3,366.89 and expenses of \$2,666.39. (T. 49)

I am sending \$430.00 a month to pay for Sherry's nephew who is in school for ministry. (T. 56)

I had my penile implant done about a year ago. (T. 80-81)

I did not tell Sherry about it. (T. 81)

I told my daughter about it. She went and stayed with me in the hospital and brought me home. She knew I had a penile implant. (T. 81)

The bill for the penile implant was \$33,000.00 (T. 81)

Using my own senses, I don't recall ever seeing Sherry being affectionate with anyone else. (T. 87)

She has never been physically abusive to me. (T. 87)

Since I have moved out in November of 2003, my wife has told me that she loves me one or two times. (T. 228)

Since the separation, I have also bought a house. (T. 230)

Since the separation, I have furnished the house. (T. 231)

My daughter helps me pay bills, keep up my finances, and my bank statements and that sort of thing. (T. 231)

I want to be free of her (Sherry). (T. 238)

I want a divorce. I want it to be final. (T. 238)

I do not remember having a seizure when I was driving back from Texas. (T. 239)

I recollect that I am more forgetful now than I have been in the past. (T. 239)

When I had prostate cancer, Sherry came to stay with me during that period of time. That was after the separation. (T. 243)

Up until October of 2005, Sherry and I would go out and eat together on occasions. That was after the separation (T. 244)

Occasionally during the year 2005, we would go out to eat someplace. (T. 244)

In 2004 I would go over to Sherry's house and eat lunch with her. She would fix lunch for me. (T. 245)

I object to my wife checking the caller id when she got home in the afternoons. (T. 255)

I do not recollect of having a spell and letting go of the steering wheel. (T. 256)

I don't remember if my daughter and Sherry helped me move away from the house, but she may have. (T. 262)

I don't remember if Shelby was there when I was moving, I sure don't. (T. 262)

All of the funds that I have, Shelby is a joint tenant. (T. 263)

She (Shelby) is a joint tenant on my safety deposit box. (T. 263)

I have promised Shelby's son that someday he will get the Kaiser automobile. (T. 263)

Sherry's testimony with regard with her relationship with Buddy is as follows:

Since my marriage to Buddy, I have not had a sexual relationship with any male. (T. 110)

Since my marriage to Buddy, I have not had an infatuation with any male. (T. 110)

I love Buddy very much. He is the father of my child. Buddy is not a well man. You can tell that by watching him on the stand. At his age, it is fixing to get worse. All of his family has died of Alzheimers. He is in the early stages of it. (T. 110)

Just by watching him not being able to do regular things everyday. Do things like shopping or remembering where he puts things or writing a check and not remember where he wrote it. Not remembering meeting people. Not remembering saying things. Not remembering doing things. Not remembering where he is. He would call me at work and tell me that I am downtown and I don't know why I am downtown, what did you send me for? This is been going on for years. (T. 111)

It is my intention to be his caretaker when he gets to the point that he cannot take care of himself. When he came to court for the temporary, Buddy rode to court with me. (T. 117-118)

I do not want to be divorced from Buddy. (T. 132)

In *Wilbourne v. Wilbourne* 748 So.2d 184, the Court of Appeals of the State of Mississippi viewed separate maintenance as follows:

“[A] decree for separate maintenance is a judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance of her until such time as they may be reconciled to each other.” *Kennedy*

v. Kennedy, 650 So.2d 1362, 1367 (Miss. 1995) (quoting Bunkley & Morse, *Amis on Divorce and Separation in Mississippi*, 7.00 (2d ed.1957)). To grant separate maintenance there must be “a separation without fault on the wife’s part, and willful abandonment of her by the husband with refusal to support her.” *Lynch v. Lynch*, 616 So.2d 294, 296 (Miss. 1993), quoting *Etheridge v. Webb*, 210 Miss. 729, 50 So.2d 603, 607 (1951). However, the Mississippi Supreme Court has held that the wife need not be totally without fault as long as her conduct did not materially contribute to the separation. *Robinson v. Robinson*, 554 So.2d 300, 303 (Miss. 1989). During this time, the wife is entitled to be maintained in the same standard of living as if the parties were still cohabiting. *Id.* at 305; *Thompson v. Thompson*, 527 So.2d 617, 622 (Miss. 1988). “On appeal, this Court will not overturn the chancery court unless its findings were manifestly wrong.” *Daigle v. Daigle*, 626 So.2d 140, 144 (Miss. 1993).

Wilbourne v. Wilbourne, 748 So.2d 184

The major point in the above is that during the separate maintenance, the wife is entitled to be maintained in the same standard of living as if the parties were still cohabiting. Buddy has excess income each month. In addition, he is contributing without obligation \$430.00 monthly to an organization called Christian’s Crusade for Christ apparently for the tuition of Sherry’s nephew, Jeff Clay. (T. 57) Further since the separation, he has had sufficient resources to purchase a new home (T. 230) and to furnish that new home. (T. 231)

Since the separation, he has had a penile implant (T. 35) costing \$33,000.00 (T. 81) He has income of \$3,366.89 each month and expenses of only \$2,666.39, leaving him a buffer in excess of \$700.00 in addition to the monthly contribution

to Christian's Crusade for Christ.

As stated in *Gray v. Gray* 484So.2d 1032 (Miss. 1986):

The nature of the marital relationship imposes upon Nelson Gray the continuing legal duty to support his wife. Having found that Annie Gray was entitled to separate maintenance, the chancellor was bound by equitable principles to award her an amount sufficient to maintain her standard of living in accord with her husband's estate and ability to provide for her well being.

The lower court in the case at bar found as follows:

"It is obvious that Mrs. Pool still cares for her husband. She has expressed a willingness to attend counseling. She was obviously upset in her testimony when she talked about the circumstances of his leaving.

In the arguments following the trial Mr. Parrish argued that she has not acted in a way conducive to reconciliation as shown by the fact that she wants exclusive use and possession of the house and that she secured marital assets in her own name to avoid Mr. Pool receiving those assets.

What Mr. Pool did in that regard was really more self-preservation. She had advance notice that he was intending to leave her. Despite the fact that they had had that confrontation where he told her that he was going to leave, they remained together for approximately six weeks. Then when it became apparent that he was doing things that would be detrimental to her financially she did ask him to go ahead and leave. But she had expressed a willingness to have him back in her home, to care for him should he become ill, and to have him resume cohabitation with her." (T. 284-285)

Sherry has never given up on Buddy. She continues to profess her love for him and he acknowledges that. (T. 228) For a long period of time, they would eat

lunch at the house (T. 245), and on occasions they would go out to eat. (T. 244)

When Buddy had prostate cancer, Sherry came to stay with him during that period.

(T. 243) Sherry's response to counsel opposite's question of "Why is it that you do not want to divorce Buddy?" was :

"There are a lot of reasons. First of all, I love Buddy very much. Second of all, he is the father of my child. Buddy is not a well man. You can tell that by watching him on the stand. At his age it is fixing to get worse. All of his family has died of Alzheimer's. He is in the early stages of it." (T. 110)

In response to the question "You intend on taking care of him when it gets to the point that he can't take care of himself?" Sherry's response was:

"You bet. And I do have that knowledge. I have been in medicine for forty years the first day of June." (T. 111)

Buddy is under a legal and moral obligation to support Sherry and he has the financial ability to do so. The award of separate maintenance is just and appropriate.

PROPOSITION 4: THE CHANCELLOR WAS CORRECT IN GRANTING ATTORNEY FEES. THE APPELLANT WAS UNABLE TO PROVE ANY OF THREE SEPARATE GROUNDS FOR DIVORCE.

The appellant argues that Sherry should not receive \$5,000.00 in attorney fees due in part to her need to defend Mr. Pools' divorce action on three separate grounds of divorce. Since no mention is made in Brief for the Appellant, Buddy is apparently not contesting the award of \$500.00 in attorney fees for his contempt in violating the terms of the agreed temporary order. (T. 196)

The testimony of Sherry's attorney is that his representation began sometime prior to February, 2003 and that he has represented her for a period of three years. He had in excess of 46 hours in that representation and testified that a reasonable fee would range between \$150.00 to \$200.00 an hour. He acknowledged that over the course of those three years, Sherry had made multiple payments totaling \$2, 850.00. (T. 183)

The ruling of the court with regard to fees is as follows:

"Mr. Pool has unsuccessfully sued for divorce from Mrs. Pool. She has had to defend a complaint for divorce and has successfully defended her marriage and she has received a separate maintenance award. In view of the fact that she has incurred attorney's fees and expenses with respect to her defense of the divorce action, the Court does find that is appropriate to award her an attorney fee. Mrs. Bresnahan testified that he had worked over 46 hours on the case and that he charges between \$150.00 to \$200.00 an hour, which makes the attorney's fees incurred by Mrs. Pool roughly \$7,500.00. The court has already awarded her \$500.00 on

the contempt portion and the court does find it reasonable that she be awarded an attorney fee in the sum of \$5,000.00 for her defense of the divorce claims made by Mr. Pool.” (R.E. 21-22, T. 296-297)

Sherry has had to defend a complaint for divorce on three separate grounds, beginning with grounds of habitual cruel and inhuman treatment, the specifics of which were so weak that that ground for divorce was finally withdrawn. (C.P. 61-63)

Buddy was unable to prove by clear and convincing evidence the alleged ground of adultery, and the ground of destructive desertion was withdrawn. (RE 178, 179) In return, Sherry defended the marriage and incurred a reasonable attorney fee in doing so.

In the 1986 case of *Dillon v. Dillon*, 498 So.2d 328 regarding attorney fees rendered in divorce action, this court recognizes the following:

Under 93-5-23, Miss. Code Ann. (Supp. 1979), chancellors are extended broad discretionary authority to make all orders touching the maintenance and alimony of a wife in a divorce proceeding. The scope of this statute is broad and includes granting chancellors the authority to award attorney fees in divorce proceedings. This court has held on numerous occasions that a question concerning attorneys fees is largely a matter entrusted to the sound discretion of the trial court. *Kergosien v. Kergosien*, 417 So.2d 1206, 1212 (Miss. 1985). Unless the chancellor abuses his discretion in such matters, his decision as to whether or not to award attorney fees will generally be upheld. *Ladner v. Ladner*, 436 So.2d 1366, 1375 (Miss. 1983). Furthermore, where a wife has sufficient funds or separate estate with

which to pay her own attorney fees, we have held that the chancellor did not err in failing to award her legal fees. *Harrell v. Harrell*, 231 So.2d 793 (Miss. 1970)

Later in the case of *Brooks v. Brooks*, 652 So.2d 1113 (Miss. 1995), this court stated as follows:

The award of attorney's fees in a divorce case is generally left to the discretion of the chancellor. *Lenoir*, 611 So.2d at 204. The award of the court costs is likewise entrusted to the sound discretion of the chancellor. *Martin*, 566 So.2d at 707. We have previously addressed the propriety of awarding attorney's fees, stating that: This court has held that when a party is able to pay attorney's fees, award of attorney's fees is not appropriate. *Martin v. Martin*, 566 So.2d 704, 707 (Miss. 1990). However, where the record shows an inability to pay and a disparity in the relative financial positions of the parties, we find no error. *Powers v. Powers*, 568 So.2d 255 (Miss. 1990). *Hammett v. Woods*, 602 So.2d 825, 830 (Miss. 1992).

In the case at bar, Sherry has greater expenses than she has income, while Buddy has excess income of at least \$700.00 monthly, not counting money that he sends to a school in California as a "donation." During the time that the parties were living together, their monies were co-mingled and all marital bills were paid out of the joint account.

In *Monroe v. Monroe*, 745 So.2d 249 (Miss. 1999) citing *Creekmore v. Creekmore*, 651 So.2d 513 (Miss. 1995) the court ruled as follows:

"The fee should be fair and should only compensate for services actually rendered after it has been determined that

the legal work charged for was reasonably required and necessary.”

In the case at bar, Buddy refused to support Sherry and thereafter sued her for divorce on three separate grounds. Without question, her need of legal assistance was required and necessary.

In the case of *Crenshaw v. Crenshaw*, 767 So.2d 272 (Miss. App. 2000) the court upheld the award of attorney’s fees where the husband brought a unsuccessful action for divorce based upon habitual cruel and inhuman treatment.

The award of attorneys fees in the amount of \$5,000.00 was fair and equitable and it was required and necessary for Sherry to have legal counsel to protect her rights and her marriage and to defend the three separate grounds for divorce brought against her by Buddy.

REQUEST FOR FEES

Sherry Clay Pool moves this Court to grant her a reasonable attorney's fees in the appeal stage of this action and in support thereof would show unto the Court that she was awarded attorney's fees in the lower court of \$5,000.00, that she has been required to file a brief before the Supreme Court of the State of Mississippi and requests a judgment against Thomas Willard Pool, Jr. for a fee equal to one-half the amount awarded by the lower court.

In the case of *Lauro v. Lauro*, 924 So.2d 584 the Court of Appeals found as follows:

This court generally awards attorney's fees on appeal in the amount of one-half of what was awarded in the lower court.
Monroe v. Monroe, 745 So.2d 249, 253 (Miss. 199)

In the case of 1876 case of *Bridges v. Bridges*, 330 So.2d 260, the Supreme Court of Mississippi allowed:

The attorney's fees allowed in the lower court amounted to four thousand seven hundred eighty-seven dollars and fifty cents (\$4,787.50). The motion for attorney's fees is sustained and fees for services here are allowed in the sum of two thousand four hundred dollars. (\$2, 400.00) being in round figures fifty percent (50% of the attorney's fees allowed in the trial court.

Sherry has had to defend against three separate grounds of divorce and now an appeal to the Supreme Court of Mississippi. She respectfully request that the reviewing court award additional attorney's fees to help compensate her for the expenses incurred by her as a result of Buddy's actions.




CONCLUSION

The court has the right to control it's own docket and properly and correctly decline to continue a matter that has been set for two months by agreement of the parties. All documents Sherry contended were available for review remained at her attorney's office for a year without inspection by Buddy.

The court properly denied a divorce on the grounds of adultery as Buddy failed to prove the two prong test of opportunity and inclination by clear and convincing evidence. The court further properly found that Sherry was entitled to separate maintenance as Buddy was adamantly opposed to reconciliation, and although retired, has the greater share of liquid assets.

The award of attorney's fees was proper. Sherry had to defend three separate grounds of divorce to protect her marriage.

RESPECTFULLY SUBMITTED this the 16th day of March, 2007.


ROBERT J. BRESNAHAN
ATTORNEY FOR APPELLEE
MS. Bar No. [REDACTED]
1108 - 19th Avenue
P.O. Box 826
Meridian, MS 39302
(601) 693-6386


CERTIFICATE OF SERVICE

I, the undersigned, Robert J. Bresnahan, of counsel for the Appellee, Sherry Clay Pool, do hereby certify that I have delivered by United States mail, postage prepaid, a true and correct copy of *Brief of the Appellee* to the following:

Honorable Judge Springer
Lauderdale County Chancellor
Post Office Box 534
Pattison, TX 77466

Honorable J. Stewart Parrish
Attorney for Appellant
Post Office Box 823
Meridian, MS 39302-0823

This the 16th day of March, 2007.


ROBERT J. BRESNAHAN
ATTORNEY FOR APPELLEE
MS Bar No. [REDACTED]
1108 - 19th Avenue
P.O. Box 826
Meridian, MS 39302
(01) 693-6386