IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-TS-01613
CA

DOUGLAS G. COSENTINO — APPELLANT

VERSUS

PHYLLIS L. COSENTINO — APPELLEE

BRIEF FOR APPELLEE

ON APPEAL FROM THE CHANCERY COURT
OF JACKSON COUNTY, MISSISSIPPI

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DOUGLAS G. COSENTINO — APPELLANT

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RESPECTFULLY SUBMITTED, this the 11th day of September, 2007.

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IN THE SUPREME COURT OF MISSISSIPPI
NO. 2004-CA-00548

DOUGLAS G. COSENTINO — APPELLANT

VERSUS

PHYLLIS L. COSENTINO — APPELLEE

I. NATURE OF THE CASE AND COURSE OF THE PROCEEDINGS BELOW

Plaintiff/Appellee, Phyllis L. Cosentino (hereinafter "Phyllis") and Defendant/Appellant, Douglas G. Cosentino (hereinafter "Doug") filed a Joint Petition for Dissolution of Marriage on October 18, 2001. (CP – 1-4) No Temporary Order was entered in this matter.

This cause came on for trial on March 11, 2003, but was recessed due to the Court Reporter's illness. The trial recommenced and was completed on June 19, 2003, after which each party submitted proposed findings of fact and conclusions of law to the Court. The Court's Findings of Fact and Conclusions of Law were filed on August 18, 2003 (CP – 14-22), and the Final Judgment of Divorce was entered on September 30, 2003. (CP – 23-30)

On October 7, 2003, Defendant filed a Motion for New Trial/Reconsideration (CP – 31-44), which Plaintiff answered on October 10, 2003. (CP – 45-46) After the hearing on the motion, the Court entered an Order on February 17, 2004, in which Defendant's Motion for New Trial/Reconsideration was denied and dismissed. (CP – 47)

Being aggrieved with the Court's decision, Defendant filed his Notice of Appeal and the Designation of Record and Statement of Issues on March 5, 2004. (CP – 48-50, and 52-53) The sole issue raised by Defendant on appeal was the lower court's decision to award permanent periodic alimony to Plaintiff. (CP-52)

In *Consentino I*, the Court of Appeals reversed and remanded the chancellor's decision, finding that the chancellor failed to conduct a *Ferguson* equitable distribution analysis prior to conducting its *Armstrong* alimony analysis. *Cosentino v. Cosentino*, 912 So.2d 1130 (Miss. App. 2005). After remand, each party declined the opportunity for a hearing, and on February 6, 2006, the chancellor entered her Ruling After Remand for Further Findings, wherein she addressed each of the *Ferguson* and *Armstrong* factors, and again exercised her discretion in awarding permanent alimony to Phyllis. (CPII – 2-13, 14-15, 16-23)[1].

Again being aggrieved with the Court's decision, Defendant filed a Motion for New Trial/Reconsideration on February 15, 2006. (CPII – 24). On March 8, 2006, the chancellor entered her Order Denying Motion for New Trial/Reconsideration. (CPII – 53).

Thereafter, Defendant failed to timely file his Notice of Appeal and on April 26, 2006, filed his Motion to Reopen Time for Appeal Pursuant to MRAP 4(h) and MRCP 77(d). (CPII – 54). Plaintiff objected. (CPII – 98). On July 19, 2006, the chancellor granted Defendant's Motion to Reopen Time for Appeal. (CPII – 101). Defendant filed his Notice of Appeal and the Designation of Record and Statement of Issues on August 1, 2006. Thus, *Consentino II* raises the same issue as *Consentino I*: whether the lower court abused its discretion in awarding permanent periodic alimony to Plaintiff.

I. STATEMENT OF THE CASE--FACTS[2]

Phyllis and Doug Cosentino were married on or about July 2, 1970, in Jefferson Parish, Louisiana (CP – 1), at a time when Phyllis was a senior in college and Doug had just been accepted to medical school.

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[1] The clerk's papers after remand begin anew with page 1. To differentiate between the proceeding prior to and after remand, Appellee will use the designation "CPII" to refer to those clerk's papers filed after remand.

[2] Due to the fact that the Court of Appeals remanded for an analysis of the *Ferguson* factors, the Facts will be interwoven with the *Ferguson* factors for purpose of brevity.

1. **Substantial contribution to the accumulation of the property including these factors:**
    a. **Direct or indirect economic contribution to the acquisition of the property.**

During the first six years of their marriage, Phyllis was employed as a medical technologist and was the primary support of the family while Doug completed medical school and his residency. (T – 10-13, 71). The couple's only financial assistance during this time was the payment by Doug's parents of his tuition for one year of medical school (T – 12, 123), and a small student loan of $1,500.00, later paid off from marital funds. (T- 13, 123, 125-126). After Phyllis became pregnant with the couple's first child, she continued to work until approximately four months prior to the birth of their daughter, born in June of 1976. (T – 13-15, 127). By mutual agreement, Phyllis remained a homemaker after the baby was born and never returned to outside employment. (T – 127-128). Doug never told Phyllis she needed to go back to work. (T – 130).

b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage and contribution to the education, training or other acknowledgments bearing on the earning power of the spouse accumulating the assets:

Throughout their thirty-two year marriage, Phyllis devoted all of her time and energy to her husband and children and was a devoted, loving wife and mother. (T – 20, 72, 134-135, 138-140). Phyllis could not recall any criticism of her by Doug during the marriage. (T – 79-80). During the trial, Doug did not express any complaints about Phyllis as a wife or mother. (T – 135-144). Phyllis devoted the majority of her time during the marriage to Doug and the children. (T – 138).

From the time the children in the family were born, Phyllis prepared a family dinner every night and served it in time to meet Doug's work schedule. (T – 17-18, 71, 134.) She met

with the children's teachers, was very active in the schools they attended, assisted them with their homework, took them to the doctor, and in every way was the primary caregiver of the parties' two children. (T – 18-19, 27, 135-137). Phyllis's hard work and devotion to children paid off as Gina, a Millsaps graduate in physics, plans to attend medical school (T – 14, 130), and Bobby, a Millsaps graduate in geology, is employed in his field (T – 17, 130). Phyllis's efforts at child rearing must be considered a significant contribution to the marriage. "The contribution of the spouse, with primary child rearing responsibility, is not to be considered insignificant or negligible." *Johnson v. Johnson*, 877 So.2d 485, 499, *reh. denied, cert. denied* (Miss. App. 2004).

Phyllis not only cooked the meals (T – 131), but she bought the children's clothes and even sewed clothes for them. (T – 28). She washed all of the family's clothing (T - 132), did the household shopping, and shopped with Doug for his clothing. (T - 28). Phyllis organized the holidays, was the gardener for the house, and performed most of the upkeep on the house. (T – 28-29, 132-133). She picked up medicine when family members were ill (T - 29), and it was she who took care of the children when they were sick. (T – 134, 143). Doug never once stayed with a sick child. (T – 143). When Doug was sick, Phyllis nursed him (T – 143-144), but Doug never took care of Phyllis when she was ill. (T – 144). Both parties testified that Phyllis never once denied marital relations to her husband. (T – 20, 138).

For eighteen years during the marriage, Phyllis drove to New Orleans twice a month and picked up Doug's mother, and brought her back to Ocean Springs to stay with the family for periods lasting from four to ten days every month. (T – 29-30, 141-143). It was Phyllis, not Doug, who spent time with his mother whose company she enjoyed and with whom she became very close, taking her mother-in-law shopping, cooking with her, and insuring that she felt

special, loved, and was an integral part of the family for as long as possible. (T – 30-31, 56).

After the Cosentinos moved from Memphis to Ocean Springs, they purchased an old home in downtown Ocean Springs for $60,000.00. (T – 26-27). Phyllis renovated the home, which they subsequently sold for $315,000.00 before moving into their new home in Bayou Sauvolle. (T – 27).

The Cosentinos purchased waterfront property in Bayou Sauvolle, a "very upscale neighborhood". In 1997, they began building a new home on the property, for which they paid in full as the house was being constructed. (T – 26-27, 38, 52). In addition to her family responsibilities, Phyllis was also on the construction site every day from July 1997 to December 1998, supervising the building and working on the site of the couple's beautiful home, which during the time of *Cosentino I*, was on the market for 1.3 million dollars. (T – 34-35, 52). She did not let her other family duties slack while she built the home. (T – 34-35).

2. **The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of assets by agreement, decree or otherwise:**

The parties agreed to an equal distribution of assets valued at $2.3 million dollars each. The trial court did not hear any evidence of disposal or waste of assets.

3. **The market value and the emotional value of the assets subject to distribution:**

There was no evidence before the court as to the emotional value of assets since the parties had already agreed upon the division of assets and the only issue was alimony.

4. **The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or *inter vivos* gift by or to an**

individual spouse.

There was no evidence before the court as to this factor.

5. **Tax and other economic consequences, and contractual and legal consequences to third parties, of the proposed distribution:**

There was no evidence before the court as to this factor.

6. **The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties.**

The marital property had already been divided, equally, by the time the matter was heard by Judge Bradley. The only issue that the parties submitted to the chancellor was alimony. Thus, the chancellor exercised no discretion in the distribution of the marital assets. Since the parties had already contractually divided their assets, any ability by the chancellor to divide the assets in such a fashion that could have conceivably eliminated the need for alimony was out of her hands. Had the chancellor been given the task of determining the equitable distribution of assets, she very well might have awarded Phyllis substantially more than half of the assets or a significant amount of lump sum alimony in order to eliminate the need for periodic future payments; however, since the parties had already divided the property and submitted only the issue of alimony to the chancellor, her hands were tied regarding eliminating the need for alimony through a greater distribution of assets to Phyllis. As the Court of Appeals noted in *Cosentino I*, the chancellor's task was to determine whether the division of assets was adequate, pursuant to *Ferguson*. *Cosentino v. Cosentino*, 912 So.2d 1130, 1132 (Miss. App. 2005). Clearly, the chancellor determined that the agreed upon equitable distribution by the parties left Phyllis with a deficiency, thus triggering an *Armstrong* analysis. *Id* citing *Johnson v. Johnson*,

650 So.2d 1281, 1287 (Miss. 1994).

7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity.

During their marriage, the parties enjoyed a lifestyle that was described by Phyllis as "very nice, almost luxurious." (T – 51). An important aspect of their lifestyle was their ability to steadily save and invest in order to augment their savings and investments on a constant basis, to secure their retirement and insure that no expenditure, great or small, would ever create a debt. They never lived from their savings.

Phyllis and Doug separated on or about October 1, 2001, in Jackson County, Mississippi. (CP – 1). After Doug and Phyllis separated, he purchased a house in Biloxi. (T – 41-42). Although Phyllis continued to live in the Bayou Sauvolle house, she purchased a smaller house in Ocean Springs and began renovating it, since the couple had agreed to sell the Bayou Sauvolle house. She paid for the smaller house with funds borrowed from her investment account, from which she had also been paying her monthly expenses since the separation. (T- 38). This was the first time either party used investment money to purchase anything.

Post-divorce Phyllis has no income whatsoever from employment and small prospects of any. After receiving her portion of the marital estate, it is certain her income will never again approach that which provided the lifestyle of the parties during their marriage. Her future income from her investments is unknown and cannot be known with any certainty. The record is thus void of any projection of Phyllis's future income. Doug has a steady stream of income from his medical practice of over $500,000.00 per year (T – 145-147, 158), he plans to continue working for an indefinite period because he enjoys working and making money (T – 145), and he does not know what his future needs might be. (T - 145).

Judge Bradley considered this factor to be of particular importance, noting that while Doug has a flourishing medical practice; Phyllis is no longer employable in her chosen field of medical technology since she was a housewife for more than 25 years. (CPII – 21-23). The chancellor believed it quite possible that Phyllis could easily outlive her assets should she continue to live the lifestyle to which she became accustomed during the 33 year marriage. (CPII – 21-23).

III. SUMMARY OF THE ARGUMENT

The Chancellor's decision to award permanent periodic alimony to Phyllis was based upon the testimony and evidence presented as applied to the relevant *Ferguson* and *Armstrong* factors. Both the *Ferguson* factors and the *Armstrong* factors support an award of permanent alimony to Phyllis. *Armstrong* factors in this case which specifically support the award of alimony are the length of the marriage, Phyllis's substantial contributions throughout the marriage, and the fact that Phyllis quit working after the birth of the parties first child and is no longer qualified to work in the field in which she had been educated and worked during the early years of the marriage. She has little, if any, earning capacity, whereas Doug's earning capacity has increased and will continue as he enjoys working and has no plans to retire. The award of periodic alimony does not prevent Doug from living a luxurious lifestyle with a very high standard of living and does not jeopardize his ability to live an elegant lifestyle during retirement when it comes. Even after paying alimony, Doug's standard of living is the same as that of the parties while married and is more than ample for him to lead a normal life with a reasonable standard of living. *Massey v. Massey*, 475 So.2d 802, 803 (Miss. 1985). The only impact the alimony payments may have on Doug is that he will have slightly less money to invest than in if he were not paying alimony, but even this inconvenience is not certain based upon Doug's

testimony that his income had not decreased, but in fact had increased every year. This being so, the impact of the alimony payment on Doug's ability to save will decrease annually. There is no other effect on Doug. A substantially higher award of $10,000.00 or more per month would have had no impact on Doug's lifestyle except for its effect on his ability to save money, an indisputable element of his lifestyle, his luxurious standard of living.

IV. ARGUMENT

A. STANDARD OF REVIEW:

The Supreme Court's scope of review in domestic matters is limited by its substantial evidence/manifest error rule. "Manifest error" is defined as "unmistakable, clear, plain, or indisputable." *Brennan v. Brennan*, 638 So.2d 1320 (Miss. 1994). The Supreme Court is limited to facts that are of record and reasonable inference that may be derived therefrom. *Cotton v. McConnell*, 435 So.2d 683, 685 (Miss. 1983); *American Life Ins. Co. v. Walker*, 208 Miss. 1, 43 So.2d 657 (1949).

It is largely within the discretion of the chancellor whether or not to award alimony, and the Supreme Court will not disturb an alimony award on appeal unless it is against the overwhelming weight of the evidence or manifestly in error. *Parsons v. Parsons*, 678 So.2d 701, 703 (Miss. 1996).

In addition to the Findings of Fact and Conclusions of Law filed on August 18, 2003 (CP 14-22) Final Judgment of Divorce entered on September 30, 2003 (CP – 23-30), and the Ruling After Remand for Further Findings, the Chancellor's own words demonstrate she was well informed regarding the facts and evidence presented in this case. During the hearing on Defendant's Motion for New Trial/Rehearing (CP 31-33) on February 6, 2004, the Chancellor stated as follows:

> "I certainly recall this trial and put a great deal of thought into the opinion that I wrote and the award that I made. I weighed all of the factors set out in the case law and considered the contributions made early in the marriage; the fact that she cannot return to her career, because, quite frankly, technology has advanced so much to the point that she would have to be recertified. And considering the age of the parties, certainly they are in the twilight of their working years and the vast difference of income between the parties, their capacity to earn more money and the style of living to which they have both become accustomed, quite frankly, my thinking was that Mrs. Cosentino could easily outlive the assets awarded her from the equitable division considering her age, and considering his large monthly income, I did not think $7,000 was an inappropriate award, so I am going to deny your motion." (T – 188.)

When reviewing a chancellor's decision, the appellate court will accept a chancellor's findings of fact as long as the evidence in the record reasonably supports those findings. *Perkins v. Thompson*, 609 So.2d 390, 393 (Miss. 1992). In other words, the appellate court will not disturb the findings of a chancellor unless those findings are clearly erroneous or an erroneous legal standard was applied. *Hill v. Southeastern Floor Covering Co.*, 596 So.2d 874, 877 (Miss. 1992.)

The decision of the Chancellor was based upon the testimony and evidence submitted during trial, was manifestly correct and should be affirmed.

B. THE LOWER COURT'S ALIMONY AWARD TO THE PLAINTIFF IS SUPPORTED BY THE FACTS AND EVIDENCE IN THIS CASE AND IS MANIFESTLY CORRECT.

Alimony is an available remedy after equitable distribution where the facts support such an award under the equities and analysis set forth in *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994) and *Armstrong v. Armstrong*, 618 So.2d 1278, 1280 (Miss. 1993). If the division of marital assets leaves one party with a deficiency, then a consideration of an award of alimony is appropriate. *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss. 1994). The court considers

certain factors when determining whether to award alimony. *Armstrong v. Armstrong*, 618 So.2d 1278, 1280-1281 (Miss. 1993). *See also Voda v. Voda*, 731 So.2d 1152 (Miss. 1999); *Parsons v. Parsons*, 678 So.2d 701 (Miss. 1996); *Etheridge v. Etheridge*, 648 So.2d 1143 (Miss. 1995); and *Hammonds v. Hammonds*, 597 So.2d 653, 654 (Miss. 1992).

"The obligation of a chancellor is not to follow some precise formula as to each individual component of distribution, alimony, and other support, but to provide equitably between the spouses in the final outcome." *Welch v. Welch*, 755 So.2d 6, 10 (¶ 26) (Miss. App. 1999). "Whether to award alimony, and the amount to be awarded, are largely within the discretion of the chancellor." *Henderson v. Henderson*, 757 So.2d 205 (Miss. 2000) (citing *Magee v. Magee*, 661 So.2d 1117, 1122 (Miss. 1995).

The general rule under which the amount of alimony is to be calculated provides that the recipient should be entitled to a reasonable allowance that is commensurate with the standard of living to which they [the parties] had become accustomed to, measured against the ability to pay on the part of the party subjected to the payment order. *Johnson v. Johnson*, 877 So.2d 485, 495-496 ¶ 45 (Miss. App. 2003).

In the instant case, the Chancellor gave due consideration to both the *Ferguson* factors and the *Armstrong* factors in weighing the testimony and evidence, and awarded Phyllis periodic alimony of $7,000.00 per month. Thus, Judge Bradley was of the opinion that the equitable division left a deficit for Phyllis, thus triggering an *Armstrong* analysis.

1. Application of the Armstrong factors to testimony and evidence:

In accordance with the provisions of *Armstrong v. Armstrong*, 681 So.2d 1278 (Miss. 1993), and *Hammonds v. Hammonds*, 597 So.2d 653 (Miss. 1992), the following is a discussion of the qualifying factors addressed by the lower court in reference to the issue of alimony:

a. Income and expenses of the parties:

Doug paid no support during the separation as no temporary order was entered (T – 22), therefore Phyllis had to withdraw funds from her investment account to maintain the standard of living to which she had been accustomed during the marriage. During this same time period, Doug purchased and paid for a house in Biloxi and paid some of his personal expenses from income received from the medical practice. Some personal expenses, such as automobiles, auto insurance, fuel, and other related expenses, are provided for him by the medical practice.

Phyllis's Financial Declaration revealed monthly expenses of approximately $3,415.81 at the time of trial, which included an estimate of $325.81 for medical insurance. (Ex. 4 & 5) (T-46-47) It is very important to note that she had already spent $307,000.00 of her savings to house herself plus the monies she expended from her savings for monthly expenses during the separation, and so the figure for monthly expenses is artificially low since she does not list expenses for rent or a monthly house note. Phyllis testified during trial that her vehicle would soon need to be replaced, but her monthly expenses do not include this anticipated cost, therefore again reducing monthly expenses that would normally contain this expense. Phyllis and Doug do not have car notes. When they wanted or needed something, they paid cash without inspecting their savings.

During testimony, Phyllis confirmed that some of the listed monthly expenses would decrease while others would increase. (T-38-40, 42-43, 45-47). The estimate obtained by Phyllis for medical insurance was an estimate only and was therefore subject to change by the time she actually purchased insurance. The estimate did not include medical expenses that were not covered by insurance, nor did her monthly expenses include any provision for dental or ocular expenses. Testimony clearly demonstrated her monthly expenses will increase once her house is

completed and property taxes and insurance are assessed.

Doug alleges that Phyllis's portion of the marital assets increased during the three month interim from March 11, 2003 to June 19, 2003. Doug did not provide any supporting financial statements or other documentation to support the figures he presented to the court. (Brief for Appellant – p. 12) (T – 116-119) (E – 6) During cross-examination, Doug admitted the document did not include information showing the total increase of his portion of the financial assets during the same time period, therefore the information in the document was incomplete and inaccurately portrayed Phyllis as having received a greater portion of the marital assets than Doug.

The record is sufficient to demonstrate that without alimony, Phyllis will over time be required to deplete her portion of the marital assets in order to maintain the very high standard of living to which she has become accustomed during thirty-three years of marriage. Living out of her property settlement, Phyllis will never be in a position to save as she did during the marriage, and her financial security in her old age will be declining as her age increases and her standard of living inevitably declines.

Doug is a radiologist. He works only three weeks and takes one week of vacation each month. (T – 153) He employs another physician at a cost of $1,500.00 per day so he can take this vacation time each month. (T – 153) This is his lifestyle. By simple mathematical calculation, Doug paid another physician $126,000.00 a year so that he could take twelve weeks of vacation each year. Thus he has been more than able to financially provide a luxurious lifestyle life for himself and Phyllis by working only forty weeks or nine months of the year, and yet he begrudges alimony to Phyllis, who created and maintained a serene world for him until he tired of her. The money Doug pays for vacation time far exceeds the alimony he pays Phyllis.

At the time of trial Doug was the sole financial beneficiary of a medical practice that had previously enriched three radiologists. Doug's former partner, Dr. Pontius, retired in December of 2001 (T - 152), and Dr. Carter, the surviving partner, left at the end of March 2003. (T -153) Doug and Dr. Carter were equal partners throughout 2002 and the first three months of 2003. Doug agreed that his income had increased as he was now drawing all of the income from what was formerly a three person practice. (T – 155-156) Doug did not want to reveal his current income at trial. During trial on June 19, 2003, Doug was evasive and claimed he did not know the exact amount of his income. (T – 156 – 169) This information had to be developed through extensive cross-examination. According to the parties' 2001 tax return, Doug's W-2 reflected income of $385,000.00. (E – 3) After adding income from dividends, capital gains and rental income, the parties' total income in 2001 was $445,841.00. (E – 3) According to Doug's W-2 for the year 2002, his income from his medical practice alone was $510,000.22, a substantial increase from the prior year. (E – 8) This figure did not include additional income received from dividends, capital gains, or rental income as is reflected in the parties' 2001 tax return. (E – 3) Simply put, his income from his medical practice increased $125,000.00 between 2001 and 2002.

Doug set his own base salary, which at trial was $13,000.00 every two weeks for a total annual base salary of $338,000.00. (T – 156-157) He also paid himself a substantial year end "bonus", which in 2002 was approximately $172,000.00. (T – 160) This figure was determined by deducting his base salary of $338,000.00 from the $510,000.00 shown on his 2002 W-2 (E-8), an amount which his attorney conceded. (T – 160) In addition, some of Doug's personal expenses, such as automobiles, auto insurance, fuel, and other related expenses, are provided for him by the medical practice.

As of March 11, 2003, Doug was receiving a monthly income of $29,890.00, a figure which included the base salary which he set for himself of $28,080.00, plus $160.00 for dividends and interest and $1,650.00 for rental income. (E – 9) It did not include his year end bonus, which is always substantial. Doug claimed $5,015.00 in monthly living expenses, which included expenses for his house in Biloxi, $842.00 for his "camp" in Louisiana, $501.00 for his office (which should have been paid by his medical practice), $261.00 for the Bayou Sauvolle home in Ocean Springs, and children's allowance of $700.00 for the adult children. (E – 9) During cross-examination it was determined that Doug's monthly expenses would, like Phyllis's, be subject to some variation after the trial and should decrease since, in addition to the office note, he would no longer pay expenses for the Bayou Sauvolle family home, which the parties were selling.

It is clear that given Doug's work habits, income and monthly expenses, the accumulation of significant amounts of investment capital with each pay period in the form of net disposable income constituted an important part of the lifestyle enjoyed by the parties during the marriage.

After withholdings and disability and liability insurance, Doug wanted to show he had $15,200.00 per month in disposable income based on the salary he, himself sets. (E – 9) This figure is based solely on Doug's $13,000.00 bi-weekly salary, but does not include his substantial year end bonus. (E – 9) In reality Doug's income in 2002 was $510,000.02, thus his monthly disposable income, including his bonus, was $42,500.02. (E - 8) According to Doug, the year end bonus was all of money left over in his medical practice after every business and personal expense had been paid. Clearly Doug's monthly income substantially exceeds the $25,000.00 he claimed at trial. Doug's Financial Declaration did not accurately portray his true

annual income, but instead utilized the bi-weekly paycheck amount which he paid himself to portray a lesser monthly income than that which he makes.

The factor weighs heavily in favor of Phyllis.

b. Health and earning capacities of the parties:

Phyllis stated her health is good, although she suffers from migraines and had been seeing a psychologist since the separation in 2001 to help her cope with depression and thoughts of suicide brought on by Doug's rejection of her. (T - 47-49) At trial she was still undergoing treatment by a psychologist. (T – 48)

Doug testified that his health is good. (T – 122)

With the exception of the first six years of the marriage, Phyllis was a full time wife, mother and homemaker during the marriage. When asked whether she had ever considered what would happen to her earning capacity if she devoted 100% of her time and energy to her family and eventually a divorce came, she replied, "I didn't stop and consider it. When we married, I said until death do us part, and I meant it." (T – 20)

After the couple married, Phyllis, who graduated with a degree in biology in 1970, worked as a medical technologist. (T – 63, 108) She last worked as a medical technologist in 1976, and would have to be completely retrained due to technological changes in the intervening years. (T – 63-64) "Likewise her earning capacity has been diminished by her foregoing a career to raise their family. If she were to obtain . . . re-certification, she would still begin work with no seniority and a salary that would not be comparable to . . ." that of Doug. See *Davis v. Davis*, 832 So.2d 492, 499 (Miss. 2002).

During the later years of the marriage, Phyllis took a few art classes at the community college and sold approximately eight paintings, averaging $125.00 for each. (T – 65-66) Clearly

she can not support herself as an artist on this meager sum. At trial, Phyllis knew of no job for which she was qualified. (T – 64-65)

At trial, Phyllis had no work record for the past twenty-seven years; she was no longer qualified to be a medical technologist, a field in which she had been educated and employed during the early years of the marriage; she lacked the capacity to earn sufficient income to meet the basic and understated expenses disclosed in her 8.05 Financial Declaration, let alone to maintain herself in the style to which she was accustomed during the parties' lengthy marriage. (T – 63-67) At age 55 at the time of trial, she has a limited work life expectancy (T – 66-67) She is currently fifty-nine years of age.

Although he denied it under oath (T - 155), testimony and evidence clearly show that Doug's earning capacity has a strong upward trend. According to Doug, his lowest yearly earnings from the medical practice were $385,000.00 in 2000, at a time when there were three partners in the medical practice. (T - 155). In 2001, again with three partners in the practice, Doug's income increased to $445,841.00. (E – 3) (T – 113) After Dr. Pontius retired in December of 2001, Doug shared the practice with his remaining partner, Dr. Carter. (T – 67-68) In 2002, Doug's income from the medical practice alone was $510,000.22 plus another $15,000.00 as rental income from the office. (E – 8) (T – 112, 158) At the end of March of 2003, Dr. Carter left the practice, so Doug no longer had to share income from the medical practice with anyone (T – 68); therefore his income for 2003 was obviously going to be significantly higher than that of 2002. Doug testified that at the time of trial he was receiving bi-weekly pay checks in the amount of $13,000.00 (E – 7), which totaled $338,000.00 for the year before his year end bonus. (T – 156-157) It must be remembered that Doug sets his own salary and this salary does not include a very large year end bonus which he also gives to himself after his

business and personal expenses are paid. With the year end bonus, Doug's income in 2002 as reflected by his W-2 was $510,000.22. (T – 158) (E – 8) Doug testified at trial that his income had increased since 2002. (T – 159)

Based on income disclosed by Doug during trial and his testimony that the medical practice should continue to do as well as in the past, it can be seen that should Doug work only for the next seven years at the rate of compensation which he received in 2002, regardless of the significant upward trend in his income, he will receive another 3.5 million dollars in income.

Since Doug has arrived at the place that he can make an annual outlay of $126,000.00 per year to hire help so he can take a week of vacation each month, it is obvious that his capacity for earning even greater income is only limited by the extraordinary amount of vacation time that he traditionally takes for granted as part of his lifestyle.

c. The needs of each party:

Testimony and evidence clearly demonstrated Doug's income far exceeds his needs (E – 9), that he enjoys working and making money (T- 145), and that he did not know how much more money he would need. (T – 145) Clearly Doug will not have to draw from his share of the marital estate to pay his monthly expenses until he is no longer employed. Without an award of alimony, Phyllis, unemployed, will be forced to regularly withdraw funds from her portion of the marital estate in order to meet her everyday expenses, thus depleting her share of the marital estate and her future income, a situation clearly not in keeping with the way the parties lived while married, the way Doug continues to live.

d. The obligations and assets of each party:

The parties entered into a Property Settlement Agreement under the terms of which they divided the marital assets. (E -1) Doug's attorney stated the division was "a literally fifty-fifty

split of the marital assets." (T – 178) Among those assets were various investment accounts which were accumulated through the joint effort of both of the parties. The parties never intended to utilize these investment assets as an income stream as the investment assets were obviously designated by the parties for their retirement.

According to the division of properties agreed to as equitable by the parties, Phyllis received $2,380,478.00 in marital assets and Doug received $2,378,917.00 in marital assets, a difference of only $1,561.00. (E - 1) The parties agreed that Phyllis would receive the house on Pine Street in Ocean Springs valued at $250,000.00, and Doug would receive the house on Arbonne Court in Biloxi valued at $360,000.00 and the "camp" in Shell Beach, Louisiana, valued at $255,000.00. These properties are included in Exhibit A attached to the Consent to Divorce on Ground of Irreconcilable Differences. (CP – 27-30) Although Phyllis and Doug had not been able to sell the Bayou Sauvolle house by the time of trial, they had agreed to divide the proceeds once the house sold. The distribution of marital assets attached as Exhibit A to the Consent to Divorce on Ground of Irreconcilable Differences allocated $500,000.00 of the anticipated proceeds from the sale of the house to each party. (CP – 27-30) (E – 1) (T – 90-92, 96)

During the pendency of the litigation, Doug continued to receive substantial earnings from the medical practice, generating the same substantial surplus-over-needs monthly income as he had throughout the marriage, while Phyllis lived from her savings in order to maintain the standard of living she had enjoyed during the marriage. (T - 111)

During most of the marriage, the parties purchased everything they needed or wanted with cash, they had no debt, and the value of the marital estate when the Consent to Divorce on Ground of Irreconcilable Differences was signed by the parties on March 11, 2003, was

$4,759,395.00. (E – 1) CP – 27-30)

e. Length of the marriage:

The parties married on July 2, 1970, when Phyllis was age twenty-two and Doug was age twenty-one. (T – 8)(CP 1-4) Phyllis and Doug had been married thirty-one years and three months as of the date of separation on October 1, 2001 (CP – 1-4), and almost thirty-three years at trial in March of 2003. The length of the marriage is sufficient to award alimony to Phyllis.

f. The presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care:

Although the parties' two children are now adults, Phyllis and Doug assist them financially from time to time. This factor does not favor either party.

g. The age of the parties:

Phyllis was born on April 18, 1948, and is currently fifty-nine years of age. (E – 2, p. 1) Doug was born on October 7, 1948, and is also fifty-nine years old. (E – 9, p. 1). (T -64, 68-69, 122) The parties were twenty-one and twenty-two respectively when they married. (T - 8)

h. The standard of living of the parties, both during the marriage and at the time of the support determination:

Modestly Phyllis understates the couple's lifestyle as "very nice almost luxurious." (T – 51) Prior to the recent decline in the stock market, the couple had over eight million dollars in investments. (T – 52) Doug and Phyllis had more than four million dollars in assets at the time of trial. (E - 1)

The couple purchased a waterfront lot in a very upscale neighborhood, Bayou Sauvolle, for $165,000.00. (T – 32) and built a beautiful home. Phyllis oversaw the construction of the 5,000 square foot, three floor home which had a three car garage, boat garage, work shop, studio, gameroom, three bedrooms, three full baths, and five half baths, all of which were paid for with

cash as the home was built. (T – 36-37, 52) The parties agreed to place the house on the market for $1.3 million (T – 52), but there was no way to know whether the house would sell, and, if so, for how much.

After the Bayou Sauvolle house was finished, the couple built a "camp" in Shell Beach, Louisiana, that Phyllis valued at about $250,000.00, and which Doug uses for fishing. (T – 52-53) Both of their children attended private college for four years at a cost of approximately $30,000.00 per year. (T – 53) The couple provided financial assistance to their grown children when it was needed and planned to continue doing so, all of this with no discernable negative effect on the Cosentino's lifestyle.

Phyllis and Doug employed a maid from four to six hours every two weeks for approximately fifteen years. (T – 28-29, 70) They bought original art work and furniture (T – 57) and purchased gifts and boats as they pleased. (T – 53-54) Credit card bills were paid in full each month. (T – 54-55) Personal cars were paid for in cash, or, in the alternative, the couple drove cars which belonged to the medical practice at no personal cost to them. (T – 55) Phyllis and Doug had no liabilities. (T – 52) According to Phyllis, "anything we needed we were able to get." (T – 54) Phyllis and Doug lived the "American Dream".

Phyllis traveled to Italy in 2001 (T – 54-55), and also went to the Grand Hotel at Point Clear, Alabama (T – 50-51, Maine (T – 51), several times to Cancun, Mexico, and Disney World with the family (T - 54), the Appalachian trail with her daughter (T – 51), and at the time of the trial in June of 2003 she had just returned from eight days in Peru (T – 50-51).

During the thirty-two marriage, starting with nothing, the couple accumulated more than four million dollars in assets, down from more than eight million dollars because of the fall in the market, with absolutely no debt. (T – 52)

It is clear from the record that an important part of the couple's lifestyle was the ability to accumulate substantial savings as protection against future needs, while at the same time maintaining their luxurious lifestyle. There can be no justification under the unambiguous circumstances of this case for Doug to hoard the fruits of the marriage, now in excess of $25,000.00 free and clear monthly, while Phyllis, despite her unselfish devotion and hard work during the marriage, should be required to steadily spend her portion of the marital assets, leaving nothing for her old age or a rainy day, in order to live in the lifestyle to which under the law and given the resources, she has every right.

i. Tax consequences of the spousal support order:

Doug will deduct the alimony from his income for tax purposes, and Phyllis will pay federal and state taxes on any alimony she receives. Phyllis's alimony of $7,000.00 per month will be substantially reduced by mandated withholdings.

j. Fault or misconduct:

The parties agreed to divorce on the ground of Irreconcilable Differences, and no evidence of fault or misconduct was presented.

k. Wasteful dissipation of assets by either party:

There was none.

l. Any other factor deemed by the court to be "just and equitable" in connection with the setting of spousal support.

It was Doug's position at trial that Phyllis should not be entitled to any alimony because Phyllis had received a property settlement equal to his own. In fact, he was adamant that she should not get another dime. (T – 144). However, Doug, who received substantially the same property settlement as Phyllis, when asked whether he needed to make any more money, testified, "I don't know. I don't know what I am going to do with the rest of my life. I don't

know how much money I will need." (T – 145, lines 26-29.) Of course, this is true. Phyllis, too, cannot know with certainty what she may need in the future. And so, Doug is really no different from Phyllis in his need to continue to provide for his daily needs, to continue his luxuries, to save for the future, and to manage matters financially so that he does not have to diminish his portion of the marital property to maintain his current lifestyle. Doug's real problem is simply greed, typified by his responses to questions as follows:

> Q. "Now, Dr., don't you find it inside of yourself, in light of this lady's having worked and given every nickel she had to help you through medical school, don't you find it at least a proper thing that not only should you all divide what you earned, but that she should have some portion of that compensation for the fact that she worked and principally put you all through medical school."
>
> A. "No, I do not."
>
> Q. "Okay. You don't deny that is what happened, you just don't want her to have it, right?"
>
> A. "I would deny that Phyllis put me through medical school. I was going to go through medical school with or without Phyllis and the money she earned. I mean, you know, there were my parents, there were loans available. I mean, medical school was not going to go away without Phyllis."
>
> Q. "Well, you didn't have any problem taking her little paycheck when she brought it every week, did you?"
>
> A. "Taking her paycheck? I don't believe I took her paycheck."
>
> Q. You didn't tell her honey you don't need do that, you can save it, my parents will do that. You spent it didn't you."
>
> A. "We spent it."

(T – 147-148)

Doug cites *Johnson v. Johnson*, 650 So.2d 1281 (Miss. 1994), for the proposition that Phyllis is not entitled to an award of alimony because the marital assets were equitable divided. *Johnson v. Johnson* states, "If there are sufficient marital assets which, when equitably divided and considered with each spouse's non-marital assets, will adequately provide for both parties,

no more need be done." Doug asks whether it "can be seriously argued that Phyllis's portion of the marital estate ... would not adequately provide for all of her financial needs?" (Brief for Appellant, p. 18) This Supreme Court has answered the question before.

In a case involving marital property totaling $2,444,078.90, the Supreme Court affirmed an award of periodic alimony of $4,000.00 per month to the wife, leaving the husband with $25,918.00 of net monthly income after alimony and child support payments, which the Court determined was more than ample for him to lead a normal life with a reasonable standard of living. *Davis v. Davis*, 832 So.2d 492, 498-499 ¶ 21-22 (Miss. 2002).

In *Waring v. Waring*, the Supreme Court upheld a $4,200.00 per month periodic alimony award to the wife in a divorce involving four million dollars in marital property and the husband's yearly adjusted gross income was $409,396.00. *Waring v. Waring*, 747 So.2d 252, 254 (Miss. 1999).

Given the lifestyle of Dr. and Mrs. Cosentino, the value of the marital property, and the income, the alimony awarded by Judge Bradley can hardly be seen to be a major departure from these cases, let alone an abuse of discretion.

A major factor to be considered by the court in the determination of periodic alimony is whether there is a significant disparity in earning capacity between the parties. *Vaughn v. Vaughn*, 798 So.2d 431, 436 (Miss. 2001).

Obviously there is a huge disparity in earning capacity between Doug and Phyllis. Her earning capacity was diminished by her foregoing a career to raise their family. Even if she were to take the necessary steps and time to become recertified as a medical technologist, she would still need to obtain employment, something that may be difficult given her current age, begin work with no seniority and few benefits, and would receive a salary that clearly would never be

comparable to that of Doug no matter how long she worked.

The Supreme Court has held that "if an equitable division of marital property, considered with each party's non-marital assets, leaves a deficit for one party, then alimony should be considered. *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994).

There are no non-marital assets to consider. The testimony and evidence in this case demonstrate that, without alimony, Phyllis would clearly be left with a deficit in the sense that her financial standing can only weaken and Doug's strengthen as time passes.

Periodic alimony is granted when there is a long term relationship to enable the spouse to maintain herself as during the marriage. *See McDonald v. McDonald*, 683 So.2d 929, 931 (Miss. 1996); *Brennan v. Brennan*, 638 So.2d 1320, 1324 (Miss. 1994).

> The right to an award of periodic alimony flows from the duty of the husband to support his wife. The husband is required to support his wife in the manner to which she has become accustomed, to the extent of his ability to pay. The value of the wife's assets and income should be determined in order to ascertain her needs to maintain her position in life to which she had become accustomed, and such value is considered by the trial court in assessing both alimony and support. In other words, in determining the amount of alimony, if any, "[t]he chancellor should consider the reasonable needs of the wife and the husband's right to lead a normal life with a decent standard of living."

Brennan v. Brennan, supra, at 1324 (citations omitted).

Another element favoring alimony is the fact that Phyllis is no longer be eligible for medical insurance through Doug's practice; therefore she will have to pay for her own health needs. The chancellor has the ability to consider the issue of medical insurance when determining alimony. *See Weeks v. Weeks*, 832 So.2d 583 (Miss. App. 2002); *Driste v. Driste*, 738 So.2d 763, 766 ¶ 11) (Miss.App. 1998).

The Chancellor's decision to award alimony to Phyllis is manifestly correct based on the testimony and evidence in the record.

2. Reasonableness of the award:

With regard to reasonableness of the award of periodic alimony in the amount of $7,000.00, the Appellant argues that the award is excessive. However, in *Davis v. Davis*, 832 So.2d 492, 498-499 ¶ 21-22 (Miss. 2002) and *Waring v. Waring*, 747 So.2d 252, 254 (Miss. 1999), the Supreme Court upheld alimony awards in comparable cases where there were significant marital assets and each husband earned a large annual income, finding in each case that the husband would have more than ample income to maintain a normal life with a reasonable standard of living. This case dovetails with the facts of *Davis* and *Waring*. Here, there is clearly more income.

In *Hemsley v. Hemsley*, 639 So.2d 909, 912-913 (Miss. 1994), the Supreme Court set forth the following factors which should be considered in determining reasonableness of an award of alimony.

(a) Health of the husband and his earning capacity.

The record demonstrates Doug's health is good and his earning capacity is extremely good, and by his own testimony, is increasing.

(b) Health of the wife and her earning capacity.

The record shows that with the exception of migraines and depression caused by the breakup of her marriage, Phyllis's health is good. She has little if any earning capacity given the passage of decades since her last paid employment.

(c) The entire sources of income of both parties.

Without alimony, Phyllis must rely solely on income from her portion of the marital estate. Doug, in addition to his portion of the marital estate, can expect, as a direct result of the joint efforts of the parties, yearly income in excess of $500,000.00. Nobody knows what either

party will earn from investments. The record is devoid of any testimony in this regard, which in any event would be sheer speculation.

(d) Reasonable needs of the wife.

Phyllis has a reasonable anticipation of living in the manner to which she was accustomed during the marriage. Her monthly expenses at trial were in excess of $3,400.00 per month, excluding housing and automobile costs, and would increase after the divorce once she began paying full utility expenses, insurance and property taxes on the Pine Street home. Her monthly expenses did not include federal and state income taxes.

(e) Reasonable needs of the children.

This factor does not apply as both of the children are adults.

(f) Reasonable needs of the husband.

Doug disclosed income at trial of $28,080.00 plus $1,650.00 for rental income and $160.00 for dividends and interest, for a total of $29,890.00. (E – 9) His Financial Declaration showed total withholdings of $12,537.00, plus payroll deductions of $316.00 for disability insurance and $35.00 for liability insurance, leaving $15,200.00 per month in disposable income. (E – 9) His monthly expenses of $5,015.00 included $1,739.00 for the Bayou Sauvolle house, $842.00 for his camp in Louisiana, and office expenses of $501.00. (E – 9) Clearly his monthly expenses would significantly decrease once the Bayou Sauvolle house sold.

As previously discussed, Doug's total salary, including year end bonus, was significantly higher than that reflected on his Financial Declaration. In 2002, Doug's salary was $510,000.22, as shown by his W-2. (E – 8) His income for the current year of the divorce, including bonus, should net him in excess of $25,000.00 of disposable income after his withholdings for taxes were satisfied. After deducting $5,015.00 for his monthly expenses and $7,000.00 for alimony,

Doug should have approximately $13,000.00 remaining. Doug has so much excess income that he pays other physicians $126,000.00 per year so he can take off three months per year.

(g) The estimated amount of income taxes the respective parties must pay on their income.

Phyllis will pay taxes on alimony received, which will lessen Doug's tax liability. By the time Phyllis's taxes are paid, her net alimony will likely be less than $5,000.00.

Each party will pay taxes, if any, on their respective investment income.

(h) The fact that wife has free use of the home, furnishings and automobile.

There were no mortgages on the homes owned by the parties and no outstanding loans on furnishings or automobiles. However, Phyllis and Doug will each be required to pay taxes, insurance, utilities, and other related monthly expenses for their respective homes. Phyllis will also pay for gasoline, repairs, insurance, and the annual tag for her vehicle as well as the cost of purchasing another vehicle when needed. The record shows the medical practice provides Doug with use of one or more automobiles, at no personal expense to himself.

(i) Such other facts and circumstances bearing on the subject that might be shown by the evidence.

The Court's decision to award periodic alimony to the Plaintiff, Phyllis L. Cosentino, is supported by the totality of the facts and circumstances of this case. The needs of the parties for financial security with due regard to the income and earning capacity of each was considered, and the record clearly demonstrates that Doug has the ability to earn significantly greater income because of his expertise in a very specialized field while Phyllis has very limited job skills and can only maintain her lifestyle by spending the savings which were set aside by the couple to be used for retirement, an entirely inequitable situation.

The record supports the Chancellor's award of periodic alimony in the amount of $7,000.00, an amount that Doug is more than financially able to pay, and an amount that will allow Phyllis to maintain the standard of living to which she was accustomed during the marriage.

The general rule under which the amount of alimony is to be calculated provides that the recipient should be entitled to a reasonable allowance that is commensurate with the standard of living to which the parties were accustomed measured against the ability to pay on the part of the party subjected to the payment order. *Johnson v. Johnson*, 877 So.2d 485, 496 (Miss. App. 2004). See also *Gray v. Gray*, 562 So.2d 79, 83 (Miss.1990); *Rainer v. Rainer*, 393 So.2d 475 (Miss. 1981); *Jenkins v. Jenkins*, 278 So.2d 446 (Miss. 1973).

Based upon the foregoing, the Chancellor's decision to award alimony to Phyllis and the amount of the award is manifestly correct.

The Supreme Court "will not disturb the findings of a Chancellor unless the Chancellor was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Carrow v. Carrow*, 741 So.2d 200 (¶ 9) (Miss. 1999)

V. CONCLUSION

The trial court was manifestly correct in its analysis of the testimony and evidence as is reflected in the Findings of Fact and Conclusions of Law and Ruling After Remand for Further Findings. The Chancellor's decision to award alimony was appropriate in this case and is amply supported by the record. The lower court's decision should be affirmed.

Respectfully submitted,
PHYLLIS L. COSENTINO

BY: LAW OFFICES OF WENDY HOLLINGSWORTH PLLC

BY: _____
WENDY HOLLINGSWORTH

CERTIFICATE OF FILING AND SERVICE

I, WENDY HOLLINGSWORTH, do hereby certify that I have this day deposited in the United States mail, first class postage prepaid, the original and three copies of the Brief for Appellee to the usual and regular mailing address of the Clerk of the Supreme Court of the State of Mississippi, and a true and correct copy of the Brief for Appellee to the following at their usual and regular mailing addresses:

Chancellor Jaye A. Bradley — One copy of each
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SO CERTIFIED on this the 11th day of September, 2007.

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