IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RONALD RODRIGUEZ — APPELLANT / CROSS APPELLEE

VS. — No. 2007-CA-00132

ANNE RODRIGUEZ (ARMSTRONG) — APPELLEE / CROSS APPELLANT

COMBINED BRIEF OF APPELLEE AND CROSS-APPELLANT ANNE RODRIGUEZ (ARMSTRONG)

APPEAL FROM THE CHANCERY COURT
OF RANKIN COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible recusal.

1. Anne Rodriguez (Armstrong), Appellee and Cross-Appellant.
2. Ronald Rodriguez, Appellant and Cross-Appellee.
3. Wright Law Firm, P.A., whose attorneys are William R. Wright, W. Benton Gregg, and Tresa B. Barksdale, Attorneys of record for Anne Armstrong.
4. Michael P. Younger, Attorney of record for Ronald Rodriguez.
5. Honorable Thomas L. Zebert, Chancellor (Retired).
6. Honorable Dan Fairly, Chancellor.
7. Tamara Fulgham, Court Reporter.

SO CERTIFIED this the 10th day of April, 2008.

WILLIAM R. WRIGHT
W. BENTON GREGG
TRESA B. BARKSDALE

Attorneys of Record for Anne Rodriguez (Armstrong)

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3. The court below erred – not in its award of alimony – but in the monthly amount.

4. The court below committed manifest error by declining to properly consider Anne Armstrong's request for an attorney fee award.

II. STATEMENT OF THE CASE

A. NATURE OF CASE, COURSE OF PROCEEDINGS, AND DISPOSITION

This divorce case began with Anne Armstrong's *Complaint for Divorce* on March 2, 2006, against Ronald Rodriguez in the Rankin County Chancery Court. *Record Excerpts* ("R.E.") 3-6. Ronnie filed his *Answer to Complaint for Divorce and for Temporary Relief* on April 10, 2006. R.E. 16-17. Anne claimed Ronnie committed adultery; Ronnie denied the allegation. With the parties' agreement, the lower court bifurcated the issues to first address the issue of grounds. R.E. 22.

Chancellor Thomas L. Zebert heard the grounds portion of the case on September 22, 2006. The lower court entered its *Findings of Fact and Conclusions of Law* on October 9, 2006. R.E. 22-29. In the chancellor's view, Anne had "supported her grounds of adultery. . . . [and] met her clear and convincing evidentiary standard; based on Ronnie's own admissions, it is clear and convincing to this Court that Ronnie committed uncondoned adultery." R.E. 28.

Once Anne proved her ground for divorce, the chancellor directed the parties to prepare for hearing on all other issues, specifically the equitable division of assets, the appropriateness of alimony, and the allocation of attorney fees. R.E. 29.

The court reconvened on December 12, 2006, to consider remaining issues. On that date, Judge Zebert entered a *Judgment of Divorce*, and took under advisement the pending financial matters. R.E. 30-31.

The reconvened hearing started with the following exchange: "Are you going to do some stipulations . . . ? What about the stipulations up front and general?" *Transcript of Proceedings Conducted December 12, 2006* ("T2.") 4.[1] Counsel for Anne responded, "The stipulation is that there will be a 50/50 division of the marital assets and that will necessarily keep [Anne] from having to go through a lengthy *Ferguson* analysis." T2. 4. Counsel for Ronnie responded, "I'll stipulate." T2. 4.

At hearing's end on December 12, Judge Zebert instructed counsel to confer and agree on the components of the marital estate, as well as values. Counsel followed those instructions. The parties agreed on the components of the marital estate, and agreed on the values of most of those marital assets.

Counsel for the parties, also at the court's behest, then submitted competing proposed findings of fact and conclusions of law.

Anne's proposal meticulously divided the parties' assets equally, taking into account the value of each element of the marital estate. R.E. 62-81. Anne sought to honor the parties' stipulation to divide the property on a 50/50 basis.

Ronnie's proposal did not attempt an equal division. Yet, the lower court adopted Ronnie's proposed "Opinion and Order" in its entirety. R.E. 192-212. In fact, the

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[1]The lower court's earlier hearing is recorded in the *Transcript of Proceedings Conducted September 22, 2006* ("T1.").

chancellor's *Opinion and Order* dated December 22, 2006 (R.E. 34-53), is – in unerring and perfect duplication – Ronnie's submission received on December 21, 2006. R.E. 192-212.

It is from the *Opinion and Order* dated December 22, 2006, that Anne appeals. R.E. 34-53.

Before Anne addresses the issue on which Ronnie seeks review, and the three issues composing her cross-appeal, a unique procedural disadvantage must be noted. Judge Zebert heard this matter below. Then he retired. His able successor, Chancellor Dan Fairly, inherited the case and was immediately asked to rule on Anne's *Motion for Relief from Opinion and Order*, pursuant to MISS. RULE OF CIV. PRO. 60(a), (b)(2) and (6), filed on January 10, 2007. R.E. 55-61. Because he found it "difficult, if not impossible, to supplant his discretion over that of [Judge Zebert]", Judge Fairly denied Anne's post-judgment motion. R.E. 95.

Judge Fairly's position is understandable. However, the confluence of Judge Zebert's retirement and Judge Fairly's reticence worked to put RULE 60 out of Anne's reach. It stripped from Anne an opportunity for relief which may very well have been successfully seized.

Adding insult to injury, the post-judgment remedy denied to Anne – as a result of Judge Zebert's retirement – was available to Ronnie, who filed his *Motion for New Trial, or in the Alternative, Motion to Set Aside Judgment of Divorce* on December 18, 2006. R.E. 32.

Ronnie's request for RULE 60 relief was considered by Judge Zebert and denied. R.E. 54.

B. STATEMENT OF RELEVANT FACTS

The Rodriguezes married in 1969. T1. 4; T2. 12. Ronnie and Anne worked for

Amoco Production Company in New Orleans at the beginning of their marriage. T1. 6. They lived in New Orleans for about fifteen years. T1. 6.

In 1984, Ronnie's new job with Federal Land Bank required Ronnie to move to Jackson, Mississippi. T1. 31. Anne moved with her husband, and lost her job in the process. T1. 31. Anne's employment outside the home was sporadic following the move to Jackson. T1. 7, T2. 35. Both parties viewed Anne as the family's homemaker. Anne testified that she "took care of the children[2] and the home and Ronnie". T1. 7. Ronnie agreed, and testified that Anne was an "excellent" wife, homemaker and cook. T1. 31.

Though it was Ronnie's job that prompted the relocation from New Orleans to Jackson, Anne welcomed the move. T1. 26. The couple agreed that Anne would "stay home with the children" and Ronnie would "pursue . . . employment". T1. 32, T2. 36. As Ronnie stated, "[W]e are fortunate enough where we had the income where she didn't have to work, and that was – that, of course, was a luxury." T1. 32.

The parties' long marriage changed irretrievably when Ronnie admitted to Anne that he had committed adultery. Though she had reason to suspect it "one time", Anne's suspicions of Ronnie's adultery were confirmed when she confronted him on January 5, 2006. T1. 7-8. The January 5 confrontation resulted in a number of Ronnie's denials. T1. 9, 11. It also prompted Anne to record facts and feelings in a journal. Excerpts of her journal were admitted into evidence. T1.10, 28. Trial Exhibits P-1 and P-2; R.E. 104-07.

Following Ronnie's multiple denials, and Anne's continued queries, Ronnie "confessed to adultery . . . with two women" on January 7, 2006. T1. 11; R.E. 105.

During her testimony, Anne read from her diary. According to her diary, "He [Ronnie] told me, 'At least I was man enough to tell you,' and he said that Jesus forgave

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[2]The parties have two adult children in their thirties. T1. 5, 29; T2. 12.

an adulterer on the cross and who was next to him and why couldn't I forgive him.[3]" T1. 27; Trial Exhibit P-2, R.E. 105.

Ronnie's confession was recorded. The recording was admitted into evidence. T1. 12-14, 32-33; Trial Exhibit P-3.

The confession was the marriage's death-blow. Once Anne learned of Ronnie's infidelity, she left the marital home and moved in with her daughter. T1. 4-5. Instead of trying to convince his wife to come home, or otherwise acting like the concerned husband that he claimed to be at trial (T1. 37), Ronnie locked Anne out of the home and cut her off financially. T2. 12. Armed with a highschool education (T1. 6) and a few years of college (T2. 35), Anne was thrust back into the workplace at age 59. Ronnie gathered Anne's treasured personal belongings, such as antiques and collectibles, and stored them in a locked unit to which Anne had no access. R.E. 7-15.

When Anne left the marital home, she withdrew funds from a joint money market account. T2. 12-13, 54-55. She also withdrew amounts from two other joint accounts. T2. 13, 54. It was this money that sustained Anne during the pendency of the divorce proceedings, because Ronnie refused any periodic support. T2. 12, 59. A summary of these funds and Anne's use of them was admitted into evidence. T2. 14; Exhibit P-6; R.E. 109-10. She testified to an amount remaining after ten months of separation, of approximately $29,700. T2. 18; R.E. 111. At this point, Anne had paid about $21,300 to her attorney for legal fees. T2. 45.

The marital estate consisted of a house, with a value on which the parties agreed. However, this agreement came only after Ronnie forced Anne to go to the expense of an

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[3]While Ronnie's theological point might be well-taken, Anne's counsel on appeal finds no biblical reference to *adultery* as the transgression which led either of the two "sinners" to Christ's crucifixion.

appraisal. T2. 20; Trial Exhibit P-2; R.E. 169-182. Tippo Timber Club, a hunting camp of sorts, was valued by Anne to be approximately $84,000. T2. 20. Though agreement was attempted, this item's value was eventually disputed. T2. 20-21, 72. The parties had many items of personal property, including jewelry (T2. 10; R.E. 190); antiques and other furniture and collectibles (T2. 6; R.E. 183-188); boats and trailers (T2. 22); cars (T2. 21-22); and guns (T2. 22; R.E. 191). Trial Exhibits P-8, P-9 and P-10; R.E. 158-168. The parties also had money assets in the form of cash, pensions and IRA's. T2. 17-19.

Ronnie's income was established at trial to be $4,046 per month. T2. 71, 93; RE. 114. Anne's income was negligible. R.E. 97.

C. STANDARD OF REVIEW

This Court's review of divorce and related financial issues is limited by the substantial evidence/manifest error rule. Therefore, the findings below should not be disturbed "unless the chancellor was manifestly wrong, clearly erroneous or a clearly erroneous standard was applied." *Yelverton v. Yelverton*, 961 So. 2d 19, 24 (Miss. 2007). The appellate court is compelled to "respect a chancellor's findings of fact which are supported by credible evidence and not manifestly wrong." *Id.*

On the issue of adultery, this Court's standard of review has been described as "one of great deference". *Brooks v. Brooks*, 652 So. 2d 1113, 1117 (Miss. 1995). "Where the factual findings of the chancellor are supported by substantial credible evidence, they are insulated from disturbance on appellate review." *Id.* at 1117-18. A "clear and convincing" burden must be met. *Id.* at 1116.

As to property division and alimony, a chancellor's failure to make *Ferguson* findings and conclusions of law is manifest error requiring reversal. *Kilpatrick v. Kilpatrick*, 732 So. 2d 876, 881 (Miss. 1999) (applying equitable division mandates of *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994)). Additionally, given the

interconnected nature of financial awards available at the time of divorce, where a property division is reversed, an award of alimony must also be reversed. *Yelverton*, 961 So. 2d at 28-29.

Furthermore, it is reversible error not to consider all payments of support and division of property in relation to one another. *Id.* Again, this is a result of the interconnected nature of financial awards available at divorce. Where a chancellor does not consider all awards together, the appellate court should reverse and remand all awards "to allow the chancellor to consider . . . support and division of property together to arrive at an equitable and fair result on the issue of alimony and all other issues". *Id.*

An award of attorney fees at divorce is within a chancellor's discretion, as long as the chancellor follows the proper standards. *Creekmore v. Creekmore*, 651 So. 2d 513, 520 (Miss. 1995). Where the record shows an inability to pay attorney fees combined with a relative disparity in the parties' financial positions, an attorney fee award may be appropriate. *Hammett v. Woods*, 602 So. 2d 825 (Miss. 1992).

Finally, when a chancellor adopts verbatim the findings of fact prepared by one litigant's attorney, the appellate court will "analyze[*] such findings with greater care and the evidence [will be] subjected to heightened scrutiny". *Brooks*, 652 So. 2d at 1119. If the adopted findings are supported by substantial evidence, they will be affirmed, "unless the chancellor has abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied". *Id.*; *see also Wilson v. Wilson*, 811 So. 2d 342, 346 (Miss. Ct. App. 2001) (reversing and remanding Judge Zebert's decision where chancellor adopted in whole proposed findings of one litigant).

II. SUMMARY OF THE ARGUMENTS

Issue 1 – Grounds. Ronnie confessed adultery in a conversation that Anne recorded. Anne can be heard on tape asking: *"Ronnie, are you telling me you had sex*

with two strangers?" To that, Ronnie said: "*Yeah.*" Under oath at trial, Ronnie recanted his recorded admissions and denied the allegation. Ronnie tried to convince the chancellor that he had been faithful, and said what he did on tape only as an act of mercy. He wanted to calm his wife, he claimed. The judge was not convinced. Instead, the judge listened to the evidence and understandably pondered: Why would a man employ such a method to calm his wife? The chancellor called on his many years of experience on the bench, and drew from his own common sense to write: "an admission of two sexual encounters with two different women at two separate times would not bode well in calming a wife." R.E. 27. The lower court concluded: "There is no logical or believable reason for [Ronnie] to admit such hurtful misconduct unless it was true." R.E. 28. The chancellor applied the correct legal standard and properly granted Anne a divorce on the ground of uncondoned adultery.

Issue 2 – Division of Assets. At the start of the December 12, 2006, hearing, the chancellor learned that "there will be a 50/50 division of the marital assets and that will necessarily keep [Anne] from having to go through a lengthy *Ferguson* analysis." T2. 4. A written stipulation was accepted into evidence. Trial Exhibit P-1, R.E. 108.

Thus, the chancellor assented to an equal split. As a result, Anne did not put on evidence or testify to the factors within a *Ferguson* analysis. She forewent her right to provide proof on the issue of equitable division because the issue had been decided – she and Ronnie stipulated to a 50/50 division of all marital assets.

However, the chancellor completely frustrated the stipulation by later adopting wholesale Ronnie's proposed "Opinion and Order", and in so doing, adopting Ronnie's *unequal* division. Ronnie received far more of the marital assets.

Judge Zebert had a responsibility to ensure the division was an equal one, in line with the parties' stipulation. He did not. Alternatively, of course, the chancellor had

authority to deviate, but only upon a reasoned announcement of such deviation, and a thorough application of *Ferguson*. He did not do that, either. His failures are clear error. The issue of property division should be reversed and remanded to ensure a 50/50 division, or allow the chancellor to consider additional evidence in light of *Ferguson* and to make proper findings of fact and conclusions of law.

Issue 3 – Alimony. The court below erred, not in its award of alimony, but in the amount awarded. The amount awarded does not meet Anne's reasonable expenses.

The purpose of alimony is to provide for one spouse's reasonable expenses, in an amount affordable to the higher income-earning spouse. The evidence at trial showed Anne's reasonable expenses could not be met by the amount of support awarded. Further, the evidence showed that Ronnie is capable of providing Anne with more support.

Importantly, the chancellor failed to make *Armstrong* findings of fact and conclusions of law. Instead, the chancellor adopted verbatim one litigant's proposed conclusions. The chancellor's failure to make *Armstrong* findings is itself manifest error, requiring reversal and remand. This is especially true, given the heightened scrutiny an appellate court applies when a chancellor adopts verbatim the findings of fact prepared by one litigant's attorney.

Finally, where a property division is reversed, an award of alimony must also be reversed.

Issue 4 – Attorneys Fees. The chancellor denied Anne's request for attorney fees without making required findings of fact. Instead, the chancellor adopted word-for-word the proposed conclusions, without findings, of the opposing party's attorney.

Additionally, as an award of attorney fees is a financial award available at divorce, the issue of attorney fees should be reversed, and the remanded issue considered together with other financial awards of property division and alimony.

Though Judge Zebert failed to make attorney fee findings, the record shows Anne demonstrated an inability to pay her fees and a significant disparity in the parties' financial positions.

For these reasons, the issue of attorney fees should be reversed and remanded for proper consideration by the trial court.

III. ARGUMENT

1. The court below applied the correct legal standard and properly granted Anne Armstrong a divorce on the ground of uncondoned adultery.

Adultery may be proved by clear and convincing evidence of: (1) an infatuation for a particular person of the opposite sex; and (2) a reasonable opportunity to satisfy that infatuation. *Arthur v. Arthur*, 691 So. 2d 997, 1000-01 (Miss. 1997).

Adultery may be established by a defendant's admissions. *Rushing v. Rushing*, 724 So. 2d 911, 914 (Miss. 1998). No corroboration is needed if the defendant admits adultery. *Sproles v. Sproles*, 782 So. 2d 742, 746 (Miss. 2001). Taped recordings of conversations may be admissible to prove adultery. *Ferguson*, 639 So. 2d at 931.

Anne offered as evidence a tape recorded confession of Ronnie's adultery. Trial Exhibit P-3, *Cassette Tape "Confession"*. The tape was played at the hearing. T1. 14.

Ronnie said on tape, when his affairs were mentioned: "I'm sorry, more than you'll ever realize." Trial Exhibit P-3, cassette at counter 165-66. Anne then posed this question: "Why did you have an affair?" In response, Ronnie said: "I don't know. . . . I regret it deeply." Trial Exhibit P-3, cassette at counter 167-69. The tacit admissions don't stop there. Anne followed up her question with another: "Was it more than one?" Ronnie answered: "I've done some bad things. Please forgive me. I did a stupid thing." Unsatisfied, Anne reworded: "How many women did you have sex with, Ronnie?" He quietly admitted: "A couple." This admission is found on Trial Exhibit P-3, cassette at

counter 194-195.

Understandably upset, Anne wanted names. To those questions, Ronnie declared: "I don't even remember their names." Trial Exhibit P-3, cassette at counter 197-199. With this statement, Ronnie admitted adultery, though he could not (our would not) reveal the individuals with whom he had been unfaithful. Anne obviously did not believe Ronnie had forgotten the women's names. At least, that is the inference Ronnie drew, because he can be heard saying: "I swear! Get the Bible, go get the Bible! I don't even remember their names. That's how much they meant to me. I'll swear to that. Go get the Bible." This emotional plea followed: "forgive me . . . I want you to forgive me." These statements, each an overt admission of adultery, are part of a sequence found in Trial Exhibit P-3, cassette at counter 200-240.

When Anne pressed for names, Ronnie reiterated that he didn't remember. "I don't know the names. I swear. Get the Bible." Trial Exhibit P-3, cassette at counter 240-242. Ronnie was able to place the two admitted affairs, at least geographically. He told Anne that one was in New Orleans and the other was in Jackson.

Unconvinced with Ronnie's inability to remember his lovers' names, Anne asked: "Ronnie, are you telling me you had sex with two strangers?" To that, Ronnie answered "Yeah." This admission is contained in Trial Exhibit P-3, cassette at counter 255-256.

Again, the tape reflects Ronnie's remorse. He states, at cassette counter 260-265, "please forgive me. I'm sorry." Ronnie repeatedly pleaded for his wife's faith, and insisted on taking an oath. Ronnie can be heard specifically and repeatedly saying "I'll swear to it, go get the Bible". (For instance, see Trial Exhibit P-2, cassette at counter 271). An objective listener is sure that Ronnie considered what he was saying to be gospel truth.

Still using his oath, Ronnie said: "I swear that since we moved to Jackson, I've not

had sex with anybody. I swear to the Good Lord, the unborn child, my children, my dad's grave." When Anne interrupted with a suggestion "once in New Orleans and once [inaudible]?", Ronnie acknowledged the truthfulness of his adultery by saying "yes". This exchange is found in Trial Exhibit P-3, cassette at counter 274-279.

Anne again asked Ronnie, "who are they?" Ronnie was consistent: "I don't even remember." She asked "how long did you know them?" Ronnie said: "not long . . . I don't know. That's how much they meant to me. . . . I don't know their names." These statements and admissions are found in Trial Exhibit P-3, cassette at counter 280-281.

Predictably, Ronnie repeated: "Get the Bible . . . I'll swear to you again. Get the Bible. I don't know their names." These statements are found in Trial Exhibit P-3, cassette at counter 285-300. Ronnie, with each assertion of an inability to remember names, tacitly admitted to the affairs. He confirms instances of adultery while concealing paramours' identities.

Ronnie's most specific admission of sex outside of marriage came at Trial Exhibit P-3, cassette at counter 318-322. "I have not had sex, I have not had sex, and I swear on my mother's grave, my grand babies, my grandchildren, my life, I have not had sex with a woman since I've been in Jackson, Mississippi, only those other two."

Ronnie said to Anne about his admitted affairs: "at least I was man enough to tell you." Also, he told Anne by way of seeking *her* forgiveness, "Jesus forgave an adulterer when he was on the cross." R.E. 105.

At trial, these recorded confessions of adultery were recanted. At trial, Ronnie repeatedly asserted his fidelity, and denied the allegation of adultery. T1. 36-39, 45.

Anticipating the obvious question, Ronnie tried to explain how he could say one thing to his wife, then say the opposite under oath: "I thought she was going to crack. So . . . I knew if I admitted to [adultery]...it would difuse[] the conversation." T1. 37, 39.

According to Ronnie, he calmed his wife by admitting to sex with other women. He reworded his amazing explanation: "I fabricated this thing . . . to please her". T1. 45.

Left unexplained is how he could fabricate such a tale, including geographical locales, but be unable to cobble together a couple of made-up names. Indeed, it was unexplainable. The chancellor simply did not believe Ronnie. "There is no logical or believable reason for him to admit such hurtful misconduct unless it was true." R.E. 28.

The chancellor considered the evidence, used the appropriate standard and correctly concluded that Ronnie was guilty of adultery. R.E. 28. The chancellor, in his *Findings of Fact and Conclusions of Law*, went to considerable lengths to articulate the standard and focus on the evidence. R.E. 23-25, 26-28.

The lower court heard Ronnie admit to adultery. The tape recording, admitted into evidence, contained these words, at tape counter 318-322: "I have not had sex, and I swear on my mother's grave, my grand babies, my grandchildren, my life. I have not had sex with a woman since I've been in Jackson, Mississippi, only those two." R.E. 23, at subparagraph 5. Therefore no corroboration is needed. *Rushing*, 724 So. 2d at 917.

That admission is properly part of the record, and like the "open court" admission of *Rushing*, it supports the lower court's conclusion that adultery was proved. That the tape recording is in direct conflict with Ronnie's trial testimony should not matter now. The trial court is uniquely in a position to weigh such a departure of stories and draw his conclusions. *Culbreath v. Johnson*, 427 So. 2d 705, 708 (Miss. 1983) (deference afforded trial judge who "saw . . . witnesses testify. . . . [had] the benefit of their words . . . observed their manner and demeanor. He was there on the scene. He smelled the smoke of battle.") That is undoubtedly what Judge Zebert did, and he rightly reached the conclusion that "the plaintiff has supported her grounds of adultery". R.E. 28.

This Court should affirm the chancellor on this issue.

2. The court below erred in its division of the marital assets.

The chancellor's division in the *Opinion and Order* was not equal. Nowhere in this appeal is the lack of RULE 60 relief more harmful to Anne than here.

The hearing on December 12, 2006, began with the chancellor asking: "Are you going to do some stipulations . . . ? What about the stipulations up front and general?" T2. 4. Counsel for Anne responded, "The stipulation is that there will be a 50/50 division of the marital assets and that will necessarily keep [Anne] from having to go through a lengthy *Ferguson* analysis." T2. 4. Ronnie's counsel agreed, "I'll stipulate." T2. 4. The parties offered Trial Exhibit P-1, "*Stipulation*". R.E. 108. Therefore, a *Ferguson* analysis was not needed. Anne forewent any offer of *Ferguson* evidence, reasonably relying on the efficacy of her stipulation. She understood that only a math equation remained. But, the chancellor did not do the math. The *Opinion and Order* eviscerated the stipulation without separately performing a *Ferguson* analysis.

The trial court had a responsibility to ensure an equal division. By adopting Ronnie's division without any edit at all, the court failed to affect the parties' agreement.

If adoption of Ronnie's proposal was the hurried and unintentional act of a judge in the week of his retirement, then that mistake should be corrected. Again, RULE 60 was unjustly out of Anne's reach. On the other hand, if the chancellor was thoughtfully deliberate in disparately dividing the assets, he should have announced his disregard of the 50/50 stipulation and proceeded to analyze *Ferguson*. He did not. Such an omission cannot withstand this Court's heightened scrutiny demanded by *Brooks*, 652 So. 2d at 1119 (verbatim adoption of findings of fact prepared by one litigant's attorney analyzed "with greater care" and subjected to "heightened scrutiny").

The parties agreed, and this Court ordered, that the equity in the marital home would be divided equally upon its sale. R.E. 34. Therefore, that component of the

marital estate was to essentially be a "wash". The parties generally agreed that the parties' personalty items were equally valued. Therefore, that component should have also been a "wash". However, the *Opinion and Order* deviated, and awarded Ronnie additional items, without commensurate awards to Anne:

a. the net value of Tippo Timber Hunting Camp ($60,000);

b. the house trailer ($6,000);

c. the boat and trailer ($8,000); and

d. the difference in value of cars ($1,800 in Ronnie's favor).

R.E. 34-39. The *Opinion and Order* awarded to Ronnie these items, collectively valued at $75,800. There was no dispute over to whom these assets were to be awarded. Yet the court, despite the 50/50 stipulation, failed to calculate these values and give Anne equivalent value elsewhere in the division.

Then, the *Opinion and Order* widened the disparity by dividing money like this:

Asset	***Net value***	***Anne***	***Ronald***
AmSouth Savings (AR)	$ 1,000	$ 1,000	
AmSouth checking (AR)	$ 21,268	$ 21,268	
R'mond James IRA (AR)	$ 22,773	$ 22,773	
Cash in Anne's possession	$ 12,700	$ 12,700	
R'mond James Pension (RR) (#2024256)	$281,700	$140,850	$140,850
R'mond James IRA (RR) (#70507369)	$ 52,300		$ 52,300
B'Plus Checking #...4427	$ 4,456		$ 4,456
AG First Farm Credit	$ 13,500		$ 13,500
totals	***$409,697***	***$198,551***	***$211,106***

Opinion and Order, at Exhibit 4. R.E. 53.

This division heightened Anne's disadvantage. The money division was hardly "equal" in and of itself. Then, matters were further skewed in Ronnie's favor with the court's footnote below its "Exhibit 4". R.E. 53. The court's justification for *not* dividing the ...7369 Raymond James IRA was a necessary "offset" against funds Anne "withdrew". R.E. 53. That is simply not supported in the facts. That is bad math. That justification is a self-serving, fact-twisting statement penned by a litigant's counsel. The testimony does not indicate such a need. Moreover, the $22,000 was not missing. It was allocated to Anne – and it still existed at trial. T2. 50. To allocate the asset to Anne, then "credit" it to Ronnie as an offset is double dipping at its worst.

Even if this Court were to somehow find reason to account for money Anne "liquidated", R.E. 53, which is an allegation unsupported in testimony, and one which Anne disputed, T2. 13-14, the *Opinion and Order* punishes Anne. Regarding the money Anne "took", as Ronnie alleged, Anne's IRA ($22,773) was still accounted for on the list allocated to her in the *Opinion and Order*.

Anne did use the roof money ($8,400), as mentioned by the lower court, but she needed those funds for support during the pendency of this action – a duration of over ten months. T2.12. She did not take $52,000, as suggested in Ronnie's submissions, and swallowed blindly by the chancellor. Indeed, the money was still largely intact at the time of trial, T2. 13, 51, and reflected in the list of assets as "cash in Anne's possession" ($12,700), AmSouth Checking ($21,268), and AmSouth savings ($1,000). R.E. 111.

Again, the lower court allocated the money to Anne, as reflected in the list, then give Ronnie a credit, as if the money no longer existed. Anne directly refuted such a notion, saying: "No. I have not touched [the IRA] . . . Its still with Raymond James." T2. 13-14; Trial Exhibit P-6; R.E. 109-110. This was ignored by the lower court.

The chancellor's division wrongly but obviously presupposed that Ronnie had

expended absolutely no marital funds during the pendency of the divorce case, as there was no notation (nor credit to Anne) for what funds Ronnie "took" to support himself.

The lower court could have avoided the inequality, and followed the parties' equal stipulation. There existed enough funds to equalize the division. With a division of the Raymond James Pension (No. ...4256), the court could have – should have – awarded Anne a commensurate amount equal to one half of the values of the hunting camp, house trailer, boat and the difference in value of the car. That was not done, though it should have been, in order to comport with the parties' stipulation. This idea was mentioned by Anne's counsel with no apparent impression on the judge during trial. T2. 85-86.

The lower court made the further mistake or oversight of awarding Ronnie a list of personalty which included several valuable assets, such as the 4-wheeler and three rugs, without remuneration to Anne. See "Additional Things For Ron", attachment to Exhibit 2, incorporated into *Opinion and Order*; R.E. 49. The values of these items were not accounted for. The lower court's adoption of Ronnie's proposed "Opinion and Order" resulted in Ronnie getting personalty – merely spitefully demanded – not in keeping with the stipulation. The lower court should have never awarded to Ronnie some of the items which were uniquely personal to Anne. T2. 29, 31. For instance: "two wooden shadow frames for Christening outfits", "framed stain glass antique", "ceramic roosters", and a "wedding portrait". R.E. 49. These items, among others, were Anne's, and Ronnie requested them purely from a mean spirit. In any event, these items have value, which were wholly ignored by the lower court. According to Anne, she "was trying to be fair. The things that he had from his family, I think he should keep. I just tried to be fair when I – there were some things that my children have given me, just gifts to me that I thought that I should keep." T2. 31; Trial Exhibits P-8, P-9 and P-10; R.E. 158-168.

Again, the lack of RULE 60 relief was a disaster for Anne. This Court should

remand this issue for equity to be achieved. The lower court simply did not do its math to ensure the *Opinion and Order* affected the parties' stipulation.

If it *did* do the math, and intended the unequal result achieved, then the lower should have announced its departure, explained that departure and proceeded to "equitably" divide the marital estate, supporting each finding pursuant to the factors of *Ferguson* and its progeny. A failure at this point is clear error, requiring reversal. *Fisher v. Fisher*, 771 So. 2d 364, 369 (Miss. 2000) (failure of lower court to make specific findings of fact and conclusions of law results in "no choice but to remand . . . so that the trial court may complete its task."). This Court's scrutiny should be particularly heightened where, as here, a chancellor has adopted verbatim findings of fact prepared by one litigant's attorney. *Brooks*, 652 So. 2d at 1119.

The chancellor did not affect the parties' stipulation; the division was simply not equal. While the lower court has authority to disparately allocate the marital estate, he must do so equitably, following the tenets of *Ferguson*. That was not done. Such failure is manifest error, demanding reversal and remand. *Kilpatrick*, 732 So. 2d at 881.

In the alternative, this Court should remand this matter with a directive for Judge Fairly to reconsider Anne's RULE 60 motion.

3. The court erred, not in the award of spousal support, but in the amount.

Though Judge Zebert properly found alimony appropriate, the amount awarded – $300 per month – does not meet Anne's needs. The award of alimony should be reversed and remanded for proper consideration under *Armstrong*. This is especially evident, given the chancellor's verbatim adoption of Ronnie's proposed "Opinion and Order".

The purpose of periodic alimony is to provide for the reasonable expenses of a lower income-earning spouse, in an amount affordable to a higher income-earning spouse, if these reasonable expenses cannot be met by the equitable division of property.

"If the situation is such that an equitable division of marital property, considered with each party's non-marital assets, leaves a deficit for one party, then alimony based on the value of the non-marital assets should be considered." *Lauro v. Lauro*, 847 So. 2d 843, 848 (Miss. 2003) (reversing and remanding alimony award to be considered together with equitable distribution and other financial awards). Further, "a wife is generally entitled to periodic alimony when her income is inadequate to allow her to maintain her standard of living and when her husband is able to pay." *Heigle v. Heigle*, 654 So. 2d 895, 898 (Miss. 1995).

Once the chancellor has perceived a deficit, *Armstrong v. Armstrong*, 618 So. 2d 1278 (Miss. 1993) controls an alimony analysis. In determining an award of alimony, the trial court must consider the following factors:

1. The income and expenses of the parties;
2. The health and earning capacities of the parties;
3. The needs of each party;
4. The obligations and assets of each party;
5. The length of the marriage;
6 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;
7. The age of the parties;
8. The standard of living of the parties, both during the marriage and at the time of the support determination;
9. The tax consequences of the spousal support order;
10. Fault or misconduct;
11. Wasteful dissipation of assets by either party;

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

Armstrong, 618 So. 2d at 1280.

At trial, the evidence showed Anne's reasonable expenses, such as health insurance, utilities, and rent, cannot be met by the amount of spousal support awarded, after proper consideration of Anne's marital and non-marital estates. Further, the evidence showed Ronnie can afford to provide more sufficiently for Anne.

Complicating matters, the trial court failed to make *Armstrong* findings. Instead, Judge Zebert adopted Ronnie's proposed "Order and Opinion".

A point-by-point analysis of the facts of this case, according to *Armstrong*, should have taken this evidence into consideration.

1. The income and expenses of the parties.

The parties' incomes differ dramatically. Historically, Ronnie worked outside the home. T1. 32; T2. 36. Anne did not; instead, she remained "home with the children". T2. 36. As Ronnie testified, "[W]e are fortunate enough where we had the income where she didn't have to work, and that was – that, of course, was a luxury." T1. 32.

Ronnie testified to a monthly retirement income of $4,064. T2. 93. His income estimate did not include income Ronnie received buying, selling, and trading guns for the last twenty years. T2. 121. At the time of trial, Ronnie received $1200 per month in Social Security benefits and managed a pension of $281,000. He also has a master's degree. T2. 41, 93, 107-08.

Anne, by contrast, did not have the opportunity to accumulate a retirement nest-egg while working in the home. A high-school graduate, Anne has never made more than $100 per week. Further, Anne did not work out of the home, so she cannot receive Social Security benefits until later in life than Ronnie, and at an amount much lower than that

afforded to Ronnie.

The parties' respective financial statements evidence the dramatic income disparity. R.E. 96-103, 113-139.

While Ronnie testified that his expenses exceeded his income, his expenses included a $1,311 per month expense for "maintenance expenses" and a $645 per month expense for "incidental expenses". T2. 116, 128; R.E. 96-103. These numbers are not reasonable expenses, and should be given greater scrutiny by the trial court upon remand.

Unlike Ronnie, who has enjoyed the financial benefit of remaining in the marital home, Anne's expenses include start-up costs as well as rent, health insurance, utilities, gas, and automotive expenses. T2. 45; R.E. 34.

A thoughtful consideration of this *Armstrong* element strongly suggests the appropriateness of substantial alimony to Anne.

2. The health and earning capacities of the parties.

Both parties are healthy. T2. 36.

Because Ronnie spent his career in the workforce, and Anne spent hers in the home, the parties' earning capacities differ dramatically. Ronnie, who has a master's degree and work experience, has marketable skills; Anne does not.

Further, Ronnie's retirement nest egg eases, for him alone, the urgency to work full-time in order to cover reasonable expenses.

This second element supports an award of substantial alimony to Anne.

3. The needs of each party.

Anne's share of the marital estate includes the illiquid assets of the home, some furniture, an automobile and some retirement funds. Anne cannot use these assets as a stream of income to cover reasonable expenses. Anne needs a steady stream of income to help her cover her reasonable expenses. Three hundred dollars per month cannot cover

reasonable expenses.

Ronnie, on the other hand, will have his needs met by a continuing stream of part-time income, and retirement assets.

Given these facts, alimony is not just appropriate; it's vital for Anne.

4. The obligations and assets of each party.

Had the Opinion and Order adhered to the parties' stipulation, by evidencing a 50-50 division of the marital estate, this factor would be balanced, favoring neither.

However, as it stands, however, Ronnie has received far more of the parties' assets, accumulated over their thirty-seven year marriage.

The parties' obligations are disparate as well, as Ronnie has enjoyed the benefit of occupancy of the marital home since divorce.

5. The length of the marriage.

Ronnie and Anne were married for thirty-seven years. T2. 36. Anne was a stay-at-home mother and wife for a majority of the marriage. The parties reared two children, both of whom are now adults. Anne took care of the home, the children, and Ronnie for thirty-seven years. She did it well. T1. 31. Over the four decades, Anne had become accustomed to a lifestyle that is necessarily dependent on Ronnie's financial contribution. That lifestyle included a large house, a large boat, and extensive travel. T2. 37-38.

The length of this marriage supports an award of significant alimony.

6 The presence or absence of minor children in the home.

There are no children in the home.

7. The age of the parties;

At the time of trial, Anne was a fifty-nine year-old, non-income earning female; Ronnie was a sixty-four year-old, income-earning male with a supplemental retirement income. T2. 36-37.

Anne is of an age that will make it difficult for her to reenter the market place to earn a significant income to cover her expenses. Alimony to Anne is necessary.

8. The standard of living during marriage; at time of the support determination.

Before Ronnie's adultery caused the break-up of the marriage, the parties had a financially comfortable life together. Their residence was expensive, valued at more than six-hundred thousand dollars. T2. 37; R.E. 169-182. Family heirlooms and antiques filled the home, situated on a water-front lot. T2. 38. Each party drove a nice automobile. The parties owned a twenty-six foot boat. T2. 38. Ronnie was historically a member of an expensive hunting club. He also owns many expensive guns, a four-wheeler and a camp home. Trial Exhibit D-14; R.E. 191.

By all measures, the Rodriguezes were doing well. Now, however, because of Ronnie's adultery, Anne must live apart and with less.

At age 60, after four decades as a homemaker, Anne must struggle from paycheck to paycheck, as an unskilled employee with a meager salary unable to cover her reasonable expenses. What Anne needs and deserves is alimony "to allow her to maintain her standard of living and when her husband is able to pay". *Heigle*, 654 So. at 898.

Anne has precious little retirement security, zero long-range job prospects, now, no way of supporting herself in the lifestyle to which she had grown accustomed. This *Armstrong* factor strongly suggests a larger award.

9. The tax consequences of the spousal support order.

Periodic alimony is deductible to the payor and taxable to the payee, a benefit to the payor. This factor supports an alimony award.

10. Fault or misconduct.

Ronnie's uncondoned adultery caused the demise of this marriage. Ronnie's

misconduct strongly supports an award of alimony.

11. Wasteful dissipation of assets by either party.

Not applicable.

12. Any other factor making alimony "just and equitable".

The parties decided decades ago that Anne would focus on the home instead of the marketplace. That crucial decision now places Anne at a considerable financial disadvantage.

If meaningful alimony is not awarded to Anne, Anne will be punished for her years of service to Ronnie, their home, and their children. This cannot stand.

If meaningful alimony is not awarded to Anne, Ronnie will be unjustly *rewarded* for his unfaithful conduct. He will have enjoyed the privilege of a stay-at-home wife to raise his children and to care for his needs, then he will have the ability to abandon her financially in her later years – precisely when her chances of making an income diminish. This result would be a totally inequitable award for Ronnie's uncondoned adultery.

The superb quality of Anne's work in the home supports an award of alimony. According to Anne, "I did everything he ever wanted me to do. I – as he stated in his deposition, I was a wonderful wife, friend, mother, housekeeper, cook. I did everything for him and more." T2. 39. Ronnie agreed wholeheartedly. T1. 31. This fact supports an award of significant periodic alimony.

Also, in 1994, Anne received an $100,000 inheritance. As Anne and Ronnie both testified, Ronnie asked Anne to turn the total inheritance money over to him. T2. 40, Instead of investing this money as security for the future, Anne gave it to her husband, who spent it. This fact supports an award of significant periodic alimony.

Further, Ronnie prolonged the divorce process, at times unnecessarily. The parties had expensive disputes over property values. R.E. 169-191. When Anne moved out,

Ronnie secreted away Anne's family heirlooms and antiques to a non-climate controlled storage facility for no productive purpose. T2. 30; R.E. 7-15. These facts strongly suggest alimony a fifty-nine year-old (now age 60) high-school graduate who cannot cover her reasonable expenses after working as a homemaker for thirty-seven years.

The chancellor failed to consider any of the factors outlined above. He ignored *Armstrong* completely. Instead, the chancellor adopted – word-for-word – one litigant's proposed conclusions, without findings.

The chancellor's failure to make *Armstrong* findings is manifest error, requiring reversal. This is especially true, given the heightened level of scrutiny demanded by *Brooks*, 652 So. 2d at 1119 (holding where a chancellor adopts verbatim findings of fact prepared by one litigant's attorney, the appellate court will "analyze[*] such findings with greater care and the evidence [will be] subjected to heightened scrutiny").

In conclusion, because the lower court failed to make a *Ferguson* analysis after adopting the proposed "opinion and Order" prepared by Ronnie's attorney, this issue should be reversed and remanded. Also, under *Yelverton*, where a property division is reversed, an alimony award must also be reversed.

In the alternative, this Court should remand this matter with a directive for Judge Fairly to reconsider Anne's RULE 60 motion.

4. *The court below should have awarded attorney fees to Anne Armstrong.*

The trial court improperly denied Anne's request for attorney fees. This is reversible error. First, the chancellor denied her request without making required findings of fact. Second, Anne demonstrated an ability to pay and a significant disparity in the parties' financial positions. Third, an award of attorney fees is a financial award, which, under *Yelverton*, should be reversed and remanded for proper consideration with other financial awards, including equitable distribution of the marital estate.

An award of attorney fees in a divorce case is within a chancellor's discretion, so long as he follows the proper standards. *Bates v. Bates*, 755 So. 2d 478, 482 (Miss. Ct. App. 1999) (citing *Creekmore*, 651 So. 2d at 520). Where the record shows an inability to pay attorney fees combined with a relative disparity in the parties' financial positions, an attorney fee award may be appropriate. *Bates*, 755 So. 2d at 482. Evidence of the relative worth of the parties, standing alone, will not support an award; the record must also reflect an inability to pay. *Id.* (citing *Benson v. Benson*, 608 So. 2d 709, 712 (Miss. 1992)).

A chancellor must make findings of fact before making an attorney fee determination. *Heigle v. Heigle*, 771 So. 2d 341 (Miss. 2000) (reversing order requiring husband to pay attorney fees "[b]ecause the chancellor made no findings as required by this Court"). If a court fails to make findings, the appellate court should reverse. *Hankins v. Hankins*, 729 So. 2d 1283, 1286 (Miss. 1999) (reversing and remanding fee award where "chancellor made no determination as to whether [wife] was able to pay her attorney's fees"); *Overstreet v. Overstreet*, 692 So. 2d 88, 92-93 (Miss. 1997) ("Attorneys' fees should not be awarded unless the chancellor finds that the party requesting attorney fees can establish an inability to pay"). A chancellor must make findings, regardless of proof in the record. *Gambrell v. Gambrell*, 650 So. 2d 517, 521 (Miss. 1995) (reversing award and remanding for findings even though there was evidence of inability to pay).

In *Bates v. Bates*, the Mississippi Court of Appeals reversed and remanded a denial of attorney fees where the requesting spouse presented proof of an inability to pay and the trial court neglected to make findings. *Bates*, 755 So. 2d at 482-83 (affirming award to ex-wife of forty percent of marital business, $70,000 home, $20,000 car, and $15,491 IRA; reversing denial of $11,548.65 attorney fee request). The appellate court paid

particularly close attention to the ex-wife's inability to cover her expenses each month and the increased cost of attorney fees due to property disputes. *Id.*

When a requesting spouse receives, in an equitable distribution, few assets that can be easily liquidated, an attorney fee award is appropriate. *Stuart v. Stuart*, 856 So. 2d 295, 299 (Miss. Ct. App. 2006) (affirming fee award to spouse granted $250 monthly in periodic alimony and "substantial sums of money" from farm revenue); *Wells v. Wells*, 800 So. 2d 1239, 1246 (Miss. Ct. App. 2001) (affirming award to wife whose only liquid asset was alimony) (finding where wife's expenses exceeded her income, wife "should not be forced to liquidate her portion of [ex-husband's] retirement plan to pay attorney's fees"); *see also Hemsley v. Hemsley*, 639 So. 2d 909, 915 (Miss. 1994) (noting wife need not liquidate her savings account to pay her attorney fees).

On December 22, 2006 Judge Zebert entered his *Opinion and Order*, a word-for-word adoption of Ronnie's proposed "Opinion and Order", prepared by his attorney.

The resultant *Opinion and Order* evidences the chancellor's failure to make attorney fee findings. The chancellor was required to make findings. This is reversible error.

Instead of impartially and judicially studying the evidence of Anne's inability to pay her fees and the disparity in the parties' financial positions, the chancellor applied a judicial "rubber stamp" to Ronnie's proposed judgment.

Paragraph IX of the *Opinion and Order* contains the only mention of fees: "Each party shall be responsible for their [sic] own attorney's fees". RE. 39. There is no mention of testimony and evidence offered by Anne. No mention of an inability to pay. No mention of the reasonableness of Anne's fees. No mention of net worth. RE. 34-37.

The facts of two recent Mississippi Court of Appeals cases, *LaRue v. LaRue* and *Stuart v. Stuart*, resemble the case at hand.

In *LaRue*, Mr. and Mrs. LaRue's twenty-one year marriage ended in a divorce on irreconcilable differences grounds. Mrs. LaRue was seventy years old; Mr. LaRue was eighty-four. Mrs. LaRue, a high school graduate, had worked ten years as a city court clerk before the marriage. She did not work during the marriage, at her husband's request. Mrs. LaRue's employment opportunities were restricted by her age, her lack of employment history, and her lack of marketable skills. *LaRue v. LaRue*, 969 So. 2d 99, 102 (Miss. Ct. App. 2007) (affirming property division, alimony, and attorney fee award). Further, Mrs. LaRue's monthly income could not cover her reasonable expenses. *Id.* at 103.

The chancellor awarded Mrs. LaRue the $123,890 marital residence, a 1994 Honda Accord, credit for half the value of the Honda against unpaid taxes and home insurance, no marital debt, $700 monthly periodic alimony, and $7,000 of her roughly $12,000 in attorney fees.

On appeal, Mr. LaRue argued his former wife failed to show an inability to pay fees, given her marital and non-marital estates. *Id.* at 112. The Mississippi Court of Appeals held: "[T]he evidence previously detailed concerning [Mrs. LaRue's] income, expenses, age, and inability to work supports the chancellor's finding that [Mrs. LaRue] lacked the ability to pay her attorney's fees". *Id.*

Mrs. Rodriguez's advanced age, lack of education, lack of work skills, and sacrifice during the marriage mirror that of Mrs. LaRue. Though Anne is sixty, where Mrs. LaRue was seventy, Anne cannot rely on ten years of experience as a city court clerk. Anne's whole life has been devoted to the home and family.

In *Stuart,* the parties were married for eighteen years. They divorced on irreconcilable differences grounds, unlike the Rodriguez's, who divorced on adultery grounds. In *Stuart*, the fifty-five year old wife was a high school graduate who raised the

couple's son and worked on the family chicken farm. Her husband directed the janitorial crew at the Veteran's Association Hospital in Jackson. *Stuart*, 956 So. 2d at 297-98. "The Stuarts had a nice home and enjoyed a comfortable standard of living during their marriage", the Court of Appeals noted. "After divorce, neither party will be able to maintain the same standard of living to which they were accustomed during the marriage". *Id.* at 298-99. In fact, Mrs. Stuart could no longer cover her expenses. *Id.* at 298. Affirming an award to her of forty acres of land, three chicken houses, all poultry equipment, a 1986 station wagon, a 1993 truck, half of her husband's Thrift Savings Plan, $250 monthly periodic alimony, the court of appeals held that a fee award of $10,000 was proper because the wife had few assets that could be easily converted into cash. *Id.* at 298-99.

Anne and Ronnie were married for thirty-seven years before Ronnie brought the marriage to an end. R.E. 31. Anne, a high school graduate, married Ronnie as a young woman, raised two children, and took care of the home. T2. 36-37. The sum total of Anne's employment history during the marriage is four months as a veterinarian's assistant and two years as a restaurant hostess. She never earned over $100 a week. T2. 35. At trial, all Anne had to her name was $16,000 in a checking account, $12,700 in cash, $1000 in a savings account, and $22,000 in an IRA. T2. 17-18. Anne is sixty years old. T2. 36. She does not receive Social Security benefits because she does not have a significant work history. T2. 38. At the time of divorce, Anne had no health insurance, no job, and no home. T(2). 41-42.

At trial, Anne presented evidence of her inability to pay attorney fees of $28,023.69. She testified that her fees were reasonable, and she provided the court with her lawyer's hourly rates. T2. 42-43, 48. Anne requested fees and introduced her

attorney's itemized bill without objection. (T2. 47-49; R.E. 140-157; Exhibit P-11).[4] Also, Anne reviewed her list of monthly expenses, amounting to $1344.90 per month, minus attorney fee expenses and before insurance, rent, and utility expenses. T2. 45-49, Exhibit P-6. Anne testified that her expenses far exceeded her income and provided the court with her MISSISSIPPI CHANCERY COURT RULE 8.05 financial statement. T2. 45-49, Exhibit ID-12).[5] It is unfortunate Anne no longer has the $100,000 of inheritance she gave to Ronnie in the mid-nineties. T2. 41.

Testimony and evidence was presented as to the disparity in the relative financial positions of the parties. Ronnie testified to a monthly income of $4,064. (T(2) 93). His income estimate did not include income Ronnie received for buying, selling, and trading guns for the last twenty years. T2. 121. Ronnie, who is retired, received $1200 per month in Social Security, managed a pension of $281,000, and has a master's degree. T2. 41, 93, 107-08.

While Ronnie testified that his expenses exceeded his income, his expenses included a $1311 monthly estimate for maintenance expenses and a $645 monthly estimate for incidental expenses. T2. 116, 128; R.E. 140-157. Ronnie's itemized income and expenses should be properly scrutinized by the trial court upon remand.

In the *Opinion and Order,* Judge Zebert granted to Anne one half the interest in the $600,000 marital home, but Ronnie was granted the right to remain in the home until its sale. The home was (and remians) an illiquid asset. The court granted Anne $16,000

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[4]Ronnie's attorney, Mike Younger, Esq., later disagreed with the time and substance of Anne's attorney bill only, not to the fact that the court should award Anne fees. (T(2) 87).

[5]Anne's expenses from her 8.05 financial statement, containing both approximate expenses and unknown future expenses – as Anne had no job, no home, and no continuous health insurance at the time of trial, was $2592.00. Anne's projected expenses cannot be covered by her income.

in her checking account, $12,700 in cash, $1,000 in a savings account, a $22,000 IRA, and $300 monthly in periodic alimony. Anne, who had no income after thirty-seven years as a homemaker, had requested $900 monthly in alimony. T2. 41. Anne also received the car in her possession, a riding lawn mower, and some personality. RE. 34-37.

The only liquid assets Anne received in the divorce, caused by Ronnie's adultery, was $300 per month in alimony, the cash in her possession, and her checking account. This is what Anne received after a thirty-seven year marriage broken by her husband's adulterous affairs, when Anne, a homemaker, was sixty years old. Anne was left without a home, without a decent chance to make a living, and without an ability to pay her attorney fees.

Where Mrs. LaRue received $7,000 in attorney fees and Mrs. Stuart received $10,000 in attorney fees, Anne request was denied without explanation and without the required findings of fact.

As in *Stuart*, few of Anne's assets can be easily liquidated to pay attorney fees. The Court of Appeals justified an award to Mrs. Stuart of $10,000 in attorney fees because her assets were illiquid. Here, Anne suffered the double blow of being awarded illiquid assets while being denied attorney fees. All the while, it cannot be forgotten that Mr. Younger wrote the *Opinion and Order* denying Anne fees. It cannot be forgotten that Ronnie's marital misconduct caused the break up of the thirty-seven year marriage.

Anne does not have the financial resources to pay her attorney fees. Under *Stuart*, *Wells*, and *Hemsley*, she should not be forced to liquidate her retirement account and savings account to pay attorney fees. Under *Hankins* and its progeny, this issue should be reversed and remanded for proper finding of fact regarding an inability to pay and a disparity in net worth. Under *LaRue* and *Stuart*, the trial court must properly consider Anne's financial position, her marital estate, and her non-marital estate, before

determining an attorney fee issue. Finally, under *Yelverton*, this issue should be reversed and remanded for proper consideration together with other financial awards, including equitable distribution of the marital estate.

In the alternative, this Court should remand this matter with a directive for Judge Fairly to reconsider Anne's RULE 60 motion.

IV. CONCLUSIONS

a. The lower court could not escape the only logical conclusion to the evidence before him. After hearing the tape-recording at trial, and balancing its content with Ronnie's explanations, the chancellor applied the correct legal standard and properly granted Anne a divorce on the ground of adultery. The lower court should be affirmed on this issue. Ronnie's appeal should be denied.

b. The lower court then sought to divide marital assets. However, he failed to follow the parties' stipulation. When he deviated, the court should have made findings of fact and conclusions of law. But, he did not. Further, he failed to value some items allocated to Ronnie, inappropriately credited to Ronnie funds which Anne did not "take", and failed to off-set such allocation with a like-valued asset or money. Finally, the chancellor awarded to Ronnie some items which were uniquely Anne's property. The lower court's division of marital assets should be reversed and the issue of property division remanded for further findings. Only thereafter will a fair result be possible.

c. The lower court should have awarded a higher monthly sum of alimony. Without offering any findings, the judge reached the terse conclusion that Anne was entitled to $300 per month. That sum is far from appropriate, given the facts of this case. The award of alimony should be reversed and remanded for further consideration.

d. Judge Zebert did not follow the law despite ample proof of Anne's inability to pay her attorney fees. This, combined with the chancellor's word-for-word adoption of

the proposed findings drafted by Ronnie's attorney, compels this Court to find reversible error. This Court should reverse the denial of attorney fees and remand the issue so the trial court may properly weigh Anne's request.

Respectfully submitted,

Anne Rodriguez (Armstrong),

Appellee and Cross-Appellant

BY: _____

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CERTIFICATE OF SERVICE

I mailed, postage prepaid, a true and correct copy of the above and foregoing *Combined Brief* to the following persons:

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SO CERTIFIED this the 10th day of April, 2008.

W. BENTON GREGG