IN THE SUPREME COURT OF MISSISSIPPI
NO.: 2007-~~TS~~-01185
CA

WILLIAM R. STRIEBECK — APPELLANT

VS.

RUTH ANN BRENT PROVENZA (STRIEBECK) — APPELLEE

(CONSOLIDATED WITH 2004-CA-00507-COA)

(On Appeal from the Chancery Court of Washington County, Mississippi
Ninth Chancery District, Cause No. 200425
Appeal After *Remand*)

****

REPLY BRIEF OF APPELLANT
(Oral Argument Not Requested)

****

OF COUNSEL:

WILLARD L. MCILWAIN, JR., ESQ.
MSB NO.: [redacted]
1024 WASHINGTON AVE., SUITE 104
P.O. BOX 519
GREENVILLE, MISSISSIPPI 38702-0519
(662) 378-5450

ATTORNEY FOR WILLIAM R. STRIEBECK
APPELLANT

CERTIFICATE OF INTERESTED PERSONS

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

1. William R. Striebeck
   Appellant

2. Willard L. McIlwain, Jr., Esq.
   Counsel for Appellant

3. Ruth Ann Brent Provenza (Striebeck)
   Appellee

4. Luther P. Crull , Jr., Esq.
   Counsel for Appellee

5. Honorable Dorothy W. Colom
   Special Chancellor(on *Remand*)

Respectfully submitted,

WILLIAM R. STRIEBECK

BY: Willard L. McIlwain, Jr. by mes
WILLARD L. MCILWAIN, JR.

OF COUNSEL:

WILLIARD L. MCILWAIN, JR.
P.O. BOX 519
GREENVILLE, MISSISSIPPI 38702-0519
(662) 378-5450

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EDITOR'S NOTE

Since this matter, Case No. 2007-TS-01185 (*i.e.* the remand case) has been consolidated with the closed case, Case No. 2004-CA-00507-COA,(*i.e.* the original case) then references herein to documents contained in the "Clerk's Original Papers" will be designated as (Original R.C.P. _____); references to documents contained in the "Clerk's Papers on *Remand*" will be designated as (*Remand* R.C.P._____); references herein to documents contained in the "Appellant's Record Excerpts" will be designated as (Appellant's R.E. _____); references to pages or testimony from the "Original Trial Record Transcript" will be designated as (Original R.Tr._____); references to pages or testimony from the "*Remand* Trial Record Transcript" will be designated as (*Remand* R.Tr._____); references to the original Trail Exhibits will be designated as (Original Trial Exhibit _____); and, references to *Remand* Trial Exhibits will be designated as (*Remand* Trial Exhibit _____).

ADDITIONAL STATEMENT OF FACTS

(In addition to the Statement of Facts contained in his original Brief, Bill submits the following Additional Statement of Facts in Reply)

Forgotten Facts: Equities Lost in the Shuffle

1). Ruth Ann goes to great lengths to argue her contribution of $15,000.00 for the parties' purchase of one-half (½) interest in a building to be rented by Bill's law practice. Forgotten by Ruth Ann was the fact that Bill set up a separate rent account for the parties and paid into it $18,000.00 from his law practice over a twenty-four(24) month period of time.[1] At trial, Ruth Ann reluctantly admitted receipt of these rental funds. **(Original R.Tr. 133)**. Her trial testimony was as follows:

> Q. And that's $18,000.00 [Ruth Ann being asked on cross-examination about the rental funds bill paid back]. $3,000.00 more than you gave Bill came right back to you. That's true isn't?
>
> A. ***I suppose that if your just looking at the dollars, yes.***[2]

(Original R.Tr.133)(bold italics added for emphasis). Also forgotten factually, was the fact Bill paid the other **$35,000.00** of the parties joint venture purchase price of the one-half(½) interest in the building. **(Original R.Tr. 42)**. All of this occurred during Ruth Ann's "early lean years" theory.

2). Ruth Ann then goes to great length to portray herself as having contributed 79% of the funds used to pay the first mortgage and household expenses of the parties during the marriage and prior to the separation in April, 2000 (without any supporting documentation, checking account statements, deposit records, *etc.*). However, this argument is clearly inaccurate and factually

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[1]These payments were made during the time period which Ruth Ann attempted to portray as Bill's "early lean years" at the trial level, and now on appeal; but more on this later. "Oh what a tangled web we weave, When first we practice to deceive!" Sir Walter Scott, *Marmion, Canto vi. Stanza 17.* (1771-1832).

[2]Well, isn't that what this is all about?

incorrect, and is only a further machiavellian attempt to obscure the true facts of the parties' financial picture during the marriage. Forgotten by Ruth Ann is the fact that Bill, aside from depositing $61,000.00 into the parties' joint account during the marriage (prior to the separation of April, 2000), paid separately out of his personal account the sum of $47,575.85 for home repairs **(Original Trial Exhibit D-21)**; required flood insurance premiums of $13,917.98 **(Original Trial Exhibit D-20)**; required *ad valorem* taxes of $7,903.18 **(Original Trial Exhibit D-19)**; additional tax liabilities of Ruth Ann resulting from her partnership interest of $18,423.00 **(Original R.Tr. 228)**; paying her $18,000.00 in rental income (*see supra*, p.1) and, after the parties' separation but prior to the Judgment of Divorce being entered, the additional sum of $16,112.31 of mortgage interest on the marital residence **(Original Trial Exhibit D-22)**. Also forgotten by Ruth Ann were Bill's efforts early in the marriage to assist her in a proceeding which resulted in her receiving the sum of $800.00 a month in child support (from her ex-husband for the 2 children she brought into the household) in a case which ultimately was reviewed by the then newly formed Court of Appeals(unreported decision styled *Ruth Ann Striebeck v. John Howard Provenza*). **(Original R.Tr. 226-27)**. This resulted in Ruth Ann receiving $76,800.00 which she deposited in the joint checking account to assist with paying the necessary living expenses of her 2 minor children from a previous marriage.[3]

3). A fact also forgotten by Ruth Ann at the trial Court level and once again on appeal, was that shortly after she and Bill married, she prepared a financial statement (dated December 10, 1992) evidencing she had a then net value of $140,000.00 which included only $25,000.00 in marketable

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[3]Curiously, Ruth Ann fails to ever mention these facts in her brief; nor does she factor in these funds to arrive at her 79% contribution into the couples' joint account. It is noteworthy that a review of the parties' actual tax returns filed jointly during the marriage reflect Bill contributed earnings of $203,619.55 to the marriage and Ruth Ann contributed $169,326.65. **(Original Trial Exhibits D-4, D-6, D-34)**. So much for the illusory 79% theory.

securities.**(Original Trial Exhibit D-23)**. During the marriage, Bill assisted Ruth Ann in locating a more knowledgeable investment supervisor who had been a friend of Bill's at Mississippi State University years earlier. With the assistance of Bill's friend, Lee Benoist, Ruth Ann reinvested these funds and their value more than quadrupled during the parties' marriage.**(Original R.Tr.252 & 276)**. She testified at trial that she had to withdraw some of these funds in the "early lean years" of the marriage, but she produced no withdrawal receipts or other documents to support her testimony. The documents admitted into evidence at trial reflected her funds had more than quadrupled in value during the marriage and her overall net worth increased from $140,000.00 (as of December 10, 1992) to $798,876.08 at the time of the divorce. **(Original Trial Exhibits D-23, D-30, D-34, D-38 and Remand Trial Exhibit D-2)**. Additionally, Ruth Ann forgets to mention that Bill deposited into the two accounts (their joint and his personal) the following sums during the marriage:

YEAR	BILL'S SALARY DRAW
93	$31,759.65
94	$24,688.72
95	$34,325.95
96	$32,011.96
97	$25,067.22
98	$27,720.58
99	$28,045.47

During the same years, Ruth Ann had earnings established by her W-2's as follows:

93	$20,431.58
94	$24,837.58
95	$14,745.51
96	$24,252.04
97	$27,591.28
98	$29,020.66
99	$28,448.00

(Original Trail Exhibits D-4, D-6, D-34).

4). Prior to the parties' marriage, Ruth Ann had to routinely withdraw money from her then limited investment accounts to make ends meet. However, after the parties' marriage she acknowledged under oath that Bill made up the difference. Thus, her investments were allowed to remain untouched and increase in value (more than quadruple in value) with the assistance of Bill's investment colleague from Mississippi State.**(Original R.Tr. 151-52)**.

5). Forgotten by Ruth Ann is the fact she had a net value of approximately $140,000.00 shortly after the parties' marriage **(Original Trial Exhibit D-23)**, and a net worth of **$793,876.08** at the time of the parties' divorce. (Prior to the successor Chancellor on *remand* considering the attorneys' fees earned and received post-separation by Bill). In the other vein, prior to considering the attorneys' fees Bill earned (and received) post-separation relating to the Bridge Litigation, he had a net worth of **$60,166.96**. **(Remand R.C.P. 52-53)**.

6). During the remand trial, Ruth Ann attempted to portray the parties' minor daughter, Ann Klein, as a "special needs child". (Over the relevancy objection of counsel for Bill)**(Remand R.Tr. 25-27)**. Ruth Ann's testimony was allowed[4] with no supporting medical evidence with which to support her allegations. Unfortunately, the Chancellor in her ruling on remand referred to Ann Klein as a "special needs child". (A finding not relevant to the issues determined by the Court of Appeals to be heard on remand in *Striebeck v. Striebeck*, 911 So.2d 628(Miss.App. 2005)(*Striebeck I*).**(Remand R.C.P. 49)**. This finding by the Chancellor was one of the subjects of Bill's Counter-Motion for Reconsideration. There was no medical, psychological, or other competent evidence

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[4]The successor Chancellor on remand allowed this "testimony" by Ruth Ann because of Bill's pretrial motion on remand seeking reimbursement of alimony paid after an erroneous award by the original Trial Court. **(Remand R.Tr. 25; Remand R.C.P. 60-65)**. This original award of alimony was *reversed* and *remanded* in *Striebeck I*. *See*, *Striebeck v. Striebeck*, 911 So.2d 628, 635(¶26)(Miss.App. 2005).

presented (nor could there have been) which would have allowed the Court to arrive at this conclusion; nor was it necessary for purposes of the remand issues. The labeling of Ann Klein as a "special needs child" without any type of expert proof to support such a finding may have adverse consequences on the minor child later in life. (**Remand R.C.P. 11**). The Chancellor on Remand denied Bill's Counter-Motion for Reconsideration on this point. **(Remand R.C.P. 56-57)**.[5]

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[5]Ironically and tragically, Ruth Ann attempted to portray herself on remand as **not being financially able** (after the divorce) to take Ann Klein to a dermatologist to have her acne treated. **(Remand R.Tr.29)**. Ruth Ann would then reluctantly admit on cross-examination that the $34,000.00 she received from Bill for her "equitable distribution" of the marital residence was used by her to remodel the kitchen in the new home she purchased after the parties' divorce.**(Remand R.Tr. 36)**. Is it not tragic that Ruth Ann will not take Ann Klein to a dermatologist to treat her acne when she has health insurance through the public school system, and the ability to spend $34,000.00 to remodel a kitchen? Not to mention that at the time of the divorce, Ruth Ann had a net worth of $798,876.68. **(Remand R.C.P. 52-53)**. "Oh what a tangled web we weave, When first we practice to deceive!" Sir Walter Scott, *Marmion, Canto vi. Stanza 17*. (1771-1832). Ruth Ann attempts to continue her "scorched earth" policy in this litigation by rearguing in her response brief Bill's fault during the marriage (remaining silent as to her own fault) and attempting to once again portray Bill in a "negative light" by stating he didn't see Ann Klein for a period of time during this protracted and prolonged divorce litigation. (Ruth Ann's Response Brief p.4). In reality, Ruth Ann refused to allow Bill visitation with Ann Klein after "the lawyers had worked it out." Over a period time, she sent 14 faxes to Bill's office stating he could not see Ann Klein because she scheduled other events on Bill's weekends.**(Original R.Tr. 143-44,230-32, 272, andOriginal Trial Exhibit D-47**(the faxes from Ruth Ann)).

ARGUMENT IN REPLY TO APPELLEE'S BRIEF

I. **THE CHANCELLOR ERRED IN AWARDING RUTH ANN $75,000.00 FROM THE ATTORNEY'S FEES BILL EARNED IN THE BRIDGE CASE THREE AND ONE-HALF (3 ½) YEARS AFTER THE PARTIES' ACTUAL SEPARATION, THREE AND ONE-HALF (3½) YEARS AFTER THE DIVORCE PROCEEDINGS BEGAN IN THIS MATTER, AND SINCE RUTH ANN DID NOT OFFER ANY PROOF OF THE *FERGUSON* FACTORS AS TO THE ACQUISITION OF THESE FEES.**

II. **THE CHANCELLOR ERRED WHEN, AS A SUCCESSOR JUDGE, SHE CHANGED THE ORIGINAL CHANCELLOR'S FINDING THAT RUTH ANN "RENDERED LITTLE ASSISTANCE TO [BILL] IN HIS LAW PRACTICE."**

1. FACTS AND LAW IN REPLY

A. Equitable Distribution Post Separation: *A Briar Thicket?*

Primarily at issue is the successor Chancellor's decision on remand to award Ruth Ann $75,000.00 from the attorneys' fees Bill earned in the Bridge case 3½ years after the parties' separation and 3½ years after the divorce proceedings began in this case. A timeline to understand the procedural history of the divorce litigation between Bill and Ruth Ann, and Bill's employment in the Bridge case and receipt of fees was entered into evidence at the remand hearing as Exhibit D-1. A timeline with additional information is included here to support Bill's argument on appeal:

TIMELINE

PROCEDURAL HISTORY

Date of Separation	April 24, 2000
Date Complaint for Divorce filed by Ruth Ann	May 15, 2000
Date of Original Trial	July 30-31, 2003
Date Chancellor issued Bench Ruling	September 23, 2003
Date Bill was required to begin paying alimony and child support to Ruth Ann	October 1, 2003

Date Chancellor signs Final Judgment of Divorce	November 29, 2003
Date Final Judgment of Divorce entered by Clerk	December 2, 2003

EMPLOYMENT IN BRIDGE CASE

Contract of Employment on Bridge Case (Case B)	November 20, 2002
Contract of Employment on Bridge Case (Case C)	November 21, 2002
Contract of Employment on Bridge Case (Case A)	January 14, 2003

ATTORNEYS' FEES RECEIVED BY BILL PRIOR TO FINAL DIVORCE BEING ENTERED BY CLERK ON DECEMBER 2, 2003

Fees from Case A	Rec'd $39,960.00 August 5, 2003
Fees from Case B	Rec'd $198,156.41 August 8, 2003
Fees from Case C	Rec'd $122,500.00 December 1, 2003

The total of the attorneys' fees earned by Bill 3½ years after the divorce proceedings began, but before the Final Judgment was actually entered by the Clerk on December 2, 2003, was $360,616.41. After deducting the 41% tax liability **(Remand R.Tr. 58)**, there remained $212,763.69. Most noteworthy, the original Trial Court ordered Bill to begin alimony and child support payments to Ruth Ann on October 1, 2003. **(Original R.C.P. 211 at ¶16; Original R.C.P. 228)**. Why then should the successor Chancellor have even considered in equity the attorneys' fees received by Bill on December 1, 2003? More on this later.

This is the 2nd occasion where the Court has been given the opportunity to declare attorneys' fees earned by an attorney to be a marital asset. The Court first addressed this issue in its' decision in *Kilpatrick v. Kilpatrick*, 732 So.2d 876 (Miss.1999). Then came the decision in the present case

in *Striebeck v. Striebeck*, 911 So.2d 628 (Miss.App. 2005)(*Striebeck I*).

In *Johnson v. Johnson*, 650 So.2d 1281(Miss. 1994), the Court set forth a three-prong test to be used in the process of applying the equitable distribution factors identified in *Ferguson*.[6] The three-prong test enunciated in *Johnson* is as follows:

> 1. First, the Chancellor is to classify the parties' assets as marital or non-marital;
>
> 2. Second, the Chancellor is to value and equitably divide the marital property employing the *Ferguson* factors as guidelines, ***in light of each parties non-martial property***[7]; and,
>
> 3. Third, if the marital assets, after equitable division and *in light of the parties' non-marital assets*, will adequately provide for both parties, then "no more need be done".

Id at 1287.(bold italics added for emphasis).

Subsequent to the *Johnson* decision, the Court rendered its' decision in *Selman v. Selman*, 722 So.2d 547 (Miss.1998). In *Selman*, the Court was faced with a spouse accumulating retirement benefits for a seven (7) month period after the parties' separation. In ruling there was no justification in ***equity*** to allow the other spouse to share in the accumulation of this asset, the *Selman* Court did note that while the "marriage had not legally terminated, **the relationship out of which equitable distribution arises had ended some months earlier**." *Selman*, 722 So.2d at 553 (¶25). (bold for emphasis). Subsequent to the decision in *Selman*, the *Aron* decision was handed down. In *Aron v.*

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[6]*Ferguson v. Ferguson*, 639 So.2d 921(Miss.1994).

[7]This part of the test (i.e. "***in light of each parties non-marital property***") will be discussed later and why it was manifest error for the successor Chancellor on remand to not consider it in the present case when she generously awarded Ruth Ann $75,000.00 in attorneys' fees earned by Bill; 42 months post-separation and after he voluntarily began paying child support and assuming payment for all of the couple's marital debts after the separation (April 24, 2000); but, regrettably, without a support order requiring him to do so.

Aron, 832 So.2d 1257(Miss.App. 2002), the Court opined that a "Chancellor has discretion in determining whether acquisitions made in a marriage's **dying stages qualify** as marital or separate property." *Id* at 1259 at (¶8)(bold added for emphasis).[8]

However, to back up a few steps, it is noteworthy (as argued in Ruth Ann's response brief at p.12-13) that in *Godwin v. Godwin*, 758 So.2d 384(Miss. 1999), the Court established an actual line of demarcation from the concept that any property acquired during the marriage are marital in nature. In *Godwin*, the Court determined that any property acquired after an order of separate maintenance is separate property. Subsequently, in *Pittman v. Pittman*, 791 So.2d 857 (Miss.App. 2001)(appropriately argued in Ruth Ann's response brief at p.12-13), the Court extended this line of demarcation to divorce cases in which a temporary support order is entered because of the practical recognition that the spouses are no longer living together as husband and wife.

Noteworthy, is the fact lost in the shuffle that Bill was ordered by the original Chancellor to

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[8]Bill again urges this Court to revisit one of its' earlier decisions for the benefit of the Bench and Bar; as he did at footnote 4 in his original brief (p.15). Not only should this Court revisit its' decision in *Selman v. Selman*, 722 So.2d 547(Miss.1998), but is should also revisit its' decision in *Aron v. Aron*, 832 So.2d 1257(Miss.App.2002)(*i.e.* Chancellor has discretion in determining whether acquisitions made in a marriage's **dying stages** qualify as marital or separate property). The Court in *Striebeck 1* stated "[a]lthough the Chancellor clearly considered Bill's fee as part of his net worth, the record does not indicate that this case is analogous to the facts or either *Selman* or *Aron*, and we see no justification in concluding that the fee is non-marital property." *Striebeck v. Striebeck*, 911 So.2d 628, 633 (¶10)(Miss.App. 2005). Prior to this pronouncement, the *Striebeck 1* Court opined that in *Selman*, "the supreme court did not state the property was not marital property; rather, the supreme court determined under *Ferguson v. Ferguson*, 639 So.2d 921(Miss.1994), there was no justification to allow the husband to share in the retirement." *Id.* at (¶9). Hence, the "*briar thicket*" exists for the Bench and Bar. This Court should either embrace the discretionary powers granted to Chancellors in *Aron* (*i.e.* discretion in determining whether acquisitions [or as in *Striebeck* - attorneys' fees earned] made in a marriage's **dying stages** qualify as marital or separate property [as the original Chancellor determined in *Striebeck* . . . "All post separation assets are separate property" **(Original R.C.P. 20(¶17), 30)**]); or, remove these discretionary powers and write *Aron* a judicial obituary, and lay it to rest. The "*briar thicket*" relating to equitable distribution is simply becoming to "entangled".

begin paying alimony and child support payments to Ruth Ann beginning **October 1, 2003**. Does this not constitute an order of support? Even though the Judgment was not technically filed by the Clerk until December 2, 2003, could Bill have sat idly by (no doubt at his own peril) and not made the support payments until the Judgment was filed? Certainly not. The successor Chancellor on remand should have considered the inequities of considering the attorneys' fees Bill received on December 1, 2003 (**$122,500.00**); 2 months after he was required to begin paying alimony/support payments to Ruth Ann.[9]

The problem with the equitable distribution award to Ruth Ann of $75,000.00 of the attorneys' fees earned 42 months post-separation by Bill, is that it was not equitably required, nor does it pass the 2nd prong of the *Johnson* test. Since Ruth Ann's net worth after the original divorce grew to **$798,876.08**, then the successor Chancellor on remand should have considered the gross disparity between the two parties' net worth.[10]

It simply is impossible for the Chancellor to be correct with her analysis of the *Ferguson* factors and in awarding Ruth Ann the additional $75,000.00 of the attorneys' fees earned by Bill; 42 months post-separation. The *Selman* Court noted the practical: "**While the marriage had not**

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[9]In *Striebeck 1*, the Court reversed and remanded the award of alimony because the original Chancellor erred by not including the present value of Ruth Ann's 1/6 interest in the partnership in her net worth. *Striebeck v. Striebeck*, 911 So.2d 628, 634-35 (¶20 & ¶26) (Miss.App.2005)(*Striebeck 1*). The inclusion of the present value of her 1/6 partnership interest clearly reflects Ruth Ann's net worth at the time of the divorce (**$793,876.08**) was far greater than Bill's (**$60,166.96**); before ever considering the attorneys' fees Bill earned and received prior to the Judgment of Divorce being entered and 42 months post-separation.

[10]If the successor Chancellor on remand had determined that there was no equitable reason for Ruth Ann to share in these attorneys' fees (something the Court stated was **entirely possible**; *Striebeck v. Striebeck*, 911 So.2d 628, 633(¶15)(Miss.App.2005)), then Bill's after tax net worth would have increased to $272,93065; still well shy of Ruth Ann's net worth (before the trial on remand) of $798,876.08.

legally terminated, the relationship out of which equitable distribution arises had ended some months earlier. *Selman v. Selman*, 722 So.2d 547, 553(¶25)(Miss.1998)(bold for emphasis). In the present case, Ruth Ann testified the financial ties between the parties were cut "very quickly" after the separation of April 24, 2000. She testified as follows:

Q. Did you continue to live out of the joint account?

A. No. I opened another account.

Q. Okay. About how long after the separation was that?

A. **Very quickly**.

(Remand R.Tr. 51). Bill concurred with Ruth Ann on this point (regrettably, but as is a common occurrence in most divorce cases, this is one of the few times these divorcing parties agreed on a fact during litigation). He testified as follows:

Q. But after your separation in April, 2000, y'all's financial picture totally separated?

A. Exactly.

(Remand R.Tr. 61). Therefore, the ruling of the successor Chancellor stretches beyond the equity's outer limits boundary the ability of Ruth Ann to offer even a scintilla of evidence that she assisted in the earning of attorneys fees by Bill in the bridge case. This situation is similar to that in *Graham v. Graham*, 767 So.2d 277, 284(¶27)(Miss.App.2000) where Justice Irving stated the obvious:

> A marriage license alone should not entitle one spouse to share in what the other spouse has accumulated if the accumulation was not the result of joint contributions . . . when they have been living apart for an extended period of time, with or without a separate maintenance order, there is just simply no rational basis for equitably dividing assets which were acquired during the extended separation unless a nexus can be shown between the acquisition of the asset and the marriage, other than the fact that it was acquired while the parties were still legally married.

Id. (IRVING, J. concurring in part, dissenting in part, joined by KING and SOUTHWICK, P.J.J., and BRIDGES, J. For an excellent overview of how some states end the marital property

accumulation date on the date of separation, the date of the filing of the divorce, the date of the divorce trial, *etc.*, *see*, Deborah H.Bell, Mississippi Family Law §6.02[3][b] (1st ed. 2005).

B. "Just the Facts, Ma'm"[11]

In her response, Ruth Ann argues initially that there was no temporary order entered in this case because Bill "objected" to it. (Ruth Ann's Response Brief p.12-13). This is incorrect; Bill merely filed a response to the motion. The Clerk's papers reflect Ruth Ann filed her separate Petition for Temporary Relief on May 15, 2000. **(Original R.C.P. 2; Remand R.C.P. 4)**. However, Ruth Ann never served the Petition for Temporary Relief on Bill until **26 months** after the divorce action was filed. This was pointed out by Bill in his response (*i.e.* is a response to be considered as an objection?) to Ruth Ann's Motion to set a hearing date on her Petition for Temporary Relief. **(Remand R.C.P. 108)**. Bill further pointed out in his response that he was **voluntarily** paying child support without a Temporary Order (and had been doing so since the parties' separated and Ruth Ann filed for divorce in May, 2000) and that the entire divorce matter could have previously been set for trial had Ruth Ann "*fully and truthfully disclosed the exact identity of and value of her marital and non-marital assets.*" **(Remand R.C.P. 108 & 110)**(italics added for emphasis). Finally, Bill was **voluntarily** paying all joint debts of the parties and had been doing so since the parties separated in April, 2000; without a Temporary Order requiring him to do so. With monthly child support and monthly payments for all marital debt being **voluntarily** paid (*i.e.* without a Temporary Order) by Bill, is there any wonder Ruth Ann did not set her Temporary Petition for a hearing?

From the outset, one of the "forgotten facts"(equities lost in the shuffle) appears. At the time of the parties' marriage (August 18, 1991), Bill had $28,000.00 of equity in the home he owned prior

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[11]Sgt. Joe Friday in the *Dragnet Series* (1967-1970).

to the parties' marriage. **(Original R.C.P. 228 & Remand Trial Exhibit D-18)**. After the parties' separation (April 24, 2000), Bill paid all required mortgage payments thru the date of the divorce trial (July 30-31, 2003) resulting in the parties gaining an additional $16,112.31 in equity. The original Chancellor awarded Ruth Ann one-half (½) of the equity Bill had **before** the marriage, one-half(½) of the equity gained by the parties from the date of the marriage thru the date of their separation, and then one-half (½) of the equity gained by Bill's payments **post-separation** and thru the date of the divorce trial. Bill only argues that the generosity of the this award (a total of $34,055.00) should have been recognized and considered by the successor Chancellor on remand under the scarcely quoted *Ferguson* factor number 8 ("Any other factor which in equity should be considered"; *Ferguson*, 639 So.2d at 928) and after a careful consideration of the 2nd prong of the *Johnson* test; "**in light of each parties' non-marital property**". *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss.1994). However, it was not.[12] This was manifest error.

The successor Chancellor further committed manifest error when she labeled the parties stipulated division of items of personalty as "non-marital assets". This is incorrect. The parties' stipulations, contained in the original Pretrial Order, provided for an agreed pre-trial partial distribution of **marital assets** and for Ruth Ann to maintain ownership of the one non-marital asset; *i.e.* her interest in the partnership.**(Original R.C.P. 151-54)**. Bill only points this out since the successor Chancellor should have recognized and considered the value of all **marital assets** Ruth Ann received by way of the parties' original trial stipulations, or by way of an award by the original

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[12]Bill does not argue the award was in error (since he did not appeal this issue in *Striebeck I*). He simply suggests that the generosity of the award should have been considered and weighed by the successor Chancellor on remand when she determined the equities of the parties. Does not *Ferguson* require it? At least according to the "catch all" 8th factor; "Any other factor which in **equity** should be considered". *Ferguson v. Ferguson*, 639 So.2d 921, 928 (Miss.1994).

Chancellor. These facts speak to the very equities between the parties.

Additionally, the successor Chancellor on remand, and Ruth Ann on appeal, fail to consider the following facts necessary to properly review the equities of the parties prior to their separation: (1) Ruth Ann's receipt of $18,000.00 from Bill's law practice by way of rent paid for her contribution of $15,000.00 to assist in the parties purchasing one-half(½) interest in a building where Bill practiced law for two (2) years. **(Original R.Tr. 133)**; (2) that Bill paid the other $35,000.00 of the purchase price for the one-half (½) interest in the building. **(Original R.Tr. 42)**; (3) that aside from depositing $61,000.00 into the parties' joint account during the marriage (prior to the separation of April 24, 2000), (a) he paid separately the sum of $47,575.85 for repairs on the marital residence **(Original Trial Exhibit D-19)**, (b) he paid the parties required flood insurance premiums of $13,917.98 **(Original Trial Exhibit D-20)**, (c) he paid the parties required *ad valorem* taxes of $7,903.18 **(Original Trial Exhibit D-19)**, (d) he paid additional tax liabilities of Ruth Ann resulting from her partnership interest of $18,423.00 **(Original R. Tr.228)**, and that Ruth Ann's net value of approximately $140,000.00 shortly after the parties' marriage **(Original Trial Exhibit D-23)**, grew to a net worth of **$793,876.08** at the time of the parties' divorce; prior to the successor Chancellor on remand considering the attorneys' fees earned and received 3½ years post-separation by Bill. **(Remand R.C.P. 52-53)**. On the other hand, Bill had a net worth of **$60,166.96** prior to the successor Chancellor on remand considering the attorneys' fees he earned as a result of his sole labors and received 3½ years post-separation and 3½ years after the divorce proceedings began.

Additionally, Ruth Ann argues again and again that she supported Bill during the "early lean years"; a theory she invented at the original trial. However, contrary to Ruth Ann's theory, the

documentary evidence at trial did not support this theory.[13] **(Original Trial Exhibits D-4, D-6, D-18, D-19, D-20, D-21)**. In a previous trial, Ruth Ann contradicted her invented theory in this divorce matter. Her trial testimony revealed the following:

Q. Well, it would be fair to say that when you were under oath trying to get more child support out of your ex-husband, the father of your two boys, that you testified under oath that Bill Striebeck made up the difference in supporting your two boys?

A. Bill made contributions to the joint account in support of our family which included my two boys, yes.

Q. And your exact testimony was, "Bill made up the difference in what it cost to support them", wasn't it?

A. To support the family.

A. Which includes the two boys.

Q. And this whole proceeding was about getting more support, was it not?

A. Yes.

Q. For your two boys?

A. Yes.

Q. And you've testified that you're going in the hole every month. That's correct?

A. Hm-hmm. [INDICATING YES]

Q. And they asked you if you pulled out your money from your Jackson account and your answer was, "No", and "Why not", and what did you say?

A. "Bill made up the difference."

Q. And your talking about the Bill sitting right over there, are you not?

A. I'm talking about that Bill.

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[13]Original Trial Exhibits D-4 and D-34 are the parties' *dreaded* tax returns which reveal the true financial story. And guess what? The "early lean years" theory didn't exist!

Q. Now, prior to your marriage to Bill, you took money out of this trust account regularly, did you not, for your support?

A. No, I did not. Prior to my marriage with Bill, I had part of the investment set up so that it paid out, is that a dividend, quarterly? That was enough to - -

Q. I want to refer you to page 127 of your sworn testimony.[14] The question was, "Okay, so you said you had been drawing that money as needed from the time of the divorce up to '91", and your answer was what?

A. "**Until August, '92, when I married Bill.**"

(Original R.Tr. 151-52)(bold added for emphasis). It was manifest error for the successor Chancellor to find that Ruth Ann was contributing her separate funds to support the family in the "early lean years" of Bill's law practice because of her own admission, it just didn't happen. Finally, the "early lean years" theory is quickly dispelled by simply reviewing **Original Trial Exhibits D4, D-6, D-34**. From the year after the parties' marriage (August, 1992) thru the last complete tax year the parties were married, Bill was paid the following amounts from the law practice: (1) 1993-$31,759.65; (2) 1994-$24,688.72; (3) 1995-$34,325.95; (4) 1996-$32,011.96; (5) 1997-$25,067.22; (6) 1998-$27,720.58; and, (7)1999-$28,045.47. The sum of these figures is **$203,619.55** which Bill contributed during the marriage. So where are the "early lean years" Ruth Ann keeps arguing about? Her "early lean years" theory simply will not hold water and it certainly wasn't supported by the documentary evidence. In fact, when the "dreaded" tax returns of the parties are reviewed **(Original Trial Exhibits D-4, D-34)**, they reflect Ruth Ann earned the following amounts which she contributed during the marriage (1) 1993-$20,431.58; (2) 1994-$24,837.58; (3) 1995-$14,745.51; (4) 1996-$24,252.04; (5) 1997-$27,591.28; (6) 1998-$29,020.66; and, (7) 1999-$28,448.00. The sum

[14]This testimony elicited from Ruth Ann was from her prior sworn testimony in a case against her ex-husband in a proceeding after she and Bill married. That case ultimately found its' way to the then newly found Court of Appeals in a case styled *Ruth Ann Striebeck v. John Howard Provenza*; resulting in an unpublished decision.

of these figures is **$169,326.65**.

So who actually contributed more annual income to the marriage? The tax returns clearly reflect it was Bill! The "early lean years" theory espoused by Ruth Ann at trial, and her mystical figure that she contributed 79% of the parties' expenses during the marriage, are "shot down" by the actual financial information in the parties' tax returns.

The Chancellor also committed manifest error when she found that Ruth Ann would go into Bill's office in the early years and assist in answering the phones. **(Remand R.Tr.51)**. Ruth Ann testified at the original trial that she went to Bill's office and worked for approximately 3 months when Bill had no secretary. **(Original R.Tr. 79-80)**. Because of this incredible testimony, Bill went back and pulled the office bank statements and produced the cancelled checks to prove he paid secretaries he employed during the time period Ruth Ann claimed he didn't have one and she was answering the phones. **(Original R.Tr.235-37; Original Trial Exhibit 49)**. Ruth Ann only came to the office to write some checks and assist in answering the phone on 2different days! *Id.*

The successor Chancellor simply committed manifest error regarding these facts. The actual documents introduced at trial dispel the theories and mystical facts portrayed by Ruth Ann. More importantly, had the successor Chancellor on remand correctly applied the 2nd prong of the *Johnson* test, there would have been no equitable reason to award Ruth Ann the sum of $75,000.00 from the attorneys' fees earned by Bill 42 months post-separation. The 2nd prong of the test requires the Chancellor to "equitably divide marital property . . . ***in light of each parties non-marital property***." *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss.1994).

The successor Chancellor found Ruth Ann's net worth to be $793,876.08 and Bill's to be $60,166.96 before considering the after tax values of attorneys' fees Bill earned in the bridge case:

42 months post-separation.[15] **(Remand R.Tr.53)**. After a careful review of the "real" facts concerning the couple's marriage (*i.e.* tax returns, W-2's, cancelled checks, Ruth Ann's prior sworn testimony), and remembering that the original Chancellor found the marriage began "***unraveling in the spring of 1997***" **(Original R.C.P. 216)**, there simply exists no equitable reason for Ruth Ann to be awarded $75,000.00 in the attorneys' fees earned by bill in August and December of 2003. Though it is rarely done, with the evidence and facts before it, this Court should *reverse* and *render* this award.

III. THE CHANCELLOR ERRED BY NOT GRANTING BILL'S MOTION FOR REIMBURSEMENT OF ALIMONY AFTER THE COURT OF APPEALS REVERSED AN ERRONEOUS GRANT OF ALIMONY BY THE ORIGINAL TRIAL COURT. (*Issue of First Impression for this Court*).

Ruth Ann does not really cite any authority in her response to this issue. She does however take the opportunity to once again argue her version of the facts; most of which were not supported by the evidence, or which were not relevant to the issues on appeal. Nevertheless, in reply, Bill simply states that this was never an alimony case to begin with. Had the original Chancellor correctly valued the net worth of each party at the time of the divorce (Ruth Ann **$798,876.08**; Bill **$60,166.96**: prior to considering the attorneys' fees earned by Bill from the bridge case 42 months post-separation), then no more would have needed to be done. *Tynes v. Tynes*, 860 So.2d 325, 328(¶6)(Miss.App.2003). The question of alimony is considered only after marital property is divided, and one spouse is in the deficit.[16] *Lauro v. Lauro*, 847 So.2d 843, 848 (Miss.2003).

In the present case, Bill paid to Ruth Ann the sum of $28,500.00 in periodic alimony under

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[15]The successor Chancellor mislabeled Ruth Ann's 1/6 interest in the Lea Brent Family Partnership by identifying it as a "trust".**(Remand R.Tr. 52)**. The partnership was formed on July20, 1996**(Original Trial Exhibit D-25)**; almost 4 years after the parties married.

[16]That would be Bill in this case.

the original Chancellor's ruling (which was subsequently *reversed* and *remanded*). There is simply no equitable reason for Ruth Ann to not be required to reimburse Bill these funds because of the great disparity in the value of their separate estates. This Court should in equity, *reverse* and *remand* on this issue and adopt the holding of *Smith v. Smith*, 928 So.2d 287(Ala.Civ.App. 2005)(after grant of alimony reversed, ex-husband entitled to reimbursement of alimony previously paid under theory of equitable restitution).

CONCLUSION

This case needs to be viewed with an eye for equity, and a search for the real truth of the parties' marriage as is contained in the documentary evidence in this matter. The forgotten facts and equities lost in the shuffle should be noticed. At the end of the day, the Court should find that the successor Chancellor committed manifest error in awarding Ruth Ann $75,000.00 in the attorneys' fees earned by Bill in August-December, 2003; 42 months post-separation and after this divorce litigation began in May, 200.(Bill wasn't even employed in the bridge case until November, 2002). There simply was no equitable justification for doing so, nor did Ruth Ann offer any credible, tangible, or intangible assistance to Bill in earning the attorneys fees 42 months after the divorce litigation began in this matter. The successor Chancellor's award allows Ruth Ann to "profit" as a result of the prolonged and protracted divorce litigation in this matter. The prior generous award by the original Chancellor has gone unnoticed and has been relegated to the category of "forgotten but not gone." The allowance of profiteering in a divorce will only serve to encourage future litigants to adopt Ruth Ann's "scorched earth" litigation approach, prolong divorce cases, and add to the further entanglement of the equitable distribution "briar thicket". This was not an equitable result, nor was it supported by the record. The Court should *reverse* and *render* this award and *reverse* and *remand* the issue of whether or not Bill is entitled to be equitably reimbursed the $28,500.00 he previously paid to Ruth Ann in alimony payments. All costs of this appeal should be assessed to Ruth Ann.

RESPECTFULLY SUBMITTED, this the 7th day of March, 2008.

WILLIAM R. STRIEBECK, Appellant

BY: Willard L. McIlwain, Jr. by was

WILLARD L. MCILWAIN, JR., ESQ., MSB NO. [redacted]
Attorney for William R. Striebeck

OF COUNSEL:
WILLARD L. MCILWAIN, JR.
1024 Washington Ave, Suite 104
P.O. Box 519
Greenville, MS 38702-0519
Telephone: (662) 378-5450

CERTIFICATE OF SERVICE

I, Willard L. McIlwain, Jr., Esq., attorney for William R. Striebeck, do hereby certify that I have this day served via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing *Reply Brief of Appellant* to the following interested parties:

Luther P. Crull, Jr., Esq.
P.O. Box 2181
Grenada, MS 38902-2181

Honorable Dorothy W. Colom
Special Chancellor (on *remand*)
P.O. Box 708
Columbus, MS 39703-0708

Mrs. Betty W. Sephton, Clerk
Mississippi Supreme Court
450 High Street
Jackson, Mississippi 39201
(Via Federal Express)

THIS the 7th day of March, 2008.

Willard L. McIlwain, Jr. by. mas
WILLARD L. MCILWAIN, JR., ESQ.
Attorney for William R. Striebeck