

COPY

IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI

2007-TS-00132

RONALD RODRIGUEZ

APPELLANT

VS.

FILED

APR 24 2008

ANNE RODRIGUEZ

APPELLEE

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SUPREME COURT
COURT OF APPEALS

APPELLANT'S REPLY BRIEF

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ARGUMENT

COMES NOW, the attorney for Ronald Rodriguez, who files this his Reply Brief in the above styled and referenced cause and for such would show unto the Court the following, to-wit:

Again, it is set forth in the prior brief of the Appellant that this case had its origin with the wife of William Wright contacting the wife of the Appellant and telling the Appellant's wife that the Appellant was having an affair with his secretary.

Upon obtaining this information, it is clear from the record that the Appellee contacted the office of William Wright and began carrying a tape recorder and keeping a diary.

The main basis for the lower court's finding of adultery was a secretly taped conversation between the Appellant and the Appellee where the Appellee asked, in a very vigorous and angry manner, dozens of times, if Mr. Rodriguez had an affair.

After being asked that question for the seventy-first time, Mr. Rodriguez, as per his testimony, stated that yes he had an affair years ago in New Orleans, he did not know the name of the women, he did not know the location of where they lived, and he did not know where the affairs occurred.

It is also clear from the record that after this heated conversation had ended, the Appellant approached the Appellee and stated that what he said was not true and that he was only doing that because "she would not take no for an answer."

The Appellant testified at trial that he had had no affairs and made those admissions after being brow beaten by his wife, the Appellee, in order to stop the heated conversation that was ongoing.

Recently the Court of Appeals of the State of Mississippi in the case of Pool v. Pool,

2006-CA-01237-COA (C.A. 11508) addressed the proof necessary in order to establish adultery.

In the Pool case, the husband had hired a private investigator who discovered that the wife had spent several nights in the home of a gentleman that was not her husband.

That was the only proof that was able to be adduced at trial, being she was at this other person's residence; however, there was no showing of inclination, therefore, any suspicion of opportunity did not meet the test of clear and convincing evidence.

In Mississippi, one seeking a divorce on the grounds of adultery must show by clear and convincing evidence both an adulterous inclination and a reasonable opportunity to satisfy that inclination Dylan v. Dylan, 498 So.2d 328 (Miss. 1986), Owens vs. Gerity, 422 So.2d 284 (Miss. 1982).

An adulterous inclination may be shown by either the defendant's infatuation of a particular person of the opposite sex or a general adulterous nature on the part of the defendant Holden v. Fraser-Holden, 680 So.2d 785 (Miss. 1996), McAdory v. McAdory, 608 So.2d 695 (Miss. 1992).

The Court of Appeals and the Supreme Court have also stated that both the inclination and opportunity are prongs of the test that must be met. In the absence of proof of an adulterous inclination, proof of opportunity would not establish adultery McAdory, 608 So2d at 701.

Direct evidence of adultery is not required because of the inherently secretive nature of an adulterous relationship; however, if circumstantial evidence is offered, the party asserting adultery as grounds bear the following burden:

If there are two or more reasonable theories which may be drawn from the facts proven, the proof will be insufficient because, to invest mere circumstances with the force of truth, the conclusion must only be logical, and tend to prove the facts charged, but must be inconsistent with a reasonable theory of innocence.

See Banks v. Banks, 118 Miss. 783, 79 So. 841 (1918).

In the case at bar, the only proof adduced at trial was the taped conversation between the Appellant and the Appellee. When the court hears the tape, it is clear that the Appellee was on a mission to obtain some type of admission from the Appellant.

Pursuant to his testimony in deposition and at trial, he testified that he only said those words to placate his wife at that time so that the argument would end.

It is submitted to this Court that pursuant to Banks, Pool, McAdory, Dillon, and Owens, that there is no reasonable basis upon which to establish adultery on the grounds of uncondoned adultery unless there is clear and convincing evidence, such is the case at bar.

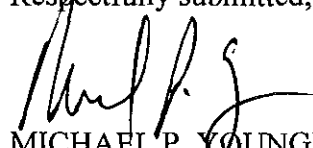
In this case there are two reasonable theories that may be drawn from the facts. The first theory is that the Appellant said on tape, after the seventy-first question concerning the subject that he had had an affair years ago with two women who he could not remember, who he could not remember where they were and could not remember where the adultery took place.

The second theory, which we believe to be plausible, is the Appellant's testimony in deposition and in trial was that he only said those words to placate his wife to stop the argument.

In the case at bar there are two reasonable theories to be drawn from the facts and because such, pursuant to Owens and Pool, this is not enough to establish adultery by clear and convincing evidence and anything contradictory must be inconsistent with a reasonable theory of innocence.

In conclusion, it is respectfully requested that this Court reverse and render the decision on the divorce from the lower court and re-establish the marital ties between the parties.

Respectfully submitted,

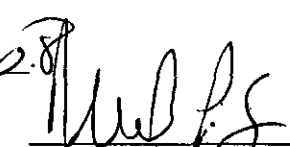

MICHAEL P. YOUNGER

CERTIFICATE OF SERVICE

I, Michael P. Younger, do hereby certify that I have this date mailed a true and correct copy, via U.S. Mail, of the above and foregoing to:

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Honorable Thomas Zebert
HAND DELIVERED

This 24 day of April, 2008

MICHAEL P. YOUNGER