SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO. 2008-CA-00476

JUDITH R. WHEAT — APPELLANT

VS.

JAMES M. WHEAT — APPELLEE

APPEAL FROM THE CHANCERY COURT
OF JACKSON COUNTY, MISSISSIPPI
CAUSE NO. 2005-0763 JB
HONORABLE JAYE BRADLEY, PRESIDING TRIAL JUDGE

REPLY BRIEF OF APPELLANT

ATTORNEY FOR APPELLANT:

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INTRODUCTION

Judy readopts the legal argument contained in the Appellant Brief and submits the following reply to those portions of the Appellee Brief deemed appropriate for response. James refers to Judy's argument in support of her appeal as "fallacious", i.e. tending to deceive or mislead; delusive. The antonym of "fallacious" is that which is true, correct and accurate. The review of the record below and the legal authorities cited by Judy will lead to that which is accurate.

Putting words aside, what was the bottom line effect of the trial court's findings? James received a net total of 'marital assets' valued at $435,761.00 compared to Judy's $171,448.00. Appellant Brief, P. 7-8. In connection therewith, Judy argues the main culprit of this disparity was the trial court's inclusion of Judy's severance agreement proceeds as a marital asset and its holding James' pension plan to be non marital.

The trial court's receipt of evidence from James and Judy was very much disjointed. It is understood that a trial court's ability to make its findings of facts can be seriously impaired when confronted with multiple hearings and submissions of evidentiary proof over long periods of time. In the trial below, the trial court was unfortunately confronted with multiple hearings, submissions, and arguments of the attorneys. Such was neither the fault of the trial court nor the attorneys therein, but one of the pitfalls of our heavy court dockets and the aftermath of Hurricane Katrina.

Regardless of the disjointed nature of a proceeding, each litigant, including Judy, has the inherent right to have his/her rights to be determined in an equitable and legally understandable manner. Judy asserts that her rights to a fair and equitable distribution of the marital assets in this

case have not be so determined. She believes that assets belonging to her and not arising out of joint efforts of the marriage have been wrongfully included in the marital estate, and assets that should have been included in the marital estate were excluded as James' separate property.

ISSUE ONE AND ISSUE TWO: JUDY'S SEVERANCE AGREEMENT (INCLUDING WHAT SHE WOULD HAVE RECEIVED BY WAY OF IRA CONTRIBUTIONS HAD SHE REMAINED EMPLOYED) WAS NEITHER ACCUMULATED "DURING THE MARRIAGE" NOR AS A RESULT OF "JOINT EFFORTS OR CONTRIBUTIONS OF THE PARTIES" AND IT WAS ERROR TO DEEM THE PROCEEDS FROM THAT SEVERANCE AS A MARITAL ASSET

First, the trial court below made no finding as to when the joint accumulation of assets ended for James and Judy. It is undisputed in the record below that they separated on March 1, 2005, and the trial court so recognized. Tr.107. It is further undisputed that thereafter James and Judy went to extremes to separate their lives and their finances, thus ending their joint efforts and contributions to accumulate joint assets. Appellant's Brief, Pp.1-3.

It is admirable that James and Judy did not enter into a 'battle' seeking the powers of the trial court to enter a temporary order forcing them to do that which they were able to amicably agree upon: separate themselves and their finances. Therefore, there was no need for an order of support. The fact that they did amicably separate their lives after March 1, 2005, should be determinative of when the marital estate's accumulation ended and not whether or not a support order was entered. Again, the trial court did not adopt any finding of when the parties' joint accumulation ended.

JUDY'S SEVERANCE AGREEMENT AND IRA

Judy was awarded the entire proceeds of her post-separation severance agreement, including what she would have contributed to an IRA had she continued to work until May 2007. However, since the trial court found the severance payment to be a marital asset, Judy was

credited with its value. James wants to ignore the undisputed fact that the severance agreement which was offered into evidence clearly and without question provided that the "lump sum payment of $395,000.00 [represented] the approximate value of the pay and benefits Judy is *foregoing* by resigning before early age" Exhibit 4, RE. 102. What Judy was foregoing was her future pay from May 2005 until her earliest retirement which would have been in May 2007. How much clearer could it be? The undisputed evidence showed that this Agreement was entered into by Judy AFTER the parties separated, and the funds were received AFTER the parties separated. To include this asset as a marital asset was error.

While James attempts to discredit Judy's inclusion of legal support from other state courts, the Mississippi cases upon which he relies are clearly distinguishable. In *Striebeck*, infra, for example, the Court of Appeals did conclude that Mr. Striebeck's fees earned after separation were marital property as James asserts. *Striebeck v. Striebeck*, 5 So.3d 450 (Miss. Ct. App. 2008). However, James fails to mention that the Court based its reasoning primarily upon Mrs. Striebeck's contribution to the establishment and operation of her husband's private law practice. *Id.* at 453. Since James and Judy separated on March 1, 2005, prior to the severance agreement, and since the agreement proceeds were for Judy's foregoing <u>future</u> income, there is no support for any proposition that James contributed anything to this agreement. Further, it was received by Judy 'outside the marriage' <u>after</u> the parties separated their lives.

James concedes that there is "no hard and fast rule" in Mississippi which requires a Chancellor to treat money received after a separation as non-marital funds. It is certainly practical for Judy to look to other states for compelling authority. Appellant's Brief, Pp.19-20. The other state authorities cited by Judy support the position that the monies she received under her severance agreement after the parties' separation should not be deemed to be a marital asset.

James' interpretation of Mississippi law is misplaced, as is his interpretation of the cases cited in Judy's brief. The *Prescott* holding is neither erroneously stated as Jimmy contends, nor does it stand for the proposition that all severance packages awarded to terminated employees are marital assets. *Prescott v. Prescott*, 736 So.2d 409 (Miss.App.1999) Judy does not argue that a severance agreement based upon past services, as was the case in *Prescott*, is non-marital. Rather, she cites *Prescott* to support her contention that Mississippi Courts look specifically to justification for a particular payment in determining its classification, *i.e.* Judy's severance was after the separation and for future income relinquished by Judy in lieu of her resignation. The benefits arising under Mr. Prescott's severance package were based upon thirty-eight years of past services, and Mrs. Prescott received only the portion of the payment earned during the marriage. *Id.* at 412. The language of Judy's agreement itself reveals the justification for the severance payment which Judy received. The payment "represent[ted] the approximate value of the pay and benefits Ms. Wheat [was] foregoing by resigning before early retirement age" and was "intended to bridge her to retirement." Exhibit 4, R.E.102.

Hensarling specifically stands for the proposition that asset accumulation after the separation date of the parties is the sole property of the spouse accumulating the asset. *Hensarling v. Hensarling*, 824 So.2d 583 (Miss. 2002). It is important to note the Court's focus in that decision as quoted in the Appellant's Brief: "the focus was on the date of the separation, not the temporary order." Appellant's Brief, P.16. In recent years, Mississippi Courts have considered specifically the effects of separation upon asset accumulation and have leaned consistently in favor of utilizing separation as the date upon which joint accumulation ceases:

In *Godwin*, the Supreme Court held that a husband's compensation plan acquired after separation was his "exclusive property" and treated the couple's separation as the cut-off date for

determining property classification. *Godwin v. Godwin*, 758 So.2d 384 (Miss. 1999). In *Graham*, the parties' retirement accounts were divided based upon the value at trial and not separation; however, both accounts existed prior to the parties' separation, unlike Judy's severance agreement which came AFTER her separation from James. *Graham v. Graham*, 767 So.2d 777 (Miss.Ct.App. 2000). It is also important to note from *Graham* the finding that the parties continued to have financial ties after their separation, again unlike James and Judy who for all practical purposes separated their lives. There is no question that Judy and James' actions following their separation in February 2005 support any other conclusion than that they began their separate lives, both physically and financially. Thus, equity demands the parties' date of separation *i.e.* March 1, 2005, was and is the clear line of demarcation as to the time at which joint accumulation ceased for James and Judy. See *Hensarling*, infra. Such a determination was a factual matter, requiring the trial court to make a finding as to the line of demarcation. The trial court erred in failing to make any such finding of the date upon which James and Judy's marital estate accumulation ended.

James alleges the fact that Judy actually received the severance payment after she left the marital home is of "no moment." To support this claim, James relies on several opinions which consider the chancellor's discretion in equitable distribution. The cases cited by James are misplaced. For instance, the *Chamblee* case, which includes a discussion on the system of equitable division and the discretion provided to a chancellor in making such division, neither involves issues regarding the time at which joint accumulation ceases, nor does it provide a discussion to that effect. *Chamblee v. Chamblee*, 637 So.2d 850 (Miss. 1994). In citing *Chamblee*, James seeks merely to show that a chancellor has wide discretion in equitable distribution, a claim that Judy does not challenge. James extends the reach of a chancellor's

discretion in asserting specifically that "wide discretion is afforded to a chancellor in determining the exact date upon which the joint accumulation of marital assets actually ceases." None of the cases cited by James go so far as to offer such an explicit assertion of a chancellor's discretion.

In conclusion, the undisputed evidence leads to but one conclusion: James and Judy separated their lives on March 1, 2005, and the joint accumulation of assets ended. Further, the proceeds from Judy's severance package negotiated and received by Judy in May 2005 for the future income she was foregoing for her early resignation was received 'outside the marriage' and should not have been included as a marital asset by the court. [The trial court further erred by also considering Judy's monthly withdrawals from these proceeds as 'income' for child support determination.] Appellant's Brief, P.28.

ISSUE THREE: THE COURT ERRED IN FAILING TO INCLUDE ANY PORTION OF JAMES' MERCHANTS AND MARINE BANK PENSION FUND AS A MARITAL ASSET

In its findings the trial court found that "[t]he pre-marital portion of the Merchants & Marine Bank pension fund" belonging to James was a "pre marital asset...not subject to distribution. CP.16. This finding by the Court is totally consistent with the exchange between the trial court and Judy's attorney at the hearing some months later:

> Regarding a submitted affidavit from James' employer that stated the pension plan was vested on a date prior the marriage and that no other contributions were made after that point in time the following exchange took place:
>
> THE COURT: What is your position on Mr. Cumbest's post-trial affidavit?
>
> MR. TISDALE: I don't remember what the affidavit says, but is that the one where he says the M&M retirement stopped being funded prior to the marriage?
>
> THE COURT: Right.

> MR. TISDALE: The wife conceded *that*. She conceded that that was non-marital property. [*The vested value at the time of the marriage!*]
>
> (Appellant's Brief, P.26)

However, following this exchange the trial court entered its supplemental judgment and erroneously held that Judy "conceded" the pension plan was non-marital. Judy contends the statement by her counsel herein above in no way "conceded" that no portion of the plan was marital. The expert valuation report offered by James clearly shows the value prior to the marriage was $7,298.00 and its value as of December 31, 2006, was $178,246.00 and as of March 20, 2007, was $180,484.00. Appellant's Brief P.23. Over one-half of the 'years of service' of James were during his marriage to Judy and included in the expert's calculation. Again, Judy's desire to not have this asset divided, but awarded to James in the distribution cannot be deemed as a concession on her part that it was all non marital. The trial court's finding was error and the marital portion of the pension plan should have been included in the marital estate and distribution by the trial court.

ISSUE FOUR: THE COURT ERRED IN FINDING JAMES' IRA WITH MORGAN KEEGAN WAS NON MARITAL

The burden of proof was upon James to prove that his IRA with Morgan Keegan was a non marital asset and this burden is required to be shown by 'more than a mere demonstration of the evidence'. *Hemsley v. Hemsley*, 639 So.2d, 909, 915 (Miss.1994). James failed to meet his burden. The only proof offered by James was his testimony. There was no corroboration or supporting documents. Just as a non custodial parent who is in arrears for child support is required to provide more than mere testimony to prove he/she should receive credit for payments made for a child, so is James required to meet the same burden. While there may be times where testimony alone is sufficient, Courts generally require more than mere testimony when there is a

lack of adequate proof to support it. See *Smith v. Smith*, 2009 WL 3465447 (Miss.) [testimony alone was not sufficient to receive credit for other payments made for child towards arrearage]. Mississippi law is that James had the burden to prove his IRA was non marital by more than a 'mere demonstration'. He offered no documents and no corroboration whatsoever. To exclude this asset as a marital asset was error.

ISSUE FIVE: THE COURT ERRED IN HOLDING JAMES WOULD BE RESPONSIBLE FOR THE FIRST MORTGAGE ON THE MARITAL HOME IN THE AMOUNT OF $116,658.00 WHEN THE CORRECT AMOUNT OF THIS MORTGAGE WAS ONLY $75,872.00, THUS BENEFITING JAMES THE DIFFERENCE OF $40,786.00

James basically concedes this error in his brief. Appellee's Brief, P. 32. What must be recognized here is that in making its equitable distribution to James and Judy the trial court assigned certain debts to each party. One dollar of debt would decrease a party's value of assets being awarded by one dollar. Thus, when the trial court incorrectly held that James was to pay the first mortgage of $116,658.00, it in essence erred to James' favor in the amount of $40,786.00, since the debt was only $75,872.00. So in addition to charging Judy with the value of the proceeds from her severance agreement, and finding James's pension plan and IRA to be non marital assets, the trial court here takes another $40,786.00 from Judy. Such was not equitable and was error. Appellant's Brief, P.28.

ISSUE SIX: THE COURT ERRED IN ORDERING JUDY TO PAY CHILD SUPPORT OF $750.00 PER MONTH PLUS ½ OF THE CHILD'S AUTOMOBILE INSURANCE PREMIUM.

It must be noted that not only did the trial court find the proceeds from Judy's severance agreement to be a marital asset (remember Judy was withdrawing monthly from this proceeds to support herself), but it then took the same money and treated it as income for the purpose of ordering child support. Such was error.

The trial court further erred in its failure to follow Section 43-19-101 of the Mississippi Code which provides child-support guidelines. *Lowrey*, 2009 WL 3645684 (citing *Chesney v. Chesney*, 910 So.2d 1057 (Miss. 2005)). To affirm a child-support award that deviates from statutory guidelines, a chancellor must first "overcome the rebuttable presumption...by making an on-the-record finding that it would be unjust or inappropriate to apply the guidelines in the instant case." *Chesney*, 910 So.2d at 1061. In accordance with the guidelines, if the chancellor had determined that Judy's adjusted gross income fell between $5,000 and $50,000, the amount of child support awarded would equal 14% of that income. In the event that the chancellor determined Judy's income exceeded $50,000, the chancellor was required to make a written finding in the record as to whether or not the application of the guidelines was reasonable. Miss. Code Ann. § 43-19-101.

The Chancellor never provided any written or on-the-record finding in this case, nor did she make an income determination before ordering Judy to pay the child support and ½ of the child's automobile insurance premium. In her Findings of Fact and Conclusions of Law, the chancellor noted that the evidence showed Judy's current annual adjusted gross income in excess of $50,000 [actually this 'income' was her monthly withdrawal from the proceeds from the severance agreement and not really income], but the chancellor also acknowledged that Judy's income would decrease after May 2007 when her severance proceeds would run out. [The trial court also held there was nothing presented to show that the child had any extraordinary needs or expenses "other than automobile insurance", which Judy would assert is not "extraordinary"]. Court's Findings of Fact, P.10-11. Ultimately, the chancellor determined that after May 2007, Judy's income would consist of her monthly retirement. That amount was unknown at the time of trial, but the chancellor proceeded to award what she believed was a "reasonable amount."

What was this based upon? The chancellor offered no support for the amount awarded, and it is difficult to understand how $750.00 per month and the unknown amount of the child's auto insurance would be considered a reasonable amount for Judy to pay when her income was not yet known. In a summary fashion the trial court ordered Judy to pay $750.00 per month in child support plus one half of the child's automobile insurance in an amount unknown. Such a finding was error.

CONCLUSION

James makes reference in his brief that a trial judge "smells the smoke of the battle". It is sometimes said "where there is smoke, there is fire". The trial court below was unfortunately required to receive this case in a piecemeal fashion. As set forth herein above, such is the beast of the overburdened trial dockets with which we all must deal. While there was not much 'battle' between James and Judy in the proceedings below, the financial issues in this divorce and way in which the parties were treated in the asset distribution had great bearing upon both James and Judy. Judy believes that the testimony and evidence adduced at trial provides the 'smoke' which clearly indicates a fire below warranting this Court's reversal and/or remand of the trial court's decision. James has received the benefit of Judy's post separation severance agreement and such was in error. James has received the benefit of being awarded his entire pension plan, when the trial court found the portion accruing during the marriage was marital. James received the benefit of being awarded his entire IRA with Morgan Keegan, when the trial court found the asset to be non-marital, such was in error. James received the benefit of being held responsible for a marital debt, i.e. the first mortgage, which was in reality $40,786.00 less than the trial court held. Finally, James has received the benefit of a child support award which

was not based upon proper finding and calculation. The Final Judgment should be reversed and/or remanded in these respects.

Respectfully submitted, this the 18th day of November, 2009.

JUDITH R. WHEAT, APPELLANT

BOYCE HOLLEMAN & ASSOCIATES

BY: _____
DEAN HOLLEMAN

CERTIFICATE

I, DEAN HOLLEMAN, do hereby certify that I have on this date forwarded a true and correct copy of the above and foregoing document to Honorable Jaye Bradley, Chancellor, Post Office Box 998, Pascagoula, MS 39568 and Gary Roberts, Post Office Box 237, Pascagoula, MS 39568, by United States Mail, postage prepaid.

DATED, this the 18th day of November 2009.

_____
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