

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

JEFFREY S. GOELLNER

APPELLANT

VERSUS

CAUSE NO. 2008-CA-00595

TENA C. GOELLNER

APPELLEE

**APPEAL FROM THE CHANCERY COURT
JACKSON COUNTY, MISSISSIPPI
CASE NO. 2007-0194RP**

BRIEF OF APPELLEE

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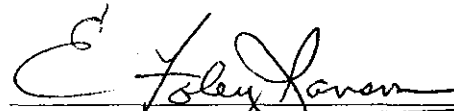
CERTIFICATE OF INTERESTED PERSONS

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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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DATED this the 6th day of November, 2008.

A handwritten signature in cursive script, appearing to read "E. Foley Ranson", is written over a horizontal line.

E. FOLEY RANSON
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STATEMENT OF THE CASE

Appellee does not disagree with Appellant's Statement of the Case.

STATEMENT OF THE FACTS

Appellee does disagree with Appellant's Statement of the Facts. In many instances, Appellant states as fact a number of allegations which represent only one witness' version of the story and ignoring other contradictory testimony or documentary evidence.

At Page 3 of his Brief, Appellant, Jeffrey Goellner (Jeff) recites that Appellee, Tena Goellner, (Tena) lived with Jeff for several months prior to their marriage in March 2003. Actually, for what it's worth, both Jeff and Tena began dating while still married to their previous spouses, (Transcript, 37) and lived together prior to their marriage. (Transcript 61-62, 169).

At Page 4 of his Brief, Jeff states that in 2004, altercations began which often resulted in Tena leaving the home. Jeff's statement of the facts tends to gloss over these so-called "altercations" which were usually reported by Tena as physical assaults. (Transcript, 11-16).

Tena testified that in January, 2004 Jeff got angry over a cold waffle and picked up a chair in which she was sitting and threw it into a counter, bruising her leg. Jeff did not recall this incident. (Transcript, 11-12, 170).

Tena estimated that Jeff was approximately 6'3" and 370 pounds. (Transcript, 116). Jeff admitted to being 6'3" and 320 pounds. (Transcript 174).

Tena related an incident in June, 2004, during which Jeff assaulted her in their mobile home causing a black eye and an injury to her wrist — he was trying to take off her wedding ring. (Transcript, 13-15, 78-81). Tena's daughter took photos of her face and these are seen in Exhibit 16. Tena had to wear a wrist brace for four weeks following this assault. (Transcript, 83). A police report was made by Tena.

Jeff's recollection of this event was that there was an argument and Tena had slapped him in the face several times and then she left. Jeff also recalled that this was the second time that the police had been called to his home. (Transcript, 171-172).

At Page 4 of his Brief, Jeff states that the parties separated approximately ten times and that Tena removed her belongings from the home three or four times..

Jeff fails to mention that Tena testified that the parties separated approximately four times. (Transcript, 77).

Also at Pages 4-5 of his Brief, Jeff describes the events of December 26, 2005, making it sound like that he and Tena were separated and that she arrived unexpectedly at their home and caused an argument which resulted in "alleged" physical abuse by Jeff against Tena.

According to Tena and her daughter, Christi Carter, Jeff and Tena had been staying with Christi because they were having their home repaired after Hurricane Katrina. In December, 2005, Christi asked Jeff to leave because his yelling at and cursing Tena was upsetting Christi's baby. On or about December 26, 2005, Tena moved back into their

home with Jeff. (Transcript, 19-21; 102; 149-150).

Tena states that Jeff threw her small dog out of the house and when she tried to go out and get it he assaulted her. She called the Sheriff and Jeff was arrested for domestic violence.

Christi testified that Tena had a slap mark on her face. (Transcript, 150). Tena testified that she went to Court to prosecute the domestic violence charge, but the case was continued and was never tried. (Transcript, 106-107).

At Page 5 of his Brief, Jeff states that Tena exhibited a “history of drug abuse, depression and suicide attempts.” This statement and several others that follow in that same paragraph are disputed by Tena and her daughter Kayla.

There was no evidence of drug abuse presented by any witness. Tena testified that she took only prescribed medications. On the two occasions on which she was hospitalized, the hospital records showed positive for cocaine on the drug screens. (Exhibit Nos. 22 and 23). Tena testified that this was a false positive caused by a diet pill she was taking and she denied ever taking any illegal drug. (Transcript, 93-96, 111-112).

Tena testified that due to her mistreatment by Jeff that she has suicidal thoughts and was hospitalized in September, 2004 for depression. (Transcript 17-19). She stated she did not attempt suicide in this occasion. (Transcript, 112).

On Page 6 of his Brief, Jeff states that throughout the marriage, “Tena abused prescription medication and illegal drugs,” which Jeff states was for “alleged pain” resulting

from a car accident. Again with the exception of Tena's one suicide attempt resulting from Jeff's cruel treatment, there is no testimony that Tena abused any medication or took illegal drugs.

Jeff and Tena purchased 35 acres of property in two separate transactions. According to Jeff they paid approximately \$73,000.00 for this land. Tena paid cash down payments totaling \$17,000.00 and the balance was financed. Tena paid most of the mortgage payments until she lost her job at the Sheriff's Department. Subsequently Jeff borrowed money from his retirement stock fund and at the time of the trial the balance due was \$23,3391.49. (Transcript, 43-44; 199-200; Exhibit 26).

Tena testified that she received \$68,000.00 from the sale of property prior to her marriage to Jeff. She paid off a credit card and car loan leaving approximately \$56,000.00 coming into the marriage with Jeff. (Transcript, 37-38). From that \$56,000.00 Tena used \$17,000.00 for down payments on the homestead property, approximately \$10,400.00 for improvements to the land and the purchase of a mobile home and \$23,941.00 to pay off Jeff's truck note. (Transcript,, 38-43; Exhibit 12). These contributions by Tena exceed \$51,000.00.

In March, 2003, the parties purchased a 2000 Honda Accord which was titled in Tena's name. Jeff borrowed \$6,900.00 from his credit union for part of the purchase price. (Exhibit 14). Tena stated that of the remaining \$5,000.00 due on this purchase, she paid \$2,000.00 and Jeff paid \$3,000.00. (Transcript, 51).

Trial Exhibits 7 and 8 provide information of the parties' respective retirement accounts accumulated during the marriage. Likewise Exhibits 1, 2 and 9 state the balances of the parties' respective checking and savings accounts.

The parties received insurance proceeds as a result of hurricane damage in 2005 and these funds were used primarily to repair and improve the homestead property. (Transcript, 207).

Tena filed a Financial Declaration which was trial Exhibit 1. She testified that her GM credit card balance was so high (\$10,000.00) because she had to use it to live on after her separation from Jeff. (Transcript, 54, 72).

Jeff's Financial Declaration was trial Exhibit 2. The Financial Declaration Jeff presented at trial in January, 2008 was the same as that he presented at the temporary hearing in July, 2007.

In Exhibit 2, Jeff swore that his monthly income was \$4,800.00 per month. On cross examination Jeff admitted that his monthly income was actually approximately \$8,500.00 per month in 2007. (Transcript, 215-220; Exhibits 24 and 25). In fact, Jeff's tax return showed that his gross wages for 2005 were \$105,554 and for 2006 were \$103,294. (Exhibits 20 and 21).

Jeff stated that in 2007 his gross wages were approximately \$115,000.00. (Transcript, 226).

Jeff also listed on his financial declaration \$800.00 per month as a mortgage payment,

but was paying \$800.00 per month on a stock loan which had been used to pay off the mortgage on the homestead property. However, he had also listed this same \$800.00 monthly payment as a deduction from his monthly wages. Accordingly the Court allowed Jeff to correct Exhibit 2 by deleting the \$800.00 per month mortgage expense Line 1 under Living Expenses. (Transcript, 221-222).

SUMMARY OF THE ARGUMENT

There was more than ample evidence presented by Tena and her witnesses to prove the grounds of habitual cruel and inhuman treatment.

The trial court went into painstaking detail in identifying the marital assets and in making an equitable distribution of these assets based upon the Ferguson factors.

The trial court also cited the Armstrong factors which it applied to the facts of this case in determining that Tena was in need of rehabilitative alimony in the form of health insurance premiums for thirty-six months and monthly payments of \$300.00 per month until May 31, 2009, the anticipated date of her graduation from her drafting and design schooling.

The Chancellor in his ruling cited and considered the Ferguson factors and the Armstrong factors, as well as other case law in explanation of and in support of his nearly seventeen (17) page opinion.

There was no manifest error or abuse of discretion in this case and the Chancellor did not apply an erroneous legal standard. Therefore, this decision should be affirmed.

ARGUMENT

In Section I of his argument, Jeff would have one believe that the break-up of this marriage was primarily Tena's fault. Assertions like "Tena only alleges three instances of physical abuse over the entire marriage" and "these instances of violence were very minor" and "there was no serious danger to Tena's health" and "Jeffrey was placed under arrest only once for abuse" are indicative of Jeff's thinking. In fact, Jeff concludes that "Tena was more at fault than Jeff."

The record presents a classic case of battered wife syndrome. Despite repeated physical assaults which resulted in bruises, black eyes, a sprained wrist and hand injury, hand prints from being slapped in the face; despite continuous verbal abuse in which Tena felt that her name was F'ing B _ _ _ _ (verified by her daughters); despite continuous acts of intimidation e.g. throwing a small dog out of their home and bowing his chest and trapping Tena against a wall with his 6'3" 320 pound frame, Tena continued to return to the marriage and to try to please the unreasonable expectations and demands of this obviously abusive personality of a husband.

Tena on one occasion was hospitalized with depression and suicidal ideation. Jeff did not check on her until she was released from the mental hospital. On a subsequent occasion, Tena was so depressed over her marital situation that she did attempt to commit suicide and very nearly accomplished it. Again Jeff did not visit her during her week-long recovery in the hospital.

Tena testified that she began taking anti-depression medication when she started dating Jeff prior to the marriage. After four years of marriage she was taking several prescription medications for depression and bleeding ulcers and was in counseling for depression.

Tena testified that she was physically assaulted by Jeff on several occasions during the marriage:

1. January, 2004 - Jeff got angry when the waffle Tena prepared for his breakfast got cold and he picked up the chair in which she was sitting and slung it into a counter causing bruising to her leg. (Transcript, 11-12).
2. June 2004 - during an argument Jeff grabbed Tena's Yorkie puppy and threw her out the front door. When Tena tried to go get the dog, he drug her back into the house and then wrestled her cell phone from her and threw it out the front door. When Tena tried to get away from him, he pinned her against the wall and tried to remove her wedding rings. Tena escaped and the police were called, but no arrest was made. Tena suffered a black eye and a sprained wrist and finger. She had to seek medical attention. (Transcript, 13-16).

Tena's daughter, Kayla Desalvo, took photographs of her face. (Transcript, 158-159) showing the black eye. (Exhibit 16).

3. December, 2005 - Jeff got angry at Tena and again threw her Yorkie puppy out the door and told her the dog was not allowed back into the house. When

she later tried to sneak out and get her dog, Jeff hit her in the back and knocked her down. Tena called the police and Jeff was arrested for domestic violence. (Transcript, 19-21).

Tena's daughter, Christi Carter, testified that Tena came to her house after this assault and she saw a hand print on Tena's face. (Transcript 150-151).

In Langdon v. Langdon, 854 So.2d 485 (Miss. App. 2003), the Mississippi Court of Appeals held that three physical assaults of the wife by her husband during a four and one-half year marriage was sufficient to support the Chancellor's granting of a divorce on the grounds of habitual cruel and inhuman treatment.

Tena also testified to Jeff's abusive language and constant criticism, also corroborated by Tena's daughters. (Transcript, 16, 22-23, 26-27, 29-30, 148-150, 156-158). These actions along with the physical abuse established a pattern of psychological abuse which resulted in persistent emotional distress for Tena. This type of mistreatment was considered sufficient to justify the granting of a divorce on the grounds of habitual cruel and inhuman treatment by our Court of Appeals. Rakestraw v. Rakestraw, 717 So.2d 1284 (Miss. App. 1998).

Clearly there was substantial evidence presented in this case to support the finding of the Chancellor in granting a divorce to Tena.

Jeff's second proposition is that the Chancellor erred in awarding alimony to Tena.

The main thrust of Jeff's argument is that the trial court failed to make adequate findings of fact and conclusions of law and failed to explain his reasoning in awarding alimony.

Haney v. Haney, 881 So.2d 862 (Miss. App. 2003) states that the Chancellor should provide an analysis to explain or illustrate how he arrived at his decision to award alimony.

The Chancellor cited the Armstrong factors and then considered the factors that applied, providing an analysis of each factor considered.

Tena was relatively healthy when she entered this marriage, but now takes approximately five prescription medications for her depression and bleeding ulcers. (Transcript 31-32, 56, 134). Tena testified that without health insurance her medications would cost approximately \$1,500.00 per month. (Transcript, 32).

In Hubbard v. Hubbard, 656 So.2d 124 (Miss. 1995) our Supreme Court at Page 130, defines "rehabilitative periodic alimony" as an "equitable mechanism which allows a party needing assistance to become self-supporting without becoming destitute in the interim."

Obviously the Chancellor in this case understood that without health insurance coverage, the cost of Tena's medication would exceed her gross monthly income.

In Hubbard, supra, the trial court awarded rehabilitative periodic alimony which was to assist the wife with her health insurance premiums. The marriage in that case lasted four and one-half years. The trial court was affirmed on this issue.

By virtue of his ruling, the Chancellor has provided modest financial assistance to Tena until she graduates from school and qualifies for employment that will provide health

insurance benefits which are not available in her current job as a hairdresser. Further, with her now preexisting conditions of depression and ulcers, Tena will likely not be able to qualify for health insurance coverage except through a prospective employer.

The chancellor also took into account the great disparity in incomes: Jeff - \$8,500.00 per month and Tena - \$1,400.00 per month.

The Chancellor's award of \$300.00 per month as alimony for fifteen months (until Tena's graduation from school) and a continuation of Tena's health insurance benefits for 36 months is an excellent example of a fair and equitable rehabilitative alimony award as authorized by Hubbard, supra.

In his Proposition III, Jeff states that the Chancellor failed to follow the Ferguson factors in his division of the parties' marital assets.

What follows in Jeff's brief is his opinion that the marital assets should have been divided differently, i.e. more favorably to him. However, he does not really provide an equitable legal basis for this opinion. Moreover, he misrepresents the evidence presented in the trial to support his argument.

For example, Jeff states that the Court awarded Tena one-half of Jeff's bank accounts. He chooses to ignore that he deposited into these accounts money he received from Tena for contributions to improvements on the homestead and contributions to the purchase and payoffs of vehicles; the deposit of insurance proceeds for damage to jointly owned property; the deposit of refunds from tax returns.

Jeff states that Tena had a “significant earning potential as a hair dresser” and only contributed minimally to the accumulation of marital property. Tena testified at great length on cross-examination that \$1,400.00 per month was about the maximum amount a hairdresser could earn as she had to pay the shop owner 30% of her earnings as well as purchasing her own supplies. (Transcript, 67-68). This testimony was not rebutted.

As far as Tena’s minimal contributions, she put into the marriage over \$51,000.00 of the \$56,000.00 she had from her separate property and at the time of the trial had cash assets of \$200.00. She contributed financially to the mortgage payments and helped clear the land, build fences, planted trees and helped build a pole barn. (Transcript 33-34).

Tena was employed the entire marriage except for one semester in college, even working at McDonald’s and Wal-Mart for brief periods. (Transcript, 64-66)..

Jeff complains that each party should be entitled to the majority of his/her retirement account. He does not cite any legal authority for this assertion.

The trial court followed the dictates of Ferguson and painstakingly establish the marital assets and the non marital assets and calculated the values of all assets. Then the Court made an equitable division of the marital assets. Jeff was awarded 57% of the marital assets and Tena was awarded 43%

The Chancellor properly followed the requirements of Ferguson and the resulting division was fair and equitable.

In regard to Jeff’s fourth proposition regarding the requirement that Jeff provide

health insurance for Tena for thirty-six months, this issue was addressed under Proposition II.

Tena would take issue with Jeff's citation of Haney v. Haney, 881 So.2d 862 (Miss. App. 2003) for the proposition as stated by Jeff at Page 21 of his brief that "however, the award of insurance coverage is normally reserved for spouses with serious and costly medical conditions." Jeff goes on to say that "Tena's stomach ulcers and periodic bouts of depression do not qualify."

This language does not appear anywhere in the Haney decision. However, it would seem that needing prescription medication, the cost of which exceeds your gross monthly income, would qualify as "serious and costly."

CONCLUSION

This was not a complex case. Tena and her witnesses offered testimony and documentary evidence which established the elements necessary for the granting of a divorce on grounds of habitual cruel and inhuman treatment.

In this four year marriage the parties accumulated a homestead, retirement funds and a modest sum of savings and personal property. The trial court considered and applied the Ferguson factors in making an equitable division of the marital assets. Jeff earned more and he was awarded a greater share of these assets.

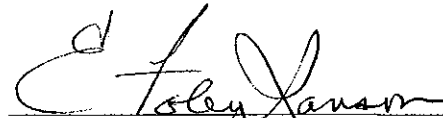
Tena presented a classic case of rehabilitative alimony and the trial court applied the

Armstrong factors in awarding Tena health insurance coverage for 36 months and monthly alimony payments of \$300.00 for 15 months. Jeff's income is nearly seven times Tena's income and she needed some temporary assistance to become self supporting without becoming destitute in the interim.

The ruling of the Chancellor was supported by substantial credible evidence and he applied the proper legal standards in this decision. Accordingly, the Chancellor's ruling should be affirmed.

DATED this the 6th day of November, 2008.

Respectfully submitted,

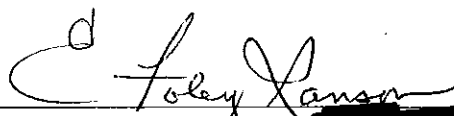
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E. FOLEY RANSON, [REDACTED]
Attorney for Tena C. Goellner

CERTIFICATE OF SERVICE

I, E. FOLEY RANSON, Attorney for Appellee, Tena C. Goellner, in the above cause, pursuant to MRAP 25 do hereby certify that I have mailed by U.S. mail postage prepaid the original and three (3) copies, and one electronic diskette of the foregoing Brief of the Appellee to the Clerk of the Supreme Court of Mississippi at her usual address of Post Office Box 249, Jackson, Mississippi 39205-0249 and to Suzette Breland, Attorney for Appellant at 1406 Bienville Boulevard, Suite 103, Ocean Springs, Mississippi 39564 and to Honorable Randy Pierce at Post Office Box 998, Pascagoula, Mississippi 39568-0998.

This the 6th day of November, 2008.



E. FOLEY RANSON, [REDACTED]
Attorney for Appellee