IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00712-COA

DARIAN DYE — APPELLANT

VS.

FRANCIS DYE — APPELLEE

APPEAL FROM THE CHANCERY COURT OF PONTOTOC COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

This case involves the novel issue of whether a spouse's expenditure of marital funds for necessary legal fees in defending himself from a baseless felony prosecution should be weighed against the spouse in a subsequent equitable distribution, even where the Trial Court does not find a wasteful dissipation of marital assets.

The Chancellor in this case "awarded" Darian Dye $103,803 of non-existent funds and property, the bulk of which had been expended prior to the divorce on Darian's successful criminal defense. Considering the existent assets awarded to the Parties, Darian received value of $78,648.95 and Frances received value of $183,567. The Court's distribution of marital property was thus manifestly inequitable.

Oral argument should be granted to discuss this novel issue.

REPLY ARGUMENT I.

A. THE TRIAL COURT DID NOT FIND THAT DARIAN'S NECESSARY LEGAL EXPENDITURES WERE WASTEFUL DISSIPATIONS OF MARITAL PROPERTY.

Appellee conveniently ignores the crucial fact that the Trial Court did not find that Darian expending his retirement account, valued at $68,803, amounted to a wasteful dissipation of marital property. The Trial Court expressly considered the dissipation prong of *Ferguson*. (T. Vol. 4, p. 404). The Trial Court found that the sale of a $5,000 vehicle and Frances' withdrawal of her IRA funds were dissipations considered under *Ferguson*. *Ferguson v. Ferguson*, 639 So. 2d 921, 925 (Miss. 1994). However, the Court did not find that Darian's other expenditures toward his towering $120,000 legal bills were such dissipations. The only evidence at the trial showed that Darian's legal expenses were reasonable and necessary. (*See, e.g.,* T. Vol. 1, p. 84-85).

Of course, marital property continues to accumulate and may be expended by either spouse, at least until the entry of a temporary support order or separate maintenance order. *Barnett v. Barnett*, 908 So. 2d 833, 841 (Miss. Ct. App. 2005). Further, "consultation has never been a prerequisite for expenditure of marital assets by the parties." *Barnett*, 908 So. 2d at 941. Simply put, any ***legitimate*** expenditure of marital property is not a wasteful dissipation and is not taxed against either spouse in a subsequent property distribution. *See, e.g., Pittman v. Pittman*, 791 So. 2d 857, 865 (Miss. Ct. App. 2001). The *Pittman* Court explained:

> [I]f marital funds in an account are used for ***legitimate expenses*** of both parties during a separation, the person who has been making the disbursements from the account does not, on the facts presented here, then need to provide equivalent amounts of separate funds at the time of the actual divorce as part of a distribution of marital property.

Pittman, 791 So. 2d at 865 (emphasis added).

Of course, where the use of marital property is not in the nature of a wasteful dissipation there is no need to adjust the property distribution for the depleted assets. *See, e.g, Bowen v. Bowen*, 982 So. 2d 385, 396 (Miss. 2008) (where Chancellor did not find wife's expenditures to have been a wasteful dissipation, Chancellor correctly did not adjust property distribution against wife).

Appellee misplaces her reliance on *Lauro v. Lauro*, 924 So. 2d 584 (Miss. Ct. App. 2006) and *Coggin v. Coggin*, 837 So. 2d 772 (Miss. Ct. App. 2003). In both *Lauro* and *Coggin* the Trial Courts found that a spouse had wastefully dissipated marital property. *See Lauro*, 924 So. 2d at 590; *Coggin*, 837 So. 2d at 776. In *Lauro* the Trial Court found that a spouse had dissipated marital assets by "selling a vehicle and spending marital funds on his girlfriend by paying rent and other monthly expenses." *Lauro*, 924 So. 2d at 590. Additionally, the Trial Court in *Lauro* determined that the offending spouse "took his girlfriend on expensive trips and purchased his mother diamond earrings." *Id.* Obviously, under such facts, the Court of Appeals affirmed the Trial Court's finding of a wasteful dissipation of marital assets. *Id.*

Similarly, in *Coggin*, the Trial Court found that a spouse had withdrawn from retirement accounts and cashed in insurance policies for "non-marital business purposes." *Coggin*, 837 So. 2d at 775. In fact, the Trial Court in *Coggin* entered an amended opinion expressly noting that the Court had considered the pre-marital dissipations in distributing the existing marital estate. *Id.* The Court of Appeals thus affirmed in *Coggin*. Likewise, the Court's holding in *Rush v. Rush*, 914 So. 2d 322 (Miss. Ct. App. 2005) is unavailing to Frances. In *Rush*, the Trial Court had to enter an Order to prevent a spouse from selling all of the marital property in an advertised "Big Moving Sale" immediately after divorce proceedings were commenced against him. *Rush*,

914 So. 2d at 324. The Court of Appeals found that the spouse "had acted in bad faith by trying to sell the property before [the wife] could receive an interest in it." *Id.* at 325.

Of course, the facts of this case are wholly dissimilar from cases such as *Lauro*, *Coggin* and *Rush*. In this case Darian made legitimate expenditures of marital property on legal fees for his criminal representation prior to the divorce. As there was no separate maintenance order or temporary support order entered in this case, the funds Darian spent on his legal bills were necessarily legitimate expenditures of marital funds.

Here there was no evidence, much less a factual finding by the Court, that Darian wastefully dissipated the assets or otherwise acted in bad faith in using funds to pay his legal fees. Again, the Record irrefutably shows that Darian had ***no choice*** but to spend the funds on his legal defense. Spending marital funds on necessary legal defense from a serious felony prosecution is a far cry from the wasteful expenditures on a girlfriend in *Lauro* or the attempted "Big Moving Sale" in *Rush*. In contrast, as established by the uncontraverted Record in this case, Darian's legal expenses were reasonable and necessary. Thus, as is implicit from the Supreme Court's holding in *Bowen*, since the Trial did not find Darian's necessary legal expenditures to have been a wasteful dissipation of marital assets, the Court should not have considered the depleted funds against Darian in the property distribution.

Appellee spends the bulk of her Brief insinuating that Darian committed some criminal act despite his acquittal and perhaps this was the basis for the Trial Court's decision. Appellee even compares Darian's acquittal to that of O.J. Simpson. Appellee's argument is disingenuous.

While Appellee correctly notes that a criminal acquittal is not conclusive of innocence in a civil case, Appellee implies that there was some evidence considered by the Trial Court of

Darian's guilt for the crime. This is flatly untrue. There is no such evidence and the Trial Court expressly accepted Darian's innocence.

The Trial Court, in considering Darian's visitation of his daughter, noted that restricted supervised visitation was appropriate where the non-custodial parent had demonstrated "irresponsible conduct, failed[ed] to consider the best interests of the child, or engage[d] in an activity which would actually endanger or result in injury to the child." (T. Vol. 4, p. 416). *See, e.g, Mord v. Peters*, 571 So. 2d 981 (Miss. 1990). Of course, sexual battery and fondling of a minor child would obviously be conduct warranting strictly supervised visitation. The Trial Court, however, stated:

> The issue has come before this Court, of course, on the charges that were lodged against the father in this case. These being matters that were dealt with in the Circuit Court of Pontotoc County, Mississippi. These were of a very serious nature. A jury of 12 men and women found this father not guilty of those charges. This Court is not going to interfere with or set aside, as it has no power whatever to do so, the decision by the jury of their peers, these people being Pontotoc County residents, a Pontotoc County jury over which this Court has no authority whatsoever, but that jury found him not guilty. Now, I want that emphasized in this record and I want it made perfectly and completely clear to the parties here today.

(T. Vol. 4, p. 417).

Although the guardian *ad litem* recommended supervised visitation, the Trial Court ordered a six-month period of supervised visitation to re-familiarize Darian and his child followed by an ***unsupervised*** "Farese" visitation schedule. Obviously, not only did the Trial Court expressly accept Darian's innocence of the baseless felony charges lodged by Frances, the Trial Court demonstrated its belief in his innocence by ordering unsupervised visitation. For Frances to now imply that the Trial Court considered Darian to have been guilty, and thus to have wastefully dissipated assets toward his legal fees, is patently absurd.

Despite Frances' urgings, the Record in this case does not reflect that Darian's expenditure of $120,000 in legal fees was a wasteful dissipation of marital assets. Moreover, the Trial Court made no such finding. Accordingly, the Trial Court erred in allocating all of the expenditures to Darian.

In the final analysis, Darian received only $78,648.95 in actual (existent) marital property, while Frances received almost all of the actual marital estate, being awarded $183,567.[1] As a result of the Trial Court awarding Darian predominantly depleted marital assets, the distribution of marital property was inequitable. Accordingly, the Trial Court's decision should be reversed and this case remanded for a re-distribution of the marital estate.

REPLY ARGUMENT II.

B. DARIAN'S PRE-MARITAL INTEREST IN HIS DAY-BRITE RETIREMENT ACCOUNT WAS SEPARATE PROPERTY.

Frances did not respond to the issue of whether the Trial Court erred in finding that all of Darian's Day-Brite retirement was marital property, even though Darian accumulated retirement benefits for eight years prior to the marriage. Frances seemingly ignores this issue entirely.[2] The Mississippi Supreme Court has held that the failure of an Appellee to brief an issue raised by the Appellant may be treated as a confession of error. *See, e.g., Turner v. State*, 383 So. 2d 489, 491 (Miss. 1980) (the failure of an appellee to respond to issues raised in appellant's brief "is tantamount to confession of error and will be accepted as such").

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[1] While the Trial Court purportedly awarded Darian $182,451.95, the sum of $103,803 had been depleted during the marriage. Thus, Darian received only $78,648.95 of the marital estate.

[2] Frances' Brief does not discuss either this issue or the issue raised regarding the Trial Court's findings as to the ownership of certain tractors and equipment. Indeed, Frances' Brief even omits these issues from its "Statement of the Issues." (Brf. of Appellee at 1). Both of these issues were expressly raised, and separately briefed, in Appellant's principal Brief. (*See* Brf. of Appellant at 1). Frances simply chose to ignore these troublesome issues entirely.

Frances did not respond to this assignment of error because she could not. The law is well-settled that a spouse's retirement benefits accumulated prior the marriage are the contributing spouse's separate property. *Arthur v. Arthur*, 691 So. 2d 997, 1003-1004 (Miss. 1997). Darian undisputedly contributed to his Day-Brite retirement for eight years ***before*** the marriage, and for only five years during the marriage. (T. Vol. 1, p. 75).

Even if the Trial Court correctly considered the depleted retirement account, the Court nevertheless erred by considering the pre-marital value as marital property. Darian's eight years' worth of contributions from before the marriage were his separate property. Accordingly, this case should be reversed as to this issue and remanded for a determination of the value of Darian's separate interest.

REPLY ARGUMENT III.

C. THE TRIAL COURT COMMITTED CLEAR ERROR IN FINDING THAT THE ENTIRE VALUE OF THE TRACTORS AND EQUIPMENT WAS MARITAL PROPERTY.

Again as to this issue, Frances' Brief makes no response whatsoever. Again here, Frances has conceded error by failing to respond to this issue. *Turner*, 383 So. 2d at 491.

As discussed in Darian's principal brief, the Trial Court's determination of ownership of this equipment is reviewed for clear error. *Burns v. Burns*, 789 So. 2d 94, 98 (Miss. Ct. App. 2000). The Trial Court's determination that Darian owned the entirety of this equipment and that all of its value was marital property is clearly erroneous in light of the testimony at trial.

Darian's and Frances' testimony were diametrically opposed regarding the ownership of this equipment. Darian denied any ownership, but Frances claimed that a partnership named "Don Dye & Sons" owned the equipment. (T. Vol. 2, p. 200-201). Even crediting Frances' testimony, Darian owned at most one-third of the value of the equipment. Thus, at most,

$10,000 of value should have been considered marital property. The Trial Court clearly erred in considering $30,000 as marital property and allocating all of it to Darian.

Accordingly, the Trial Court's decision should be reversed in this regard.

REPLY ARGUMENT IV.

D. ORDERING DARIAN TO CONTINUE FRANCES' COBRA HEALTH INSURANCE COVERAGE WAS AN ABUSE OF DISCRETION UNDER THE FACTS OF THIS CASE.

Frances claims that Darian "cites no authority for this argument" and it therefore should not be considered. (Brf. of Appellee at 14). A review of Darian's principal Brief belies this statement. (Brf. of Appellant at 16) citing *Bumpous v. Bumpous*, 770 So. 2d 558, 561 (Miss. Ct. App. 2000).

Despite Frances' contentions, Darian's Brief cites authorities pertaining to the familiar analysis of this sort of issue: whether the Trial Court *abused its discretion* by ordering one spouse to provide insurance coverage to the other. *Bumpous*, 770 So. 2d at 561. The *Bumpous* Court expressly stated that a Chancellor's order for one spouse to provide health insurance to the other is reviewed for abuse of discretion. *Bumpous*, 770 So. 2d at 561. *Bumpous* sets out the entire analysis for this issue i.e., whether the Trial Court abused its discretion. No further citations were necessary.

As noted in the Darian's principal brief, this Court's standard of review as to this issue is admittedly deferential. However, a decision of this sort is not beyond review by this Court. Rather, as noted in *Bumpous*, the Appellate Court will reverse such a decision if it is "persuaded that the chancellor has exceeded the boundaries of reasonable discretion." *Id.*

Darian claims that the Trial Court ordering him to provide the maximum COBRA insurance to Frances as allowed by law amounts to an abuse of discretion under the unique

circumstances of this case. Here, Darian provided Frances COBRA insurance coverage for twenty-seven (27) months ***prior*** to trial. The Trial Court ordering an additional thirty-six (36) months amounts to Darian providing Frances with approximately sixty-three (63) total months of coverage.

Considering the already one-sided property distribution in this case, and Frances' higher income, compelling Darian to provide such protracted COBRA insurance amounts to an abuse of discretion under these facts. That is, ordering one spouse to provide continued health insurance coverage to the other ***for over five (5) years*** "exceed[s] the boundaries of reasonable discretion" as contemplated by the Court in *Bumpous*. This is even more acute where the providing spouse was awarded only a fraction of the existent marital estate and has the lowest of the Parties' incomes.

Based on the facts of this case, the Trial Court's order amounts to an abuse of discretion. Accordingly, Darian requests that the Trial Court's decision be reversed in this regard.

CONCLUSION

The Trial Court's decision in this case should be reversed on four separate grounds. First, the Trial Court erred by allocating all of Darian's marital legal expenses to him where the expenditures were not a wasteful dissipation of marital assets. There was no temporary support or separate maintenance order entered in this case, and Darian's legal expenses were legitimate, reasonable and necessary. Accordingly, the funds legitimately expended during the marriage should not have been credited to Darian in the property distribution. The result of the Trial Court's analysis was Darian being awarded mostly nonexistent marital property and a facially inequitable property distribution.

Alternatively, even if the Trial Court correctly allocated the depleted funds to Darian, the Court nevertheless erred by considering the pre-marital portion of Darian's Day-Brite retirement account as marital property. The pre-marital value of Darian's Day-Brite retirement account was manifestly his separate property under Mississippi law.

Additionally, the Trial Court clearly erred by finding that Darian fully owned the tractors and equipment, where the testimony established that Darian at most owned a one-third interest in this property. Finally, in light of the facts of this case, the Chancellor abused his discretion by ordering Darian to provide Frances with an additional thirty-six (36) months of COBRA health insurance coverage.

Accordingly, for the above and foregoing reasons, Darian respectfully requests the Court to reverse the Trial Court's rulings.

RESPECTFULLY SUBMITTED, this the 21st day of April, 2009.

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CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Reply Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

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This the 21st day of April, 2009.

R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Reply Brief of Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

Ms. Betty W. Sephton
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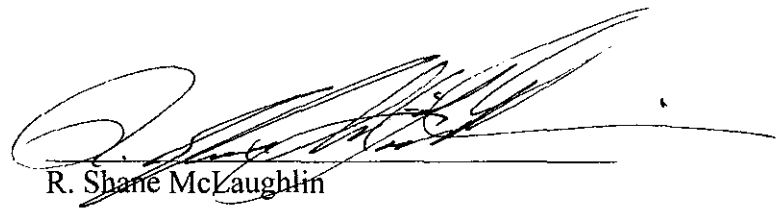
This, the 21st day of April, 2009.



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