

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NUMBER 2008-CA-01510-COA**

DUDLEY S. BURWELL

APPELLANT

VERSUS

APPELLATE NO. 2008-CA-01510-COA

ROSE LEE BURWELL

APPELLEE

REPLY BRIEF FOR APPELLANT

APPEAL FROM THE CHANCERY COURT OF HARRISON
COUNTY, FIRST JUDICIAL DISTRICT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

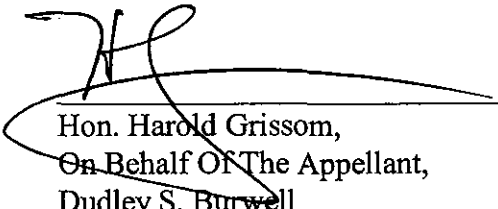
I Harold Grissom, attorney for the Appellant, Dudley S. Burwell, files this and certifies through his Certificate Of Interested Parties that the following individuals have an interest in the outcome of this case as follows, to-wit:

Hon. Sanford Steckler,
Chancellor
P.O. Box 659
Gulfport, MS 39502

Hon. Woodrow W. Pringle, III
On Behalf Of The Appellee, Rose Lee Burwell
2217 Pass Road
Gulfport, MS 39501

Huey L. Bang, RMR, CRR
P.O. Box 406
Pass Christian, MS 39571

RESPECTFULLY SUBMITTED, this the 3rd day of February, 2010.



Hon. Harold Grissom,
On Behalf Of The Appellant,
Dudley S. Burwell

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REPLY - SUMMARY OF THE ARGUMENT

That the Appellee, Rose Lee Burwell has ignored the Chancery Court's erroneous method of calculating the Appellant, Dudley Burwell's decrease in income. Instead, Rose has focused on facts which she claims supports her position that Dudley's periodic alimony amount should not be reduced. In Dudley's Reply - Argument, he establishes that Rose's fact specific references are misleading and not supported by the record. Dudley establishes that he was not the affluent individual Rose would have the Court believe. In fact, the evidence in this matter shows that Dudley was doing things to reduce his debt so he could afford to pay his periodic alimony. In the interim however, Dudley had to sell assets he acquired in the property settlement and take out loans to pay alimony. Rose argues that Dudley was aware of cut-backs by Medicare in the Spring of 1997 (prior to the October 14, 1997 divorce), however the proof establishes that Dudley was concerned about his income and ordered an audit at that time. It wasn't until after the divorce and in early 1998 that Dudley saw that part of his income was being cut by not only Medicare, but also by insurance companies, Garden Park Hospital and PDN (Private Duty Nursing). In an effort to insure that this was not a temporary reduction, Dudley waited just over a year to file his petition to reduce his alimony payments. Dudley only knew after the divorce that there was a continuing pattern of decline in his income which needed to be addressed by the Court.

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REPLY - ARGUMENT

Rose Lee Burwell has attempted to paint Dudley Burwell as an affluent physician that doesn't deserve to have the alimony payments reduced. The emphasis has been a distraction from Dudley's position on the Chancery Court error in it's mathematical calculation and more fact specific as to other reasons this Honorable Court should not reverse the findings of the Chancery Court. Rose claims alimony should not be reduced based on her allegations that Dudley Burwell (1) was building a \$400,000 home; (2) paid money to an architect to do the plans for this house; (3) made a down payment on the new home; (4) bought furniture for his home; (5) invested in Cedar Lake Surgery Center, LLC; (6) invested in Hickory Creek, Inc.; and (7) that Dudley Burwell's sharing of expenses with Dr. Clause in some manner was a reason alimony should not be reduced.¹

These allegations are misleading because Rose fails to point out that Dudley was selling the marital home for \$475,000 which costs \$640,000 to build (this does not include the appreciation of the home since it was built), and was downsizing to a \$400,000 home since he

¹ Pages 4-5 of Rose's Brief Of Appellee.

could not afford the larger more expensive marital home.² Rose had moved out of the marital home and had already purchased her new home.

Rose fails to point out that the \$43,000 down payment on the home is included in the \$400,000 costs to build the new home. It was actually a 387,000 home (\$43,000 down with a remaining loan of \$344,000).³

Rose fails to point out that she had taken most of the furniture in the divorce property division. That the furniture being purchased was being used to replace furniture he lost in the divorce action.⁴

Rose fails to point out that Dudley Burwell's investment in Cedar Lake Surgery Center, LLC was not a major investment. It was a \$2,500 investment in which he is yet to receive any income.⁵

Rose fails to point out that the investment in Hickory Creek, Inc. was \$1,810.78 and this was not something that started in 1998.⁶ In fact they took a loss of \$3,664 in 1997.⁷ Furthermore, Dudley Burwell is yet to receive any income from this investment.

² Page 87 of February 24, 1999 Transcript Of Hearing (Found on Page 22 of Appellant's Supplemental Record Excerpts).

³ Page 44 of February 24, 1999 Transcript Of Hearing (Found on Page 11 of Appellant's Supplemental Record Excerpts).

⁴ Pages 34 & 72 of February 24, 1999 Transcript Of Hearing (Found on Pages 9 & 18 of Appellant's Supplemental Record Excerpts).

⁵ Page 31 of February 24, 1999 Transcript Of Hearing (Found on Page 8 of Appellant's Supplemental Record Excerpts).

⁶ Page 31 of February 24, 1999 Transcript Of Hearing (Found on Page 8 of Appellant's Supplemental Record Excerpts).

⁷ Page 61 of February 24, 1999 Transcript Of Hearing (Found on Page 16 of Appellant's Supplemental Record Excerpts).

Rose's reliance on Dudley Burwell sharing expenses with Dr. Clause is speculative at best. How their sharing expenses should be held against Dudley is not based on fact. It would be more reasonable to argue that Dudley's sharing of expenses was a way to save money and thus net more income.⁸ Instead, Dudley Burwell's income continued to decrease.

Rose claims that Dudley was aware in Spring, 1997 of his decline in income due to reductions Medicare was making. Rose argues that since he was aware of the reductions due to Medicare in Spring of 1997 then he should be denied any relief since the Judgment Of Divorce was not until October 14, 1997. This allegation is not accurate however. Dudley was attempting to find out why there was a decrease in his income so he ordered an internal audit in the Spring of 1997. "Question:when did you first become aware of it to the extent that you ordered an internal audit? Answer: It was approximately in the Spring of '97."⁹ So in the Spring of 1997 Dudley ordered the audit and it wasn't until the end of 1997 and early 1998 that he was concerned (ie., after the divorce). "When '97 showed a significant decline and early '98 show a decline, I started to worry."¹⁰

Rose also fails to consider that Dudley was having other financial losses as well. For instance, from 1997 to 1998 tax years, Dudley had a \$32,000 reduction in income from Garden

⁸ Pages 58-60 of February 24, 1999 Transcript Of Hearing (Found on Page 15 of Appellant's Supplemental Record Excerpts).

⁹ Page 71 of February 24, 1999 Transcript Of Hearing (Found on Page 18 of Appellant's Supplemental Record Excerpts).

¹⁰ Page 71 of February 24, 1999 Transcript Of Hearing (Found on Page 18 of Appellant's Supplemental Record Excerpts).

Park Hospital.¹¹ Dudley lost \$1,000 per month from his PDN (or \$12,000 a year) after the divorce.¹² Accordingly, there were other sources of income loss that Rose fails to consider.

Rose failed to consider that she got approximately \$700,000 of assets in the property settlement and only carried \$15,000 of debt on said property.¹³ In the meantime, Dudley took all other debt with his approximate equal share of the property. Dudley's share of the debt was approximately \$500,000.¹⁴

Rose relies on *Tingle v. Tingle* where the father attempted to modify child support six months after the divorce.¹⁵ Unlike this *Burwell* case, Tingle had voluntarily quit work and enrolled in college full time. The Court found from Tingle's own testimony that prior to the divorce he was planning on going back to college full time prior to entering into his divorce. It was anticipated and within his control so his relief was denied.

Dudley was aware that he was not making as much money in the Spring of 1997 so he ordered an audit in the Spring of 1997. He was concerned that there may be embezzlement involved, but wasn't sure.¹⁶ It was only after his divorce that he realized that his Medicare income, insurance income, Garden Park Hospital income and PDN income was taking a

¹¹ Pages 84-85 of February 24, 1999 Transcript Of Hearing (Found on Pages 21-22 of Appellant's Supplemental Record Excerpts).

¹² Page 85 of February 24, 1999 Transcript Of Hearing (Found on Page 22 of Appellant's Supplemental Record Excerpts).

¹³ Pages 20-21 of February 24, 1999 Transcript Of Hearing (Found on Pages 5-6 of Appellant's Supplemental Record Excerpts).

¹⁴ Page 25 of February 24, 1999 Transcript Of Hearing (Found on Page 7 of Appellant's Supplemental Record Excerpts).

¹⁵ *Tingle v. Tingle*, 573 So.2d 1389 (Miss.1990).

¹⁶ Page 70 of February 24, 1999 Transcript Of Hearing (Found on Page 18 of Appellant's Supplemental Record Excerpts).

substantial decrease and continuing to decline. Dudley waited until November, 1998 to file his Petition For Modification Of Judgment Of Divorce. It was necessary that Dudley wait to see if this change in income was going to take on any form of permanency. The Court in *Dix v. Dix* found no modification was warranted because the payor husband did not show a “continuing pattern of decline.”¹⁷ Once it was clear that Dudley’s income had decreased and would remain substantially lower (ie., showed a continuing pattern of decline), from Medicare, insurance, Garden Park Hospital, PDN, etc., he filed to reduce said alimony. This is completely different than the *Tingle* and *Dix* case.

Rose argues that *Dix v. Dix* is identical to this case, however there are major differences. Dr. Dix admittedly lived an affluent lifestyle. Since the divorce Dr. Dix continued to purchase major luxury items such as an airplane, recreational vehicle, invested in numerous real estate ventures.¹⁸ Dudley lives to the contrary. Dudley had to sell the \$640,000 marital home to reduce his expenses and get into a home which was more affordable. Dudley had no major luxury purchases.¹⁹ In fact, Dudley’s few investments were very small (ie., \$1,810.78 in Hickory Creek, Inc.²⁰ and \$2,500 in Cedar Lake Surgery Center, LLC.)²¹ In Dudley’s property settlement with Rose, Dudley took most of the debt giving Rose lien free property. Dudley was forced to sell

¹⁷ *Dix v. Dix*, 941 So.2d 913, 917 (Miss.2006).

¹⁸ *Dix v. Dix*, 941 So.2d 913 (Miss.2006).

¹⁹ Page 27-28 of February 24, 1999 Transcript Of Hearing (Found on Page 7 of Appellant’s Supplemental Record Excerpts).

²⁰ Page 31 of February 24, 1999 Transcript Of Hearing (Found on Page 8 of Appellant’s Supplemental Record Excerpts).

²¹ Page 31 of February 24, 1999 Transcript Of Hearing (Found on Page 8 of Appellant’s Supplemental Record Excerpts).

assets he obtained in the property settlement to pay taxes, alimony and child support.²² Dudley has had to take out loans to pay child support and alimony.²³

Rose did not address the conclusion of the Chancery Court and the error in the mathematical computation of same. As pointed out in Dudley's Appellant Brief, when comparing income, the Court looked at 1996 as the base line year for comparison for Dudley's income. Rather than comparing each subsequent year to 1996, the Chancery Court compared 1996 to 1997; 1997 to 1998; 1998 to 1999; and 1999 to 2000. When the Court should have compared 1997's income to 1996; 1998's income to 1996; 1999's income to 1996; and 2000's income to 1996. If the Court had done so it would reflect that Dudley's income had materially changed and the change demonstrated a continuing pattern of decline.

YEAR	EARNED INCOME	COMPARE TO 1996	% DECREASE VS. 1996
1996	386,828		
1997	330,066	-56,762	-14.67%
1998	267,226	-119,602	-30.92%
1999	315,388	-71,440	-18.47%
2000	364,210	-22,618	-5.85%
	TOTAL	-270,422	-69.91%
	AVERAGE	-67,606	-17.4769

At no time during the 1997 through 2000 time frame did Dudley Burwell's income meet or exceed his 1996 income as suggested by the Court's calculations. Accordingly, the Court was manifestly wrong or clearly erroneous in its mathematical calculation of decrease in Dudley S.

²² Pages 21 & 26 of February 24, 1999 Transcript Of Hearing (Found on Pages 6 & 7 of Appellant's Supplemental Record Excerpts).

²³ Page 23 of February 24, 1999 Transcript Of Hearing (Found on Page 6 of Appellant's Supplemental Record Excerpts).

Burwell's income when using the year 1996 as the base line. This is based on the Chancery Court's certified public accountant's figures which was appointed as the Court's expert in this case.

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REPLY - CONCLUSION

Based on the Court appointed expert, Robert Culumber, CPA, Dudley has had a material and substantial decrease in income. That based on the Court's expert's computations and Dudley's testimony it is evident that Dudley's income demonstrated a continuing pattern of decline which was no fault of Dudley's. The Chancery Court was in error simply based on a mathematical miscalculation. Rather than comparing Dudley's subsequent years of income to 1996, the Court compared 1996 to 1997, 1997 to 1998, 1998 to 1999 and 1999 to 2000. Accordingly, Dudley respectfully requests that this matter be reversed.

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CERTIFICATE OF SERVICE

I Harold Grissom, attorney for the Appellant, Dudley S. Burwell, do hereby certify that I have hand delivered on this day, the Appellant, Dudley S. Burwell's Reply Brief For Appellant with Supplemental Record Excerpts For Appellant to the following, to-wit:

Hon. Sanford Steckler,
Chancellor
P.O. Box 659
Gulfport, MS 39502

Hon. Woodrow W. Pringle, III
On Behalf Of The Appellee, Rose Lee Burwell
2217 Pass Road
Gulfport, MS 39501

RESPECTFULLY SUBMITTED, this the 3rd day of February, 2010.


Hon. Harold Grissom,
On Behalf Of The Appellant,
Dudley S. Burwell