2008-CA-01785-COART

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT REGARDING ORAL ARGUMENT

As noted in Appellant's opening Brief, the Chancellor's grant of a divorce in this case significantly expands the ground of habitual cruel and inhuman treatment. The evidence at trial established frequent bickering and perhaps incompatibility, but did not rise to the level of habitual cruel and inhuman treatment. Further, there was no evidence that the subjective effect on Donald Anderson even neared the requisite degree for a divorce, as Donald admitted that his wife's petty stubbornness was his chief complaint with the marriage.

Additionally, oral argument would be helpful to discuss the issue of condonation, as there was no evidence of any conduct warranting divorce after the couple resumed normal marital relations.

The Court should grant oral argument to discuss each of these issues.

REPLY ARGUMENT I.

THE RECORD IS DEVOID OF ANY CONDUCT RISING TO THE LEVEL OF HABITUAL CRUEL AND INHUMAN TREATMENT.

When evaluating whether specific conduct rises to the level of habitual cruel and inhuman treatment, the "impact of the conduct on the plaintiff is crucial." *Faries v. Faries*, 607 So. 2d 1204, 1209 (Miss. 1992). Thus, the Court employs a subjective standard to evaluate the conduct's effect on the complaining spouse. *Stein v. Stein*, 11 So. 3d 1288, 1291 (Miss. Ct. App. 2009). *See also Tedford v. Tedford*, 856 So. 2d 753, 756 (Miss. Ct. App. 2003) (noting that subjective standard, rather than normative standard, applies to claim of habitual cruel and inhuman treatment). Mere subjective unhappiness does not rise to the level of habitual cruel and inhuman treatment. *Tedford*, 856 So. 2d at 757.

While Courts have become more liberal in the quantum of proof required for a divorce based on habitual cruel and inhuman treatment, "by no means have they made a farce and mockery of the requirement to prove the ground." *Potts v. Potts*, 700 So. 2d 321, 323 (Miss. 1997).

Further, even if the conduct is subjectively cruel and inhuman, there must nevertheless be a causal connection between the conduct and the Parties' separation. *Sproles v. Sproles*, 782 So. 2d 742, 747 (Miss. 2001) (holding "there must be some causal connection between habitual cruel and inhuman treatment and the parties' separation to sustain the charge."). A divorce based on habitual cruel and inhuman treatment is improper where the complaining spouse fails to prove that the conduct was a cause of the separation. *Fournet v. Fournet*, 481 So. 2d 326, 329 (Miss. 1985).

None of Merlene's conduct referenced in Donald's Brief nears the level of habitual cruel and inhuman treatment. This is especially apparent by considering the conduct's subjective

effect on Donald. The subjective effect is most apparent by considering what Donald claimed was the most hurtful aspects of Merlene's conduct. Donald testified:

> She thinks she's always right, and that's one of the most detrimental parts about her. ***You can't tell her nothing, you know, and that's what really – what really hurts more than anything else.***

(T. Vol. 3, p. 354) (emphasis added). Donald expounded on this by describing Merlene as far too "self-dominant." (*See* T. Vol. 3, p. 332-33). Further, Donald complained:

> So everything, no matter how minute it was, everything had to be exactly as she said. And this point of dominance and – that – ***that I could not handle. I just can't handle it.***

(T. Vol. 3, p. 315). (emphasis added). Donald testified that Merlene's "dominant" behavior was his major problem with the marriage. (*See, e.g,* T. Vo. 3, p. 314-15, 673-74).

Not even Donald can contend that thinking one is always right, being "self-dominant" or even ardent stubbornness amounts to habitual cruel and inhuman treatment under Mississippi law. Yet, by Donald's own admission, it was this conduct which "hurt[] more than anything else" and amounted to Donald's chief problem with Merlene. Since this conduct, which clearly does not rise to the level of habitual cruel and inhuman treatment, was subjectively the most hurtful to Donald, none of the other conduct could possibly be cruel or inhuman. That is, since the most subjectively injurious conduct amounts to mere incompatibility, any other conduct necessarily had an insufficient subjective effect on Donald to warrant a divorce. Accordingly, since no conduct rose to the level of habitual cruel and inhuman treatment, the Trial Court erred in granting a divorce.[1]

[1] Notably, while the Trial Court's factual findings as to whether certain conduct occurred is a finding of fact subject to deferential review, whether the conduct rose to the level of habitual cruel and inhuman treatment is a determination of law subject to *de novo* review. *Potts v. Potts*, 700 So. 2d 321, 322 (Miss. 1997). As a matter of law, the conduct in this case which was most subjectively injurious to Donald could never warrant a divorce on this ground.

Donald next offers other conduct, which of course must have been less hurtful than Merlene's dominant behavior, that he claims warranted a divorce. This conduct could not warrant a divorce. First of all, all of the conduct Donald complains of is far too insignificant and petty to warrant a divorce. Moreover, the conduct necessarily had less of a subjective effect on Donald that Merlene's innocuous "dominant" behavior. Additionally, there is no evidence that any conduct, other than Merlene's "self-dominant type thing" was a cause of the Parties' separation.

Donald first points to Merlene's treating his children differently and allegedly physically abusing the children as justifying a divorce. However, this conduct likewise meets neither of the requirements for a divorce based on habitual cruel and inhuman treatment. The conduct does not endanger life, limb or health and is not so unnatural and infamous as to make the marriage revolting. *See Jackson v. Jackson*, 922 So. 2d 53, 56 (Miss. Ct. App. 2006).

Further, Donald's inflammatory allegation that Merlene abused either child is wholly disingenuous. Donald's frivolous allegation in the Trial Court necessitated the appointment of a guardian *ad litem*. The guardian *ad litem* found the allegations of abuse unsubstantiated. (R. Vol. 2, p. 157). Specifically the guardian *ad litem* reported:

> And, preliminarily, there is no confirmation of abuse or neglect by either parent.
>
> Now, let me say this: There is some – has been conduct that has been complained of by the minor children, but that did not rise – in the guardian ad litem's opinion did not rise – or as dictated by statute, did not rise to a level of abuse or neglect.
>
> There was some difference in some parenting styles and things that are more attributed to that, simply a difference in philosophy, but nothing that rose to the level of a neglect or abuse.

(R. Vol. 2, p. 157-58). The Trial Court noted in its opinion that the guardian *ad litem* found the allegations of abuse and neglect unsubstantiated and did not rely on the spurious allegations as a basis for the divorce. (*See* R.E. tab 2, n. 2).

Donald's frivolous allegations of abuse were unsubstantiated, are not supported by the record and were not even considered by the Trial Court as a basis for the divorce. These allegations are no basis whatsoever for a divorce based on habitual cruel and inhuman treatment.

Donald next points to Merlene's allegations of adultery as constituting habitual cruel and inhuman treatment. As Donald points out, malicious allegations of adultery can amount to habitual cruel and inhuman treatment. *Richard v. Richard*, 711 So. 2d 884, 889 (Miss. 1998) ("false accusations of infidelity, made habitually over a long period of time ***without reasonable cause*** also constitute cruel and inhuman treatment.") (emphasis added). However, Donald conveniently ignores that good-faith claims of adultery do not amount to habitual cruel and inhuman treatment under Mississippi law. *Gregory v. Gregory*, 881 So. 2d 840, 845 (Miss. Ct. App. 2003). The Supreme Court has explained:

> In order that false accusations may constitute cruelty, they must be made without probable cause or reasonable grounds for belief therein. . . . It has been held that the false accusations must have been made maliciously or in bad faith in order to constitute cruelty, and that the good faith of the accuser or good faith coupled with the existence of reasonable grounds for making the accusation, is sufficient justification and prevents the making of the accusations from constituting cruelty.

Hibner v. Hibner, 64 So. 2d 756, 758 (Miss. 1953).

Merlene's principal Brief addresses the overwhelming evidence which formed Merlene's good-faith belief of Donald's likely adultery. Donald's Brief offers no response at all. In short, Merlene found an e-mail from Donald to his secretary, Lisa Spencer, dated September 20, 2005, which consisted solely of the following phrase:

> good PUSSY

(Exhibit No. 7, p. 29) (emphasis in original). Merlene also knew that Donald had booked a hotel room for a business trip to New Orleans for two people, when he supposedly traveled alone. (T. Vol. 4, p. 461-62). Further, Donald had signed up for various on-line dating websites and pornographic websites during the marriage. (Exhibits Nos. 8-9; T. Vol. 4, p. 435; 492).

Merlene had an ample good-faith basis to question Donald's fidelity based on these facts. Donald's e-mail to his secretary, standing alone, was sufficient for Merlene to have a "probable cause" to question Donald. There is no evidence that Merlene made any allegations of adultery in bad-faith. Thus, this was likewise no basis for a divorce based on habitual cruel and inhuman treatment.

Donald finally points again to Merlene's "imprecatory declarations" and her reference to a preacher's wife who shot her husband in Selmer, Tennessee, in hopes these statements were enough for a divorce. They are not. As noted above, Donald admitted that these statements were not sufficiently subjectively hurtful to constitute cruelty, as the statements were less hurtful that Merlene's stubbornness and "self-dominant" behavior. Further, Donald admitted that Merlene never threatened to shoot him, but merely made such statements during some of the couple's frequent bouts of bickering.

Such statements do not approach the level required for a divorce based on habitual cruel and inhuman treatment under Mississippi law. Merlene's statements do not endanger life or limb, do not render the marriage revolting and were subjectively less hurtful to Donald that Merlene's innocuous behavior of resisting Donald's will.

Donald did not prove conduct that amounted to habitual cruel and inhuman treatment. Accordingly, the Trial Court's judgment should be reversed and judgment rendered in Merlene's favor.

REPLY ARGUMENT II.

NO RECORD EVIDENCE ESTABLISHES THAT THE GROUND FOR DIVORCE WAS REVIVED AFTER CONDONATION.

Donald's Brief makes scant reference to issue of condonation. The Chancellor apparently found that Donald had, at some point, condoned any grounds for divorce based on his resumption of sexual relations with Merlene. The Trial Court's opinion noted that where condonation has occurred, and the cruel conduct subsequently occurs "the previous offenses are revived for the chancellor's consideration of the ground of habitual cruel and inhuman treatment." (R.E. tab 2, ¶ 13). Citing *Kumar v. Kumar*, 976 So. 2d 957, 962 (Miss. Ct. App. 2008).

The Chancellor did not specifically find when the couple had last engaged in sexual relations which amounted to condonation. Merlene testified it was on February 23, 2006, in a hotel room in New Albany, Mississippi. The Chancellor did not make any finding as to what conduct Merlene committed after the date of condonation which amounted to a revival of Donald's claim for habitual cruel and inhuman treatment.

As noted above, and in Merlene's principal Brief, there is no evidence whatsoever which amounts to habitual cruel and inhuman treatment in this case. Much less is there any evidence that Merlene committed such conduct after the couple resumed in sexual relations. Accordingly, not only were there no grounds which could be revived, neither was there any such conduct after the couple last engaged in normal marital relations.

Even if there had been, at some point, grounds for a divorce based on habitual cruel and inhuman treatment, Donald condoned the conduct and there is no evidence that the grounds were revived by subsequent conduct.

Therefore, in any event, the Trial Court erred in granting a divorce based on the doctrine of condonation.

CONCLUSION

Merlene contends that the record is devoid of any evidence amounting to habitual cruel and inhuman treatment. This is particularly evident by noting that the conduct which was most subjectively hurtful to Donald is clearly insufficient for a divorce under Mississippi law.

Further, even if there had been evidence supporting a divorce based on habitual cruel and inhuman treatment, the conduct would have been condoned. There is likewise no record-evidence that Merlene committed any actionable conduct after Donald's condonation.

Accordingly, Merlene respectfully requests the Court to reverse and render the Trial Court's grant of divorce.

RESPECTFULLY SUBMITTED, this the 19th day of October, 2009.

MCLAUGHLIN LAW FIRM

By: _____

R. Shane McLaughlin (Miss. Bar No. 101185)
Nicole H. McLaughlin (Miss. Bar No. 101186)
338 North Spring Street Suite 2
P.O. Box 200
Tupelo, Mississippi 38802
Telephone: (662) 840-5042
Facsimile: (662) 840-5043
E-mail: rsm@mclaughlinlawfirm.com

ATTORNEYS FOR APPELLANT

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:

Rebecca Phipps, Esq.
Attorney at Law
Post Office Box 992
Corinth, Mississippi 38835

D. Kirk Tharp, Esq.
Attorney at Law
Post Office Box 7332
Tupelo, Mississippi 38802

Hon. Jacqueline Estes Mask
Chancellor
Post Office Box 7395
Tupelo, Mississippi 388027395

This the 19th day of October, 2009.

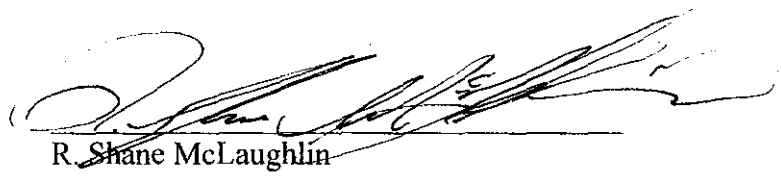
R. Shane McLaughlin

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
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

This, the 19th day of October, 2009.



R. Shane McLaughlin