IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOSEPH F. TATUM, III — **APPELLANT**

VERSUS — **NO: 2008-CA-01858**

LAUREN D. TATUM — **APPELLEE**

On appeal from the Chancery Court of Lamar County, Mississippi
Case No. 2007-0394-GN-W

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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2. **The reliance of the Chancellor on assumptions and speculation which were not supported by the testimony and evidence at trial were not harmless error.**

3. **Joseph has properly appealed with supersedeas and had every right to do so.**

4. **Lauren did not satisfy her burden of proof for an award of attorney fees and the Chancery Court abused its discretion and erred as a matter of law in awarding Lauren additional attorney fees.**

5. **Joseph had no obligation to "object" to the amount of the award of child support during the Chancellor's bench ruling.**

ARGUMENT

Joseph Tatum, Appellant, respectfully submits this Reply Brief to the Brief of the Appellee, Lauren Tatum[1] and for cause would respectfully show the reviewing Court as follows:

1. **Joseph respectfully requests that the reviewing Court strike or disregard all facts contained in the Brief of Appellee which are not supported by the record.**

"This Court can act only on the basis of the contents of the official record . . . . It may not act upon statements in briefs or arguments of counsel which are not reflected by the record." *Porter v. State*, 749 So. 2d 250, 256 (Miss. Ct. App. 1999). There are unsubstantiated assertions in Lauren's Brief that are either not contained in, or supported, by the record and exhibits so designated on appeal.

Lauren states in her Brief, citing to pages 96-97 of the trial transcript, that "The proof showed that Joseph asked his father, who controlled Loresco, not to pay him bonuses or dividends while the divorce was pending." This is based on Lauren's own testimony which was denied by Joseph, corroborated by no-one and flatly contradicted at trial by Joseph's father, Chip, owner of Joseph's employer company, Loresco. Chip testified that any bonuses awarded to any of his employees, including Joseph, are based on performance, are determined by Chip, are not automatic, and are based on the performance and profitability of the company. (TR 224-225). Chip also stated that the divorce proceedings were irrelevant

[1]Since the divorce Lauren has re-married and is now named Lauren D. Fairey.

to any decisions made by the company regarding whether or not to award bonuses. (TR 231)

2. The reliance of the Chancellor on assumptions and speculation which were not supported by the testimony and evidence at trial were not harmless error.

Lauren acknowledges in her brief that the Chancellor looked outside of the record to determine Joseph's present and potential future financial condition, but argues that to do so was harmless error, stating that:

> "Joseph argues that the Court looked outside the record in stating "that Joseph comes from one of the most well to do families in our community." At no time did the Chancellor use that fact to make an unfair distribution of marital assets."

Brief of Appellee, pages 12-13

It is a fundamental pillar of our jurisprudence that in order to be afforded a fair trial the trial court must rely on the witnesses and evidence presented at trial and not upon generalized assumptions or speculation, particularly when looking at matters such as the equitable distribution of marital assets, child support and spousal support. To do otherwise is to deny the litigants a fair trial. Chancellors are bound to rely upon the facts and record as presented, not upon speculation. *Cosentino v. Cosentino*, 986 So.2d 1065, 1069 (Miss. Ct. App. 2008). There was simply no evidence in the record to support any finding by the Chancery Court that because Joseph came from a "well to do family" that Joseph would have access or rights to any income or assets owned by members of his extended family, either presently or in the future. To do so was not harmless error but was the central focus of the entire analysis of the Chancery Court with regard to matters of equitable distribution and

alimony and tainted the entire analysis.

3. Joseph has properly appealed with supersedeas and had every right to do so.

The Appeal Bond to Supreme Court of Mississippi with Supersedeas was approved by the Circuit Clerk on December 18, 2008. (CP 67-89) A filed copy of the bond was furnished to Lauren and there has been no challenge to that bond, or motions filed to challenge the sufficiency of that bond. The issue of the supersedeas bond is referred to by Lauren on more than one occasion in her Brief. Joseph objects to the same as it is not germane to any of the issues pending before the reviewing Court on appeal. Lauren accuses Joseph of attempting to "starve her out" financially through the posting of the supersedeas bond. It is at best ironic to note that while all of the contested monetary awards are protected by a supersedeas bond, Lauren has sought and obtained every possible extension of time in filing her Appellee's Brief in this case while claiming to be "starved financially during her appeal."

4. Lauren did not satisfy her burden of proof for an award of attorney fees and the Chancery Court abused its discretion and erred as a matter of law in awarding Lauren additional attorney fees.

Without citation to any part of the record, Lauren states that "The Court considered Joseph's adultery, Lauren's inability to pay, the complexity of the division of assets, the issues of custody and visitation, and determined that Joseph should pay Lauren an additional Fifteen Thousand Five Hundred dollars ($15,500.00). This analysis was neither contained in the bench ruling or subsequent judgment entered by the Chancery Court. (CP 34-43) (TR

298-300) The fact that Lauren was awarded a fault based divorce and that a Rule 8.05 financial statement is in evidence does not absolve Lauren of her burden of proof in establishing whether or not she meets the criteria for an award of attorney fees. No record was made by Lauren of any attorney fees expended on her behalf. The Chancery Court brought up the question of attorney fees itself, *after* Lauren had rested on her case in chief. (TR 298-299) (CP 45-46). Lauren did not establish during her case in chief the factors set forth in *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1990): the financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, the time and labor required, the customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case. The burden is on the party requesting attorney's fees to prove an inability to pay. *Rodriguez v. Rodriguez*, No. 2007-CA-00132-COA (Miss. Ct. App. 2009). Absent evidence in the record to support an award of attorney fees none can be awarded.

Because the Chancery Court failed to properly consider the *McKee* factors and the applicable law governing attorney fee awards and to enter specific findings and conclusions based on each factor pursuant to MRCP 52 (a) and because Lauren presented no evidence whatsoever at trial on which the Chancery Court could make a determination for an award of attorney fees, to do so was erroneous as a matter of law and an abuse of discretion. As stated by the Chancellor concerning attorney fees for Lauren, "Well, I haven't seen any." (TR 298-299) (CP 45-46) Because Lauren put on absolutely no proof concerning an award

of attorney fees it was manifest error, an abuse of discretion and erroneous as a matter of law for the Chancellor to make any award of attorney fees and Joseph again respectfully requests that the reviewing Court reverse and render as to the award of any attorney fees.

5. Joseph had no obligation to "object" to the amount of the award of child support during the Chancellor's bench ruling.

Lauren suggests that Joseph waived his right to challenge the award of child support because "At no time during the Court's dictation into the record of his opinion did Joseph object to the payment of child support." (Brief of Appellee, page 8). Lauren cites no authority for such a proposition. Joseph properly objected to the award of attorney fees, without the requisite findings and discussion to support a deviation from the Mississippi child support guidelines, in his post-trial motion (CP 45-52) as well as in his Brief of Appellant. Joseph was under no duty to object to, or interrupt, the Chancellor's bench ruling. To do so would not only have been improper it would have been in direct violation of Uniform Chancery Court Rule 4.03 "No Interruption While Rendering Opinion" which states that "While the Chancellor is rendering an oral opinion in any action he shall not be interrupted by anyone."

CONCLUSION

For the foregoing reasons Joseph respectfully requests that the appellate Court reverse and remand the decision of the Chancellor as to the award and equitable distribution of marital assets to Lauren and to reverse and render as to the award of periodic alimony and attorney fees to Lauren. Joseph further respectfully requests that the appellate Court reverse

and render to award the statutory child support guideline amount of support only. Alternatively, Joseph requests that the appellate court reverse and remand this matter to the Chancery Court of Lamar County for a new trial.

RESPECTFULLY SUBMITTED this the 23rd day of December, 2009

JOSEPH F. TATUM, III

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CERTIFICATE OF SERVICE AND FILING

I, David A. Pumford, do hereby certify that I have this date mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to the following persons at their usual mailing addresses:

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Hon. Johnny L. Williams
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I, David A. Pumford, Attorney for the Appellant , hereby certify that I have actually mailed this date the Original and three copies of the Reply Brief of the Appellant to the Mississippi Supreme Court.

THIS, the 23rd day of December, 2009

David A. Pumford

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