

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EDMOND JENKINS

APPELLANT

VS.

NO. 2008-CA-01895-COA

ROSE JENKINS

APPELLEE

APPEAL FROM THE CHANCERY COURT OF
COPIAH COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

STATEMENT OF ISSUES

I. THE CHANCELLOR COMMITTED REVERSIBLE ERROR IN AWARDING A DIVORCE TO ROSE WHERE EDMOND PROVED THAT ROSE LACKED CLEAN HANDS IN REQUESTING A DIVORCE.

STATEMENT OF THE CASE

(i) Course of the Proceedings and Disposition in the Court Below:

Mr. Jenkins has no substantial agreement with Appellee's recitation of the course of the proceedings and will discuss material disagreements regarding Appellee's factual statements in the merits portion of the brief.

SUMMARY OF THE ARGUMENT

In his initial brief, Mr. Jenkins argued that the Chancellor committed reversible error in granting Rose divorce because she did not have clean hands. Appellee's principal argument is that the evidence is sufficient to support the Chancellor's finding that Mr. Jenkins was guilty of habitual cruel and inhuman treatment. The problem with this argument is that Edmond's argument is that, notwithstanding any proof that he was guilty of habitual cruel and inhuman treatment, the Chancellor should have denied the divorce because Rose committed adultery which caused Edmond's treatment.

ARGUMENT

I. THE CHANCELLOR COMMITTED REVERSIBLE ERROR IN AWARDING A DIVORCE TO ROSE WHERE EDMOND PROVED THAT ROSE LACKED CLEAN HANDS IN REQUESTING A DIVORCE.

Rose has not denied that she committed adultery during the marriage dating from November 29, 2007. R.III/157/60. She argues in her brief, however, that this was her only

adulterous affair and that Edmond failed to prove that she was guilty of adultery prior to the time the parties separated. Specifically, Rose states in her brief; “Edmond put on **uncorroborated accusation[s]** of marital infidelity which Rose denied [emphasis added].” Appellee’s Brief, p. 8. Rose misstates the evidence; Edmond had a witness who testified that Rose had admitted to adulterous relationships prior to the separation as early as 2006.

Specifically, Donna Bryant testified that she was a friend of Rose. She began to babysit for Rose and Edmond around March or April of 2006 at a time prior to separation. During the time that she babysat, she observed Rose. Importantly, Rose admitted to Donna that she was seeing a man named Walter who worked for MPL. After that affair ended, she was involved with a man from the human employment center in Brookhaven. Rose also told Donna that she had met a man named Pete at the radio station where Rose worked at the time. R.III/281-82. Rose would call her from where she was staying with that man at the Drury Inn Suites in Jackson and ask Donna to stay late so she could be with Pete.¹ R.III/283. Rose also told Donna about how she and Pete would go to the trailer and spend the night. Rose went into detail about what she would wear and what they did. R.III/283. The children would stay with Donna while Rose was out all night. R.III/283.

¹ Edmond works offshore with two weeks on and two weeks off.

Rose told Donna that Pete had given her money, a ring and a diamond bracelet and necklace and paid her retainer fee for her first attorney. Rose showed her clothes that Pete's money had brought her that she kept in a trunk.² R.III/284.

Rose also showed Donna pictures Rose said had been taken at a St. Patrick's Day parade that she went to with Pete. Edmond later found the pictures in Rose's car. R.III/284-86; Exhibit 10. Edmond did not ask her about Rose's behavior when she was working for them. R.III/293.

It was during the time that Rose was carrying on with her lovers that Edmond began to suspect that she was behaving differently toward him and began to suspect that Rose's change was because of her affairs. [Not only did Edmond have corroboration of Rose's adultery **prior to the separation** in November, it is reasonable to conclude that Edmond's so-called "controlling" and "irrational" behavior and his accusations against Rose were based on this change even if the reasons for Rose's unusual change were not known to Edmond at the time.] Thus, the "irrational" acts complained of by Rose were due to Rose's own misconduct. There can be no doubt that Edmond loved Rose and wanted to continue the marriage. RE 10.

Notwithstanding, Edmond's proof of Rose's adultery **prior to the separation**, the Chancellor made no fact finding as to the truth of the allegation other than to note that it was not relevant because Edmond "did not learn of the affairs until November or December of 2007, and Mrs. Jenkins denies any such behavior prior to December of 2007. From the evidence, the court can't find that it was Mrs. Jenkins [sic] behavior

² Edmond testified that during this time, Rose needed her car repaired. He offered to pay for it, but she said she had "traded out" for the repairs with someone at the radio station. R.II/63.

which caused the parties [sic] separation.” RE 11. The problem with this finding is that it is simply not supported by the evidence because if Edmond’s allegations are true, then it is not logical to infer that his wife’s changes toward him and furtive behavior did not cause Edmond to be suspicious. It is Edmond’s suspicions and accusations of infidelity which Rose relies on to justify her decision to leave Edmond. Thus, it is Rose’s behavior which directly caused the parties’ separation.

While admitting that Mississippi recognizes the doctrine of recrimination, Rose argues that it should not apply in this case. Rose’s argument is predicated on §93-5-3, MCA, which gives the Chancellor the discretion to grant a divorce even though the other party is guilty of recrimination—in Rose’s case—adultery.

The problem with Rose’s argument, however, is that the Chancellor failed to make any fact findings supported by the evidence which justify the exercise of any such discretion. The finding that Rose’s adulterous behavior prior to the separation did not contribute to the separation is not supported by the evidence. Clearly, her conduct caused Edmond to become suspicious and caused him to act in the “irrational” way that Rose complains caused the separation.

Rose cites the case of *Parker v. Parker*, 519 So.2d 1232 (Miss. 1988) for the notion that the Chancellor appropriately weighed and balanced the evidence and appropriately exercised his discretion to grant the divorce. That case, however, is readily distinguishable. In *Parker*, there was no evidence that the wife committed adultery prior to the separation. *Id.* 1236. Therefore, in *Parker*, it was appropriate to conclude that Mrs. Parker’s adultery did not contribute to the separation. As Edmond has shown, the

Chancellor made no such finding here, and even if he had, it would not be supported by the evidence.

Rose also cites *Garriga v. Garriva*, 770 So.2d 978 (Miss. App. 2000). Again, Rose's reliance is misplaced. The adultery, according to the *Garriga* Court, "occurred a considerable time after the separation," and therefore, "Mrs. Garriga's adultery was not the precipitating cause of the separation and subsequent action for divorce." *Id.* at 984.

In the instant case, Rose's adultery occurred both before and after the separation and was the precipitating cause of the behavior Rose claims caused the separation.

Any evaluation of the cause of the separation by the Chancellor in this case is flawed by the Chancellor's failure to accord sufficient weight to the testimony of Donna Bryant that Rose had numerous affairs prior to the separation which she admitted to Donna and his erroneous conclusion that because Edmond did not know for certain of the affairs, Rose's affairs did not cause his behavior.

Where a Chancellor fails to make fact-findings or his fact findings are flawed, this Court reviews the issue *de novo*. *E.g., Trowbridge Partners, L.P. v. Mississippi Transp. Com'n*, 954 So.2d 935, 938 (Miss. 2007) [where Chancellor fails to apply the appropriate legal standard, this Court reviews the issue *de novo*]; *Sandlin v. Sandlin*, 699 So.2d 1198, 1204 (Miss. 1997) [failure to make findings of fact and conclusions of law was manifest error requiring reversal and remand].

Because the Chancellor's finding that Rose's conduct did not contribute to the separation, is not a logical inference to be drawn from the fact that Edmond did not learn of the affairs for certain until later, this Court should find that her multiple acts of adultery prior to the separation contributed to the separation and that she should be

denied the divorce. In this case, however, Edmond clearly did not want a divorce. This factor, therefore, also supports denying Rose a divorce.

CONCLUSION

In summary, Edmond has shown that the Chancellor committed both legal and factual error in concluding that Rose was entitled to a divorce. The factors supporting denial favor Edmond. Therefore, this Court should reverse the decision of the Chancellor and render a judgment in favor of Edmond denying the divorce. Alternatively, the Court should grant a new trial.

RESPECTFULLY SUBMITTED,
EDMOND JENKINS, APPELLANT

BY: E. Michael Marks
ATTORNEY FOR APPELLANT

CERTIFICATE

I, the undersigned, do hereby certify that I have this date mailed, by first class mail, postage prepaid, four true and correct copies of the above and foregoing Record Excerpts to Kathy Gillis, Clerk, at Box 117, Jackson, MS 39205 and a true and correct copy to each of the following:

1. Hon. George Ward, Chancellor, PO Box 1144, Natchez, MS 39121.
2. Joseph Fernald, Jr., PO Box 542, Brookhaven, MS 39601, Attorney for Appellee, Rose Jenkins.

This, the 4 day of November, 2009.

E. Michael Marks
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