

CAUSE NO. 2008-CA-2110

In The

MISSISSIPPI STATE SUPREME COURT

And

MISSISSIPPI STATE COURT OF APPEALS


January 4, 2010

PHILLIP WAYNE LADNER, SR.,
DEFENDANT/APPELLANT

VERSUS

DEBORAH LADNER
PLAINTIFF/APPELLEE

BRIEF OF APPELLEE



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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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Robert H. Koon
Attorney for Appellee

Phillip Wayne Ladner, Sr.
Defendant/Appellant

J. Richard Kanuch
Attorney for Appellant

Honorable Sanford Steckler
Chancery Court Judge

John McAdams
Chancery Court Clerk

A handwritten signature in black ink, appearing to be 'R. Koon', written over a horizontal line.

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TABLE OF AUTHORITIES

<i>Armstrong v. Armstrong</i> , 618 So.2d 1278 (Miss. 1993).....	3,5,6, 10,12,13
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STATEMENT OF THE ISSUES

1. Whether the Chancellor committed manifest error when granting a dual-fault divorce.
2. Whether the Chancellor correctly determined both parties' fault.
3. Whether the chancellor correctly awarded periodic alimony to the appellee.
4. Whether the Chancellor correctly charged one-half of the appellee's attorney fees to appellant.

STATEMENT OF THE CASE

The Appellee herein agrees with the Statement of the Case as stated in the Appellant's brief and simply reiterates same here. The parties were separated on or about May 16, 2006 with Mrs. Ladner filing her Complaint for Divorce on May 25, 2006. This Complaint was later amended to alleged she was entitled to a divorce on the basis of Habitual, Cruel and Inhuman Treatment or Irreconcilable Differences. She also requested division of the marital assets accumulated during the marriage, alimony and custody of the parties' youngest child in the event the Court determined he was not yet emancipated. Temporary support was requested by Mrs. Ladner and granted in the amount of \$1,500.00 per month beginning May 2008.

Mr. Ladner filed his Complaint for Divorce on July 27, 2006 and alleged the Appellee had committed adultery or in the alternative Habitual, Cruel and Inhuman Treatment or Irreconcilable Differences.

A Judgment of Divorce was entered on February 13, 2008 after a two day trial on November 12 and 13, 2007. The Chancellor granted each party a divorce upon a fault ground, Mrs. Ladner for Habitual, Cruel and Inhuman Treatment and Mr. Ladner on adultery. The Court found that the children of the parties were emancipated and therefore,

entered no order with regard to their care, custody and control. Mrs. Ladner was awarded retroactive spousal support in the amount of \$600.00 per month representing the period of May 2006 to May 2008, that being offset by \$3,000.00. That amount represented one-half of those funds Mrs. Ladner removed from a joint account at the time of separation.

Mrs. Ladner was awarded periodic alimony in the amount of \$1,000.00 per month and although each party received different assets, the monetary division was equal and took into account the stated desires of the parties. Mr. Ladner was also required to pay one-half of Mrs. Ladner's attorney fees. These rulings were based upon applicable case law in the State of Mississippi. Ferguson v. Ferguson, 639 So.2d 931 (Miss. 1994); Armstrong v. Armstrong, 618 So.2d 1278 (Miss. 1993); McKee v. McKee, 418 So.2d 764 (Miss. 1982).

STATEMENT OF THE FACTS

Phillip and Deborah Ladner were married on December 18, 1982. This marriage resulted in the birth of two children, no issues therefrom that are not an issue in this appeal because the court determined both to be emancipated and no appeal was taken on that basis. After 24 years of marriage, on May 16, 2006 the parties separated and each pursued a complaint for divorce of and from the other with the appellee being the first to file. Mrs. Ladner alleged that Mr. Ladner was at fault in the

separation and pending divorce based upon the ground of Habitual, Cruel and Inhuman Treatment. Mr. Ladner pursued his divorce action on the basis of adultery.

It was well established during the course of the trial that Mr. Ladner was by far the main breadwinner of the family and was absent fifty percent (50%) of the time working offshore during the entire marriage. At the time of separation Mr. Ladner made approximately four (4) times the income that his wife did. Mrs. Ladner, although often during the marriage served as a homemaker, now worked as a clerk for the Hancock County Justice Court. She also served as the main caregiver to the children for the entire marriage.

It was also determined during the course of the trial that the parties had accumulated certain assets consisting of a homestead, retirement accounts and personal property. These assets were divided equally by the Court and that division is not the subject of this appeal as neither complained about the division.

The main source of contention that resulted in this appeal is the Chancellor's finding that each was entitled to a divorce from the other. Mrs. Ladner alleged that her husband was verbally and physically abusive to her including calling her names, striking her, pulling her hair, pointing a gun at her and forcing himself upon her sexually. Her testimony was that

this behavior combined with his being gone two weeks out of every four left her lonely and despondent, causing her to turn to another man. The Court granted her a divorce based upon Habitual, Cruel and Inhuman Treatment.

Mr. Ladner simply contended that he was entitled to a divorce on the basis of adultery and had done nothing wrong during the course of the marriage. He also argues that he did not condone that adultery despite his admission that he found out about the infidelity in January of 2006 but the parties remained in the home together until mid-May 2006 while undergoing marriage counseling at the same time.

After the trial, the court divided the assets of the parties with each receiving equal value and Mrs. Ladner being awarded \$1,000.00 per month as period alimony from her husband and, he was required to pay one-half of her attorney fees. It is these two issues that Mr. Ladner objects to being financially responsible for.

I. Only harmless error resulted from the Chancellor granting both parties a fault based divorce, i.e., the Chancellor determined that fault was equal and therefore did not favor either party in an Armstrong analysis.

The process of analyzing this argument first lies with a determination whether or not Mrs. Ladner is entitled to a divorce based upon the evidence submitted regarding the Habitual, Cruel and Inhuman Treatment allegedly committed by Mr. Ladner. If so, then secondly it must

be determined whether or not Mr. Ladner is entitled to a divorce based upon adultery. If he is so entitled, then thirdly, whether or not such a dual ruling was simply a recognition of the equality of fault in the dissolution of the marriage applying the Court's analysis of merely one of twelve Armstrong factors, therefore resulting in harmless error.

Under our standard of review, we view the facts of a divorce decree in a light most favorable to the appellee and may not disturb the chancellor's decision unless we find that decision to be manifestly wrong or unsupported by substantial evidence. Mullins v. Ratcliff, 515 So.2d 1183, 1189 (Miss. 1987).

Evidence of habitual cruel and inhuman treatment is sufficient if it shows conduct that endangers life, limb or health or creates a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief. Daigle v. Daigle, 626 So.2d 140, 144 (Miss. 1993). This Court has consistently held that the chancellor as the trier of fact evaluates the sufficiency of the proof based on the credibility of the witnesses and the weight of their testimony. Richard v. Richard, 711 So.2d 884, 888 (Miss. 1998).

The appellant argues that a finding that he was guilty of committing habitual, cruel and inhuman treatment because of a lack of corroboration. According to the appellant, the only evidence presented

to support this allegation was the appellee's testimony. In fact, the record is replete with examples that substantiate her contention:

1. The pursuit and granting thereof, of two protective orders which were never contested by Mr. Ladner. (T. 41-42, 114-115, 117).
2. Mrs. Ladner's flight from the marital residence to escape the abuse. (T. 41-42)
3. Mr. Ladner locked Mrs. Ladner and the parties' son out of the marital home with no intent to allow their return, including changing the locks. (T. 36-37, 64-65, 113).
4. Leaving Mrs. Ladner and the parties' minor child without a vehicle despite having two trucks and two motorcycles at his disposal. (T. 43-45).
5. Police reports that included not only allegations by Mrs. Ladner but a statement by their son that he was afraid of his father, evidencing verbal and/or physical violence in the home. (T. 47-49).
6. Mr. Ladner owned multiple guns evidencing one was available to him and his admission that the .357 was in the vehicle at the time Mrs. Ladner alleges he pointed one at her. (T. 94-95, 121-22, 228).
7. It was not either of the parties but a third party who called the police after the alleged gun incident evidencing an argument of some kind loud enough for the neighbor to hear. (T. 184).
8. The parties' daughter has called the police because Mr. Ladner physically broke down her bedroom door, evidencing is anger and ability to be physically violent. This is documented by his own admission. (T. 193).

Therefore, there is clearly some corroboration that the verbal and physical violence allegedly perpetrated by Mr. Ladner did in fact occur. In addition, it is not at all uncommon for a battered spouse not to report.

This was best explained by Mrs. Ladner. (T. 124):

Mr. Thomas: "With all this physical and verbal abuse going on, give some explanation to Judge Steckler about why there is no police reports or arrests to back any of this up?

Mrs. Ladner: "Because you just don't do it. When you are in that situation, it's almost like -- it would be the arguments and then it would be okay. And then you would hope everything would be okay. And then it would start all over again, the over and over. And I knew what would happen if I called the police. There was a lot of things that I didn't want to face. I didn't want to face leaving, I didn't want to face -- I mean, divorce was like, that's not the way I was raised. I was raised to, you know, you get married, you have your children. Its really hard to explain being in an abusive situation."

It was therefore within the Chancellors authority to find that Mr. Ladner was in fact the perpetrator of physical and verbal abuse to an extent sufficient that a finding of Habitual, Cruel and Inhuman Treatment as a fault ground for divorce was substantiated. In fact, the Court stated as follows:

"He's jealous and insecure as a result of her conduct, or if its just his personality, he is offshore and can't do anything about it. That's the most frustrating thing, and I can understand why he would have a tendency to lose control. **But I think that there can be no excuse for him manhandling her, if it was because he wanted sex and thought he was entitled to it, if it was because he wanted to correct her or dominate her, or control her in any kind of way, to do so physically or mental abuse is inexcusable and I think he did that.** I think at the same time, her going out and drinking and running around at night and causing him to be driven to those extends was also wrong. Obviously, to go out and have an affair with another man was wrong." (T.279)

Great deference is given to the findings of fact by the

Chancellor. Findings of fact made by a chancellor will not be disturbed if the court finds substantial evidence supporting the factual findings. Lenoir v. Lenoir, 611 So.2d 200, 203 (Miss. 1992).

It must now be determined whether or not sufficient evidence of uncondoned adultery exists for the Chancellor to award a divorce on that basis to Mr. Ladner. It is the Appellee's position that sufficient evidence of condonation existed and therefore manifest error was committed when Mr. Ladner was awarded a divorce on that ground. If this Court finds this to be correct, our analysis ends here because no adverse affect in favor of Mr. Ladner on the award of periodic alimony or attorney fees would be had. In other words, harmless error. In Mississippi one seeking a divorce on the grounds of adulterous activity must show by clear and convincing evidence..... Owen v. Gerity, 422 So.2d 284, 287 (Miss. 1982).

Court grants divorce to wife based upon habitual cruel and inhuman treatment despite husband also establishing adultery. Boutwell v. Boutwell, 829 So.2d 1216 (Miss. 2002).

Mrs. Ladner admitted her affair under oath during the course of the trial. There is no question that she had a year long relationship with a man not her husband. It began in December of 2004 and ended in December of 2005. Mr. Ladner, by his own

admission, learned of the relationship in January of 2006. (T. 53). Mr. Ladner further admits there is no evidence the affair continued after that time. (T. 59). The parties also attended marriage counseling during the course of this time in an effort to salvage the relationship. (T. 56,127). Mrs. Ladner insists sexual relations had resumed, including an incident of forced sexual conduct by Mr. Ladner. (T. 125, 128). This is all clear evidence of a resumption of the marital relationship. Therefore, the Chancellor committed manifest error in granting the Appellant a divorce on this basis.

However, if this Court finds that there was sufficient evidence available to grant Mr. Ladner a divorce upon the fault ground of uncondoned adultery, it is of no consequence because the result is harmless error. The Court repeatedly stated that he found the parties to be equally at fault in the breakup of the marriage. (T. 136-37, 279, 286). Because of the equality, the Court found that it was not an important Armstrong factor. (T. 137). Because the Court found the parties to be equally at fault, he chose not to place any emphasis on the fault ground in determining distribution of assets or alimony and therefore harmless error resulted from the granting of dual fault ground divorces.

II. The Chancellor should have only granted the Appellee a divorce upon the ground of Habitual, Cruel and Inhuman Treatment and erred in granting the Appellant a divorce on the ground of Adultery, also resulting in harmless error.

An additional contention made by the Appellee is that not only should a finding of adultery be deemed manifest error as condonation has not been established, the circumstances that give rise to a finding that the Appellant did commit Habitual, Cruel and Inhuman Treatment against his wife via verbal and physical abuse were present well before the adultery occurred. If this Court rules that it was manifest error to consider the fault of the parties to be equal, resulting in dual fault divorces, then this Court should find that because the circumstances giving rise to the Appellee's fault ground were present before and continued after Mr. Ladner knew of the affair.

Granting him a divorce nevertheless results in harmless error because the circumstances giving rise to the Appellee's cause of divorce occurred first. Court grants divorce to wife based upon habitual cruel and inhuman treatment despite husband also establishing adultery. Boutwell v. Boutwell, 829 So.2d 1216 (Miss. 2002). 42, 746 (Miss. 2001). In Sproles v. Sproles, 782 So.2d 742, 746 (Miss. 2001), this Court was presented with a similar issue, here, the chancellor granted the wife a divorce on the grounds of habitual drunkenness and habitual, cruel and inhuman treatment instead of granting the husband a divorce on the ground of

adultery even though he proved that ground. The Court specifically found that "there is ample proof that it was Thomas's conduct that caused the dissolution of the marriage and that teresa was entitled to a divorce on the grounds of cruel and inhuman treatment and habitual drunkenness. Id. At 747 (quoting Boutwell v. Boutwell, 829 so.2d 1216, 1224 (Miss. 2002).

III. An award of periodic alimony to the Appellee was within the discretion of the Chancellor, regardless of the dual finding of fault.

Our scope of review of any alimony award is familiar and well settled. Alimony awards are within the discretion of the chancellor. McEachern v. McEachern, 605 So.2d 809, 814 (Miss. 1992); Cherry v. Cherry, 593 So.2d 13, 19 (Miss. 1991). And his discretion will not be reversed on appeal unless the chancellor was manifestly in error in his finding of fact and abused his discretion. Powers, v. Powers, 568 So.2d 255, 257 (Miss. 1990); Carpenter v. Carpenter, 519 So.2d 891, 894-95 (Miss. 1988).

Because the Chancellor found that both parties were equally at fault for the cause of divorce, the remaining Armstrong factors must be analyzed to determine if an award of \$1,000.00 per month in periodic alimony for Mrs. Ladner was appropriate. The Appellee argues that -and just and appropriate, or in the alternative, if the court finds that the

awarding of dual fault ground divorces was error that it be deemed harmless. See Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss. 1993).

The court ruled that with regard to the income and expenses of the parties; the health and earning capacities; the needs of each party; the obligations and assets of each party; and, the length of the marriage all favored an award of alimony to the Appellee. (283-87). The Court went on to find that the presence or absence of minor children; the age of the parties; the tax consequences of the support order; fault or misconduct; wasteful dissipation of assets by either party; and any other factor deemed "just and equitable" were either equal or of no consequence in this case. (T. 276-77, 288-89).

The amount of alimony to be awarded is a matter also committed to the discretion of the chancery court because of the Chancellor's opportunity to evaluate the equities of the particular situation. Tilley v. Tilley, 610 so.2d 348 (Miss. 1992).

No one factor favored Mr. Ladner's position that he should not be required to pay spousal support. The first five factors heavily favor Mrs. Ladner. It is clear that the award of spousal support was warranted regardless of a finding of dual fault grounds, she having been the only party to be granted a divorce, or if Mr. Ladner had been the only one. It was only one of twelve factors to consider, the factors weighing much

more heavily in favor of the Chancellor's award. Same should be upheld and any error in the Court's ruling should be deemed harmless error.

IV. The Court was within its discretion in awarding attorney fees to the Appellee.

The vast difference in the income of the parties alone justifies and award of attorney fees. This Court has held that when a party is able to pay attorney's fees, award of attorney's fees is not appropriate. Martin v. Martin, 566 So.2d 704, 707 (Miss. 1990). However, where the record shows and inability to pay and a disparity in the relative financial positions of the parties, we find no error. Powers v. Powers, 568 So.2d 255 (Miss. 1990). Mrs. Ladner had become deeply in debt by the lack of support from Mr. Ladner during their two year separation. There was no dispute she had incurred a \$15,000.00 debt as a result. (T. 144-46, 203-06). The Court also found that the fees incurred were reasonable and only awarded one-half. (T. 300).

CONCLUSION

The Court concluded after a two day trial that the parties were equally at fault in the cause of divorce and although the Court may have incorrectly granted each a divorce on fault grounds, this result was harmless error. In the alternative, the Appellant should not have been granted a divorce because sufficient evidence was provided at trial to show condonation without further incidence of adultery had occurred,

again resulting in harmless error. In addition, because the Appellee's cause of divorce arose before that alleged by the Appellant, she should have been the only party granted same, again resulting in harmless error.

The award of periodic alimony was appropriate even if the Appellant is correct in his argument that the Court should not have granted dual fault grounds for divorce as the Armstrong factors clearly favor the Appellee. The Court was also well within its discretion in awarding partial attorney fees to the Appellee based on her inability to pay and level of difference in each party's income and future earning capacity.

CERTIFICATE OF SERVICE

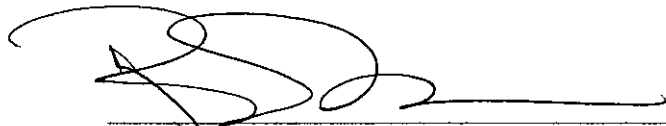
I, Robert H. Koon, attorney for the Appellee, Deborah Ladner, do hereby certify that I have this day served a true and correct copy of the above and foregoing Appellee's Brief via facsimile or U.S. Postal Service, postage prepaid, on the following persons:

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SO CERTIFIED on this 4th day of January, 2009.



ROBERT H. KOON