

IN THE SUPREME COURT OF MISSISSIPPI
No. 2008-CA-02138

CATHY D. WISE

APPELLANT

V.

TIM WISE

APPELLEE

ON APPEAL FROM THE CHANCERY COURT OF
PERRY COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

REPLY BRIEF FOR APPELLANT
SUBMITTED BY:

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I. REPLY TO POINT I OF APPELLEE'S BRIEF: WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN ITS CLASSIFICATION AND VALUATION OF MARITAL PROPERTY FOR PURPOSES OR EQUITABLE DISTRIBUTION

Cathy is well aware of the rule that a point not raised before the trial court cannot be raised for the first time on appeal to justify a reversal. Cathy points out, however, that she is not seeking a reversal on the grounds that the Chancellor applied the net asset value to Tim's, Inc. but on the well-established and bedrock principle of the law pertaining to equitable distribution: the Chancellor *must* value each asset of the parties to be divided.

By far the principal asset of the parties was each one's ownership of a 50% interest in Tim's, Inc., the family business that owned three convenience stores, two in Richton, MS and one in Beaumont, MS. This was an asset from which each party had, in the past, drawn \$60,000.00 a year in income and which Cathy had owned 50% of the stock since its inception. This Court simply cannot make a meaningful review of the decision of the Chancellor without knowing what value the Chancellor placed on this asset.

The Court will recall that the Chancellor had three appraisals from which to pick: One based on Rev. Rul. 59-60 1959-1C.B. 237, which appraised Tim's, Inc. to have a fair market value of \$410,000. (Ex. vol. 2, 88); one after being instructed by the Court to omit goodwill, for \$80,000 as of July 31, 2006 (Ex. Vol. 7, 735); and a third appraisal effective as of December 30, 2007, showing a value of \$0. (Ex. vol. 8, 797-99). This last appraisal which showed a value of \$0 was flawed on its face in that the appraiser applied the net asset value but admitted that he did not know the actual value of the assets being appraised, having taken them from the tax rolls (Tr. vol. 5, 212-213). Without making a decision on the value of Tim's, Inc., the Chancellor arbitrarily awarded all of Cathy's stock to Tim and ordered Tim to convey the assets of the Beaumont store to her for the payment of \$35,200.

The other reason the case should be remanded is that the decision of the Chancellor was unfair and unreasonable. Here again, Cathy is not claiming that the Chancellor should be reversed because of his failure to use the investment value of the assets being divided, but because his decision was simply unfair and unreasonable. Cathy will not rehash her argument on this point except to point out that she is being deprived of her 50% ownership in Tim's, Inc., a corporation in which she had worked for years and from which she had drawn substantial income without having the value of her interest in the business determined by the Chancellor. With deference, we remind the Court that the only statutory mandate to the Chancellor in this type of case is to make such orders as are equitable and just. Miss. Code Ann. 93-5-23 (2004). As pointed out in Cathy's brief, the Order of the Chancellor in this case far exceeds his considerable discretion in making these awards and should be reversed. Cathy has not been treated as well as a dissenting shareholder in a corporate merger situation, which requires the corporation be appraised at its fair value market and the shareholder's awarded his or her proportionate share of the value of the whole. By no stretch of the imagination can this be held to meet the statutory mandate of equitable and just.

II. REPLY TO POINT II OF APPELEE'S BRIEF: WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN FOLLOWING THE NET ASSET RULE FOR VALUATION PURPOSES

With deference, Tim misapprehends Cathy's argument concerning the net asset value. Cathy is not arguing that the Chancellor was *obliged* to apply the net asset value but simply that the Chancellor should have the *discretion* to do so, and that this rule should be spelled out if the Court should remand the case. In other words, Cathy is not arguing that the Chancellor's decision should be reversed because it did not apply the investment value, but simply that if the Court does reverse the Chancellor, then on remand the Chancellor should be instructed that he

has the discretion to do so. Giving instructions and guidance when a case is remanded is not a new practice in Mississippi. This is especially true where we have no statutory formula or guidelines for the application of the equitable distribution of marital assets – all we have is the body of case law starting with *Ferguson* in which the court has spelled out instructions to the Chancellor on remand the rules to be followed. For instance in *Yelverton v. Yelverton*, 961 So. 2d 19, p. 20 (Miss. 2007), the Court stated “Since we are remanding this case for other purposes, we need not enter into a lengthy discussion on the issue; however, in an effort to lend guidance to the Chancellor upon remand, we state here that the Chancellor should be mindful that ‘goodwill’ whether ‘personal goodwill’ or ‘business enterprise goodwill’ shall not be included in the valuation of Jim Yelverton Imports.” In *Goodson v. Goodson* 910 So. 2d 35, p. 13 (Miss. Ct. App. 2005), the Court stated “some of these factors include, but are not limited to, income generated, accounts receivable, pending contracts, and customer lists. *On remand* the chancery court is free to consider factors other than goodwill and physical assets in valuing Judy’s Painting Services.” (Emphasis supplied).

In fact, the leading case, *Ferguson v. Ferguson*, 639 So. 2d 921, 929 (Miss. 1994), consists largely of guidelines to the Chancellor on remand. A review of this opinion reveals that the Mississippi Supreme Court cited extensively from cases from other jurisdictions and treatises. As the court stated in *Ferguson*, the law of property division is in a state of flux. This is still the case. In *Ferguson* the court states “property divisions should be based upon a determination of *fair market value* of the assets, and these valuations should be initial step before determining division.” (Emphasis supplied). Now through *Singley, Watson and Yelverton* the court has specifically and clearly departed from the “fair market value rule” set out in *Ferguson* and adopted the net asset value rule which, as the Court knows, has nothing to do with the fair

market value of a going concern which includes goodwill in the form of sales, profits and income.

Cathy points these out to show that, were this Court to remand this case, there would be nothing new or unusual about also giving the lower courts guidance on this and future cases. Again, Cathy is not arguing that the use of net asset value is reversible error but simply that if the Court should reverse and remand this cause it should instruct the Chancellor as set out in Appellant's brief.

CONCLUSION

This case should be reversed and remanded for either one of two reasons: (1) The Chancellor failed to value the stock Tim's, Inc. and/or (2) the division by the Chancellor does not comport with the statutory mandate to be equitable and just. Once the decision is made to remand, then, on remand, the Chancellor should be instructed that he is free to use valuations other than the net asset value, including the investment value, if in his discretion, this should result in a fair and equitable decision.

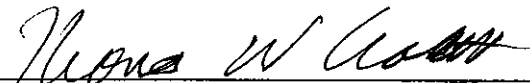

This the 17th day of September, 2009.

Respectfully submitted,

CATHY D. WISE

By Her Attorneys,

WATKINS LUDLAM WINTER & STENNIS, P.A.

By: 
Thomas W. Crockett (MSB# )

CERTIFICATE OF SERVICE

I, Thomas W. Crockett, do hereby certify that I have this day served via U.S. Mail, postage prepaid, a true and correct copy of the foregoing Reply Brief of Appellant upon the following interested parties:

Honorable Sebe Dale, Jr.
Chancery Court Judge
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This the 17th day of September, 2009.


Thomas W. Crockett