CASE NO. 2008-CA-02110

In the

MISSISSIPPI STATE SUPREME COURT

and

MISSISSIPPI STATE COURT OF APPEALS

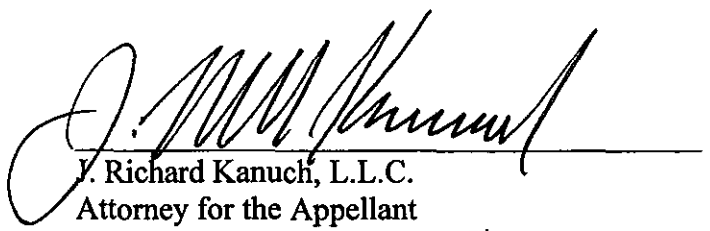
March 29, 2010

PHILIP W. LADNER, SR.
DEFENDANT-APPELLANT

VERSUS

DEBORAH LADNER
PLAINTIFF-APPELLEE

CORRECTED REPLY BRIEF FOR THE APPELLANT



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Introduction

NOW INTO COURT comes the Appellant, Philip W. Ladner, Sr., through his counsel of record, and files this Reply Brief in response to the Appellee's Brief filed in this Honorable Court by Appellee, Deborah Ladner, and without waiving any issue contained in the Brief for the Appellant, would like to respectfully state and bring to this Court's attention the following facts, statutory interpretation, and case law in support of the Appellant's assignments of error and in favor of reversal of the judgment of the lower court:

As the Appellee in her Brief agrees with the Statement of the Case of the Appellant's initial brief, the Appellant would simply like to bring it to the attention of this Honorable Court certain factual misstatements in relation to the dates, namely: the trial in the case at bar occurred on November 12 and 13, 2008, rather than in 2007; and a Judgment of Divorce was signed by the Chancellor on February 13, 2009, and entered into the lower court's record on February 20, 2009, rather than in 2008.

In her Statement of the Facts, the Appellee identifies the Appellant's issue as the those of alimony and attorney's fees. However, the Appellant's argument of multiple manifest errors extends beyond determination of the type or amount of alimony or award of any attorney fees. As stated in the Appellant's initial brief, judicial and legislative precedent supports a fault-based divorce for the Appellant alone, and does not support granting of a fault-based divorce to the Appellee and certainly does not support granting of a dual-fault divorce.

While the Appellee recognizes that errors may be found, she argues that all were of harmless nature or alternatively manifest error occurred in not granting a divorce only to her despite the Chancellor finding that the Appellant proved the ground of Adultery. Finally, the Appellee's last resort is that any outcome in the case at bar would favor the Appellee, thereby resulting in harmless

error overall, namely that even if dual-fault allotment was in error, it would not have affected issues of alimony or attorney's fees. The Appellant recognizes the limited-scope review of this Court in domestic matters but respectfully disagrees with Appellee's arguments and responds specifically as follows:

Argument

I. Manifest, not harmless, error resulted from the Chancellor granting both parties a fault-based judgment of divorce and, further, said outcome favored the Appellee.

The Appellant argued in the initial brief that granting of dual-fault divorce is manifest error and, further, manifest error was committed in not solely granting a divorce to the Appellant and in granting a fault-based divorce to the Appellee. The Appellee argues that only harmless error resulted from the granting of a divorce to both parties.

The Appellee begins her argument on the issue of fault with a discussion of the legal standard for habitual cruel and inhuman treatment. To this, the Appellant would like to add that, in the State of Mississippi, mere incompatibility is not a sufficient proof of the habitual cruelty ground. *Benson v. Benson*, 608 So.2d 709 (Miss. 1992); Bunkley and Morse, Amis on Divorce and Separation in Mississippi § 3.14(10) (1957). Something more than unkindness, rudeness, mere incompatibility, or want of affection must be shown to sustain the ground of habitual cruel and inhuman treatment. *Wires v. Wires*, 297 So.2d 900 (Miss. 1974); *Smith v. Smith*, 614 So.2d 394, 396 (Miss. 1993); *Chamblee v. Chamblee*, 637 So.2d 850 (Miss. 1994). Specifically, the legal standard would have been for the Appellee to prove personal violence against her by the Appellant or Appellant's endangerment of her life, limb, or health. *McIntosh v. McIntosh*, 2006-CA-01762-COA (Miss.

2008); Amis §3.14(18) (1957). Per *Chamblee*, the Appellee must have proven her ground of habitual cruel and inhuman treatment by a preponderance of the evidence in order to prevail.

The Appellee's position in relation to her evidence appears to be clear. She states that "the record is replete with examples that substantiate her contention" and then asks this Court for reliance on her word, i.e. testimony, ex-parte protection orders and her own police reports, as such substantiation. The Appellee herself admits that she filed her police reports after her adultery came to light (T. 190) and, in the case of the ex-parte protection orders, after the parties' final separation (T. 114-116) despite alleging a long-lasting occurrence of the complained behavior.

While the Appellee's trial testimony and the eight-item list presented in her Brief certainly amounts to a hefty dose of allegations stated by the Appellee in multiple formats, it does not meet the standard held by this Court. "Divorce has been denied in a number of cases for lack of evidence corroborating the plaintiff's testimony." Bell on Mississippi Family Law, pp. 59 (2005). Specifically, per *Stringer v. Stringer*, 209 Miss. 326, 46 So.2d 791 (1950), complainant seeking a divorce on the ground of habitual cruelty must prove that personal violence or endangerment of life, limb or health occurred. This Court held in *Lindsey v. Lindsey*, 818 So.2d 1191 (Miss. 2002), that "a divorce will not be granted on the uncorroborated testimony of the claimant," citing *Anderson v. Anderson*, 190 Miss. 508, 200 So. 726, 727 (1941).

Even when considering the record in the most favorable light to the Appellee, the Appellee's offer of her own allegations as evidence is insufficient in proving endangerment of life, limb or health or that of personal violence, and, therefore, she failed to prove her ground. This Court has upheld the Chancellor's denial of a divorce to a wife on the ground of habitual cruel and inhuman treatment where the husband has clearly denied every instance of physical abuse alleged by wife in *Chamblee*, supra.

However, even if the Appellee did met the standard of proof of preponderance of the evidence, she would not be entitled to a divorce on her ground without establishing proximate cause. A claimant alleging cruel and inhuman treatment must also prove that the alleged habitual cruelty was the proximate cause of the failure of marriage. Amis §3.14(17) (1957). Namely, "the cruelty complained of must be proximately related in point of time to the cause of separation." (*Ibid.*) A causal connection between the alleged habitual cruel and inhuman treatment and the parties' separation is required for it to be a sufficient ground. *Fournet v. Fournet*, 481 So.2d 326, 329 (Miss. 1985). Additionally, in *Hinton v. Hinton*, 254 Miss. 50, 179 So.2d 846 (1965), the Court made it clear that where both parties are found to be at fault, it is incumbent upon the Chancellor, if a divorce is to be awarded, to determine which party's fault is the proximate cause of the divorce. *Rives v. Rives*, 416 So.2d 653 (Miss. 1982).

However, such determination is not done in a vacuum. "So in determining whether or not the habitual or unusual conduct of the defendant has been such as to amount to cruelty within the statute, his or her entire course of conduct during the period complained of should be considered, as well as that of the complainant, in order to show what provocation, if any, there was to cause the conduct of which the latter complains." Amis §3.14(8) (1957). From the record, it appears that the Appellee was content staying in the marriage, even while having and hiding an affair, until she decided to withdraw $6,000 from the parties' joint saving account (T. 113) in May 2006 and subsequently file for divorce later that month. The record shows that the couple at hand had a strained relationship for a long time, in fact years before, not just after the Appellant tried to save the marriage in Spring of 2006 (T. 53-56).

The Appellee concludes her argument with case analysis, citing *Sproles v. Sproles*, 782 So.2d 742 (Miss. 2001), and *Boutwell v. Boutwell*, 829 So.2d 1216 (Miss. 2002). The Appellee invokes *Sproles* by stating "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." However, the Appellee's application of *Sproles* to the instant case fails because in *Sproles* the wife's adultery occurred approximately a year after the parties' separation. (*Ibid.*) In the instant case, the Appellee committed and hid her adultery during the course of the marriage. Additionally, in *Sproles*, the husband, who was found at fault, admitted the endangerment behavior alleged by the wife, namely making threats against the wife's life, negating the need for further corroboration. (*Ibid.*) In the instant case, the Appellant denied the Appellee's allegations and they were uncorroborated.

Subsequently, the Appellee argues that the "Court grants divorce to wife based upon habitual cruel and inhuman treatment despite husband also establishing adultery," citing *Boutwell*. However, in *Boutwell*, the wife's extramarital relations occurred after the parties separated and the wife was found to have proven her ground with reliance on testimony from other witnesses. Further, in *Boutwell*, the husband was found in violation of a protection order granted to the wife nearly two months after the wife filed her complaint. (*Ibid.*) In the instant case, there is no dispute that the Appellant proved his ground based on the Appellee admitting adultery that occurred during the course of the marriage . Also, the Chancellor relied solely on the Appellee's allegations for evidence of her ground. Again, the Appellant must respectfully suggest that the Appellee fails in her application of the law.

The Appellee's final statement is that "harmless error resulted from the granting of dual fault ground divorces." If the Appellee's final contention here is to be correct, namely, that the Chancellor did not err in finding both parties in being "equally" at fault, it would amount to allowing the doctrine of comparative rectitude in the area of fault, which the State of Mississippi does not recognize. Namely, "this doctrine is not subscribed to in this state and the doctrine of recrimination is in full force." Amis §4.03 (1957).

Counter to the Appellee's argument, the established case law precludes granting of a divorce in Mississippi to both husband and wife citing dual fault by the Chancellor. It is per se manifest error and must be reversed. *Hyer v. Hyer*, 636 So.2d 381 (Miss. 1994); *Dillon v. Dillon*, 498 So.2d 328 (Miss. 1986); *Chaffin v. Chaffin*, 437 So.2d 384 (Miss. 1983). "If both parties prove grounds for divorce, the court must identify the party whose conduct caused the separation or whose fault was greater and grant divorce to the other." Bell, pp. 60 (2005). Further, in *Hinton*, the Chancellor awarded a divorce to both the husband and wife on the ground of habitual cruel and inhuman treatment and the Supreme Court reversed such finding as well.

In the case at bar, Appellee argues that the ruling by the Chancellor in granting a divorce to both parties is merely harmless error. As stated above, this decision is manifestly erroneous. The decree in the case at bar is self-contradictory and should be reversed as the Chancellor committed manifest error and abused his discretion in granting the Appellee a divorce on the ground of cruel and inhuman treatment.

II. The Chancellor correctly granted the Appellant a Judgment of Divorce based upon the Appellee's adultery during the Marriage. However, the Chancellor committed manifest error in finding the Appellant guilty of habitual cruel and inhuman treatment towards the Appellee.

The Appellee's second argument is that 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, resulting in harmless error, is inaccurate and incorrect. Also incorrect is the Appellee's contention that granting the Appellant a divorce on the ground of adultery results in harmless error.

The Appellee returns to citing *Boutwell* and *Sproles*, supra, to support her ground for divorce and to contend that the Chancellor erred in granting the Appellant a divorce on the ground of adultery. The particulars of said cases have already been stated as conflicting with the Appellee's position in the instant case. For instance, in both *Boutwell* and *Sproles*, the adultery occurred after the separation and in both, the prevailing wives proved their grounds by more than their own testimony and allegations. In *Boutwell,* the proof included the husband's admission of fault. In *Sproles*, the prevailing wife relied on the husband's violation of a protective order and testimony from witnesses other than herself.

Therefore, the Appellee fails in application of these factually-dissimilar cases as in the instant case, the Appellee's adulterous relationship with her paramour, Highway Patrolman Dale DeCamp, indisputably occurred during the course of the parties' marriage (T. 126-127). Therefore, while lower courts correctly refused to assign proximate cause to the adultery in *Boutwell* and *Sproles*, it would be inappropriate to do the same in the case herein.

This Court has upheld lower court rulings where there is sufficient evidence to support the Chancellor's granting of a divorce on the grounds of adultery. *Dillon v. Dillon*, 498 So.2d 328 (Miss. 1986). More specifically to the instant case, in *Martin v. Martin*, 566 So.2d 704 (Miss. 1990), the Supreme Court of Mississippi upheld a husband's divorce on the ground of adultery, stating "the proof was overwhelming on that ground, i.e., Nancy [Martin] and her paramour both testified in open court sustaining the ground." In the instant case, the Appellant proved the adultery ground to the satisfaction of the Chancellor (T. 138), who determined the testimony of the Appellee's January 2005-2006 paramour, Dale DeCamp, unnecessary if the Appellee admitted the extramarital sexual relationship (T. 20), which she did through her counsel (T. 20-21) and by testimony (T. 126).

As the year-long adulterous relationship with the Appellee's paramour during the course of marriage is indisputable, the Appellee in her Brief resorts to a condonation defense of her adultery.

For a successful condonation defense to apply, it requires the parties to have "a resumption of usual marital relations between them." Amis §3.09(2) (1957). This has been distinguished by the courts in Mississippi as not simply cohabitation. "It shall be no impediment to a divorce that the offended spouse did not leave the marital domicile or separate from the offending spouse on account of the conduct of the offending spouse." Amis §4.13 (1980 Supplement). Adultery is a violation of exclusivity of the mutual right of sexual exclusiveness which is basic to every permanent mating, and is the foundation on which every marriage rests. Amis §3.08(3) (1957). This Court has held this view in *Owen v. Gerity*, 422 So.2d 284 (Miss. 1982).

The Appellant could have pursued a divorce immediately after learning of the Appellee's adultery. However, the Appellant did not leave the marital home after learning of the Appellee's adultery but sought to repair the marriage as testified by both him (T. 53-56) and the Appellee (T. 127-128). This Court has held that a spouse "should not be penalized for attempting to save [the] marriage." *Cherry v. Cherry*, 593 So.2d 13 (Miss. 1991). However, the Appellant herein also never condoned the Appellee's adultery (T. 220, 235-236) and never had sexual relations with her again (T. 55-56, 238-239).

The Appellee seeks to establish her condonation defense on the basis of her testimony alleging that the Appellant resumed consensual sexual relationship with her after her adultery came to light. The Appellee testified that the normal course of the couple's sexual relationship was defined by sexual activity at least every other week (T. 189-190). However, the Appellee testified that she and the Appellant had sexual relations "maybe only a couple of times" altogether (T. 128) between when her relationship with her paramour ended in January 2006 and the ultimate separation in May 2006. Additionally, the Appellee testified that the Appellant forced sexual relations on her approximately a week prior to their separation in May 2006 (T. 125).

Firstly, the Appellee's position appears to lack common sense. She contends that the couple would have normally have had sexual relations more often than twice a month. Yet, she proffers her testimony counting "maybe only a couple of" instances of post-adultery consensual relations (T. 128) with the Appellant, whom she felt "she didn't mean anything to" (T. 126), and, at the same instance, one of these or more of these instances were forced (T. 125).

Secondly, the Appellee makes a rather curious legal argument in her Brief. She seeks to use her testimony regarding sexual relations after the disclosure of her adulterous relationship to both prove the resumption of normal marital relations and at the same time prove that the behavior by the Appellant that was so unacceptable as to give her a ground for divorce. However, arguing condonation on the basis of non-consensual sexual relations is absurd due to the lack of voluntariness. In order for condonation to adultery to be valid defense, the condonation must be voluntary. No condonation of adultery occurred when the wife was not a willing participant in sex. *Lee v. Lee*, 232 So.2d 370 (Miss. 1970). It is also illogical for the Appellee to contend that consensual sexual relations continued after her adultery was disclosed in January 2006, as that would mean condonation of her own ground, precluding her from receiving a fault-based divorce. In *Chaffin*, this Court stated that cohabitation does not condone habitual and cruel and inhuman treatment "but condonation of cruelty has been found where the parties separated but then resumed their marital relationship."

It appears as if the Appellee was perhaps prepared to testify with any allegation and make any argument whatsoever. As a result, the Appellee's conflicting positions are irreconcilable. On the other hand, the Appellant has logically and consistently maintained that normal marital relations never resumed following his learning of the Appellee's adultery. Otherwise, the Appellant could have himself argued a condonation defense in relation to the Appellee's allegations. Directly speaking to this issue, this Court has held that the trial court was within its authority to accept a

husband's testimony that he had not effected a legal condonation of the wife's prior course of conduct in any way and that because the adultery stood uncondoned, the trial court was within its authority in granting the husband a divorce on grounds of adultery. *Wood v. Wood*, 495 So.2d 503 (Miss. 1986).

There is no dispute that the marital relations overall became more strained after the Appellee's adultery according to the record both on the Appellant's side (T. 55-56) and Appellee's side (T. 127-128, 220). The marriage was never the same after the January 2006 disclosure of the Appellee's adultery, leading to the separation in May of 2006. While the parties attempted reconciliation after the Appellant learned of the adultery, it was the occurrence of this adultery that made continuation of the marriage impossible. The record makes it clear that it was the disclosure of the Appellee's affair that caused the ultimate separation.

The Chancellor found overwhelming proof for the Appellant's ground of adultery, granting the Appellant a fault-based divorce on that ground. As stated countless times by this Court, unless the Chancellor was clearly erroneous and abused his discretion, the Chancellor's granting of divorce to the Appellant on the ground of adultery should remain undisturbed.

III. The Chancellor awarded permanent alimony to the Appellee despite no deficit existing after division of marital property and consideration of non-marital assets and without considering at least some and stating the considered Armstrong factors in said award, resulting in manifest error and favoring the Appellee.

Next, the Appellee states her reasons why her alimony award should be upheld on its own and also despite any error committed by the Chancellor in relation to the issue of fault. The Appellee refers to *McEachern v. McEachern*, 605 So.2d 809 (Miss. 1992), which cites *Cherry v.*

Cherry, 593 So.2d 13, 19 (Miss. 1991), to establish that alimony awards are within the discretion of the chancellors. However, in *McEachern*, this Court also held that "the chancellor should consider the reasonable needs of the wife and the husband's right to lead a normal life with a decent standard of living" (emphasis added), citing *Gray v. Gray*, 562 So.2d 79, 83 (Miss. 1990). This Court's disposition in *McEachern* was a reversal and remanding to the lower court for a new trial.

Further in support of her award of permanent alimony, the Appellee cites *Tilley v. Tilley*, 610 So.2d 348 (Miss. 1992), wherein the Chancellor made and this Court upheld the finding that the wife met the stricter standard for a lump sum alimony award as she had a meager independent income and would otherwise "lack any financial security." This Court reversed and remanded permanent alimony in *Tilley* despite the wife producing an explicit list of living expenses. "There is no automatic right to an equal division of jointly-accumulated property, but rather, the division is left to the discretion of the court" as held by this Court in *Carrow v. Carrow*, 642 So.2d 901 (Miss. 1994). In the instant case, the Appellee earns approximately $21,000 per year after taxes (T. 140), exits the marriage with a paid-for house (T. 259, 289-290) and an even half of marital property overall. The Appellee's citations appear to support the Appellant's call for a reversal of permanent alimony.

As her final citing of legal precedent on alimony, the Appellee calls for an *Armstrong* analysis. In *Armstrong*, the wife was found to be entitled to permanent alimony as she was not at fault, no allegations against her were raised and the husband did not contest the grounds at the trial. *Armstrong v. Armstrong*, 618 So.2d 1278 (Miss. 1993). The Appellee continues by stating that the Chancellor's failure to fully consider fault in the instant case "should be deemed harmless error" even while stating that *Armstrong* set forth certain factors the Chancellor must consider when deciding to award alimony. The result of the Appellee being found guilty of adultery is not harmless error since fault is one of the *Armstrong* factors to be considered in an alimony award. *(Ibid)*; *Hammonds v. Hammonds*, 597 So.2d 653 (Miss. 1992). Thereby, Appellee's argument that an

award of periodic alimony to the Appellee was within the Chancellor's discretion regardless of the dual finding of fault is incorrect and not one of harmless error.

Further, while this Court has agreed that fault does not bar an at-fault wife from receiving alimony when she would otherwise be left destitute, this is not the case herein. In *Hammonds*, this Court held that an at-fault wife who contributed substantially to the total accumulation of marital assets is entitled to "minimal alimony" when she otherwise lacks "any financial security." *Hammonds* also states that recent awards of alimony "have been made not to enable the wife to maintain the lifestyle to which she has been accustomed, but to prevent her from destitution," citing *Retzer v. Retzer*, 578 So.2d 578 (Miss. 1990). In the instant case, the at-fault Appellee leaves the marriage with significant assets and continues to draw sufficient take-home pay to support herself to a standard of living significantly beyond destitution.

Finally, this Court has upheld denial of alimony in instances where the Chancellor essentially split the marital estate equally. See *McIntosh v. McIntosh*, 2006-CA-01762-COA (Miss. 2008). In *McIntosh*, this Court referred to its holding in *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss. 1994), that "if there are sufficient marital assets which, when equitably divided and considered with each spouse's non-marital assets, will adequately provide for both parties, no more need to be done," citing *Hemsley v. Hemsley*, 639 So.2d 909, 914-915 (Miss. 1994). The Court, in awarding alimony, must also consider the wife's resources. *Wood v. Wood*, 495 So.2d 503 (Miss. 1986).

In the instant case, the Chancellor did consider the Appellant's gross income (T. 256) and the Appellee's take-home pay (T. 140), finding that the Appellant's gross income to be higher than the Appellee's after-tax income (T. 277). Ultimately, the Appellee emerges from this divorce, having admitted a secret adulterous relationship (T. 20, 126-127) on the stand, with sufficient means to live the life she was accustomed to, as her post-separation debt is to be covered by the money she withdrew from the joint savings account (T. 146) and retroactive spousal support from the Appellant

(T. 306), living in a house that is mortgage and debt-free (T. 259) and able to support herself with take-home pay of approximately $21,000 per year (T. 140). Therefore, the Chancellor incorrectly and abusively granted the at-fault Appellee permanent alimony and the award should be reversed.

IV. The Chancellor committed manifest error and abused his discretion on the award of attorney's fees, disfavoring the Appellant.

The standard of law in relation to attorney's fees demanded is their reasonableness and the requesting party's proving an inability to pay them. *Martin v. Martin*, 566 So.2d 704 (Miss. 1990); *Powers v. Powers*, 568 So.2d 255 (Miss. 1990). In the instant case, the Chancellor found the fees to be reasonable (T. 301), which is not at dispute herein. However, the Chancellor erred in applying the incorrect legal standard by only considering the parties' relative ability to pay that has been effective under *McKee v. McKee*, 418 So.2d 764 (Miss. 1982), but has been distinguished by this Court more recently in cases like *Martin* and *Powers*. The consideration of relative abilities is stated by both the Appellee in her Brief and by the Chancellor in the record, specifically stating that he considered "the parties' relative financial ability to pay" the fees (T. 300).

In *Dillon*, this Court upheld denial of attorneys' fees to a wife where she has sufficient funds or a separate estate with which to pay her own attorneys' fees, citing *Harrell v. Harrell*, 231 So.2d 793 (Miss. 1970). Further, inability to pay must be substantiated by evidence presented to the Court with the burden of proof falling on the party requesting the attorney's fees. *Deen v. Deen*, 856 So.2d 736 (Miss. 2003). Herein, the Appellee failed to prove her inability to pay. At the trial, the Appellee sought to simply rely on her testimony that she cannot pay the fees (T. 155). In her Brief, the Appellee suggests that the debt she incurred during separation is proof of her inability to pay. Yet, at the same instant, the Appellee identifies $3,000 of her post-separation debt as resulting from

"frivolous" expenses according to her own testimony (T. 144-146). Therefore, the Appellee was prepared to spend thousands of dollars frivolously, was able to and actually did work drawing a non-negligible salary (T. 140) and received retroactive spousal support from the Appellant to offset her post-separation debt (T. 306).

The Appellee in her Brief specifically cites *Martin* to state that "if a party is financially able to pay her attorney, an award of attorney's fees is inappropriate." Further, the Appellee also cites *Powers*, wherein the wife could only afford one-fifth of the attorney's fees based on her payment of $500. The Chancellor's finding in *Powers* was not simply based on the wife's testimony that she is "unable." Further, the husband in *Powers* was at fault and the wife was not guilty of a divorce ground. A review of *Martin* favors the Appellant herein as the Appellee failed to prove her inability to pay and the *Powers* case is factually dissimilar to the instant case. Therefore, the Appellee fails her review of law argument.

It was an abuse of Chancellor's discretion to award attorney's fees to the Appellee as she was clearly not destitute and was at fault. Under *Powell v. Powell*, 644 So.2d 269 (Miss. 1994), where fees were awarded without substantiation, this Court reversed award of attorney's fees. Therefore, the award of attorney's fees herein must be reversed.

Conclusion

The arguments discussed both here and in the Appellant's initial brief are based on clearly established Mississippi case law that fault of a spouse is central to the issues of divorce and its financial outcomes. While courts have a long time ago agreed that an adulterous spouse is not automatically barred from alimony or even attorney's fees, the issue of fault must be considered in

both. It is impossible to do so without clear allotment of fault and without clear identification of the proximate cause of the failure of the marriage.

Therefore, clear error was committed by the Chancellor in his failure to assign fault to just one party and it could not have been of a harmless nature. The Chancellor committed manifest error in granting a fault-based divorce to the Appellee. Further, the Chancellor committed manifest error and abused his discretion in awarding substantial alimony to the Appellee despite finding her at fault on the ground of adultery and ignoring the fact that marital property was divided equally, permanently raising the Appellee's standard of living. Finally, the Chancellor committed manifest error and abused his discretion in the granting of attorney's fees to the at-fault Appellee, who failed to prove her inability to pay said fees.

WHEREFORE, PREMISES CONSIDERED, the Appellant herein submits on the propositions cited and briefed hereinabove, together with any other error noticed by the Court which has not been specifically raised, that the Chancellor's judgment be reversed and vacated, respectively, and the matter be remanded to the lower court for a new trial on the issues of fault, proximate cause of the divorce, alimony, division of marital assets and attorney's fees. See *Douglas v. Douglas*, 766 So.2d 426 (Miss. 2000). In the alternative, the Appellant herein prays that the Chancellor's granting of a fault-based divorce, permanent alimony and attorney's fees, to and on behalf of the Appellee be reversed, granting the Appellant a divorce with an equitable distribution of the marital property.

CERTIFICATE OF SERVICE

I, J. Richard Kanuch, L.L.C., attorney for Appellant, Philip W. Ladner, Sr., certify that I have this day filed this pleading with the clerk of the Honorable Supreme Court of Mississippi and have served a copy of this pleading by facsimile and/or mail (properly addressed and shipping paid) on the following persons at these addresses:

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The Honorable Sandy Steckler
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Huey L. Bang, RMR, CRR
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NEW ORLEANS, LA, this twenty-ninth day of March, 2010.

J. Richard Kanuch, L.L.C. (MSB [redacted])
Attorney for Appellant, Philip W. Ladner, Sr.