

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CYNTHIA AMACKER

APPELLANT

VERSUS

CASE # 2008-TS-00332

PATRICK AMACKER

APPELLEE

BRIEF OF APPELLEE
PATRICK AMACKER

ON APPEAL FROM
CHANCERY COURT OF PEARL RIVER COUNTY, MISSISSIPPI
CAUSE NO. 05-0427-GN-W

SUBMITTED BY:

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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.

Honorable Johnny L. Williams
Presiding Chancery Court Judge

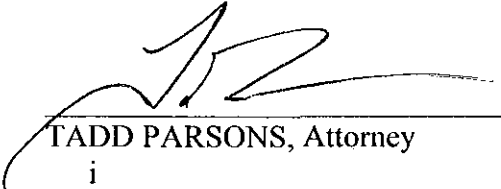
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ISSUES TO BE CONSIDERED BY THE COURT

1. Did the lower Court fail to have evidence on which to basis its decision against the great weight of evidence or was it manifestly wrong or clearly erroneous?
2. Did the lower Court fail to follow the criteria established by the Court as set out in the case law?

PROCEDURAL HISTORY

Cynthia Amacker filed a Complaint for Divorce and Motion for Temporary Relief against Patrick Amacker on August 11, 2005 stating they were both resident citizens of Pearl River County, Mississippi for more than six (6) months next preceding the filing of the Complaint for Divorce and Other Relief alleging they were both over the age of twenty-one years, members of the Caucasian race and were united in marriage on or about February 14, 1993 in Pearl River County, Mississippi and separated on August 9, 2005 in Pearl River County, Mississippi. The Appellee, Patrick Amacker, filed an Answer to the Complaint and Counter-Complaint on November 28, 2005 confessing the jurisdictional aspects of the Complaint and requested a divorce on the grounds of habitual cruel and inhuman treatment and other relief. Both parties asked that the Court make division of the marital assets of the parties. The Appellee filed discovery including interrogatories and requests for production and also requests for admissions. The Appellant filed her response to the Counter-Claim of the Defendant. The Court held one day's hearing and after that hearing it was agreed by the parties that a divorce should be entered and the remaining issues reserved by the Court to be heard at a later date which was done. The Court had the final hearing on February 9, 2008 and after conclusion of the case the Court entered an Order confirming the divorce and making a division of the real and personal property and other matters using the factors set out in the cases of *Ferguson* and *Hemsley*. Prior to this final hearing the Defendant had propounded requests for admissions to the Plaintiff on 28th day of November 2005 and the Plaintiff did not respond until April 6, 2006 which was more than the time allocated under Rule 36 of the Mississippi Rules of Civil Procedures and said requests for admissions would have been taken as admitted. The Plaintiff did not ask for additional time or file any motions to extend the time for response.

The Court, on January 9, 2008, entered a very detailed opinion from the bench outlining each one of the factors required by the Mississippi Supreme Court as to making determination of ownership of the marital assets taking into consideration all of the factors set out in the *Hemsley* and *Ferguson* cases. In addition to this he used the *Armstrong* factors in arriving at the conclusion pertaining to the ruling on the alimony. (See record Pages 173 through 180).

The Appellee's brief will states the pleadings in the above styled and numbered cause and cites them as follows, to-wit:

The Appellant filed a Complaint for Divorce against the Appellee on statutory grounds of habitual cruel and inhuman treatment or in the alternative irreconcilable differences. The Complaint for Divorce was proper and alleged the statutory necessities including all of the jurisdictional facts requesting among other things to determine temporary and permanent and ownership of the marital domicile which was titled in both names. The Appellant proceeded to request the Court for the Appellee to pay the mortgage payments, make an equitable distribution of other real and personal assets accumulated during the course of the marriage, require the Appellee to pay the marital debts, pay lump sum and periodic alimony and a reasonable sum for her attorney fees and court costs.

The Appellee proceeded to answer the Complaint responding to each of the allegations in the Complaint and filed a Counter-Complaint for Divorce and Other Relief. The Appellee adopted the jurisdictional allegations set out in the Complaint and requested the Court to grant him a divorce on the grounds of habitual cruel and inhuman treatment and alternate grounds of irreconcilable differences. Among the things he requested was an equitable division of the assets acquired during the marriage and each to pay their own personal debts and requested court costs and attorney fees. This Answer and Counter-Complaint was filed on November 28, 2005.

Your Defendant and Counter-Plaintiff propounded a first set of interrogatories to the Plaintiff, requests for production and requests for admissions to the Plaintiff on November 28, 2005.

On December 6, 2005 the Plaintiff responded to the Counter-Complaint of the Defendant. The Plaintiff did not respond to the interrogatories and requests for production and requests for admission until April 6, 2006. This was done much after the requests for admissions had been admitted for failure to respond within the proper time or getting an extension of time.

Various other pleadings were filed, not substantive in nature, among them being a Motion and Order allowing the first attorney, Mr. Richard Dymond, to withdraw which Order was entered on the 8th day of March, 2006. The Plaintiff proceeded to acquire the services of Mr. Walter W. Teel who filed dilatory pleadings and the matter was subsequently set for hearing on 26th day of September 2006 in Hattiesburg, Mississippi. At the September 26, 2006 hearing the Court heard one day's testimony and it was continued until a later date at which time the Court would hear the remaining part of the case.

Mr. Teel filed a Motion on or about September 20, 2006 asking to be permitted to withdraw and the matter was set for hearing on November 27, 2006. This hearing was continued at the request of the Plaintiff and was rescheduled for conclusion of the matter on February 22, 2007.

The final Judgment of Divorce was entered on April 26, 2007 granting a divorce to the Plaintiff on the grounds of habitual cruel and inhuman treatment and reserved all other issues for final hearing on October 16, 2007. On October 30, 2007 an Order was entered setting the matter for trial on January 9, 2008. At which time the Court heard the matter and entered a final Judgment on January 22, 2008.

The Appellant filed a Motion for a new trial on January 31, 2008 and the Appellee answered the Motion for New Trial on February 8, 2008. The hearing was heard on the Motion for a new trial on February 20, 2008. On March 17, 2008 a Judgment was entered overruling the Motion for a new trial.

Immediately after the Motion for New Trial was entered the third counsel for the Appellant withdrew.

BRIEF OF APPELLEE

Standard of Review

It is well established law in the State of Mississippi that the Mississippi Supreme Court will only review a Chancellor's findings through the manifest error/substantial evidence rule. In Biddix v. McConnell, 911 So. 2d 468 (Miss. 2005), this Court found, "This Court's 'review of a chancellor's findings of fact is the manifest error/substantial evidence rule.' This Court has held that a chancellor's finding of fact may only be disturbed if the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or applied the wrong legal standard." Biddix v. McConnell, 911 So. 2d 468 (Miss. 2005) (citing (Med. Devices, Inc., 624 So. 2d at 989 and Denson v. George, 642 So. 2d 909, 913 (Miss. 1994))). For the lower Court to be reversed: It is a well settled law in the State of Mississippi that a Chancellor's decision will be not be overturned or disturbed nor set aside by appeal "unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. In other words, on appeal this Court is required to respect the findings of fact by the Chancellor supported by credible evidence and not manifestly wrong." Flechas v. Flechas, 791 So.2d 295, 299 (Miss. App. 2001), Sandlin v. Sandlin, 699 So.2d 1198, 1203 (Miss. 1997). "Nonetheless, if manifest error is present or a legal standard misapplied, this Court will not hesitate to reverse." Flechas at 299 (Miss. App. 2001); Tilley v. Tilley, 610 So.2d 348, 351 (Miss. 1992).

“ A chancellor’s findings of fact will not be disturbed unless manifestly wrong or clearly erroneous. Sanderson v. Sanderson, 824 So.2d 623, (¶8) (Miss. 2002). This Court will not disturb the findings of a chancellor when supported by substantial credible evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Id.* 625-26 (¶8). Legal questions are reviewed de novo. Russell v. Performance Toyota, Inc., 826 So.2d 719, 721 (¶5) (Miss. 2002).”

Argument

The lower Court heard all of the testimony and gave a detailed ruling, findings of fact and conclusion of law as required of him and applied the standard and principles of law laid down by the court in Ferguson v. Ferguson, 639 So.2d 921 (1994) and Hemsley v. Hemsley, 639 So.2d 909 (Miss. 1994). The *Hemsley* did not add anything to the *Ferguson* case but just reaffirmed the principles laid out in *Ferguson*. In the case of Bowie v. Bowie, 557 So.2d, 793, 794 (Miss. 1990), Armstrong v. Armstrong, 618 So.2d 1278 (Miss. 1993) and Draper v. Draper, 627 So.2d 302, 305 (Miss. 1993) the Court stated the chancellor had authority and discretion by dividing the property awarding use and possession of property as the facts and circumstances proven in the case may justify. In other words if there are facts on which the lower court based its decision the appellate court would not disturb the ruling. This is what happened in the instant case.

The Court could have relied solely on the requests for admissions but elected to hear the case in full and found adequate and sufficient facts on which to base his findings without relying on the requests for admissions. Rule 36(a) of the Mississippi Rules of Civil Procedure provides that where a party does not respond to requests for admission within thirty days, the requests are deemed admitted. The admission conclusively establishes the matter for the pending litigation unless the trial judge allows withdrawal or amendment. M.R.C.P. 36. In the *Williams* case,

infra, the chancellor held a hearing on whether to deem the requests admitted and deferred to her evidence before ruling. In the present case Appellee served the Appellant with Requests for Admissions on November 5, 2005 and the Appellant's responses were filed on April 6, 2006 which would require the requests for admissions to be admitted. This one thing would have been adequate and sufficient for the Court to base its ruling. In the case of Robert Williams, et al v. Estate of John Horace Williams, No. 2005-CA-0061 – COA, February 25, 2005. The Court states "Indeed, pursuant to Rule 36(a), these requests were deemed admitted unless the chancellor permitted amendment or withdrawal. *Id.* The rule is enforced according to its terms. Martin v. Simmons, 571 So.2d 254, 256 (Miss. 1990)." In this case no withdrawal was requested nor granted. The Appellant admitted the following as a result of her failure to answer requests for admissions within thirty days of service as required by the rules, to-wit:

REQUEST FOR ADMISSION NO. 1: Does the Plaintiff admit that the Defendant should be awarded use and possession of the home and the land on which it is located?

REQUEST FOR ADMISSION NO. 2: Does the Plaintiff admit the Defendant was given the property on which the marital home is located by his parents?

REQUEST FOR ADMISSION NO. 3: Does the Plaintiff admit the Defendant paid all of the notes on the home with his own personal funds with no contribution by the Plaintiff?

REQUEST FOR ADMISSION NO. 4: Does the Plaintiff admit that the personal property should be equally divided between the parties since all personal property owned by either of the parties has been acquired during the marriage and as a result of joint efforts of the parties?

REQUEST FOR ADMISSION NO. 5: Does the Plaintiff admit the Defendant should be awarded title, use and possession to the marital home?

REQUEST FOR ADMISSION NO. 6: Does the Plaintiff admit the Defendant paid for the marital home out of funds not earned during the covenant of marriage to the Plaintiff?

REQUEST FOR ADMISSION NO. 7: Does the Plaintiff admit she has adequate and sufficient funds to provide for herself without any help from the Defendant?

REQUEST FOR ADMISSION NO. 8: Does the Plaintiff admit when she is able to return to this career she will earn a much greater sum per month than the Defendant receives?

REQUEST FOR ADMISSION NO. 9: Does the Plaintiff admit she is not entitled to any contribution of any type, form or fashion from the Defendant as a result of her marriage to the Defendant?

REQUEST FOR ADMISSION NO. 10: Does the Plaintiff admit Defendant should be awarded alimony and support from the Plaintiff?

REQUEST FOR ADMISSION NO. 11: Does the Plaintiff admit Plaintiff should pay to the Defendant a percentage of her income after she returns to work since the Defendant provided Plaintiff with the funds to secure her education?

REQUEST FOR ADMISSION NO. 12: Does the Plaintiff admit Defendant is entitled to a percentage of any and all funds she receives as a result of any pending lawsuit she has against the State of Louisiana and other parties?

The lower Court has complied with each of the statutory requirements of the statutes of the State of Mississippi and the Mississippi Rules of Civil Procedure. The Complaint was filed by the Appellant who had a Rule 4 process served on the Defendant together with a Rule 81 process returnable to a date certain. This complies with the requirements for the parties in the court and the Court will find that Orders were entered continuing the matter to specific dates, times and places pursuant to Rule 4 and Rule 81 of the Mississippi Rules of Civil Procedure.

The Court proceeded to hear testimony from both parties which presented conflicting testimony as to who paid for improvements to the home and who did the work on the home and the value thereof. There were no written documents showing the contribution of either party and the Court had to use the *Ferguson* and *Hemsley* factors attempting to arrive at a conclusion that would be fair and equitable to the parties. The Plaintiff surmised that in her opinion the house was worth approximately \$60,000.00 at the time that she married the Defendant which was his individual property at that time. (See record Page 173) This property was given to the Appellee by his family in 1982. This was many years prior to the marriage to Appellant. The Appellee stated in his opinion the property was worth about \$100,000.00 at the time he started improvements to it. (See record Page 135) The Appellee went into great detail about what improvements he did and the approximate costs of these improvements that enhanced the value of the property. The Appellee stated the Appellant made certain improvements to the property such as fence, built a barn but did not give a value of these improvements. (See record Page 136-138) The Appellant stated the Appellee worked on the house and made improvements and purchased some of the materials and she purchased materials and helped work on the house. (See record 158 et seq)

The testimony of the Appellant and Appellee was devoid of the specific amount that each contributed towards the improvements to the house after the marriage. Each of the parties gave parts and parcels of prices of the work but never a total amount expended by each of the parties.

Appellee, PATRICK AMACKER, calls the Court's attention to the Requests for Admissions that are admitted in part of the record of evidence. There are several statements made in the brief of the Appellant more particularly Paragraph III styled "Summary of

Argument” which the Appellant will refer to and cite the authorities in refuting said statements.

The statements are hereinafter set out.

Appellant, on Page 9, stated the Court acknowledged that Mrs. Amacker had some interest in the camp property and takes great comfort in the statement of the Court. Actually, the Court believed and in fact finds she had an interest in the camp property and once the Court did an equitable division of the property would consider what property would be assigned to each of the parties after determining what each one of them had an interest in. However, if the Court will look at the record it will find the camp property was purchased by Mr. Amacker after the separation which was set out in the statement of facts of the Appellee.

The contract to purchase the camp property between the seller and the purchaser, Amackers, had expired and had no validity for several months prior to the Appellee agreeing to purchase said property.

The Appellant states “Mr. Amacker has a higher income than Mrs. Amacker”. If the Court will look at the Requests for Admissions it was admitted Mrs. Amacker had a greater capacity to earn a higher income than Mr. Amacker. This was not denied in the Requests for Admissions.

Appellant stated “the Chancery Court erred in its analysis of facts and failed to consider pertinent information regarding equitable distribution of marital assets and awarding relief when making its ruling on same”. On Page 4 of the Appellant’s brief it is readily apparent the Court considered every factor introduced into evidence before making a ruling and applied the law as laid down by the Court in “*Ferguson v. Ferguson*”, supra, “*Hemsley v. Hemsley*”, supra. In fact, the Appellant acknowledged on Page 10 of the brief talking about the Order of the Court stated “this Order reflected the detailed opinion dictated into the record by the Court when the parties

were present in court on January 9, 2008. In the dictated opinion the Court discussed each factor set out in the *Ferguson, Hemsley and Armstrong* cases... However, despite all of the evidence and testimony presented, the Order entered by the Court was in direct contradiction of said evidence and testimony in its application of the standards set forth by governing case law was misapplied". In the same paragraph the Appellant went ahead to state Cynthia Amacker was not given credit for negotiations, time and monetary funds expended for improvements and renovation of the marital home and the secondary dwelling or "camp". The Appellant properly acknowledged the Court considered every parcel of property, both real and personal, and made a decision predicated upon his findings of facts and conclusions of law that an equitable division would be made as required by the three cases as cited above. This is all that is required of the lower Court and the Court can do nothing further than listen to testimony, watch the witnesses and determine what is fair, right and just under the circumstances and make an equitable division of the property. The Appellant has not shown anywhere where the Court was manifestly wrong in applying the law to the facts that he heard in presentation of the case.

In response to the baseless allegations and statements of the Appellant that Mrs. Amacker was not given credit for her negotiation, time and monetary funds expended for improvements and renovation of the marital home and secondary dwelling was inaccurate and improper since the Court recited in its opinion all of these factors were considered in making an equitable distribution of the property and obligations of the parties. Fortunately or unfortunately neither of the parties are granted any right to determine whether or not the Court has made an equitable division of the property after hearing all of the testimony and observing the witnesses. This is left entirely up the lower Court and this Court. If the Appellant is correct in her statement on Page 11 of their brief that says "she had undeniable interest in the marital home as well as

interest in the secondary home, or camp, that Mr. Amacker purchased after the date of separation and that said property be subject to equitable distribution". The Court considered all of this and acknowledged he had taken this into consideration when he decided what he did about the division of the home. The Court concluded Mr. Amacker purchased the home with his funds after the separation and the contract that both of the parties had with the doctor had expired and no more interest in that contract existed. However the Court did acknowledge that he took this into consideration in making his determination. The Appellee calls the Court's attention to the cases cited in the brief of the Appellee, "*Flechas v. Flechas*", supra and "*Sandlin v. Sandlin*", supra.

The Appellant stated on Page 13 of their brief the Court dictated into the record an analysis of the facts of the case regarding the real property as they apply to the facts in *Ferguson*, *Hemsley* and *Armstrong* cases. Where they complained that he improperly applied the facts to the ????? to be considered. Nowhere in the brief did they state the Court was manifestly wrong in application of facts are required by the laws set out by the Supreme Court of the State of Mississippi. The Appellant complained about appliances in the camp however they forgot to mention the appliances that were new that were placed in the home that was awarded to the Appellant.

The Appellant made the statement pertaining to failure to award alimony and if the Court will look at the Requests for Admissions it was admitted that no alimony should be granted to her and, in fact, she had the ability to learn to earn a greater income than the Appellee. On Page 16 and 17 of the brief the Appellee further discussed the alimony question and the Court found from the facts certain circumstances pertaining to the Appellant which she complains and there is no evidence whatsoever contrary to the Court's finding.

The Appellee urges the Court to affirm the lower Court's ruling because the lower Court purposely followed the case law that controls this matter more particularly set out in the *Flechas v. Flechas*, supra and "*Sandlin v. Sandlin*", supra, *Sanderson v. Sanderson*, and *Russell v. Performance Toyota, Inc.*, pertaining to the determination of facts and circumstances. In application of the rules and factors set out in *Ferguson*, supra, *Hemsley*, supra and *Armstrong*, supra, the Court usually followed the evidence presented in the case and ruled in accordance with the factors this Court has determined that is material in a case of this type and nature.

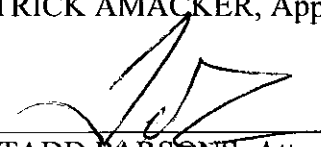
Conclusion

The Appellee takes the position the Court has properly, correctly and without fault or error followed the law in the State of Mississippi pertaining to the application of all facts necessary to make a fair and impartial determination of the equitable division of personal and real property and has applied all of the factors that are incumbent upon the Court to follow the rules properly in this case. This case is controlled basically by *Flechas v. Flechas*, 791 So.2d 295, 299 (Miss. App. 2001), *Sandlin v. Sandlin*, 699 So.2d 1198, 1203 (Miss. 1997), and *Sanderson v. Sanderson*, 824 So.2d 623, (Miss. 2002) pertaining to whether or not the lower Court should be reversed by the Mississippi Supreme Court or the Mississippi Court of Appeals.

The only other issues involved is the issue of proper application of the factors set out in the three major cases being the *Ferguson*, *Hemsley* and *Armstrong* cases as previously cited in the brief of the Appellee. Once the Court looks at all of the facts presented in the Court and the Requests for Admissions that were admitted then obviously the Court did not make a manifest error and properly applied the factors in making a fair and equitable distribution of the property and findings that pertain to the parties.

We urge the Court to affirm the lower Court's decision.

Respectfully submitted,
PATRICK AMACKER, Appellee

By: 
TADD PARSONS, Attorney for the Appellee

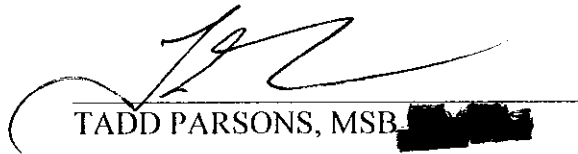
CERTIFICATE OF SERVICE

I, JACK PARSONS, of counsel for Appellee, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing REPLY BRIEF OF APPELLEE to the following at their respective addresses listed below:

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