COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO. 2008-TS-00580

BILLY FRED MCCARRELL **APPELLANT**

v.

JANIE ANNETTE HYDE MCCARRELL **APPELLEE**

On Appeal from the Chancery Court of DeSoto County, Mississippi

APPELLANT'S REPLY BRIEF

William B. Seale, Esq.
Mississippi Bar No.: [redacted]
The Seale Law Firm
323 Beale Street, Suite 2006
Memphis, TN 38103
(901) 521-9958 – Telephone
(901) 525-7702 – Facsimile

Attorney of Record for
Appellant Billy Fred McCarrell

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ARGUMENT

I. ALIMONY

Both parties agree that the key case to awarding alimony is **Armstrong v. Armstrong,** 618 So.2d 1278 (Miss. 1993), wherein the Supreme Court listed twelve factors to be considered in making alimony awards. In the Appellant's Brief, Billy McCarrell outlined in detail how the twelve (12) factors should have been applied by the Chancellor and how she abused her discretion in not applying the factors according to the evidence presented at trial. In his Reply Brief, Billy McCarrell will only emphasize the factors that he feels needs a reply after reading Janie McCarrell's Appellee Brief.

1. The parties' income and expenses: It was obvious from the record that Billy McCarrell made more money from his present occupation than his wife, but he has substantially more expenses, including, but not limited to his business expenses. (Exhibit 12: Appellant's Financial Declaration). Because of this difference in income, he agreed to take on all liability for all marital debts such as the deficiency judgment on the foreclosure of the marital home, the parties' tax lien, and the parties' Federal and State Tax Liabilities. That means that Janie McCarrell had no liability for any of the marital debts whatsoever. (RC pg. 50). All she had was her living expenses and her personal debts as reflected on her Financial Statement. Her monthly expenses on her Financial Statement were shown to be out of line, estimates, and excessive with many different figures being used for different expenses, such as her medical bills. (TR 94-100), She also had no car note because Billy McCarrell was ordered to provide her with a vehicle and he complied with that order.

The problem with this analysis is that Janie McCarrell only works part-time at FedEx. (TR 24). There was no reason shown at trial as to why she was working a full-time job. She worked full-time prior to the marriage and during the first part of the marriage until the parties' son was born. (TR 15). No proof of employment applications supported her testimony and no witnesses. No health problems or disabilities were presented at trial to support her failure to find full-time employment. She presented no justifiable reasons for her not being employed in a full-time job like she had before and during the marriage at Sunbeam Outdoor Products. (TR 15). Janie McCarrell just wants to work part-time and that is totally her decision and Billy McCarrell should not be punished financially for her employment decision.

2. The parties' health and earning capacity: Both parties are in good health and this factor is even between the parties. Janie McCarrell worked full-time prior to the marriage and during the marriage and there is no reason she cannot work full-time now. (TR 48). She did not need a college degree in the past to work a full-time job. (TR 15, 44). But, now, on her third marriage, (TR 46) her plan is to go back to college and earn a degree. But, during this marriage she had the opportunity to go back to college and all she earned was 9 hours of credit towards a business associate degree. (TR 76). Billy McCarrell also paid for her to attend modeling school for a period of time during the marriage, but she failed to follow through with that occupation. (TR 77, 78). She did not have the exact information on the reimbursement of college expenses and requirements of FedEx to pay such reimbursements. (TR 117). If it was so important for her to receive alimony for her to go back to college, then she should have been more prepared at trial. She should have given the Chancellor the exact college information and outlined her plan

in more detail. She failed to do either and her argument about attending college to support an alimony award is not supported by the evidence she presented at trial.

3. The needs of both parties: In her brief, Janie McCarrell does not mention that her Financial Statement's expenses were proven inaccurate, out of line and estimates. She filed two (2) different Financial Statements with the Trial Court and attempted to change some of her figures for a third time at trial. (TR 92, 109-115). These Financial Statements are very important to the Courts when determining the needs of both parties. She even included her daughter from a previous marriage in her figures and Billy McCarrell has no duty to support her daughter from the pervious marriage in any form or manner. (TR 94). Appellee estimated almost every entry on the Financial Statement and the Chancellor ignored this problem and this evidence.(TR 95, 96, 97, 98). She has no car note and no day care expense. Janie McCarrell should be able to meet all of her reasonable expenses, with the $800.00 per month child support paid by Billy McCarrell if she would find a full-time job.

4. The obligations and assets of both parties: Janie McCarrell has no car note (TR 81-82) and no day care expenses that were proven at trial. By agreement, Billy McCarrell assumed all liability for all marital debts of the parties. He purchased a house but has no equity in it. There was no proof at trial that Janie McCarrell's credit was damaged in any form or fashion. There is nothing in evidence except her testimony. They both have their regular living expenses to pay, but the Court could not know what those expenses are because there was no credible evidence presented by Janie McCarrell on her expenses. .

5. Length of marriage: The parties were married for twelve (12) years. Janie McCarrell did not mention that this is a middle range of marriage between ten and nineteen years, and it was her third marriage. In the cases heard on appeal in the middle range of length, alimony awards are less consistent. Rehabilitative or lump sum alimony awards were awarded in approximately forty percent of the cases. **Bell on Mississippi Family Law, Section 9.06[2][a]page 266.**

6. The presence of minor child in the home: By agreement, Appellee was awarded primary custody of the minor child, who was ten (10) years old and not of tender years. There was no proof in the record of any day care expenses, now or in the future. There was no proof of what college classes Janie McCarrell wanted to take, or the days and hours she would be attending. No evidence presented as to the cost of day care in the future or anything to support the alimony award in reference to this factor.

7. The parties' ages: At the time of the trial, Appellant was 44 years old and Appellee was 45 years old. This was not a factor that would support an alimony award.

8. The parties' standard of living during the marriage and at the time support is determined: The court should have taken the marriage as a whole during the entire twelve (12) years and not limit its review to the last few years when Billy McCarrell started a new occupation and began making more money in 2005. (TR 57 and Exhibits 15, 16, 17 & 18: TAX RETURNS). The parties clearly lived beyond their means. Reviewing the Income Tax Returns of the parties that were entered into evidence, the Court should have determined that their marital income was lower in the beginning and middle of the marriage, than at the end, when Billy McCarrell's income began to increase in 2005. The Court abused its discretion by not looking at the marriage as a whole.

9. Tax consequences of the spousal support order: Any award of alimony paid by Billy McCarrell can be deducted from his income tax, but this is not enough of a benefit to be a factor.

10. Fault or misconduct: Not a factor because this divorce was granted on the ground of irreconcilable differences.

11. Dissipation of assets by either party: It was a bad situation when the parties lost their equity in the marital home when it was foreclosed. Billy McCarrell made the payments but some of them were returned by his bank (TR121-124) and some by the mortgage company. (TR 68, 69). Billy McCarrell was ordered to pay Janie McCarrell $750.00 per week until the house was sold and then the support lowered to $400. (RC 12) (TR 85). He paid her $9,750.00 in temporary support through the end of December, 2006, when he started paying her $400.00 per week. Most of the $9,750.00 was to be used to pay the house note, but she never did make one payment. She could not explain what happened to the money during cross-examination except to say that she spent it on living expenses and attorney's fees. She paid $4,500.00 in attorney fees, but borrowed $1,200.00 from her mother to pay on the attorney's fees, as evidenced by her Financial Statements and her testimony. Therefore, there is $6,450.00 not accounted for during the period through the end of December, 2006 that she dissipated in some form or fashion. She did not pay it on the marital home and could not spend all that money on her living expenses. She did not even pay rent until March, 2007, after she moved out of the marital home at the end of February. (TR 87-91). Billy McCarrell testified that he cashed in the CD's to pay the temporary support and his bills. There was no proof or documents to prove otherwise. (TR 194-195). He provided copies of all of his bank statements to the

Appellee's attorney and was cross-examined on his deposits in detail during trial. Both parties were at fault along with their attorneys, who represented them at that time. Someone should have done something to save the home. Instead, Janie McCarrell and her attorneys chose to do nothing, except to blame Billy McCarrell for the foreclosure.

12. Any other factor deemed to be just and equitable: Free use of a car is another factor to consider, along with no child care expenses proved now or in the future. If Janie McCarrell did not request periodic alimony, then that argument is not valid in this appeal. She could have completed college during the marriage if she really wanted to. She could have a full-time job if she really wanted one. There are many single mothers who hold down full-time jobs, including professional women.

The Chancellor should look at all the evidence that is presented at trial and should not abuse her discretion by awarding alimony that is not justified by credible proof taken at trial.

II. ERROR ON DUE DATE OF FIRST PAYMENT OF ALIMONY

There is nothing Janie McCarrell could state in her brief that would win this argument. The law is clear in this matter. The clerk's entry of an order pursuant to **Rule 58 of the Mississippi Rule of Civil Procedure,** which states: A judgment shall be effective only when entered as provided in M.R.C.P. 79(a). A chancellor's opinion is not a final judgment, **Banks v. Banks, 511 So.2d 933, 935 (Miss. 1987).** Therefore, the Final Decree of Divorce was effective as of January 18, 2008 and Appellant could not be ordered to pay alimony on January 5, 2008 because that was in the Chancellor's Written Opinion.

IV. ATTORNEY'S FEES

Janie McCarrell did not comply with the factors established in **McKee v. McKee,** 418 So.2d 764, 767 (Miss. 1982), at trial and therefore the Trial Court had **no** choice but to deny any request for attorney fees. All she had to do was present testimony or affidavits from other attorneys that would comply with the **McKee** factors. These factors must be entered into evidence in some form or fashion and the Chancellor cannot take judicial notice of the factors. There is not one case in the State of Mississippi that Billy McCarrell's attorney has found that allows the Chancellor take judicial notice of the factors when nothing has been entered into evidence at trial.

Janie McCarrell tries to use **Upchurch Plumbing, Inc. v. Greenwood Utilities Comm'n** 964 So.2d 1100 (Miss. 2007) to support her position that the attorney's fees award is valid. The Chancellor in our case at hand did make substantive findings of fact in accordance with the **McKee** factors, but that is not enough. The only thing Janie McCarrell did at trial was enter an itemized copy of her attorney's fee bill. No other evidence was taken or presented that complied with any of the factors of **McKee.** Even the Court in **Upchurch** (p.116) quotes **Mabus v. Mabus**, 910 So.2d 486, 489 (Miss. 2005) that "where a trial judge relies on substantial credible evidence in the record regarding attorney's fees, the trial judge has not abused his discretion." It was found that the judge did apply the **McKee** factors even though he did not put it in his ruling. In **Mabus** both attorneys filed affidavits with the court and attached their detailed itemized bills. They also subjected themselves to examination by the court on the witness stand. None of that happened in our case except for the entry of an itemized attorney's fee bill.

In the case of **Mississippi Power & Light Co. v. Kenneth D. Cook,** 832 So.2d 474, 487 (Miss.2002), the trial judge was found to have abused her discretion in awarding the attorney's fees. She stated that the case had been litigated for more than nine (9) years which was not true. No record of the proceedings wherein the attorney's fees were awarded was made because the court reporter was not allowed to record the hearing. There was no record of the fee customarily charged in the locality or the time and labor required. The Court stated: "The *McKee* factors should have been applied by the trail judge in determining the amount of attorney's fees to be awarded and any award should be supported with factual determinations." In our case on appeal, there was no record of the fee customarily charged in the locality or the time and labor required, along with no other proof of any of the factors required.

In the case of **Billy R. Browder and Peggy Browder v. Eddie E. Williams and Sarah A. Williams,** 765 So.2d 1281, 1287 (Miss.2000), the Browders' attorney submitted an itemized fee application specifying 443 hours at $100.00 per hour for a total of $4,430.00. The Chancellor erred in his ruling on the award of attorney's fees because he did not specify the reason for awarding them. Even though the fixing of reasonable attorney's fees is ordinarily within the sound discretion of the trial court, "This Court does not, however, leave the reasonableness of an award for attorney's fees to the arbitrary discretion of the trial court." The Court further states: "The chancellor should have applied these factors (McKee) in determining the amount of attorney's fees to be awarded and supported that award with factual determinations."p.1288. This case is right on point because Janie McCarrell's attorneys only submitted an itemized statement and nothing else to comply with the required **McKee** factors.

Finally, in the case of **DynaSteel Corporation v. Aztec Industries, Inc.,** 611 So.2d 977 (Miss.1992) there was a collection case where an open account was involved and the Judge erred in awarding a one-third of the judgment for attorney's fees. "No evidence substantiating the reasonableness of this figure was presented in the record. DynaSteel is correct in that, as a general matter, the amount of an attorney's fees award should be supported by credible evidence and should not be plucked out of the air." The Court further outlined that the trial court should adhere to the factors stated in **McKee.** There was no such evidence presented to the trial court and contained in the record and the trial judge's award was ruled to be excessive even though this was a default judgment collection case.

Janie McCarrell argues that her itemized bill was entered into evidence without any objection. This is true because there is not objection to that document as it stands. But, there was an objection made when Janie McCarrell attempted to testify as an expert witness on attorney's fees and that objection was sustained by the court. (TR 40-43). It is not up to Billy McCarrell to cross-examine or question an itemized bill for attorney's fees when the **McKee** factors are not proven at trial in any form or manner.

Further, the Chancellor abused her discretion by awarding the full amount of attorney's fee when all Janie McCarrell requested was the balance that she owed. And no matter how badly Janie McCarrell and her attorney's try to present Billy McCarrell to the court, he was never found to be in contempt of court at any time prior to trial.

The Chancellor abused her discretion by taking judicial notice of the **McKee** factors (RC pg. 111) and there is no case law that allows a Chancellor to take judicial

notice to prove attorney's fees, when a party does not comply with the requirements required by this Supreme Court.

CONCLUSION

No award of alimony should have been made by the Trial Court in this case based upon the totality of the circumstances of the marriage and considering the pertinent factors set out in **Armstrong**. The alimony award should be reversed.

The entry of the Final Decree of Divorce was on January 18, 2008 and that is the date it is effective. The Chancellor's Written Opinion is not a judgment and her order to start paying alimony on January 5, 2008 was improper and should not be enforced. Appellant's alimony and child support obligation should begin on January 18, 2008 and the amounts owed should be prorated according to the days left in the month of January because Appellant was ordered to pay Temporary Support until January 18, 2008.

Appellant has complied with the automobile provision of the Final Decree of Divorce by providing an appropriate automobile to the Appellee. Therefore, Appellant withdraws this issue from his appeal.

No attorney's fees should have been awarded because the Appellee did not comply with the **McKee** factors required by the Supreme Court to prove the attorney's fees requested. The Chancellor should not be allowed to take judicial notice of the **McKee** factors when they are not proven at trial. The Court further erred in awarding more attorneys' fees than Appellee requested. Appellant was never held in contempt by any Order in this cause. Therefore, the attorney's fees award should be reversed.

CERTIFICATE OF SERVICE

I, William B. Seale, Attorney for the Appellant in the above styled and referenced cause, do hereby certify that I have this day forwarded, via United States mail, postage pre-paid, a true and correct copy of the Appellant's Brief to William P. Myers and Amy Holliman Brown, Attorneys for Appellee, at P.O. Box 876, Hernando, Mississippi 38632, and to Chancellor Vicki Cobb at P.O. box 1105, Batesville, MS 38606, on this the 20th day of January, 2009.

William B. Seale

William B. Seale, Certifying attorney