

**IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2009-CA-00555-COA**

STACEY ANNE RHODES

APPELLANT

V.

GEORGE WILLIAM RHODES, JR.

APPELLEE

APPEAL FROM CHANCERY COURT OF HARRISON COUNTY

**REPLY BRIEF
OF APPELLANT**

ORAL ARGUMENT REQUESTED

**CLIFFORD C. WHITNEY III
VARNER, PARKER & SESSUMS, P.A.
Post Office Box 1237
1110 Jackson Street
Vicksburg, Mississippi 39181-1237
Telephone: 601/638-8741
Facsimile: 601/638-8666**

ATTORNEYS FOR APPELLANT

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INTRODUCTION

This divorce case cries out for appellate relief, because the decision of the trial court left the wife, Stacey Rhodes, with a mere 1.8% of the marital estate, while the husband, Rocky Rhodes, left with millions of dollars in assets accumulated during the term of this five-year marriage. The chancellor failed to award Stacey with a dime of Rocky's vast earnings and ignored Stacey's clear contributions to the marriage as a housewife.

Rocky understandably wants this Court to overlook the massive disparity between his own wealthy economic circumstances and the borderline poverty of Stacey. In an attempt to misdirect the Court, in his brief he repeats over and over that "this was only a fifteen month marriage," which in his mind justifies leaving his wife high and dry. First of all, this was not a mere fifteen month marriage - separation occurred after four years of marriage and divorce after five. Secondly, the length of the marriage is but one of many factors to be considered in making equitable distribution and determining alimony. The length of the marriage does not justify awarding the wife only a minimal share of the assets and a minimal amount of rehabilitative alimony, when the other *Ferguson* and *Armstrong* factors dictate otherwise. In short, Rocky has failed to rebut the fatal shortcoming in the proceedings below, and the Court should now reverse and remand for a new trial.

REPLY TO APPELLEE'S ARGUMENTS

1. *Erroneous Determination and Valuation of Marital Assets.*

It is clear that errors in the determination and valuation of marital assets by the trial court are grounds for reversal. *Redd v. Redd*, 774 So.2d 492, 494 (Miss. App. 2000). As we will now see, Rocky vainly attempts in his Brief to justify the chancellor's manifest errors in this important part of the case.

a. *Rhodes Carpet and Draperies, Inc.*

Rocky's primary argument about his wholly owned business, Rhodes Carpet and Draperies, Inc. ("RCD"), is that 100% of the business was a gift from his parents. In the Appellant's Brief, we showed that the stock in RCD was not a gift. A portion of the stock was in fact compensation for Rocky's running the business, as supported by *Hankins v. Hankins*, 729 So.2d 1283, 1287 (Miss. 1999). Moreover, 50% of the company was purchased by Rocky from his brother during this marriage and was by no conceivable means a gift *to Rocky*. We will not repeat this discussion now. Suffice it to say, when the chancellor completely omitted the value of RCD from the marital estate, that was reversible error.

Where there is no real dispute is that RCD substantially appreciated in value during the marriage and that the chancellor wrongly omitted this appreciation from the marital estate. In his Brief, Rocky quotes valuation figures from his own accountant demonstrating that the book value of the company increased from \$828,931 at the beginning of the marriage to \$3,507,410 in 2006 - an increase of \$2,678,479. Appellee's

Brief at 10. Rocky tries to explain away this appreciation in value by claiming that the 2006 figure was aberrational, in that it represented one-time business generated by Hurricane Katrina. However, Rocky omits the 2007 post-Katrina value of the company, which was \$3,164,492 in 2007, which still yields an appreciation in value over the term of the marriage of \$2,335,564.

Contrary to the undisputed figures about the appreciation of the business, the chancellor found that there was *no increase in value of RCD* during the marriage. Thus, the trial court erroneously failed to reach the *Ferguson* equitable distribution factors with regard to this valuable marital asset - an error which should be cured by a new trial.

b. Other Business Assets.

With regard to two of the marital assets - Rhodes Capital, LLC and Rhodes Rental of Ocean Springs, LLC - Rocky contends that Stacey did not cite any legal authority for why she is entitled to an award based on these interests. Appellee's Brief at 21-22. On the contrary, Stacey's Brief discussed the two step process involved in dividing assets under *Hemsley* and *Ferguson* - i.e., determine whether the asset is marital or non-marital and then equitably distribute the marital assets. Appellant's Brief at 21. We then proceeded to apply this analysis to the various assets, including Rhodes Capital and Rhodes Rental; to demonstrate that these companies or their appreciation in value were marital; and to show that the assets were erroneously excluded by the trial court from the marital assets. Later in the Brief, we go through the equitable distribution analysis and establish how it should have been applied to all of the marital assets, including

Rhodes Capital and Rhodes Rental. Therefore, it is plainly wrong for Rocky to contend that Stacey has waived any claim regarding these assets.

c. Florida Vacation Home.

Rocky argues that the family use doctrine does not apply to a vacation. In attempting to distinguish the family use cases, Rocky repeats his familiar mantra that this was too short a marriage. Appellee's Brief at 24-25. However, Rocky's position is refuted by *Stewart v. Stewart*, 864 So.2d 934, 938-939 (Miss. 2003), in which the Supreme Court held that the parties' residence became marital property due to family use in a one-year marriage. The Court merely adjusted the share awarded to the wife based on the length of the marriage. *Id.*

Rocky also suggests that the family use doctrine should not apply to a vacation home, even though it has been applied to a variety of other assets by the courts of this state. Rocky quarrels with our reliance on *Oatey v. Oatey*, 1996 WL 200273, *25 (Ohio App. 1996), stating that "as has been the case with a majority of the law included in Stacey's brief, the support is misplaced." Appellee's Brief at 25. The following quotation from *Oatey* succinctly demonstrates that the support is *not* misplaced and that, even if *Oatey* never uses the words "family use doctrine", it fully supports Stacey's position that a vacation home can become marital property through family use:

[I]t is apparent that the Chautauqua, New York vacation home was transmuted into marital property. Testimony was presented to demonstrate the use of the home by the family, the duration of that use as well as the intention of the parties regarding the property. Accordingly,

the trial court did not abuse its discretion regarding transmutation of the Chautauqua home into marital property.

1996 WL 200273, *25.

Another argument in the Appellee's Brief is that the Florida home was merely a passive investment and a rental house, and therefore it was not marital property. Yet, the evidence supports that the property was, first and foremost, a vacation home used extensively by the Rhodes and by Stacey and her family. Tr. 719-728. Even Rocky had to admit this family use in his testimony. Tr. 327-329.

Not surprisingly, since he had represented to the IRS that the property was a tax deductible vacation rental, Rocky would now have the Court believe that the house was seldom used for personal purposes outside the two weeks per year allowed under the Internal Revenue Code. Rocky relies on his tax returns as proof of this status of the property. However, the returns (E. 244-573) tell another story. The property received rents of \$14,000 in 2003 and \$10,000 in 2004, which amounts to an annualized average of \$1,000 per month or less for high rent beach property in Santa Rosa Beach, Florida. In 2005, there was "0" reported rental income on the property, and Hurricane Katrina did not strike until the end of August of that year. In 2006, the property was not even listed in the tax returns, and Stacey lived there for a good portion of 2007. None of this evidence indicates a high level of rental activity on this property, which is consistent with the testimony about the primary use of the property for family vacation and recreation purposes.

Rocky contends that the Florida house was his passive investment, and any appreciation in its value cannot be considered marital property. Yet, “if the appreciation of an asset is the result of the efforts of *either spouse*, it is considered active appreciation and becomes a marital asset.” *Craft v. Craft*, 825 So.2d 605, 613 (Miss. 2002)(emphasis added). In *Craft*, the Supreme Court held that the husband’s active efforts in a business were sufficient to make the appreciation in its value a marital asset, notwithstanding the lack of participation by the wife. *Id.* Performing renovation and repair work constitutes active participation. *Carrow v. Carrow*, 642 So.2d 901, 907 (Miss. 1994).

Even if the Florida house can be said to be an “investment” property instead of a family vacation house (which it cannot), it was clearly an active investment. Both Rocky and Stacey testified that they maintained and repaired the property throughout the marriage, and Stacey introduced receipts in evidence to demonstrate her efforts. Tr. 97, 721-723. Thus, the substantial appreciation in the property during the marriage is a marital asset which the chancellor should have - but did not - equitably distribute.

2. *Erroneous Equitable Distribution Analysis.*

At the heart of Rocky’s argument is that the duration of this marriage was too short for Stacey to have accrued any right to the millions of dollars amassed by Rocky through his active efforts during the marriage. Can it really be said that Stacey is entitled to next to nothing from a five year marriage in which Stacey was either marginally employed or a housewife, while Rocky was making millions as a businessman?

Professor Bell notes in her treatise on Mississippi family law that “only a few reported cases involve an award in which the disparity [between the amounts allowed to each spouse] exceeds one-third of the assets.” D. Bell, *Mississippi Family Law*, § 6.08[2] (1st ed. 2004). Even in those few cases with lower than a 2/3 - 1/3 split, the awards were 3/4 - 1/4, where the husband had a very high income and the wife little or none. *Id.*, n. 268, citing *Ford v. Ford*, 795 So.2d 600, 602 (Miss. App. 2001); *Redd*, 774 So.2d at 494-495.

In the present case, based on the chancellor’s valuations, **Stacey received approximately 1.8% of the marital assets**, when you consider the assets the chancellor improperly left out of the marital estate. See Appellant’s Brief at 18-19, showing chancellor’s allocation. This represents a complete departure from the presumption that each spouse made an equal contribution and thereby diverges from *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994), as the following discussion of key *Ferguson* factors will now illustrate:

a. Contribution to Marriage.

Rocky does not dispute that he accumulated millions of dollars in assets during the term of the marriage, through his active efforts. His contention is that there should be no equitable distribution *any* of this money to Stacey, because she did not contribute funds or labor to Rocky’s businesses.

However, the equitable distribution factor relating to contribution is *not* about the wife’s contribution to the husband’s business - it is about the wife’s contribution *to*

the marriage. King v. King, 760 So.2d 830, 837 (Miss. App. 2000). The contribution to the marriage does not have to be monetary but can be in the form of services and other indirect economic contributions. *Id.*

Rocky tries to argue that Stacey's non-economic contributions were "0". This is primarily based on his own testimony that he did most of the cooking, that he "participated" in the cleaning, and that he handled a "significant" portion of the laundry. Appellee's Brief at 7. Rocky made these statements about his domestic contributions, while at the same time emphasizing that he worked 12 hours a day at RCD and therefore lived a separate life from Stacey. Appellee's Brief at 7. Obviously, the two are not consistent.

Rocky did not testify in rebuttal at the trial, and he did not refute the testimony about Stacey's substantial contributions to the marriage. These included her providing the Dacey Street house for use by the parties during the early marriage; obtaining favorable terms for the purchase of the marital home from her parents; managing the major remodel of the marital home; managing household expenses and paying bills for the joint account; contributing all of her available funds toward living expenses; obtaining FEMA funds for paying household expenses; Rocky's using the \$550 per month rental income from Stacey's Darcey Street property; cleaning up the marital home after Katrina and bringing supplies from Florida; and, performing extensive household chores both in the marital home and the Florida home, including sweeping, mopping,

vacuuming, dusting, clothes washing, cooking, grocery shopping, ironing, cleaning porches, and cleaning windows. See Appellant's Brief at 35-36.

Rocky and the chancellor would completely write off Stacey's contributions to this marriage. We submit that this view represents a failure to follow *Ferguson*.

b. Length of Marriage.

Rocky's principal argument on equitable distribution, alimony and just about everything else in this case - which he repeats over and over in his Brief - is that Stacey is entitled to very little, if anything, because of the short duration of the marriage. First of all, the length of the marriage is only a very small aspect of the *Ferguson* analysis, and it is but one of the matters to be taken into account in considering the contribution of the spouses to the stability and harmony of the marriage. *Ferguson*, 639 So.2d at 928. There is no authority of which the undersigned is aware that justifies reducing a spouse's share of the marital estate to 1.8% solely on the basis of the length of the marriage.

Admittedly, this was not an extremely long-term marriage, but it did in fact last four years before separation and five years before divorce - not fifteen months, as Rocky contends. While Rocky may have given self-serving testimony that the marriage had for practical purposes ended in January 2005 (Tr. 34), it is important to know whether the wife perceived the term of the marriage the same way. Rocky's *post hoc* rationalization does not, in and of itself, establish a fifteen month marriage.

The record reveals that Rocky and Stacey dated for seven and one-half years before the marriage. Tr. 597-601. According to Stacey's daughter and parents, the

Rhodes' marriage was a good one for a considerable period of time, and Stacey's parents saw the couple frequently at gatherings, on vacation, and at the Florida beach house. Tr. 195-196, 409-410, 423-424. There is no doubt that the parties encountered problems in their relationship periodically during the marriage, which is not uncommon in any marriage. Rocky would sometimes say "let's get divorced" or words to that effect, when these problems arose. Tr. 742-745.

The January 2005 date that Rocky cites repeatedly in his Brief as the end date of the marriage was actually just another of those incidents where Rocky threatened divorce in the course of an argument. At that time, Rocky said he was going to see a lawyer and suggested Stacey do the same. Tr. 742. However, even though the parties consulted attorneys, nothing came of it, and the parties stayed together. Stacey testified that she realized Rocky was not serious about his threat of divorce at that time, and the marriage got better after this incident. Tr. 745.

It was not until January 2006 that the relationship began to deteriorate. At that time, Rocky cut off all financial support for Stacey. Tr. 661-662. Nevertheless, the marriage survived for another 1-1/2 years, until Rocky filed for divorce in May 2007 and the chancellor entered the Temporary Order for separation in August 2007. Merely because Rocky says it was so does not mean that the marriage can be deemed to be a 15 month marriage.

Flechas v. Flechas is directly on point to this case. Contrary to Rocky's contention in his Brief, Stacey is very much like Eunice Flechas. In *Flechas*, the parties were

married for six years, as compared to five in this case. Just like Stacey, Eunice quit her relatively low paying teaching job to become a full-time a housewife. Her businessman husband, similar to Rocky, earned a high six-figure income and amassed nearly \$2 million in assets during the marriage. 791 So.2d at 301-302.

The Court of Appeals reversed and remanded *Flechas* for a second time, holding that the chancellor had erred in failing to award Eunice any of the assets the husband accumulated during the marriage, including any share of the \$1.6 million in appreciation in the value of the husband's business. The Court held that the award of lump sum alimony of \$36,000 was inadequate and remanded for a new trial for the chancellor to equitably distribute the assets amassed by the husband during the six year marriage. 791 So.2d at 298. There is no reason for a different resolution of this appeal.

c. Fault.

As with the length of the marriage, fault is not one of the specifically enumerated *Ferguson* factors, although it undoubtedly comes into play under the stability and harmony factor. Rocky repeatedly tries to make the case that Stacey was at fault and therefore was not entitled to any portion of the marital assets, based on the fact that Stacey spent 55 hours talking to a former boyfriend, Keith Polovich, on the cell phone over a several year period. Rocky would have the Court to extrapolate from this fact that Stacey was having an affair with Mr. Polovich. Rocky fails to mention that Mr. Polovich testified at trial in Rocky's case, and he denied that anything untoward had taken place. Tr. 298-299. Mr. Polovich and Stacey both testified that they were friends

and that they talked about a variety of things, including automobile problems, Mr. Polovich's family and issues going on between Stacey and Rocky. Tr. 296-297, 715-716. There is not one iota of evidence that any sexual relationship occurred during Stacey's marriage to Rocky. The trial court specifically declined to make any finding as to marital fault. Amended Judgment at 39 (E. 42).

If anyone was at fault for the breakup of the marriage, it was Rocky. When Stacey was unable to have sex because of her physical ailments (Tr. 735), Rocky erupted in anger, cut off Stacey's livelihood, and bullied her to get a lawyer and to agree to a divorce settlement that same day. Tr. 661-662, 684-685, 742-745. If Rocky wants to play the game of innuendo about affairs, he should also take into account the testimony that he had been seen with a girlfriend, Cathy Newton, during the marriage (including possible overnight visits), had traveled to California to be with her and had given her a gift. Tr. 718-719. In short, the fault issue does not and should not count against Stacey in determining the equitable distribution of the assets.

3. *Alimony.*

Stacey's fundamental contention regarding alimony remains undisturbed in the wake of Rocky's Brief - her contention being that, in determining alimony, the trial court incorrectly ignored the enormous disparity between Stacey's inadequate earning capacity and Rocky's huge income and resources. Nevertheless, we are compelled to respond to the following points:

a. **Stacey's Medical Condition and Diminished Earning Capacity.**

Rocky wants the Court to believe that Stacey has no medical conditions to impair her ability to work at a \$20,000 per year job. His "compelling" evidence includes the fact that Stacey was able to sit and assist her attorneys during trial. Appellee's Brief at 32. This is grasping at straws. There is no way to equate being able to assist your attorneys at a five-day trial and being able to work eight hours a day, five days a week, fifty weeks a year, when you have illnesses that can destroy your ability to work for days or even weeks at a time.¹

Another argument is that Stacey failed to produce medical testimony to support that she has Epstein-Barr, fibromyalgia and chronic fatigue. Yet, a plaintiff is always permitted to testify about her own physical condition, pain, weakness, injury, etc. *Blake v. Clein*, 903 So.2d 710, 732 (Miss. 2005). At the trial of this case, Stacey testified at some length about her conditions and the limitations they place on her ability to work. Tr. 735-737. It was up to Rocky to offer medical testimony, if he desired to do so, to refute these conditions. As it stands, Stacey's testimony is unrefuted and cannot be replaced with conjecture about what Stacey is or is not capable of doing.

Rocky's reliance on *Rogillio v. Rogillio*, 2010 WL 610611 (Miss. App. 2010) is misplaced. *Rogillio* does not condemn a woman like Stacey with legitimate illnesses that

¹ Rocky argues that Stacey's performance of household work and work at the Florida residence conflicts with her claim of impairment in her employment. However, it is a far cry from being able to perform work at home, when you can rest when you have to, and being available regularly and dependably for a 40-hour per week job.

impair her employability. Stacey is not Helen Rogillio, who claimed to be disabled and yet was proved to be a practicing alcoholic who frequently rode four-wheelers and went scuba diving. Here, there is no question - other than through speculation by Rocky and the chancellor - that Stacey is genuinely unable to hold regular, 40 hours per week employment due to her medical condition. Because the chancellor ruled otherwise in evaluating alimony, his decision was in error.

b. The Absence of Any Lease Payments to be Included in Stacey's Income.

Rocky argues that, in determining Stacey's available income for alimony purposes, an \$85,000 lease payment on her Dacey Street property should be taken into account. Appellee's Brief at 34. Yet, the testimony at trial was that the lease payment on Dacey Street (S&J, LLC) had ceased by the time of the trial of this case. Tr. 748. The chancellor held that any future income from this property was speculative at best, and he valued the property at \$295. Judgment at 5, ¶ 14. Thus, there was no basis for this non-existent income to be considered in determining alimony.

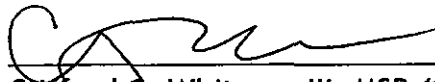
CONCLUSION

The judgment of the trial court in this case is fundamentally flawed and fatally inequitable. The chancellor excluded millions of dollars in assets of the husband from the marital estate and limited the wife to an award that does not even enable her to meet her basic expenses. Rocky's arguments in his Brief simply do not overcome the fundamental defects in the Judgment in the decision in applying *Ferguson* and *Armstrong*, and this Court should reverse and remand for a new trial.

RESPECTFULLY SUBMITTED,

STACEY ANNE RHODES

BY:


Clifford C. Whitney, III, MCD [REDACTED]

OF COUNSEL:

VARNER, PARKER & SESSUMS, P.A.
Post Office Box 1237
1110 Jackson Street
Vicksburg, Mississippi 39181-1237
Telephone: 601/638-8741
Facsimile: 601/638-8666


CERTIFICATE OF SERVICE

I, CLIFFORD C. WHITNEY, III, Attorney for Defendant, Stacey Anne Rhodes , do hereby certify that I have this day mailed, postage prepaid, by United States Mail, hand-delivered, or via facsimile, a true and correct copy of the above and foregoing document to the following counsel of record:

Dean Holleman, Esquire
BOYCE HOLLEMAN, P.A.
1720 23rd Avenue
Gulfport, Mississippi 39503

Honorable Jim Persons
Harrison County Chancery Court Judge
Post Office Box 457
Gulfport, Mississippi 39502

This the 21st day of April, 2010.


Clifford C. Whitney, III