IN THE MISSISSIPPI COURT OF APPEALS

RT

ROGER A. CARROLL — APPELLANT

V. — Cause No. 2010-CA-00823

ANNA F. CARROLL — APPELLEE

APPELLANT'S REPLY BRIEF

APPELLANT'S BRIEF IN REPLY TO THE JUDGMENT ON REMAND FROM THE CHANCERY COURT OF MONROE COUNTY MISSISSIPPI, HONORABLE TALMADGE LITTLEJOHN, CHANCELLOR

PREPARED BY:
STEWART GUERNSEY, MBA[redacted]
STEWART GUERNSEY, JD, M.DIV, LLC
P. O. BOX 167
WATER VALLEY, MS 38965
(662) 473-0091 (TEL)
(662) 473-0097 (FAX)
rsguernsey@bellsouth.net

Appellant does not request oral argument.

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APPELLANT'S REPLY BRIEF

I- Summary of Proceedings and Argument to Date

A. Summary of Proceedings

On or about September 19, 2003, Plaintiff/Appellee Anna Carroll, (hereinafter "Anna"), filed her Original Complaint For Divorce, allegedly asserting adultery as the cause. We have no document before the Court which supports the above description of the Complaint, only references in Table of Contents patched to comments by the Chancellor and brief of Appellee (Anna).

Divorce, Division of Property and Alimony were granted (according to the Table of Contents from the Docket), and filed on February 22, 2005. Defendant Roger Carroll, (hereinafter "Roger"), filed an appeal as to all matters except the Divorce. After extensive litigation, the Opinion of the Court of Appeals was finalized as "law of the case" together with its Mandate, filed in Monroe County on April 2, 2008. The Chancellor noted some confusion as to the Court of Appeals' Mandate before re-examining both equitable distribution and alimony.

A Bench Opinion was rendered on March 31, 2010, with the only "new" or contemporaneous evidence before the Chancellor being Roger's Motion For New Trial on Remand, Clerk's Papers, pp. 112-171. This document included numerous exhibits which were before the Chancellor. There was also evidence from a hearing on an ancillary matter before both the Chancery Court and this Court. The majority of the Findings of Fact made by the Chancellor were based on evidence and proof not in the Record before this Court.

Certainly, the evidence relied on by the Chancellor was from before 2/22/05, probably mostly from the period between December 7, 2004, when Roger's counsel was allowed to withdraw and February 22, 2005, when the original Decree was recorded.

This Court may certainly go outside of the Record to acknowledge that the economic circumstances of the U.S. economic "recession" have dramatically the "global" financial picture for almost everyone. Samuels v. Mladineo, 608 So. 2d 1170, 1185(Miss. 1995). Similarly, the record evidence that is before the Court will show that Roger's financial circumstances declined even more dramatically from 12/04 – 2/05 till March 31, 2010. The Chancellor made no such acknowledgment despite the un-contradicted contemporaneous evidence before him that Roger's finances had changed for the worse.

Appeal was taken to this Court. To date, Roger's Brief-in-Chief and Anna's Response Brief have been filed. They are concisely summarized below as, essentially, a single-sentence per Issue summary.

B. Summary of the Arguments

1) In his Brief-in-Chief, Roger asserts three major errors:

a) The Chancellor "abused his discretion" by finding, based on 2004-05 evidence, that Roger had a current "capacity" to earn about $22,000 per month;

b) The Chancellor erred, secondary to the first named error by creating an "impossible" situation for Roger and

c) The Chancellor erred by granting "double relief" or "multiple relief" for Anna. This he did by ordering two liens against Roger's property, lump sum alimony, periodic alimony, and payment of all debts against the marital home by Roger.

2) In her Response Brief, Anna asserts:

a) With no analysis of the proof or testimony before the Court on 3/31/2010, or its currency, Anna concludes that the Chancellor's Judgment on remand is supported by the Court's nominal Ferguson and Armstrong/Davis analysis;

b) Relying on Armstrong's indubitable holding that "income capacity" is used to determine ability to pay alimony, Anna completely misses the point that "earning capacity" can change in six (6) years, and must be proved contemporaneously; and

c) Completely side-stepping the issue of "double-dipping," Anna asserts that the Chancellor "hinted" that Roger would be forgiven other obligations if he satisfied the two mortgages on the marital home.

d) Out of nowhere, Anna asks for $20,793.75 in attorney fees for this appeal. This issue is not properly before the Court at this time. Additionally, the basis for this request, that this is the second time Roger has appealed, therefore, he should pay Anna's attorney fees on appeal, is argued without citation to authority.

e) There are, other glaring irregularities in Anna's brief:

i) Anna continuously relies on the testimony of her attorney's "paralegal" in the original hearing, in 2004-05. Anna's Brief, pp. 6, 11, 20). That testimony is not before this Court and was not properly before the Chancellor at the Remand hearing.

ii) Anna asserts that the 3/31/2010 Judgment on Remand was based on "proof before the Court." She does not say which court – (certainly not this Court) – nor when the proof was presented.

iii) Anna seeks to appeal or raise issues not cross appealed.

iv) Without citation, Anna asserts that Roger has "admitted in his Brief," that his "earning capacity is $22,000 per month". She does not cite to this "admission," as it does not exist.

v) Finally, Anna seeks to impeach Roger's citation of a Department of Labor report. Surely Anna, (by counsel) is aware of this Court's practice of allowing "Brandeis Brief" evidence.

3) Summary of Roger's Arguments in Reply.

a) Anna has failed to address the "currency" or contemporaneous" requirement for evidence as to Ferguson or Armstrong analysis; Roger will address the law on point;

b) The Opinion of the Court of Appeals apparently confused the Chancellor as to what is required of the Chancellor, as intimated in his Judgment on Remand. How does that confusion affect Roger's Motion for New Trial on Remand, never ruled on by the Court? Did the Chancellor properly analyze the record before him, or merely rehash his 2005 Decree? Did the Chancellor clarify Roger's duties as requested by the Court of Appeals, or further muddle the waters, as suggested by Anna, with "between the lines" suggestions?

c) Do all of these complicating and confusing issues require remand for a "new trial?" Is there an alternative remedy?

C. Roger's Argument in Reply

1) Anna has failed to address the "currency" and "contemporaneous" of the evidence required by case law.

In his excellent Motion For New Trial, Roger's trial attorney sets out at Clerk's Papers, p. 114, the doctrine in Griffith's Mississippi Chancery Practice § 700 (2000 edition), (internal cites omitted), that "[t] he chancellor should allow whatever amendments are necessary that he may consider the action as the parties are situated on the day of the remand hearing. To hold otherwise would not be equitable.

This authoritative law was followed by Proposed Findings of Fact and Conclusions of Law. Counsel exquisitely lays out the facts as of the date of filing his Motion at Clerk's Papers, pp. 118-124

The motion concludes with the summary suggestion that Anna be given the house with all mortgages against it, the Nissan X-Terra car, all furniture, personal items, and debts on those items Anna would receive a net benefit of $78,620.00.

Roger would be "awarded" the debt from the former business, netting about $75,000 in debt. This $150,000 plus, "swing" in debts and assets, to Roger's clear detriment, would account for any fault or dissipation "against" Roger.

The only pertinent evidence of the post-2005 period, i.e., the only "current" evidence is presented in the Motion for New Trial, which motion attached exhibits which are the only new evidence before the Court, except limited testimony as to Roger's "earning capacity" at TR. 18, indicating that Roger was a "good mechanic" who had a large track hoe type machine, financed by his mother, with which he could make a living. Through his lawyers, Roger reaffirmed an 8.05 form from 2004, net monthly income of $3440.00. He showed expenses of $4,915, with about $1942 paid by his business at the time. In short, he showed expenses of about $3,000 and income of $3440.00. The sale of his business massively changed these numbers and left him no income except what he could make from a track hoe machine. His expenses have skyrocketed.

The chancellor and Plaintiff's trial counsel both acknowledged at TR. 42 that the equity in the marital home had dwindled under Mr. Dobbs' calculation to as little as $5,000.00, based on a pre-2008 valuation of the home at $130,000.

At TR 51, the chancellor acknowledged Griffi[th's] Chancery Practice § 700, and announced that the hearing was to determine "the condition of the parties at this time." The trial court goes on to analyze the evidence presented in 2005, with no consideration of the new evidence presented by Roger whatsoever.

The chancellor proceeded to do what he had done before. The trial court was reversed by the Mississippi Supreme Court on the issue of business "proceeds," reducing marital assets by about $150,000.

Anna was granted a 2001 Nissan, and a lien was give on Roger's 50% of the $5,000 equity in the marital home, and on the "sales proceeds" of the business, attested by Roger to be negative $50-75,000.00. Does this erase the first lien? It is unclear. The thing that is clear is that no new evidence went into the Chancellor's Ferguson analysis, although he promised to analyze on the basis of the current situation.

Neither did the Chancellor follow the Opinion of the Court of Appeals ordering Judge Littlejohn to "determin[e]...whether Roger has complied with the requirements of the chancery court set forth in dividing the marital estate, and if not, what he must do to comply..." Clerk's p. 74, Roger asserts there is no such determination to be found in the Judgment on Remand.

In his alimony analysis, the Chancellor harkens back repeatedly to the 2005 hearing, again in contradiction of the "current status" promise and requirement. While steadfastly refusing to do the Armstrong analysis required, by the Court of Appeals, the Chancellor undertook a Davis v. Davis analysis. Davis, 832 So. 2d 492, (MSSC, 2002). While the Davis analysis is similar to Armstrong, it actually is different in some pertinent ways. "The needs of each party" in Armstrong become the "wife's reasonable needs" and "the husband's necessary living expenses." Perhaps this is one reason that the trial judge went into detail in considering Anna's needs and capacity, while not considering Roger's

needs at all. With respect, Roger would show that a Davis analysis is not an Armstrong analysis.

At the conclusion of the bench opinion, as though responding to the preacher's call to the amen corner, the Chancellor, in responding to Anna's requests – (not to his own Davis analysis) – the chancellor appears to have granted retroactive interest in the alimony award of 2005 which was reviewed. TR. 71-72)... The chancellor then granted, without the basis of support from his own analysis and certainly not based on new evidence, the chancellor granted a "triple dip," interest bearing, lien for $89,375. on Mr. Dobbs' request alone. (TR.72). Then Anna's counsel sought fees from the chancellor for work on an appeal in which his client's position was reversed. Is it not the duty of the Court of Appeals to award fees in favor of the prevailing party? The Chancellor properly declined to grant the motion.

Under the logic of Evans v. Evans, 2009-CP-00953-COA, 2009-CP-01442-COA(MSCA, 4/26/2011), at para 11 , Roger seeks a much more scrupulous review of this Judgment on Remand than the abuse of discretion standard. While the chancellor claims to have reviewed "the hearing of testimony," (there was none), and the Proposed Findings of Fact and Conclusions of Law from Plaintiff (there were none except perhaps, that document called Judgment on Remand), Clerk's Papers 229. It appears that the "hearing of testimony" consisted of a conference in chambers, (TR. 41).

2) The confusion of the Chancellor and the "parroted Judgment[1] on Remand may have been exacerbated by confusion over the Decision and Mandate of the Court of Appeals. The Court of Appeals opinion, Clerk's Papers, pp. 64-74, early on asserts that they affirm on "all issues other than III and IV...We reverse and remand for proceedings consistent with this opinion." Clerk's Papers, p. 65. Issue III challenges the equitable distribution of marital property. Issue IV asserts that alimony is so excessive as to constitute an abuse of discretion.

Does the Court's command not instruct the Chancellor to re-evaluate marital property and debt? Later, the Appellate Court says that equitable

[1] It is no coincidence that the Judgment on Remand was typed by ""mhw," Clerk's Papers, p.237, (find print). Could this be any other person than Mr. Dobb's "paralegal," Anna's Response Brief, p. 6

distribution and alimony "are intertwined, therefore they will be discussed together." (Clerk's Papers, p. 69). Further, the Court of Appeals "cannot ascertain whether Roger has transferred the marital property as ordered." (Clerk's Papers, 72). Neither the Judgment on Remand, the bench opinion, nor the Clerk's Papers contain any indication of that matter, mandated (?) to be clarified by the chancellor. The chancellor, with great respect, has failed to perform the tasks required of him by the Court of Appeals. This creates per se an arbitrary Judgment.

Additionally, the Court of Appeals "decline[d] to assess Roger the cost of [Anna's] attorney fees on appeal. "Clerk's Papers, p. 74. In a direct violation of the "law of the case," Mr. Dobbs raised the same already decided issue before the chancellor. To his credit, the chancellor found that the question was not before him. That issue should finally be "put to bed."

3) Do the absence of current evidence at the Remand hearing, the absence of any supporting evidence in the record before this Court, the failure of the chancellor to invite or accept new evidence as to equitable distribution or the Armstrong analysis, the Chancellor's confusion over the Appellate Court's mandate, the failure of the chancellor to rule as to the completion of the distribution of marital property or give specific instructions to Roger as to what he must do to effect distribution, can this Court do anything but remand? What is the alternative? Roger confesses knowing no equitable alternative.

The honorable chancellor is owed a debt of respect and gratitude for his commitment to public service to the bar and the bench. His hard work and loyalty to law are worthy of praise. But, he too, has feet of clay. Roger requests reversal and remand with (regrettable) instructions to grant a new trial.

Otherwise, when does Roger have a chance to present his new, current evidence as to income, expenses and earning capacity? His lawyer asked for a new trial, but got no answer. Isn't Roger entitled to have his Motion and exhibits considered, (Clerk's Papers. Pp. 112-151)? Yet, the trial court took no new testimony.

And what about the record before this Court in the instant appeal? It simply cannot support the Judgment on Remand. The best example of

abuse of discretion herein is the finding that Roger has the "capacity" to make $22,000 per month. There is no testimony, competent or otherwise, in this Record to support that conclusion. And there is no documentary evidence either.

Anna's Response Brief cites to testimony from a prior hearing. This evidence is not in the record and is not before this Court. MRAP 30.

In any event, the contemporaneous evidence before the Court, Roger's extensive exhibits and well-written request for new trial, were ignored by the Chancellor. It is, however, true that Anna's form 8.05, updated the date of the Bench Opinion, was considered by the Court.

The consideration of Anna's evidence while ignoring Roger's motion and evidence is paradigmatic of the problem in this case. So is the closing colloquy between the Chancellor and Mr. Dobbs. There is an intrinsic lack of equity in granting double and triple relief to one side without considering the other side's evidence and argument.

CONCLUSION

The record before the Court does not support the Chancellor's Judgment on Remand. Evidence relied on by the Chancellor is from a prior case, reversed on the very points in contention, by this Court. It is, under the doctrine of law of the case, not controlling. Nor is it contemporaraneous as required by Chancellor Griffith's, (actually Judges Bridges') doctrine. There is simply no substantial evidence to support the Chancellor's ruling.

The double/multiple relief asserted by Roger is never disputed by Anna. Hence, the matter must be reversed to correct that error. The "rubber-stamping" of Anna's requests implicates a higher standard of review than abuse of discretion.

It also implicates due process concerns and concerns about basic equity. All of these errors and irregularities taken together can only be remedied by a new trial, for which Roger prays.

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CERTIFICATE OF SERVICE

I, Stewart Guernsey, hereby certify that I have this day mailed a true copy of the above and foregoing Appellant's Memorandum-in-Chief, postage prepaid to:

Esq. Carter Dobbs
PO Box 517
Amory, MS 38821

Hon. Talmadge Littlejohn
PO Box 8869
New Albany, MS 38652

This the 7 day of May, 2011.

Stewart Guernsey, MBA [redacted]
PO Box 167
Water Valley, MS 38965
662-473-0091