IN THE SUPREME COURT OF MISSISSIPPI

ROGER A. CARROLL — APPELLANT

V.

Cause No. 2010-CA-00823

ANNA F. CARROLL — APPELLEE



APPEAL FROM JUDGMENT ON REMAND TO THE
MONROE COUNTY CHANCERY COURT

APPELLANT'S COUNSEL:

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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.

Roger A. Carroll, Appellant

R. Stewart Guernsey, Appellant's Counsel

Anna F. Carroll, Appellee

Carter Dobbs, Esq., Appellee's Counsel

Hon. Talmadge Littlejohn, Chancellor

John "Jay" Perry, Esq., Appellant's Trial Counsel

Robert Richmond, "Deemed" Surety (See Record, pp. 262-63, RE-18)

Verna Mae Carroll, "Deemed" Surety (Record, pp. 262-63, RE-18)

Stewart Guernsey

STEWART GUERNSEY, MBA# [redacted]
ATTORNEY FOR APPELLANT

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## STATEMENT OF THE CASE

This is the second appeal brought in this divorce case. This appeal, like the prior appeal, Carroll v. Carroll, 976 So.2d 880 (Miss. App. 2007), is primarily concerned with issues of property division and alimony. The facts asserted below are an amalgam of findings in Carroll I and the well-crafted Proposed Findings of Fact found at R. 112, et seq; RE-59.

Roger and Anna were married May 21, 1988, and had one child, Jennifer Lynn Carroll, who is now an emancipated adult. Sometime in July 2003, Anna confronted Roger about an alleged affair, and shortly thereafter Roger moved out of the marital home and in with his mother. Anna filed for divorce in or about September 19, 2003.

At the time of separation, Roger owned a gravel yard he had purchased from his parents for approximately $450,000. Roger paid $150,000 at the time of closing and signed a promissory note to his parents for the remaining $300,000, payable over a period of ten years at the rate of seven percent interest in monthly installments of $3,483.25. Roger made regular payments pursuant to the promissory note. The gravel business was not doing well, and Roger was saddled with debt, as was the business. Roger had been trying to sell the gravel business and was finally approached by someone who wanted to buy the business. Roger informed his divorce attorney and Anna of the pending sale of the gravel business. Thereafter, in November, 2004, he sold the gravel business for $500,000.00, which was an amount less than the total debt Roger owed in connection with the business.

There was no testimony that the sales price of the business was anything other than a commercially reasonable, fair market value price. In fact, even though Anna filed a lawsuit against Roger, his mother, and the purchasers of the gravel business and others, Anna released the purchasers from any liability in that lawsuit through an agreed order due to the fact that the sale appeared to be an at-arms-length transaction.

(R, pp 113-14)

"Following the February 1, 2005 trial, the Chancellor did the following:

Awarded Anna the use and possession of the marital home, ordered Roger to pay off two mortgages on the home, awarded Anna one-half of the proceeds of Roger's sand and gravel business, awarded Anna a 2001 Nissan Xterra after determining it had been a gift from Roger to her, ordered Roger to pay alimony of $4,000 per month, ordered Roger to pay child support of $500 per month and ordered Roger to pay Anna's attorney fees of $42, 890." Carroll, op cit at 884-85.

The Court of Appeals reversed and remanded for an Armstrong analysis, based on the factors found at the time of the judgment on remand. After Motions for Rehearing and an unsuccessful Petition for Certiorari to the Court of Appeals, filed in the Supreme Court, the mandate issued on March 20, 2008. After the submission by the parties of Proposed Findings of Fact and Conclusions of Law, an order denying enforcement of the supersedeas bond, and numerous administrative orders and motions, on March 31, 2010, the Chancellor announced his decision from the bench.

The only discernible difference in the new order was the reduction of "permanent alimony" from $4,000. per month to $2,749.04 per month, the additional grant of "lump sum alimony" in the amount of the sum of the two mortgages, and, additionally, liens against all of Roger's belongings, (R. 39, et seq.) to insure compliance. From the Judgment on Remand this appeal was timely taken.

At this stage, despite the above-mentioned knowledge of the sale of the gravel business by Anna and her counsel, (R.116), this divorce suit is inextricably interwoven with another case. After the gravel pit was sold for $500,000, ($50,000. more than Roger paid for it), Anna sued for all money paid to Verna Mae Carroll, (Roger's mother), as debt on the original loan. Of course, the resolution of that parallel lawsuit will have major impact on property distribution, all manner of alimony, and payment of the mortgage. This writer wonders if remand in this matter should carry an instruction to abate property division, etc., until resolution of the parallel lawsuit. Abatement could radically change the entire picture if Anna prevails. (note-after this section was written, Verna Carroll's appeal was decided. There remains a question as to whether Anna will share in business losses, as previously indicate at (R. 47) "Anna is awarded...one-half of the net proceeds of the sale....")

The Appeals Court in its remand instructed Chancellor Littlejohn to perform an Armstrong analysis before awarding alimony. The Chancellor did so nominally. However, Appellant will show that there is no substantial evidence in the record to support the following conclusions:

1) "Roger has the ability to earn in excess of $13,000 per month judging from the previous testimony..." (R.61; RE 28).

2) Anna is favored in regard to income and expenses;

3) Anna is favored as to income capacity since she has no specialized training or education, (neither does Roger);

4) Need of the parties favors Anna;

5) Obligations and assets—without reviewing Roger's assets and obligations, the Chancellor placed a lien on all his property to protect the award the Chancellor had already announced;

6) The lengthy marriage, the Chancellor implies, favored Anna;

7) The presence or absence of children was correctly analyzed by the Judge as a wash;

8) Age of the parties favored Anna for reasons left unexplained;

9) Standard of living during the marriage was a comfortable one. The standards of both parties were dramatically reduced by the business losses suffered, the recession of 2008, and the sale of the business, Roger's former ticket to success. Somehow, the Chancellor finds this factor dramatically favors Anna.

10) The tax consequences would favor Anna's receipt of alimony, but not very strongly;

11) Fault or misconduct favors Anna;

12) Wasteful dissipation of assets favors Anna; and

13) The Chancellor found that the "other factor" favoring Anna was "Roger has paid very little support to Anna as ordered by the Court." (T.R. 66, RE 47).

The Court ordered Roger to pay lump sum alimony in an amount equal to the two mortgages on the marital home. The Chancellor awarded periodic alimony in the amount of $2,749.04 per month, which includes payments on both mortgages on the marital home. Additionally, in dividing the marital property, the Court granted Anna use and possession of the home, and gave her an undivided half share in the home's equity. He awarded Anna one-half of sums paid into the Court in another lawsuit, as part of one-half of the net proceeds of the gravel pit sale. (See above). A lien was granted on Roger's portion of the estate to secure Anna's. A second lien (T.R. 63, RE 34) was placed on all of Roger's estate to secure payment of Anna. The Court further ordered attorney fees and left open the possibility of further attorney fees. (T.R. 73, RE 34).

Mr. Carroll's attorney pointed out the "windfall" double payment on the house. (T.R. 70, RE 31); Shortly thereafter, counsel was relieved from his representation. T.R.74, RE 35. Thereafter, this appeal was taken.

There is a minor mystery in the Exhibit envelope. Plaintiff, (Anna Carroll), submitted an 8.05 financial form at the same time Mr. Carroll filed his form, February 22, 2010. In Anna's 8.05 form, she showed total living expenses of $2,321. per month. By the time of the hearing, March 31, 2010, Anna had apparently opened an IRA account, and her expenses had ballooned to $3,596., all in one month. If nothing else, this mystery speaks

volumes about the ultimate subjectivity of the 8.05 form and of the awesome discretion granted to Chancellors, often tempting them to abuse. In a single change of form, Plaintiff's expenses increased by more than $1,200. Defendant's obligation rose by the same amount.

## SUMMARY OF THE ARGUMENT

Defendant/Appellant Roger Carroll asserts three errors, abbreviated as 1) "abuse of discretion"; 2) "impossibility"; and 3) "double relief." Each will be separately summarized.

The root of the "abuse of discretion" argument is the Chancellor's finding that "Roger has the ability to earn in excess of $13,000. per month..., not including $9,000. per month in off the books' income." (TR60) (RE 21). Given the evidence of record, this finding is incredible and "manifestly wrong."

As this Court knows from Carroll 1, Roger and Anna bought a gravel pit on credit from Roger's mother, Carroll 1, at 884. Roger had bought the gravel pit from his mother for approximately $450,000. with a down payment of $150,000. and monthly payments of $3,483.25, for ten (10) years. This is not an opportunity that Defendant would have had but for his parents. Indeed, as his mother testified, Roger left home to marry Anna, (TR. 71, RE 67) in May, 1983, after high school. (TR 115).

When asked about his work history, Roger's mother testified "Mechanical work mostly. You know, he's a good mechanic." We know, for example, that Roger worked on helicopters with disastrous result. (TR. 65). He is undoubtedly not a certified helicopter

mechanic. A mechanic makes about $16. per hour according to the labor statistics from the U.S. Department of Labor in 2006. This equals just over $32,000. per year. This is a long way from $13,000. per month.

Two other factors must be considered at this point:

1) Marital property rights cannot be totally ascertained until a parallel lawsuit is resolved. Anna sued Roger's mother for a "fraudulent transfer" on money owed her for the gravel pit. Roger asserts that Anna has acknowledged that the sale was "at-arms-length." (R, 116), (See above), and;

2) The recession of late 2008 has negatively affected Roger's capacity to make money. His first business having ended in debt, Roger is now earning money using a piece of heavy equipment owned by his mother, (essentially a sophisticated "backhoe.") His work in this area has been greatly reduced since late 2008.

The "impossibility" argument is similar. By finding that Roger can make $13,000. per month, the Chancellor set an income standard that Roger can never make. While there is no doubt that Roger has been "his own worst enemy" in this lawsuit, neither can it be gainsaid that Roger will never again make $13,000. in a month, with or without "off the books" income.

It is significant to remember that the Chancellor ordered $500. per month child support (based on) a 14% guideline. While this would indicate an income higher than a median mechanic's pay, it sets a much more reasonable monthly benchmark of about

$3,500. A.G.I. While this number is high, it comports much more closely with Defendant's 8.05 form. It is reasonable to assume, based on the child support award which Roger paid regularly and completely, that $3,500. per month is a maximum income which Roger can make.

Third is the "double relief" error. Mr. Perry pointed out this error quite clearly at TR. 70-71 (RE 31-32). Actually, under the post-Remand Order, relief granted may be more like "triple relief." The Chancellor ordered Roger to give one-half title in the home to Anna, to place a lien on his ½ to insure all payments, and to grant Anna exclusive use and possession of the home. The judge also ordered a lien o Roger's share of the net proceeds of the sale of his business. (TR., 57-8 (RE-18-19). He also granted Anna all furniture and a 2002 Nissan. (Id.).

The Chancellor also put liens against not only Roger's interest in the house, but also against all of his property past, present, or future. Two liens would suffice, one would think. Next, the Chancellor ordered Roger to pay lump sum alimony equal to the debt on the marital home less alimony paid by Roger between the filing of the divorce and the Judgment on Remand. The "remaining" lump sum alimony was in the amount of $89,375.00.

Next, the Chancellor awarded, in addition, periodic (permanent) alimony in the amount of $2,749.04 per month. This was the amount of Anna's "revised" expenses less her part-time salary. Her expenses listed include the mortgages on the home.

Hence, two liens, lump-sum and periodic alimony all to guarantee payment of the mortgage. This "multiple relief" is prohibited in Mississippi law and requires this Court to reverse again. Appellant prays for rendering without any alimony allowed.

## ARGUMENT

### STANDARD OF REVIEW

The well known standard for review was cited in Carroll 1. "... a chancellor's findings of facts should not be disturbed unless 'manifestly wrong, clearly erroneous or an erroneous legal standard was applied.' [Internal cites omitted]... However, the interpretation and application of law are reviewed de novo." This standard is sometimes called an "abuse of discretion" standard, as well.

I- Did the trial court err as to its Armstrong analysis?

Yes, the Court was manifestly wrong or clearly erroneous in its finding that Roger is capable of earning $13,000. per month. From that error, all subsequent errors have followed.

Appellant, a high school graduate with a mechanical aptitude but no specialized training, made a lot of money in a business that his parents made possible for him to buy on favorable terms. Unfortunately, Roger spent money as he earned it, believing the money would flow freely forever. He came out of his gravel business tens of thousands of dollars in debt, after repaying his mother for his initial purchase.

Roger now operates a piece of big landscaping machinery for a living. His income is variable, but the Chancellor backed into a reasonable baseline salary when he set child support for the one child of the parties at $500. per month (14%). This would work out to an income of almost exactly $3,500. per month. While this amount is more than Roger "averages," it is a reasonable benchmark to work from. As his post-remand 8.05 form shows, Roger begins deeply in debt, with few assets from which to draw.

It is simply not realistic to believe that Roger now earns $13,000. per month. As above, a mechanic earns an average of around $16.00 per hour. The state of Louisiana is currently advertising for a Backhoe Operator for Jefferson Parish at a salary of just less than $21,000. per year, literally one-half of $3,500. per month.

There is simply no authority providing that a court may "wish" a fact into existence. It seems indubitable that Roger at one time earned over $13,000. per month and more. He no longer earns even 25% of that amount. No kind or amount of analysis will change that fact. Armstrong allows for consideration of the standard of living both at the time of the marriage and at the time of the support award. But Armstrong does not allow constructive fictions that create impossible obligations.

As the Supreme Court said in Tilley v. Tilley, 610 So.2d 348, 353-54 (Miss. 1992): "In Gray v. Gray, 562 So.2d 79, 83 (Miss. 1990), this Court said the 'chancellor should consider the reasonable needs of the wife and the right of the husband to lead as normal a life as possible with a decent standard of living.' Considering that admonishment, this judgment seems unsettling. Certainly Joyce and the children deserve to enjoy a nice standard of

living with many amenities of life. But the blunt truth is that now two families will have to live on the same salaries that once supported one family. There is no way the standard of living can remain as high as it once might have been. The other problem is Richard Tilley's debt burden."

The Tilley case is instructive. It is distinguishable in that the Appellant in Tilley was a medical doctor earning $7,300.00 per month. He was ordered to pay a total of more than $11,000. per month. The Supreme Court reversed the orders on alimony for remand as excessive.

In the instant case, Roger has been ordered to pay Anna within sixty days: $89,375. lump sum alimony to equal the amount of the two mortgages on the marital home, less payments of alimony already made by Roger; attorney fees of $42,000. plus. Roger, as of the remand decree, may also have to repay his mother $153,000. on his sold business. Conversely, there may be a net loss in the business of which Anna would, presumably, owe one-half. (See above).

Not counting the business debt to Verna Mae Carroll, Roger would be paying almost $11,000. per month on lump sum alimony and attorney fees plus (effectively) $2,750. per month periodic alimony in the first year. No person including Roger can pay $13,750. per month on an income of $3,500. per month. It cannot be done. The formula is inherently and manifestly wrong.

Nor does Roger have assets to call into play. Like Dr. Tilley, Roger begins deep in debt. This was not discussed by the Chancellor.

To be sure, Roger's behavior during the trial was inexcusable. He appears to have evaded process, avoided discovery inquiries, and generally frustrated the honorable Chancellor, not to mention Plaintiff or her counsel. For these very real offenses, Roger has paid dearly.

"According to the record, Richard Tilley will have to pay a total of $11,038.34 a month under the terms of the judgment, but only has a monthly net income of $7,306.00. It appears the chancellor was either punishing Richard Tilley for the grounds of divorce, or flatly ignoring his resources. Richard has not even been left enough monthly income for a standard of living, much less a reasonable one. In Mississippi, alimony should be awarded to the wife in accordance with her needs with consideration being given to the ability of the husband to make the payments. Dudley v. Light, 586 So.2d 155, 161 (Miss. 1991); Brendel v. Brendel, 566 So.2d 1269, 1272 (Miss 1990). Alimony is not a punishment and should not be so used. Taylor v. Taylor, 348 So.2d 1341, 1344 (Miss. 1977) (Smith, dissenting). However, it seems clear the chancellor might have been trying to punish Richard Tilley for his actions." Tilley, op. cit, 354.

Before announcing its determination, the Court reviewed the nine Brabham factors. Brabham v. Brabham, 84 So.2d 147, 152 (1955); Powers v. Powers, 568 So.2d 255, 259 (Miss. 1990). The Brabham factors are used by appellate courts to review an award of periodic alimony. The Brabham factors are:

1) the health of the husband and his earning capacity;

2) the health of the wife and her earning capacity;

3) the entire sources of income of both parties;

4) the reasonable needs of the wife;

5) the reasonable needs of the child;

6) the necessary living expenses of the husband;

7) the estimated amount of income taxes the respective parties must pay on their incomes;

8) the fact that the wife has the free use of the home, furnishing and automobile, and;

9) such other facts and circumstances bearing on the subject that might be shown by the evidence.

In the case at bar:

1) Roger is in good health. His maximum earning capacity is estimated at $3,500. per month based on the Chancellor's award of child support;

2) Anna's health is good. She is certainly capable of making over $20,000. per year, although she is now making less than that at a part-time job;

3) Roger's sources of income are currently from his heavy equipment work and from his current wife. In the past, his parents were a source of capital, but Roger's mother testified to a "falling out" (R. 23-4, RE-67-68), perhaps over the parallel lawsuit against her;

Anna earns a small amount from her part-time job at Wal Mart. For years she received $500. per month child support from Roger, as well as all he could muster for alimony. Her family's capacity is unknown;

4) The needs of Anna as laid out in her 2/22/08 financial report are $2,321.00 per month. They "grew to" $3,596. per month in the month prior to trial. Appellant asserts that Anna's "true" expenses are $2,321.00 minus mortgage payments of $710. per month for a total of $1611.00 per month. Hence, income of $20,000. per year would exceed Anna's needs.

5) N/A

6) Roger's needs are laid out in his 8.05., Exhibit 2. Candidly, the amount of $3,230. per month includes some of the needs of Roger's second wife. There is no evidence of her income. However, Roger's huge debt load, in excess of $300,000., consumes every nickel he makes.

7) Both parties are well below the median U.S. salary. Because of overhead and debt service for Roger, the parties taxes are a negligible element as they both remain in the 10-15% tax bracket. Roger's income exceeds Anna's. However, she is certainly not working to her maximum potential.

8) "the fact that the wife has the free use of the home, furnishing and automobile," Tilley, supra.; and

9) The Court should note that the Chancellor, in the remand Judgment, does not make any order as to payment of the mortgages on the marital home. Nor does the Chancellor note that only Roger's name is on the mortgage, making the obligation his without any "credit" if he pays.

Secondly, the housing "crash" has devalued the marital home, probably placing it "under water." The recession has hit both parties as to value of assets and income capacity. Similarly, the outcome of the parallel lawsuit will impact distribution of the estate, lump sum alimony, and certainly periodic alimony.

So to summarize, the trial court was "manifestly wrong" in its finding that Roger could earn $13,000. per month. The court erred in not ordering any payment of the mortgage. The court erred in permitting the "escalation" of Anna's expenses from February 22 to March 29. From the first error, finding that Roger could make as much now as when he owned a once lucrative gravel business, all other errors flowed.

II Did the Court err by abusing its discretion in creating an impossible financial dilemma for Roger?

Closely related to "abuse of discretion" in finding that Roger's current income potential is $13,000. per month is the doctrine of "impossibility" or "impossibility of performance." The doctrine arises from the common law.

In 1861, the U.S. Supreme Court endorsed the doctrine in Gaines v. Hennen, 65 US 553, 561 (1861); "The law cannot have intended to require an impossibility and to leave a party so circumstanced without a remedy."

Once again, the root of the problem can be traced to a single erroneous decision, that Roger was capable of earning $13,000. per month. He is not. Thus, an impossibility has been required of Roger.

There is little cavil that the Chancellor sought to secure the marital home for the use and possession of Anna. Lump sum alimony was granted to Anna based on the debt o the house. The award of periodic alimony included payments on the house. And, of course, the mortgages were in Roger's name alone, obligating him to pay both mortgages. Somehow, however, the Chancellor failed to order payment of the mortgages by either party.

The general process for deciding issues of divorce, equitable distribution, and alimony is set out in a partial concurrence/partial dissent by Justice Lamar in Hensarling v. Hensarling, 824 So.2d 583, 611 (Miss. 1959):

"In the present case, it has been shown that the chancellor apparently reached his two-to-one decision in favor of Ken primarily on Ken's greater economic contribution and on Brenda's post-separation affair. The former should not affect the distribution in view of Brenda's superior contributions to the home. And for the latter to justify such a disproportionate award is clearly punitive and unacceptable.

¶ 52. The majority concludes that the $108,000 in alimony awarded to Brenda serves to render the chancellor's distribution of the marital property equitable, based on the oft cited language of Ferguson: "Where one expands, the other must recede." 639 So.2d at 929. I respectfully disagree with this analysis. Our precedent is clear that equitable distribution precedes the determination of alimony, which is to be awarded only where necessary.

> Division of marital assets is now governed under the law as stated in Hemsley and Ferguson. First, the character of the parties assets, i.e., marital or non-marital, must be determined pursuant to Hemsley. The marital property is **then equitably divided**, employing the Ferguson factors as guidelines, in light of each parties' non-marital property. 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 be done. If the situation is such that an equitable division of marital property considered with each party's non-marital assets, leaves a deficit for one party, then alimony based on the value of non-marital assets should be considered."

Johnson v. Johnson, 650 So.2d 1381, 1287 (Miss. 1994) (emphases added).

The language of this Court could not be clearer: *first* classify the assets, *then* divide the marital ones equitably, and *then*—if necessary—award alimony. It is this which the chancellor in the present case has failed to do. This sequence was first established in

Ferguson, and has been respectfully quoted many times thereafter by this Court in "advance-and-recede" situations.

In the case at bar, Anna was given half of the house outright, half of the proceeds of the business, (not yet a settled amount), all furniture, the couple's Nissan, exclusive use and possession of the house, a lump sum award of the amount owed on the house, and periodic alimony exceeding the expenses she noted a month before. (See Exhibits). This certainly does not comport with Justice Lamar's assertion of alimony as being awarded only after equitable distribution and only if necessary.

Indeed, in the case at bar, the Chancellor never classified the property as marital or non-marital. In distributing the property, the Chancellor never ordered either party to pay the mortgage. This latter deletion can be seen to be a fatal, harmful error.

Mississippi law also supports the defense of impossibility. See Rainwater v. Rainwater, 110 So.2d 608,611 (Miss. 1959):

> If a defendant is in fact unable to comply with the terms of the alimony decree, he should with reasonable promptitude, make the fact known to the court by proper petition and have the decree modified or suspended. Redding v. Redding, 167 Miss. 780, 150 So.776; Lewis v. Lewis, supra. If he fails to seek a modification or suspension prior to the institution of contempt proceedings, the burden is on him to purge himself of the contempt by showing clearly that he has complied with the decree, or his inability so to do, or the impossibility of performance. Ramsay v.

Ramsay, supra; Redding v. Redding, supra; Kincaid v. Kincaid, 213 Miss. 451, 57 So.2d 263.

Of course in the instant case, Roger has sought to avoid contempt on the "front end" by appeal. This, too, is supported by Mississippi law. As the Mississippi Supreme Court ruled in White v.White, 509 So.2d 205, 209 (Miss. 1987): "Judicial economy is best served by not rendering impossible decrees, and that could have been avoided here."

The Court reversed the oppressive decree in White. The White Court further pointed out that such an oppressive decree extends litigation, since Defendant can plead impossibility. The Court further pointed out that a Defendant who has no property except future earnings should not be incarcerated for contempt. The ruling of White is that only a Defendant with the present ability to purge any contempt should be incarcerated. See also Ramsey v. Ramsey, 87 So.491 (Miss. 1920); Lewis v. Lewis, 57 So.2d 163 (Miss. 1952).

By the time of Armstrong v. Armstrong, 618 So.2d 1278 (Miss. 1993), the Court endorsed the "front end" approach. This is further demonstrated in Tilley, op cit, at 354:

"We find the Chancellor abused his discretion in ordering Richard Tilley to pay aggregate monthly support beyond his means. As such, we reverse and remand to the trial court for determination of a more equitable judgment of support, including both periodic alimony and lump sum alimony, in line with this opinion and this state's law."

Such is the rule which applies in this case.

This Court should reverse this matter on the basis of Tilley and the doctrine of impossibility. Past wealth cannot be the basis for an alimony award. It must be based on the parties' current income.

Roger Carroll got a huge break in being allowed to run a business once owned by his parents. He earned a lucrative living, to be sure, but debt and dissipation caused an end to that asset and its concomitant generous income. It is incredible to think that he can make $13,000. per month as a big machine operator. There is no substantial evidence to support the proposition. This matter must be reversed.

III.-Did the trial court err by "double-dipping" against Appellant in ordering mortgage costs to be paid at least twice?

Yes, the trial court erred by granting Anna "double relief" as to the mortgages on the marital home. Mississippi law does not permit such "windfall" double relief. See J.K. v. R.K., 946 So.2d 764 (Miss. 2007); Ory v. Ory, 936 So.2d 405 (Miss. App. 2006). While J.K. was later reversed for improper analysis of relief requested, (See J.K. v. R.K., 30 So.3d 290 (Miss. 2009)), the principle of prohibiting double relief is sound. Ory, at 412, stands for the proposition that in formulating property division, it is error to give "double credit for her contribution."

In the case at bar, the error is egregious. It was pointed out to the Chancellor, who seems to have acknowledged the double relief. The Chancellor explained that double relief was given to "credit Roger" for payments he had timely made.

As briefly mentioned above, the trial court erred in not ordering either party to pay the mortgages. This is plain error, having the effect of obligating Roger, whose name is the only one on the mortgage, to make the payments.

Additionally, the Court required Roger to deed half-interest in the house, gave Anna exclusive use and possession and placed liens on Roger's interest in the house. Then, the Chancellor ordered lump sum alimony in the amount of the two mortgages less alimony payments made by Roger. Then, the Chancellor granted periodic payments in a sum which included the mortgage payments.

> ¶ 37. It is well known that this state does not endorse double recovery. Judgments involving property settlement agreements are also subject to this policy. Double recovery is a tort doctrine that prevents unjust enrichment by precluding a recovery of the same damages multiple times or beyond 100% of the judgment. (emphasis added). See Medlin v. Hazlehurst Emergency Physicians, 889 So.2d 496, 499 (Miss. 2005) (holding that a plaintiff may only recover once for his damages). The theory of double recovery is not defeated simply by bringing claims under two different areas of law as J.K. suggests. Instead, the inquiry in this case in determining whether the theory of double recovery applies is simply whether the claimant is attempting to obtain payment of her monetary loss more than once. Clearly, allowing J.K. to recover the chancery court judgment for property distribution payments as well as the federal court judgment for conversion of those same payments would be contrary to this state's policy against multiple recoveries for the

same damages. Construed in order to achieve substantial justice, Rule 60(b) requires relief from one of the judgments as to the portion attributable to the property distribution payments.

¶ 38. At this time the occurrence of J.K.'s double recovery is uncertain. As alternative relief, R.K. requests from this Court a stay of the execution of the judgment in chancery court until the appeal in the Fifth Circuit is resolved. We grant that request. The execution of the chancery court order should have been stayed until the Fifth Circuit issued a decision. If the district court award is affirmed, the chancery court must grant R.K. relief from its judgment in order to prevent double recovery, and conversely, upon reversal the chancery court must deny R.K. relief and require payment. Accordingly, the chancery court erred in its denial of relief to R.K. under Rule 60(b).

J.K. v. R.K., 946 So.2d 764, 777 (Miss. 2007).

Obviously, there is double relief awarded in this matter. Roger was ordered to pay lump sum alimony in the exact amount of the two mortgages owed. Then he was ordered to pay a sum which included mortgage payments "flowing through" Anna. Additionally, Roger deeded half interest in the house to Anna. Finally, the Chancellor placed a lien on Roger's half interest in the house, as well as all of his property real and personal.

Nor was this error unaddressed by Defendant. In a brief colloquy, Roger's attorney laid out the issue for the court, (T.R. 70-71; RE 31-32).

"Mr. John Fletcher Perry, III: Yes, Your Honor, a couple for clarification purposes. And it may not change the Court's ruling at all but just for clarification purposes. I would note that the $17,475, those were alimony payments that were made. I note that the Court gave credit on mortgage. I would just bring that to the Court's attention that over the course since the entry of the divorce, those were alimony payments paid. Also, Your Honor, I would inquire – I understand the Court's ruling with regard to periodic alimony of $2,749.04 was arrived at when you took Ms. Carroll's expenses and then subtracted out her current earnings. I would ask the Court--and then the Court ordered a lump sum for the mortgage. I would just bring to the Court's attention that in Ms. Carroll's expenses of which the Court based its periodic alimony, it included a payment of this mortgage. So it would seem that the Court might be giving an extra windfall relative to acknowledging her expenses, which include the payment to the mortgage holder, and then also that on the back end of the lump sum awarding that she be paid the full mortgage as well. I would just bring that to the Court's attention for the Court's consideration those two matters."

The Chancellor acknowledged the accuracy of Mr. Perry's statement. He asserts that the rationale for the double relief was that "she's having to pay that to satisfy these mortgages...that's why I gave him credit for what he had paid...I took this figure to give him credit somewhere for what he had paid." The Chancellor's full reply, at R 71; RE 32.

"Chancellor Talmadge D. Littlejohn: Well, I have noted that. I noted that in the whole matter and that's why I subtracted her income from it. But as of now, that's what she's having to pay. And if she wants to come back and seek modification of that or your

client does at a later date, that's their privilege. But at this point in time, she's having to pay that to satisfy these mortgages to keep them from foreclosing. So that was considered in this whole ruling here. And that's why I gave him credit for what he had paid, acknowledging this was payment on alimony, but also keep in mind, that was lump sum alimony that I awarded for which I gave him credit. So it's just six of one and half dozen of another if you get it down to that. I could have also subtracted that from one of the others, but I took this figure to give him credit somewhere for what he had paid. Okay."

The Chancellor seems to endorse the double relief as a means to credit Roger for payments made without disturbing Anna's pre-separation lifestyle. While this may be q worthy goal, it cannot justify a grant of double relief.

The trial court erred in granting double relief. This is impermissible in Mississippi law. This matter must be reversed.

CONCLUSION

In summarizing the errors of the Court, Appellant asserts the reasons mentioned above:

1) The Chancellor abused his discretion by:

a) Ruling that Roger is currently capable of earning $13,000 per month;

b) Basing his ruling on Anna's 8.05 form which showed an increase of over $1,000. per month from the statement she filed one month earlier;

c) The Chancellor failed to distinguish marital and non-marital assets;

d) The Court made no effort under Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994), "to eliminate periodic payments and other potential sources of future friction between the parties;"

e) As to an Armstrong analysis, the Court's analysis was doomed from the start because of the Court's finding that Roger could earn $13,000. per month or otherwise pay $2,750. per month;

f) Though the Chancellor found that Anna would not be financially insecure, (TR. 68), he granted both lump sum and periodic alimony on the basis that she "would substantially be deprived of a standard of living to which she was accustomed in the course of this marriage." This is contrary to the doctrine of **Brabham v. Brabham**, 84 So.2d 147 (Miss. 1955), specifically endorsed at fn 1, **Armstrong, op cit**.

g) Under Cheatham v. Cheatham, 537 So.2d 435 (Miss. 1988), one of the requirements for lump sum alimony is a lack of "any financial security." **Abshire v. Abshire**, 459 So.2d 802, 804 (Miss. 1984).

2) The Chancellor created an impossible situation for Roger. Suffice to say: "Judicial economy is best served by not rendering impossible decrees." White v. White, 509 So.2d 205.

Appellant commented above that this is Carroll 2. In truth, with the publication of Verna Mae Carroll v. Anna Carroll, 2009-CA-00328-COA, on December 15, 2010, this could be called Carroll 3. This brief is being finished two (2) days after that publication. Therefore, any analysis of Carroll 2, (i.e. Verna Mae v. Anna), will be made in Appellant's Reply Brief.

Suffice to say that the ruling in Verna Mae v. Anna eliminates $153,000. in assets that would, if the appellate court had affirmed the lower court, been available for distribution. They are not now available, contributing further to the impossibility of Roger's performance of the Court's Judgment on Remand.

The truth is that Roger once had access to a large income and endless credit. So did Anna, who used the credit far less often. That income and credit are now gone. Anna is living a relatively modest lifestyle, but has almost no debt. Roger is covered up in debt. There is no way that Roger can pay the sum ordered by the trial court.

This error, as the abuse of discretion and the "double relief" are based on the single erroneous premise that Roger can still earn $13,000 per month. He cannot. Without

reversal, this case is doomed to appear before appellate courts repeatedly in future. This Court should reverse and render with any alimony.

3) There is no doubt that the trial court granted Anna multiple relief as to mortgage payments. If no other argument has effect, this requires reversal.

Justice, law and equity demand reversal in this matter. Appellant seeks reversal and rendering without alimony. In the alternative, Appellant seeks remand with instructions to assess Roger's current income realistically. And Appellant prays for general relief.

Respectfully Submitted this 21 day of December, 2010.

ROGER CARROLL

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IN THE SUPREME COURT OF MISSISSIPPI

ROGER A. CARROLL — APPELLANT

V. — Cause No. 2010-CA-00823

ANNA F. CARROLL — APPELLEE

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 and Record Excerpts postage prepaid to:

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This the 31 day of January, 2011.

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