IN THE SUPREME COURT OF MISSISSIPPI

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**Case No. 2010-CA-01041**

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SHERIDA (CAUDLE) POWELL — APPELLANT

VERSUS

JAMES SAMUEL POWELL — APPELLEE

APPEAL FROM THE CHANCERY COURT OF
THE SECOND JUDICIAL DISTRICT OF
JONES COUNTY, MISSISSIPPI

# APPELLANT'S REPLY BRIEF

**ORAL ARGUMENT NOT REQUESTED**

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II. THE CHANCERY COURT ERRED IN THE DIVISION OF MARITAL PROPERTY.

## ARGUMENT

### 1. ALLEGED PROCEDURAL BARS

#### A. Failure to File Post Trial Motion.

In Appellee's Brief, Sammy argues that because Sheri did not file a post trial motion for the Chancellor to reconsider or grant new trial, then she is procedurally barred from raising any issue on appeal. Neither the cases nor the rules he cites support such an argument. While a trial Court cannot be found to be in error on a matter not presented at trial, in the case at hand, all issues of ownership, classification and equitable division of marital assets and debts (*Ferguson* factors) were presented at trial.

MRAP Rule 3 and 4 provide the guidelines for appeals from our trial courts. Nothing in either rule requires a litigant to file a post trial motion before he or she can file a timely notice of appeal. Likewise, nothing in MRCP Rule 52 (cited by Sammy) nor MRCP Rule 59 or 60 requires a litigant to file a post trial motion before he or she can perfect an appeal. In contradiction to Sammy's argument, nothing in the rules make the filing of a post trial motion a prerequisite for filing an appeal. In fact,

> When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised *regardless of whether the party raising the question has made in court an objection to such findings or has filed a motion to amend them or a motion for judgment or motion for a new trial.* (emphasis added)
>
> MRCP Rule 52(b).

Sammy relies upon *Ory v. Ory*, 936 So.2d 405 (Miss. COA 2006) and *Robinson v. Brown* (2009-CA-01599-COA) for the proposition that, "[t]he party must file a post trial motion, bringing this error to the Court's attention so that the Chancellor would have the opportunity to review and consider his decision. ($A^E$ Brief at 11). Neither *Ory* nor *Robinson* mandate a post trial motion as a prerequisite to appeal as alleged by Sammy. One of Mr. Ory's issues on appeal for which the Court of Appeals discussed post trial motions, was his alleged error of the trial court granting him a divorce on Habitual Cruel and Inhuman treatment. He asked for the divorce on HCIT and it was granted. He did not object to his request being granted nor did he raise error with it in post trial motions. In *Robinson*, Mrs. Robinson argued that the trial court failed to make sufficiently detailed findings in addressing child support when the non-custodial parent's income is over $50,000. The facts in *Ory* and *Robinson* are not applicable to this case. In the case at hand, the issues of ownership, classification and equitable division of marital assets and debts were raised at the trial.

**B. Alleged Failure to Raise Issue in Statement of Issues**

In Appellee's Brief, Sammy argues that Sheri is barred from arguing the trial court was in error because he alleges that she failed to identify valuation of marital assets in her Statement of the Issues. First, the Statement of Facts in Appellant's Brief set forth errors with the trial Court's valuations. Second, and of

most import, in determining and classifying assets and debts as marital or non-marital and in equitably dividing marital assets (the two issues identified in Sheri's Statement of Issues), there is no doubt that the *Ferguson* factors apply. The *Ferguson* factors to be considered by the trial Court clearly include:

> 3. The market value and emotional value of assets subject to distribution.
>
> 4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse.
>
> *Ferguson v. Ferguson*, 639 So.2d 921, 928 (Miss.1994).

Finally, Sammy relies upon *Giles v. Stokes*, 988 So.2d 926 (Miss. COA 2008) for the proposition, "[t]his court has refused to consider issues raised in the Appellant's Brief without including those issues in the Statement of Issues.". ($A^E$ Brief at 13). A review of the *Giles* opinion indicates otherwise. The *Giles* court merely identified an argument that was not raised by Mr. Giles neither in his argument nor in his Statement of Issues – "[w]e note that on appeal, Giles does not argue that the circuit court erred when it dismissed the common-law claims found in his original complaint. Giles also does not list this dismissal as error under his statement of issues." *Giles* at 929 (Miss. COA 2008). The finding of the *Giles* court does not support Sammy's argument.

Sammy's reliance upon *Reed v. State*, 987 So.2d 1054 (Miss. COA 2008) is likewise misplaced. In that criminal appeal, Mr. Reed identified 4 issues in his

Statement of Issues, then proceeded to argue 3 issues not even closely related to the issues raised. As shown hereinabove, whether marital or non-marital the valuation of properties are *Ferguson* factors to be considered in determining ownership, classification and equitable division, which were the errors identified in Sheri's Statement of Issues.

## 2. ERROR IN DETERMINING OWNERSHIP AND CLASSIFICATION OF ASSETS AND DEBTS.

To clear up any misconception created by Sammy's argument, Sheri does admit that the trial Court correctly "classified" the marital assets and debts of the parties except failing to include Sammy's PERS as a marital asset. With that said, classification and the marital value are separate and distinct. As to the marital value placed upon those marital assets and debts, Sheri has raised issues of error as discussed in Appellant's Brief.

### Marital Residence & Lot

"The foundational step to make an equitable distribution of marital assets is to determine the value of those assets based on competent proof." *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss.1994). The Powell's marital residence and lot, through the family use doctrine, converted entirely into marital property. *Faerber v. Faerber*, 13 So.3d 853 (Miss. COA 2009); see also *Boutwell v. Boutwell*, 829 So.2d 1216, 1221 (Miss. 2002); *Lockert v. Lockert*, 815 So.2d 1267,

1269 (Miss. COA 2002). An appraisal showing the value of the residence and lot at the time of trial as $123,200 was admitted into evidence [Tr. 28; Tr. Ex. 1]. In his findings of fact, the trial Court determined that for purpose of division of marital property, the marital value was only $43,200 - "Home and lot at 27 Hummingbird Lane valued at $123,200, $43,200.00 of which value accrued during the marriage." (R. 157). This was error. Furthermore, the calculation of the marital value of $43,200 was based solely upon Sammy's unsupported and self serving guess of $80,000 value as of the date of the marriage of the parties, some 17 years before trial. This was also error.

Furthermore, Sammy relies upon *Dunn v. Dunn*, 911 So.2d 591 (Miss. COA 2005) for the proposition, "[t]his Court has previously held that a party may testify and give an opinion as to the values of his property." ($A^E$ Brief at 18). While the *Dunn* case permits such testimony, the *Dunn* trial court was presented with other evidence. As such, Sammy's argument that only a party's opinion of value of property is "competent proof" or "substantial evidence" required at trial, is misfounded.

In the *Dunn* case, error was raised as to the valuation of two marital assets, a business and some Kentucky property. As to the business, Mrs. Dunn submitted financial records submitted by the business' accountant and Mr. Dunn testified to the value of the business' equipment. As to the Kentucky property, Mrs. Dunn submitted an appraisal.

In the case at hand, there was neither competent proof nor substantial evidence of the value of the marital residence when the parties married on February 19, 1993. As such, the trial Court's finding that it was worth $80,000.00 on said date was reversible error.

**ASAP – Future Installment payments**

As discussed in Appellant's Brief, as to ASAP future installments, the trial Court erred in failing to make an equitable division of this marital asset.

**Sammy's PERS Retirement Account**

In response to Sammy's argument, Sheri would only add that Sammy provided the value of his PERS income in his 8.05 financial statement admitted into evidence [Tr. Ex. 3]. Sammy himself testified that he paid into PERS from 1985 until 2003, which would have included 10 years during the marriage [Tr. 18]. Nonetheless, the trial Court determined "that the only assets brought into the marriage which were not converted to marital assets were Sheri's 401K retirement from Masonite and Sammy's PERS retirement benefits [R. 161]. Failing to classify any part of the PERS as a marital asset, when 10 years of it was accumulated during the marriage, is reversible error. *Faerber v. Faerber*, 13 So.3d 853 (Miss. COA 2009).

## 3. THE CHANCERY COURT ERRED IN THE DIVISION OF MARITAL PROPERTY

In response to Sammy's argument here, three points to be made.

First, Sammy has taken extreme liberties with his list of divided "marital assets". The trial Court identified the marital assets of the parties on page 9 of the Findings of Facts and Conclusions of Law [R. 157] and determined division of those marital assets on pages 14-15 of the same [R. 162-63]. Sammy's list is a fabrication and should be disregarded by this Court. Sheri's calculation of 75/25% split comes from the trial Court's classification and division.

Secondly, no matter what light Sammy attempts to put Sheri in as a part of his argument, there is no question that the business ASAP would not have survived nor grown without Sheri's contributions. Sheri assisted Sammy in drafting a business plan for ASAP. [Tr. 180]. Sheri also took out a loan with Trustmark for approximately $20,000 for the office building for ASAP [Tr. 187]. From its inception, Sheri was the accountant for the business, "in charge of handling all of the money and handling the – the billing." [Tr. 33, 188-89].

Finally, Sammy takes one last shot at Sheri arguing that she "was at fault for destroying the marriage" and that "Sheri squandered approximately $51,000.00 from the parties' Met Life Retirement account". ($A^E$ Brief at 25-26). The testimony was clear that the marriage was over before Sheri moved out and most importantly that she did not start an extra-marital relationship until post separation. [Tr. 211-12]. Sammy also forgets his

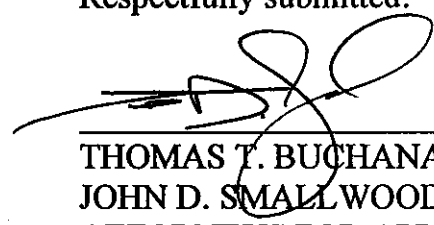
trip to Las Vegas sharing a hotel room with a female "friend" and that same "friend" spending some nights at the marital residence post separation [Tr. 205-06]. As to the "squandered" money as alleged by Sammy, Sheri was forced to use those funds to support herself in her rental apartment as she no longer had use of the marital residence after the parties separated.

The trial court's award of 75% of the marital assets to Sammy and only 25% of the marital assets to Sheri was reversible error. *Craft v. Craft*, 825 So.2d 605, 608-609 (Miss. 2002), citing, *Johnson v. Johnson*, 650 So.2d 1281 (Miss. 1994).

## CONCLUSION

Based upon the foregoing, this Court should reverse and remand the Chancellor's Findings of Fact and Conclusions of Law and Final Judgment for a new determination of marital assets and equitable division of marital assets .

Respectfully submitted:



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## CERTIFICATION OF SERVICE

I do hereby certify that I served a copy of the foregoing Appellant's Reply Brief on all parties to this matter by hand delivery to the attorneys and on the date listed below:

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This the 6th day of April, 2011.

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