

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO. 2010-CA-01777**

**ALFREDO SANDOVAL
APPELLANT**

V.

**KIMBERLY SANDOVAL
APPELLEE**

BRIEF OF APPELLEE

APPEAL FROM THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

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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 judges of this Court may evaluate possible disqualification or recusal.

1. Appellant: Alfredo Sandoval
2. Appellee: Kimberly Sandoval
3. Trial Counsel for the Appellant: Samuel Creel
4. Trial Counsel for the Appellee: Shelia Havard Smallwood
5. Counsel for Appellant: Jeannene T. Pacific and Michael D. Mitchell
6. Counsel for Appellee: Margaret Holmes and Marcus McLelland
7. Trial Court Judge: Honorable Billy Bridges

MARCUS MCLELLAND

Marcus McLelland

MARGARET HOLMES

M. Holmes

So certified on this the 5th day of April, 2011.

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STATEMENT OF THE CASE

A. Proceedings Below

Appellant filed a Complaint for Divorce on April 23, 2009. Appellee filed her Answer and Counterclaim on June 11, 2009. Appellant responded with an Answer to the Counterclaim on March 29, 2010.

Trial in this matter was held in the lower court on September 16, 2010. Thereafter, the court entered its Judgment Incorporating Findings of Fact and Conclusions of Law on October 13, 2010. The court awarded Appellee the divorce based on Appellant's admitted adultery, and made findings on all issues surrounding the broken marriage of the parties, including child custody, support, and equitable distribution of marital assets. The issues of child custody and support are not on appeal here.

In its judgment, the trial court found that Appellee should be awarded title to the marital home, with Appellant being required to pay the monthly mortgage amount each month until the home is paid in full. The court also found that Appellee should be awarded a 1/4 interest in a building in Laurel, that the appreciation of businesses should be considered "marital" such that Appellee should receive a 50% interest in Appellant's share of the business. This interest was found by the court to be \$64,208.71.

B. Statement of Facts

During the course of the trial, Appellant, Alfredo Sandoval, admitted to having an affair during the marriage which produced an illegitimate child. Additionally, there was testimony that Alfredo and Appellee, Kimberly Sandoval had lived and worked together since 2000 and prior to marriage and had two children, now ages 11 and 9. Appellant's brief has specific details on this

topic which are undisputed; therefore, there was no need to reiterate the information herein. In 2005, she moved into a home purchased by Alfredo but her name was included in the deed giving her full joint ownership of said home. The parties were married on March 14, 2007 and a third child was born to the couple that following August. The family remained in the marital home until 2009, when Alfredo had an adulterous affair which produced a child with another woman. He moved from their home located in Petal, Mississippi. Kimberly and the couple's three children still reside in the home. He agreed to and has ratified the portion of the Judgment giving Kimberly the home and ordering him to pay the house note; hence, this issue is not on appeal.

During trial, trial exhibits were introduced reflecting the value of the parties' home, three businesses and their value and the value of properties in which the businesses were run (owned in part by Kimberly Sandoval); however, upon completion of review of the court file, Appellant failed to produce or make available the file which included the exhibits; therefor, for purposes of Appellee's reply brief, can only rely on the information contained in the transcript and Judgment. In any event, Alfredo's accountant prepared a summary of Alfredo's net worth which showed it as \$333,653.01 not including the marital home, See the Judgment included in Appellant's record excerpts - Book 0593 Page 021 Bate-stamped 000028 (referring to Trial Exhibit 7). This must have reflected the assets, appreciation and depreciation for which the Honorable and highly respected and experienced Judge relied upon when making his equitable distribution which is the basis of this appeal. The Sandovals were partners with another couple insofar as the three store/restaurants which are further discussed in appellant's brief. The court determined that Alfredo's/Kimberly's percentage was 50%; therefore, Kimberly was entitled to 25% of said

businesses.

The Judge took into account the fact that Kimberly had been a homemaker for the last several years of their marriage citing *Hemsley* “Contributions to the marital assets accumulation of a homemaker are presumed to be equal to those of a wage earner.” He went on to state in his Judgment that she contributed to the marital stability and harmony of the family in her role as primary care giver of the children. He further stated that Alfredo, on the other hand had an affair and produced a child while married to Kimberly..... See Appellant’s Record Excerpt the Judgment Book 0593 Page 026, Bate-stamped 000033. This information is crucial to the issues in this appeal because the Judge awarded a reasonable equitable distribution explaining that this would negate the necessity of alimony to Kimberly.

SUMMARY OF THE ARGUMENT

The Chancellor is/was the finder of facts during this trial which commenced on September 16, 2010 and as such, listened and reviewed all evidence presented. He obviously meticulously studied the matter afterwards and drafted a thoroughly considered and reasonable decision when entering his Judgment on or about October 13, 2010. The Sandovals had been in a relationship and partnership, if you will, for several years during the “building up” of three businesses in and around the Laurel, Mississippi area. Kimberly’s participation during her working phase in the relationship and then as a homemaker, mother and care-giver gave her every right to share in a portion of the parties’ accumulated assets over the years. The Chancellor **did not** err in his classification and division of “Alfredo’s” businesses as marital property as Appellant claims. Kimberly even had part ownership in the actual building(s) from which the businesses were run. The *Ferguson* factors, *inter alia*, were properly applied and the Judgment should be affirmed.

LAW AND ARGUMENT

“This Court has limited powers of review over a chancellor’s equitable division of marital property.” *Henderson v Henderson*, 757 So.2d 285, 289 (Miss. 2000). “We will not disturb the findings of a chancellor when supported by substantial evidence unless discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.” *Parsons v Parsons*, 741 So.2d 302, 306 (Miss. Ct. App. 1999). “The chancellor must determine what credibility and weight to give to the evidence.” *Powell v Ayars*, 792 So.2d. 240, 243 (Miss. 2001). Cited within *Wilson v Wilson*, 2001-CA-00659-COA (Miss. App. 2002).

In the case at bar, it is apparent that Honorable Billy Bridges, Special Chancellor in this matter, went to great lengths to explain each aspect of his ruling. Please see Appellant Record Excerpt, the Judgment, Date stamped 000027 through 37. In an effort to save space and not commit waste, Appellee did not recopy the same Excerpt that has already been received via the Appellant’s Brief and accompanying record excerpt.

Appellant in his own brief discusses *Wilson, Id.* when making an equitable distribution of marital property:

(1) economic and domestic contributions by each party to the marriage, (2) expenditures and disposal of the marital assets by each party, (3) the market value and emotional value of the marital assets, (4) the value of the nonmarital property, (5) tax, economic, contractual, and legal consequences of the distribution, (6) elimination of alimony and other future frictional contact between the parties (7) the income and earning capacity of each party, and (8) any other relevant factor that should be considered in making an equitable distribution.

The Judge explained that Kimberly had been involved and was entitled to a ½ interest in the assets (paraphrased). He discussed that Kimberly was listed on the deed with Alfredo along with Jose Padilla and his wife. The businesses were incorporated prior to the marriage, despite the fact that Kimberly and Alfredo lived together and had children together when he and Jose Padilla started their first Hispanic grocery store in Laurel. However, the appreciation of that business grew through the course of the marriage and expanded to an an additional grocery store and restaurant in Forrest and an additional grocery store in Ellisville. Courts classify the appreciated value of a separate asset by examining the reasons for the appreciation. If the increase resulted from a spouse's efforts, the appreciation is "active" or marital. Alfredo's testimony at the trial indicated that he manages and runs the grocery stores in Laurel and Ellisville while his partner manages and runs the Forrest store and restrauant. Therefore, his involvement is clearly "active." Appreciation resulting from other causes - "passive" appreciation remains separate. In other words, despite the fact that the businesses may be considered Alfredo's separate property, Kimberly is entitled to an equitable distribution of the accumulated portion or the increase in value of the businesses because the appreciation of the husband's asset, due to his active participation, is considered marital property. *Fleishhacker v. Fleishhacker*, 2007-CA-01942-COA (Miss. Ct. App. 2009) *cert granted*, 24 So.3d 1038 (Miss. 2010) citing *Craft v. Craft*, 825 So.2d 605 (Miss. 2002).

The Judge also mentioned the fact that Kimberly had been a homemaker, etc. and that Alfredo's affair contributed to the instability of the marriage. He further stated in the Judgment Bate-stamped 000033 that "Kimberly should be awarded a greater share of the marital asset based on financial need. She is currently a student with no income other than child support."

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The Appellant, on page 9 of their brief, states that the Chancellor did not take into account the business IRS debt owed by Alfredo (and not mentioned but also his other business partners) in the amount of \$150,000.00 which in reality would only make Alfredo responsible for \$75,000.00. He made the determination that Kimberly should be protected from any tax consequences. The Chancellor did take into account that one of buildings owned by all partners should be reduced in value by \$70,000.00 due to needed roof repairs; hence, it reduced the Sandoval's equity in half causing a lessened amount of equitable distribution to Kimberly. As above stated and contained within *Wilson, Id.*, the Judge weighed the credibility of the evidence as well as all other factors including the well known *Ferguson* factors in determining equitable distribution and came to a conclusion that should not be disturbed. Therefore, Appellee asks that the Judgement be affirmed and that all cost of this appeal be taxed against the Appellant including attorney fees and for any other such relief this higher court can apply and order.

CONCLUSION

The Chancellor did not err in determining which property was marital nor did the chancellor err in dividing the marital property. As it was correctly noted, the home and the Laurel building were both jointly titled between the parties and therefore should be considered marital property. Further, the appreciation and expansion of the businesses were correctly found by the Chancellor to be due to the active management and participation of Appellant during the marriage and as such Appellee is properly entitled to an equitable distribution of the value of those assets.

For the above stated reasons, Appellee prays that this Court affirm the judgment of the lower court and find in favor of Appellee.

Respectfully submitted, this the 5th day of April, 2011.

KIMBERLY SANDOVAL

By:


MARGARET HOLMES


MARCUS MCLELLAND

CERTIFICATE OF SERVICE

— WeI, Margaret Holmes and Marcus McLelland, attorneys for Appellee, hereby certify that
we have served a true and correct copy of the foregoing document, via First Class U.S. Mail,
postage prepaid, to:

Honorable Jeannene Pacific
P.O. Box 1282
Laurel, MS 39441-1282

Kathy Gillis, Clerk (Original and 4 copies)
Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
P.O. Box 249
Jackson, MS 39205-0249

Honorable Billy Bridges
Special Chancellor
520 Chuck Wagon Dr.
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Ms. Kimberly Sandoval
110 Larowood Point
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On this 5th day of April, 2011.


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