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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL JACKSON **APPELLANT**

V. **CAUSE NO. 2013-CA-00434-COA**

ROSIE JACKSON **APPELLEE**

APPELLANT'S MOTION FOR REHEARING

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A. MISCALCULATION OF THE MARITAL ESTATE – THE OPINION MISSES THE MATHMETICAL ERROR.

1. Respectfully, this Court's opinion makes the same miscalculation as did the Trial Court. The Trial Court counted the indebtedness owed on the martial home twice. This error resulted in the incorrect valuation of the marital estate and the under-valuation of Rosie's distribution.

2. When calculating Rosie's distribution, the Trial Court considered the *equity* in the marital home which Rosie was awarded. The equity, the value of the home reduced by the indebtedness, was $27,897. By doing this the Court, correctly at this step, reduced the home's value by the debt. However, the Court then **again** reduced the value of Rosie's distribution by the mortgage indebtedness. Thus, the Court reduced the value of the assets awarded to Rosie by the amount of the mortgage debt ($50,103) **twice**. This Court's opinion accepts the Chancellor's reasoning in this regard, which was as follows:

> Rosie will receive Thirty-One Thousand Nine Hundred Twenty-Eight Dollars ($31,928) in marital assets and Fifty Thousand One Hundred Three Dollars ($50,103.00) in marital liabilities, leaving her with a net award after equitable distribution of a ***negative*** Eighteen Thousand One Hundred Seventy-Five Dollars (-$18,175.00).

(C.P. p. 90) (emphasis added). It is a mathematical certainty that the Chancellor miscalculated the value of Rosie's distribution in this regard.

3. The $31,928 in marital assets was already reduced by the mortgage debt. Reducing Rosie's distribution by the same debt again was a mathematical error. This counted the mortgage debt twice, and thus indicated that Rosie's distribution was worth $50,103 less than it really was. Simply put, if the Court considers the "equity" of the marital home it has already reduced the value by the mortgage debt. To subtract the mortgage debt again later in the analysis is inherently incorrect, and leads to an undervaluing of the distribution.

4. This Court's opinion does not address this issue, or how this could not be a double-counting of the debt. The opinion's discussion of this issue was limited to the following:

> Michael was granted the majority of the marital assets, with Rosie receiving the majority of the marital liabilities. In assigning the assets and liabilities concerning the marital home, the chancellor stated, "Michael will no longer be financially responsible for payment of the mortgage, and will be under no other obligation, financial or otherwise, with regard to the marital home, after entry of this Final Judgment." It is clear that the chancery court's intent was for Michael to no longer have involvement in the marital home. Therefore, we find that the chancellor's findings are supported by credible evidence and are not manifestly wrong.

Slip Op. p. 15.

5. The Court's conclusion is completely true, as far as it goes. However, respectfully, it has nothing to do with this issue. The issue is whether counting the mortgage debt twice undervalued what the Court considered to be Rosie's distribution. It undisputedly did. It does not matter that Rosie was awarded the marital home and Michael would have no further ownership of it. What matters is that the mortgage debt was put into the equation twice – once by only counting the "equity" in the home (instead of the home's value) and again by reducing the equity by the mortgage debt. This undervalued the amount of property which Rosie really received. This erroneous calculation is the reason the Chancellor found that Rosie's distribution had a value of "negative $18,175."

6. An example illustrates the error in this case. Suppose a divorcing couple own a home worth $100,000, with a mortgage debt owed of $50,000. If the Court awards the marital home to the wife, she receives equity of $50,000 (the value of the home minus the debt owed on the home). That is, $50,000 goes on wife's side of the ledger and $0 goes on husband's side of the ledger. Assuming the couple had no other assets, the wife would have received $50,000 and the husband nothing. However, in this case the Chancellor's reasoning would value the wife's

distribution at $0, because the Chancellor would reduce the equity by the amount of the mortgage debt, thus counting it twice. Thus, applying the calculation method used in this case, both parties would have a distribution of $0, despite that the wife received a home worth $50,000 more than was owed on it. Of course, this is incorrect no matter what else is distributed. This is exactly what happened in this case.

7. The value of the marital home in this case was $78,000. The mortgage debt was $50,103. Thus, the equity in the home was $27,897. The Chancellor and this Court's opinion, then **again** reduce that equity by the mortgage balance. By definition, reducing "equity" by the debt owed on the property double-counts the debt. Thus, based on this error, the Chancellor's analysis would show that the home has a negative worth, rather than the $27,897 in equity which actually existed.

8. This is not an argument regarding a discretionary ruling, a disputed finding of fact or even a misapplication of controlling precedent. This is an undeniable error in calculating the marital estate which undervalued Rosie's distribution and led to an improper award of alimony. As argued in Appellant's Briefs, errors in calculation of the marital estate require reversal of the distribution and an accompanying award of alimony. *See, e.g., McKissak v. McKissack*, 45 So. 3d 716, 723 (Miss. Ct. App. 2010); *Gray v. Gray*, 909 So. 2d 108, 112-13 (Miss. Ct. App. 2005). *See also* BELL ON MISSISSIPPI FAMILY LAW § 9.01 (2d Ed. 2011) (noting that "when a court's division of marital property is reversed, an accompanying award or denial of alimony must also be reversed."). This Court has reversed for similar computational errors. *Coggins v. Coggins*, 81 So. 3d 285, 288 (Miss. Ct. App. 2012).

9. The mathematical error in this case is hard to catch and easy to make. However, the error is clear-cut. Unless rehearing is granted and the opinion corrected, the decision in this case could

ostensibly stand for a unique, and incorrect, method of calculating the value of a marital estate under Mississippi law.

10. The opinion in this case perpetuates the error in the valuation of the martial estate in this case. The Court should grant rehearing to correct the opinion in this regard.

B. ADMISSION OF HEARSAY WAS NOT HARMLESS AND THE HARMLESS ERROR DOCTRINE WAS NOT RAISED BY APPELLEE.

11. The Court concludes that the Chancellor erred by admitting hearsay testimony regarding statements made by Ace Pulliam, but finds that the error was harmless. There are two reasons re-hearing should be granted in this regard: 1) the error was not harmless, but was highly prejudicial and 2) Appellee did not argue the harmless error doctrine as to this issue and thus waived this argument on appeal.

12. The Chancellor considered Rosie's testimony that Ace Pulliam told her of statements made by Michael directly implicating Michael in homosexual acts. The Court finds that admission of this hearsay was error, but that the error was harmless. Respectfully, this cannot be. There is no way to logically conclude that the Chancellor would have granted a divorce without this inflammatory evidence. Indeed, the record would be far too sparse to support a divorce without this evidence. At the least, the Court should have remanded the case for the Chancellor to consider whether a divorce was warranted without this inadmissible evidence.

13. The admission of the hearsay testimony was highly prejudicial to Michael and was not harmless error.

14. In any event, Appellee never raised the harmless error doctrine as to admission of this testimony. The only references in Appellee's Brief to harmless error was in response to Michael's arguments regarding the valuation of the marital estate. (*See* Appellee's Brf. at pp. 6, 21, 22). Appellee *never* contended before this Court that admission of the hearsay testimony was

harmless error. This Court should not consider any argument not raised in the Briefs. *Goodwin v. Derryberry Co.*, 553 So. 2d 40, 43 (Miss. 1989); *R.C. Petroleum, Inc. v. Hernandez*, 555 So. 2d 1017, 1023 (Miss. 1990); *Greenlee v. Mitchell*, 607 So. 2d 97, 109 (Miss. 1992). The Court's *sua sponte* consideration of an argument not raised by Appellee likewise justifies rehearing.

C. THE RECORD IS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A DIVOCE BASED ON HABITUAL CRUEL AND INHUMAN TREATMENT.

15. The divorce in this case stands on the following evidence:

a. An allegation by "James" that Michael molested him twenty-six years before the divorce case was filed; and

b. Testimony from Michael's daughter claiming that she heard Michael ask a man for oral sex in 2008.

16. Michael vehemently disputes these allegations. However, this conduct, even if it had been true, cannot justify a divorce under Mississippi law. First of all, even if this otherwise met the definition of habitual cruel and inhuman treatment, the conduct is not "routine and continuous." The allegedly cruel treatment must be "routine and continuous" rather than an isolated occurrence. *See Moore v. Moore*, 757 So. 2d 1043, 1047 (Miss. Ct. App. 2000); *Parker v. Parker*, 519 So. 2d 1232, 1234 (Miss. 1988).

17. Second, even if those hurdles were overcome (and they were not) the "proof" as to the conduct's subjective effect on Rosie is insufficient. Rosie claimed that upon learning of the allegations against Michael her blood pressure, blood sugar and even her cholesterol levels were elevated. She testified she began taking an anti-anxiety medication intermittently at some time. This was insufficient proof of a sufficient subjective effect to support an award of divorce.

18. Accordingly, rehearing should likewise be granted in this regard.

CONCLUSION

Rehearing should be granted in this case. The Court's opinion affirms the mathematical error which resulted in the Trial Court's property division and alimony award. By definition, when a Court reduces a property's "equity" by the debt owed on the property, the Court double-counts the debt. It is beyond dispute that the mathematical error caused the Trial Court to conclude that Rosie received a negative valued distribution from the marital estate.

Further, the Court's opinion applies the harmless error doctrine to testimony which was highly prejudicial, and in the absence of Appellee ever raising the issue.

Finally, the Court's opinion grants a divorce based on insufficient evidence of habitual cruel and inhuman treatment, and writes the requirement that conduct be "routine and continuous" out of the law.

Appellant respectfully requests the Court to grant its Motion for Rehearing and to enter an opinion reversing the Trial Court's decision.

RESPECTFULLY SUBMITTED, this the 18th day of November, 2014.

MCLAUGHLIN LAW FIRM

By: /s/ R. Shane McLaughlin

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CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day submitted a true and correct copy of **Appellant's Motion for Rehearing** to all counsel of record and the Trial Court Judge by electronic filing or by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

Hon. Talmadge D. Littlejohn
Chancellor
Post Office Box 869
New Albany, Mississippi 38652

Luanne Stark Thompson
Post Office Box 360
Amory, MS 38821-0360

This the 18th day of November, 2014.

/s/ R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed **Appellant's Motion for Rehearing** by filing the document with the Court's MEC e-filing system.

This, the 18th day of November, 2014.

/s/ R. Shane McLaughlin