rel: January 14, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200220

Ex parte Jason Tyler Grimmett

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(In re: Jason Tyler Grimmett

v.

April Grimmett)

(Winston Circuit Court, DR-18-900122; Court of Civil Appeals, 2190277)

PARKER, Chief Justice.

The Winston Circuit Court entered a judgment divorcing Jason Tyler

Grimmett from April Grimmett[1] on the ground of adultery by Jason and dividing the couple's marital property. The Court of Civil Appeals affirmed the judgment without an opinion, Grimmett v. Grimmett (No. 2190277, Nov. 20, 2020), ___ So. 3d ___ (Ala. Civ. App. 2020) (table), and Jason petitioned this Court for certiorari review. This Court issued the writ to examine, among other things, a potential conflict in the law regarding whether adultery committed after a party files for divorce is a ground for divorce. Because the language chosen by the Legislature, specifying adultery as a ground for divorce, does not limit this ground to prefiling conduct, and because this Court's early cases distinguishing between prefiling and postfiling adultery must be read in light of the procedural restrictions of equity practice under which they were decided, we affirm the judgment.

I. Facts

Jason and April met in 2010 or 2011 while Jason, who owned a

[1]In the proceedings below, April Grimmett was sometimes called "Yvette." This opinion will refer to her as "April" because that is how her name appears on this Court's docket.

home-construction business, was doing work on a house belonging to April and her then-husband. Jason was also married at that time. Jason and April each obtained a divorce shortly thereafter and, in February 2012, married each other. They began experiencing various marital difficulties within a few years, possibly as early as 2014. Accounts differ as to the cause and nature of the strife, but it seems that it did not arise (at least initially) from infidelity by either party. Evidently, the parties' difficulties resulted in a series of separations and reconciliations, culminating in a final separation in November 2018.

In 2016, Jason met with Alexandra Yap[2] regarding building a house for her and her husband. Alexandra hired Jason a few months later. He began working on her house in fall 2017 and completed construction in fall 2018. In December 2018, Jason filed for divorce from April on the ground of incompatibility. Alexandra also filed for divorce from her husband. In February 2019, Jason and Alexandra began to have an intimate

[2]At trial and in Jason's motion to alter, amend, or vacate the judgment, the parties referred to Alexandra as "Alexandra Yap," Yap being her husband's surname. In an affidavit, she stated her surname as Dupont.

relationship.

On June 11, 2019, less than a week before trial in Jason and April's divorce case, April counterclaimed for divorce; she did not allege adultery by Jason.

At trial, April testified that she had not known about any relationship between Jason and Alexandra until about a month before Jason filed for divorce, when she discovered from telephone-account records that there had been many calls or text messages between Jason and Alexandra. To April, these records bolstered her "gut feeling that something was going on."

Jason was cross-examined about his relationship with Alexandra. He admitted having a sexual relationship with her, but he did not specify whether the relationship became sexual before he filed for divorce from April.

Alexandra did not testify at trial. After trial but before entry of judgment, Jason filed an affidavit of Alexandra in which she averred that she and Jason "did not become intimate and engage in any sexual activity until mid February, 2019," about two months after Jason filed for divorce.

Toward the end of trial, the judge stated that it was undisputed that Jason had committed adultery. The judge explained that he could not divide the property equally because doing so would be tantamount to condoning Jason's infidelity ("If I split down the middle, I'm saying it's okay to cheat on your wife.... It ain't ever okay to cheat on your wife."). The judge indicated that the marital property would be sold and the proceeds divided "60/40" in favor of April.

The circuit court entered a final judgment divorcing Jason and April on the ground of adultery and dividing the property, not "60/40" but in an itemized way.[3] On appeal, the Court of Civil Appeals affirmed the judgment in a no-opinion order. Jason filed a petition for a writ of certiorari with this Court, and this Court granted review.

II. Standard of Review

Conclusions of law of a court of appeals are subject to de novo review by this Court. Ex parte Thomas, 54 So. 3d 356, 358 (Ala. 2010). Because the petitioner has the burden of demonstrating error by a lower court, Ex

[3]The judge explained that he believed that Jason would try to hinder a fair auction of the marital property.

parte Brown, 26 So. 3d 1222, 1225 (Ala. 2009), on certiorari review as on appeal, this Court may affirm for any reason consistent with due process, Ex parte Kelley, 870 So. 2d 711, 714 (Ala. 2003).

III. Analysis

Before this Court, Jason raises two primary arguments: (1) the evidence before the circuit court was insufficient to prove that he committed adultery before his divorce complaint was filed, and the Court of Civil Appeals' affirmance of the judgment conflicted with prior decisions articulating the standard of proof for adultery; and (2) adultery committed after the filing of a divorce complaint is not a proper ground for divorce, and the Court of Civil Appeals' affirmance of the judgment conflicted with prior decisions so holding. We will address each argument in turn.

A. Prefiling adultery

Adultery is a statutory ground for divorce in Alabama. § 30-2-1(a)(2), Ala. Code 1975. For purposes of divorce, adultery is voluntary sexual intercourse of a married man or woman with a person other than the offender's wife or husband. Rowe v. Rowe, 575 So. 2d 584, 586 (Ala. Civ.

App. 1991).[4] Jason first argues that, as to the period before the filing of his divorce complaint in December 2018, the evidence was insufficient to prove that he committed adultery. April disagrees.

This Court has recognized that adultery is rarely capable of direct proof but that caution is warranted when evaluating circumstantial evidence of adultery:

> "It is a fundamental principle of the law of divorce that direct proof of adultery by evidence of eyewitnesses is not required, for, on account of the secret nature of the act, it is seldom susceptible of proof except by circumstantial evidence. However, its stigma is so degrading and humiliating and its legal consequences so serious, that the courts should never accept as sufficient proof of the commission of the act of adultery anything less than circumstances such as would lead the guarded discretion of a reasonable and just man to the conclusion that the act of adultery has been committed."

Rudicell v. Rudicell, 262 Ala. 41, 44, 77 So. 2d 339, 342 (1955). "[T]he proof

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[4]The term "adultery" had essentially the same meaning two centuries ago when the Legislature enacted the State of Alabama's original divorce statute, which included adultery as a ground. See "An Act Concerning Divorce" § 1, Ala. Acts 1820, at p. 79; Noah Webster, An American Dictionary of the English Language, "Adultery" (1828) ("[v]iolation of the marriage bed"; "sexual intercourse of any man, with a married woman, is ... adultery in both"; "such intercourse of a married man, with an unmarried woman, is ... adultery of the man"; "the unfaithfulness of any married person to the marriage bed").

must be such as to create more than a mere suspicion, but be sufficient to lead the guarded discretion of a reasonable and just mind to the conclusion of adultery as a necessary inference." Maddox v. Maddox, 281 Ala. 209, 212, 201 So. 2d 47, 49 (1967).

Two of this Court's cases will suffice to illustrate when evidence is insufficient to meet this standard. In Hilley v. Hilley, 275 Ala. 617, 157 So. 2d 215 (1963), a wife visited with her alleged paramour while she was on vacation with her two children. During the trip, she called the husband to get permission to send the children back home by plane. This Court held that these facts were insufficient to prove adultery. In Maddox v. Maddox, 281 Ala. 209, 201 So. 2d 47 (1967), a witness saw a wife stop her car at a point north of Cullman. A car occupied by a man was stopped at the same place. The two cars then proceeded to Falkville, and then the wife and the man traveled to Decatur in one car, where they entered a motel. About an hour later, the witness drove by and saw the car still at the motel. Again, this Court held the evidence insufficient. See also Fowler v. Fowler, 636 So. 2d 433, 435-36 (Ala. Civ. App. 1994) (holding evidence insufficient when, among other things, husband had made

numerous and lengthy (almost daily) telephone calls to alleged paramour, including long-distance collect calls, calls at unusual times and from public telephones, calls while he was on business out of state, calls from the parties' lake cabin, and calls while attending an out-of-state football game with the wife; when husband had denied calling alleged paramour; when alleged paramour had visited the lake cabin and the marital residence; when husband had visited alleged paramour's apartment three times and given her flowers and a gift; and when husband had shunned wife in several ways); Turner v. Turner, 210 So. 3d 603, 606-07 (Ala. Civ. App. 2016) (holding evidence insufficient when husband had seen wife talking with alleged paramour at at least one of child's sports games and husband testified that, during time leading up to wife's filing of divorce complaint, wife had engaged in " 'a lot of secretness, texting and on the phone all the time' ").

Similarly, here the evidence of Jason's prefiling conduct was insufficient to prove adultery. Although April testified that telephone-account records showed many calls or text messages between Jason and Alexandra and that April had a "gut feeling" that something was amiss,

that evidence alone was insufficient under our precedent to rise above a "suspicion" of adultery.

B. Postfiling adultery

Jason next contends that adulterous conduct after the filing of a divorce complaint is not a ground for divorce under Alabama law. On the other hand, April argues that postfiling adultery was a proper ground here because evidence of that adultery was before the circuit court and because her counterclaim was amended to conform to that evidence, by implied consent, under Rule 15(b), Ala. R. Civ. P.

In enumerating adultery as one of the grounds for divorce, the relevant statute provides:

> "The circuit court has power to divorce persons from the bonds of matrimony ... for the causes following:
>
> "....
>
> "... For adultery."

§ 30-2-1(a)(2), Ala. Code 1975. Notably, the language of the statute simply refers to "adultery" and does not specify that it must occur before the filing of the divorce complaint. Moreover, nothing about the legal meaning

of adultery -- voluntary sexual intercourse of a married man or woman with a person other than the offender's wife or husband -- implies that it does not apply after a divorce complaint is filed. A husband and wife are legally married until a divorce judgment is entered, see 24 Am. Jur. 2d Divorce & Separation § 373 (2018), so the filing of the complaint does not remove such conduct from the category of adultery.

Further, unlike the ground of adultery, certain other grounds within § 30-2-1(a) do specify that the facts supporting the ground must be present before the filing of the complaint:

> "(3) ... voluntary abandonment from bed and board for one year next preceding the filing of the complaint.
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> "....
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> "(8) ... when the other [spouse], after marriage, shall have been confined in a mental hospital for a period of five successive years, if such party from whom a divorce is sought is hopelessly and incurably insane at the time of the filing of the complaint ....
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> "....
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> "(12) In favor of the wife when the wife has lived, or shall have lived separate and apart from the bed and board of the husband for two years and without support from him for two years next preceding the filing of the complaint ...."

§ 30-2-1(a) (emphasis added). "[W]e presume that a difference in wording, especially in provisions within similar statutes, reflects a difference in meaning." Ex parte Smiths Water & Sewer Auth., 982 So. 2d 484, 488 (Ala. 2007); see 2A Norman J. Singer & Shambie Singer, Sutherland Statutes and Statutory Construction § 46:6 (7th ed. 2019-2020 Supp.) (discussing inference of difference in meaning when "a legislature includes particular language in one section of a statute but omits it from another section of the same or a related act" or based on the legislature's "omission of the same term or phrase from a similar section"). Subdivisions (3), (8), and (12) quoted above make clear that, as to grounds that the Legislature found appropriate to limit to prefiling conduct, "it knew how to do so," Edwards v. Kia Motors of Am., Inc., 8 So. 3d 277, 281 (Ala. 2008). And "[i]t is not proper for a court to read into the statute something which the legislature did not include although it could have easily done so." Noonan v. East-West Beltline, Inc., 487 So. 2d 237, 239 (Ala. 1986). "The judiciary will not add that which the Legislature chose to omit." Ex parte Jackson, 614 So. 2d 405, 407 (Ala. 1993). Accordingly, the language of § 30-2-1(a) does not indicate that postfiling adultery is excluded from this ground for

divorce.

Jason relies on decisions of the Court of Civil Appeals that have distinguished between prefiling and postfiling adultery. As will be seen below, those decisions ultimately relied on earlier decisions of this Court. To grasp the import of this Court's earlier decisions, however, it is first necessary to understand the era of court procedure in which they were decided, an era very different from our own.

Before 1973, Alabama cases in equity were handled under a different type of court procedure from cases at law. See Jenelle Mims Marsh, Alabama Law of Damages § 11.4 (6th ed. 2012). And divorce cases were governed by equity procedure. John Shipley Tilley, Tilley's Alabama Equity § 345 (1954). In equity procedure, a case was initiated by filing a "bill" (the rough equivalent of today's complaint). Id. § 48; Rule 2, Ala. R. Equity (repealed). And composing a bill was a demanding process. The "stating section" had to "contain averment of every fact which ... [would] enable the [trial] court to arrive at a proper settlement of the issues." Tilley, supra, § 48. That is, the bill had to "set forth ... every material averment of fact necessary to [the] complainant's right of recovery."

McDonald v. Mobile Life Ins. Co., 56 Ala. 468, 470 (1876); Majors v. Killian, 230 Ala. 531, 534, 162 So. 289, 292 (1935). Facts not alleged in the bill could not be a basis for relief; they " '[we]re deemed not to exist.' " Tilley, supra, § 50 (quoting Cullman Prop. Co. v. H.H. Hitt Lumber Co., 201 Ala. 150, 154, 77 So. 574, 578 (1917)); see Bone v. Lansden, 85 Ala. 562, 564, 6 So. 611, 612 (1888) ("Chancery does not grant relief in the absence of appropriate averments."); Equitable Mortg. Co. v. Finley, 133 Ala. 575, 578-79, 31 So. 985, 985-86 (1902) (explaining this general principle of equity procedure; "[P]roof without averment is not available for relief.").

Thus, in that procedural era, the evidence at trial had to conform to the bill's allegations. Tilley, supra, § 48. The evidence was "never ... allowed to supply omissions and defects in the [allegations]." McDonald, 56 Ala. at 470; Majors, 230 Ala. at 534, 162 So. at 292. Consequently, "the allegations [had to] be such as to justify presentation of the evidence." Tilley, supra, § 48.[5]

[5]A party could file an amended bill to conform to the evidence, so long as the amendment did not "work[] a radical departure" from the

All of that changed in 1973. In that year, this Court merged law and equity procedure when the Court adopted the Alabama Rules of Civil Procedure. See Rule 2, Ala. R. Civ. P.; id., Committee Comments on 1973 Adoption. See generally Frank W. Donaldson & Michael Walls, Merger of Law and Equity in Alabama - Some Considerations, 33 Ala. Law. 134, 134-41, 148-50 (1972). (The Legislature had specifically authorized this merger two years earlier. See Act No. 1311, Ala. Acts 1971.) The Rules also made a "drastic change[]" to the relationship between pleadings and evidence in cases formerly governed by equity procedure. Rule 15, Committee Comments on 1973 Adoption, 2d para. Under the Rules, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b). Thus, "where evidence is introduced or an issue raised with the express consent of the other party, or without objection from him, the pleadings 'shall' be deemed amended

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original bill. Rudulph v. Burgin, 219 Ala. 461, 463, 122 So. 432, 433 (1929); see Rule 28, Ala. R. Equity (repealed); Tilley, supra, § 65; Pitts v. Powledge, 56 Ala. 147, 149-50 (1876); McCrory v. Guyton, 164 Ala. 365, 51 So. 312 (1910); Farmer v. Hill, 243 Ala. 543, 11 So. 2d 160 (1942).

to conform to such evidence." Committee Comments, supra (quoting Rule 15(b)). Accordingly, since 1973, the strict requirement of equity procedure that the evidence conform to the pleadings no longer exists, when nonconforming evidence is admitted without objection.

In divorce cases, the effect of this procedural change is significant. Now, "Rule 15(b) ... authorizes a trial court to grant the divorce upon unrequested grounds when supported by sufficient evidence." 1 Judith S. Crittenden & Charles P. Kindregan, Jr., Alabama Family Law 5:2 (2008). Accordingly, in a case involving the ground of cruelty, the Court of Civil Appeals explained: "Although there was no specific allegation of cruelty in the complaint for divorce, the trial court had the authority under [Rule] 15(b) to grant the divorce upon unrequested grounds so long as there [was] sufficient support in the evidence for the decree." Lassitter v. Lassitter, 371 So. 2d 918, 919 (Ala. Civ. App. 1979).

With that historical background in mind, we turn to examine this Court's cases addressing postfiling adultery. In Morrison v. Morrison, 95 Ala. 309, 10 So. 648 (1892), a husband filed a bill for divorce based on adultery. There was evidence that the wife committed adultery before the

bill was filed and that she cohabited with the alleged paramour both before and after the bill was filed. This Court noted that the evidence of postfiling cohabitation "[was] admissible to show a previous adulterous intercourse." 95 Ala. at 310, 10 So. at 648. The Court cited three criminal cases involving convictions of adultery or fornication, in which this Court had held that evidence of the defendant's postindictment conduct was admissible only to shed light on the defendant's preindictment conduct. See id. (citing Lawson v. State, 20 Ala. 65 (1852); Smitherman v. State, 40 Ala. 355 (1867); Alsabrooks v. State, 52 Ala. 24 (1875)). Those criminal cases' holdings reflected the due-process principle that a person cannot be criminally convicted for uncharged conduct. See generally 16C C.J.S. Constitutional Law § 1643 (2015). By citing those criminal cases, Morrison indicated its reliance on the analogous principle, under the old equity procedure, that the evidence had to conform to the bill.

This Court's reliance on strict equity procedure was further demonstrated in Scott v. Scott, 215 Ala. 684, 112 So. 218 (1927). There, a husband presented evidence that apparently suggested both prefiling and postfiling adultery by the wife. This Court held that the evidence of

postfiling adultery was admissible only to show prefiling adultery because, necessarily, only prefiling adultery was alleged in the bill:

> "While evidence tending to show acts of illicit sexual intercourse between the [wife] and [the alleged paramour] subsequent to the filing of the bill was admissible[] when offered in connection with or subsequent to the introduction of evidence tending to show adulterous intercourse between the parties during the time covered by the averments of the bill, the right to relief must rest upon proof of the adulterous intercourse charged in the bill."

215 Ala. at 684, 112 So. at 218 (emphasis added). The Court cited Morrison, thus indicating that it had been decided on the same procedural basis.

Next, a procedural variation on this fact pattern came before this Court in Rudicell v. Rudicell, 262 Ala. 41, 77 So. 2d 339 (1955). A wife filed a bill for divorce on the ground of cruelty. Later, the husband filed a cross-bill (the rough equivalent of today's counterclaim) for divorce on the ground of adultery. There was evidence of cruelty by the husband after the filing of the wife's bill, and there was evidence of the wife's relationship with the alleged paramour after the filing of the husband's cross-bill. Regarding both of those aspects of the evidence, this Court noted that

"[s]uch evidence was admissible but the right to a decree of divorce could not be rested thereon." 262 Ala. at 43, 77 So. at 341. The Court then quoted the above-quoted language of Scott. Notably, the Court also cited a Maryland case, Renner v. Renner, 177 Md. 689, 12 A.2d 195 (1940). In Renner, the Maryland court explained the procedural reason why, at that time, a divorce judgment could not be grounded on postfiling adultery:

> "In the Ecclesiastical Courts of England, either party to a divorce suit was allowed to enter supplemental proceedings to show that acts of adultery had been committed by the other party after the commencement of litigation, and a decree could be obtained thereon. But in most of the American Courts the rules of Equity practice have been applied to actions for divorce with the result that adultery committed by a defendant subsequent to institution of suit can not be used as the basis for a decree. Maryland has followed the prevailing view that testimony as to acts of adultery by a defendant after institution of suit is inadmissible. This rule can not be evaded by amendment or by a supplemental bill; no engrafting of a new cause can be made upon the original action. To make such evidence admissible, the existing suit for divorce should be dismissed by consent of the Court, and a new action should be instituted."

177 Md. at 690, 12 A.2d at 198 (emphasis added). Later in the Rudicell opinion, this Court reiterated this equity-procedure limitation on evidence of postfiling adultery: "[T]he evidence of subsequent acts is admissible as

tending to explain evidence already introduced in reference to the act originally charged." 262 Ala. at 44, 77 So. at 343 (emphasis added).

This Court's final case addressing postfiling adultery was decided a decade before the 1973 procedural changes discussed above. In Hilley v. Hilley, 275 Ala. 617, 157 So. 2d 215 (1963), a wife filed a bill for divorce on the ground of fear of violence. The husband answered (but did not file a cross-bill), opposing the divorce by alleging that the wife had committed adultery. The husband presented evidence showing that the wife committed adultery about two months after the bill was filed. Again emphasizing the equity-procedure limitations on evidence of postfiling conduct, this Court noted:

> "This evidence was relevant and admissible to corroborate proof of adultery ... prior to [the filing of the bill] ....
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> "But, in the absence of proof of adultery prior to the date of filing suit for divorce, we are controlled by ... Rudicell ...."

275 Ala. at 621, 157 So. at 220. The Court then quoted the portions of Rudicell and Scott discussed above. Thus, Morrison, Scott, Rudicell, and Hilley were all decided on the same procedural basis.

Accordingly, this Court's earlier treatment of postfiling adultery was rooted in that procedural era's requirement that, in equity proceedings (including divorce actions), all evidence had to conform to the facts pleaded in the bill, and thus the judgment could not be based on events that occurred after the filing of the bill. As discussed above, that procedural stricture was eliminated in 1973 by the adoption of Rule 15(b). Therefore, the procedural basis for this Court's earlier treatment of postfiling adultery no longer exists.

Notably, before other states adopted modern civil procedure, their courts similarly held or suggested that postfiling conduct could not be a ground for divorce. See Thomas v. Thomas, 208 Ark. 20, 22-23, 184 S.W.2d 812, 813 (1945) (adultery); Renner v. Renner, 177 Md. 689, 690, 12 A.2d 195, 198 (1940) (adultery); Thayer v. Thayer, 101 Mass. 111, 112-14 (1869) (adultery); Segelbaum v. Segelbaum, 39 Minn. 258, 260, 39 N.W. 492, 494 (1888) (cruelty); Campbell v. Campbell, 69 A.D. 435, 74 N.Y.S. 979 (1902) (adultery); Brown v. Brown, 142 W. Va. 695, 708, 97 S.E.2d 811, 819 (1957) (habitual drunkenness). But several states now permit divorce based on postfiling conduct, specifically citing their adoption of modern

rules of civil procedure. See Milne v. Milne, 266 Ark. 900, 904, 587 S.W.2d 229, 232 (Ct. App. 1979) (general statement); Scherer v. Scherer, 150 So. 2d 496, 497-98 (Fla. Dist. Ct. App. 1963) (adultery; rejecting Thomas); Clifford v. Clifford, 354 Mass. 545, 546-47, 238 N.E.2d 522, 523-24 (1968) (adultery; rejecting Thayer); Schmitt v. Schmitt, 9 N.J. Super. 470, 75 A.2d 480 (Ch. Div. 1950) (adultery); Otto v. Otto, 220 A.D. 130, 220 N.Y.S. 513 (1927) (adultery; rejecting Campbell); Sanford v. Sanford, 2 Pa. D. & C.2d 603, 609-10 (Pa. C.P., Delaware Cnty. 1955) (indignities). As an American Law Reports author summarized in the midst of that nationwide procedural transition, "the problem [of whether postfiling conduct can be a ground for divorce] is largely controlled by pleading practice, which has, in many jurisdictions, been modified in fairly recent times." B. Finberg, Annotation, Acts Occurring After Commencement of Suit for Divorce as Ground for Decree Under Original Complaint, 98 A.L.R.2d 1264, § 1 n.2 (1964).

Therefore, the language of the divorce-grounds statute, the legal definition of adultery, and this Court's precedent read in procedural context do not support a substantive rule that postfiling adultery cannot

be a ground for divorce. Rather, under Rule 15(b), if adultery that occurred after the filing of the operative pleading is tried by consent, whether express consent or consent implied by the absence of a proper objection,[6] then that adultery is properly a ground for divorce.

We now turn to examine the Court of Civil Appeals' cases addressing the issue of postfiling adultery. Jason relies on Smith v. Smith, 599 So. 2d 1182 (Ala. Civ. App. 1991), for the proposition that postfiling adultery cannot constitute a ground for divorce. In Smith, a wife filed a complaint for divorce, and, four months later, the husband counterclaimed for divorce on the ground of adultery. The evidence regarding the wife's adultery included events that occurred before and after the filing of the wife's complaint. The Court of Civil Appeals held that the divorce could

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[6]In general, a failure to object to admission of evidence that supports an unpleaded issue allows that issue to be deemed tried by consent. See Scrushy v. Tucker, 70 So. 3d 289, 314 (Ala. 2011). An exception exists for when that evidence, in addition to being relevant to the unpleaded issue, is relevant to a pleaded issue; in such a case, a party's failure to object or to seek limitation of the evidence's relevance does not imply consent to trial of the unpleaded issue. Cf. McCollum v. Reeves, 521 So. 2d 13, 17 (Ala. 1987); Koch v. State Farm Fire & Cas. Co., 565 So. 2d 226, 229 (Ala. 1990). Jason does not assert this exception, so we have no occasion to address its applicability in this case.

not be grounded on postfiling adultery: "[I]ncidents of adultery subsequent to the filing of the divorce petition are admissible to corroborate evidence of adultery prior to the date of filing, but the subsequent incidents cannot be the sole basis to grant the divorce." Id. at 1184. The court cited Hilley and Vail v. Vail, 360 So. 2d 985 (Ala. Civ. App. 1977); in Vail, the court had relied on Rudicell and Hilley for the same proposition. Under the facts of Smith, the court held that the relevant filing was the husband's counterclaim rather than the wife's complaint. Thus, the court appears to have treated this Court's earlier preclusion of postfiling adultery as if it were a substantive rule, rather than an application of equity procedure. Notably, the Court of Civil Appeals did not discuss the effect of the 1973 adoption of Rule 15(b) or its concept of trial by consent, nor did the court mention whether that effect had been argued by any party.

Jason also cites Ragan v. Ragan, 655 So. 2d 1016 (Ala. Civ. App. 1995), in which the Court of Civil Appeals repeated that postfiling adultery "[could]not be the sole basis for granting a divorce on the ground of adultery," id. at 1018, citing Smith. The husband admitted that he committed adultery after the parties separated, but he apparently did not

state whether that adultery occurred before or after the divorce complaint was filed. The court held that that and other evidence was insufficient to prove prefiling adultery. Again, the court did not mention Rule 15(b).

Finally, Jason points us to Turner v. Turner, 210 So. 3d 603 (Ala. Civ. App. 2016). There, the evidence of prefiling adultery by the wife was minimal, as detailed in part III.A of this opinion, although she admitted postfiling adultery. The court recited that postfiling conduct could not support the ground of adultery, again without addressing Rule 15(b).

In addition to those cases, the Court of Civil Appeals has relied on its prefiling/postfiling distinction as to adultery in several other cases. See Vail, reversed on other grounds, 360 So. 2d 992 (Ala. 1978); Duke v. Duke, 457 So. 2d 432, 433-34 (Ala. Civ. App. 1984); Zinnerman v. Zinnerman, 803 So. 2d 569, 574-75 (Ala. Civ. App. 2001); Morgan v. Morgan, 183 So. 3d 945, 955-56 (Ala. Civ. App. 2014); cf. Mosley v. Mosley, 747 So. 2d 894, 898-99 (Ala. Civ. App. 1999) (applying this distinction to adultery as a misconduct factor in property-division analysis). Those decisions likewise did not discuss Rule 15(b) and trial by consent.

Nevertheless, in the present case the Court of Civil Appeals seems

to have recognized the effect of Rule 15(b). In its order affirming the judgment, immediately before citing the statutory ground of adultery, the court cited Rule 15(b). Thus, it appears that the court now acknowledges that, in a case like this one, postfiling conduct may support the ground of adultery if it is tried by consent.

Accordingly, nothing in the decisions of the Court of Civil Appeals persuades us that this Court's pre-1973 decisions implied a substantive rule that postfiling conduct can never be a basis for the ground of adultery. Rather, as the Court of Civil Appeals may now have recognized, no such substantive rule exists, and the procedural basis for this Court's earlier distinction between adultery before and after filing has been abrogated by Rule 15(b)'s concept of trial by consent. Thus, to the extent that the Court of Civil Appeals' prior decisions can be read as inconsistent with this recognition, we disapprove them.

In this case, Jason does not dispute that he committed adultery during the pendency of the divorce case and before trial. Indeed, he admitted as much at trial, and he later filed Alexandra's affidavit testifying to the same. Thus, under Rule 15(b), the ground of adultery,

based on Jason's postfiling conduct, was before the circuit court by Jason's implied consent, and the court did not err by basing its divorce judgment on this ground.[7] Accordingly, the judgment of the Court of Civil Appeals affirming the judgment of the circuit court must be affirmed.

IV. Conclusion

Neither the language chosen by the Legislature within the divorce-grounds statute nor this Court's precedent, read in light of modern civil procedure, requires that adultery as a ground for divorce be limited to conduct before the commencement of the divorce proceeding. Thus, adultery that occurs after the operative pleading is filed and before a divorce is granted may be deemed to have been tried by consent if evidence of that adultery is admitted without objection by the defending

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[7]Jason also contends that the circuit court erred by inequitably dividing the marital property. Jason's certiorari petition, however, expressly disclaimed that issue, and any conflict with precedent arising out of it, as a basis for review. Jason's petition, at pp. 7-8 n.1. Therefore, this Court's order issuing the writ of certiorari did not grant review as to that issue, and we will not consider it. See Ex parte State Dep't of Revenue, 993 So. 2d 898, 899-900 (Ala. 2008) ("The [petitioner] did not challenge in its petition the Court of Civil Appeals' [particular ruling in question]; therefore, we did not grant certiorari review on that ground, and we cannot review it.").

spouse and is properly considered by the trial court. In this case, the circuit court properly considered and based its judgment on undisputed evidence of postfiling adultery. For these reasons, we affirm the judgment of the Court of Civil Appeals.

AFFIRMED.

Mitchell, J., concurs in part and concurs in the result.

Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and Stewart, JJ., concur in the result.

MITCHELL, Justice (concurring in part and concurring in the result).

I join all but Part III.A. of the main opinion. I agree that the Alabama Rules of Civil Procedure abolished the procedural strictures that once barred courts from granting divorce based on postfiling adultery. The main opinion's historical analysis on this point is thorough and compelling, and I would affirm the judgment on this basis alone. I write specially only because I do not believe Part III.A. of the opinion is necessary to decide this case. For that reason, I take no position on the analysis or conclusions in that portion of the opinion, and likewise reserve judgment about whether the cases cited in that part were correctly decided.