

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PATRICIA ANN JACKSON AUSTIN

APPELLANT

VERSUS

CIVIL ACTION NO. 2006-CA-00766

JOHN THOMAS AUSTIN

APPELLEE

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE CHANCERY COURT
OF WAYNE COUNTY, MISSISSIPPI

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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 Mississippi Supreme Court may evaluate possible disqualification or recusal:

1. Patricia Ann Jackson Austin, Appellant
2. John Thomas Austin, Appellee
3. Andrew Thomas Austin, John Allen Austin, and Alecia Ann Austin, natural born children of Patricia Ann Austin and John Thomas Austin
4. David M. Ratcliff, Esquire, Attorney for the Appellee
5. Thomas T. Buchanan, Esquire and Marcus D. Evans, Esquire, Attorneys for the Appellant
6. The Honorable Franklin C. McKenzie, Jr., Chancery Court Judge, Wayne County, Mississippi

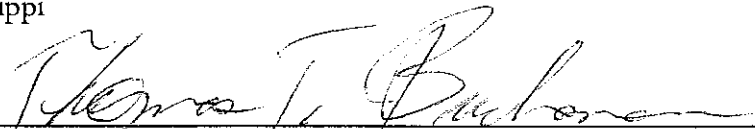

Thomas T. Buchanan, Attorney of Record for Appellant

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STATEMENT OF THE ISSUES

Appellant submits the following issues for review:

1. The trial court erred in permitting Mr. Austin an opportunity to relitigate the issues resolved in the Final Decree entered on June 6, 2003.
2. There is no credible evidence to support the Trial Court's findings of fact concerning the issues of alimony and child support, and thus the Trial Court's ruling is clearly erroneous and manifestly wrong.
3. The Trial Court applied the wrong legal standard in rendering its April 3, 2006 Order, and thus the decision is in contradiction to the provisions of Rule 60 of the Mississippi Rules of Civil Procedure.
4. The relief provided in the April 4, 2006 Order is barred by res judicata.
5. No agreement occurred on May 25, 2004, and the Court erred in ruling that an agreement was present.
6. The Court applied the wrong legal standard in the April 3, 2006 Order, as the Court admitted evidence concerning the alleged material change in circumstances that the Court considered in the June 6, 2003 Final Order.

STATEMENT OF THE CASE

The nature of this case concerns the issues of divorce, alimony and child support. This is an appeal from the Chancery Court of Wayne County, Mississippi, concerning the modification, by the lower Court, of alimony and child support. This appeal seeks to reverse the Trial Court's Decree rendered on April 3, 2006, reversing the lower Court's previous Final Decree entered on June 6, 2003. In its June 6, 2003 Final Decree, the Trial Court held that there was not a material change of circumstances concerning the Appellee's reduction of income to necessitate a modification of the agreed upon amount of alimony and child support. The Court considered the same evidence in its April 3, 2006 ruling, as it had considered in its June 6, 2006 ruling, and thereafter held that there was a material change in circumstances regarding the Appellee's reduction of income, and that the parties Property Settlement and Child Custody Agreement, along with its June 6, 2003 Final Decree, should be modified retroactively. A brief statement of the facts and procedural history is as follows:

Statement of the Facts and Related Procedural History

The Appellant and the Appellee were married on February 4, 1983. The parties had three (3) children born during the course of their marriage: Alecia Ann Austin, Andrew Thomas Austin, and John Allen Austin. Alecia was born on June 14, 1984 and is twenty-two (22) years old. Andrew was born on June 20, 1989 and is seventeen (17) years old. John was born on January 3, 1991 and is sixteen (16) years old. The parties separated on or about February 21, 2001 and filed for divorce. (R.E. 8.)

The divorce trial commenced on December 11, 2001, with Mr. Austin being called as the first witness. Each party was represented by counsel. Prior to the conclusion of Mr. Austin's testimony, the proceedings recessed for the remainder of the day. On December

12, 2001, the parties resumed negotiations and later that morning informed the Court that they had negotiated a settlement agreement. On December 12, 2001, the Trial Court granted the parties a divorce on the ground of irreconcilable differences and approved and adopted the parties' Property Settlement and Child Custody Agreement (hereinafter "Agreement"). They then dictated the settlement terms into the record. The Final Decree of Divorce was executed by the Court on February 20, 2002, and recites that it is "effective from and after December 12, 2001". Neither Mrs. Austin nor Mr. Austin appealed or otherwise challenged the validity of the Final Decree. (R.E. 31.)

The Agreement stated that Mr. Austin was to pay \$4,800.00 a month in child support, compiled by (1) Mr. Austin paying \$1,000.00 per month, (2) Mr. Austin paying \$30,400.00 each March 15th of every year, and (3) paying \$15,200.00 August 15th every year. (R.E. 31.)

On February 26, 2003, a hearing was held on two (2) separate Motions for Contempt and a Motion for Wage Withholding Order filed by Mrs. Austin and a Petition for Modification and Complaint for Contempt filed by Mr. Austin. (R.E. 29.) Mrs. Austin alleged in her Motions that Mr. Austin had failed to pay the entire amount of the child support due and owing per their Agreement. (R.E. 29.) Mr. Austin, in his response to Mrs. Austin's Contempt Motions, admitted that he did not pay the entire amount of child support due per the Agreement, but contended that the amount set forth in the Agreement was calculated for an entire year, and that only ten months was actually due and owing; therefore, he was entitled to a reduction based on the prorated 10 month period versus the 12 month time period. (R.E. 29.) Contemporaneously, Mr. Austin filed his first of several Petitions for Modification seeking custody of one of his three (3) children, John Allen Austin, alleging that the child preferred to live with him, and requested a reduction of his child support

obligation because of the proposed custody change. Mr. Austin alleged that he was unable to pay the Court ordered child support because of a substantial decrease of income. (R.E. 29-30.)

At the hearing, Mr. Austin, Mrs. Austin, Mr. Austin's boss (Frank Johnson) and Mr. Austin's accountant (Richard James) testified. (R.E. 30.)

On June 6, 2003, the Court rendered its written findings, holding that Mr. Austin (1) failed to pay child support as and when required, (2) failed to demonstrate that he was unable to pay the required support and (3) he should be held in civil contempt for his failure to pay child support. The Court denied Mr. Austin's Motion for Contempt and his Petition for Modification. The Court further found that the provisions of the Agreement were clear and unambiguous, and therefore shall be enforced as the parties agreed. (R.E. 29-44.)

On July 17, 2003, some forty-one (41) days after the Court provided its written opinion, Mr. Austin filed for a Motion to Extend Time for Filing Notice of Appeal and to Reopen (R.E. 45.) It is indisputable that Mr. Austin was on notice of the date of entry of the June 6, 2003 Order, as Exhibit "A" of the Appellee's Motion to Extend Time for Filing Notice of Appeal and to Reopen confirms that he received a copy of the aforementioned Final Decree. (R.E. 48.) Mr. Austin petitioned the Court to reopen the case for the presentation of alleged newly-discovered evidence and for relief from judgment pursuant to Rule 60 of the Mississippi Rules of Civil Procedure. (R.E. 45.)

On October 2, 2003, the Court granted Mr. Austin's request, and entered an Order Sustaining Motion to Reopen, setting a trial date of January 29, 2004. (R.E. 55.) On October 8, 2003, Mrs. Austin filed a Motion to Reconsider the Court's October 2nd Order, notifying the Court that the June 6, 2003 Order was a Final Judgment, and that Mr. Austin's

attempts to reopen the case was an attempt by trickery and concealment to avoid the finality of the Court's June 3, 2003 Order. (R.E. 57.)

On January 23, 2004, Mr. Austin filed a Petition Renewing Request for Modification, stating that further newly-discovered evidence renders Mr. Austin's responsibilities concerning child support impossible. (R.E. 59.)

On February 10, 2004, the Court entered an Order Re-setting the case for trial for May 25, 2004. (R. 141.) The case was not tried on the aforementioned scheduled date, and on September 28, 2004 Mrs. Austin's attorney withdrew as counsel. (R. 154.) On October 15, 2004, Thomas T. Buchanan was permitted to substitute as counsel for Mrs. Austin. (R. 165.)

Again, another date for trial was set, reserving trial for March 31, 2005. However, trial would not be conducted on that date. (R.184.) On March 8, 2005, Mr. Austin filed his Motion to Enforce Agreement, which attempted to enforce an agreement that was allegedly reached between the parties on or about May 25, 2004. Mr. Austin alleges that an agreement was reached, but the wording of the agreement was in dispute, and therefore, no finality of the agreement was memorialized. (R.186.) Mrs. Austin filed her Response to Mr. Austin's Motion to Enforce Agreement, contending that the Motion does not state a cause of action upon which relief can be granted, as there is no writing in existence proving that an agreement was reached. (R. 199.)

Yet again a trial date was agreed upon, scheduling the matter for trial on May 4, 2005. (R. 202.) This matter was tried on that date, and the record was left open, per the request of Mr. Austin's attorney. On July 26, 2005, the Court entered an Agreed Order to Close the Record. (R. 215.) On October 11, 2005, Mrs. Austin filed her Motion to Enter Proposed Judgment in Accordance with Rule 15 of the Mississippi Rules of Appellate

Procedure. (R. 217.) On October 11, 2005, Kevin Lackey, Director of the Administrative Office of Courts, wrote a letter stating that his office received notice that this matter was taken under advisement on July 26, 2005, as no Order or Decree has been entered since the trial of the matter on May 4, 2005. (R. 223.)

On March 9, 2006, Mrs. Austin filed her Amended Motion to Enter Proposed Judgment in Accordance with Rule 15 of the Mississippi Rules of Appellate Procedure. (R. 226.) Again, on March 29, 2006, Mr. Lackey informed all interested parties that his office had received notice that no order or decree had been entered resolving the matter after trial, and that it was his office's position that the matter was taken under advisement. (R. 235.)

The Trial Court entered its Opinion and Order on April 3, 2006, holding that (1) the periodic alimony ordered in the original Final Decree was terminated and replaced with periodic rehabilitative alimony, (2) that Alecia Ann Austin is fully emancipated, (3) that the child support obligation shall be reduced, (3) that the April 3, 2006 Order completely replaces all child support ordered in the Original June 6, 2003 Final Decree, (4) that Mr. Austin was not in contempt of the Trial Court, and (5) that Mrs. Austin was in contempt of Court. The Court ruled in its April 3, 2006 Decree that the enforcement of the Decree was retroactive, and was to be considered effective from May, 2004. (R.E. 75.)

On May 1, 2006, Mrs. Austin filed her Notice of Appeal, seeking relief from the Trial Court's April 3, 2006 Order and seeking enforcement of the lower Court's original Final Decree entered on June 6, 2003. (R. 245.)

SUMMARY OF THE ARGUMENT

Mr. Austin was procedurally barred from appealing or relitigating the issues resolved in the Trial Court's June 6, 2003 Final Decree. Mr. Austin did not file his Motion to Extend Time for Filing Notice of Appeal and to Reopen until July 17, 2003. Based upon the time limitations pursuant to Rule 4(a) of the Mississippi Rules of Appellate Procedure, Mr. Austin was barred from appealing the Trial Court's ruling. Further, he was barred from seeking an amendment of findings or amending the judgment pursuant to Rule 52(b) of the Mississippi Rules of Civil Procedure, as more than ten days had passed since the Order was entered. Similarly, Mr. Austin was barred from seeking a new trial pursuant to Rule 59(b) of the Mississippi Rules of Civil Procedure, as more than ten days had passed since the Order was entered. Also, it is obvious that the Trial Court erred in granting Mr. Austin's Petition to Modify pursuant to Rule 60 of the Mississippi Rules of Civil Procedure because (1) the "newly-discovered evidence" Mr. Austin alleges to have discovered was the same evidence he could have gathered and used at the trial of the matter, and (2) Mr. Austin did not formally file his Petition to Modify the Final Decree of June 6, 2003 until January 23, 2004, some seven months after entry of the Order. By waiting until January 23, 2004, Mr. Austin did not meet the six (6) month requirement of Rule 60. Further, under this pleading, any evidence of a material change in circumstances had to have occurred between the June 6, 2003 Final Decree and the filing of Mr. Austin's January 23, 2004 Petition for modification. The Trial Court, by considering the same evidence alleging a material change in circumstances that was previously considered in the Court's June 6, 2006 Order, applied the wrong legal standard.

Secondly, there is no credible evidence to support the Trial Court's findings of fact concerning the issues of alimony and child support, and thus the lower Court's ruling is clearly erroneous and manifestly wrong. As the Court opined in its June 6, 2003 Decree, Mr. Austin alleged that he was unable to meet his monthly alimony and child support obligations due to a reduction of income. These same facts resurfaced in the Court's April 3, 2006 Order, which reversed its previous position that Mr. Austin's income had not been reduced significantly enough to warrant a reduction of alimony and child support. In contrast, by Mr. Austin's own declarations, his income had actually increased since 2001. Clearly the facts do not support the Court's decision to reduce Mrs. Austin's alimony or child support.

Third, The Trial Court applied the wrong legal standard in rendering its April 3, 2006 Order, and thus the decision is in contradiction to the provisions of Rule 60 of the Mississippi Rules of Civil Procedure. Rule 60 is clear and unambiguous that a motion requesting relief from judgment does not affect the finality of a judgment or suspend its operation. As such, the provisions of the June 6, 2003 Final Decree was still in effect until the entry of the April 3, 2006 Order. However, the April 3, 2006 Order clearly states that the Order, as it applies to the reduction of alimony, was retroactive and is effective from May, 2005. This is in clear contradiction to the provisions of Rule 60.

Further, the relief provided in the April 4, 2006 Order is clearly barred by res judicata. It is clear that the subject matters of the June 6, 2003 and April 3, 2006 Orders are the same, that the cause of actions are the same, that the parties are the same and that the quality or character of a person against whom the claim is made are the same. It is indisputable that all of the elements of res judicata are present concerning the two contrasting Orders.

Also, no agreement occurred on May 25, 2004 between the parties, and there is no written proof indicating that an agreement took place. As such, the April 3, 2006 Order is clearly erroneous in incorporating the terms of an agreement that was never reached or memorialized in writing.

Lastly, the Trial Court applied the wrong legal standard in its April 3, 2006 Order, as the Trial Court admitted and considered evidence of an alleged material change in circumstances that the lower Court considered in the June 6, 2003 Final Order. As this Court has established, in order for a chancellor to find a substantial change in circumstances, there must have been some change which resulted from after-arising circumstances of the parties not reasonably anticipated at the time of the agreement, and the change must be one that could not have been anticipated by the parties at the time of the original decree.

For the abovementioned reasons, this Court should reverse the rulings of the April 3, 2006 Order and affirm the holding of the June 6, 2003 Final Decree. For the Court's convenience, please find the specifically contested pleadings and Orders indexed and bound in the Record Excerpts, which have been provided for the Court's review per Rule 30 of the Mississippi Rules of Appellate Procedure.

ARGUMENT

For the reasons set forth below, the decision of the Trial Court was manifestly wrong, clearly erroneous and an erroneous legal standard was applied.

1. The Trial Court erred in permitting Mr. Austin an opportunity to relitigate the issues resolved in the Final Decree entered on June 6, 2003.

On July 17, 2003, some forty-one (41) days after the Court entered its written Opinion, Mr. Austin filed for a Motion to Extend Time for Filing Notice of Appeal and to Reopen (hereinafter “Motion”). (R.E. 45.) However, all available procedural remedies for appealing the Trial Court’s ruling were already barred by time.

For convenience, below please find a timeline of relevant proceedings as they transpired in this case:

2/21/01	Complaint for Divorce Filed
12/12/01	Final Decree of Divorce Entered & Agreement Executed (R.13)
6/6/03	Final Judgment on Motions for Contempt and Modification (R.13)
6/6/03	Chancellor’s OPINION (R.E. 29)
7/17/03	Motion to Extend Time for Filing Notice of Appeal (R. 31)
10/2/03	Order Sustaining Motion to Reopen (R.44)
10/08/03	Motion to Reconsider filed by Mrs. Austin (R.E. 57)
1/23/04	Petition Renewing Request for Modification Filed (R. 68)
3/8/05	Motion to Enforce Agreement filed by Mr. Austin (R. 186)
4/3/06	OPINION AND ORDER (R.E. 75)

Rule 4(a) of the Mississippi Rules of Appellate Procedure states, in part, “in a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to the Supreme Court the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from”. No Order granted Mr. Austin’s Motion to Extend Time to File Notice of Appeal, and no appeal was ever filed. Clearly, by waiting until July 17, 2003 to file his Motion, Mr. Austin was procedurally barred from appealing the ruling of the Trial Court rendered on June 6, 2003.

Rule 52(b) of the Mississippi Rules of Civil Procedure provides, in part, “[u]pon motion of a party filed not later than ten days after entry of judgment or entry of findings and conclusions, or upon its own initiative during the same period, the court may amend its findings or make additional findings and may amend the judgment accordingly”. Relief pursuant to this Rule was unavailable because the time allotted for such relief had passed.

Another remedy that was available to Mr. Austin can be found pursuant to Rule 59 of the Mississippi Rules of Civil Procedure. That rule grants the possibility for new trials and amendment of judgments, such as the June 6, 2003 Final Decree Mr. Austin was seeking relief from. Rule 59(b) holds that “[a] motion for a new trial shall be filed not later than ten days after the entry of the judgment.” *Id.* Rule 59(e) holds that “[a] motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment.” *Id.* Because Mr. Austin waited until July 17, 2003 to seek post-judgment relief from the Final Decree entered June 6, 2006, the remedies pursuant to Rule 59 were not available.

Lastly, Rule 60(b)(3) states that “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (3) newly discovered evidence which by due

diligence could not have been discovered in time to move for a new trial under Rule 59(b);”. The assertion that the information Mr. Austin presented in his Motion was “newly discovered evidence” pursuant to Rule 60(b)(3) is incorrect.

Mr. Austin, in his July 17, 2003 Motion (and again in his January 23, 2004 Petition to Modify), alleges that newly-discovered financial evidence would show that he is unable to meet his financial obligations pursuant to the Agreement. (R. 31.) However, these same issues were resolved in the Court’s June 6, 2003 Final Decree. (R.E. 29.) By granting Mr. Austin’s Motions, the Trial Court allowed the Appellee an opportunity to relitigate these issues, which is clearly adverse to the previous rulings of this Court.

In *Russell v. Russell*, 733 So.2d 858, 862 (Miss. Ct. App. 1999) the Court was confronted with a similar situation involving a party claiming the revelation of newly-discovered evidence in support of his post-judgment relief efforts pursuant to Rule 60(b)(3). “The matter of granting post-judgment relief based on a claim of newly-discovered evidence is a matter vested in the sound discretion of the trial court. In order to be entitled to such relief, the movant must demonstrate that the evidence was not available at trial and could not have been available through the exercise of reasonable diligence”. *Id.* citing M.R.C.P. 60(b)(3); *Sullivan v. Heal*, 571 So.2d 278, 281 (Miss. 1990). “In this case, Dr. Russell’s financial affairs for 1996 had been concluded for over one month prior to trial. Thus, the information was certainly available to him. The fact that his accountant had been unable to compile and finally process the information was a matter known to Dr. Russell prior to commencement of the trial. Had he deemed the availability of this information vital to the proper presentation of his case, it was certainly within his prerogative to seek a continuance until the accountant could have completed his work. Dr. Russell failed to do so, and instead, announced ready for trial. On these facts, we do not think that the accountant’s analysis,

though it may have been surprising, was something that could not have been discovered through the exercise of reasonable diligence in advance of trial”. *Id.*

Similarly, all of the information in Mr. Austin’s Motion filed on July 17, 2003 could have been gathered and presented at the hearing. With due diligence and effort, all of the accompanying exhibits to Mr. Austin’s Motion could have been gathered and presented as evidence at the hearing. At the very least, Mr. Austin could have asked for a continuance of the hearing to a later date in an effort to provide him more time to accumulate his exhibits and evidence. The information was readily available to Mr. Austin prior to the hearing, and his deficiency in not presenting same should not entitle him to post-judgment relief pursuant to Rule 60(b)(3).

Mr. Austin did file a Petition to modify the June 6, 2003 Final Decree on January 23, 2004, more than seven (7) months after the Order was entered. (R.E. 59.) Clearly, this pleading was untimely, and the granting of such request is blatantly in opposition of the requirements of Rule 60 of the Mississippi Rules of Civil Procedure.

The case of *Pruett v. Malone*, 767 So.2d 983 (Miss. 2000) is on point with the instant case. In *Pruett*, the Final Order was entered on December 23, 1996. Malone filed a motion to reconsider on June 2, 1997, which was ultimately denied on November 20, 1997. Malone did not file an appeal from the adverse ruling, but instead, some eight (8) months later in July, 1998, she filed a second motion to reconsider pursuant to M.R.C.P. 60. In August, 1998, the trial judge granted the motion, but the Mississippi Supreme Court reversed and rendered, finding the trial judge erred in granting the motion since it was untimely.

In deciding to reverse and render, the Supreme Court in *Pruett* found that Malone’s proper remedy was to timely appeal the denial of her first motion to reconsider to the Supreme Court, rather than filing a second motion to reconsider, since everything Malone

cited in her second motion to reconsider was available to the trial court at the same time she filed her first motion to reconsider. This Court held in *Pruett* that “Malone’s proper avenue for relief from the first order dismissing her complaint was by way of appeal, not a Rule 60 motion. Rule 60(b) motions should be denied where they are an attempt to relitigate the case”. *Id.*

Similarly, the Motion filed by Mr. Austin on July 17, 2003, and his Petition to Modify the Final Decree he filed on January 23, 2004, should not have been granted because it was an attempt to relitigate issues of the case that the Trial Court had already ruled upon: whether alimony and child support should be reduced based upon an alleged reduction of income by Mr. Austin. As such, the Trial Court committed a manifest error and applied an erroneous legal standard in permitting Mr. Austin to relitigate these matters under Rule 60 of the Mississippi Rules of Civil Procedure.

2. There is no credible evidence to support the Trial Court’s findings of fact concerning the issues of alimony and child support, and thus the Trial Court’s ruling is clearly erroneous and manifestly wrong.

In the April 3, 2006 Order, on the issue of alimony, the Trial Court ruled that “there has been a material change of circumstances not reasonably anticipated at the time of the original Divorce Decree in that John Austin’s income has decreased dramatically from the date of his employment termination”. (R.E. 79.) As such, the Court replaced the periodic alimony awarded in the June 6, 2003 Final Decree with periodic rehabilitative alimony, retroactive to May 4, 2005. (R.E. 80.) On the issue of child support, the Court found that “due to the substantial change of circumstances previously cited regarding the income of John Austin that the child support obligation of John Austin, as of May 25, 2004, should be reduced to \$1,370.00 per month”. (R.E. 80.)

While the father's ability to pay is but one of the factors supportive of a change or alteration in child support payments, the paramount concern is the needs of the child. *Cupit v. Cupit*, 559 So.2d 1014, 1018 (Miss. 1990). There must be a change in circumstances affecting either the children or their parents which was not reasonably foreseeable at the time of the original decree. *Morris v. Morris*, 541 So.2d 1040, 1042-43 (Miss. 1989).

As the Chancellor opined in the Court's June 6, 2003 Opinion, "[s]ince the child support provision is clear and since Mr. Austin does not contend that he paid all that was due, the issue centers around his financial ability to pay the support that he agreed to pay. Thus, the analysis begins and ends with his income". (R.E. 31.)

The Court continued stating that "Mr. Austin urged the Court to find that he was unable to pay the entire amount of child support due on August 30, 2002, because he used his bonus to pay his alimony obligation and paid the remainder of his bonus to Mrs. Austin as child support. It is quite significant that Mr. Austin failed to allege in his Response to Mrs. Austin's Motion for Contempt that he was financially unable to meet his August, 2002 child support obligation. Instead, he claimed that he actually over paid child support by \$3,927.00. Since Mr. Austin did not allege an inability to pay in his response that he filed on November 19, 2002, and since he in fact paid the child support arrearage in December, 2002, the Court eyes Mr. Austin's claim of inability to pay with suspicion". (R.E. 33.)

The Court further stated that "Mr. Austin paid the past due support amount in full by check in December, 2002, after the first hearing setting on Mrs. Austin's Motion on November 27, 2002. Mr. Austin contends that he borrowed the money from his parents. Mr. Austin failed to present any evidence of such a loan through a document evidencing the loan or through the testimony of his parents." (R.E. 34.)

Mr. Austin, as Exhibit "C" to his Motion, offered a written and unverified list of income as proof of the loans from his parents. (R.E. 50.) However, any proof concerning his reduction of income should have been presented at the hearing, as opposed to 41 days after the Court rendered its Opinion.

The Court, in its June 6, 2003 Order continued by stating "[s]uffice it to say that Mr. Austin has failed to meet his burden of showing an inability to comply with his child support obligation. Since Mr. Austin failed to comply with the clear, unambiguous order for his payment of child support and failed to demonstrate a financial inability to pay his child support as ordered, the Court finds Mr. Austin in Contempt." (R.E. 36.)

In essence, Mr. Austin's Motion was a successful attempt to re-try the matter, circumvent the Mississippi Rules of Civil Procedure, and have a second swing at the pitch. Procedurally, the Motion filed by Mr. Austin, could not have prevented what eventually became the result: a new trial concerning the same subject based on the same set of facts with retroactive application. Clearly the actions by the lower Court to grant Mr. Austin's requests are manifestly wrong and clearly erroneous.

Because the Trial Court essentially allowed a new trial on the same subject (alimony and child support) based upon the same facts (unsupported allegations of reduction of income), the lower Court applied the wrong legal standard.

3. The Trial Court applied the wrong legal standard in rendering its April 3, 2006 Order, and thus the decision is in contradiction to the provisions of Rule 60 of the Mississippi Rules of Civil Procedure.

The Chancellor's April 3, 2006 Order, which erroneously granted Mr. Austin's Petition for Modification pursuant to Rule 60, states "(1) That periodic alimony as ordered in the original Final Decree of Divorce shall be terminated and that it shall be replaced with

periodic rehabilitative alimony in the amount of \$650.00 per month *for a period of two years from the date of the hearing on May 4, 2005*; (2) That Alicia Ann Austin has been fully emancipated by her marriage in May, 2005; (3) That the child support obligation shall be reduced to \$1,370.00 which is the same as the agreement made on May 25, 2004 in the Agreed Modification which was never entered; (4) That this Order completely replaces all child support ordered in the original Final Decree of Divorce; (5) That John Austin shall continue to pay all medical, dental and health obligations of the minor children; (6) That John Austin is not in contempt of this Court; (7) That Patricia Austin is in contempt of this Court for violating her obligations pursuant to the original Decree of Divorce, specifically for converting those items of personal property to her own use and for failure to pay the house note on the home of the parties and she shall return all items of property listed in the original Decree of Divorce within thirty (30) days of the date of this Decree or provide a list of those items sold and the amounts received for full reimbursement to John Austin directly or on behalf of the minor children or come before the Court on the 30th day to show cause as to why she should not be subject to further contempt penalty of this Court". (R.E. 81-82.) *Emphasis added.*

Clearly this Order is in direct conflict with the provisions of Rule 60 of the Mississippi Rules of Civil Procedure. Rule 60 provides, in part, that a "motion under this subdivision does not affect the finality of a judgment or suspend its operation". As such, the retroactive application of the April 3, 2006 Order acts to suspend and discard those responsibilities (that were in place from June, 2003 until April, 2006) concerning alimony that Mr. Austin agreed to pay, and was later ordered to pay pursuant to the Final Decree of June 6, 2003. As noted in *Briney v. U.S. Fidelity & Guar. Co.*, 714 So.2d 962, 969 (Miss. 1998), Rule 60 must not be used as a substitute for appeal. Clearly, allowing Mr. Austin to achieve

a retroactive application of the April 3, 2006 Order is in direct conflict with the provisions stated in Rule 60.

4. *The relief provided in the April 3, 2006 Order is barred by res judicata.*

Res Judicata is a doctrine which protects the finality of judgments. It applies to final judgments on the merits. *Anderson v. LaVere*, 895 So.2d 828, 833 (Miss. 2004). Res Judicata requires four elements: (1) identity of the subject matter, (2) identity of the cause of action, (3) identity of the parties, and (4) identity of the quality or character of a person against whom the claim is made. *Norman v. Bucklew*, 684 So.2d 1246, 1253 (Miss. 1996). “If these four identities are present, the parties will be prevented from relitigating all issues tried in the prior lawsuit as well as all matters which should have been litigated and decided in the prior suit”. *Dunaway v. W.H. Hopper & Assocs.*, 422 So.2d 749, 751 (Miss. 1982).

By comparing the Order entered on June 6, 2003 to the Order entered on April 3, 2006, it is clear that the identical subject matter (i.e. child support and alimony), the same cause of action (i.e. modification/reduction of child support and alimony), the same parties (Mr. & Mrs. Austin) and the same identity of the quality or character of a person against whom the claim is made (i.e. Mr. Austin’s alleged reduction in income). (R.E. 29-44, R.E. 75-82.) All of the requirements of res judicata are met in this case. Clearly the Trial Court erred in allowing Mr. Austin to reopen the June 6, 2003 Order and re-try the same issues concerning reduction of child support and alimony.

The primary issue considered in both the April 3, 2006 and June 6, 2003 Orders is Mr. Austin’s income. Per the information gathered (and as demonstrated by Appellant’s Exhibit List, Exhibit 2), Mr. Austin’s monthly income for the past five years is, as follows:

Summary of John Austin’s Income

8.05s

<u>Date</u>	<u>Gross</u>	<u>Net</u>
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7/6/01	\$5,630.00 (w/est. bonus of \$24K)	\$3,539.30
12/10/02	\$6,200.00	\$4,686.92
1/25/04	\$8,000.00	\$5,147.07
5/24/04	\$9,350.00	\$6,227.44
1/26/05	\$9,330.02	\$5,591.20

Clearly, by the Appellee's own admissions, it is indisputable that Mr. Austin's income has increased each year, as evidenced by the Appellee's Rule 8.05 information sheets he has submitted.

As noted previously, the issue of whether Mr. Austin's income has been reduced was litigated, determined and finalized, as the June 6, 2003 Order reflects. (R.E. 29-44.) Any re-trial of the same issues is barred by res judicata.

5. No agreement occurred on May 25, 2004, and the Court erred in ruling that an agreement was present.

The terms of the December 12, 2001 Judgment of Divorce, as stated in the attached Agreement, are clear and unambiguous, providing for specific amounts of alimony and child support to be paid by Mr. Austin. However, the Court makes reference to an agreement in its April 3, 2006 Order, stating "[t]hat the child support obligation shall be reduced to \$1,370.00 which is the same as the agreement made on May 25, 2004 in the Agreed Modification which was never entered". (R.E. 81.) However, it is clear by the Court's own admission that the alleged May 25, 2004 agreement was never made and memorialized.

As noted in *Beezley v. Beezley*, 917 So.2d 803, 807 (Miss. Ct. App. 2005), a "property settlement agreement is no different from any other contract, 'and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character'". *Id.* citing *East v. East*, 493 So.2d 927, 931-32 (Miss. 1986).

The Mississippi Supreme Court has held that before a court orders specific "performance on a contract, the contract must be sufficiently definite on material terms".

Leach v. Tingle, 586 So.2d 799, 802 (Miss. 1991). A contract is sufficiently definite “if it contains matter which will enable the court under proper rules of construction to ascertain its terms”. *Id.* If any essential terms are left unresolved, then no contract exists. *Busching v. Griffin*, 465 So.2d 1037, 1040 (Miss. 1985).

As stated in *Leach*, a contract is unenforceable if its material terms are not sufficiently definite. *Leach*, 586 So.2d 799, 802. A valid contract must include the following essential elements: “(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with the legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation”. *Lanier v. State*, 635 So.2d 813, 826 (Miss. 1994). By the Court’s own admission, the parties never entered into the contract. (R.E. 81.)

It is apparent by the April 3, 2006 Order that the Court agrees with Mr. Austin’s contention that an agreement was made on May 25, 2004. (R.E. 81.) On March 8, 2005, Mr. Austin filed a Motion to Enforce Agreement, which attempts to enforce an agreement that was allegedly reached between the parties on or about May 25, 2004. (R. 186.) Mr. Austin alleges that an agreement was reached, but the wording of the agreement was in dispute, and therefore, no finality of the agreement was memorialized. Mrs. Austin filed her Response to Mr. Austin’s Motion to Enforce Agreement, contending that the Motion does not state a cause of action upon which relief can be granted, because there is no writing memorializing the agreement. (R. 199.)

It is undisputed that Mississippi law requires the aforementioned six (6) elements to have a binding and enforceable agreement: (1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with the legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract

formation. Clearly the parties did not reach an agreement that is sufficiently definite, nor did they have mutual assent. By Mr. Austin's own admission, the wording of the agreement was in dispute.

Further, even in the event one decides that there was an agreement between Mr. Austin's and Mrs. Austin's attorneys, the agreement is not enforceable. "While an attorney may bind his client by stipulation or admission of *facts* during the course of trial, an attorney has no implied or apparent authority to bind his client by stipulation or admissions as to *matters of law or legal conclusions*". *Lane v. Woodland Hills Baptist Church*, 285 So.2d 901, 905 (Miss. 1973), *Emphasis added*. "Neither his client nor the court is bound by such stipulations. Neither does he have the implied or apparent authority, to surrender or conclude substantial legal rights of the client, unless such admission or stipulation is a proper step in the accomplishment of the purpose for which he is employed". *Id.*

It is indisputable that significantly reducing alimony and child support is a substantial legal right of Mrs. Austin. Without a writing evidencing that an agreement was in existence, the Trial Court cannot even begin to take the next step of analyzing the intentions of the parties. Based upon the foregoing facts, the Trial Court erred in Ordering the parties to an agreement that did not exist.

6. *The Court applied the wrong legal standard in the April 3, 2006 Order, as the Court admitted evidence concerning the alleged material change in circumstances that the Court considered in the June 6, 2003 Final Order.*

In *Ivison v. Ivison*, 762 So.2d 329, 334 (Miss. 2000), the Mississippi Supreme Court held that "absent fraud or overreaching, a chancellor should take a dim view of efforts to modify improvidently agreed-upon divorce judgments. However, *Ivison* noted that agreed divorce judgments, like Mr. and Mrs. Austin's, are still modifiable in the event of a change in

circumstances not foreseen at the time of the agreement. *Id.* “In order for a chancellor to find a substantial change in circumstances, there must have been some change which resulted from ‘after-arising circumstances of the parties not reasonably anticipated at the time of the agreement’ and furthermore the change must ‘be one that could not have been anticipated by the parties at the time of the original decree’”. *In the Matter of the Dissolution of the Marriage of Profilet*, 826 So.2d 91, 95 (Miss. 2002), citing *Steiner v. Steiner*, 788 So.2d 771 (Miss. 2001); *Varner v. Varner*, 666 So.2d 493, 497 (Miss. 1995); *Tingle v. Tingle*, 573 So.2d 1389, 1391 (Miss. 1990); *Bell v. Bell*, 572 So.2d 841 (Miss. 1990).

The Court ruled in its June 6, 2003 Final Decree that there was not a material change in circumstances worthy enough to modify the agreed amount of alimony and child support. (R.E. 36.) The Court, in the June 6, 2003 Decree, considered the reduction of income of Mr. Austin. (R.E. 32-36.) Mr. Austin alleged that his income had been reduced because of his job performance, which resulted in a lack of sales and commissions. (R.E. 32-36.) However, the Court concluded that Mr. Austin’s income had not been reduced, and his checking account reflected that there were deposits of significant amounts of money that proved his income had not been reduced. (R.E. 34.)

Then, in its April 3, 2006 Order, the Court found to the contrary. Specifically, the Court held that Mr. Austin’s income had been reduced, and that the amounts of alimony and child support should be reduced accordingly. (R.E. 81.)

As the abovementioned case law states, in order for a chancellor to find a substantial change in circumstances, there must have been some change which resulted from after-arising circumstances of the parties not reasonably anticipated at the time of the agreement and the change must be one that could not have been anticipated by the parties at the time of the original decree. (R.E. 75-82.) Based upon the Court’s April 3, 2006 ruling, there is no

change in circumstances of Mr. Austin's which resulted from after-arising circumstances that he did not anticipate at the time of the original decree. Further, there was no change that could not have been anticipated by Mr. Austin, or the Court, at the time of the June 6, 2003 Final Decree.

First, as discussed in the lower Court's June 6, 2003 Decree, Mr. Austin alleges that he is suffering from a reduction of income (i.e. reduction in income, and reduction of sales and commissions), and asks the Court to modify his obligations of alimony and child support accordingly. (R.E. 30-36.) However, the Court rejected Mr. Austin's argument and did not modify his agreed upon obligations. (R.E. 36.)

Secondly, even if the Court did not fully grasp the severity of Mr. Austin's alleged loss in income at that time, based upon the facts stated in the Court's June 6, 2003 Order, the Court was well aware of and anticipated possible future arising-circumstances concerning the Appellee's loss of income. (R.E. 29-44.)

As such, based upon the decisions in *Ivison* and *Proffitt*, the lower Court applied the wrong legal standard in its April 3, 2006 Order.

CONCLUSION

For the aforementioned reasons, this Court should reverse the Trial Court's April 3, 2006 Order and order the Trial Court to enforce the provisions of the June 6, 2003 Final Decree.

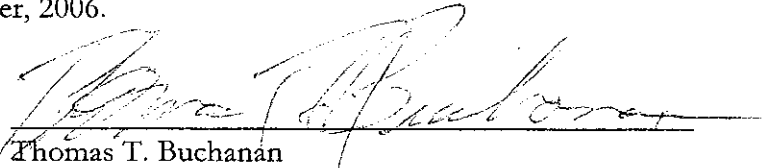
CERTIFICATE OF SERVICE

I, Thomas T. Buchanan, counsel of record for the Appellant, do hereby certify that I have this day forwarded via United States Mail, postage prepaid, a true and correct copy of the foregoing document to the following:

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Post Office Box 706
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Honorable Franklin C. McKenzie, Jr.
Chancery Court Judge, Wayne County
Post Office Box 1961
Laurel, Mississippi 39441

This the 22nd day of December, 2006.



Thomas T. Buchanan
Attorney for the Appellant