

**IN THE SUPREME COURT OF MISSISSIPPI
2006-CA-02052**

JULIE MABUS

APPELLANT

vs.

JERRY McBRIDE

APPELLEE

**APPEAL FROM THE CIRCUIT COURT
OF HINDS COUNTY, MISSISSIPPI**

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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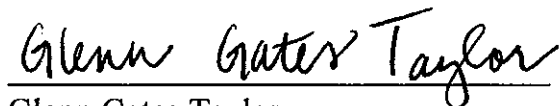
ATTORNEYS FOR JERRY McBRIDE

July 7, 2008

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 Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Julie Mabus, Appellant, Plaintiff below.
2. Felecia Perkins and Katherine Nester, trial and/or appellate attorneys for Julie Mabus.
2. Jerry McBride, Appellee, a Defendant below.
3. Glenn Gates Taylor, D. James Blackwood, Jr., Karen L. Gunn, Christy M. Sparks, attorneys with Copeland, Cook, Taylor & Bush, P.A., attorneys for Jerry McBride.
4. Robert A. Malouf, attorney for Jerry McBride.



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INTRODUCTION

This is the second appearance of this case on Julie Mabus' claim against Jerry McBride for his alleged fraudulent concealment of Ray Mabus' tape recording of a January 1998 meeting. At that meeting, Ray, her husband, confronted Julie about an affair that she was having. In 2001, Julie Mabus sued McBride and others claiming that allegedly confidential statements she made at that meeting were later used against her in her divorce case. In 2002, the circuit court denied McBride's first motion for summary judgment based on an affidavit that Julie Mabus submitted in opposition to that motion, an affidavit in which she stated:

that had she known that McBride had entered into a conspiracy with her husband to confront her, while being taped, about her affair, she would have responded differently if not refused to participate in the conversation altogether.

(emphasis added). The court held that the statement in her 2002 affidavit "was sufficient to create a genuine issue of material fact and thereby enable Julie to survive summary judgment." This Court agreed. *Mabus v. St. James Episcopal Church*, 884 So. 2d 747 (Miss. 2004). The case was remanded and the parties conducted discovery.

In 2006, when McBride finally deposed Julie Mabus, *she gave startling testimony that completely contradicted her 2002 affidavit*. First, she testified that, shortly after the January 1998 meeting began--and *well before* she made any of the statements that she claims were later used against her--"all the bells and whistles started going off," "all the pieces started fitting together," and she "realized" and knew that McBride was a "co-conspirator" with Ray,

she was “enraged” and “furious” at McBride, and she “absolutely” thought she had been “betrayed” by McBride. Second, she testified that well before she made the statements that she claims were later used against her, she figured or suspected that Ray was tape recording the meeting.

Given that testimony, McBride filed a motion for summary judgment on the grounds that Mabus could not establish all necessary elements for her fraud claim, including the reliance requirements and the requirement that McBride took some affirmative act to prevent Julie Mabus from discovering that Ray was taping the conversation. The circuit court granted the motion, noting the “about-face” in Julie’s testimony:

In that [2006] deposition, as well as in her new affidavit submitted in opposition to the instant motion, *Julie has inexplicably taken an about-face, testifying that she did suspect that McBride entered into the exact conspiracy of which she claimed ignorance four years ago, and that she figured or believed that her husband was in fact taping the subject meeting.* Most importantly, it is clearly evident, upon reviewing her deposition, her new affidavit, and all transcribed versions of the taped encounter, that Julie came to these conclusions well before making any of the remarks that she contends in this lawsuit were used against her in her divorce case.

(emphasis added).

The Court should affirm the circuit court’s dismissal of the remaining claim in this case. Julie Mabus can not make out a *prima facie* case that McBride fraudulently concealed Ray Mabus’ taping of the meeting at issue. The Court should also affirm the circuit court’s denial of Julie Mabus’ motion to reassert her breach of fiduciary duty claim.

STATEMENT OF THE ISSUES

1. Julie Mabus' 2006 deposition testimony establishes that, *well before* she made the statements that she claims were later used against her in her divorce case, ^① she viewed and perceived McBride to have betrayed her and to be a co-conspirator against her and aligned with her husband, Ray Mabus. She also ^② figured or suspected that Ray Mabus was tape recording the meeting at issue.

Did the circuit court correctly hold that Julie Mabus can not satisfy the *prima facie* requirements for her fraudulent concealment claim, particularly the reliance requirements and the requirement that McBride must have committed some affirmative act to prevent and which did prevent Mabus from discovery that her husband was taping their conversation?

2. In 2002, the circuit court entered orders that granted summary judgment in favor of all defendants on Julie Mabus' claim for breach of fiduciary duty and all of her other claim, excepting only her fraudulent concealment claim against McBride individually. The circuit court certified its order as final under M.R.C.P. 54(b), and Mabus appealed. This Court affirmed. On July 31, 2006, in the face of McBride's motion for summary judgment, Mabus filed a motion under M.R.C.P. 60(b) seeking to reinstate her claim for breach of fiduciary duty on the ground that Ray Mabus and McBride "lied" in their 2002 affidavits. The circuit court correctly denied the motion. Her effort to reinstate that claim was not timely under Rule 60(b), and it was barred by this Court's ruling in *Mabus v. St James*.

Kirk v. Pope
+ Rule
60(b)?

Did the circuit court correctly deny Julie Mabus' motion to reinstate her breach of fiduciary duty claim against McBride? Was Mabus' motion barred by this Court's decision

in *Mabus v. St. James Episcopal Church*, 884 So. 2d 747 (Miss. 2004), wherein the dismissal of that claim was affirmed? Was Mabus' motion untimely under Rule 60(b)?

STATEMENT OF THE CASE

1. Course Of Proceedings And Disposition In The Court Below

In January 2001, Julie Mabus ("Mabus") filed suit against St. James Episcopal Church ("St. James"), the Episcopal Diocese of Mississippi, Inc. (the "Diocese"), and Jerry McBride ("McBride") for alleged breach of fiduciary duty, fraudulent concealment, negligent misrepresentation, invasion of privacy, negligent infliction of emotional distress, and negligent retention/supervision, and clergy malpractice. Mabus' claims arose out of events surrounding her husband's discovery that she was having an affair, and his tape recording of a January 7, 1998 conversation with her during which McBride was present.

In May 2001, all of the defendants filed a motion to dismiss. A principal issue raised by the motions was whether the First Amendment of the United States Constitution barred the claims against St. James, the Diocese, and McBride as a priest and employee of the church. The circuit court denied that motion, this Court denied an interlocutory appeal, and the United States Supreme Court denied a petition for writ of certiorari. See *Mabus v. St. James Episcopal Church*, 884 So. 2d 747 (Miss. 2004).

Defendants subsequently filed motions for summary judgment, as a result of which the trial court granted summary judgment on all claims against all defendants, with the exception of Julie Mabus' fraudulent concealment claim against McBride individually but not as an agent or employee of St. James or the Diocese. In *Mabus v. St. James*, this Court

affirmed the circuit court, letting stand the claim for fraudulent concealment against McBride in light of the record then before it. Procedurally, this Court heard Mabus' appeal of the dismissal of all of the claims against all of the defendants (except the fraudulent concealment claim against McBride) as an appeal from a final judgment pursuant to the circuit court's entry of a Rule 54(b) certificate. *Mabus*, 884 So.2d at 752. McBride's appeal was heard as a permitted interlocutory appeal. *Id.* at 752-53.

The circuit court denied McBride's 2002 motion for summary judgment based on an October 2002 affidavit that Julie Mabus submitted in opposition to that motion. In that affidavit, she stated:

that had she known that McBride had entered into a conspiracy with her husband to confront her, while being taped, about her affair, she would have responded differently if not refused to participate in the conversation altogether.

That statement in her 2002 affidavit "was sufficient to create a genuine issue of material fact and thereby enable Julie to survive summary judgment." RE. 1 at p. 3, R. 2745 (Memo. Op. dated Oct. 9, 2006).

Mabus v. St. James was decided on a record of limited discovery by the parties. For example, Julie Mabus had never been deposed; she submitted her affidavit in opposition to defendants' motions for summary judgment. On remand, the parties engaged in extensive discovery and, for the first time in this case, Julie Mabus was deposed. Her 2006 deposition testimony—in particular, her testimony about what she thought and knew during the tape recorded meeting at issue, and when—provided the basis for McBride to file a motion for

summary judgment on July 27, 2006. RE. 4, R. 652-770. Mabus filed a response with attached exhibits. RE. 9, R. 900-2367. McBride filed a rebuttal in support of his motion. R. 2398-2406.

On July 31, 2006, Mabus filed a motion under M.R.C.P. 60(b) seeking to reinstate her claim for breach of fiduciary duty on the ground that Ray Mabus and McBride “lied” in their 2002 affidavits. R. 773-846. McBride opposed that motion. R. 847-94.

On October 9, 2006, the circuit court granted McBride’s motion for summary judgment, and denied Mabus motion to reinstate her breach of fiduciary duty claim on the grounds that it was both time-barred and barred by this Court’s ruling in *Mabus v. St James*. See Memorandum Opinion And Order Regarding Defendant McBride’s Motion For Summary Judgment, RE. 1, R. 2743-47; Memorandum Opinion And Order Denying Plaintiff’s Motion For Relief From Judgment, RE. 2, R. 2748-2751. A Final Judgment was entered on October 16, 2006. R. 2757-58. On November 8, 2006, Mabus filed her Notice Of Appeal. R. 2759-60.

2. Statement Of The Facts

A. Ray Mabus Learns That Julie Mabus Is Having An Affair

In late December 1997, Ray Mabus, a former governor of Mississippi and former U.S. Ambassador to Saudi Arabia, learned that his wife, Julie, was having an affair with one of her former college boyfriends. RE.3, R. 701-16 (Aug. 2002 Mem. Op.). In an effort to save his marriage, Ray asked McBride, who was the Rector at St. James Episcopal Church in Jackson where Ray and Julie attended church services, to be present when he confronted .

Julie about her adultery. *Id.*; RE. 6, R. 698-700 (McBride Aff. ¶ 3). Ray also asked Julie's sister, Martha, to be present for the meeting, as he hoped that McBride's and Martha's presence would influence Julie to abandon her affair, for the sake of their children if nothing else. RE. 3, R. 701-16 (Aug. 2002 Mem. Op.). During the discussion in which Ray requested McBride's presence, Ray told Jerry that his attorney had advised him to tape record the meeting. RE.6, R. 698-700 (McBride Aff. ¶ 3).

In advance of the meeting, Ray told Julie that he had been "emotionally dishonest with [her]," and that he wanted to meet with her with McBride present to discuss it. RE. 5, R. 673 (Julie Mabus Depo., p. 129). Julie later said that she suspected that Ray was going to tell her that he had contracted the AIDS virus (something there is absolutely no evidence of). *Id.*

B. The Meeting On January 7, 1998

The meeting was scheduled to occur at 9:00 a.m. on January 7, 1998 at the Mabuses' house in Jackson. Julie's sister, Martha, was not able to be present because her flight from Dallas to Jackson was cancelled due to bad weather. RE.3, R. 701-716 (Aug. 2002 Mem. Op.). McBride had advised Ray that he might be late for the meeting. RE. 7, pp. 1-2, R. 717-718 (Transcript of Jan. 7, 1998 meeting, pp. 1-2). McBride was a few minutes late because he had been at River Oaks Hospital with a couple whose infant had died earlier that morning. RE. 6 (McBride Aff. ¶ 4.) At the request of the baby's family, McBride spent the earlier part of the morning holding the deceased baby until the funeral home staff arrived. *Id.* At that point, McBride left the hospital and went directly to the Mabuses' house. *Id.* Given what he had just been through, Ray's earlier remark about his lawyer advising him to tape

record the meeting was, perhaps understandably, not something that was on McBride's mind as he entered the house. *Id.* at ¶ 5-6.

Ray recorded the conversation with Julie.¹ It is undisputed that McBride had nothing to do with the acquisition, placement, operation or concealment of any tape recorder.

Shortly after McBride arrived at the Mabuses' house, McBride explained to Julie why he was there:

Jerry: Let me tell you why I'm here.

Julie: Okay.

Jerry: I'm here because I love you and I love Ray.

Julie: Uhm-hmn.

Jerry: And you know that.

Julie: Uhm-hmn.

Jerry: Okay. That's why I'm here, that's it.

Julie: Okay.

Jerry: I'm gonna be here for both of you.

Julie: Okay.

Jerry: Regardless. None of this is fun.

¹ Two transcripts of the conversation have surfaced in this case. The transcript that Julie Mabus has referred to throughout this case and was deposited on (her Depo. Exhibit 1) appears as RE. 7, R. 717-45, and is numbered pages 1 through 29. The second transcript contains fewer references to unintelligible comments, appears as RE. 8, R. 746-70, and is numbered pages 863 through 887. We cite to and quote from the transcript that was Deposition Exhibit 1 to her deposition, RE. 7. However, we have included in brackets the missing dialogue that RE. 8 provides.

Julie: Okay.

Jerry: I just want you to know that and that, that's, that's why I'm here.

Julie: Okay.

RE. 7 (Transcript at pp. 4-5), R. 720-721.

After that exchange between Jerry and Julie, Ray confronted Julie regarding her affair:

Ray Mabus: I'd rather do anything than this. (UI) I want you to listen to the whole thing.

Julie Mabus : Okay.

Ray Mabus: Just listen.

Julie Mabus: Okay.

Ray Mabus: Okay. You've always said that I was a really good father. You've always said that I've been fair to you. I've always tried to treat you with kindness and respect [and generosity]. I've always loved you and I still do. I've always tried to [do] what's right. And whatever I've done, I've done because I think it's in our best interest and the children's best interest.

Julie Mabus: Okay.

Ray Mabus: I know all about [Jim Ely].

Julie Mabus: Okay.

Ray Mabus: *I know about 825 Webster Street, I know (UI) I know you spent the last weekend there. I know [you spent our anniversary there. I know you've been giving him money, I know you've been talking to (UI) in Memphis and LC James]. I don't wanna paint you into a corner.*

Julie Mabus: *uh-huh*

RE. 7 (Transcript at p. 5), R. 721 (emphasis added).

Thereafter, Ray enumerated for Julie three options: (1) reconcile the marriage, (2) agree to Ray's terms for a no-fault divorce, i.e., custody of the children, or (3) "go to war." *Id.* at p. 6.

C. **Julie Considered McBride To Be A Co-Conspirator**

What is particularly material to Julie Mabus' claim against McBride for fraudulent concealment is her deposition testimony regarding *how she perceived McBride and Ray immediately after Ray told her that he knew about the affair*. According to Julie, after Ray listed her first option, she responded:

A. And I said, "What's Door No. 2?" and he said, "It will be a fault divorce. You'll lose the children. You won't get anything," blah, blah, blah, blah. And I said, "Okay." *And then all the bells and whistles started going off*, and I had remembered that Jerry and Ray had been spending a good deal of time together lately at my request, because I was trying to push Ray through the divorce process, and I knew that Jerry had gone through it, because Molly had just informed Jerry the month before that she was – the month before, which was the day after they got their divorce, Molly went to tell Jerry she was marrying this guy 25 years younger than she was. And Jerry had never been able to use that information against her So these things started percolating up. *And I turned around – and all the pieces started fitting together. And I turned around to Jerry, and I said, "What are you doing here? " And he knew at that point he was caught.*

Q. Caught doing what?

A. *That I now realized at that split second that I had walked into a room with a husband and a priest and was now being faced with two coconspirators, both of whom had been cuckolded by their wives, and they were angry. And it was like I had been stabbed. I had been set up. It was all so clear. . . .*

RE. 5 (Julie Mabus Depo. at pp. 135-136), R. 674-675 (emphasis added).

The point in time when Julie Mabus says that “all the bells and whistles started going off” occurred at the bottom of page 5 of the transcript of the conversation. RE. 7 at p. 5, R.

721. At that point in the meeting, Julie Mabus had not made *any* of the statements that she claims were somehow used against her in the divorce case.

When questioned further about what were her thoughts at the time of the statements that appear at the bottom of page 5 of the transcript of the conversation R. 721), Julie explained:

Q. *Now, after you said, “Uh-huh,”* [referring to the bottom of page 5 of the transcript] why didn’t you leave?

A. Because at that point, I first wanted to see what Ray was going – what his next step was going to be.

Q. Let me stay with this point right here. I mean, at that point –

A. That’s why I didn’t leave.

* * *

Q. So, I mean, you could have – you could have just said, I’m going to see L.C.² Goodbye. You could have done it, couldn’t you?

A. I could have.

Q. But you thought that he wanted to negotiate, I guess. What did you think?

A. I wanted to see what his next step was going to be.

* * *

² The reference to “LC” is to L.C. James, the divorce attorney Julie Mabus had already contacted.

Q. But you stayed because you wanted to see what was coming next?

A. I stayed for two reasons. *Number one, I was paralyzed with rage.*

Q. *Rage at what?*

A. *At McBride.*

Q. *No, no, no. Jerry McBride hadn't said anything to this point.*

A. *He didn't have to.*

MS. PERKINS: Object to the form of the question.

BY MR. TAYLOR:

Q. *But you stayed because you were – at that point after what Ray said on page 5 and you said "Uh-huh," at that point you were enraged with Jerry McBride?*

A. *Oh, yes.*

Q. *You were furious with him?*

A. *With great passion.*

Q. *Because at that point you thought you had been betrayed by Jerry?*

A. *Absolutely.*

Q. *And you were on your guard?*

A. *At that point in time – at that point in time –*

Q. *Right there right at the bottom of page 5.*

A. *Thirty seconds before there, I was sitting in a counseling session with my husband who had AIDS, for whom I felt great compassion, and my priest comforter, and with this, all of a sudden I was facing two bitter, angry coconspirators, both of whose wives had cuckolded them, and they were conspiring against me.*

Q. *And that was going through your head at the bottom of page 5?*

A. *Yes, sir.*

Q. All right. So why didn't you get up and leave --

A. Because --

Q. -- at the bottom of page 5?

A. *-- I wanted to see where Ray was. I wanted to see -- I wanted to get as much information as I could.*

Q. About what?

A. *What he was going to do to me.*

RE. 5 (Julie Mabus Depo. at 173-176), R. 676-679 (emphasis added).

While this discussion with Ray was taking place, Julie admits that Jerry had not uttered a word:

Q. But at that point, you're sitting in the meeting -- now, to the bottom of page 6, Jerry hasn't had anything to say since Ray told you, I know all about New Orleans. Right?

A. That's right.

Q. Jerry had just been sitting there?

A. That's right.

* * *

Q. *But by the bottom of page 6, in your mind, you felt like you were sitting there looking at two men who were conspiring against you, two men you said had been cuckolded by their wives?*

A. *Yes.*

Q. *So you viewed them as coconspirators at that point?*

- A. *At that point.*
- Q. *You were enraged with Jerry at that point?*
- A. *Enraged.*
- Q. *And that's why, I take it, at the top of page 7, please, ma'am, at line 5, you turned around with this remark, "I don't understand why you're here." Was that directed to Jerry?*
- A. *I very slowly turned to the left, and I looked at him, and I said – I think I said, "Why the hell are you here? I don't understand. Why? What are you doing here?"*
- Q. But you were asking that question because at that point you were viewing him as a –
- A. – witness.
- Q. – a coconspirator?
- A. *Witness.*
- Q. *But, I mean, a coconspirator?*
- A. *Same thing.*
- Q. *As a betrayer?*
- A. *Absolutely.*
- Q. *At that point right there?*
- A. *No. It happened when Ray started reading stuff.*
- Q. *Back over on page 5?*
- A. (Nods affirmatively)
- Q. The stuff you're talking about on page 5 at line, what, 42?

A. I don't know if you've ever been in a situation like that, but what happens is things start happening, and you have to sit and be really quiet, be really still and listen until you can figure out what's happening to you.

Q. I understand, *but when Ray was reading you this statement on page 5 about I know all about New Orleans, Jim Ely, and Webster Street, it was at that point that you viewed Jerry as a coconspirator?*

A. *Absolutely.*

Q. *And as having betrayed you?*

A. *Very, very deepest level.*

RE. 5 (Julie Mabus Depo. at pp. 182-185), R. 683-686 (emphasis added).

The foregoing is clear and unequivocal testimony by Julie Mabus that by the point in time that is at the bottom of page 5 of the transcript of the conversation--*a point in time when she had not made any of the statements she claims were later used against her*--she knew she was being confronted by Ray and she perceived McBride to have betrayed her and to be Ray's co-conspirator against her.

**D. Julie Continued With The Meeting To Find Out
What Ray Knew And What Ray Was Offering**

Julie further testified that, although she knew she was being confronted by Ray and she perceived McBride as Ray's co-conspirator, she made a conscious decision not to simply get up and leave, but to stay and try to find out what Ray knew and what Ray was going to offer her:

A. Because at that point, I first wanted see what Ray was going -- what his next step was going to be.

* * *

A. I wanted to see what his next step was going to be.

* * *

A. – I wanted to see where Ray was. I wanted to see – I wanted to get as much information as I could.

Q. About what?

A. What he was going to do to me.

* * *

A. *Because I wanted to see what his offer was. I wanted to see what he wanted.* Ray works off of leverage. Nothing's clean. Nothing's straight. And so I was becoming the political ally now – the political enemy, and I wanted to see what he was – I was going to try and discern what he was going to try to do to me.

* * *

A. *Because I wanted to see what all his options were.* I was scared to death of Ray, and I wanted to learn as much information right there as I could.

Q. But you could have left?

A. *I wanted to learn as much information from him right there as I could.*

* * *

Q. *So you stayed because you wanted to hear what else he had to offer?*

A. *Yes.*

RE. 5 (Julie Mabus Depo. at pp. 173-174, 176, 178-180), R. 676-682 (emphasis added).

When Ray got to the part of his confrontation where he threatened to sue Julie's paramour, Jim Ely, (which occurred *on page 8* of the transcript of the conversation), Julie's

testimony is that Ray struck a nerve:

A. Well, he hit my nerve. He hit my heart. He hit my nerve when he starts threatening Jim. And so the protective . . . see, when he started threatening Jim, I became very protective.

Q. Why didn't you just leave?

A. Because I became very protective. Now I wanted to find out what he was going to do to Jim.

RE. 5 (Julie Mabus Depo. at p. 182), R. 683.

Once Ray struck that nerve, Julie responded:

Julie Mabus: Don't you dare hurt him, this is not his fault. It's my fault. You, you, you castrate me, you've hindquartered me, don't you f___ in touch me.

* * *

It's my fault, it's my fault, I am to blame. I am a hundred percent to blame. Don't you dare hurt him –

RE. 7 (Transcript at pp. 7-8), R. 723-724.

By **page 9** of the transcript of the conversation, both Ray and Julie had come to the agreement and realization that they would no longer be married to one another, leaving only the question of the terms of separation and custody of the children:

Q. I mean, it looks like to me by page 9 – and you correct me if I'm wrong – by page 9 y'all are both resigned that, Look, we don't want to be married to one another, but what about the children? Is that a fair statement?

A. Yes.

RE. 5 (Julie Mabus Depo. at p. 204), R. 687.

**E. Julie Admits That She Did Not
 Give McBride Any Confidential Information**

It was not until *page 10* of the transcript of the conversation--well after the point in time when Julie Mabus viewed McBride as a co-conspirator who had betrayed her and who was out to get her--that McBride and Julie had their one-on-one conversation outside of Ray's presence that Julie contends was McBride's furtherance of the alleged fraud. However, Julie admits that she did *not* give McBride any confidential information during that conversation:

Q. All right. Tell me -- we're going to go through a little exercise here, because I'm trying to find out -- with just you and Jerry in the room, what private or confidential information do you claim that Jerry got you to blab. So on the rest of page 10, while you say it was just you and Jerry in the room, tell me what private or confidential information he got out of you.

A. *It wasn't what he was successful getting out of me. It was his overt attempt to keep me in there talking.*

Q. All right.

A. *He wasn't successful.*

Q. Okay. When you say "wasn't successful," he didn't -- wasn't successful in getting you to talk?

A. Oh, he was successful in getting me to talk.

Q. *But not to say anything -- any secrets or anything?*

A. *I don't think he learned anything that he didn't already know.*

* * *

Q. All right. Let's just go through this exercise. On the rest of page 10 after Ray left the room, is there any confidential or private information that you say you gave Jerry?

A. *Well, again, there was none.*

Q. *During the whole time you and Jerry were in the room?*

A. *Correct.*

* * *

Q. Please, ma'am, I know this is difficult. I'm just trying – with the printed page that we've got here, will you please tell me what confidential information Jerry either asked you for or got out of you. That's all I'm asking.

A. *Anger, rage, and profanity. That's personal information.*

RE. 5 (Julie Mabus Depo. at pp. 216-217, 225), R. 688-689 (emphasis added). Assuming, for the sake of argument, that McBride had some ulterior motive for the one-on-one conversation (which he did not), Julie Mabus has admitted that the only thing she showed or disclosed to McBride was her “[a]nger, rage and profanity.” RE. 5 at 225.

**F. Julie Mabus Admits That She Figured Or Suspected
That Ray Mabus Was Taping The Conversation**

Julie Mabus also testified in her deposition that, at the beginning of the meeting, she “figured” or suspected that Ray was tape recording their discussions:

Q. But Ray was saying something about the language you had used on the tape –

A. Right.

Q. -- he was going to use that against you, or something like that.

A. Right. This is before. Yeah, that was before. I think they had told me it was taped, but I figured it had been.

Q. Who told you it had been taped?

A. They told me at a deposition.

Q. But you figured it had been before that, though.

A. Yes.

* * *

Q. When you left the house that day, you figured he had taped you?

A. Yes.

* * *

Q. At what point during the confrontation did you figure he was taping you?

A. I think when he went through the litany of things: You can do this, this, this, and this.

Q. When he was giving you the options?

A. And it was, like, okay.

Q. You were kind of sizing things up?

A. That's when I turned to Jerry, and I said to him –

Q. – “What are you doing here?”

A. – “What are you doing here?” Because I thought he was there in another capacity to help us through a situation with Ray.

Q. But at that point you had a suspicion Ray is taping you.

A. At some point in time 10 or 15 minutes into it, you know, yes. Yeah.



Q. *That was your – your kind of sixth sense cut in and you said –*

A. *Whoa.*

RE. 5 (Julie Mabus Depo. at pp. 408-410, R. 694-696 (emphasis added). Clearly, at the point in time that occurs at the bottom of page 5 of the transcript of that conversation—when Ray is reading his statement to her—Julie figures or suspects that Ray is taping the meeting.

G. Julie Mabus' August 2006 Affidavit

In opposition to McBride's motion, Julie Mabus filed an August 2006 affidavit. RE. 10, R. 2354-2367. That affidavit underscores two now undisputed facts: (1) *well before* Julie Mabus made the statements that she claims were used against her in her divorce case, she considered that McBride had betrayed her and was conspiring with Ray to get her; and (2) she thought or suspected that Ray was taping the meeting.

In her 2006 affidavit³, Mabus re-plows her deposition testimony about what she was thinking and how she perceived McBride during the period of time between the point in time that occurred at the bottom of page 5 of the transcript and the top of page 7 when she turned to McBride and stated, "I don't understand why you're here." In paragraph 4 of her affidavit, she states in relevant part:

A. Rev. McBride walked in the door, a little rattled and a little preoccupied. I was greatly relieved to see him. We chit chat a bit, Rev. McBride made his statement about

³ We note the rule of law that a "nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony." *Rod v. Home Depot USA, Inc.*, 931 So. 2d 692, 696 (Miss. App. 2006).

why he was there⁴, and then Ray began to read from a piece of paper.⁵

- B. I heard words come out of Ray's mouth, and I felt like I was in a dream. It slowly began to sink in that Ray was confronting me. * * *
- C. And then, as I sat there and listened to those threatening words, my thoughts turned to Rev. McBride-my mentor, my protector-my safety net-and I slowly turned around and faced him. He was just sitting there, sort of nodding his head, and acting not at all surprised at what Ray was saying. *And at that horrible moment, it dawned on me-REV. MCBRIDE KNEW.* I was suddenly faced with the horrific knowledge that my priest had known in advance what was going to happen at that meeting and he had not told me. Rev. McBride had listened to Ray, Ray had told Rev. McBride about Jim, Ray had told Rev. McBride that he wanted to confront me-and Rev. McBride, my close friend and mentor and priest, had not warned me-he had allowed me to walk into this meeting without any warning. *Then I began to put the pieces together*
- D. At 15 minutes and 30 seconds into the meeting, when it hit me that Rev. McBride knew everything, I turned to Rev. McBride and I said, "I don't understand why you are here."⁶ *It was at that point, and not a second before that point that Rev. McBride became a co-conspirator to me.*

RE. 10 at pp. 6-7, R. 2359-60 (emphasis added).

That affidavit version of how Julie Mabus perceived McBride, and when, contradicts

⁴ Transcript, bottom of p. 4, top of p. 5.

⁵ Transcript, midway on p. 5.

⁶ Transcript, top of p. 7.

her deposition testimony in which she repeatedly and unequivocally stated that the point in time when she viewed McBride to be a co-conspirator against her occurred at the bottom of page 5 of the transcript, not the top of page 7. Nevertheless, not even her new point in time for perceiving McBride to be a co-conspirator against her helps her because that even point in time is still well before she made any of the statements that she claims were used against her in her divorce case. Between the point on page 5 when Ray began reading his statement about what he knew and the top of page 7 when Julie turned to McBride and stated, "I don't understand why you're here," the only statements that Julie made were non-substantive and non-incriminating ("Okay" and "uh-huh").

Julie Mabus' 2006 affidavit also attempts to contradict her deposition testimony about knowing or suspecting that Ray was recording the meeting. In her affidavit, she acknowledges that at the point when she asked McBride, "I don't understand why you're here," that "I thought for a second that maybe, just maybe Ray was taping the meeting. But I quickly dismissed the idea of the tape and understandably so." RE. 10 at p. 9, R. 2362. In her deposition, however, she said nothing about dismissing her suspicion that Ray was taping the discussion:

Q. *At what point during the confrontation did you figure he was taping you?*

A. *I think when he went through the litany of things: You can do this, this, this, and this.*

Q. When he was giving you the options?

A. And it was, like, okay.

Q. You were kind of sizing things up?

A. That's when I turned to Jerry, and I said to him –

Q. – “What are you doing here?”

A. –“What are you doing here?” Because I thought he was there in another capacity to help us through a situation with Ray.

Q. *But at that point you had a suspicion Ray is taping you.*

A. *At some point in time 10 or 15 minutes into it, you know, yes. Yeah.*

Q. *That was your – your kind of sixth sense cut in and you said –*

A. *Whoa.*

RE. 5 (Julie Mabus Depo. at pp. 408-410), R. 694-96 (emphasis added).

SUMMARY OF THE ARGUMENT

1. The Claim For Fraudulent Concealment

Under Mississippi law, Julie Mabus can not make out a *prima facie* case for fraudulent concealment by McBride, because she can not prove by clear and convincing evidence any of the “reliance elements” of her claim, including that she relied on McBride’s silence, or that she had a right to rely on his silence. What overwhelms her claim is the complete about-face in her testimony. In her 2002 affidavit, Julie Mabus swore:

can't prove reliance

that had she known that McBride had entered into a conspiracy with her husband to confront her, while being taped, about her affair, she would have responded differently if not refused to participate in the conversation altogether.

Yet, in her 2006 deposition, she testified repeatedly and unequivocally that, as soon as Ray told her he knew about the affair (which occurred at the point in time that is at the bottom of

page 5 of the transcript of that conversation), the “bells and whistles” went off in her head, “all the pieces started fitting together,” she immediately viewed and perceived McBride as a “betrayor” and a “co-conspirator” with Ray Mabus, and that she “realized at that split second that [she] had walked into a room with a husband and a priest and was now being faced with two coconspirators, both of whom had been cuckolded by their wives, and they were angry.” Because by the bottom of page 5 of the transcript of that conversation, Julie viewed McBride as a “co-conspirator,” a “witness,” and as someone who had betrayed her at the “[v]ery, very deepest level,” it is clear that as a matter of law Julie did not rely on McBride, either through action or omission, or that she had any right to rely on McBride through action or omission. She cannot satisfy any of the reliance requirements for a fraud claim.

*figured
or
suspected*

Further, it is clear from her testimony that at the point in time that is at the bottom of page 5 of the transcript of the conversation, Julie Mabus “figured” or suspected that Ray Mabus was taping the conversation. Although she admits that she thought that Ray was taping her, and that she viewed Ray and McBride to be co-conspirators, she testified that she made the conscious decision not to leave, but to stay in the meeting and voluntarily participate in the conversation in an effort to learn what Ray knew and what kind of property settlement Ray was going to offer her.

Given those undisputed facts, Julie Mabus can not establish three of the several requirements of her fraud claim: (1) that she relied on McBride or had any right to rely on him; (2) that McBride’s silence was material (she figured or suspected that Ray was taping

her); (3) that she was unaware of the falsity of that omission (again, she figured or suspected that she was being taped); and (4) a consequent and proximate injury (she voluntarily continued with the meeting).

Additionally, Julie Mabus has not come forward with any evidence of an affirmative act of concealment by McBride. There are two circumstances in which a party is under a duty to speak: first, when one party stands in a fiduciary relationship with the other; second, when one party actively participates *in the concealment* of facts that a plaintiff claims should have been disclosed. "An affirmative act of concealment is necessary." *Mabus v. St. James Episcopal Church*, 884 So. 2d 747, 763 (Miss. 2004). This Court has already ruled that there was no fiduciary relationship between McBride and Julie. Thus, the question is whether there is any evidence that McBride engaged in an affirmative act of concealment.

no
aff.
act
of
concealment

While it is true that McBride was present when Ray confronted Julie, and that he was a participant in the conversation that followed, it is undisputed that McBride did not have any involvement in obtaining, placing, operating or concealing the existence of a tape recorder from Julie (a tape recorder that Julie assumed Ray had). Because there is no "affirmative act of concealment" of the existence of a tape recorder on McBride's part, he was not under any legal duty to tell Julie that Ray might be taping their conversation.

2. The Motion To Reinstate The Claim For Breach Of Fiduciary Duty

The circuit court correctly denied Julie Mabus' motion to reinstate her breach of fiduciary duty claim. That claim was adjudicated to be without merit by a final, appealable order of the circuit court entered under M.R.C.P. 54(b), and that decision was affirmed by

had earlier depositions in hand

this Court. Additionally, Mabus' motion was not timely under M.R.C.P. 60(b). Among other facts, at the time of the circuit court's 2002 ruling that dismissed her breach of fiduciary duty claim, Julie Mabus had in hand the 1998 deposition testimony of Ray Mabus and the 2000 deposition testimony of McBride. If she wanted to make the argument that either or both of them were lying in their 2002 affidavits, she should have done so then. Instead, she waited until after McBride filed his July 2006 motion for summary judgment--when she knew that the outcome of her fraudulent concealment claim looked rather bleak--to first raise the accusation. Her motion was both barred by the Court's decision in *Mabus v. St. James*, and it was not timely under Rule 60(b).

ARGUMENT

1. The Standard Of Review

We agree that the circuit court's grant of summary judgment is reviewed *de novo* by this Court. M.R.C.P. 56 requires a trial courts to grant summary judgment where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c); *Holiday v. Pizza Inn, Inc.*, 659 So. 2d 860, 864 (Miss. 1995). The burden of establishing no genuine issue of material fact rests with the movant, but the movant's burden is only a burden of production and persuasion, and not of proof. Once that burden has been met, the non-moving party, here Julie, must go beyond the pleadings and designate specific facts showing that there is a genuine issue of material fact for resolution at trial. *Celotex Corp. v. Catrett*, 477

U.S. 317, 324 (1986). *See also Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 683 (Miss. 1987); *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 364 (Miss. 1983). In other words, in order to prevent summary judgment, Julie Mabus has the burden of establishing that a genuine issue of material fact does, in fact, exist by means allowable under Rule 56. *Yowell v. James Harkins Builder, Inc.*, 645 So. 2d 1340, 1343 (Miss. 1994).

Not every factual issue will defeat a motion for summary judgment. To justify denial of a summary judgment motion, there must be an issue of *material fact*, *i.e.*, a fact essential to the claim at issue. *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985); *Vickers v. First Mississippi Nat'l Bank*, 458 So. 2d 1055, 1061 (Miss. 1984). Thus, the existence of a hundred contested issues of fact will not thwart summary judgment where none of them are material. *Grisham v. John Q. Long V.F.W. Post, No. 457, Inc.*, 519 So. 2d 413, 415 (Miss. 1988).

2. Julie Mabus Can Not Prove The Elements Of Her Fraud Claim

Under Mississippi law, in order to prevail on a claim for fraud, whether by commission or omission, a plaintiff is required to prove by clear and convincing evidence:

- (1) a representation;
- (2) its falsity;
- (3) its materiality;
- (4) the speaker's knowledge of its falsity or ignorance of the truth;
- (5) the speaker's intent that it should be acted on by the hearer and in the manner reasonably contemplated;

- (6) the hearer's ignorance of its falsity;
- (7) *the hearer's reliance on its truth;*
- (8) *the hearer's right to rely thereon;* and
- (9) the hearer's consequent and proximate injury.

See, e.g., *Mabus*, 884 So. 2d at 762 (citing *Franklin v. Lovitt Equip. Co.*, 420 So.2d 1370, 1373 (Miss. 1982)).

An omission or concealment of a material fact may constitute a misrepresentation, just as can a positive, direct assertion. *Davidson v. Rogers*, 431 So. 2d 483, 485 (Miss. 1983). However, to prove fraudulent concealment, the plaintiff is required to prove that the defendant took some action, affirmative in nature, which was designed or intended to prevent and which did prevent the discovery of the facts giving rise to the fraud claim. *Ezell v. Robbins*, 533 So. 2d 457, 461 (Miss. 1988) (citing *Davidson*, 431 So. 2d at 485). "An affirmative act of concealment is necessary." *Mabus*, 884 So. 2d at 762. The Restatement (Second) of Torts explains:

One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.

Restatement (Second) of Torts § 550. Accordingly, concealment of a material fact is the legal equivalent of a misrepresentation. *U.S. Fidelity & Guar. Co. v. Rice*, 130 So. 2d 924 (Miss. 1961).

“To be remediable, a representation must have been of such a nature and made under such circumstances that the injured party had a right to rely on it.” 37 C.J.S. *Fraud* § 41. A speaker does not have a right to rely on a representation where the hearer knows the statements are false based on the hearer’s own investigation. The Restatement (Second) of Torts instructs that:

The maker of a fraudulent misrepresentation is not liable to another whose decision to engage in the transaction that the representation was designed to induce is not caused by [her] belief in the truth of the representation but is the result of an independent investigation by [her].

Restatement (Second) of Torts § 547.

The principles set forth above are illustrated in Mississippi case law in *Franklin v. Lovitt Equip. Co., Inc.*, 420 So. 2d 1370 (Miss. 1982). In that case, the plaintiff filed a fraud action alleging that a tractor salesperson intentionally misled him as to the age of a John Deere front-end loader. The court concluded that, although the salesperson may have provided the plaintiff with the incorrect year model, the plaintiff did not rely on that representation in making the purchase. *Id.* at 1373. Rather, the plaintiff chose to purchase the machinery only after he took the loader home for a two-week trial period, during which the plaintiff concluded the performance was satisfactory. Accordingly, the court affirmed the lower court’s conclusion that the plaintiff failed to establish *the reliance element* of his fraud claim. *See also In re Mercer*, 246 F.3d 391, 417 (5th Cir. 2001) (where hearer knows facts that would make it impossible for speaker to carry out intention, hearer cannot justifiably rely on stated intention).

The court reached a similar conclusion in *Rankin v. Brokman*, 502 So. 2d 644 (Miss. 1987). There, the owner of a lot and accompanying motor home, who was a 66-year old widow with a fourth grade education ("Brokman"), requested the assistance of an acquaintance ("Rankin") to negotiate on her behalf with a local bank in an effort to get the bank to agree to forbear foreclosure on her property. 502 So. 2d at 645. In the process of doing so, Rankin presented Brokman with a warranty deed and bill of sale conveying the lot and mobile home to Rankin, which Brokman signed. *Id.* Thereafter, Rankin collected \$225 from Brokman. *Id.* In the litigation that followed, Brokman claimed the \$225 as to be given to the bank to pay her own indebtedness; Rankin claimed the \$225 was a rental fee. *Id.*

Brokman sued Rankin seeking to cancel the deed and bill of sale on the grounds that her signature was obtained through fraudulent misrepresentation. *Id.* at 646. The lower court denied a motion to dismiss filed by Rankin. 502 So. 2d at 646. On appeal, the Court reversed, in part, on the grounds that, although she had only a fourth-grade education, she could read and write, and therefore *could not justifiably rely* on any alleged oral representations regarding what was the true nature of the warranty deed and bill of sale that she was signing. *Id.*

As in *Franklin* and *Rankin*, Julie Mabus did not rely on nor did she have a right to rely on McBride's silence about Ray's taping of the meeting. In no uncertain terms, Julie has admitted that *well before* she made any of the statements that she claims were later used against her in her divorce, her perception was that she was "facing two bitter angry co-conspirators, both of whose wives had cuckolded them, and they were conspiring against

me.” By the bottom of page 5 of the transcript of the conversation, Julie viewed McBride as a “co-conspirator” and a “witness,” and she believed that McBride had betrayed her at the “[v]ery, very deepest level.” “[I]t was like I had been stabbed. I had been set up. It was all so clear. . . .” Based on her own testimony, by the point in time that occurred at the bottom of page 5 of the transcript of the conversation, McBride was not someone upon whom Julie relied, or had a right to rely.

Then there is the impact of Julie’s testimony that she figured or suspected that Ray was tape recording the conversation – not as an afterthought to her tirade – but at the *very time* Ray began enumerating her options for a divorce. RE. 5 (Julie Mabus Depo. at pp. 408-410.) Moreover, after she says that she came to the realization that (1) McBride as a co-conspirator and (2) Ray was taping her, she testified that she made a conscious decision *not* to leave, but to stay in the meeting in an effort to determine what Ray knew and what Ray was going to offer her in the forthcoming divorce, property dispute, and custody battle. “[B]ecause at that point, I first wanted to see what Ray was going -- what his next step was going to be. . . [b]ecause *I wanted to see what his offer was. I wanted to see what he wanted.*” RE. 5 (Julie Mabus Depo. at 173-180) (emphasis added). It was only *after* Julie made that decision that McBride and Julie had their one-on-one conversation during which Julie has admitted McBride neither asked for nor obtained any confidential information.

Accepting Julie’s deposition testimony, there is no basis upon which a reasonable juror could conclude that she relied, or had a right to rely, on McBride’s inability, failure or refusal to tell her that Ray might be recording their conversation.

3. Julie Mabus Can Not Prove The Materiality, Ignorance Of Falsity, And Consequent And Proximate Injury Elements Of Her Fraud Claim

In order to prevail on her fraud claim, Julie Mabus is also required to prove by clear and convincing evidence that (1) McBride's silence was material, (2) she was ignorant of the falsity of McBride's silence, and (3) she suffered a consequent and proximate injury as a result of McBride's silence. *Mabus*, 884 So. 2d at 762-63. Again, her deposition testimony disposes of her fraud claim.

She has admitted that at the point in time that is the bottom of page 5 of the transcript of the conversation--well before she made the statements that she claims were later used against her--she "figured" or suspected that Ray was taping the conversation. (Julie Mabus Depo. at pp. 408-410). Despite that and the fact that she viewed and perceived Ray and McBride as two cuckolded husbands who were conspiring against her, she consciously decided not to leave, but to stay in the meeting and voluntarily participate in the conversation, so that she could gauge what her future ex-husband's posture and strategy would be in the ensuing divorce, property and custody battle. Simply put, curiosity got the better of her--she wanted to know, what did Ray know, and what Ray was going to offer her.

Thus, in the context of the elements that Julie is required to prove, McBride's silence about Ray taping the meeting-- when Julie figured or suspected that Ray was doing exactly that-- is not material, because Julie made the conscious decision to stay in the meeting and negotiate with Ray *after* she figured or suspected that Ray was recording the conversation. Likewise, it is not possible for Julie to contend that she was ignorant of the falsity of

McBride's omission (that Ray might be taping the conversation) because she has admitted that, when Ray began enumerating her options for a divorce (at the bottom of page 5 of the transcript of the conversation), she assumed she was being taped.

Finally, McBride's failure to tell Julie Mabus that Ray might be taping the conversation could not have resulted in a consequent and proximate injury to her, when Julie figured or suspected from the bottom of page 5 of the transcript forward that Ray was recording the conversation.

Stated most simply, it is not possible to deduce how Julie was defrauded by McBride's failure to tell her that Ray might be taping her, when she figured or suspected that Ray was doing just that. Thus, in addition to not being able to satisfy the reliance elements, Julie can not establish the materiality, ignorance of falsity, and consequent and proximate injury elements of her fraud claim.

4. There Is No Evidence That McBride Committed An Affirmative Act Of Concealment

There are two circumstances in which a party is under a duty to speak. One such circumstance is when one party stands in a fiduciary relationship with the other. The other is when one party actively participates *in the concealment* of facts that a plaintiff claims should have been disclosed. Under that scenario, "[a]n affirmative act of concealment is necessary." *Mabus*, 884 So. 2d at 763. In the statute of limitations context, the Court of Appeals has told that "[t]o establish fraudulent concealment, the asserting party must show some act or conduct of an affirmative nature designed to prevent discovery of the claim."

Baldwin v. Holliman, 913 So. 2d 400, 409 (Miss. Ct. App. 2005) (citing *Reich v. Jesco, Inc.*, 526 So. 2d 550, 553 (Miss. 1988)). “That conduct, designed to prevent discovery of the claim, must actually prevent discovery of the claim.” *Id.* at 409 (emphasis added).

The commentators further tell us that an affirmative act of concealment requires more than mere silence or a mere failure to disclose known facts. 37 Am. Jur. 2d *Fraud and Deceit* § 203. “Active concealment of the truth” as an element of fraud, where there is no affirmative misrepresentation by a defendant, connotes steps taken by the defendant to hide the true state of affairs from the plaintiff. *Id.* (citing *Kezer v. Mark Stimson Assoc.*, 742 A.2d 898 (Me. 1999)).

In this case, there has never been any allegation, much less any evidence, that McBride took any affirmative steps to purchase, place, operate or conceal the existence of any tape recorder. McBride played no part in recording the meeting, and took no affirmative steps to conceal the existence of any tape recorders.

Didn't he indicate it was confidential?

After volumes of depositions and thousands of documents, there is absolutely no evidence in this case that McBride committed the *necessary* “affirmative act of conceal[ing]” that Ray was recording the January 7, 1998 meeting. Accordingly, Julie does not have a viable claim for fraudulent concealment, and in the alternative to the grounds cited above, the Court should grant summary judgment in favor of Jerry.

**5. The Circuit Court Correctly Denied Julie Mabus’
Motion To Reassert Her Claim For Breach Of Fiduciary Duty**

The circuit court correctly denied Julie Mabus’ motion to reassert her breach of

fiduciary duty claim. That claim was adjudicated to be without merit by a final, appealable order of the circuit court entered under M.R.C.P. 54(b), and that decision was affirmed by this Court. Additionally, Mabus' motion was not timely under M.R.C.P. 60(b).

The alleged factual basis for her July 2006 motion was her allegation that in their 2002 affidavits filed in this case, Ray Mabus and McBride lied about the January 1998 meeting not being a "marital counseling session." In support of that accusation, Julie Mabus relied on Ray Mabus' 1998 deposition testimony and McBride's 2000 deposition testimony, both in the Mabus divorce case. R. 773-780.

Julie Mabus, of course, knew about and had all of that testimony at the time that she opposed the 2002 motion for summary judgment on her breach of fiduciary duty claim. If she wanted to make the argument that either or both of them were lying in their 2002 affidavits, she had to do so then, not four years later. Instead, she waited until after McBride filed his July 2006 motion for summary judgment--when she was obviously concerned about being able to survive summary judgment on that claim--to first raise the accusation. Her motion was both barred by the Court's decision in *Mabus v. St. James*, and by the passage of time.

A. Her Motion Is Barred By Res Judicata and/or Law Of The Case

Julie Mabus' motion to reassert her breach of fiduciary duty claim is barred by the doctrine of res judicata and/or by the law of the case doctrine. The doctrine of "res judicata applies to bar an action where the parties or their privies have previously litigated a legal claim to a final judgment." *Johnson v. Howell*, 592 So. 2d 998, 1002 (Miss. 1991).

Moreover, res judicata prohibits litigation in a second action of the same claims or defenses that were *previously available* to the parties in the first action regardless of whether they were raised or decided in the prior proceedings. *Dunaway v. W. H. Hopper Assocs., Inc.*, 422 So. 2d 749, 751 (Miss. 1982).

Under Mississippi law, four identities must be satisfied in order to establish res judicata: “(1) identity of the subject matter of the actions; (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.” *Black v. City of Tupelo*, 853 So. 2d 1221, 1225 (Miss. 2003). If these four identities are present, all claims which have been or should have been litigated in a prior lawsuit are barred from relitigation. *Hogan v. Buckingham*, 730 So. 2d 15, 17 (Miss. 1998). Finally, “a party may not elude the bar of res judicata by alleging a new legal theory of recovery in a second lawsuit where the underlying facts and circumstances are the same as those involved in the first lawsuit.” *Bullock v. Resolution Trust Corp.*, 918 F. Supp. 1001, 1009 (S.D. Miss. 1995) (citing *Walton v. Bourgeois*, 512 So. 2d 698, 702 (Miss. 1987)).

The law of the case doctrine provides that “[w]hatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, so long as there is a similarity of facts.” *Florida Gas Exploration Co. v. J. C. Searcy*, 385 So. 2d 1293, 1295 (Miss. 1980).

B. Her Motion Was Not Timely Under Rule 60(b)

Under M.R.C.P. 60(b)(1), a party may seek relief as a result of acts of “fraud by an adverse party,” if that relief is requested “within a reasonable time,” but “not more than six

months” after the entry of the judgment. In circumstances of “fraud upon the court,” a party is not constrained by the six month time limitation; however, any motion for relief from a judgment must still be filed “within a reasonable time.” Mississippi law clearly holds that allegations of perjury “are in the nature of claims of fraud against a party . . . rather than . . . fraud upon the court.” *Brown v. Estate of Johnson*, 822 So. 2d 1072, 1073 (Miss. Ct. App. 2002). Therefore, Julie Mabus’ motion is governed by Rule 60(b)(1), and was required to be filed “not more than six months” after entry of the judgment. Her motion, however, was not filed until *almost four years after the entry of the Court’s judgment*, which was not “within a reasonable time.”

In *Brown v. Estate of Johnson*, 822 So. 2d 1072, 1073 (Miss. Ct. App. 2002), a former wife filed suit against her ex-husband’s estate and her ex-husband’s second wife to set aside a divorce judgment on the grounds that the husband allegedly committed perjury in disclosing his assets during the divorce trial. The former wife sought relief from the judgment two and a half years after it was entered, alleging that the perjury constituted fraud upon the court. The Mississippi Court of Appeals rejected the former wife’s argument:

Brown’s argument fails to note the distinction between an alleged “fraud . . . of an adverse party” and a “fraud upon the court” as the two are set out in Rule 60. *The two concepts are not interchangeable.* Fraud on the court (other than fraud as to jurisdiction) is fraud *which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements, or perjury.* It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court. It is thus fraud where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial

function – thus where the impartial functions of the court have been directly corrupted.

Id. at 1073 (citing *Bulloch v. U.S.*, 763 F.2d 115, 1121 (10th Cir. 1985)) (emphasis added).

Reasoning that the former wife's allegations of perjury were "in the nature of claims of fraud against a party to the proceeding rather than the kind of fundamental interference with the administration of the justice system that would amount to the more serious and more narrowly defined fraud upon the court," the court held that the former wife's request for relief from the judgment was governed by Miss. R. Civ. P. 60(b)(1). Because the former wife did not seek relief from the judgment within six months of the judgment as required by Rule 60(b)(1), the court concluded that the former wife's claim was time-barred.

As in *Brown*, Julie Mabus does not allege impropriety by the court or fraud in connection with the administration of the justice system. Rather, as in *Brown*, she is alleging perjury by an adverse party, which falls within Rule 60(b)(1) as an allegation of fraud by an adverse party. Consequently, she was required to file her motion not more than six months after entry the Court's Memorandum Opinion, on August 21, 2002. Waiting until July 2006 to file the motion is waiting too late.

Even if Julie's allegations were considered fraud upon the court, Rule 60(b) still required her to seek relief "within a reasonable time." Julie has been in possession of the deposition transcripts that she contends contain perjured testimony since before she even filed this lawsuit, and she had possession of those transcripts throughout the initial briefing on her breach of fiduciary duty in this court, as well as at the appellate level. Under these

circumstances, four years after the court entered its judgment is not “within a reasonable time.”

C. In Any Event, It Is Undisputed That The January 1998 Meeting Was Not A Marital Counseling Session

Both Ray Mabus and McBride have consistently stated that the January 1998 meeting was not a marital counseling session. The Court itself agreed in its 2004 decision:

The transcript does not reveal marital counseling by McBride, but rather a confrontation initiated by Ray in an effort to get his wife to admit to an adulterous affair. The wife, reacting to being “backed into a corner,” lashed out at times and at other times pleaded that her husband not take the children away from her. Other than the fact that the third person present was a priest, there is no indication of any spiritual or other counseling occurring. * * *

The evidence presented reveals that Julie was not dependent upon McBride, nor that she reposed any trust or confidence in him.

Additionally, when reviewing the transcript of the meeting as well as the entire record, there is equally no doubt that Julie has failed to prove the existence of a fiduciary relationship between McBride and her.

Mabus, 884 So. 2d at 755, 759, 761.

CONCLUSION

The Court should affirm the circuit court's dismissal of Julie Mabus's claim for fraudulent concealment, and the denial of her motion to reinstate her claim for breach of fiduciary duty.

This the 7th day of July, 2008.

Respectfully submitted,

JERRY MCBRIDE

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ATTORNEYS FOR JERRY McBRIDE

CERTIFICATE OF SERVICE

I, Glenn Gates Taylor, do hereby certify that I have served, via First Class U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

Felecia Perkins, Esq.
Law Office of Felecia Perkins, P.A.
Post Office Box 21
Jackson, MS 39205-0021

This the 7th day of July, 2008.



Glenn Gates Taylor

**IN THE SUPREME COURT OF MISSISSIPPI
2006-CA-02052**

JULIE MABUS

APPELLANT

vs.

JERRY McBRIDE

APPELLEE

CERTIFICATE OF SERVICE



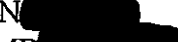

I, Glenn Gates Taylor, do hereby certify that I have this date served, via Hand Delivery, a true and correct copy of the following to The Honorable Bobby Delaughter, Hinds County Circuit Court Judge, at the Hinds County Courthouse, 127 West Main Street, Raymond, MS 39154.


This the 8th day of July, 2008.

Respectfully submitted,

JERRY McBRIDE

By: 

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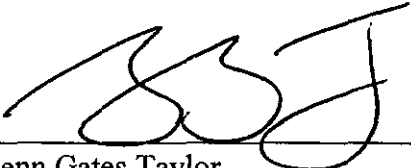
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This the 8th day of July, 2008.


Glenn Gates Taylor