

IN THE SUPREME COURT OF MISSISSIPPI

2006-CA-02052

JULIE MABUS

Appellant

v.

JERRY MCBRIDE

Appellee

BRIEF OF APPELLANT

On Appeal from the Circuit Court of Hinds County, Mississippi

ORAL ARGUMENT REQUESTED

FELECIA PERKINS, ESQ.

Mississippi Bar Number [REDACTED]

LAW OFFICE OF FELECIA PERKINS, P.A.

Post Office Box 21

Jackson, Mississippi 39205-0021

Office: (601) 352-5053

Fax: (601) 355-0173

Counsel for Julie Mabus

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

Julie Mabus
Plaintiff/Appellant

St. James Episcopal Church
Defendant/Appellee

Episcopal Diocese of Mississippi
Defendant/Appellee

Jerry McBride
Defendant/Appellant

Katherine Nester
Trial counsel for Julie Mabus

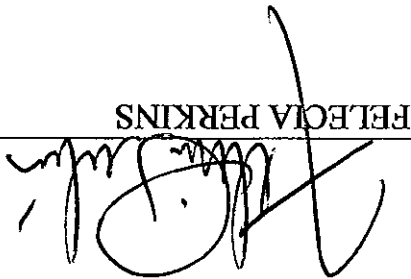
Felecia Perkins
Trial/appellate counsel for Julie Mabus

Glenn Gates Taylor
Karen L. Gunn
Trial/appellate counsel for Jerry McBride

Robert A. Malouf
Trial counsel for Jerry McBride

Breland Hilburn
Bobby Delaughter
Hinds County Circuit Court Judges

SO CERTIFIED BY ME, this the 2nd day of April, 2008.



FELICIA PERKINS

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STATEMENT OF THE ISSUES

1. **The trial court erred in granting summary judgment for Jerry McBride. In granting summary judgment, the court confused the elements of a fraudulent concealment claim with fraudulent concealment used to excuse non-compliance with the statute of limitations.**
2. **The trial court erred in refusing to reinstate the breach of a fiduciary duty claim after it was revealed that the affidavits by Ray Mabus and McBride used to support summary judgment on that claim were lies.**

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Miss.R.App.P. 34(a), Appellant requests oral argument in this case.

Given the twenty-volume record, the facts are somewhat complicated.

STATEMENT OF THE CASE

Statement of the facts:

Julie and Ray Mabus were married in 1987. By 1997, the marriage had broken down. Ray Mabus suspected that Julie was cheating on him and set up a plan to catch her confession on tape. He told Julie that he wanted to meet with her and their pastor, Reverend Jerry McBride, to discuss the marriage.

McBride was the pastor at St. James Episcopal Church in Jackson. Both St. James and Jerry McBride were very important in Julie's life. Julie's parents were founding members of the Church (CP. 1980) and Julie had been active in the Church her entire life. For the five years that Julie's mother was sick before her death from cancer in 1986, McBride ministered to Julie and her father. CP. 936. Before Julie and Ray were married, they had several counseling sessions with McBride. CP. 937, 2001. (Premarital counseling was a requirement for marriage in the Episcopal Church. CP. 938.). McBride baptized the two Mabus daughters. CP. 942. Throughout her marriage to Ray, but particularly after Ray Mabus lost his reelection bid for governor, Julie would talk through issues with McBride – McBride acting as a professional counselor and her priest. CP. 943.

In the summer of 1997, Julie, increasingly unhappy in the marriage, told Ray that she wanted a divorce. CP. 948. Ray's response was that there could be no divorce for at least two years because he wanted to run for governor again. CP. 951. When Julie

warned Ray that she would end up hurting him, he replied, "we're going to do a don't ask, don't tell." CP. 951. Thereafter, Julie began having an affair with a man she knew from college.. CP. 952.

In January 1998, Ray called Julie and told her that he may have been emotionally dishonest with her and that he wanted to meet with Julie to talk. He wanted McBride to be there with them. CP. 956. It was Julie's understanding that McBride would be there in his position as priest/counsel. CP. 956. In fact, Ray told Julie that "We need your priest here." CP. 957. Unbeknownst to Julie, Ray had met with McBride and told him that he would be taping their meeting without Julie's knowledge. CP. 1059, 1976, 1982.

When McBride was deposed about that meeting, he was asked what Ray Mabus told him when he met with him prior to their meeting with Julie. Before answering that question, McBride stated, "He's going to have to waive that privilege for me to be able to" CP. 1980 . Since Ray Mabus was at McBride's deposition, Ray's lawyer then asked Ray whether he was willing to waive any privilege that he might have with regard to discussions he had with his priest, Jerry McBride. CP. 1980. The lawyers then agreed that all privileges would be waived. CP. 1980. According to McBride, he was there in his capacity as a preacher who had known Julie for 20 years and he was trying to save her marriage. CP. 1982.

At the meeting, Ray told Julie that he knew she was having an affair and that she had to break it off otherwise he would file for a divorce blaming her for the breakup of their marriage. CP. 957. During the discussion, "Julie expressed confusion as to why

McBride was present.” *Mabus. v. St. James Episcopal Church*, 884 So.2d 747, 752

(Miss. 2004).

McBride responded at times that he was there for Ray and at other times for both of them. Julie was combative and used profanity during the course of this confrontation and likewise begged and pleaded for custody of her children.

Id. When Julie asked McBride why he couldn't have called one of her women friends to be at Julie's side during the meeting, McBride stated, “Julie, I had no right to call anybody, that would have broken a confidence.” CP. 796.

The tape of that day's meeting was transcribed and used by Ray Mabus's expert who testified that custody of the couple's two children should be with Ray Mabus and not Julie. Julie also suffered considerable emotional distress after realizing she had been so thoroughly betrayed by her priest.

Statement of the case:

Mabus filed her complaint against the Church, the Diocese and Jerry McBride on January 15, 2001, and an amended complaint two months later. CP. 906. The complaint included claims of breach of fiduciary duty, fraudulent concealment, invasion of privacy, negligent infliction of emotional distress and negligent supervision. CP. 906. On August 21, 2002, the trial court granted summary judgment on all of the claims against the Church and the Diocese and all but one claim against Jerry McBride. The Mississippi Supreme Court affirmed the grant of summary judgment that took out all the claims against the Church and the Diocese. *Mabus v. St James Episcopal Church*, 884

So.2d 747 (Miss. 2004). In that opinion, the Mississippi Supreme Court also affirmed denial of summary judgment for Jerry McBride on the fraudulent concealment claim and sent the case back for trial on the single claim. *Mabus*, 884 So. 2d at 763.

McBride filed another motion for summary judgment in July 2006. CP. 652. Judge Bobby DeLaughter granted that motion in October 2006 (CP. 2743; RE. 24) and entered final judgment. (CP. 2757; RE. 33). It is from that order as well as an order denying reinstatement of Julie's claim for breach of fiduciary duty (CP. 2748; RE. 29) that Julie Mabus brings the present appeal.

Appeals
1) Order for summary to McBride
2) order denying the reinstatement of her claim of fid. duty

SUMMARY OF ARGUMENT

Julie Mabus's claim against McBride was dismissed after Julie testified that she suspected, during the meeting, that McBride was taking Ray Mabus's side against her in the divorce. She was never told by McBride or Ray Mabus, though, that the meeting was being taped for use in the Mabus divorce. In fact, more than once, McBride reminded Julie that he could not have called any of her women friends to be at the meeting for her because "that would break a confidence." McBride flat-out lied about the confidential nature of the meeting. Had Julie known that she was being set up, she would never have agreed to the meeting.

concealed the taping!

The trial court granted summary judgment for McBride using a standard for determining whether a plaintiff has good cause for failing to comply with the statute of limitations. In other words, the trial court held that since Julie suspected wrongdoing

tc said b/c she suspected wrongdoer, she was not prevented from discovering

during the meeting, she was not prevented from discovering her cause of action against

McBride. No doubt, the trial court made this mistake because there are two types of
fraudulent concealment. ^① One is a cause of action. ^② The other is an excuse for failing to
comply with the statute of limitations. In determining that Julie's suspicions were

*2 types
of
fraud
concealment*

sufficient to defeat her claim, the trial court used a test that does not exist for the cause of
action that is fraudulent concealment. Even if Julie suspected something was up,

McBride's exhortations that the meeting was a confidential one made it a jury question
on Julie's claim of fraudulent concealment.

★

The trial court also erred when it failed to allow Julie to reinstate her claim of
breach of fiduciary duty. McBride was granted summary judgment on this claim after
McBride and Ray Mabus submitted affidavits claiming that there was no way the meeting
was ever considered to be a marriage counseling session; McBride was there only as a
friend. In depositions given pursuant to the Mabus divorce, however, both testified that
McBride was there as a priest to provide marriage counseling. Moreover, McBride's
insistence during the meeting that the meeting was a confidential one supports Julie's
claim for breach of fiduciary duty. Given that McBride was still in the case and that the
previous partial summary judgment was based on fraud, it was an abuse of discretion for
the trial court to refuse to reinstate Julie's breach of fiduciary duty claim against him.

LAW AND ARGUMENT

- 1. The trial court erred in granting summary judgment for Jerry McBride. In granting summary judgment, the court confused the elements of a fraudulent concealment claim with the fraudulent concealment used to excuse non-compliance with the statute of limitations.**

Standard of review:

A trial court's grant of summary judgment is reviewed de novo. *Prime Rx, LLC v. McKendree, Inc.*, 917 So.2d 791, 794 (Miss. 2005). "Summary judgment may only be granted where there are no genuine issues of material fact such that the moving party is entitled to judgment as a matter of law." *Cole v. Buckner*, 819 So.2d 527, 530 (Miss. 2002). Further, the evidence must be viewed in a light most favorable to the non-moving party. *Id.*

According to Rule 56 of the Mississippi Rules of Civil Procedure, a circuit court may grant summary judgment "if 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." "A fact is material if it 'tends to resolve any of the issues, properly raised by the parties.'" *Webb v. Jackson*, 583 So.2d 946, 949 (Miss.1991). The moving party bears the burden of showing that no genuine issue of material fact exists. *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss.1990). Additionally, the circuit court must view the evidence in the light most favorable to the non-moving party. *Russell v. Orr*, 700 So.2d

619, 622 (Miss.1997). Because it is generally better to err on the side of denying the motion, it has been said that the circuit court must consider motions for summary judgment with a skeptical eye. *Ratliff v. Ratliff*, 500 So.2d 981, 981 (Miss.1986).

Law and argument:

Julie's remaining cause of action was one for fraudulent concealment against Jerry McBride. The trial court initially refused to grant summary judgment. After additional discovery, though, McBride moved for summary judgment on the grounds that Julie a) could not prove reliance; b) could not prove her ignorance of the falsity and c) McBride did not commit an affirmative act of concealment. CP. 652. McBride argued that Julie's claim failed because she testified that during the meeting she suspected McBride was conspiring with Mabus.

McBride's motion for summary judgment was based on Julie Mabus's deposition. In that deposition, Julie stated that, just prior to leaving the room, Ray Mabus told her that they had three options. The first was to reconcile. Julie testified that she then asked "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. 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 to Jerry, and I said, “What are you doing here?” And he knew at that point he was caught.

CP. 657.

The trial court granted summary judgment for McBride stating as follows:

In successfully resisting McBride’s first attack, Julie Mabus submitted her affidavit, which, as noted by the Court in ruling in her favor, asserted “that had she known that McBride 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.

Subsequent to the Mississippi Supreme Court affirming this Court’s ruling and remanding the case back to this Court for trial, the parties launched into discovery, including the deposition of Julie Mabus. In that 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 the 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. The concessions completely negate the requirement that she was prevented from discovering anything that forms the basis of her claim due to anything that McBride did or did not do.

Did she believe it was being taped?

Although it is unnecessary, in order to establish a prima facie case of fraudulent concealment, for a plaintiff to show the reliance necessary in a traditional fraud claim, it is **necessary** under Mississippi law to show that the defendant: 1) took some action, affirmative in nature; (2) that was designed or intended to prevent; and (3) **which did prevent** the plaintiff’s discovery of the facts giving rise to the fraudulent concealment claim.

CP. 2745-46; RE. 24 (emphasis in original).

The problem with this ruling is that the trial court confused the elements of a claim for fraudulent concealment with the elements required when fraudulent concealment is pleaded as an excuse for failure to comply with the statute of limitations.¹ As the Fifth Circuit has pointed out, the latter “doctrine, which is applicable to any cause of action, should not be confused with the doctrine applicable where the gist of the action itself is fraud, and the concealment is inherent in the fraud.” *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 341 n. 2 (5th Cir. 1971), citing *Holmberg v. Armbrrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946).

The gist of McBride’s summary judgment motion was that it wasn’t fraud because Julie suspected something was up at some point during the meeting. In other words, McBride argued that Julie wasn’t ignorant of the falsity. The trial court, though, didn’t analyze the situation this way. In analyzing the issue as one of whether McBride had fraudulently concealed an underlying cause of action (thus excusing a failure to comply with the statute of limitations), the trial court found that Julie’s **suspicions** were sufficient to alert her to her claim.

However, this wasn’t a case of whether McBride concealed a cause of action Julie may have had and whether Julie had sufficient information to have constructive knowledge of her claim. This case was about whether McBride committed fraud by

¹ For instances of the fraudulent concealment as an excuse for failing to comply with the statute of limitations, see, e.g., *Windham v. Latco of Mississippi, Inc.*, 972 So.2d 608, 614 (Miss. 2008); *Robinson v. Cobb*, 763 So.2d 883, 887 (Miss. 2000).

inducing her to enter into a marriage counseling session that she rightfully believed to be confidential and allowed the meeting to be taped. That Julie came to suspect during the meeting that McBride was assisting Ray Mabus doesn't translate into Julie knowing that McBride was participating in a conspiracy to tape her marriage counseling session in order to publish it to third parties (i.e. Mabus's lawyers and the judge in their divorce action). **Particularly in light of the fact that McBride assured her during the meeting that it was confidential.**



The Mississippi Supreme Court correctly stated the elements of fraudulent concealment in its first opinion in this matter:

In order to establish fraud, the plaintiff must prove 1) a representation, 2) its falsity, 3) its materiality, 4) the speaker's knowledge of its falsity or ignorance of its truth, 5) his 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) his reliance on the truth, 8) his right to rely thereon, and 9) his consequent and proximate injury.

Mabus v. St. James Episcopal Church, 884 So.2d 747, 762 (Miss. 2004).

Julie had a right to expect that the information she revealed to McBride would be kept confidential. Indeed, McBride can't contest this fact. As related above, when, years later, McBride was deposed about the meeting, he was asked what Ray Mabus told him when Ray met with McBride prior to their meeting with Julie. Before answering that question, McBride stated, **"He's going to have to waive that privilege for me to be able to . . ."** CP. 1980 . Unbelievable as it may seem, McBride considered anything

Ray said to him that day (or in setting up the meeting) was said in confidence but not anything said to him by Julie. Indeed, during the taped meeting, Julie told McBride, "I didn't get in the middle of you and Molly either." CP. 757. And McBride replied, "You're also not our priest." *Id.*

Also during the meeting, just before McBride reminded Julie she was not a priest, McBride told Julie that needed to leave in order to visit with a family with a baby in the hospital. Julie stated, "Well, what do you wanna say to me? That baby, that family of that baby needs you more than I do." McBride responded, "I know that (unintelligible). I can't break a confidence. When Ray called me I had no choice." CP. 757. Later, when Julie tells McBride that she feels ambushed and that she wished she had a female friend by her side (CP. 794), McBride states, "Julie, I had no right to call anybody, **that would have broken a confidence.** I can't legally did that. **I know it would have broken a confidence for me to call somebody.** You understand that?" CP. 796. (emphasis added)² The transcript could not be more clear. Even after Julie realized that McBride was taking Ray Mabus's side³, McBride was assuring Julie that everything about the meeting was confidential. He made affirmative representations

*assurance
of
confidentiality*

² Earlier in the transcript, McBride tells Julie that he didn't have any say in how the meeting was set up but that he did tell Ray that Julie would not have wanted Molly McBride, McBride's ex-wife, to be at her side during the meeting. Julie tells McBride to "Get the fuck out of here," and McBride says "I couldn't break." Julie then says "I am by myself. Do you understand that?" CP. 796. A jury could certainly determine that McBride was once more telling Julie that he couldn't have broken a confidence in order to get someone there to be on Julie's side.

³ It even fleetingly occurred to Julie that Ray Mabus might have managed to tape record the meeting but she didn't **know** that he was and she certainly never thought that McBride knew about and consented to the taping. CP. 2362, 666.

about the confidential nature of the meeting were not true and McBride knew were not true.

As noted in *Mabus*, the trial court previously characterized McBride as having “participated ‘in a charade for [Julie] to believe that the conversation to follow would be just between the two of them’ and that McBride ‘did the great majority of the wheedling on behalf of Ray Mabus, doggedly cajoling Julie Mabus to talk about her affair, first to him (McBride) and then to Ray.’” *Mabus*, 884 So.2d at 761.

Courts have upheld verdicts for plaintiffs who demonstrated that they suffered damages as a result of a priest’s violating the oath of confidentiality. In *Barnes v. Outlaw*, 964 P.2d 484 (Az. 1998), the Arizona Supreme Court held that a husband may recover for loss of consortium as a result of emotional trauma he suffered when a pastor revealed confidential information given to him during pastoral counseling sessions about his wife’s family.

And in *Alexander v. Culp*, 705 N.E.2d 378 (Ohio 1997), the Ohio Court of Appeals found a common law tort against a minister who disclosed confidential information he obtained in marriage counseling. In *Alexander*, a husband sued after information he gave to the pastor was later revealed by the same pastor to the husband’s wife. The husband alleged that the statements were made intentionally, with malice and intent to harm. The Court of Appeals, overturning dismissal below, held that there was a common law action in negligence. “People expect their disclosures to clergy members to be kept confidential.” *Alexander*, 705 N.E.2d at 382. The duty of a minister to maintain

confidentiality was breached by the disclosure to the plaintiff's wife, proximately causing injury to the husband. On remand, the court held that the plaintiff would be allowed to seek punitive damages on proof that the disclosure was made recklessly, intentionally and with malice and intent to harm.

In this case, Julie has evidence that McBride assisted her husband in a scheme to confront her about her affair and tape that confrontation to use against her in their divorce. Not only did McBride and Mabus know that Julie would expect the meeting to be confidential, McBride reassured her during the meeting that it was confidential. McBride told Julie that the reason he couldn't ask one of Julie's women friends to be at her side during the meeting was because that would break a confidence. The tape recording was later used against Julie in her divorce. And once Julie realized her priest had conspired with Ray Mabus to tape what should have been a confidential marriage counseling session, she suffered a great deal of emotional distress. Indeed, she is no longer a member of the Church her parents helped found.

The trial court erred when it threw out Julie's fraudulent concealment claim on the grounds that Julie's suspicions "negate the requirement that she was prevented from discovering anything that forms the basis of her claim due to anything that McBride did or did not do." CP. 2745. Not only did the trial court err in analyzing Julie's claim using a test that did not apply, the court ignored the evidence that McBride affirmatively assured Julie that the meeting was confidential.

2. The trial court erred in refusing to reinstate the breach of a fiduciary duty after it was revealed that the affidavits by Ray Mabus and McBride used to support summary judgment on that claim were lies.

Julie's claim against McBride for breach of fiduciary duty was thrown out on summary judgment prior to the Mississippi Supreme Court's first review of this case. McBride had filed self-serving affidavits by himself and Ray Mabus⁴ in support of his argument that he was not present at the meeting in the guise of a marriage counselor. The Mississippi Supreme Court affirmed summary judgment on the fiduciary duty claim noting that the trial court was correct in stating as follows:

[Julie] has completely failed to call to this Court's attention any evidence that would rebut that assertion [by Ray that neither he nor McBride informed Julie that McBride was present at the meeting as a marriage counselor], and the transcript of the subject meeting totally belies her allegation that she was requested by her husband "to attend a marital counseling session with her priest."

nothing to
show McBride
there in
the capacity
of a
marriage
counselor

Mabus, 884 So.2d at 761.

As it turns out, however, both Ray Mabus and McBride contradicted their affidavits when they testified pursuant to the Mabus divorce. Based on this testimony, Julie asked the trial court to reinstate the claim for breach of fiduciary duty. CP. 773. The trial court denied the motion. CP. 2748; RE. 29.

Summary judgment on the fiduciary duty claim was based, in part, on Ray Mabus's affidavit stating that:

This meeting was not in any way a counseling session. I did not ask Jerry to be there for the purpose of giving us marital counseling. Neither Jerry nor I told Julie that Jerry was present for the purpose of marital counseling.

CP. 783-83.

This, however, is not what Mabius testified pursuant to the divorce proceeding.

Q. Why was he (McBride) present?

A. He was present because I had gone to him when I learned definitely that Julie was having an affair with Mr. Ely to seek guidance and counseling. I told him that I wanted to try and save the marriage.

Q. Did she know he was going to be there.

A. Yes.

Q. When did she know he was going to be there?

A. I believe the day before.

Q. And what did you actually tell her about that meeting?

A. I told her that there was something I needed to talk about her about. That I had talked to Jerry about it. And that he was going to be there.

Q. Okay. Is your wife's personality such that she made no particular inquiry to you as to why she was going to be over there talking to you and Jerry McBride?

A. No. She told me . . . she asked what it was about. I told her it was about the marriage, but I would prefer to do it at the meeting.

Q. Okay. And it is your position that Jerry McBride was there in his capacity as a priest for both of you?

A. Yes.

⁴ Ray Mabius was not a party to the lawsuit. He apparently assisted McBride voluntarily.

Ray affidavit

Q. And to offer whatever spiritual guidance either of you would ask of him on that occasion?

A. Yes.

CP. 820-21 (emphasis added).

McBride's affidavit in support of his motion for summary judgment swore that he was present at the meeting with Julie only as a supportive member of the church and that he did not provide any marital counseling. CP. 811. In fact, McBride stated that "[I]f Ray and Julie Mabus had expressed to me an interest in pursuing marital counseling I would not have become involved in the process." *Id.* This, however, is not what McBride testified to when he was deposed pursuant to the Mabus divorce.

Q. Did he (Ray Mabus) ever tell you that his purpose of going over there was for anything other than in you capacity as a preacher that had been knowing her for 20 years, or thereabouts, to try and sit down and counsel with a couple to save their marriage.

A. That was the only reason I was there.

Q. Okay. At least as far as you were concerned, that's the only reason - -

A. Of course. I'm speaking for me.

Q. Right.

A. Right. As far as I was concerned.

Q. And I'm not asking you why Mr. Mabus was there. I'm asking you why you were there. Okay?

A. Yes. That's correct.

Q. And the purpose was to do that.

A. Right.

Q. Do what you could to save the marriage?

A. (Nodded head affirmatively)

* * *

Q. What did -- how many times have you been asked to do this before for with obviously, other people?

A. A number. And that's all I can say because of the confidentiality.

CP. 841.

When Ray Mabus was deposed in the divorce proceeding, he testified that he sought out McBride "when I learned that Julie was having an affair with Mr. Ely to seek guidance and counseling. I told him that I wanted to save the marriage." CP. 820. Ray Mabus stated that McBride was there as a priest for both he and Julie to offer whatever spiritual guidance they needed. CP. 821.

Tape The partial summary judgment was also based on a misinterpretation of the tape of the meeting. The trial court stated that Julie's first words during the meeting demonstrated that she had had not been told she was there for a marriage counseling session.

Although Julie asserts in her complaint that the meeting was a marital counseling session with her priest, her words at the beginning of the conversation indicate that she did not know the purpose of the meeting. Julie asked Ray prior to McBride's arrival: "Is it about me?" and "What triggered your return?"

Mabus, 884 So.2d at 758⁵. Julie had the tape of the meeting reviewed by an audio expert who concluded that what Julie really said was "You want to sit down by me. Do you

⁵ The Mississippi Supreme Court is summarizing the trial court's Opinion. It is at CP. 713.

want me to sit down and get you a chair? Is that close enough?" CP. 2495. No where
on the tape does she indicate that she was not aware of the purported purpose of the
meeting, i.e. that it was a marriage counseling session with the same priest who had
conducted their pre-marriage counseling. McBride never disputed the expert's version of
the transcript.

does not
indicate
that she
did not
know
purpose
of
meet.

As is apparent from these depositions, the affidavits that McBride and Ray Mabus
submitted denying that McBride was at the meeting as either a priest and/or a marriage
counselor were lies submitted solely to obtain summary judgment for McBride.

Consequently, Julie moved to reinstate the breach of fiduciary duty claim against
McBride. CP. 773. In so doing, she cited Rule 60(b) but also urged the court to do so
using the inherent powers of the court. *See transcript of argument, Supp. Vol., p. 56.*

inherent
powers

The Mississippi Supreme Court has held that "[u]nder Circuit Court Procedural
Rules, any order signed during the course of the proceeding is not final and can be
changed during the course of the action and prior to a final judgment." *Franklin v.*
Franklin ex rel. Phillips, 858 So.2d 110, 121 (Miss. 2003). As a general matter, an
order granting partial summary judgment is an interlocutory judgment. *Geneva v. Barr*,
386 F.3d 485, 494-95 (2d Cir.2004). The power of the court to modify an interlocutory
order, such as one that renders partial summary judgment, is not limited by Rule 60(b)
but are within the court's inherent authority to render justice. *Zimzora v. Veterans*
Administration, 778 F.2d 264, 266 (5th Cir. 1985) citing 7 Moore's *Federal Practice* ¶
60.20 at 60-170 (2d ed. 1985). "[T]he district court has the authority to reconsider its

ruling (which is, on the remand, a partial summary judgment) at any time before final judgment . . .” *Powers v. Nassau Development Corp.*, 753 F.2d 457, 464 (5th Cir. 1985).

The trial court denied Julie’s motion to reinstate her breach of fiduciary duty claim. CP. 2748. It did so on the basis that her request was out of time. The trial court concluded that even if the allegations in Julie’s motion were considered to constitute fraud upon the court and not within Rule 60(b)(1), Rule 60(b) required her to seek relief “within a reasonable time”.

Because Julie has been aware of the subject transcript, as well as the depositions of McBride and her ex-husband given in her divorce action, well before her filing this lawsuit in 2001, her request for relief in 2006 cannot be considered as being within a reasonable time.

CP. 2750.

The trial court’s curious refusal to reinstate the breach of fiduciary duty claim is difficult to understand given that 1) both McBride and his witness had lied when McBride obtained partial summary judgment and 2) that McBride was still in the case and, thus, would not be prejudiced by having the claim reinstated (especially since it didn’t call for additional discovery, the parties and Ray Mabus having already been deposed on this issue). Under Mississippi law, parties can move to amend their complaint to conform to the evidence at trial even after trial. M.R.C.P. 15(b).

The case cited by the trial court in rejecting Julie’s motion, *Brown v. Estate of Johnson*, 822 So.2d 1072, 1073 (Miss.App. 2002), involved a party trying to reopen a divorce some three years **after it was final**. The order granting partial summary

judgment in this case was interlocutory and the trial court both could and - under these circumstances should - have allowed the claim to be reinstated.

When the plaintiff was found to have lied in *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385, 1389 (Miss.1997), the Mississippi Supreme Court affirmed dismissal of her case as a sanction. In *Pierce*, the plaintiff claimed she was injured when the ceiling in her apartment fell. When asked by interrogatory if there were other eyewitnesses to the event, the plaintiff responded that she was alone when, in fact, there was another person in the room when the incident happened. *Pierce*, 688 So.2d at 1388. She falsely testified during the first trial but after a verdict for the plaintiff, the court granted a motion for new trial. The plaintiff revealed in a deposition before the second trial that she was not alone. *Id.* The false testimony at the first trial and discovery violations resulted in the Mississippi Supreme Court's affirming the trial court's dismissal with prejudice of her complaint before the second trial. *Pierce*, 688 So.2d at 1391. Just as the sanction of dismissal was warranted by the plaintiff's conduct in *Pierce*, the conduct of McBride in this case warrants reinstatement of the claim procured by fraud.

Oddly enough, the trial court never addressed the perjury contained in the affidavits of McBride, a priest, and Ray Mabus, the former governor. Throughout the proceedings however, Judge DeLaughter was not hesitant to criticize Julie Mabus for merely bringing this lawsuit. In his opinion dismissing Julie's breach of fiduciary duty claim, Judge DeLaughter states : "The Mabus children, two young girls, twelve and ten years of age, deserve some measure of privacy and this Court is not willing to even

incidentally sacrifice that peace of mind upon the altar of their mother's vain pursuit of lucre." CP. 716.

Given that McBride was still a defendant in the case, the trial court erred in when it ruled that the claims against McBride could not be reinstated because they were not brought within a reasonable time. If anything, the additional evidence demonstrated that the summary judgment on the fiduciary duty claim was premature and procured by fraud. When further discovery revealed evidence contradicting the self-serving affidavits of McBride and Mabus, the trial court should have vacated its previous order granting partial summary judgment and allowed that claim to go to trial. The trial court abused its discretion when it refused to do so.

Conclusion

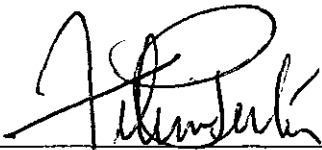

Julie Mabus has evidence to support her claim that McBride committed fraud when he allowed Ray Mabus to tape what Julie was told would be a marriage counseling session. Not only did Julie have a reasonable expectation that the meeting would be confidential, McBride assured her that this was so during the meeting. Not only was the tape used against her in her divorce, Julie suffered great emotional distress once she learned that her priest betrayed her. Given this evidence, Julie Mabus should have been permitted to have a jury decide her case.

The trial court further erred when it refused to allow Julie to reinstate her claim for breach of fiduciary duty once it was discovered that the basis on which summary judgment was granted on that claim was a false one.

Wherefore, this Court should reverse and remand so that these claims can be heard
by a jury.

Respectfully submitted,

JULIE MABUS

By: 
FELECIA PERKINS, MSB 
LAW OFFICE OF FELECIA PERKINS, P.A.
P.O. Box 21
Jackson, Mississippi 39205-0021
(601) 352-5053

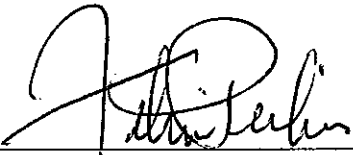
CERTIFICATE OF SERVICE

I, Felecia Perkins, Attorney for Julie Mabus, certify that I have this day served a copy of this Brief of Appellant by United States mail, first class postage prepaid, to:

Glenn G Taylor
Karen L. Gunn
Copeland Cook Taylor & Bush
P. O. Box 6020
Ridgeland, MS 39158-6020

Judge Bobby DeLaughter
Hinds County Circuit Court Judge
P.O. Box 27
Raymond, MS 39154

THIS, the 3rd day of April, 2008.



FELECIA PERKINS