IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CA-00362

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES and RUBY MURPHY — APPELLANTS

VS.

HENRY RAY — APPELLEE

APPEAL FROM THE CHANCERY COURT OF SUNFLOWER COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

HONORABLE TAMEKIA R. GOLIDAY
GOLIDAY LAW FIRM
1500 Jacksonian Plaza, Ste C
Post Office Box 13632
Jackson, Mississippi 39236
Tel: (601) 368-1800
Fax: (601) 206-1136

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES

CASES **PAGES**

RULES

OTHER AUTHORITIES

A. THIS COURT SHOULD APPLY THE HEIGHTEN SCRUTINY STANDARD OF REVIEW.

Henry Ray, appellee, hereinafter "*Ray*", argues in his brief that this Court should apply the substantial evidence standard of review since the order he submitted to the trial court was merely an order setting forth the trial court's ruling and was not intended as findings of fact and conclusions of law. This argument is misleading considering the fact that the record is clear that after the April 12, 2006, hearing, in which the trial court award Ray $23,183.10 as recovery for past child support payments, Ruby Murphy, appellant, hereinafter "*Murphy*", filed a motion for reconsideration, or in the alternative, for findings of facts and conclusions of law. (CP, p. 66 - 71)

Uniform Chancery Court Rule 4.01 states that "the Chancellor shall find the facts specially and state separately his conclusions of law" where a party requests such findings in writing. Murphy, pursuant to Rule 4.01, made her request for findings of facts and conclusions of law in writing and all parties understood that Murphy sought findings of facts and conclusions of law. Specifically, Ray knew and understood that the trial court intended to set forth findings of fact and conclusions of law as evidenced by the fact the order he submitted to the court included a detailed chronology of the testimony and evidence presented at trial and used the heading "**CONCLUSIONS OF LAW**" to identify the section of the order which set forth the ruling of the court.

The trial court, during its bench ruling, never set forth all of the facts noted in the order and failed to make any findings of fact which would support a judgment based on fraud. *See* Record Excerpt 6. It is clear the decree executed by the court on or about February 1, 2007, goes beyond the scope of the November 30, 2007, bench ruling and there is no evidence that the trial court ever made its own independent and impartial findings.

Likewise, Ray admits in his brief that the "*trial court's findings* ***are identical to*** *those presented by Ray*," but denies that the court's *in toto* adoption of his findings of fact and conclusions

of law requires this Court to review this matter using the greater care and heightened scrutiny standard. He asserts that this matter should be reviewed using the substantial evidence standard, however fails to cite any authority to support his proposition.

It is well established that the Mississippi Appellate Courts are not required to review arguments which are not properly supported by reasons and authority. Hoops v. State, 681 So.2d 521, 535 (Miss. 1996). Mississippi Rules of Appellate Procedure 28(a)(1)(6) requires an argument contain the contentions of the party with respect to the issues presented and the reasons for those contentions, with citations to the authorities, statutes and parts of the record relied on. Failure to cite relevant authority obviates any obligation by this Court to review an argument. Byron v. State, 863 So.2d 836, 862 (Miss. 2003).

Considering the fact Ray cites no authority to support his proposition that this Court should employ the substantial evidence standard when the trial court adopts one parties' findings of fact and conclusions of law *in toto,* this Court should disregard Ray's contentions and apply the rationale of Mississippi Department of Wildlife, Fisheries and Parks v. Brannon, 943 So.2d 53 (Miss. Ct. App. 2006), which holds that the greater care and heightened scrutiny standard applies where the trial court adopts the findings of fact and conclusions of law submitted by one party *in toto*. Brooks v. Brooks, 652 So.2d 1113, 118 (Miss. 1995)(where the chancellor adopts, verbatim, findings of fact and conclusions of law prepared by a party to the litigation, this Court analyzes such findings with greater care and the evidence is subjected to heightened scrutiny.)

"*The judge is a judge and not a rubber stamp,*" and when a judge adopts verbatim findings submitted by a party, these findings are simply "*not the same and findings independently made by the trial judge after impartially and judiciously sifting through the conflicts and nuances of the trial testimony and exhibits.*" Rice Researchers, Inc. v. Hiter, 512 So.2d 1259, 1264-66 (Miss. 1987);

Bailey v. Estate of Kemp, 955 So.2d 777, 782 (Miss. 2007). Likewise, where the trial judge wholly abdicates these judicial responsibilities, such a failure constitutes an abuse of discretion and the challenged findings and record should be viewed "*with a more critical eye to ensure that the trial court has adequately performed its judicial function.*" Id. Applying the rationale of Rice Researchers, Brannon, and Brooks and considering the fact that Ray admits that the trial court adopted his findings verbatim, it is clear that this Court should apply the heighten scrutiny standard in this matter and view the findings and record with a "*more critical eye to ensure that the trial court has adequately performed its judicial function.*"

B. RAY IS BLATANTLY WRONG IN ITS ASSERTION THAT THE TRIAL COURT COULD AWARD A REMEDY OF PAST CHILD SUPPORT PAYMENTS TO HIM AS A MATTER OF EQUITY.

Wherever the rights or duties of the parties in a given situation are definitely defined and established by law, equity must observe those rights and enforce those duties. Bridges & Shelson, Griffith Mississippi Chancery Practice (2000 Ed.), § 40. Therefore, in adjudicating questions of legal right, title or interest, equity follows and applies legal rules. Id.; American Freehold Land & Mortgage Co. v. Jefferson, 12 So.464 (1892)(equity must follow the law); E.J. Platte Fisheries v. Wadford, 155 So.161(1934); Morrissey v. Bologna, 123 So.2d 537 (1960) Where the law has positively declared that there shall be no right and no remedy, equity cannot create a right or impose a remedy. Bridges & Shelson, Griffith Mississippi Chancery Practice (2000 Ed.), § 40.

Jefferson, Wadford and Bologna make it clear that a court of equity is bound to follow the law and Mississippi law is definitely defined and well established regarding the issues raised in this matter: in cases where a non-biological father fails to contest paternity and/or voluntarily acknowledges paternity, pays child support and later finds out he is not the father of the child, it is inequitable to require the mother to reimburse the non-biological father for the support paid. R.E.

v. C.E.W. and A.C.W., 752 So.2d 1019 (Miss. 1999)(father who supported a child born during his marriage with knowledge that the child was not his, was not entitled to reimbursement for child support); McBride v. Jones, 803 So.2d 1168 (Miss. 2002)(without knowledge that he was not the child's father, a presumed father was not entitled to reimbursement from the child's mother for fifteen years of child support). Child support payments are for the benefit of the child and cannot be recovered from the mother when paternity is disproved. Deborah Bell, Bell on Mississippi Family Law, §15.07[5],1st Edition; N. Shelton Hand, Jr., Mississippi Divorce, Alimony and Child Custody with Forms, §8.5, 6th Edition (there will be no reimbursement or recovery of child support payments made by mistake).

Considering the well established law regarding the reimbursement of child support payments, it is clear that the trial court, ignoring the maxim that equity follows the law, committed reversible error and was manifestly wrong when it rendered a judgment in favor of Ray for $23,183.10 as reimbursement for past child support payments. Mississippi law is clear that child support payments are for the benefit of the child and cannot be recovered from the mother when paternity is disproved. Therefore, this Court should reverse the trial court's judgment in favor of Ray.

C. RAY IS INCORRECT IN HIS ASSERTION THAT MURPHY PERPETRATED FRAUD ON HIM.

To demonstrate a prima facie case of fraud, Ray must show, 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 its truth; (5) the speaker's intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on the truth; (8) the hearer's right to rely thereon; (9) and his or her consequent and proximate injury. Hamilton v. McGill, 352 So.2d 825, 831 (Miss. 1977). All elements must be

satisfied in order to support a finding of fraud. Koury v. Ready, 911 So.2d 441 (Miss. 2005) Ray, in his brief, alleges that he provided clear and convincing evidence that Murphy and the Mississippi Department of Human Services defrauded him, however, outside genetic test results, Ray produced no real and substantial evidence which indicates that Murphy knew, prior to the testing, that Linnerius was not his child and intentionally sought to defraud him. (TT 56-88) Ray failed to identify any written documentation or call as witnesses any persons that proved Murphy knew Linnerius was not his son prior to the genetic testing.

There is no clear and convincing evidence which establishes each of the elements of fraud. Ray's testimony alone is riddled with inconsistencies and instantly falls short of the clear and convincing evidence standard: he initially testified that when he was initially contacted by DHS regarding Linnerius, he informed them that he did not believe he was the child's father and that he only signed the stipulation of paternity because he did not want to be picked up by the Sheriff for child support but later testified he believed Linnerius was his child. He also testified that despite the fact that he knew Linnerius was not his son, he wanted to give Linnerius "*different from the way my father did. My father never spent no time, didn't no raise me, didn't spend no money with me.*" (TT 71) The inconsistent testimony given by Ray and the genetic testing results are the only evidence he produced to support a finding for fraud.

The inconsistencies in the testimony of Ray and the lack of real and substantial evidence that Murphy intended to defraud Ray, indicate that the findings of the trial court were manifestly wrong, clearly erroneous or an erroneous legal standard was applied. As such, this Court should reverse the February 1, 2007, order awarding Ray $23,183.10 as recovery for past child support payments.

D. RAY IS WRONG IN HIS ASSERTION THAT THE TRIAL COURT COULD REIMBURSE PAST CHILD SUPPORT PAYMENTS BASED ON MISS. R. CIV. P. 60(B)

Ray argues that the original order adjudging him as the father of Linnerius A. Jackson was entered into by mistake and Rule 60(b) gave the trial court authority to reimburse Ray for past child support payments. Miss. R.Civ. P. 60(b) prescribes a method for correcting substantive errors in judgments and orders. Specifically, Rule 60(b) was established to give the court authority to relieve a party or his legal representative from a final judgment, order or proceeding. At best, Rule 60(b) gave the trial court authority to terminate Ray's child support payments after the DNA testing results indicated Ray was not Linnerius' father, thereby correcting the January 21, 1986, order establishing paternity and child support. The rule did not give the trial court authority to reimburse the past support payments. Prior to the February 1, 2007, order awarding damages to Ray, there was no final judgment regarding the reimbursement of child support so there was no final judgment to be corrected. As such, Rule 60(b) provided the trial court with no authority to award damages to Ray.

E. RAY IS INCORRECT IN HIS ASSERTION THAT THE TRIAL COURT WAS CORRECT IN REIMBURSING PAST CHILD SUPPORT PAYMENTS ON THE THEORY OF UNJUST ENRICHMENT.

Ray cites Williams v. Rembert, 654 So.2d 26, 30 (Miss. 1995) for the proposition that Murphy has been unjustly enriched because Ray paid child support for her son, Linnerius, however, Rembert, stood for the proposition that "*a parent's receipt of child support when the child is self-sufficient was 'unjust enrichment*'". In Rembert, the father unilaterally stop paying child support for his daughter who was under the age of 21 but had moved out of the mother's house. The mother filed a contempt action against the father alleging he was delinquent in his child support payments and the trial court awarded the mother support arrears. The Mississippi Supreme Court remanded the case for a determination of when the daughter became emancipated and directed the trial court to terminate the support obligation and award arrears based on the date of emancipation.

It is clear Rembert is distinguishable from the case *sub judice*: Ray is not seeking to terminate his child support obligations because Linnerius is self-sufficient. Therefore, Ray's argument regarding unjust enrichment should be disregarded. The child support received from Ray by Murphy on behalf of her son, Linnerius, was for the benefit of the child and the obligation of child support vested in the child. Id.

Mississippi law provides that, in an action for unjust enrichment, the plaintiff needs to **allege and show** that the defendant holds money which in equity and good conscience belongs to the plaintiff. Owens Corning v. R.J. Reynolds Tobacco Co., 868 So.2d 331 (Miss. 2004) Ray never alleged unjust enrichment in his motion for reimbursement of child support, the issue of unjust enrichment was never brought up during the November 30, 2006, hearing and the trial court's ruling was not based on the theory of unjust enrichment. (CP, p. 119 - 122)(RE 5)(TT, p. 24-127) Since the issue of unjust enrichment was never brought up at trial and the judgment awarding damages to Ray is not based on unjust enrichment, this Court is barred from considering unjust enrichment as a theory of recovery in this matter. Smith v. State, 729 So.2d 1191, 1201 (Miss. 1998)(failure to raise an issue at trial bars consideration by the appellate court) Therefore, this Court should disregard Ray's allegation that he is entitled to the February 1, 2007, judgment reimbursing past child support payments based on the theory of unjust enrichment.

In the alternative, assuming *arguendo* that this Court considers the theory of unjust enrichment, the evidence is clear that Murphy never held any money which belonged to Ray. When a child support payment becomes due, the payment vests in the child and once vested, the payment cannot be modified or forgiven by the courts. Burt v. Burt, 841 So.2d 108 (Miss. 2001) Without modification, support obligations continue as ordered by the court in its original judgment. Department of Human Services v. Blount, 913 So.2d 326 (Miss. Ct. App. 2005)

Ray presented to the Mississippi Department of Human Services, acknowledged paternity of Linnerius and executed a stipulated agreement of support and admission of paternity which acknowledged he was Linnerius' father and agreed to pay $100.00 per month as child support. (CP 6-7) An order for child support was entered based on the stipulated agreement of support. In accordance with Burt and Blount, as each child support payment became due, the payment vested in Linnerius. Therefore, it is clear that Murphy has never been a position to hold money which in equity belonged to Ray. Equity follows the law and Mississippi law says that the child support belonged to Linnerius. Ray was bound by court order to pay child support for Linnerius and the obligation could only be terminated by the court. Therefore, this Court should disregard Ray's allegation that he is entitled to the February 1, 2007, judgment reimbursing past child support payments based on the theory of unjust enrichment and reverse and render the February 1, 2007, judgment in favor of Ray.

CONCLUSION

The trial court, after considering the evidence and testimony presented at trial, erred in awarding Ray $23,183.10 as recovery for past child support payments since there was no clear and convincing which supported a finding of fraud against Murphy. Therefore, the judgment entered by the trial court against Murphy in the amount of $23,183.10 should be reversed and rendered.

SO REPLIED, the 28th day of March, 2008.

Respectfully Submitted,
RUBY MURPHY, APPELLANT

By: _____
TAMEKIA R. GOLIDAY
Attorneys for Appellant

OF COUNSEL:

HONORABLE TAMEKIA R. GOLIDAY
GOLIDAY LAW FIRM
1500 Jacksonian Plaza, Ste C
Post Office Box 13632
Jackson, Mississippi 39236
Tel: (601) 368-1800
Fax: (601) 206-1136

CERTIFICATE OF SERVICE

I, TAMEKIA R. GOLIDAY, attorney for appellant, Ruby Murphy, certify that I have this day mailed, postage prepaid, a true and correct copy of APPELLANT'S REPLY BRIEF to:

Honorable Peter Bagley
MISSISSIPPI DEPARTMENT OF HUMAN SERVICES
Post Office Drawer F
Marks, Mississippi 38646

Honorable Howard Q. Davis
Post Office Drawer B
Indianola, Mississippi 38751

Honorable Judge Jane R. Weathersby
Post Office Box 1380
Indianola, Mississippi 38751

THIS, the 28th day of March, 2008.

TAMEKIA GOLIDAY