

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

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES  
and RUBY MURPHY

APPELLANTS

VS.

HENRY RAY

APPELLEE

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APPEAL FROM THE CHANCERY COURT OF SUNFLOWER COUNTY, MISSISSIPPI

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**BRIEF OF APPELLANT**

ORAL ARGUMENT REQUESTED

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**CERTIFICATE OF INTERESTED PERSONS**

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The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

1. RUBY MURPHY, APPELLANT
2. TAMEKIA R. GOLIDAY, COUNSEL FOR RUBY MURPHY
3. MISSISSIPPI DEPARTMENT OF HUMAN SERVICES, APPELLANT
4. PETER BAGLEY, COUNSEL FOR MISSISSIPPI DEPARTMENT OF HUMAN SERVICES
5. DON TAYLOR, COUNSEL FOR MISSISSIPPI DEPARTMENT OF HUMAN SERVICES
6. WALLEY R. NAYLOR, COUNSEL FOR MISSISSIPPI DEPARTMENT OF HUMAN SERVICES
7. HENRY RAY, APPELLEE
8. HOWARD Q. DAVIS, COUNSEL FOR APPELLEE
9. HONORABLE JANE R. WEATHERSBY, CHANCERY COURT JUDGE

  
TAMEKIA R. GOLIDAY  
Counsel of Record for Ruby Murphy

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**STATEMENT OF REQUEST FOR ORAL ARGUMENT**

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Pursuant to Rule 34 (b) of the Mississippi Rules of Appellate Procedure, Ruby Murphy requests to be heard orally. The issues presented in this appeal would be significantly aided by oral argument inasmuch as this appeal involves crucial issues surrounding the inconsistencies in Mississippi law relating to the standard of review applicable where a trial court, sitting as the trier of fact, adopts proposed findings of fact and conclusions of law submitted by the litigating parties.

Oral argument would significantly aid in the adjudication of this appeal by allowing dialog regarding the broader implications and affect a decision in this case makes on Mississippi Department of Transportation v. Johnson, 873 So. 2d 108 (Miss. 2004)(where the trial judge adopts proposed findings of fact and conclusions of law submitted by the litigating parties, the appellate court will review the record *de novo*), Mississippi Department of Wildlife, Fisheries and Parks v. Brannon, 943 So.2d 53 (Miss. Ct. App. 2006)(where the trial judge adopts proposed findings of fact and conclusions of law submitted by the litigating parties, the appellate court must analyze such findings with greater care, and the evidence is subject to heightened scrutiny but not *de novo* review) and Mississippi Department of Transportation v. Trosclair, 851 So.2d 408(Miss. Ct. App. 2003)(findings of fact and conclusions of law will not be disturbed unless the judge abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied).

Johnson, Trosclair and Brannon make it clear there is ambiguity in Mississippi law as to the applicable standard of review when the trial judge adopts proposed findings of fact and conclusions of law submitted by the litigating parties. As such, oral argument should be granted so that the parties can assist this Court in making a fair and impartial decision regarding the proper standard of review to apply in this matter.

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## **STATEMENT OF THE ISSUES**

**WHETHER THE SUBSTANTIAL EVIDENCE STANDARD OF REVIEW APPLIES WHERE THE CHANCELLOR ADOPTS *IN TOTO* PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY HENRY RAY?**

**WHETHER THE TRIAL COURT ERRED IN AWARDING DAMAGES TO HENRY RAY IN THE AMOUNT OF \$23,183.10 AS RECOVERY FOR PAST CHILD SUPPORT PAYMENTS?**

**WHETHER THE TRIAL COURT ERRED IN ALLOWING HENRY RAY TO AMEND HIS COMPLAINT TO ALLEGE FRAUD AFTER IT HAD PREVIOUSLY ENTERED JUDGEMENT AGAINST RUBY MURPHY AND THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES FOR \$23,183.10?**



## I. STATEMENT OF THE CASE

### A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This is a civil action seeking monetary damages in the amount of \$23,183.10 for past child support payments made by Henry Ray (*Ray*) for the benefit of Linnerius A. Jackson (Linnerius). (CP 74-75). On or about January 21, 1986, Ray entered into a stipulated agreement of support and admission of paternity in which he acknowledged Linnerius as his child and agreed to pay the sum of \$100.00 per month as child support. (CP 6-8) Approximately nineteen (19) years later, on or about January 10, 2005, Ray petitioned the Chancery Court of Sunflower County, Mississippi for genetic testing to determine if he was the biological father of Linnerius and the testing revealed Linnerius was not his child. (CP 23-45) Ray filed a motion to terminate child support payments and on June 2, 2005, a hearing was held before the Honorable Jane R. Weathersby on the motion. The trial court terminated Ray's child support obligations and admonished Ruby Murphy (*Murphy*), Linnerius' mother, as follows:

It's your responsibility to know. If you're going to practice sex with a lot of different people, it's your responsibility to know who the father of your child is or to find out the truth. **I'm going to grant this relief [terminate Ray's child support payments] and I'll probably grant some more if they ask me for it.** (CP 44-45)(TT 12)

The court further stated,

**And if you've got some friends that have done this you can tell them I'm fixing to start putting judgments on you women that name men to be the father and they're not the father.**

Later, Ray filed a motion against the Mississippi Department of Human Services (DIHS) and Murphy seeking reimbursement of all the past child support payments made on behalf of Linnerius. (CP 47-48) There were no allegations of fraud against Murphy in the motion. This matter was heard before the Honorable Judge Jane R. Weathersby on April 12, 2006, and the court, at the conclusion

of oral argument, awarded damages to Ray in the amount of \$23,183.10 as recovery for past child support paid on behalf of Linnerius and stated in relevant part:

And above all things this is a court of equity and certainly what happened to Mr. Ray was not equitable. **The mother perpetrated a fraud on Mr. Ray and was allowed to do so by the Department of Human Services**, and this Court is going to grant the motion ordering Ruby Murphy and the Department of Human Services to reimburse Mr. Ray in the amount of \$23,183.10 and a judgment in that amount is granted.

(CP 70)(TT 22)

After the trial court made its ruling based on fraud, counsel for Murphy reminded the court there were no allegations of fraud in the motion and the Court responded by stating,

**I have ruled. I have ruled. You can appeal it.** I don't know what fraud is if you've got a lady that alleges that somebody is the daddy and he's not the daddy. She knows who the father is. She knew it then. **Word needs to be spread that these women better name the right man as the father.**

(TT 22) Other than the results of the genetic testing, no evidence was presented by Ray during the June 2, 2005, hearing to terminate child support payments or the April 12, 2006, hearing on the motion to reimburse past child support payments which indicated Murphy knew Ray was not Linnerius' father and intentionally perverted the truth to obtain child support from Ray. (TT 5-12) Neither Ray nor Murphy testified during the April 12, 2006, hearing. The Court, in its ruling, indicated that Murphy knew Ray was not Linnerius' father when Murphy consistently and repeatedly testified during the June 2, 2005, hearing to terminate child support that Ray was the *"only person I ever thought was the father,"* and *"I slept with one other person and I didn't think he possibly could be the father. I only thought he [Ray] was possibly the only one could be the father."* (TT 6)(TT 7)(TT 8)

The Court, when issuing its order awarding Ray past child support payments, failed to make findings of fact and conclusions of law. (CP 70) As such, Murphy, on or about May 2, 2006, filed

a motion for reconsideration, or in the alternative, motion for findings of fact and conclusions of law and Ray, on or about August 21, 2006, filed a motion to amend his motion for reimbursement of funds to allege fraud against Murphy and DHS. (CP 65-70) The Court granted both motions thereby allowing Ray to amend his motion to allege fraud and setting the matter for full hearing on or about November 30, 2006, at which time Ray and Murphy gave testimony under oath regarding this matter. (CP 131)(CP 143A) On or about February 1, 2007, the trial court entered findings of fact and conclusions of law identical to the proposed findings of fact and conclusions of law presented by Ray and awarded damages to Ray in the amount of \$23,183.10 as recovery for past child support paid on behalf of Linnerius. (CP 143A)(RE 7) The issues raised by this appeal focus on whether the trial court erred in awarding damages to Ray in the amount of \$23,183.10 as recovery for past child support.

#### B. STATEMENT OF THE FACTS

Murphy and Ray were engaged in a long-term, romantic relationship which lasted approximately two years. (TT 46)(TT 66) On average, the couple had sex one to two times a week. (TT 46)(TT 66-67) During their courtship, Murphy had sex with one other person -- Johnny Lloyd (*Lloyd*). (TT 47-48) She had sex with Lloyd once. (TT 48) At some point during her courtship with Ray, Murphy became pregnant and gave birth to Linnerius A. Jackson on December 10, 1985; she was 18 years old. (TT 33) She believed Ray was Linnerius' father. (TT 6-7)(TT 48)

Shortly after giving birth to Linnerius, Murphy presented to DHS seeking welfare benefits for her son and was told she would have to identify Linnerius' father to receive benefits. (TT 37) She informed DHS Ray was Linnerius' father and executed an affidavit and affirmation of paternity indicating Ray was Linnerius' father (TT 37)(CP 8) She was never asked if she had sex with anyone other than Ray prior to the child's birth. (TT 39) No DHS representative questioned her as to her

sexual history prior to or at the time she executed the affidavit and affirmation of paternity which named Ray as the natural father of Linnerius: she was never asked if she engaged in sexual relations with any person other than Ray at or near the time of conception. (TT 39)

Ray presented to DIIS and acknowledged paternity of Linnerius and executed a stipulated agreement of support and admission of paternity which acknowledged he was Linnerius' father. (CP 6-7) Murphy and her case worker, Catherine Labella. (*Labella*) were present when Ray executed the stipulated agreement. (TT 114) Based on Murphy's recollection of events, Labella told Ray he could request a genetic test if he disputed paternity and he verbally acknowledged Linnerius as his child. (TT 9) Ray agreed to pay \$100.00 per month in child support for the benefit of Linnerius. (CP 6-7) Ray, based on Murphy's recollection of events, signed the stipulated agreement voluntarily. (CP 55) Ray alleges, "*I didn't go voluntarily 'cause they wrote me a second letter to get me there,*" but agreed that "*nobody made me went*". (CP 73)

For approximately nineteen (19) years, Ray paid child support for the benefit of Linnerius. (CP 6-45) He never told Murphy he doubted Linnerius was his son or sought a paternity test. (CP 43) Ray had on occasion commented that Linnerius looked just like him. (CP 49) On or about January 10, 2005, Ray petitioned the Chancery Court of Sunflower County, Mississippi for genetic testing to determine if he was the biological father of Linnerius and the testing revealed Linnerius was not his child. (CP 23-45) The child support was ceased and Ray sued DHS and Murphy for past child support payments in the amount of \$23,183.10. Id.

During the November 30, 2006, hearing on his motion for reimbursement of past child support payments, Ray testified that he always used condoms when he engaged in sex with Murphy and that because of his condom usage, he never believed Linnerius was his child. (TT 60-61) Murphy denied that Ray always used condoms. (TT 48) Ray further testified that when he was

initially contacted by DHS regarding Linnerius, he informed them he did not believe he was the child's father and was told if "*I didn't sign those papers they was going to have the Sheriff to pick me up.*" (TT 60-61) Ray alleges he only signed the stipulation of paternity because he did not want to be picked up by the Sheriff for child support. (TT 61)

Ray recalls that when he discovered Murphy was pregnant she told him the condom bursted and that was how she got pregnant, however, he had no independent recollection of any condom bursting during his courtship with Murphy. (TT 67-70) Ray testified he never believed the condom burstes and reiterated that the only reason he signed the stipulation agreement was because DIHS threaten to send him to jail if he did not sign it. (TT 70) He further stated, "*I didn't really want to take care of him, but I was -- after signing the paper I had to take care of him.*" (TT 75) Ray, conversely, testified that he signed the stipulation because he was raised in a single mother and 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) Later, Ray stated he believed Linnerius was his child and never seriously questioned paternity during the nineteen (19) years proceeding the genetic testing. (TT 76)(TT 87)

After paying child support for nineteen (19) years, Ray decided to challenge paternity because his friend, Ervin Minton (*Minton*), told him he had been told by a man identified as Baby Brother that Linnerius was not his son. (TT 62) Minton was not available to testify at trial and Ray was not a party to the conversation between Minton and Baby Brother. (TT 62-65)(TT 72)

Murphy testified that when she named Ray as the father of her child on or about January 21, 1986, she believed Ray was the father of her child and maintained that belief until the March 17, 2005, DNA testing results indicated Ray was not Linnerius' father. (TT 6-10) To this day, she questions the accuracy of the results but refused a second genetic test because Linnerius "*told me*

*he'll leave the State before he go through another test."* (TT 44-45) Murphy testified that during her courtship with Ray, she had sex with Johnny Lloyd ("Lloyd") once and that she, prior to the DNA testing, never believed Lloyd was the father of Linnerius. (TT 37-39) Lloyd is deceased. (TT 38)

Murphy's bestfriend, Janet Thompson, testified that she and Murphy have been good friends since childhood and that when Murphy got pregnant with Linnerius she told her Ray was his father. (TT 99-100) Beverly Bennett, case worker for DHS, testified that it was not the practice of DIIS to coerce or threaten putative fathers into signing the stipulation agreement and that all fathers are given the option of genetic testing. (TT 104)(TT 121)

At the conclusion of the hearing, the trial court awarded damages to Ray in the amount of \$23,183.10 as recovery for past child support paid on behalf of Linnerius and stated its reasoning as follows:

The mother's testimony is that the Department of Human Services did not ask her when she went into the office to initiate these proceedings if she had ever had sex with anyone else. The worker told her to get benefits she would have to sign an affidavit alleging who the father was. This Court does not think it is sufficient for the Department of Human Services to take a mother's affidavit, pursue a man for child support – actively pursuing the man here – Mr. Ray and then when the DNA results prove it negative, the Department of Human Services claims no responsibility. This is growing trend in this jurisdiction. If the Department of Human Services is going to actively pursue child support then they either need to investigate more fully and/or provide DNA tests. Just because something is the State procedure where they take the lady's affidavit, whoever the lady names does not make it sufficient for this Court.

(TT 124) The court further reasoned,

This Court is a Court of equity and there is not anything equitable about a man paying over \$23,000 in child support for the benefit of a child that is not his. The Court finds that Ruby Murphy either knew that her statement was false or should have known that her statement was false when she named Mr. Ray as the father. The Department of Human Services actively went along with that. The Court finds that Ruby Murphy with the assistance of the Department of Human Services perpetrated a fraud on Mr. Ray. The Department of Human Services and Ruby Murphy are liable for \$23,183.10, together with all costs.

(TT 124)

## II. SUMMARY OF ARGUMENT

The trial court adopted *in toto* the proposed findings of fact and conclusions of law submitted by Ray and failed to generate its own independent findings of fact and conclusions of law. As such, this Court should review this matter *de novo* or with greater care and *heightened scrutiny*.

The trial court, after considering the evidence and testimony presented at trial, erroneously found that Murphy perpetrated a fraud on Ray as related to the paternity of Linnerius and awarded Ray \$23,183.10 as recovery for past child support payments. Mississippi law makes it clear there will be no reimbursement or recovery of child support payments from the mother, however, an alleged father may recover from the mother under the theory of fraud where he proves the mother intentionally sought to defraud him regarding paternity of the child. Fraud must be proved by clear and convincing evidence.

Ray failed to establish all the necessary elements of fraud. The only evidence produced by Ray to support his allegations of fraud was his testimony and the genetic testing results which indicated Linnerius is not his child. Ray's testimony is riddled with inconsistencies and falls short of the clear and convincing evidence standard: he testified that when he was initially contacted by DHS regarding Linnerius, he informed them 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 never produced any written documentation or witness testimony which indicated Murphy intentionally perpetrated fraud upon him regarding the paternity of Linnerius. It is abundantly clear Ray failed to establish fraud on behalf of Murphy. As such, the trial court erred in awarding Ray \$23,183.10 as recovery for past child support payments.

### III. ARGUMENT

#### A. STANDARD OF REVIEW

On appeal, the findings of a chancellor generally will not be reversed unless “he was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. Madison County v. Hopkins, 857 So.2d 43, 47 (Miss. 2003). Put another way, this Court ought and generally will affirm a trial court sitting without a jury on a question of fact unless, based upon substantial evidence, the court was manifestly wrong. Jackson Public Sch. Dist. v. Smith, 875 So.2d 1100 (Miss. Ct. App. 2004); Havens v. Broocks, 728 So.2d 580 (Miss. 1998). The premise underlying this standard of review is that the trial court heard the testimony and observed the demeanor of the witnesses and from this made the tough and necessary credibility determination. Omnibank of Mantee v. United Southern Bank, 607 So.2d 76, 83 (Miss. 1992).

The Mississippi Supreme Court in Mississippi Department of Transportation v. Johnson, 873 So. 2d 108 (Miss. 2004), held that where the trial judge adopts proposed findings of fact and conclusions of law submitted by the litigating parties, the appellate court will review the record *de novo*. The Mississippi Court of Appeals in Mississippi Department of Wildlife, Fisheries and Parks v. Brannon, 943 So.2d 53 (Miss. Ct. App. 2006), determined that the standard of review set forth in Johnson was an inaccurate statement of the law that needed to be addressed and clarified. The Court adopted the greater care and heightened scrutiny standard in lieu of *de novo* review in cases where the trial judge adopts proposed findings of fact and conclusions of law submitted by the litigating parties. Id.

In the case *sub judice*, the trial court, at the conclusion of the trial, requested each party submit findings of fact and conclusions of law. A review of the trial court’s findings of fact and conclusions of law reveals that the court adopted Ray’s proposed findings *in toto*. See Record



Excerpt 7. Because the trial court's findings are identical to those presented by Ray, this matter falls squarely into the purview of Brannon and Johnson, cases which suggest that the trial court's findings should be reviewed by a heightened standard rather than the substantial evidence standard. As such, this Court is bound by the precedent set in Brannon and Johnson to review this matter using the greater care and heightened scrutiny standard.

**B. THE TRIAL COURT ERRED IN AWARDING DAMAGES TO HENRY RAY IN THE AMOUNT OF \$23,183.10 AS RECOVERY FOR PAST CHILD SUPPORT PAYMENTS.**

1. Mississippi law prohibited the trial court from awarding past child support payments to Ray from Murphy.

It is well-settled in Mississippi that an award of child support is for the benefit of the child and that an obligation of child support vests in the child. Williams v. Rembert, 654 So.2d 26, 29 (Miss. 1995). As such, 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).

In McBride v. Jones, 803 So.2d 1168 (Miss. 2002), husband and wife had a child. They divorced and husband began paying child support for the minor and continued making the payments for approximately fifteen years. Husband later instituted an action against wife requesting a paternity test and wife testified at trial she was not certain who the father of the child was, but felt in her heart that it was husband. The paternity test revealed husband was not the child's father. The child support was immediately ceased and husband sought reimbursement from wife for the past child support payments. Husband argued he was the victim of fraud and that justice required wife reimburse him for the financial support he provided for the minor child. The trial court refused to award husband the past child support payments and the husband appealed the decision.

The Mississippi Supreme Court affirmed the trial court and held that husband could not recover child support payments made on behalf of the child as such payments are for the benefit of the child and not the mother. It further noted that whether husband was "*the victim of fraud is irrelevant in this case. Child support payments are for the benefit of the child and cannot be recovered from the mother even when paternity is disproved.*" Id. at p. 1170. The Court indicated that although husband could not seek reimbursement from wife, he could elect to sue the natural father for reimbursement or pursue a possible claim against the natural mother for fraud. Id.

In R.E. v. CEW and ACW, 752 So.2d 1019 (Miss. 2000), husband and wife had three children during their marriage. Wife had an adulterous affair and DNA test proved that one of the child born during the marriage was not husband's child. Husband and wife later divorced and signed legal documents stating husband was the natural father of all the children and establishing child support. Husband later brought a paternity action against the child's biological father and wife seeking reimbursement of past child support payments. The trial court held and the Mississippi Supreme Court adopted and affirmed the order of the trial court *in toto* which held that it would not

be equitable to force wife to reimburse husband for the child support he paid when he knew the child was not his but nevertheless represented to the Court during his divorce proceeding that he was the child's father and assumed child support obligations. Id. at p. 1025.

Considering R.E. and McBride, cases which held that child support payments cannot be recovered from the mother when paternity is disproved, it is clear that the trial court was manifestly wrong when it awarded Ray \$23,183.10 as recovery for past child support payments made on behalf of Linnerius. The order of the trial court granting Ray's motion for reimbursement of funds should be denied since the child support paid by the defendant was for the benefit of and vested in the child. Linnerius A. Jackson and Mississippi law does support reimbursement to Ray for the monies he paid in child support.

Furthermore, like R.E., Ray testified during the November 30, 2006, hearing under oath that he knew Linnerius was not his child at the time he executed the stipulation agreement and as such, it would not be equitable to force Murphy to reimburse him for child support he paid when he knew the child was not his but nevertheless represented to the Court that the child was his. Therefore, consistent with Mississippi law, this Court should reverse the February 1, 2007, order awarding Ray \$23,183.10 as recovery for past child support payments.

2. There exists no evidence to support the trial court's finding that Murphy perpetrated fraud upon Ray.

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)

There is a presumption that all persons act honestly and as such, fraud is never presumed. Aponaugh Mfg. Co. v. Collins, 42 So.2d 431, 478 (Miss. 1949). Proving fraud is difficult: Mississippi law requires clear and convincing evidence to prove fraud. Cherry v. Anthony, Gibbs & Sage, 501 So.2d 416, 419 (Miss. 1987). Clear and convincing evidence is the weight of proof that produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. It is evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, as to the truth of the asserted facts. Moran v. Fairley, 919 So.2d 969 (Miss. Ct. App. 2005); Sumler v. East Ford, Inc., 915 So.2d 1081, 1088 (Miss. Ct. App. 2005). Clear and convincing evidence is such a high standard that even the overwhelming weight of the evidence does not rise to the same level. Id. The clear and convincing standard is not met where the evidence is not of such real and substantial nature that impartial men of sound judgment could reasonably believe it. Aponaugh Mfg. Co., 42 So.2d at 479.

In Morton v. Anseman, Supreme Court of Mississippi, Cause No. 94-CA-01005-SCT, wife was pregnant when she married husband. Husband assumed the child was his and began caring for the child. Husband later discovered the child was not his and divorced wife. Husband acknowledged the child as his during the divorce proceedings and agreed to pay child support. Later, husband sought to terminate his child support obligations and alleged that wife perpetrated a fraud regarding the child's paternity. The Mississippi Supreme Court determined that in order to show fraud, husband would have to prove wife intentionally perverted the truth and the evidence indicated wife could not be sure of who was the child's father but believed in her heart that husband was the father of the children. The Court held that husband failed to meet his burden of proof to show that wife perpetrated fraud upon him regarding the paternity of the minor child.

In Brabham v. Brabham, 483 So.2d 341 (Miss. 1986), husband and wife divorced and husband agreed to pay child support for the couple's minor children. Husband failed to pay child support and wife sued him for contempt for failure to pay child support. Husband answered and cross-claimed alleging possible fraud in the paternity of the children, and sought blood tests to determine paternity. During the contempt hearing, husband called a number of witnesses that testified about rumors they heard and statements wife made about the paternity of the children. The Mississippi Supreme Court determined the rumors and hearsay that husband was not the father of the minor children were insufficient to support a finding of fraud as to justify blood testing.

(a) *Murphy honestly believed Ray was Linnerius' father and exhibited no intent to defraud Ray.*

To demonstrate a prima facie case of fraud, Ray must show, by clear and convincing evidence, that Murphy knew Linnerius was not his child and intended to defraud Ray into believing Linnerius was his child. Hamilton v. McGill, 352 So.2d 825, 831 (Miss. 1977). The record evidence indicates Murphy repeatedly testified that when she named Ray as the father of her child on or about January 21, 1986, she believed Ray was the father of her child and maintained that belief until the March 17, 2005, DNA testing results indicated that Ray was not Linnerius' father. (TT 6-10) Even after receiving the test results, Murphy questioned the test results but refused a second genetic test because Linnerius "*told me he'll leave the State before he go through another test.*" (TT 44-45)

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.

Ray indicated during his testimony his friend, Ervin Minton (*Minton*), told him he had been told by a man identified as Baby Brother that Linnerius was not his son but he did not indicate that Minton at anytime during the conversation stated that Murphy knew Linnerius was not his son and intended to defraud him. (TT 62) Further, Minton was not available to testify at trial and Ray was not a party to the conversation between Minton and Baby Brother. (TT 62-65)(TT 72) This is precisely the type of evidence presented in Brabham, a case which held that rumors and hearsay as to the conduct of the mother, in the absence of any other evidence, would not support a finding of fraud as to paternity, and like Brabham, the testimony given by Ray regarding his conversation with Minton was nothing but rumors and hearsay and is insufficient to support a finding of fraud.

In Morton v. Anseman, Supreme Court of Mississippi, Cause No. 94-CA-01005-SCT, this Court held that where the evidence indicates the mother could not be sure of who was the child's father but believed in her heart that her husband was the father of the children, despite the fact that she engaged in various adulterous relationships during the marriage, there was insufficient evidence to establish fraud. Like Morton, Murphy admits she had intercourse with Lloyd once while dating Ray but honestly believed Ray was the father of her child. No evidence was ever presented by Ray which indicates or disproves that Murphy honestly believed Ray was the father of her child. No evidence was ever presented by Ray which indicates that Murphy intentionally sought to defraud him. Therefore, applying the reasoning and rationale of Morton, there is insufficient evidence to establish fraud on the part of Murphy.

The elements of fraud which require that the speaker's knows her representation is false or is ignorant of its truth and the speaker's intent that it should be acted upon by the person and in the manner reasonably contemplated fail because there is no clear and convincing evidence which indicates that Murphy knew Ray was not Linnerius' father or that she intended to defraud him. As

such, this Court should reverse the February 1, 2007, order awarding Ray \$23,183.10 as recovery for past child support payments. Koury v. Ready, 911 So.2d 441 (Miss. 2005)(where all elements are fraud are not met, there can be no finding of fraud.)

(b) *Ray knew Linnerius was not his child.*

To demonstrate a prima facie case of fraud, Ray must show, by clear and convincing evidence, that he was ignorant to the fact Linnerius was not his child. Hamilton v. McGill, 352 So.2d 825, 831 (Miss. 1977). There is no clear, direct and weighty evidence that suggests that Ray was ignorant to the fact Linnerius was not his child: Ray 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. (TT 60-61) Ray alleges that he only signed the stipulation of paternity because he did not want to be picked up by the Sheriff for child support. (TT 61) This testimony by Ray clearly indicates that Ray was not ignorant of the fact Linnerius was not his child. As such, the element of fraud which requires the hearer's ignorance of its falsity fails because Ray admitted during the November 30, 2006, hearing that prior to signing the stipulation of paternity he was aware that Linnerius was not his son. Therefore, this Court should reverse the February 1, 2007, order awarding Ray \$23,183.10 as recovery for past child support payments.

(c) *Ray never relied on Murphy's representation that Linnerius was his child.*

To demonstrate a prima facie case of fraud, Ray must show, by clear and convincing evidence, that he relied on the representation made by Murphy. Hamilton v. McGill, 352 So.2d 825, 831 (Miss. 1977). This element of fraud fails because Ray consistently 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 agreement because he did not want to be picked up by the Sheriff for child support and this course of action indicates that Ray entered into the

stipulation agreement because he felt threatened by DHS not because he relied on any representation made by Murphy. He also testified that despite the fact that he knew Linnerius was not his child, because he was raised in a single mother and 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) As such, the element of fraud which requires the hearer’s reliance on the truth fails because Ray never relied on the representation made by Murphy: Ray acknowledged paternity and agreed to pay child support on behalf of Linnerius because he was fearful of being arrested and wanted to give Linnerius “*different from the way my father did.*” This Court should reverse the February 1, 2007, order awarding Ray \$23,183.10 as recovery for past child support payments. Koury v. Ready, 911 So.2d 441 (Miss. 2005)(where all elements are fraud are not met, there can be no finding of fraud.)

(d) *There is no clear and convincing evidence that supports a finding of fraud against Murphy.*

Fraud must be proved by clear and convincing evidence. Clear and convincing evidence is so clear, direct and weighty that the trier of fact would immediately upon being presented the evidence develop a firm belief or conviction as to the truth of the allegations sought to be established. Moran v. Fairley, 919 So.2d 969 (Miss. Ct. App. 2005); Sumler v. East Ford, Inc., 915 So.2d 1081, 1088 (Miss. Ct. App. 2005). As discussed *supra*, Ray failed to establish all the necessary elements of fraud. 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, 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 trial court awarded damages to Ray, not because there was clear and convincing evidence of fraud on behalf of Murphy, but because it sought to send a message to the community that “*women better name the right man as the father*” or the Chancery Court of Sunflower County, Mississippi was going to utilize its judicial power to “*start putting judgments on you women that name men to be the father and they’re not the father.*”

(TT 12)(TT22) There are clear limitations to the discretionary powers of a trial judge, and one such limitation is that a judge may not utilize her authority to do that which the substantive law of the State forbids her from doing. McDonald v. McDonald, 683 So.2d 929, 934 (Miss. 1996).

The ethically questionable statements made the trial court along with 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.

**C. THE TRIAL COURT ERRED IN ALLOWING HENRY RAY TO AMEND HIS COMPLAINT TO ALLEGE FRAUD AFTER IT HAD PREVIOUSLY ENTERED JUDGEMENT AGAINST RUBY MURPHY FOR \$23,183.10.**

In all averments of fraud, the circumstances constituting the fraud shall be stated with particularity. Fraud will not be inferred or presumed and may not be charged in general terms. Brabham v. Brabham, 483 So.2d 341 (Miss. 1986). The circumstances constituting fraud must be stated with particularity, including such matters as time, place, contents of false representations.

identify of the person who made the fraudulent statements and what he obtained as a result. Miss. R. Civ. P. 9(b); Boling v. A-1 Detective & Patrol Service, Inc., 659 So.2d 586 (Miss. 1995).

When Ray initially filed his motion for reimbursement of past child support payments he failed to plead fraud: there was no mention of or averments of fraud in the motion filed by Ray. The motion was heard before the Honorable Judge Jane R. Weathersby on April 12, 2006. No testimony was given by the parties or any other witnesses; counsel for each of the parties argued the motion and the Court, at the conclusion of oral argument, awarded damages to Ray in the amount of \$23,183.10 as recovery for past child support paid on behalf of Linnerius and stated in relevant part:

And above all things this is a court of equity and certainly what happened to Mr. Ray was not equitable. **The mother perpetrated a fraud on Mr. Ray and was allowed to do so by the Department of Human Services**, and this Court is going to grant the motion ordering Ruby Murphy and the Department of Human Services to reimburse Mr. Ray in the amount of \$23,183.10 and a judgment in that amount is granted.

(CP 70)(TT 22) This ruling is the **first time** fraud was ever mentioned with regard to this matter. The trial erred in awarding damages to Ray on the theory of fraud when fraud was never pleaded by him. Mississippi law makes it clear that fraud should not be inferred or presumed and may not be charged in general terms. Brabham v. Brabham, 483 So.2d 341 (Miss. 1986). Therefore, it is clear that the trial court abused its discretion and was clearly erroneous when it awarded damages to Ray based on allegations of fraud that were never pled.

Murphy, considering the erroneous nature of the April 12, 2006, ruling, filed a motion for reconsideration and/or motion for findings of facts and conclusions of law. Shortly after the motion for reconsideration was filed, Ray sought to amend his complaint to allege fraud. The trial court erroneously allowed Ray to amend his complaint to allege fraud.

The matter of amendments to pleadings lies within the discretion of the trial court. Natural Mother v. Paternal Aunt, 583 So.2d 614, 614 (Miss. 1991). The application for an amendment should be prompt and not the result of an inexcusable want of diligence. Id. Leave to amend should not be granted where there exists undue delay, bad faith, or dilatory motive on the part of the movant. Id. Furthermore, amendments which are permitted in the latter stages of litigation may deny the important policy favoring finality of judgments and the expeditious termination of litigation. Id. Amendments should never be granted as to encourage delay, laches and negligence. Griffith, Mississippi Chancery Practice § 392 (2d ed. 1950); Knotts v. Hassell, 659 So.2d 886 (Miss. 1995)(Failure to seek to amend until less than three weeks before trial was not prompt and should be denied); Rolkosky v. Rolkosky, 113 So.2d 661 (1959)(chancellor committed no error in denying amendment where the motion was filed after the cause was submitted and the chancellor announced the decision); Natural Mother v. Paternal Aunt, 583 So.2d 614 (Miss. 1991)(Amendment was properly denied where mother sought to amend pleadings two days before trial).

Consistent with the holdings of Natural Mother, Knotts, and Rolkosky, cases which hold that amendments to pleadings should be denied when sought days before trial or after the cause was submitted to the chancellor, it is clear that the trial court was clearly wrong when it allowed Ray to amend his complaint to allege fraud after it made its April 12, 2006, ruling awarding damages to Ray based on the theory of fraud. The amendment was untimely, the result of an inexcusable want of diligence, filed in bad faith, dilatory and unfounded. As such, this Court should reverse the February 1, 2007, order awarding Ray \$23,183.10 as recovery for past child support payments.

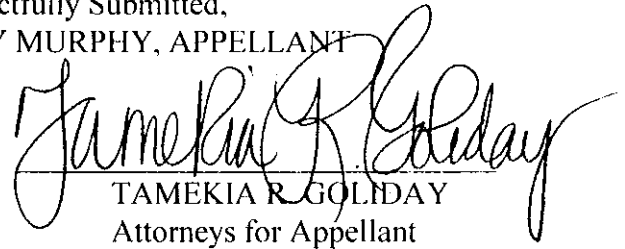
## CONCLUSION

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.

SO BRIEFED, the 29th day of January, 2008.

Respectfully Submitted,  
RUBY MURPHY, APPELLANT

By:

  
TAMEKIA R. GOLIDAY  
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## 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 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 29th day of January, 2008.

  
TAMEKIA R. GOLIDAY

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TAMEKIA R. GOLIDAY