

IN THE SUPREME COURT OF MISSISSIPPI

**STATE OF MISSISSIPPI
DEPARTMENT OF HUMAN SERVICES**

APPELLANT

VS.

DOCKET NO. 2007-CA-00362

**HENRY RAY
SSN: 428-21-9471**

APPELLEE

BRIEF FOR APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

I, Byron W. Hughes, Attorney for the Mississippi Department of Human Services, Appellant, certify that I do hereby submit this certificate of interested persons in this case. To the best of Appellant's knowledge, the hereinafter named individuals represent the parties who have a significant interest in the outcome of this case.

Chancellor Jane R. Weathersby
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Honorable Betty W. Sephton, Clerk
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Honorable Walley R. Naylor
Division Director
Child Support Enforcement
Mississippi Department of Human Services
Post Office Box 352
Jackson, Mississippi 39202

This the 16th day of NOVEMBER, 2007.


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STATEMENT OF ISSUES

The Appellant, STATE OF MISSISSIPPI, DEPARTMENT OF HUMAN SERVICES ("State of Mississippi"), would most respectfully state that the primary issues before this Honorable Court are as follows, to-wit:

1. DID Appellant, State of Mississippi, receive lawful Service of Process?
No. Was such Non-Service ignored by the Trial Court? Yes. Was said Service of Process waived by the Appellant, State of Mississippi? No. Is the Highest Standard of review appropriate? Yes.
2. WAS Lawful Service of Process received by and or made upon the Appellant, State of Mississippi, within one hundred twenty days (120) of the filing of the Complaint herein? No. HENCEFORTH, should said Complaint have been dismissed by the Trial Court? Yes.
3. WAS the Judgment against Appellant, State of Mississippi, altered or amended later than ten (10) days after entry of said Judgment? Yes.

IS the Trial Court permitted to extend or enlarge this ten (10) day time period?
No.
4. DID the Appellant, State of Mississippi, commit or perpetuate FRAUD in this action? No. DID the employees thereof act within their lawful Statutory Authority? Yes. Further, is said FRAUD barred against the Appellant, State of Mississippi, by the Statute of Limitations and the MISSISSIPPI TORT CLAIMS ACT? Yes. DID the STATE OF MISSISSIPPI waive Sovereign Immunity? No.
5. IS the Appellee, Henry Ray, guilty of LACHES? Yes.

6. HAS Appellee, Henry Ray, violated the Litigation Accountability Act of 1988 for false, frivolous and unproven allegations of FRAUD against the Appellant, State of Mississippi? Yes.

7. ARE child support payments in this action vested and unforgivable? Yes.
Can such be modified? No.

8. CAN a Non-biological Father who fails to contest paternity and voluntarily pays child support require the Mother of said child to reimburse said payments? No.

9. DO child support payments vest in the child and are such unforgivable? Yes.

10. CAN a Court forgive child support payments that have become due and payable? No.

11. IS the Appellant, Department of Human Services, State of Mississippi, required to post bond pending this appeal? No.

IS the State entitled unto an automatic stay of the Judgment herein? Yes.

STATEMENT OF THE CASE

Appellee, Henry Ray, brought this action against the Appellant, State of Mississippi, seeking recovery of child support payments in the amount of \$23,183.10, same having been voluntarily paid by the Appellee, Henry Ray, during a nineteen (19) year period.

In 1986, Appellee, Henry Ray, voluntarily executed an Affidavit and Affirmation of Paternity naming himself as the lawful father of subject child herein.

At that time, Appellee, Henry Ray, did not seek nor request paternity testing in this matter.

In 2004, some eighteen (18) years later, Appellee, Henry Ray, sought and received paternity testing herein. The results of such were received in 2005, which excluded the Appellee, Henry Ray, as the biological father of subject child.

In December 2005, Appellee, Henry Ray, filed a complaint to compel Appellant, State of Mississippi, to remit reimbursement of aforesaid child support payments.

After numerous Motions, hearings and objections by the Appellant, State of Mississippi, the Trial Court entered a Judgment on May 1, 2006 and on February 1, 2007, NUNC PRO TUNC, November 30, 2007, (2006), entered a Final Decree rendering the Appellant, State of Mississippi, liable unto the Appellee, Henry Ray, in the amount of \$23,183.10, for child support paid herein by said Appellee, Henry Ray.

Appellant, State of Mississippi, does hereby most respectfully appeal from said Judgment and Final Decree and PRAYS that such rulings and JUDGMENTS of the Trial Court be reversed in all respects.

STATEMENT OF FACTS

The facts of this action are relatively simple.

As heretofore stated, Appellee, Henry Ray, voluntarily admitted and paid child support herein for a period of approximately nineteen (19) years, in the amount of \$23,183.10.

Now, said Appellee, Henry Ray, is seeking recovery of said funds from the Appellant, State of Mississippi.

Appellee, Henry Ray, contends that the Appellant, State of Mississippi, is guilty of fraud, that lawful Service of Process against the Appellant, State of Mississippi, is not required, that a Judgment may be amended past the ten (10) day rule, that the Statute of Limitations and the Mississippi Tort Claims Act does not apply herein, that Appellee, Henry Ray, is not guilty of Laches and has not violated the Litigation Accountability Act of 1988.

Further, Appellee, Henry Ray, contends that child support payments in this action are not vested, are forgivable and can be modified.

Also, Appellee, Henry Ray, contends that a non-biological father, who failed to contest paternity and voluntarily paid child support, can require the Mother of said child to reimburse payments.

Appellant, State of Mississippi, most respectfully submits that Appellee's, Henry Ray, said allegations and contentions are frivolous, unconscionable, laudable, vexatious and without any merit whatsoever. Therefore, Appellant, State of Mississippi, states that the Honorable Trial Court erred in its rulings and does hereby appeal from said Judgment

and Decree rendered against Appellant, State of Mississippi, Department of Human Services.

SUMMARY OF THE ARGUMENT

Appellant, State of Mississippi, hereby respectfully submits ten (10) points for arguments as to this Appeal.

1. Appellant, State of Mississippi, has not been served with lawful Service of Process.

2. Judgment against Appellant, State of Mississippi, was altered and amended later than ten (10) days after the entry thereof.

3. Appellant, State of Mississippi, did not commit nor perpetuate FRAUD in this action, as accused by the Appellee, Henry Ray.

4. Fraud in this action would be barred by the Statute of Limitations and the MISSISSIPPI TORT CLAIMS ACT. Appellant, State of Mississippi, did not waive Sovereign Immunity.

5. The employees of Appellant, State of Mississippi, acted within their lawful statutory authority.

6. Appellee, Henry Ray, is guilty of LACHES.

7. Appellee, Henry Ray, is in violation of the Litigation Accountability Act of 1988.

8. Child support payments became vested in the child and cannot be forgiven nor modified.

9. A Mother cannot be required to reimburse child support payments.

10. The Trial Court should have dismissed this action against Appellant, State of Mississippi, and the State is not required to post bond and is entitled to an automatic stay of the Judgment herein pending this appeal.

Henceforth, this Honorable Court should reverse, set aside and render NULL AND VOID the Judgment herein entered May 1, 2006, and the Final Decree of the Trial Court, entered February 1, 2007, *Nunc Pro Tunc* November 30, 2007 (*sic*), (2006), ordering Appellant, State of Mississippi, to reimburse \$23,183.10 in child support payments unto Appellee, Henry Ray.

BRIEF OF ARGUMENT

POINT ONE

Appellant, State of Mississippi, most respectfully submits that the highest standard of review should be afforded unto this case at BAR.

“The findings of a Trial Court, sitting without a jury on a question of fact, will usually be affirmed, unless based upon substantial evidence and the record that the Trial Court was manifestly wrong”. Jackson Public School District v. Smith, 875 So.2d 1100 (Miss. Ct. Appeal, 2004). May v. Harrison County Dept. of Human Services, 883 So.2d 74, 77 (Miss. 2004). Brown v. Mississippi Department of Human Services, 806 So.2d 1004 (Miss. 2000).

“Where the Trial Judge adopts proposed Findings of Fact and Conclusions of Law submitted by a litigating party”, the Appellate Court will review the record *de novo*. Miss. Dept. of Transportation v. Jo Hanson, 873 So.2d 108 (Miss. 2004).

Also, where the Trial Judge adopts proposed Findings of Fact and Conclusions of Law submitted by a litigating party”, the Court has adopted “the greater care and heightened scrutiny standard in lieu of *de novo*”. Mississippi Dept. of Wildlife, Fisheries and Parks v. Brandon, 943 So.2d 53 (Miss. Ct. Appeal, 2006).

As stated, certainly in this case, the highest standard of review is appropriate. The record speaks for itself, *ipso facto*. Motions after motion submitted by Appellant, State of Mississippi, were denied by the Trial Court, without any legal basis whatsoever. For example, Appellant, State of Mississippi, was never served with lawful Service of Process in this matter. A fact obviously ignored by the Trial Court.

Further, the element of fraud committed by Appellant, State of Mississippi, as alleged by Appellee, Henry Ray, was never proven nor lawfully substantiated.

Appellee, Henry Ray, proposed, drafted and submitted the Judgment and Final Decree in this case, which were adopted by the Trial Court, without any lawful basis, over the objections of Appellant, State of Mississippi. Therefore, as previously stated, Appellant, State of Mississippi, hereby most respectfully submits that this Honorable Court should bestow the highest degree of care and scrutiny of review in this case, *sub judice*.

POINT TWO

Appellant, State of Mississippi, has not been served with lawful Service of Process, pursuant unto the Mississippi Rules of Civil Procedure Rule 4(d)(5), a Summons and Complaint shall be served together, "upon the STATE OF MISSISSIPPI or any one of its Departments, officers or institutions, by delivering a copy of the Summons and Complaint to the Attorney General of the STATE OF MISSISSIPPI". Further, pursuant unto Section §11-45-3, et seq., Mississippi Code 1972, (Revised), "any action against the STATE OF MISSISSIPPI and/or any agency thereof, the Attorney General of the STATE OF MISSISSIPPI, must be served with lawful Service of Process. As evidenced by the record hereto, there is no such lawful Service of Process in this cause nor has said service been waived.

Appellant, State of Mississippi, did not waive Sovereign Immunity herein and is therefore immune from liability for any damages assessed by the Trial Court. Section §11-46-9, et. seq., Miss. Code 1972 (Revised).

Also, pursuant unto Section §11-51-101, et seq. Miss. Code 1972 (Revised) the State of Mississippi is entitled unto an automatic stay of the Judgment without posting bond therefor.

POINT THREE

Further, pursuant unto Rule 4(h) M.R.C.P., if a lawful service of summons and complaint is not made upon a Defendant within one hundred twenty (120) days of the filing of the complaint, same shall be dismissed.

As evident by the record, said time limit of over one hundred twenty (120) days has long expired for this Cause, such having been filed against the Appellant, State of Mississippi, on December 29, 2005, with no lawful Service of Process to date.

POINT FOUR

Further, as evidence by the record on May 1, 2006, the Trial Court entered an Order To Reimburse Funds against Appellant, State of Mississippi.

On June 28, 2006 Appellee, Henry Ray, filed a Motion To Amend The Amended Motion To Reimburse Funds.

On August 15, 2006 the Trial Court entered an Order granting Appellee's, Henry Ray, "Motion To File A Second Amended Motion To Reimburse Funds" and on August 21, 2006 Appellee, Henry Ray, filed a "Second Amended Motion To Reimburse Funds".

M.R.C.P. Rule 59(e), et. seq., states that a Motion to alter or amend the Judgment shall not be filed later than ten (10) days after entry of the Judgment.

Pursuant to M.R.C.P. Rule 6(b)(2), et. seq., the Trial Court is not permitted to extend this time period and the ten (10) day time period cannot be enlarged.

Obviously the ten (10) day time period to "Alter or Amend" from the entry of aforesaid Order on May 1, 2006, had long expired.

POINT FIVE

Appellee, Henry Ray, contends that this Appellant, State of Mississippi, has committed Fraud. Such allegations are false, unproven, frivolous and defamatory.

There is no evidence of any kind in the record, neither written nor oral testimony, which proves or even suggests that the Appellant, State of Mississippi, is guilty of Fraud.

"Allotments of Fraud must be plead with PARTICULARITY." M.R.C.P. Rule 9, et seq., Rule 12, et. seq. McHahon v. McHahon, 157 So.2d 494 (Miss. 1963).

Any evidence of fraud must be "clear and convincing". Cherry v. Anthony, Gibbs and Sage, 501 So.2d, 416, 419 (Miss. 1987). Hamilton v. McGill, 352 So.2d 825, 831 (Miss. 1997).

POINT SIX

Further, Appellee's, Henry Ray, allegations and claims of Fraud as committed by Appellant, State of Mississippi, a State Agency and/or the employees thereof are barred by the MISSISSIPPI TORT CLAIMS ACT, Sections §11-46-1, §11-46-23, Miss. Code 1972 (Revised).

Section §11-46-11, thereof, requires that any complaint against tortuous, wrongful or otherwise actionable conduct "which would include Fraud, shall be commenced within one year after the date of such event".

As is clearly evident in this Cause, Appellee's, Henry Ray, allegations of any perpetration of Fraud committed by Appellant, State of Mississippi, would have occurred many years prior unto the filing date of the complaint therefor.

“A claim filed against a County was dismissed, because the claim was filed after the one year Statute of Limitations had expired”. Williams v. Clay County, 861 So.2d 953 (Miss. 2003).

“Actions against a State entity were dismissed, since plaintiff filed his complaint after the one year statute of limitations had expired”. Davis v. Hoss, 869 So.2d 397 (Miss. 2004).

“An action against the State and State agencies was time-barred, same having been filed one year after the alleged occurrence”. Stockstill v. State, 854 So.2d 1017 (Miss. 2003). Black V. City of Tupelo, 853 So.2d 1221 (Miss. 2003).

POINT SEVEN

Further, the actions of Appellant, State of Mississippi, and its employees were and are lawful pursuant unto Statutory Authority. Section §43-19-31, et seq., Miss. Code 1972 (Revised). Hull v. State Dept. of Public Welfare, 515 So.2d 1205 (Miss. 1987). Child support payments herein were “collected pursuant unto a valid court order, Department of Human Services v. Blount, 2005 So.2d (2003-CA-01785-C.O.A.) and did not constitute unjust enrichment”

No evidence of fraud exists as alleged by Appellee, Henry Ray, and such wrongful allegations are frivolous, unproven, malicious and defamatory.

POINT EIGHT

Appellee, Henry Ray, contends that Appellant, State of Mississippi, is in violation of the Litigation Accountability Act of 1988, Section §11-55-1, et. seq., Miss. Code 1972 (Revised). Appellee's, Henry Ray, said contentions are groundless in fact and law and are without any merit whatsoever.

In fact, the reverse is true, as such applies unto Appellee, Henry Ray, for such unproven, frivolous and unlawful claims of fraud against Appellant, State of Mississippi. Accordingly, Appellee, Henry Ray, should be so sanctioned therefore.

POINT NINE

As reflected by the record, Appellee, Henry Ray, admitted having sexual relations with Mother, Ruby J. Murphy. At that point in time, Ms. Murphy was a minor child, being seventeen years of age. Appellee, Henry Ray, who was then nearly twenty years old, clearly believed himself to be the biological father of subject child herein.

Nearly nineteen years lapsed from the time Appellee, Henry Ray, voluntarily admitted paternity of said subject child and began paying child support, until Appellee, Henry Ray, requested paternity testing, received negative results, and filed his Complaint in this action. Also, during this time period, the initiatory Child Support Enforcement Officer herein departed this life and Appellee's, Henry Ray, claims of fraud are unprovable.

Appellee, Henry Ray, is clearly guilty of LACHES, *ipso facto*. The one year statute of limitations against a State entity having long expired. Further, Appellee, Henry Ray, contends he is entitled to relief pursuant to Rule 60(b) M.C.R.P.; however, the exact opposite is true as said Rule clearly states that any motion for relief shall be made "within a reasonable period of time and not more than six months after entry of a Judgment or Order". As stated, more than nineteen (19) years have lapsed. Is that not LACHES on the part of Appellee, Henry Ray? To now sustain Appellee's, Henry Ray, action would result in an inequitable injury unto Appellant, State of Mississippi. Sullivan v. McCallum, 231 So.2d 801 (Miss. 1970).

POINT TEN

“Child support payments are for the benefit of the child and cannot be recovered from the mother when paternity is disproved.” McBride v. Jones, 803 So.2d 1168 (Miss. 2002).

“Where a non-biological father fails to contest Paternity and/or voluntarily acknowledges Paternity, pays child support and later finds out that he is not the father of the child, it is inequitable to require the mother to reimburse the non-biological father for support paid.” R.E.V.C.E.W. AND A.C.W., 752 So.2d 1019 (Miss. 1999).

“An award of child support is for the benefit of the child and such vests in the child and is unforgivable”. Varner v. Varner, 588 So.2d 482 (Miss. 1991). Williams v. Rembert, 654 So.2d 26, 29 (Miss. 1995). Cumberland v. Cumberland, 564 So.2d 839, 847 (Miss. 1990).

“Child support payments become vested, are unforgivable and cannot be modified”. Thurman v. Thurman, 559 So.2d 1014 (Miss. 1990). Burt v. Burt, 841 So.2d 108 (Miss. 2001).

“A Court cannot relieve the civil liability for support payments that have already accrued”. Tanner v. Roland, 598 So.2d 783 (Miss. 1992). Haley v. Holden, 457 So.2d 974 (Miss. 1984).

CONCLUSION

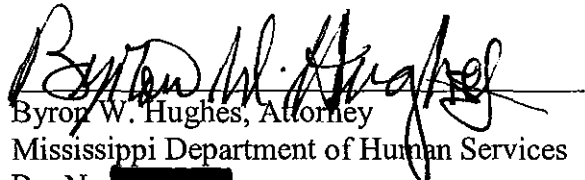
Appellant, State of Mississippi, hereby most respectfully appeals unto this Honorable Supreme Court.

Appellant, State of Mississippi, submits that based upon the record, foregoing arguments, cited statutes, case decisions and authorities that the Rulings, Judgments and

Decrees of the Trial Court should be reversed in all respects and that Appellee, Henry Ray, be assessed with all costs and sanctions herefor and Appellant, State of Mississippi, be awarded attorney fees.

Appellant, State of Mississippi, further appeals and prays for any additional relief deemed just by this Honorable Court.

Respectfully submitted, this, the 16th day of NOVEMBER, 2007.


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CERTIFICATE OF SERVICE

I, Byron W. Hughes, Counsel for Appellant, the State of Mississippi, Department of Human Services, do hereby certify that I have this day, mailed, postage prepaid, a true and correct copy of the foregoing **Brief for Appellant** to the following individuals and interested parties, to-wit:

Chancellor Jane R. Weathersby
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Post Office Box 1380
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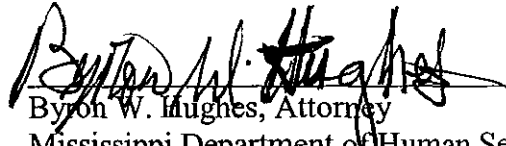
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This the 16th day of NOVEMBER, 2007.


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