CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal. Such persons are:

a. Dorothy Jeannine Jones, Appellant

b. Briley Richmond, attorney at law, counsel for Appellant

c. Lloyd Casey Jones, Appellee

d. Wendy C. Hollingsworth, Esq., Trial counsel for Appellee

MARCH 19, 2007

Briley Richmond,
Attorney of Record for Appellant Dorothy Jeannine Jones

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TABLE OF CONTENTS

Table of Cases and Authorities Page

Cases:

Statutes:

Treatises

Mississippi Rules of Civil Procedure

Statement of Issues:

First Issue: At a hearing based upon a Rule 81 summons, the Trial Court did modify a Final Judgment containing a Property Settlement Agreement from an Irreconcilable Differences Divorce. Appellant asserts that rule 81 does not confer jurisdiction on a Trial Court to modify the property settlement portion of a final judgment.

Second Issue: At a hearing to modify the property settlement agreement of an agreed Final Judgment from an Irreconcilable Differences divorce, the judge modified only one aspect of the property settlement. Appellant would assert that at the time she consented to the Irreconcilable Differences divorce she made substantial concessions in areas of alimony and property division in return for the specific property that she has now been denied due to the modification. Appellant would submit that where there has been an Irreconcilable Differences divorce and both parties have reached an agreement as to a property settlement, in the event of modification of the property settlement the entire settlement should be set aside so the other issues which had been compromised in the negotiations can now be readdressed.

Statement of the case:

A) This case involves the appeal of a judgment below, where a trial judge, acting under the jurisdiction of Rule 81 on a Complaint for Modification of a prior decree, entered an order modifying the property settlement agreement.

B) The parties were originally divorced in 1999. The Final Judgment of Divorce was entered on February 2, 1999. It was an agreed judgment under the Irreconcilable Differences Statute of the State of Mississippi. It contained a property settlement agreement and was signed and approved by both parties. A copy is contained at page 1 of the Clerk's papers.

C) On March 29, 2006, the Appellant, Dorothy Jeannine Jones (hereinafter referred to as Jeannine) filed a "Complaint Seeking Modification of Decree". A copy of the Complaint is contained at page 13 of the Clerk's papers. Process under rule 81 was duly prepared and served. (Index to Clerk's papers, entry dated 3/29/2006)

D) On June 9, 2006, the Appellee, Lloyd Casey Jones (hereinafter referred to as Casey) entered his appearance with an answer to the original complaint, and a "Counterclaim for Modification and Citation of Contempt". This "Counterclaim for Modification and Citation for Contempt can be found at page 26 of the Clerk's papers.

E) A trial was set and the matter was heard on March 13, 2007, before the Chancery Court of Jackson County, Mississippi, the Honorable Randy Pierce presiding.

F) On the date of the trial the parties announced that they had reached agreement on all issues but one – that issue being the jurisdiction of the Court to modify the property settlement portion of a Final Judgment that was 7 years 4 months old in a Rule 81 proceeding..

G) A "mini-trial" was conducted on March 13, 2007, with all parties agreeing to the manner in which the Court proceeded. A transcript of the mini trial is indeed the "Trial Transcript", consisting of 27 pages which has been filed with this Court.

H) On March 16, 2007, the trial judge entered a letter ruling holding that he had jurisdiction to modify the property settlement portion of the Final Judgment, and did indeed enter an order modifying only a portion of the property settlement, a modification which took away valuable property rights of Jeannine, leaving in tact the remaining portions of the property settlement, all favorable to Casey. This letter ruling can be found at page 46 of the Clerk's papers.

I) On June 6, 2007, the Court entered an "ORDER" based on his letter ruling. Clerk's papers, page 54.

J) On April 27, 2007, Jeannine filed a motion for a new trial.(page 49, Clerk's papers). After entry of the "ORDER" dated June 6, 2007, Jeannine re-filed her Motion for a New Trial. (Clerk's papers, page 56)

K) On July 25, 2007, the Trial Court entered an order denying the motion for a new trial. (Clerk's papers page 66).

L) Notice of Appeal was filed August 7, 2007. (Clerk's papers page 67)

Statement of the facts:

The facts are very simple. As shown in the Statement of the Case, Casey sought the modification of the property settlement agreement of a Final Judgment of Divorce through a Rule 81 proceeding. At the hearing Jeannine raised the issue of jurisdiction, page 15 of the transcript, lines 14 through 23:

By Mr. Richmond: "First, Your Honor, we do not believe the issue is properly before the Court. This is a property settlement. It is not subject to modification. If they were to seek to attack this decree, we would submit that Rule 60(b) would be the proper mechanism to attack it. We would be entitled to the defenses and protections of Rule 60 (b). As the matter was framed, we do not believe that this Court has a modification – has any jurisdiction."

The issue of the attack on the decree being untimely was brought up as a defense also. At page 17, lines 7-9 the following is stated:

By Mr. Richmond: I note that the decree is entered in 1999. I would suspect that they are outside the boundaries of Rule 60(b).

STANDARD OF REVIEW: Jeannine asserts that the Trial Judge made errors as to the law, and as such the review by this court is de novo. "We use a de novo standard of review when examining questions of law decided by a chancery court. ." *Saliba v. Saliba,* 753 So.2d 1095, 1098 (Miss.2000).

Please note: When the word "rule" is used throughout this brief, the term is used to describe Rules under the Mississippi Rules of Civil Procedure

Summary of the Argument:

First Issue: At a hearing based upon a Rule 81 summons, the Trial Court did modify a Final Judgment containing a Property Settlement Agreement from an Irreconcilable Differences Divorce. Appellant asserts that rule 81 does not confer jurisdiction on a Trial Court to modify the property settlement agreement portion of a Final Judgment.

This matter was before the Trial Court pursuant to a Rule 81 summons. The Trial Court entered an order modifying the property settlement portion of an agreed Final Judgment. Appellant (hereinafter Jeannine) would show that a Court does not have jurisdiction under Rule 81 to modify the property settlement agreement portion of a Final Judgment. Jeannine would show that the proper procedure to attack a Final Judgment would be under Rules 59 and 60, rules which limit the method and manner of attack and provide her certain protections, not the least of which is the doctrine of laches. The Final Judgment modified was 7 years and 4 months old at the time the Complaint Seeking Modification was filed, and the trial judge who had entered the Final Judgment had retired, leaving the modification to be made by a different Judge than who initially handled the matter.

Second Issue: At a hearing to modify the property settlement agreement portion of an agreed Final Judgment from an Irreconcilable Differences divorce, the judge modified only one aspect of the property settlement. Appellant would assert that at the time she consented to the Irreconcilable Differences divorce she made substantial concessions in areas of alimony and property division in return for the specific property that she has now been denied due to the modification. Appellant would submit that where there has been an Irreconcilable Differences divorce and both parties have reached an agreement as to a property settlement, in the event of modification of the property settlement the entire

settlement should be set aside so the other issues which had been compromised in the negotiations can now be readdressed.

The final judgment that was modified in this matter was the property settlement portion of an Irreconcilable Differences divorce. Jeannine freely negotiated the terms of the settlement and made substantial concessions in the areas of property division and alimony in order to receive the asset which is the subject of this dispute. It is not fair to take from Jeannine the asset she bargained for and made financial concessions for without reopening the entire process and allowing her to renegotiate property division and alimony. She forwent a claim for alimony, she conceded valuable property to her husband, in return for which she was to receive a certain asset. The trial court has now taken that asset from her without allowing her to readdress her alimony claim and other property issues. Jeannine would submit that if the Court is to upset the property settlement agreement, the entire agreement should be upset so as to allow her to negotiate for the items she had made concessions on. Jeannine signed off on an agreed judgment of divorce. She expected, and is entitled to, the exact wording that she signed off on. It is not fair to assume that she would have signed the agreed judgment unless it was worded exactly as it was. In fact, had the judgment not been worded exactly as it was, she would not have agreed to the divorce. This modification allows the defeat of the entire purpose of the Irreconcilable Differences ground for divorce in Mississippi.

ARGUMENT TO THE FIRST ISSUE: At a hearing based upon a Rule 81 summons, the Trial Court did modify the Property Settlement portion of an agreed Final Judgment from an Irreconcilable Differences Divorce. Appellant asserts that rule 81 does not confer jurisdiction on a Trial Court to modify the property settlement agreement portion of a Final Judgment.

In this case the Chancellor entered an order modifying the property settlement portion of a final decree of divorce. (Clerk's papers, page 54) The matter before the Court was a "Counterclaim For Modification" (Clerk's papers, page 25) brought pursuant to Rule 81, seeking modification of a prior decree as such is allowed in 81 (d) (2). Rule 81 is a rule of limited jurisdiction. Under Rule 81 (d) (2) the Court is granted jurisdiction to handle matters certain matters, among which is the authority to enter orders of "...modification or enforcement of custody, support, and alimony judgments;..." No where does the rule grant the court jurisdiction to modify a property settlement, or judgment awarding property rights.

A divorce decree is a "final judgment" as such is defined in Rule 58, and was labled such in the case at issue (Please see document titled "Final Judgment, page 1 of the Clerk's papers). As such, all issues, other than those enumerated in Rule 81, are considered "res judicata", (the term "res judicata" is defined in Black's Law Dictionary, Revised 4th Edition, 1968, as follows, "Rule that final judgment or decree on merits by a court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in former suit...the sum and substance of the whole rule is that a matter once judicially decided is finally decided. Page 1470). Therefore the Final Judgment of February 2, 1999 which was at issue before the Court is to be treated under the Rules as a final judgment as such is defined in Rule 54 (a):

"Judgment" as used in these rules includes a final decree and any order from which an appeal lies."

Upsetting a final judgment is governed by rules 59 and 60. The granting of new trial to upset a final judgment or to seek an amendment to the judgment is governed by Rule 59. The time limit under this rule is 10 days to either file a motion for a new trial or to amend. The judgment that was amended in the case before the Court today was entered in February of 1999. The Complaint seeking the amendment was filed on June 8, 2006. We would ask the Court to take judicial notice of the fact that 10 days had expired.

The rule that allows a party to seek RELIEF FROM JUDGMENT OR ORDER is Rule 60. Rule 60, just as Rule 81, is as rule of limited jurisdiction. It provides specific grounds for which a decree may be "corrected" in the case of clerical errors {Rule 60 (a)}, and specific grounds for which a Court "may relieve a party or his legal representative from a final judgment, order, or proceeding..." Rule 60(b). The reasons for which a Court may take such action are limited, and the procedure to be used, including various time limits, are spelled out at Rule 60(b).

No claim or showing has been made of a clerical error, nor has any claim been made that would have led Jeannine to believe she was defending anything but a Rule 81 modification.

Quite simply, the Appellee, Casey, is not properly before Court. The Final Judgment at issue is dated February 2, 1999. If the Appellee wishes to attack this 7 year 4 month old judgment he would need to seek relief under either Rule 59 or 60. Both of those rules have explicit procedures that must be followed to reopen a judgment. Both are subject to time limitations, and other defenses, one of which is laches. The

Chancellor who entered the Final Judgment being attacked, that Judgment dated February 2, 1999, was the Honorable Glenn Barlow, a learned and esteemed Chancellor with an outstanding record of service to our judiciary. I ask the Court to take judicial notice that this well known and respected jurist has since retired. The case was then assigned to Chancellor Randy Grant Pierce.

"In determining whether laches can be applied, the court looks to three considerations. The party seeking to invoke the doctrine of laches must show: (1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted. *Grant v. State,* 686 So.2d 1078, 1089 (Miss. 1996)." BAILEY v. ESTATE OF KEMP, 955 So.2d 777 (MS 2007). The Court further found in Kemp that the undue prejudice prong of the test was satisfied as follows, "First, Kemp could no longer testify to defend himself against the complaints of the Baileys, as he had passed away two years before their suit was filed." In the case before the Court today the Chancellor who signed the original decree served 4 years after the decree was entered. Three years after that the complaint was filed. Certainly this causes prejudice to Jeannine – Appellee waited 7 years and 4 months to seek his relief. Surely this is an undue delay that is inexcusable and prejudices Jeannine as the judge who signed the decree has since retired. We now have a case where a judge has set aside the finding of the trial judge 7 years and 4 months after the entry of the decree. And he wasn't the judge who signed the original judgment. Certainly that can't be right.

Though there are opportunities available to attack property settlements in Divorces, those opportunities are limited:

"The supreme court has recognized that "[a] true and genuine **property settlement** agreement is no different from any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character." *East v. East*, 493 So.2d 927, 931-32 (Miss. 1986).(fn3) Based on the terms of the agreement, entered into in 1998, and the fact that Mr. Shaw did not fraudulently conceal his 401K account, the marital **property settlement** terms were not modifiable..." SHAW, v. SHAW, (No. 2006-CA-01360-COA, 2007)

In the case before the Court today, the Final Judgment was involving an Irreconcilable Difference divorce. Both parties signed and approved the final judgment (signatures at pages 9 and 10 of the Clerk's papers).

For the reasons shown above, the Trial Court below was without Jurisdiction to modify the Property Settlement portion of an agreed Final Judgment when the matter being tried before him was in Court by virtue of a Rule 81 Summons. Jeannine is entitled to have her Final Judgment protected, and the aspects that the Trial Judge touched upon were matters that could only be attacked under Rules 59 and 60. No motions or proceedings have been brought under these rules – and from a procedural due process standpoint, Jeannine never defended Motions under Rule 59 or 60, nor was she on notice that she had to.

Argument to Second Issue: At a hearing to modify a property settlement portion of an agreed Final Judgment, an agreement that arose from an Irreconcilable Differences divorce, the judge modified only one aspect of the property settlement. Appellant would assert that at the time she consented to the Irreconcilable Differences divorce she made substantial concessions in areas of alimony and property division in return for the specific property that she has now been denied due to the modification. Appellant would submit that where there has been a Final Judgment in an Irreconcilable Differences divorce and both parties have reached an agreement as to a property settlement, in the event of modification of that portion of the Final Judgment that comprised the property settlement, the entire settlement should be set aside so the other issues which had been compromised in the negotiations can now be readdressed.

CONCLUSION: Jeannine would show that the Trial Court lacked jurisdiction under Rule 81 to take the action it did. The attack of a final judgment is properly made under Rules 59 and 60. Both of these rules allow specific procedures and defenses to allow Jeannine to protect her Final Judgment. Among these defenses is laches. The decree attacked in this proceeding was 7 years and 4 months old at the time the attack was launched. The Trial Judge who entered the original final judgment served an additional 4 years after the entry of the judgment, then retired. Three years later this complaint seeking modification was filed. Certainly laches would apply. The Final Judgment attacked was an agreed judgment, signed off on by both parties. Jeannine is entitled to the exact judgment she agreed to. If the Court is to upset a final judgment which was an agreed judgment under the Mississippi Irreconcilable Differences Divorce law, then the entire judgment should be upset so as to allow Jeannine the opportunity to negotiate for the items she had conceded in order to receive the asset at issue.

We would ask that this Court reverse and render on the jurisdiction issue. In the alternative, we would request that the entire agreed judgment be set aside so that Jeannine can negotiate for and receive the items she had previously conceded as a portion of her prior agreement. If you are going to take her groceries away, at least give her some of her money back.

as Hospital, Tex.Civ.App., 89 S.W.2d 801, 809; Slayback Van Order Co. v. Eiben, 177 A. 671, 673, 115 N.J.L. 17. For evidence to be admissible as res gestæ, there must be an act in itself admissible in the case independently of the declaration that accompanies it; a declaration uttered simultaneously, or almost simultaneously, with the occurrence of the act; and the explanation of the act by what is said when it happens. Staley v. Royal Pines Park, 202 N.C. 155, 162 S.E. 202, 203.

Test as to whether declaration is part of res gestæ depends on whether declaration was facts talking through party or party talking about facts. Batchelor v. Atlantic Coast Line R. Co., 196 N.C. 84, 144 S.E. 542, 544, 60 A.L.R. 1091.

"Res gestae", while often spoken of as an exception to the hearsay rule, is generally not such in fact but ordinarily it relates to statements which because of their intimate relation to facts become a part of those facts and are therefore admitted as such. Industrial Commission of Colorado v. Fotis, 112 Colo. 423, 149 P.2d 657, 659.

Res habiles. In the civil law, things which are prescriptible; things to which a lawful title may be acquired by ordinary prescription.

Res immobiles. In the civil law. Immovable things; including land and that which is connected therewith, either by nature or art, such as trees and buildings. Mackeld. Rom. Law, § 160.

Res incorporales. In the civil law. Incorporeal things; things which cannot be touched; such as those things which consist in right. Inst. 2, 2; Bract. fols. 7*b*, 10*b*. Such things as the mind alone can perceive.

Res integra. A whole thing; a new or unopened thing. The term is applied to those points of law which have not been decided, which are untouched by *dictum* or decision. 3 Mer. 269.

Res inter alios acta. A thing done between others, or between third parties or strangers. Chicago, etc., R. Co. v. Schmitz, 211 Ill. 446, 71 N.E. 1050.

Res ipsa loquitur. The thing speaks for itself. Rebuttable presumption that defendant was negligent, which arises upon proof that instrumentality causing injury was in defendant's exclusive control, and that the accident was one which ordinarily does not happen in absence of negligence. Sliwowski v. New York, N. H. & H. R. Co., 94 Conn. 303, 108 A. 805, 807; Poth v. Dexter Horton Estate, 140 Wash. 272, 248 P. 374, 375; Pearson v. Butts, 224 Iowa 376, 276 N.W. 65, 67.

Res judicata. A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. A phrase of the civil law, constantly quoted in the books. Epstein v. Soskin, 86 Misc.Rep. 94, 148 N.Y.S. 323, 324; Rule that final judgment or decree on merits by court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in former suit. American S. S. Co. v. Wickwire Spencer Steel Co., D.C.N.Y., 8 F.Supp. 562, 566. And to be applicable, requires identity in thing sued for as well as identity of cause of action, of persons and parties to action, and of quality in persons for or against whom claim is made. Freudenreich v. Mayor and Council of Borough of Fairview, 114 N.J.L. 290, 176 A. 162, 163. The sum and substance of the whole rule is that a matter once judicially decided is finally decided. Massie v. Paul, 263 Ky. 183, 92 W.2d 11, 14. See, also, Res Adjudicata, supra.

Estoppel and res judicata distinguished. See Estoppel.

Res litigiosæ. In Roman law, things which are in litigation; property or rights which constitute the subject-matter of a pending action.

Res mancipi. See Mancipi Res.

Res mobiles. In the civil law. Movable things; things which may be transported from one place to another, without injury to their substance and form. Things corresponding with the chattels personal of the common law. 2 Kent, Comm. 47.

Res nova. A new matter; a new case; a question not before decided.

Res nullius. The property of nobody. A thing which has no owner, either because a former owner has finally abandoned it, or because it has never been appropriated by any person, or because (in the Roman law) it is not susceptible of private ownership.

Res periit domino. A phrase used to express that, when a thing is lost or destroyed, it is lost to the person who was the owner of it at the time. Broom, Max. 238.

Res privatæ. In the civil law. Things the property of one or more individuals. Mackeld. Rom. Law, § 157.

Res publicæ. Things belonging to the public; public property; such as the sea, navigable rivers, highways, etc.

Res quotidianæ. Every-day matters; familiar points or questions.

Res religiosæ. Things pertaining to religion. In Roman law, especially, burial-places, which were regarded as sacred, and could not be the subjects of commerce.

Res sacræ. In the civil law. Sacred things. Things consecrated by the pontiffs to the service of God; such as sacred edifices, and gifts or offerings. Inst. 2, 1, 8. Chalices, crosses, censers. Bract. fol. 8.

Res sanctæ. In the civil law. Holy things; such as the walls and gates of a city. Inst. 2, 1, 10. Walls were said to be holy, because any offense against them was punished capitally. Bract. fol. 8.

Res universitatis. In the civil law. Things belonging to a community, (as, to a municipality) the use and enjoyment of which, according to their proper purpose, is free to every member of the community, but which cannot be appropriated to the exclusive use of any individual, such

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93-5-2

Statutes and Session Law

TITLE 93 DOMESTIC RELATIONS

CHAPTER 5 DIVORCE AND ALIMONY

93-5-2 Divorce on grounds of irreconcilable differences.

93-5-2. Divorce on grounds of irreconcilable differences.

(1) Divorce from the bonds of matrimony may be granted on the ground of irreconcilable differences, but only upon the joint complaint of the husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process.

(2) If the parties provide by written agreement for the custody and maintenance of any children of that marriage and for the settlement of any property rights between the parties and the court finds that such provisions are adequate and sufficient, the agreement may be incorporated in the judgment, and such judgment may be modified as other judgments for divorce.

(3) If the parties are unable to agree upon adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between them, they may consent to a divorce on the ground of irreconcilable differences and permit the court to decide the issues upon which they cannot agree. Such consent must be in writing, signed by both parties personally, must state that the parties voluntarily consent to permit the court to decide such issues, which shall be specifically set forth in such consent, and that the parties understand that the decision of the court shall be a binding and lawful judgment. Such consent may not be withdrawn by a party without leave of the court after the court has commenced any proceeding, including the hearing of any motion or other matter pertaining thereto. The failure or refusal of either party to agree as to adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between the parties, or any portion of such issues, or the failure or refusal of any party to consent to permit the court to decide such issues, shall not be used as evidence, or in any manner, against such party. No divorce shall be granted pursuant to this subsection until all matters involving custody and maintenance of any child of that marriage and property rights between the parties raised by the pleadings have been either adjudicated by the court or agreed upon by the parties and found to be adequate and sufficient by the court and included in the judgment of divorce. Appeals from any orders and judgments rendered pursuant to this subsection may be had as in other cases in chancery court only insofar as such orders and judgments relate to issues that the parties consented to have decided by the court.

(4) Complaints for divorce on the ground of irreconcilable differences must have been on file for sixty (60) days before being heard. Except as otherwise provided in subsection (3) of this section, a joint complaint of husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process, for divorce solely on the ground of irreconcilable differences, shall be taken as proved and a final judgment entered thereon, as in other cases and without proof or testimony in termtime or vacation, the provisions of Section 93-5-17 to the contrary notwithstanding.

(5) Except as otherwise provided in subsection (3) of this section, no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial; provided, however, that a divorce may be granted on the grounds of irreconcilable differences where there has been a contest or denial, if the contest or denial has been withdrawn or cancelled by the party filing same by leave and order of the court.

(6) Irreconcilable differences may be asserted as a sole ground for divorce or as an alternate ground for divorce with any other cause for divorce set out in Section 93-5-1.

Sources: Laws, 1976, ch. 451, § 1; Laws, 1978, ch. 367, § 1; Laws, 1990, ch. 584, § 1, eff from and after passage (approved April 9, 1990).

RULE 54.

State Court Rules

RULES OF CIVIL PROCEDURE

CHAPTER VII. JUDGMENT

RULE 54. JUDGMENTS; COSTS

RULE 54. JUDGMENTS; COSTS

(a) Definitions. "Judgment" as used in these rules includes a final decree and any order from which an appeal lies.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings; however, final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings.

(d) Costs. Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Misslssippi is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security. Costs may be taxed by the clerk on one day's notice. On motions served within five days of the receipt of notice of such taxation, the action of the clerk may be reviewed by the court.

Comment

The first sentence of Rule 54(a) defines "judgment," for the purposes of these rules, to include a decree and any appealable order. Traditionally, in Mississippi courts in equity suits judges rendered a "decree," and an action at law resulted in the entry of a "judgment." There is no longer any purpose in preserving a technical distinction between a decree and a judgment. Therefore, Rule 54(a) indicates that a judgment at law and a decree in equity are to be treated in the same fashion.

Although it is not specifically described in the rule itself, there are several different stages that lead to the creation of a judgment that is final and appealable. It is important to differentiate the various steps that are part of this process. The first distinction is between the adjudication, either by a decision of the court or a verdict of the jury, and the judgment that is entered thereon. The terms "decision" and "judgment" are not synonymous under these rules. The decision consists of the court's findings of fact and conclusions of law; the rendition of judgment is the pronouncement of that decision and the act that gives it legal effect.

RULE 58.

State Court Rules

RULES OF CIVIL PROCEDURE

CHAPTER VII. JUDGMENT

RULE 58. ENTRY OF JUDGMENT

RULE 58. ENTRY OF JUDGMENT

Every judgment shall be set forth on a separate document which bears the title of "Judgment." However, a judgment which fully adjudicates the claim as to all parties and which has been entered as provided in M.R.C.P. 79(a) shall, in the absence of prejudice to a party, have the force and finality of a judgment even if it is not properly titled. A judgment shall be effective only when entered as provided in M.R.C.P. 79(a).

[Amended effective July 1, 2001; amended effective May 27, 2004 to address finality of improperly titled judgment.]

Comment

The purpose of Rule 58 is simply to provide a precise post-trial date from which periods of time may be computed. Throughout these rules there are provisions for events which, when performed, commence the running of a time period within which a responsive event must be performed; e. g., a defendant must serve his answer within thirty days after service on him of the summons and complaint, and a plaintiff must serve his reply to a counter-claim within thirty days, Rule 12(a); answers to interrogatories to parties must be served within thirty days after service of same, Rule 33(a); and objections to a master's report must be served within ten days after notice of the report's having been filed, Rule 53(g)(1).

The times for taking post-trial action are computed from the date judgment is entered, as provided in Rule 58; hence, a motion for a new trial must be filed within ten days of entry of judgment, Rules 6(b), 59(b); a motion to alter or amend a judgment must be filed within ten days of entry of judgment, Rules 6(b), 59(e); a motion for a stay of execution must be filed within ten days of entry of judgment, Rule 62(a); and a motion for a directed verdict or for judgment, n. o. v. must be filed within ten days of entry of judgment, Rule 50(b).

Rule 58, as it now reads, requires that all final judgments must be entitled "Judgment." However, failure to properly title a judgment which fully adjudicates all claims in a case as to all parties will not be deemed to prevent that judgment form being fully effective so long as it has been entered as required in M.R.C.P. 79(a). Where a notice of appeal in a civil case is not timely filed, if the failure to timely file was caused by an inappropriate or misleading title of judgment, such failure may, under proper circumstances, constitute "excusable neglect" under M.R.A.P. 4(g). As now amended, the rule effectively overrules Thompson v. City of Vicksburg, 813 So. 2d 717 (Miss. 2002), Mullen v. Green Tree Financial Corp.-Miss, 730 So. 2d 9 (Miss. 1998), and Roberts v. Gafe Auto Co., 653 So. 2d 250 (Miss. 1994) insofar as they hold that strict compliance with the titling requirement is mandatory and prevents finality, even in the absence of prejudice.

[Comment amended effective July 1, 1997; amended effective May 27, 2004.]

RULE 59.

State Court Rules

RULES OF CIVIL PROCEDURE

CHAPTER VII. JUDGMENT

RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of Mississippi; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of Mississippi.

On a motion for a new trial in an action without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be filed not later than ten days after the entry of judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten days after service to file opposing affidavits, which period may be extended for up to twenty days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than ten days after entry of judgment the court may on its own initiative order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment.

[Amended effective July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 59(b), (c) and (e) were amended to clarify that motions for a new trial and accompanying affidavits, and motions to alter or amend a judgment, must be filed not later that ten days after entry of judgment. 689 So. 2d XLIX (West Miss. Cases).

Comment

Rule 59 authorizes the trial judge to set aside a jury verdict as to any or all parts of the issues tried and to grant a new trial as justice requires. This practice is not new to Mississippi, but the procedures set forth in this rule are. The grounds for granting new trials remain the same as under prior state practice; generally stated, however, the court has the power and duty to set aside a verdict and order a new trial whenever, in its sound judgment, such action is required. See generally 11 Miss. Digest, New Trial, Key numbers 13-108 (1972).

RULE 60.

State Court Rules

RULES OF CIVIL PROCEDURE

CHAPTER VII. JUDGMENT

RULE 60. RELIEF FROM JUDGMENT OR ORDER

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders up until the time the record is transmitted by the clerk of the trial court to the appellate court and the action remains pending therein. Thereafter, such mistakes may be so corrected only with leave of the appellate court.

(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

(2) accident or mistake;

(3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(6) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

Comment

Rule 60 (a) prescribes an efficient method for correcting clerical errors appearing in judgments, orders, or other parts of a trial record; errors of a more substantial nature must be corrected in accordance with MRCP 59 (e) or 60(b). Thus, the Rule 60(a) procedure can be utilized only to make the judgment or other document speak the truth; it cannot be used to make it say something other than was originally pronounced. See, e. g., West Va.

RULE 81.

State Court Rules

RULES OF CIVIL PROCEDURE

CHAPTER IX. APPEALS

RULE 81. APPLICABILITY OF RULES

RULE 81. APPLICABILITY OF RULES

(a) Applicability in General. These rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures.

(1) proceedings pertaining to the writ of habeas corpus;

(2) proceedings pertaining to the disciplining of an attorney;

(3) proceedings pursuant to the Youth Court Law and the Family Court Law;

(4) proceedings pertaining to election contests;

(5) proceedings pertaining to bond validations;

(6) proceedings pertaining to the adjudication, commitment, and release of narcotics and alcohol addicts and persons in need of mental treatment;

(7) eminent domain proceedings;

(8) Title 91 of the Mississippi Code of 1972;

(9) Title 93 of the Mississippi Code of 1972;

(10) creation and maintenance of drainage and water management districts;

(11) creation of and change in boundaries of municipalities;

(12) proceedings brought under sections 9-5-103, 11-1-23, 11-1-29, 11-1-31, 11-1-33, 11-1-35, 11-1-43, 11-1-45, 11-1-47, 11-1-49, 11-5-151 through 11-5-167, and 11-17-33, Mississippi Code of 1972.

Statutory procedures specifically provided for each of the above proceedings shall remain in effect and shall control to the extent they may be in conflict with these rules; otherwise these rules apply.

(b) Summary Proceedings. In ex parte matters where no notice is required proceedings shall be as summary as the pertinent statutes contemplate.

(c) Publication of Summons or Notice. Whenever a statute requires summons or notice by publication, service in accordance with the methods provided in Rule 4 shall be taken to satisfy the requirements of such statute.

(d) Procedure in Certain Actions and Matters. The special rules of procedure set forth in this paragraph shall apply to the actions and matters enumerated in subparagraphs (1) and (2) hereof and shall control to the extent

they may be in conflict with any other provision of these rules.

(1) The following actions and matters shall be triable 30 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to-wit: adoption; correction of birth certificate; alteration of name; termination of parental rights; paternity; legitimation; uniform reciprocal enforcement of support; determination of heirship; partition; probate of will in solemn form; caveat against probate of will; will contest; will construction; child custody actions; child support actions; and establishment of grandparents' visitation.

(2) The following actions and matters shall be triable 7 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to wit: removal of disabilities of minority; temporary relief in divorce, separate maintenance, child custody, or child support matters; modification or enforcement of custody, support, and alimony judgments; contempt; and estate matters and wards' business in which notice is required but the time for notice is not prescribed by statute or by subparagraph (1) above.

(3) Complaints and petitions filed in the actions and matters enumerated in subparagraphs (1) and (2) above shall not be taken as confessed.

(4) No answer shall be required in any action or matter enumerated in subparagraphs (1) and (2) above but any defendant or respondent may file an answer or other pleading or the court may require an answer if it deems it necessary to properly develop the issues. A party who fails to file an answer after being required so to do shall not be permitted to present evidence on his behalf.

(5) Upon the filing of any action or matter listed in subparagraphs (1) and (2) above, summons shall issue commanding the defendant or respondent to appear and defend at a time and place, either in term time or vacation, at which the same shall be heard. Said time and place shall be set by special order, general order or rule of the court. If such action or matter is not heard on the day set for hearing, it may by order signed on that day be continued to a later day for hearing without additional summons on the defendant or respondent. The court may by order or rule authorize its clerk to set such actions or matters for original hearing and to continue the same for hearing on a later date.

(6) Rule 5(b) notice shall be sufficient as to any temporary hearing in a pending divorce, separate maintenance, custody or support action provided the defendant has been summoned to answer the original complaint.

(e) Proceedings Modified. The forms of relief formerly obtainable under writs of fieri facias, scire facias, mandamus, error coram nobis, error coram vobis, sequestration, prohibition, quo warranto, writs in the nature of quo warranto, and all other writs, shall be obtained by motions or actions seeking such relief.

(f) Terminology of Statutes. In applying these rules to any proceedings to which they are applicable, the terminology of any statute which also applies shall, if inconsistent with these rules, be taken to mean the analogous device or procedure proper under these rules; thus (and these examples are intended in no way to limit the applicability of this general statement):

Bill of complaint, bill in equity, bill, or declaration shall mean a complaint as specified in these rules;

Plea in abatement shall mean motion;

Demurrer shall be understood to mean motion to strike as set out in Rule 12(f);

Plea shall mean motion or answer, whichever is appropriate under these rules;

Plea of set-off or set-off shall be understood to mean a permissible counter-claim;

Plea of recoupment or recoupment shall refer to a compulsory counter-claim;

Cross-bill shall be understood to refer to a counter-claim, or a cross-claim, whichever is appropriate under these rules;

Revivor, revive, or revived, used with reference to actions, shall refer to the substitution procedure stated in Rule 25;

Decree pro confesso shall be understood to mean entry of default as provided in Rule 55;

Decree shall mean a judgment, as defined in Rule 54;

(g) Procedure Not Specifically Prescribed. When no procedure is specifically prescribed, the court shall proceed in any lawful manner not inconsistent with the Constitution of the State of Mississippi, these rules, or any applicable statute.

[Amended effective June 24, 1992; April 13, 2000.]

Advisory Committee Historical Note

Effective April 13, 2000, Rule 81(d)(5) was amended to make a continuance effectual on a signed rather than an entered order. 753-754 So. 2d XVII) (West Miss.Cas. 2000.)

Effective June 24, 1992, Rule 81(h) was deleted. 598-602 So. 2d XXIII-XXIV (West Miss. Cas. 1992).

Effective January 1, 1986, Rule 81(a) was amended by adding subsections (10) - (12); Rule 81(b) was amended by deleting examples and by deleting a provision that no answers are required in ex parte matters; Rule 81(d) was rewritten to provide for proceedings in a number of specified actions and to abrogate its treatment of domestic relations matters. 470-473 So. 2d XVI-XVIII (West Miss. Cas. 1986).

Comment

Rule 81 complements Rule 1 by specifying which civil actions are governed only partially, or not at all, by the provisions of the M.R.C.P.

Rule 81(a) lists 12 categories of civil actions which are not governed entirely by the M.R.C.P. In each of those actions there are statutory provisions detailing certain procedures to be utilized. See generally Miss. Code Ann. §§ 11-43-1, et seq., (habeas corpus); 73-3-301, et seq., (disciplining of attorneys); 43-21-1, et seq., (youth court proceedings); 43-23-1, et seq., (family court proceedings); 23-5-187 (election contests); 31-13-1, et seq., (bond validation); 41-21-61, et seq., (persons in need of mental treatment); 41-30-1, et seq., (adjudication, commitment and release of alcohol and drug addicts); 11-27-1, et seq., (eminent domain); 91-1-1, et seq., (trusts and estates); 93-1-1, et seq., (domestic relations); 51-29-1, et seq., and 51-31-1, et seq., (creation and maintenance of drainage and water management districts); 21-1-1, et seq., (creation of and change in boundaries of municipalities); and those proceedings identified in category (12) by their Code Title as follows: 9-5-103 (bonds of receivers, assignees, executors may be reduced or cancelled, if excessive or for sufficient cause); 11-1-23 (court or judge may require new security); 11-1-29 (proceedings on death of surety on bonds, etc.); 11-1-

CERTIFICATE OF SERVICE

I, Briley Richmond, Counsel for Appellant, certify that I have this day served a copy of the foregoing brief on the following individuals:

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The Honorable Randy Grant Pierce
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Date: March 18, 2008

Briley Richmond