SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DANA M. SHADDEN — **APPELLANT**

VS. — **SUPREME COURT NO.:2007-CA-01628**

KEITH A. SHADDEN — **APPELLEE**

APPELLANT'S BRIEF

ATTORNEY FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned of Counsel o Record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications of refusal.

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3. Honorable John Grant
   Chancery Court Judge
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   Brandon MS 39043
   Telephone: 601-825-1477

This the 22 day of July , 2008.

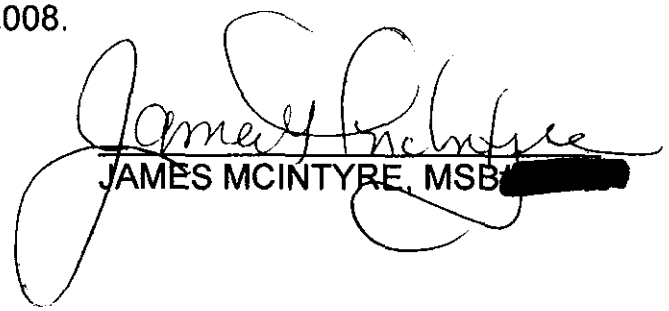

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

The lower court failed to take jurisdiction of the minor children after the Superior Court Of California had entered a Judgement Of Divorce, and subsequently, the Defendant, (father) moved to the state of Wyoming and the Plaintiff, (wife) moved to the state of Mississippi and had been living in the state of Mississippi for more than six (6) months next preceding the date of her Petition for the court to assume jurisdiction of the minor children and a Final Judgement For Modification had been entered on March 28, 2007 and there were no pending matters before the Superior Court Of California.

STATEMENT OF THE CASE

There was entered in The Superior Court Of California, a Judgement Of Divorce on May 25, 2005, Cause Number R1502-FL-4144 in which the Appellant (mother) was awarded physical custody of the minor children and the Appellee (father) was ordered to pay child support payments (see Record Excerpts No. 4). On March 2, 2005, the Superior Court Of California entered an Order concerning visitations of the minor children. This was done after a telephonic conversation to the Appellant (mother) by the court and no process had been issued upon her. The court in California found, among other things, that the Appellee (father) lived in the state of Wyoming and that the Appellant (mother) lived in the state of Mississippi (see Record Excerpts No. 5). The telephonic conversation with the court in California gave reason to believe that the court would further make inquiry by telephonic means. Appellant, (mother) was served with process by the Superior Court Of California in Mississippi on March 14, 2007 to be before the court on March 28, 2007 at 1:30 P.M. On that date, being March 28, 2007, Appellant, (mother) stood by the telephone at 1:30 P.M. at her home waiting for a telephone call from the Superior Court Of California but never received such call. Thereafter, the Appellant called the Superior Court Of California some six (6) times in order to make inquiry as to the hearing (see Record Excerpts No. 14). On March 22, 2005, Appellant (mother) filed her Petition To Confirm Jurisdiction Of The Minor Children in the lower

court and, therein she alleged, among other things, that she had been a bonafide adult resident of the State Of Mississippi for more than six (6) months next preceding the filing of the action, and that the Appellee (father) was a bonafide adult resident citizen of the state of Wyoming. On the 2nd day of March, 2007, the Appellee (father) while a resident citizen of the state of Wyoming filed a Motion For Modification with the California court for visitation. The Appellant (mother) was served with process by the California court on the 14th day of March, 2007. The California Order of March 2, 2007 ordered in paragraph numbered 3 that "The parties agree and therefore the court makes a finding of mutual risk of abduction. Each party is to register this Order in their state" and further found that the Appellee (father) lives in the state of Wyoming and the Appellant (mother) lives in the state of Mississippi. This was never done by the Appellee (father) and he proceeded with his hearing in the California court on March 28, 2007 at 1:30 P.M. and the Appellant (mother) not making her presence before the court, and thinking that the court would have the hearing by telephonic means, failed to appear. As a result of that hearing, the Superior Court Of California shifted the custody of the

minor children to that of the Appellee (father).

The Appellant (mother), abiding by the orders of the California court, which was entered on the 2nd day of March, 2007, filed her Motion asking the court to take jurisdiction on March 23, 2007 in the lower court. An entry of appearance was made

by the Appellee's attorney after the Appellee (father) failed to accept process as prescribed by law. Meanwhile, the Appellee (father), on the 7th day of May, 2007, entered Registration Of A Foreign Custody Order which was entered by the Superior Court Of California and heard on the 28th day of March, 2007 and entered into the Superior Court Of California on the 10th day of April, 2007 (see Record Excerpts 10). At this point in time, the lower court had jurisdiction of the parties and the subject matter.

On May 5, 2007, the court conducted a hearing on the Appellant's (mother) Petition To Confirm Jurisdiction Of The Minor Children who found, among other things, that there was a pending litigation in the state of California at the time the Petition was heard. The court failed to recognize that there was nothing pending in the state of California and the Final Order was entered from the hearing on the 28th day of March, 2007 and entered in the lower court on the 10th day of April, 2007. The court failed to recognize that the Order entered in The Superior Court Of California was a Final Order and nothing could be decided in the state of California or any litigation filed therein (see Record Excerpts No. 3A).

On June 20, 2007, the Appellant (mother), filed her Motion To Reopen The Record For Clarification and for Consideration (see Record Excerpt No. 9). Also, on May 30, 2007, Appellant (mother), filed her Motion For Relief From Judgement from that Order which was entered on the 28th day of March, 2007 (see Record Excerpts

No. 11). A combined hearing was scheduled on the two motions which the court heard and entered its Order on August 31, 2007 denying the Motion To Reopen in that the court had no jurisdiction. The court, found, among other things in its opinion that that there was a Final Judgement entered in the state of California on the 28th day of March, 2007. The court further found and had no doubt that the Appellant (mother), was of the opinion that she was not supposed to be in the state of California on the 28th day of March, 2007, the court further found that there is a question in the court's mind that the lower court does not have any jurisdiction. The court suggested that if it was wrong on the jurisdiction issue, then the Supreme Court Of The State Of Mississippi could clarify this matter (see Record Excerpts 3B, 2A).

Therefore, it is the contention of the Appellant (mother), that because of her misunderstanding of her trial date of March 28, 2007, together with the Mandate from that court in California that both parties were to enroll the respective judgement in their respective states, and finally, that the lower court had jurisdiction of the parties and of the subject matter because there was nothing pending in the state of California to be adjudicated and that on the 28th day of March, 2007, the parties lived in separate states other than California, there was entered in the Superior Court Of California a Final Judgement and the lower court could have taken jurisdiction of the children.

SUMMARY OF THE ARGUMENT

The record in the lower court is unambiguous and clearly reflects that on the 12th day of May, 2005, the Appellant and Appellee were divorced by the Superior Court Of California. On the 2nd day of March, 2007, a telephonic conversation from the Superior Court Of California to the Appellant (mother) was made to her discussing visitation rights, which, among other things, ordered the parties to register the divorce which was entered in the within cause in their respective states. The court found in the order of March 2, 2005 found that the Appellant (mother) lived in the state of Mississippi and the Appellee (father) lived in the state of Wyoming. On the 14th day of March, 2007, process by the Superior Court Of California was served upon the Appellant (mother) to be before the court on March 28, 2007. It was the understanding of the Appellant (mother) that on March 2, 2007,there would be a telephonic conversation of the hearing and she stood by her telephone all day expecting that telephonic conversation and even called the court on six (6) different occasions. On the 22nd day of March, 2007, the Appellant (mother), filed her Petition to ask the lower court herein to confirm the jurisdiction of the minor children. On March 28, 2007, The Superior Court Of California entered its Final Order shifting custody from the Appellant (mother) to the Appellee (father). On March 7, 2007, there was an Order entered from the Superior Court Of California to the lower court confirming jurisdiction and from that order was to shift custody from

the Appellant (mother) to the Appellee (father). On May 30, 2007, the court conducted a hearing on the Petition of the Appellant (mother) to confirm jurisdiction and the court found in that opinion that there was a misunderstanding by the Appellant (mother) as to her being before Superior Court Of California on the 28th day of March, 2007 otherwise, she would have certainly made every effort to be there. The court found that under this misunderstanding by her to be before the California court and found that there was a final judgement registered with the Superior Court Of California and finally on the 7th day of May, 2007 and entered that final judgement of California with the lower court. The court further found that it does not have jurisdiction of the parties and of the subject matter according to Section 93-27-206 (1). On the 30th day of May, 2007, Appellant (mother) filed her Motion For Relief from that Final California Judgement because, among other things, there was a misunderstanding and the Appellant (mother) was given the impression that she did not have to appear before the California court on March 28, 2007 in that there would be a telephonic conversation to be held on the 28th day of March, 2007. The Appellant (mother) was always contended and advised that all matters before the court would be telephonic and the Appellant (mother) relied upon such representation. After she did not receive any telephone calls on the 28th day of March, 2007, then she made three (3) attempts to call the court in California and therefore asked the court pursuant to Rule 60 of The Mississippi Rules Of Civil

Procedure to Vacate and Set Aside that judgement. On the 31st day of August, 2007, the lower court heard the Appellant's (mother) Motion For Modification, and To Vacate and Set Aside the Judgement which had been rolled from the Superior Court Of California to the lower court. The lower court found that the Appellant was a good mother and there was confusion about her being in California on March 28, 2007 and from that judgement entered, it was a Final Judgement by the Superior Court Of California and the court under full faith and credit clause of the constitution recognized that California Judgement. The lower court further found that the Appellant (mother) and the minor children were residents of the state of Mississippi.

With these undisputed facts in mind, the court erred in its findings that it had no jurisdiction of the parties and of the subject matter. The parties resided in the state of California and from the marriage between the parties, the two children were born and subsequently a Motion For Modification was filed by the Appellee (father) to shift custody. The lower court confirmed jurisdiction of the March 28th Final Order of the Superior Court Of California. The parties were ordered by the Superior Court Of California in the March 2nd order that the parties were to register the order of the court in which they reside and found that the Appellant (mother) lived in the state of Mississippi and the Appellee (father) lived in the state of Wyoming.

The lower court clearly has jurisdiction of the parties and of the subject matter according to Section 93-27-101 of the Mississippi Code Of 1972 Annotated and

Recompiled. The parties no longer live in the state of California and each have gone their separate ways to the state of Mississippi and the state of Wyoming. The children, at the time of her filing the petition, were located in the state of Mississippi and the state of Mississippi is more appropriate forum according to Section 93-27-207 and 93-27-208. The lower court had personal and in persona jurisdiction since both parties did not live in the state of California where they were divorced and a Final Judgement was entered on the 28th day of March, 2007 when the parties lived in separate states namely, Mississippi and Wyoming and the children resided in the state of Mississippi, all in accordance with Section 93-27-203. The Appellant (mother) had asked the lower court to modify the Judgement of California entered on the 28th day of March , 2007 because that court had jurisdiction and she could have been heard. The court found in its opinion that she was a good mother.

Appellant (mother) relies on Section 93-27-203 styled Jurisdiction To Modify Determination which states as follows:

> Except as otherwise provided in Section 93-27-204 of this act, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under Section 93-27-201 (1)(a) or (b) of this act; and:
>
> (a) The court of the other state determines it no longer has exclusive, continuing jurisdiction under Section 93-27-2002 or that a court of this state would be a more convenient forum under Section 93-27-207; or

(b) A court of this state or a court of the other state determines that neither the child, the child's parents, nor any person acting as a parent present does not reside in the other state.

According to the testimony, there is no doubt that a Final Judgement was entered in the Superior Court Of California from the hearing of March 28, 2007. Both parties had moved from the state of California, the Appellee (father), had moved to Wyoming, and the Appellant (mother) had moved to the state of Mississippi. There was no ongoing litigation after the March 28th hearing and the lower court could have exercised its jurisdiction in accordance with Section 93-27-203. Mississippi is the more appropriate forum pursuant to Section 93-27-207.

The lower court in its opinion has relied heavily upon Section 93-27-206 (1) under Simultaneous proceedings which states:

> (1) Except as otherwise provided in Section 93-27-204, a court of this state may not exercise its jurisdiction under this act if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under Section 93-27-207.

Accordingly, the proceeding had been terminated by the court in California, the state of Mississippi was a more convenient forum under Section 93-27-207 and the lower court could have modified that Judgement from the Superior Court Of California which was entered on March 28, 2007.

The lower court has stated numerous times in its opinion that the Appellant (mother) was a good mother, that she was unaware of the proceedings that were taking place in California on March 28, 2007 or misunderstood the date that she was to be in court because of the prior telephone conversation that she had with the California court.

Due to the default taken against Ms. Shadden, which the court found that she was under the impression that there was supposed to be a telephonic hearing on March 28, 2007. The lower court could have set aside that Judgement or modified it in accordance with Sections 93-27-206 and 93-27-207. Default Judgements are not favored by the courts and this state's policy with regard to such judgement was summarized in the case of *Bell vs. The City Of Bay Saint Louis, 467 S 2d 657 (1985).* It is a policy of our judicial system of administration to favor disposition of cases on its merits, *Manning vs. Lovett 228M, 199, Southwestern Security Insurance Company vs. Tradeway, 11M, 189.* Default Judgements are not favored and trial judges have been extremely lenient when it comes to relieving a party of a burden of a default judgement, *Metts vs. State Department Of Public Welfare, 437 S 2d 401, Ross vs. Federal Department Of Insurance Corporation, 261 S 2d 471.* Where there is a reasonable doubt as to whether or not a judgement should be vacated, such judgement should be resolved in favor of overruling the judgement and hearing the case on its merits, *Campbell vs. Carter, 231M., 658.*

In considering a Motion of Setting Aside Entry Of Judgement By Default, a court must apply Rule 60 equally and liberally...To achieve substantial justice, *Blotch vs. Friday, 612 F. 2d 938.* Where default judgement results from an honest mistake rather than a willful misconduct, carelessness, or negligence, there is especially a need to apply Rule 60 (b) liberally. In the case of *Hertz vs. Woma Corporation, 732F. 2d 1178* the court listed three factors in which the court should consider when deciding whether to set aside a default judgement;

1. Whether the Plaintiff will be prejudiced by the default if lifted;
2. Whether the Defendant has a meritorious defense;
3. Whether the default was the Defendant's conveyable negligence.

In Mississippi, the courts have addressed the issue of whether a default judgement could be set aside because it was the result of an accident or mistake. The courts have stated that in setting aside a default judgement under the action of mistake criteria, a court is vested, with discretionary powers. Although vested with such powers, the court stated that it is a general rule that a judgement will not be set aside in the actions of an allegation and on showing that a Defendant has a meritorious defense.

CONCLUSION

THEREFORE, because there has been a final determination of the Superior Court Of California of custody which was entered on the 28th day of March, 2007, the lower court had the power to assume jurisdiction of the parties and of the subject matter since neither party lived in the state of California, the father had moved to Wyoming and the mother had moved to Mississippi. Those proceedings in California had already been determined and the court had the authority to act and to take jurisdiction of the parties and of the subject matter. Mississippi was the more appropriate forum under Section 93-23-13 in that (a) Mississippi has a closer connection with the children where the mother lives, (b) substantial evidence of the children's future and care, protection and care is more readily available in the state of Mississippi (C) and the exercise of the jurisdiction of the court of the parties and of the subject matter would not contravene any provisions of UCCJA. It would have been in the best interest of the children that the Mississippi courts assumed jurisdiction of the children because the children had a significant connection in the state of Mississippi and there is available in the state of Mississippi substantial evidence concerning the children's present or future care, protection and welfare. Therefore, the court erred in not assuming jurisdiction over the minor children in that (1) The parties had moved from the state of California; (2) There was no pleadings or any matter in the state of California which need to be adjudicated (3) The more

CERTIFICATE OF SERVICE

I, James G. McIntyre, do hereby certify that I have this day delivered, via Hand Delivery, a true and correct copy of the foregoing instrument to:

Christopher P. Palmer, Esquire
Adams & Edens, P.A.
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Brandon, MS 39043

Honorable John Grant
Chancery Court Judge
Post Office Box 1437
Brandon MS 39043

Dated this the 21 day of July, 2008.

JAMES G. MCINTYRE, ESQUIRE