2007-CA-01648

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IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CA-01648

GEORGE E. TRIM **APPELLANT**

V.

LISA MOSLEY TRIM **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for appellants 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.

1. George Trim, appellant.
2. William L. Colbert, Jr., attorney for appellant.
3. Lisa Trim, appellee.
4. A. Randall Harris, attorney for appellee.

Respectfully submitted,

GEORGE TRIM

By: _____
WILLIAM L. COLBERT, JR.
Attorney of Record for Appellant

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IV. STATEMENT OF ISSUES

I. THE CHANCELLOR ERRED IN NOT DISMISSING PETITIONER LISA TRIMS' COMPLAINT TO SET ASIDE AND OVERTURN A PRIOR JUDGMENT AND PROPERTY SETTLEMENT AGREEMENT ON THE GROUND OF FRAUD, FOR THE REASON THAT SAID PETITION WAS NOT TIMELY FILED WITHIN SIX (6) MONTHS AS REQUIRED BY MRCP 60 (b).

II. THE CHANCELLOR ERRED AS A MATTER OF ACT AND LAW IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE OF THE ELEMENTS OF COMMON LAW FRAUD SUFFICIENT TO SUPPORT THE CHANCERY COURT JUDGMENT TO REOPEN AND SET ASIDE THE ORIGINAL DIVORCE JUDGMENT AND INCORPORATED PROPERTY SETTLEMENT AGREEMENT OF THE PARTIES.

V. STATEMENT OF THE CASE

This case arises from a Petition filed by Lisa Trim in the Chancery Court of the First Judicial District of Hinds County, Mississippi, to set aside a June 2000 irreconcilable differences Final Judgment of Divorce and the Property Settlement Agreement incorporated therein. Lisa Trim's Petition was filed some four and one-half (4-1/2) years after entry of the Judgment. The Petition was primarily grounded on the allegation that George Trim had wilfully, knowingly and fraudulently undervalued his forty-nine percent (49%) minority stock interest in his business corporation, Business Communications, Inc. ("BCI"), as reflected in his Unified Chancery Court Rule 8.05 financial statement filed during the entry of the Judgment of Divorce. George's 8.05 statement listed a value of $100,000 for the stock.

George Trim filed his Answer denying that he wilfully, knowingly and fraudulently misrepresented the value of his business stock and raised the affirmative defense that Lisa's Petition should be dismissed under the provisions of MRCP 60(b) (1) requiring that actions to set aside prior Judgments of a court must be filed within six (6) months of the date of the Judgment.

As to the MRCP 60(b) defense, Lisa Trim argued that George's fraudulent undervaluation of his business interest on his 8.05 financial statement constituted a "fraud upon the court" which fell within the savings clause of MRCP 60(b) requiring only that her Petition be filed "within a reasonable time" from the date the fraud was discovered.

Lisa Trim's allegation of fraud is based primarily upon a May, 2002, Judgment of the Madison County Chancery Court valuing George Trim's stock interest in an unrelated, highly contested minority shareholder oppression action. In August, 2001, George filed a complaint in the Madison County Chancery Court against Tony Bailey, co-founder of BCI and BCI praying that the corporation be judicially dissolved on the grounds of illegal and oppressive breach of fiduciary duty and his rights as a minority stockholder under Miss. Code Ann. ¶ 79-4-14.30(2). BCI and Bailey exercised their statutory option to purchase George's stock at a value to be determined by the Court under Miss. Code Ann. ¶ 79-4-14.34. Pursuant to statutory requirements, the Madison County Chancery Court scheduled a hearing to determine the value of George Trim's forty-nine percent (49%) minority stock interest. Trim's valuation expert testified that the fair value of George's stock as of August 14, 2001, was $1,186,000, calculated with no consideration of lack of marketability and lack of control discounts.. BCI's expert testified that the underlying fair market value of George's interest was $111,000, after utilizing proper lack of marketability and lack of control discounts. In his opinion and order, the Madison County Chancellor expressed grave doubts as to the proper valuation of George Trim's stock due to the great disparity in valuations calculated by the two prominent and well-qualified experts. However, the Chancellor noted that he was bound to accept the testimony of one or the other of the experts, and was not qualified to recalculate his own "middle ground" figure. Thus, the Chancellor adopted the fair value

opinion of George Trim's expert of $1,186,000 as the judgment of the court for valuation purposes specific to oppressive shareholder's action.

At the trial of the case at bar in the Hinds County Chancery Court, valuations of both of the Madison County case experts was introduced into evidence. A third expert hired by Lisa Trim, offered testimony that he utilized George Trim's expert's written data to recalculate the value of George Trim's stock as of the date of the June 2000 divorce at $659,000. Thus, the Hinds County Chancery Court was presented with three distinct and widely divergent valuations of Trim's stock, all prepared by qualified business valuation experts.

At the conclusion of the trial, the learned Chancellor below entered his Order and Opinion finding that the value of Mr. Trim's stock at the time of the divorce was, as testified by Lisa Trim's expert, the sum of $659,000. Despite being faced with opinions from recognized experts varying from a low of $111,000 to a high of $1,186,000, the Court found that George Trim had wilfully, knowingly and fraudulently undervalued his stock in his 8.05 financial statement. The Court acknowledged that under current Mississippi law, the fraudulent behavior of George Trim did not rise to the level of a fraud upon the court, and thus, would seem to require dismissal of Lisa Trim's Complaint for failure to conform with the six-month time limit. However, the Chancellor found that George Trim's action in undervaluing his stock was so egregious as to allow the court, under its general equity powers, to right a potential wrong caused by his deceitfulness. The Chancellor further opined that the court had the power to consider the Petition as a request for Modification of the prior divorce Judgment and incorporated property settlement agreement, apparently beliving that this would somehow avoid the requirements of 60(b). After considering the *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994), factors for equitable distribution of marital assets, the Court entered its

judgment awarding Lisa Trim twenty-five percent (25%) or $148,500 of the additional stock valuation calculated by Lisa's expert less the $100,000 figure used by George Trim in his financial statement. The Court further awarded Lisa Trim her reasonable attorney's fees and recovery of a portion of her expert fees incurred in pursuing her Petition.

From this adverse decision, George Trim filed and perfected his appeal.

B. STATEMENT OF FACTS

Lisa and George Trim were married on November 16, 1990, in Hinds County, Mississippi. No children were born of their marriage. They lived together has husband and wife until their separation in or about September, 1999. On September 24, 1999, George and Lisa signed a Property Settlement Agreement providing for the distribution of assets and settlement of all issues between them concerning their marriage. (The "Settlement Agreement"). This Settlement Agreement provided, *inter alia,* that all issues between them, including the division of marital property was finally and fully settled upon their execution of the agreement and was not subject to the amendment or modification without the written approval of both parties.

On April 10, 2000, George and Lisa filed a joi nt Bill of Complaint for Divorce – Irreconcilable Differences in the Chancery Court of the First Judicial District of Hinds County, Mississippi. The Complaint prayed for a divorce absolute and incorporated the written Settlement Agreement previously signed by the parties. George Trim filed his Rule 8.05 Financial Statement, dated June 12, 2000,with the clerk on June 14, 2000. His attorney indicated a copy was forwarded to Lisa Trim on the date of signing. George Trim's stock interest in BCI was listed under assets at $100,000 on his financial statement. Lisa Trim signed her financial statement June 12, 2000, and filed it with the court on June 14, 2000. A Final Judgment of Divorce – Irreconcilable Differences

was signed by the Judge and filed on June 14, 2000. George Trim was represented by attorneys with James & Associates Law Firm. Lisa Trim was not represented by counsel in those proceedings.

On November 19, 2004, Lisa Trim filed her Petition which gives rise to the current dispute alleging that George Trim had wilfully, knowingly and fraudulently undervalued his forty-nine percent (49%) minority stock interest in BCI, a Mississippi corporation, he co-founded and worked for. Mrs. Trim basically argues that she relied to her detriment upon the fraudulent valuation advanced by George Trim with the result that the parties' June, 2000, Judgment of Divorce and incorporated Settlement Agreement should be set aside.

During the course of their marriage, Lisa Trim worked as a full-time sales rep for the Berry Companies selling Yellow Page advertising. At the time of their marriage, George Trim was self-employed in a computer networking and cabling business. On or about 1993 Mr. Trim joined forces with Tony Bailey, a friend who had substantial experience in se lling specialized computer hardware/software to form BCI. George Trim was the minority shareholder with a forty-nine percent (49%) interest, while Tony Bailey owned fifty-one percent (51%) of BCI. For tax purposes BCI was registered as "sub-chapter S" corporation, whereby the corporation pays no taxes on any profits, but simply reports any profit or loss at the year, which is then attributed to each shareholder, according to his percentage ownership, whether or not a shareholder received the actual distribution of the profit.

As the valuation of BCI stock and George Trim's knowledge and appreciation of same are an integral issue in this cause, facts concerning the Madison County Chancery lawsuit and valuation methods of the experts are necessary to an understanding of this case. Although Tony Bailey and George Trim were friends when they jointly founded BCI., serious disagreements arose between

them concerning management, control and authority. As Bailey was the majority shareholder, he could elect two of the three members of the board of directors, thereby retaining control of employment of officers and major decisions of the business. In a board of directors meeting called by Bailey in July 2001, Bailey and a third director elected by Bailey, voted to fire George Trim as president of the company and reduce his management responsibilities and salary. In August 2001, George Trim filed suit against Bailey and BCI in the Madison County Chancery Court requesting dissolution of BCI on the grounds of illegal and oppressive breach of fiduciary duty and wrongful breach of his rights as a minority shareholder, under provisions of Miss. Code Ann. ¶ 79-4-14.30(2). BCI and Bailey exercised their statutory option to purchase George's stock at a value to be determined by the court under Miss. Code Ann. ¶ 79-4-14.34. Pursuant to statutory requirements, the Madison County Chancery Court convened a hearing to determine the value of Mr. Trim's forty-nine percent (49%) minority stock interest. Trim's valuation expert, Mr. James Koerber, testified that the value of Mr. Trim's stock as of August, 14, 2001, was $1,186,000. He opined that the fair value without discounts for non-marketability of closed corporate stock and lack of control, was the proper type of valuation for minority stockholder oppression suits. BCI's expert, Dr. Hugh Parker, testified that the fair market value of George Trim's stock as of the same date was $111,000. Dr. Parker testified that a lack of control and lack of marketability discount totaling forty percent (40%) should be applied to the $186,000 value of George Trim's stock he calculated, resulting in the $111,000 fair market valuation.

At the conclusion of the hearing, the Madison County Chancellor Bill Lutz expressed his concern as to the wide disparity of valuation of George Trim's stock interest by two recognized, well-known experts, and even suggested that the parties agree to pay for a third expert, to be

appointed by the court to reconcile same. The parties declined to do so. In his written opinion, the Madison County Chancellor noted::

> Valuing a business such as BCI requires specialized knowledge in forecasting markets and estimating future earnings potential. Also, business valuation is known to be as much art as science. For this reason, there was no specific formula the court could use to plug in known numbers and come up with a figure.
>
> Because of the large disparity in figures presented by each side, the court asks the parties to agree on an independent valuator to act as the court's expert and analyze both valuation reports within the parameters set out by the court in this opinion. After much discussion, the parties declined to spend the money to do this. Therefore, the court must make its decision using the reports and testimony already presented to the court by the litigants. (Madison Chancery opinion p. 5)

Thus, faced with having to pick one of the two valuations rather than calculate some figure on its own, the court found that the approach used by George Trim's expert seemed more appropriate for a valuation in the context of a minority oppression suit, and therefore, adopted the $1,186,000 valuation as the finding of the court. The Madison County judgment was entered on June, 6, 2002. Lisa Trim found out about the million dollar plus valuation sometime in 2002.

In support of her complaint to set aside the prior Judgement of Divorce and Settlement Agreement, Lisa Trim hired J. Raleigh Cutrer, a CPA, as an expert to value George Trim's BCI stock interest at the time of the June, 2000 divorce. Mr. Cutrer testified that he basically took James Koerber's 80-plus page valuation report prepared in connection with the Madison County case, and utilized those figures to"recalculate" the value of Trim's stock back a year until June 2001. He agreed that valuing a business such as BCI was a very complex matter and involved a lot of subjective elements. He did not disagree with the Madison County Chancellor's statement that valuation of a business is "more art than science." He did agree for purposes of valuing a business interest for divorce settlements and most other general financial applications, the fair market value

utilizing proper discounts rather than fair value should be used. He agreed with the other experts, that fair market value required that a discount for lack of marketability and lack of control should be applied to the calculation. He agreed that the "fair value" of $1,186,000 determined by the Madison County Chancery Court was not the proper valuation for purposes of financial applications, including division of marital assets in divorce proceedings, all of which utilized fair market value, with the discounts. He explained that fair market value involved discounting the "fair value" to recognize that there is no market for close corporate stock and that George Trim's minority block was worth much less than a majority or controlling block. Thus, plaintiff's expert testified that a forty percent (40%) reduction from his "fair value" determination would yield a fair market value of $694,000 for George Trim's stock in the domestic fair market value context. Upon cross examination, Lisa Trim's expert further agreed that his discount should be increased by at least five percent (5%) due to George Trim's lack of any control over the board of directors to a final fair market figure of $659,000. The expert also agreed that financial statements produced by BCI accountants and signed by George Trim to provide to BCI's bankers did not generally include fair market value discounts, but were probably based on undiscounted fair value. He acknowledged that the same forty-five percent (45%) discount would be applicable to those figures in most cases, to reach a fair market value.

George Trim testified that he did not complete high school, but did obtain a GED. He has little understanding of accounting principles and, before the Madison County trial, no particular knowledge concerning valuation of stock or businesses. At the time of the divorce, as far as he knew, his stock had little value as an asset in his hands, because there is no market to sell close corporate stock unless some individual under unique circumstances decide they want to buy it. Any

sale or transfer of his stock was restricted by the By-laws and subject to a first right of refusal in BCI and Tony Bailey. Since BCI did not pay dividends to its two shareholders, it further had little realistic value in his mind. The only distributions he received, other than his salary, each year was the amount necessary to pay taxes on the amount of income, if any, attributable to him under sub-chapter S rules. The annual "tax distribution" was paid to the IRS to cover taxes attributable to his percentage of any net income of BCI, which not actually paid to him. George Trim further testified that the financial officer or accountants of BCI always prepared his and Tony Bailey's financial statement each year for submission to banks in connection with BCI business loans. Their valuation placed on BCI stock mean little to him, and seemed unrealistic. George Trim testified that his secretary and/or bookkeeper had, for years, handled his income and paid his bills. He noted that the financial information contained in his 8.05 financial statement was in the handwriting of and filled out by his secretary Shirley Wilson and bookkeeper in the BCI accounting division, Liz Hill. He gave the form to them to fill out – as they commonly had done for his other financial forms or applications. He stated that he believed that Liz Hill placed the $100,000 value for his BCI stock on the form. He did not discuss the valuation with her, nor did he discuss the other figures concerning his expenses, car payments, etc. with them. As far as he knew, they already had this information from handling his personal affairs for years. His former secretary testified that she, indeed, handled all of Trim's personal financial matters, including making deposits and paying his bills, for a number of years prior to the preparation of the Rule 8.05 Financial Statement. She agreed that she and Liz Hill, the BCI bookkeeper, had filled out other financial statements for Trim in the past. She testified that Liz Hill, the company bookkeeper, most likely determined the figure to put in the statement for the value of George Trim's stock.

VI SUMMARY OF ARGUMENT

All actions to set aside, modify or otherwise obtain relief from a final Judgment must be brought under the provisions of MRCP 60. Motions or petitions grounded on allegations of fraud are covered under MRCP 60(b). Mississippi has long recognized that actions involving allegations of fraud on the part of a single witness or party must be brought within 6 months from the date the final Judgment was filed. Actions involving multiple witnesses committing fraud in a grand scheme to subvert justice nay may be characterized as involving a fraud upon the court which has no specific time limitations. As Lisa's Petition was filed nearly 41/2 years after the Final Judgment, it is barred by the 6 month limitation of 60(b)(1). The Chancery Court, in its Opinion, found that George's fraud was not a fraud upon the court, and that 60(b)(1) would appear to bar her Petition. The lower Court held. however, that general equitable principals allowed the court to treat Lisa's Petition as a Motion to Modify, to somehow avoid 60(b). It is respectfully submitted that this reasoning on the part of the learned Chancellor below was error as a matter of law.

Lisa's Petition alleges that George fraudulently undervalued his BCI stock by listing it at $100,000 on his 8.05 financial statement. At trial, 3 expert opinions as to the value of George Trim's BCI stock were offered into evidence ranging from $111,000 to $711,600. An essential element of fraud is that there be clear and convincing evidence of a **knowing** and intentional misrepresentation of a material fact. This record simply does not support such a finding of fraud against George.

VII ARGUMENT
MRCP 60(b)

At the outset, George Trim would show that prior to even determining the issue of fraud, petitioner's Petition must be dismissed under the provisions of MRCP 60(b), which basically

requires that motions or petitions to set aside or otherwise attack Judgments or Orders of the Court on the grounds of "fraud, misrepresentation, or other misconduct of an adverse party" must be filed within six (6) months after the date of the Judgment or Order. Lisa filed her Petition to set aside Final Judgment of Divorce and Property Settlement Agreement on the allegation of fraud nearly 4 and 1/2 years after entry of said final Judgment and incorporated Property Settlement Agreement. The relevant portion of Rule 60 states:

RELIEF FROM JUDGMENT OR ORDER

> (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 (6) 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 appellant court unless the record has been transmitted to the appellant 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 vobis, 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.

Brown v. Estate of Johnson, 822 So.2d 1072 (Miss. App., 2002) is directly applicable to the

case at bar. In *Brown*, a former wife brought an action against her former husband's estate to set aside a final judgment of divorce based on the wife's allegations that her former husband had committed fraud by failing to disclose significant assets during the divorce proceedings. The chancellor held that the wife's suit, filed more than two and a half years after the date of the original judgment, was governed and barred by the six month statute of limitations contained in M.R.C.P. 60(b) (1). In her appeal, the former wife argued that Rule 60(b) does not have a period of limitations on independent actions to set aside a judgment for fraud upon the court. In affirming the chancellor's decision barring the wife's suit, the Court of Appeals noted that the former wife had failed to note the distinction between an alleged "fraud of an adverse party" and "fraud upon the court," as used in the Rule. The Court of Appeals noted that the former wife's allegations were strictly that of fraud on the part of an adverse party, through perjury and otherwise, which fell squarely within the six month limitation prescribed under Rule 60(b)(1). The court noted that "fraud upon the court," as cited in the Rule for which no specific limitation period is provided, is a separate concept involving fraud directed to the judicial machinery itself and not fraud between the parties or fraudulent documents, false statements or perjury. The court noted that "mere perjury is not a ground for collateral attack on a judgment of divorce." Id., at 1073.

The court also observed that Rule 60(b) deals with two competing concepts: first that some reasonable procedure for attacking a judgment or order procured by fraud on the part of an advasary should be made available; but, on the other hand, that at some point there must be an end and finality to litigation. The court observed that Rule 60(b) deals with these competing considerations by providing a window of opportunity, "albeit a relatively narrow one," for a party to uncover and file an action contesting the judgment or order within that window, or be forever barred from attacking

the judgment. Thus, the court of appeals affirmed the chancellor's decision that the former wife's suit was barred by the Rule 60(b)(1) six month limitation.

The recent decision in *Walton v. Snyder*, 2007WL4234855 (Miss. App., Dec. 4, 2007) provides a detailed analysis of application of MRCP 60(b) to facts strikingly similar to the case at bar. In *Walton*, the parties had obtained a final judgment of divorce on irreconcilable differences with an incorporated written settlement agreement in March, 2002. In November, 2004, Ms. Snyder filed a complaint for contempt and modification of the final judgment and other relief. Ms. Snyder sought an increase in child support retroactive to the date of the original judgment of divorce based on allegations that Dr. Walton had fraudulently understated his income on his Rule 8.05 financial statement. At the trial, Dr. Walton acknowledged that his original 8.05 disclosure did understate his annual income by some $28,000 through a mistake. Although the Chancellor commented that he found it "...hard to believe it was an innocent mistake ...", he didn't specifically find it to be fraudulent warranting a finding of contempt. As Dr. Walton's current new 8.05 statement showed a substantial increase in annual income as compared to the "corrected" original 8.05 statement, the Chancellor awarded a 20% increase in child support based on the difference. retroactive back to the date Ms. Snyder filed her Complaint for Modification. This part of the lower court judgment was affirmed .

However, the chancellor also awarded an increase of 20% of the difference between the original understated 8.05 annual income and the corrected amount, retroactive to the date of the original judgment of divorce in March, 2002. Dr. Walton appealed citing his ex-wife's failure to comply with the 6 month limitation of MRCP 60(b)(1). The appellant court agreed that this part of the judgement did involve a attempt to modify a prior judgment, requiring compliance with MRCP

60(b), and reversed the trial court. In its detailed analysis, the appellant court reasoned:

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The chancery court discussed two cases involving fraud and Mississippi Rule of Civil Procedure 60(b) before applying an older equitable precept.

¶ 20.First, the chancery court cites *Pulliam v. Smith*, 872 So.2d 790 (Miss.Ct.App.2004) which held that the issue of fraud is generally raised in a Rule 60(b) motion. Id. at 794(¶ 7) (citing Askew v. Askew, 699 So.2d 515, 519(¶ 17) (Miss.1997)). Next, the court cites *Tirouda* v. State, 919 So.2d 211 (Miss.Ct.App.2005), in support of the authority given to a court "to make amendments to a prior judgment when its prior judgment was obtained by fraud upon the court" The chancery court also notes that in Warner's Griffith, Mississippi Chancery Practice (Rev.2d 1991), courts of equity are given as broad a jurisdiction in cases of mistake as fraud to correct judgments where a judgment was based on mistaken facts.

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¶ 21.We find the trial court erred. Mississippi Rule of Civil Procedure 60(b) provides, in pertinent part, that the court, upon a motion or its own power, may relieve a party from final judgment for "(1) fraud, misrepresentation, or other misconduct of an adverse party; (2) accident or mistake; (3) newly discovered evidence ... [or] (6) any other reason justifying relief from the judgment. "Motions under subsections (1), (2) and (3) must, however, be brought within "six months after the judgment, order, or proceeding was entered or taken."Motions made under subsection (6) must be made within a "reasonable time." The 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."M.R.C.P. 60(b). As Ms. Snyder did not file her motion within six months of the March 2002 judgment, she cannot rely upon any grounds found in subsections (1), (2) or (3).

*7 ¶ 22.We find the trial court's citation to *Tirouda* and the Griffith treatise misplaced, because, as *Tirouda* explains, **the requirements of Rule 60(b) must nonetheless be met in order for the court to**

take corrective action. *Tirouda* dealt with a chancery court, on its own Rule 60(b) motion, finding fraud upon the court relating to a judgment it had issued granting a delayed birth certificate to an immigrant. The immigrant and two other witnesses had knowingly falsified information provided to the court in order to claim birth in Mississippi. The *Tirouda* court discussed the difference found in Rule 60(b) between fraud upon an individual, falling under Rule 60(b)(1), which requires a motion for relief from judgment be filed within a reasonable time but not more than six months after the judgment, and fraud upon the court, falling under the savings clause of Rule 60(b), which is not subject to such time constraints. Id. at 214-15(¶ 8). In *Tirouda*, it was determined that fraud upon the court was committed by numerous witnesses in a deliberate scheme to influence the court, thus the judgment could be set aside by the chancery court, within a reasonable time, and did not fall within the Rule 60(b) six-month time constraints. **In contrast, the perjured testimony of merely one witness, as *Tirouda* discussed, would not trigger relief for fraud upon the court.** Id. at 216(¶ 12).

¶ 23.In our case, the court did not find Dr. Walton's misstatements fraudulent, but rather a mistake. **Even if Dr. Walton's misstatement of income would have been found fraudulent, it would have been fraud upon an adverse party, falling within the Rule 60(b)(1) six-month time constraint, because Dr. Walton would have been the sole witness committing perjury**. However, it is irrelevant whether the trial court found Dr. Walton's statements fraudulent or not, because, as Tirouda explains, the only way to escape the six-month time constraints of Rule 60(b) is for there to be a finding of fraud upon the court, such as where several witnesses perjure themselves. Id. at 216(¶ 12). This was not the case here. Therefore, under Rule 60(b), Ms. Snyder had six months from the date of judgment of March 2002, to file a motion for relief.

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¶ 24.Mrs. Snyder cites to Rule 60(b)(6) to justify this award.

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However, relief under Rule 60(b)(6) cannot be based upon a reason which may be found under the first five subsections of the rule. *Mitchell v. Nelson*, 830 So.2d 635, 639(¶ 9) (Miss.2002).Walton, at ¶¶ 19-24, (Emphasis added).

Walton and *Tirouda* clearly require that Lisa Trim's Petition to set aside and/or modify the final judgment and incorporated Settlement Agreement on the ground of fraud must be brought under and comply with MRCP 60(b). As her ground of fraud relies solely upon the alleged intentional understatement of the value of his BCI stock by George Trim, a single witness, her Petition is subject to the six-month limitation of MRCP 60(b)(1), and must be dismissed.

In his Order and Opinion of the Court, the learned chancellor below first considers the application of MRCP 60(b) to the case at bar, and reluctantly concludes that George Trim's "egregious" deceitfulness does not constitute "fraud upon the court": under current case law. The court then acknowledges that MRCP 60(b)(1) would seem to apply and require dismissal of Lisa's Petition, as it was not filed within six months of the date of the Final Judgment. However, the Chancellor states that the court is unwilling, under principles of equity, to allow George Trim to profit from his ability to deceive Lisa and the court for more than six months. Citing *Kalman v. Kalman*, 905 So. 2d 760 (Miss. App., 2004), the trial court finds that it has the inherent power to treat Lisa's "Petition to Set Aside Final Judgment of Divorce and/or Property Settlement Agreement instead as a motion to Modify the final judgment of Divorce and/of Property Settlement Agreement," thereby somehow avoiding the 60(b)(1) limitation. The lower court then concludes that general principles of equity demand that the Final Judgment and Property Settlement Agreement be modified. after considering the *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994), factors, the chancellor then awarded Lisa Trim a cash sum equal to a portion of the increase in valuation of George's stock based upon the testimony of Lisa's expert at the trial.

It is respectfully submitted that the learned Chancellor's reasoning and reliance upon *Kalman, supra*, are clearly erroneous. In *Kalman*, the parties filed a joint petition and were granted a divorce in January, 1998. A few months prior to filing the joint petition, the husband won $2,600,000 in the Ohio state lottery. He never disclosed his winnings to his wife or the court, as neither party filed a Rule 8.05 financial statement. Some three years later, the ex-wife found out about the lottery winnings and filed a Motion to Modify the Final Judgment of Divorce and for contempt. The chancery court increased child support and provisions for the three children's medical costs and education expenses and entered an award for past due child support. The chancellor denied the motion for alimony and contempt. The Court of Appeals reversed, and sent the case back to the Chancery Court with instructions to reconsider the denial of alimony in light of a determination of whether the lottery winnings were marital property, and the finding of no contempt.

In reading *Kalman*, it should first be noted that the ex-husband apparently did not raise the MRCP 60(b) issue at trial and that the Court of Appeals never considered same in its opinion. While 60(b) would not be applicable to a motion solely for modification of child support and possibly alimony based upon a change of circumstances, it certainly would come into play on a motion for modification of a marital property division. Thus, the Court of Appeals may have avoided this issue in *Kalman* by considering the marital property division only in the alimony context. On the other hand, once MRCP 60(b) is brought into play, *Kalman* is in direct conflict with *Tirouda* and *Walton, supra*; these cases and the authorities cited therein, clearly provide that any action to set aside or modify a final judgment is subject to the provisions of MRCP 60(b). Indeed, *Walton* specifically holds

that an action to modify child support provisions in the original Judgment, based upon allegations of fraud prior to and at the time of the Judgment (as opposed to a subsequent change of circumstances), is subject to and must be brought under Rule 60(b). Thus, the only way to reconcile *Kalman* with established law is, apparently, to simply recognize that the 60(b) issue was simply not raised by the parties, and therefore, never considered.

B. FRAUD

In her Petition, Lisa Trim relies on the 2002 judgment of the Madison County Chancery Court valuing George Trim's stock at $1,186,000 as overwhelming evidence that George fraudulently undervalued his stock at $100,000 in his Rule 8.05 financial statement. As the "million dollar valuation" played an integral part in the trial court's finding of fraud in the case at bar, it is necessary to understand the evidence and valuation process which led to the Madison County Chancellor's determination. In August, 2001, George Trim filed suit against Tony Bailey and BCI in the Madison County Chancery on the grounds of illegal and oppressive breach of a fiduciary duty and wrongful breach of his rights as a minority shareholder and requesting that the court to judicially dissolve BCI under Mis. Code Ann. § 79-4-14.30(2). BCI and Bailey exercised their statutory option to purchase George's stock at a value to be determined by the Court under Miss. Code Ann. § 79-4-14.34. Pursuant to statutory requirements, the Madison county Chancery Court scheduled a hearing to determine the value of Mr. Trim's 49% stock interest. Trim's valuation expert, Mr. James Koerber, testified that the fair value of Mr. Trim's stock as of August 14, 2001, was $1,186,000. He stated that the fair value without discounts for non-marketability of close corporate stock and lack of control, was the proper type of valuation. BCI's expert, Dr.

Hugh Parker, valued Mr. Trim's stock as of the same date by applying a lack of control and lack of marketability discount totaling 40% resulting in a fair market value for George's stock of $111,000. In his Opinion, the Madison County Chancellor expressed his concern as to the wide disparity between the two highly qualified experts' opinions of value, but noted that the court has no choice but to adopt one of the opinions. The Chancellor found that George Trim's expert's approach that the proper measure was fair value, without taking into account normal lack of marketability and lack of control discounts, in minority oppression suits, was more credible and adopted Mr. Koerber's valuation.

At the trial of the instant case, Lisa Trim offered the testimony of her own expert ,J. Raleigh Cutrer, CPA, as to the value of George's BCI stock in June, 2000, the date of the Final Judgment of Divorce. Cutrer utilized the previous financial statements and valuation methodology contained in the Koerber report, to give his opinion that the fair market value of George's stock was $694,000, obtained by applying a discount for lack of marketability and lack of control of 40% of his fair value determination. during cross examination, he agreed that his discount should be increased by at least 5% due to George's lack of control over the Board of Directors, yielding a final opinion of fair market value of $659,000. Cutrer agreed that fair market value, utilizing an appropriate lack of marketability/control discount, should be used in valuations for domestic cases. Thus, Koerber's determination of fair value of $1,186,000 in the Madison County case would have to be reduced by 45% (Cutrer's discount) or 40% (Dr. Parker's discount) for fair market valuation purposes, yielding fair market values of $652,000 or $711,600, respectively. Mr. Cutrer also agreed that the stock valuation contained in financial statements prepared by BCI's accountants and

signed by George to provide to BCI's bankers likely did not include fair market value discounts.

George Trim testified that he did not intentionally or knowingly undervalue his stock, as he had little idea as to its actual "value" at or about the time of his divorce. George noted that he did not finish high school and had neither training nor understanding of accounting principles and financial statements for businesses, and certainly no understanding of the various valuation methods and theories used by experts prior to the Madison County Chancery proceedings. George noted that, as far as he knew, the stock had little value as an asset in his hands because there is no market to sell close corporate stock unless some individual under unique circumstances, decides they want to buy it. Any sale or transfer of his stock is restricted by the by-laws and subject to a first right of refusal in BCI and Bailey. Since BCI did not pay dividends to its shareholders, it further had little realistic value in his mind. Expert Cutrer agreed that there is little real liquid value in close corporate stock, as there is no ready market for same and the companies rarely pay dividends or distributions to officers in addition to their regular salaries. George further testified that the financial officer or accountants at BCI always prepared his and Bailey's financial statement for submission to banks in connection with the BCI business loans. Thus, as noted from Cutrer's testimony, these figures were likely inflated by 40-45%. George testified that his 8.05 financial statement had been, as was his normal routine, prepared by a secretary and staff bookkeeper at BCI, as he had little knowledge of the true "value" of his stock, or details of his bill paying, budget, etc. His former secretary testified that she, indeed, handled all of Trim's personal financial matters, including making deposits

and paying all bills, for a number of years prior to the preparation of the 8.05 disclosure. She also agreed that she and Liz Hill, the BCI bookkeeper, had filled out other financial statements for George in the past, and had filled in the value of George's stock on the 8.05 form.

So what does the record in the instant case reflect was the fair market value of George's BCI stock against which his "fraudulent valuation" is to be measured? The fair market valuation opinions of three highly qualified experts range from a low of $111,000 to a high of $711,600. The learned Chancellor adopted Lisa's expert's opinion of $694,000 (apparently rejecting Cutrer's own admission that an additional 5% discount to his reported figure was appropriate), a value not even established until some seven (7) years after the alleged fraudulent undervaluation by George Trim. Mr. Cutrer calculated the fair value of George's stock as of the June 2000 date of divorce at $1,100,916, nearly identical to Koerber's $1,186,000 as of August, 2001, before application of the necessary 45% discount. Thus, the value of BCI was nearly the same , according to Lisa's expert in August, 2001 as June, 2000. Dr. Parker's valuation of fair market value of $111,000, as of August,2001 is, therefore, just as applicable to June 2000, and is only some $11,000 over the $100.000 estimate contained in George's 8.05 statement

Fraud must be predicated on clear and convincing evidence of a knowing and intentional misrepresentation. When the experts cannot agree as to the fair market value of close corporate stock, how can a mere layman be charged with a knowing and intentional misrepresentation of same? It is submitted that this record is simply insufficient to support a finding of fraud against George Trim

VIII CONCLUSION

Lisa Trim's Petition to Set Aside a Final Judgment of Divorce and incorporated Property Settlement Agreement on the ground of fraud is governed by and must comply with MRCP 60(b). Since the fraud was allegedly committed by only one witness, George Trim, MRCP 60(b)(1) requires that the Petition be filed within six (6) months of the date the Final Judgment was filed. Mississippi has long recognized that perjury of a single witness or party does not constitute a fraud upon the court, which does not incorporate the six-month limitation. The Chancery Court below found that George Trim's fraudulent misrepresentations did not constitute a fraud upon the court, but reasoned that it could ignore appication of the 60(b)(1) limitation by recharacterizing Lisa's Petition as a Motion to Modify the Final Judgment. Thus, the chancery court entered its judgment modifying the prior final Judgment and Settlement Agreement. This reasoning by the trial court was erroneous as a matter of law. Actions to set aside or modify a final Judgment are both actions seeking relief from a final Judgment, and as such, are subject to 60(b). Lisa's Petition was not filed until nearly four and one-half years after the Final Judgment. Alternatively, Lisa Trim alleged that George fraudulently undervalued his BCI stock in his 8.05 financial statement. The record reflects that three well-qualified experts gave widely varying opinions as to the fair market value of the stock. In order to support a finding of fraud, clear and convincing evidence of a knowing and intentional misrepresentation of a material fact must be shown. The record below simply does not support the Chancellor's finding of fraud. For either or both of the foregoing reasons, this Honorable Court should enter its decision reversing the lower court's judgment, and dismiss Lisa Trim's Petition

with costs to be assessed against Appellee.

Respectfully submitted,
GEORGE TRIM, APPELLANT

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CERTIFICATE OF SERVICE

THIS WILL CERTIFY that the undersigned counsel of record for the Appellant herein has this day served a true and correct copy of the above and foregoing Brief of Appellant upon the following counsel of record, and Honorable Dewayne Thomas, Chancery Court Judge, by placing same in the United States Mail, postage fully prepaid, addressed as follows:

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SO CERTIFIED, this 18th day of March, 2008.

_____
WILLIAM L. COLBERT, JR.