

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DIANE RENE' PERSONS MCCOY FORREST

APPELLANT

V.

APPEAL NO. 2007-CP-01760

KENDALL MCCOY

APPELLEE

BRIEF OF THE APPELLEE

*(On Appeal from the Order of the Chancery Court of
the First Judicial District of Hinds County, Mississippi)*

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CERTIFICATE OF INTERESTED PERSONS

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 this Court may evaluate possible disqualification or recusal.

1. Diane Rene' Persons McCoy Forrest,
Pro Se Appellant;
2. Kendall McCoy,
Appellee;
3. Tracy S. Steen, Esq. and Stephanie G. Beaver, Esq.
Counsel for the Appellee.

This the 30th day of January, 2008.



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I. STATEMENT OF THE ISSUES

1. Whether the Chancery Court's denial of past due child support was proper when the Appellant waived the issue because she failed to timely raise the issue in her original appeal two and one half years earlier.
2. Whether the Chancery Court's denial of past due child support was supported by substantial evidence.
3. Whether the Chancery Court's denial of past due child support was manifest error when the Appellant waived the issue after she failed to timely appeal the issue.

II. STATEMENT OF THE CASE

A. Procedural History.

The Plaintiff/Appellant, Diane Forrest, appeals from the Order of the Chancery Court of the First Judicial District of Hinds County denying her Motion for Contempt. (R., pp. 31-35). The Court determined that Ms. Forrest failed to pursue the previous denial of past due child support under her original appeal and could not revisit the issue two and one half years later. *Id.* Feeling aggrieved by the Hinds County Chancery Court's ruling, the Plaintiff/Appellant appealed to the Mississippi Supreme Court.

B. Summary of the Facts.

On or about November 13, 1987, Plaintiff filed a Complaint for Divorce from Defendant. Defendant filed an Answer to the Complaint on or about November 19, 1987. One minor child was borne of the parties' marriage on September 16, 1987. On January 8, 1988, a Temporary Order was entered by the Honorable Stuart Robinson ordering the Defendant to pay child support in the amount of \$450.00 per month and provide medical and hospitalization insurance for the minor child. (R., pp. 27-28). On or about February 24, 1988, the Plaintiff filed a Motion for Contempt seeking an Order of Contempt against Defendant for failure to pay child support as ordered on January 8, 1988. Defendant simultaneously filed a Motion to Amend Temporary Order seeking relief from the Temporary Order for support secondary to the financial constraints he was enduring. Defendant also requested visitation provisions which were not addressed in the Temporary Order.

On or about December 6, 1988, Honorable Stuart Robinson entered a Judgment of Divorce incorporating the Child Custody and Property Settlement Agreement the parties reached on July 11, 1988.

(R., pp. 16-22). The Child Custody and Property Settlement Agreement provided, in pertinent part:

Both parties understand and agree that it is in the best interest of the parties' child for the Husband not to have any visitation rights and/or contacts with the parties' child. Therefore, Husband shall not be entitled to any visitation rights with the parties' child whatsoever.

Id.

Husband shall not be responsible for the payment of any medically related expenses previously incurred by Wife for the benefit of the parties' minor child (whether surrounding the birth of the parties' minor child or whether these expenses were incurred following the birth of the parties' minor child; and Husband shall further not have any responsibility whatsoever with respect to the payment of any and all future medically related expenses incurred in behalf of the parties' minor child.

Husband shall have no obligation or responsibility to pay any sum whatsoever in child support and maintenance payments in behalf of the parties' minor child. Husband shall further have no financial responsibilities whatsoever with respect to the parties' minor child.

Id.

Plaintiff, being represented by counsel, knowingly and willingly entered into the Child Custody and Property Settlement Agreement. *Id.*

On October 19, 2004, Plaintiff filed a Motion to Modify Child Support seeking child support for the past sixteen years in addition to medical benefits for the minor child. Plaintiff maintained that Defendant had no visitation rights to the minor child. Defendant filed an Answer, Defenses, and Counterclaim to Plaintiff's Motion to Modify Child Support on January 4, 2005, seeking to modify visitation with his son. Plaintiff filed an Answer to Defendant's Counterclaim to Modify Visitation on January 18, 2005, denying the Defendant was entitled to any visitation whatsoever with the minor child. On July 25, 2005, Honorable Stuart Robinson entered an Order dismissing the Plaintiff's Motion to Modify Child Support and the Defendant's Counterclaim for Modification of Visitation. Plaintiff appealed the decision to the Mississippi Supreme Court which assigned the case to the Mississippi Court of Appeals.

On November 7, 2006, the Mississippi Court of Appeals reversed and remanded the matter for further proceedings on the issue of child support. (R., pp. 50-54). However, this Honorable Court carefully reiterated

that the Plaintiff only appealed the Chancellor's denial of future child support, and she *did not* appeal the denial of back child support. *Forrest v. McCoy*, 941 So.2d 889 (Miss.Ct.App. 2006) (emphasis added). The Court held that on remand, the Chancellor should determine Defendant's child support obligation retroactive to the date of filing of the Plaintiff's Petition on October 19, 2004, "*since Forrest does not appeal the denial of past due child support.*" *Id.* (emphasis added).

On January 18, 2007, Defendant filed a Motion to Dismiss with the trial on the remanded issues being held on the same date. On January 25, 2007, the Chancery Court rendered a Supplemental Opinion and Final Judgment reiterating that this Honorable Court duly noted the Plaintiff failed to appeal the denial of past due child support, and affirmatively stated it {Chancery Court} lacked authority to reconsider the matter of past due child support based on the Court of Appeals ruling. (R., pp. 5-8). Defendant was ordered to pay child support from October 2004 through January 2007 in the amount of \$13,500.00 and \$500.00 per month from January 2007 until the minor is either emancipated or attains age 21. *Id.* Defendant was also ordered to provide full medical coverage for the minor and to maintain a life insurance policy on himself with the minor designated as the beneficiary. *Id.* Further, the Court encouraged the parties to promote a relationship between father and son. *Id.* Defendant was charged with court costs. *Id.*

Undeterred, on July 19, 2007, the Plaintiff filed yet another Motion for Contempt of Court seeking an Order of Contempt against Defendant for failing to provide medical coverage, failing to reimburse a dental expense for the minor, and yet again past due child support from January 8, 1988, through December 2, 1988. (R., 1-4). A hearing was held on the Plaintiff's Motion on August 8, 2007, with the Defendant providing proof of health insurance coverage and proof payment of the disputed dental bill. (R., pp. 9-14). Defendant had also paid the child support for the stated period and continues to pay child support as ordered. Defendant was again assessed with court costs for the Plaintiff's latest Motion. (R., p. 35). The Court requested the parties

submit briefs supporting their respective positions with regard to the past due child support issue. Defendant asserted that no "past due child support" existed. (R., pp. 38-43). Plaintiff filed a brief unsupported by anything other than her blanket allegations. (R., pp. 55-56). The Chancellor entered an Order denying the Plaintiff's request for past due child support on the premise that the Plaintiff failed to appeal the Judge Robinson's previous denial of past child support in her original appeal. (R., pp. 31-35, 46-47). From this ruling, the Plaintiff appealed to this Honorable Court.

III. SUMMARY OF THE ARGUMENT

The Chancery Court properly applied well established Mississippi Supreme Court jurisprudence. The Plaintiff has done nothing more than make cursory allegations to which she provides no support. The Supreme Court has held that the failure to cite authority in support of an argument precludes consideration of the issues on appeal. *In re Mason*, 616 So.2d 322, 327 (Miss. 1993). The chancellor determines the sufficiency of the evidence, sits as fact finder, and determines the weight and credibility of the evidence. *Milligan v. Milligan*, 956 So.2d 1066 (Miss. 2007). A chancellor's findings will not be disturbed when supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Sanderson v. Sanderson*, 824 So.2d 623, 625 (Miss. 2002); *Milligan, supra*.

The Chancellor appropriately relied upon the record and evidence presented him, and rendered an informed decision supported by the evidence. He accurately opined that the Plaintiff was precluded from raising the issue of back child support, an issue which had previously been decided and not appealed, two years after the original appeal. (R., pp. 31-35). Failure to raise an issue on appeal constitutes waiver of the issue. *Ory v. Ory*, 936 So.2d 405 (Miss.Ct.App. 2006), citing *Burcham v. Burcham*, 869 So.2d 1058 (Miss.Ct.App. 2004) and *Seals v. State*, 767 So.2d 261 (Miss.Ct.App. 2000).

Finally, the Plaintiff failed to produce evidence supporting (1) that the Chancellor's decision was not

supported by substantial evidence; or (2) that the Chancellor's decision was manifestly erroneous. *Sanderson, supra*. Thus, in viewing the evidence presented and considering the applicable law, the Chancery Court properly denied Plaintiff's Motion for Contempt in favor of Defendant. As such, the Order of the Chancery Court should be affirmed.

IV. ARGUMENT

A. NATURE AND SCOPE OF COURT'S REVIEW.

The chancellor determines the sufficiency of the evidence, sits as fact finder, and determines the weight and credibility of the evidence. *Milligan v. Milligan*, 956 So.2d 1066 (Miss. 2007). A chancellor's findings will not be disturbed when supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Sanderson v. Sanderson*, 824 So.2d 623, 625 (Miss. 2002); *Milligan, supra*. Legal questions are reviewed *de novo*. *Russell v. Performance Toyota, Inc.*, 826 So.2d 719 (Miss. 2002).

Pursuant to well established principles of Mississippi law, the Plaintiff must show that the Chancellor's findings were manifestly wrong and against the substantial weight of the evidence. *Sanderson, supra; Milligan, supra*. The Plaintiff has failed to sustain her burden. The Plaintiff filed her brief with the Chancery Court in support of her position that she is entitled to back child support. (R., pp. 55-56). However, Plaintiff failed to cite any case law in support of her position; she merely states that she is entitled to the relief requested because she declared it so. *Id.* The fact that she has been told by no less than four courts does not deter the Plaintiff in her pursuits on an issue that has been discussed ad nauseam at the Defendant's and taxpayers' expense. In applying the applicable standards, the Chancery Court properly found that the Plaintiff was not entitled to past due child support. Under this scope of review, this Honorable Court will find that the ruling of the Chancery Court should be affirmed.

B. THE CHANCERY COURT WAS CORRECT IN DENYING PLAINTIFF'S MOTION FOR CONTEMPT.

Plaintiff submits no proof in support of her assertion that the Chancellor's findings were erroneous. She simply makes blanket allegations with the expectation of being awarded the relief requested. The Supreme Court has held that the failure to cite authority in support of an argument precludes consideration of the issues on appeal. *In re Mason*, 616 So.2d 322, 327 (Miss. 1993). Plaintiff's selective memory allows her to forget that on July 25, 2005, Judge Stuart Robinson entered an Order dismissing her Motion to Modify Child Support filed October 19, 2004. When she appealed Judge Robinson's decision to the Mississippi Supreme Court, Plaintiff *failed to raise the issue of back child support*. At the time of the original appeal filed in August of 2005, Ms. Forrest was focused on future child support. On the Court's remand to Chancery Court for a determination of amounts due, Plaintiff was content with Judge Thomas' ruling of January 25, 2007, which awarded only future child support as instructed by this Honorable Court, until July 19, 2007, when she resolved to file yet another Motion for Contempt *seeking back child support*. (R., pp. 1-8). This issue was denied July 25, 2005, and was proper for appeal within thirty days after the ruling when she appealed the issue of future child support which was also denied. (R., pp. 31-35, 46-47). *See also* M.R.A.P. 4(a).

Unremitting, Plaintiff maintains the Defendant is in contempt for failure to pay child support from January 8, 1988, through December 2, 1988. Defendant contends that the Plaintiff waived the issue of past due child support when she failed to appeal the denial of the same in 2005, when the issue was ripe for appeal. Again, this Honorable Court meticulously reiterated that the Plaintiff *only* appealed the Chancellor's denial of future child support, and she *did not* appeal the denial of back child support. *Forrest v. McCoy*, 941 So.2d 889 (Miss.Ct.App. 2006) (emphasis added) (R., pp. 50-54).

This Court held that on remand, the Chancellor should determine Defendant's child support obligation retroactive to the date of filing of the Plaintiff's Petition on October 19, 2004, "*since Forrest does not appeal*

the denial of past due child support." *Id.* (emphasis added). Defendant asserts that this Court made a point to twice state that the Plaintiff did not appeal the denial of back child support. *Forrest v. McCoy*, 941 So.2d 889 (Miss.Ct.App. 2006). Failure to raise an issue on appeal constitutes waiver of the issue. *Ory v. Ory*, 936 So.2d 405 (Miss.Ct.App. 2006), citing *Burcham v. Burcham*, 869 So.2d 1058 (Miss.Ct.App. 2004) and *Seals v. State*, 767 So.2d 261 (Miss.Ct.App. 2000). The Plaintiff's opportunity to address the issue of denial of back child support was in 2005 when she appealed the denial of future child support. Since she failed to do so, she is now barred from asserting the issue.

Moreover, since the issue was initially decided by the Chancellor's denial and was not appealed, Defendant maintains the issue is further procedurally barred by the doctrine of *res judicata*. *Res judicata* bars all issues that were, or could have been, decided in the first action. *Swaney v. Swaney*, 962 So.2d 105 (Miss. 2007). As stated, the issue of past child support was decided by the Chancellor by denying the same, and Plaintiff failed to appeal the denial resulting in a bar to the claim. This Court found the failure to appeal the issue peculiar enough to twice state the Plaintiff failed to appeal the issue of back child support. (R., pp. 50-54).

Simply put, the Plaintiff was satisfied with the relief she was granted on her original appeal until the funds were expended. Now, she seeks to again waste this Court's valuable time in asking for relief she should have sought in her original appeal, and relief to which she is now precluded from recovering. Plaintiff has proceeded *pro se* since 2005. The Supreme Court has consistently held that "*pro se* litigants should be held to the same rules of procedure and substantive law as represented parties." *Davis-Everett v. Dale*, 926 So.2d 279 (Miss.Ct.App. 2006) citing *Zimmerman v. Three Rivers Planning and Dev. Dist.*, 747 So.2d 853, 856 (Miss. 1999). Defendant respectfully requests that this Court send a message to Plaintiff that further appeals of this already decided issue will not be tolerated. While this exercise in futility provides an outlet for Plaintiff, it costs

Defendant because he has been assessed all court costs, and it costs taxpayers by wasting this Honorable Court's valuable time when otherwise meritorious appeals are postponed pending resolution of this baseless appeal.

V. CONCLUSION

The Plaintiff can present no evidence to show that the Chancellor's decision was not supported by the substantial weight of the evidence or that his decision was manifestly erroneous. To the contrary, the Chancellor's decision was couched in well established principles of law. Accordingly, Defendant, Kendall McCoy, urges this Court to affirm the Chancery Court's Order denying Plaintiff's Motion for Contempt seeking back child support.

Respectfully submitted,

KENDALL McCOY

BY: _____


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CERTIFICATE OF SERVICE

I, Tracy S. Steen, one of the attorneys for the Appellee, Kendall McCoy, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing

Brief of Appellee to:

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This the 30th day of January, 2008.



TRACY S. STEEN