IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARGIE EDNA (GALLOWAY) MALLETT WILSON — APPELLANT

V. — DOCKET NO.: 2008-CA-01196

BYRON KEITH MALLETT — APPELLEE

APPELLANT'S REPLY BRIEF

APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

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The Appellee, Byron Keith Mallett, in his Appellee's brief, argues that the Chancellor did not refuse to hear the Motion to Set Aside Judgment Pursuant to Rule 59 , and in the alternative , Order Granting Relief from Judgment pursuant to Rule 60 (b) of the Mississippi Rules of Civil Procedure. He also argues that the Chancellor granted the Motion for Emergency hearing. (Appellee's brief pages 11-13). In support thereof, he uses various phrases contained in the letter of attorney to Chancellor Cobb of July 8, 2008, confirming the non-action or refusal to hear the Motion or in the alternative set a hearing date on either 9th or the 11th of July, 2008, due to the fact that Attorney for Appellant, Margie Edna (Galloway) Mallett Wilson, had hearings already scheduled.

The letter to Chancellor Cobb Dated July 8, 2008 basically sets out what happened and the Chancellor's outright refusal to hear the Motion for Reconsideration, Etc. filed by the Appellant, Margie Edna (Galloway) Mallett Wilson, until August 18th, 2008 some forty-seven (47) days after the entry of the Agreed Order, and some forty-two days (42) after the Motion to set aside had been filed. (CP 175-176, MRE 60-61)

The entire factual situation of what happened on that date of July 8, 2008, is memorized in the letter from the Appellant, Margie Edna (Galloway) Mallett Wilson , Attorney, H.R. Garner, to Chancellor Cobb, which was never responded to by Chancellor Cobb nor denied by her . (CP 175-176, MRE 60-61)

The Letter stated as follows:

"On July 8, 2008, I filed the following:

1. Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief From Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure.

2. Motion for Emergency Hearing setting forth the reason that I and my client considered same to be an emergency based upon the matters set forth in the preceding Motion.

3. **A letter to Ms. Paoli Banchetti, Court Administrator requesting that the matter be presented to the Court and set for hearing on either the 9th of July or 11th of July, 2008, due to the fact that I had hearings already scheduled**.

All of the aforementioned were mailed and telefaxed to the Court, also were attached to emails to Ms. Banchetti in pdf format with copies being sent to counsel opposite and my client.

On the afternoon of Tuesday, July 8, 2008, at approximately 4:15 p.m., I received a call from Ms. Banchetti, who advised that she had discussed setting the matter on your docket with you. She advised that you had reviewed the Motions and documentation, and correspondence and felt that the matter was not an emergency matter, but I was free to present same in the morning, July 9, 2008 before the Court in Winona. I was advised that the matter involved was not a Motion pursuant to Rule 59, 60 and 62, that could not be heard on the next regular Ex Parte Date on August 18, 2008.

I certainly respect the decision of this Court, and I will re-notice same for hearing on the date of Monday, August 18, 2008 before this Court in Hernando. " (CP 175-176, MRE 60-61)

All the information received by attorney for Appellant, Margie Edna (Galloway) Mallett Wilson, was communicated by the Court Administrator who Chancellor Cobb had asked to speak for her. (CP 175-176, MRE 60-61)

The matter requested to be heard on an Emergency Basis was the Motion for Reconsideration, filed by the Appellant, Margie Edna (Galloway) Mallett Wilson . Apparently, Chancellor Cobb, had reviewed the Motion for Emergency Hearing and had prejudged whether or not the Motion for Emergency Hearing should be granted and hearing set, instead communicating that same was not an emergency. But if Appellant wanted to come to

Winona on July 9, 2008 and argue the Emergency Motion only , which had been already prejudged by the Chancellor. The Chancellor's opinion that the " **the matter involved was not a Motion pursuant to Rule 59, 60 and 62, that could not be heard on the next regular Ex Parte Date on August 18, 2008"** The Appellant's attorney advising the Chancellor in the letter **"I certainly respect the decision of this Court, and I will re-notice same for hearing on the date of Monday, August 18, 2008 before this Court in Hernando. "** (CP 175-176, MRE 60-61)

Can it be any clearer that the Chancellor outright refused to hear the Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief From Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure?

A review of the Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief From Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure, which contained the affidavit of Appellant's Attorney, H.R. Garner, and the Appellant, Margie Edna (Galloway) Mallett Wilson, were clearly going to require testimony under oath of both the Appellant, Margie Edna (Galloway) Mallett Wilson , and her Attorney, H.R, Garner. In all probability the Appellee, Byron Keith Mallett , and his attorney, L. Anne Jackson-Hodum, was going to be required . The Court, after hearing the evidence to be presented at the hearing would then make a decision as to whether to grant the Appellant, Margie Edna (Galloway) Mallett Wilson, Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief From Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure. (CP 149-166, MRE 36-53)

The Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief From Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil

Procedure and the Emergency Motion clearly revealed that the matter was an emergency in light of the letter of July 4, 2008, the next day after the order was entered clearly indicated that they were going to have the Appellant, Margie Edna (Galloway) Mallett Wilson , cited for contempt of Court if she refused to deliver the child to Appellee, Byron Keith Mallett , and with his interpretation of the Consent Order there was nothing to keep him from basically snatching the child from the Appellant , Margie Edna (Galloway) Mallett Wilson, under what he considered the meaning of the Court Order. (CP 149-166, MRE 36-53)

The requested time to present the Motion and other evidence was "set for hearing on either the 9th of July or 11th of July, 2008, due to the fact that I had hearings already scheduled." (CP 175, MRE 60)

The Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief From Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure moved for "an emergency hearing ... on either July 9 or 11, at such time and place as the Court has available to hear the Motion." Clearly the Court was requested to set a hearing on either July 9 or 11th to hear the Motion "at such time and place as the Court has available to hear the Motion. " This can in no way be misconstrued that the Appellant , Margie Edna (Galloway) Mallett Wilson , wanted to present to Motion other than one of those two dates. (CP 175. MRE 60) The Court never informed the Appellant, Margie Edna (Galloway) Mallett Wilson , and her attorney as to the reason or reason that July 9 or 11th , 2008 were not convenient dates to hear the Motion.

The Chancellor abused her discretion in not hearing this matter at all until August 18, 2008, all the while leaving the Appellant, Margie Edna Galloway Mallett Wilson , subject to a possible contempt citation filed by the Appellee, Byron Keith Mallett, Sr., if she refused to turn

over the child to him, which Appellant, Margie Edna Galloway Mallett Wilson , clearly gave her custody until the date of the transfer of custody under the Order of Modification as she understood same to say. (CP 155-158, 175-176, MRE 42-45, 60-61)

As to the reason or reasons for refusing to hear the Motion earlier than the 18th of August, 2008, was never given by the Chancellor .

Davidson v Hunsicker, 224 Miss. 2003, 79 So2d 839 (1955) held that a judgment is not final until the Motion for a New Trial is overruled; the same time for perfecting an appeal commences on the day after a motion for new trial is overruled.

However, what if the Chancellor refuses to grant a hearing for the court to even consider a Motion for Trial? There is no question that there was a difference of opinion as to the meaning of the Order of Modification by both parties and their attorneys. The Letter from the Appellee, Byron Keith Mallett, Sr., clearly indicates the disagreement as to meaning of the Order and agreement, or non-agreement of the parties. (CP 165, MRE 52)

The Chancellor abused her discretion in not hearing this matter at all until August 18, 2008, all the while leaving the Appellant, Margie Edna Galloway Mallett Wilson, subject to a possible contempt citation filed by the Appellee, Byron Keith Mallett, Sr., if she refused to turn over the child to him, which Appellant, Margie Edna Galloway Mallett Wilson , clearly gave her custody until the date of the transfer of custody under the Order of Modification as she understood same to say. (CP 155-158, 176-176, MRE 42-45, 60-61)

Only the Chancellor could have ruled on this, and abused her discretion in refusing to do so in a timely manner.

The case of Weeks v Weeks , 556 So2d 348 (Miss. 1990) is a similar situation. In that case, Mary Lynn Weeks filed a petition on October 15, 1987, seeking to hold her ex-husband,

Charles Aaron Weeks, Sr., in contempt of court for failing to abide by the terms of a Final Decree of Divorce entered April 23, 1983. After a series of continuances, the case was heard in the Chancery Court without a Court Reporter . At the end of the hearing, the trial court entered an Order holding the Defendant Weeks in contempt. The Defendant then filed a Motion for a New Trial for which a hearing was held with a Court Reporter.

At the hearing on this Motion, the Chancellor did not allow the Defendant to present his witnesses' testimony in support of such Motion. Rather, the Chancellor attempted to take judicial notice that the Defendant's witnesses would have testified that Defendant had abided by the terms of the Divorce Decree. The Chancellor then dispensed with the Defendant's Motion for a New Trial by denying it without hearing the Defendant's additional evidence.

It was charged that, in the trial, the Defendant offered to prove, by his own testimony and the testimony of other witnesses, that he had, indeed, paid his ex-wife the money she claimed he had not paid for the nonpayment of which he was held in contempt. However, the Chancellor shut off Defendant's proof, saying that he was satisfied that the Defendant was in contempt. While there is no written record of that fact, and there was no bill of exception taken, the Chancellor said nothing on the Motion for a New Trial to refute those allegations. When Defendant's counsel sought to put on proof, during the hearing on the Motion for a New Trial, of payment by Defendant in accordance with the Divorce Decree, the Chancellor did not permit it. Presentation of such proof would have involved no significant delay, and the policy of the law is to hear all pertinent evidence and to decide cases on fully developed facts.

This case was reversed and remanded because the record discloses that there were important, material, and pertinent facts and available witnesses which should have been heard. In re Prine's Estate, 208 So.2d 187, 192 (Miss.1968). Remand is necessary for development of

these facts. Id. A litigant can not be deprived of his fundamental right under our legal jurisprudence of having a judicial hearing. Merchants Fertilizer & Phosphate Co. v. Standard Cotton Gin, 199 Miss. 201, 23 So.2d 906 (1945). The defendant in this case was deprived of this right by the Chancellor's refusal to allow the Defendant to present his evidence.

Every Defendant or Respondent has the right to notice in a court proceeding concerning him and to be present and to introduce evidence at the hearing. Edwards v. James, 453 So.2d 684 (Miss.1984). The parties should be afforded a full, complete hearing at which the parties have an opportunity to call witnesses in their behalf and be heard by themselves or counsel. Fortenberry v. Fortenberry, 338 So.2d 806 (Miss.1976). If a full and complete hearing is not allowed by refusing the defendant his opportunity to present evidence, then the defendant is thereby deprived of due process. Id.

This case was reversed and remanded for a hearing on the defendant's motion for a new trial.

The case at bar is distinguished, by one important fact, that being that the Appellant in the Weeks case was afforded an opportunity to be heard, where Margie Edna Galloway Mallett Wilson was not.

Appellee, Byron Keith Mallett, argues that the Appellant, Margie Edna (Galloway) Mallett Wilson, had an opportunity to proffer her testimony and evidence on July 9, 2008, in Winona . However, the Appellee, Byron Keith Mallett, fails to note that the Chancellor had firmly indicated that she would not hear the Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief From Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure until August 18th, 2008. That she had already determined that the matter was not an emergency situation that could not be heard later. When no hearing

was granted, it was impossible to proffer testimony in evidence when the Chancellor refused to hear same until forty-two (42) days later. (CP 175-176, MRE 60-61)

The Appellee, Byron Keith Mallett, suggests the fact that the child support payments were paid and a Withholding Order entered indicates that the Appellant, Margie Edna (Galloway) Mallett Wilson, and her attorney clearly understood what the Order stated. However, there was nothing in the Order that required the Appellant, Margie Edna (Galloway) Mallett Wilson, to reimburse his child support payments that he had already paid , or medical insurance which he had already paid. This argument is without merit . (CP 156, MRE 43)

B. ISSUE II: DID THE CHANCELLOR BY HER REFUSAL TO GRANT A HEARING MOTION TO SET ASIDE JUDGMENT PURSUANT TO RULE 59 AND IN THE ALTERNATIVE ORDER GRANTING RELIEF FROM JUDGMENT PURSUANT TO RULE 60 (b) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE FILED ON JULY 7, 2008 AND MOTION FOR EMERGENCY HEARING FILED ON THE 8TH DAY OF JULY 2008 UNTIL AUGUST 18, 2008, CONSTITUTE AN ABUSE OF DISCRETION AND DENIAL OF DUE PROCESS TO THE APPELLANT

The Appellee, Byron Keith Mallett, argues that the Appellee, Margie Edna (Galloway) Mallett Wilson, chose not to present her the Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief From Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure before the Chancellor in Winona on July 9, 2008 (Appellee Brief page 14). This is entirely incorrect. The Chancellor advised through the Court Administrator that she would not hear the Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief From Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure until the next regular ex parte day in DeSoto County, Mississippi, which would be August 18, 2008, some forty-two (42) days later. (CP 175-176, MRE 60-61)

The Appellant, Margie Edna (Galloway) Mallett Wilson, being denied her right to present her Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief From Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure with testimony by the Court . (CP 175-176, MRE 60-61)

Appellee, Byron Keith Mallett , alleges in his brief that the Appellee failed to make record for appeal meaning I presume testimony. However, Appellant, Margie Edna (Galloway) Mallett Wilson, was not afforded an opportunity by the Chancellor on a timely basis to submit her Motion and testimony in support thereof. (CP 175-176, MRE 60-61)

Appellee, alleges that the issue is now moot, which had the Chancellor granted a hearing other facts that occurred after the Appeal was perfected would not have occurred. (CP 175-176, MRE 60-61)

In the case of White v State, 742 So.2d 1126 (Miss . 1999) in its dicta within its opinion stated:

"Judicial discretion is defined as a "sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable in circumstances and law, and which is directed by the reasoning conscience of the trial judge to just result." Black's Law Dictionary 848 (6th ed.1990) (citing State v. Grant, 10 Wash. App. 468, 519 P.2d 261, 265 (1974)). Rather than implying bad faith or an intentional wrong on the part of the trial judge, an abuse of discretion is viewed as a strict legal term that is "clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing." Black's Law Dictionary 10 (6th ed.1990). Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 866, 6 L. Ed. 204.

Any attempt at more concrete or concise definition of discretion would be futile. Likewise, the phrase "abuse of discretion" does not lend itself to a definitive or precise meaning. This ambiguity is necessary to allow judges enough room to exercise their own sound judgment in the cases coming before them. A more narrow definition of the term would constrict a judge's ability to do what a judge is supposed to do - make sound judgments on the issues before the court within the boundaries of the laws of this State, the Mississippi Constitution and the United States Constitution. This is an awesome responsibility and it places a great deal of power in the hands of our trial judges. This power and responsibility should not be taken lightly in any case.

The discharge of judicial duties requires consideration, deliberation and thoughtful use of the broad discretion given judges under the laws of this State. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."

Was there an abuse of discretion on the part of the Chancellor in requiring over a month before it would even permit a hearing on the Motion for Reconsideration, which clearly revealed that the parties were each at others' throats as to the meaning of the Order of Modification of Child Custody? Without a doubt, the Chancellor could have set a time and date to hear the Motion and rule upon same one way or the other, but instead, by failing to grant a hearing simply overruled the Motion by implication by failing or refusing to grant a hearing until a month or more after the initial entry of the Agreed Order of Modification .

By the Court's action did it abuse its discretion in this case? Without a doubt, a hearing was not directly denied it was merely set a distant date in the future. Therefore, in essence depriving both parties of due process of law in not permitting either party to have a hearing and the Chancellor to make a decision.

Justice delayed is justice denied.

CONCLUSION

The issue before the Court is did the Chancellor abuse her discretion in refusing to hear the Appellant's Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief From Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure until the earliest date of August 18, 2008, some 42 days after it was filed?

This is surely as there is a cow in Texas a case of Judicial indiscretion on the part of the Chancellor. A situation that could simply have been avoided by simply granting a hearing on either the 9th or the 11th of July, 2008, or some other convenient date as determined by the parties and the Court. Either denying the Motion or granting same based on a hearing of short duration .

There is no question that this appeal is not frivolous, and it has merit and clearly is a case of Judicial indiscretion on the part of the Court in outright refusing to grant a hearing on the Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief From Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure and rule

accordingly after permitting testimony adduced from both parties and their attorneys at the hearing.

Respectfully submitted,

H.R. Garner, [redacted]
Attorney for Appellant

CERTIFICATE OF SERVICE

I, H.R. Garner, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct coy of the foregoing APPELLANTS REPLY BRIEF to:

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Dated this the 12th day of January, 2009.

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