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 BRIEF

APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

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MARGIE EDNA (GALLOWAY) MALLETT WILSON **APPELLANT**

V. **DOCKET NO.: 2008-CA-01196**

BYRON KEITH MALLETT **APPELLEE**

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.

The Appellant:

Margie Edna (Galloway) Mallett Wilson
381 Bailey Drive
Olive Branch, MS 38654

The Appellee:

Byron Keith Mallett
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The Trial Judge:

Chancellor Vicki B. Cobb
115A Eureka St.
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Batesville, MS 38606-1104
Chancery Court Chancellor

H.R. Garner
Attorney of Record for Appellant,
Margie Edna (Galloway) Mallett Wilson

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authority

STATEMENT OF THE ISSUES

The issues presented by the Appellant in this appeal are:

ISSUE I: DID THE CHANCELLOR ABUSE HER DISCRETION IN REFUSING TO HEAR THE A 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 BY THE APPELLANT ON JULY 7TH, 2008, UNTIL AUGUST 18, 2008 , MORE THAN A MONTH AFTER IT WAS FILED

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

STATEMENT OF THE CASE

A. Nature Of The Case, Course Of The Proceedings And Disposition In The Court Below *

This is an appeal from the Chancery Court of DeSoto County, Mississippi, from An Agreed Order of Modification of child custody entered on the 2nd day of July 2008, A 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 7th , 2008, a Motion for Emergency Hearing filed by the Appellant, Margie Edna Galloway Mallett Wilson , on the 8th day of July, 2008; and the refusal on the part of the Chancellor to hear same until August 18, 2008. Being aggrieved of the Chancellor's Refusal to grant a hearing until August 18, 2008, the Appellant, Margie Edna Galloway Mallett Wilson , perfected an appeal to the Supreme court.

*** The following abbreviations shall apply as used herein for reference: CP means Clerk's Papers. TR means transcript. MRE means mandatory record excerpts.**

B. STATEMENT OF THE FACTS AND CIRCUMSTANCES OF THE CASE

This case stems from the Chancery Court of DeSoto County, Mississippi, upon the Court's refusal or grant a hearing a Motion to Set aside Judgment pursuant to Rules 59 and in the Alternative , Order Granting Relief from Judgment Pursuant to Rule 60 (b) of the Mississippi Rules of Civil Procedure , and Motion for Emergency Hearing filed by the Appellant, Margie Edna Galloway Mallett Wilson .

The case begins where the other ends . On July 2, 2008, an Agreed Order Modifying Custody was entered in the Chancery Court of DeSoto County, Mississippi signed by the parties and their attorneys and approved by the Chancellor. (CP 140, MRE 29) No testimony was taken or received , nor is there any transcript of same.

That on the 7th day of July , 2008, a 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. Attaching therewith Exhibits "A" which was the Court Agreed Order of Modification , and Exhibit "B" which was a letter from L. Anne Jackson Hodum attorney for the Appellee , Byron Keith Mallett, Sr. , dated July 3rd , 2008, one day after the agreed order was entered, filed by the Appellant, Margie Edna Galloway Mallett Wilson . A copy being served upon the Appellee's attorney via mail and telefax receipt attached to the Motion.(CP 149, MRE 36)

On July 8, 2008 , a Motion for Emergency Hearing was filed by the Appellant, Margie Edna Galloway Mallett Wilson , requesting an emergency hearing by the Chancellor to set a hearing 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 filed with attorney's affidavit being attached as to what he believed to be the basis for

the emergency motion on the party of the Appellant, Margie Edna Galloway Mallett Wilson , on the 7th of July , 2008 by the Appellant. (CP 167, MRE 54)

On July 8, 2008, Attorney for Appellant, Margie Edna Galloway Mallett Wilson , because the Chancellor was holding Court on that particular date in another portion of the Third Chancery Court District, attempted to communicate with the Chancellor through the Court Administrator. Copies of the Motions and attachments were mailed and telefaxed to the Court Administrator by attorney for Appellant, Margie Edna Galloway Mallett Wilson . A copy of the letter was sent to the Court Administrator requesting a hearing be set on either the 9th or 11th of July, 2008. On the afternoon , of July 8th , 2008, the Court Administrator telephoned attorney for Appellant, Margie Edna Galloway Mallett Wilson , advising that she had discussed setting the matter on the docket for hearing with the Chancellor. The Chancellor advising through the Court Administrator, that she had reviewed the Motions, documentation, and correspondence, and felt that the matter was not an emergency , but the attorney for Appellant, Margie Edna Galloway Mallett Wilson , was free to present same on the morning of July 9, 2008 before the Court in Winona . (The Court in Winona is located approximately one hundred miles(100) from the DeSoto County Courthouse in Hernando) The Chancellor also advised through the Court Administrator that the Motion was not a Motion pursuant to Rule 59, 60, and 62 of the Mississippi Rules of Civil Procedure, that could not be heard at the next regular Ex Parte Term on August 18, 2008, in DeSoto County, Mississippi . (A period of time of approximately a month and a half after the Agreed Order was entered , and over a month after the Motion for Reconsideration was filed by the Appellant, Margie Edna Galloway Mallett Wilson). By letter dated July 8, 2008, attorney for the appellant, Margie Edna Galloway Mallett Wilson, basically set out the circumstances of the conversation via Court Administrator and re-noticed same for

hearing on the 18th of August, 2008, pursuant to the Chancellor's instruction . A copy of the letter dated July 8, 2008 to the Chancellor from Attorney for Appellant, Margie Edna Galloway Mallett Wilson, was made a part of the Court Record . (CP 175, MRE 60)

Being aggrieved of the refusal on the part of the Chancellor to even grant a hearing before August 18, 2008 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 the Motion for Emergency Hearing filed the Appellant, Margie Edna Galloway Mallett Wilson , the Appellant, Margie Edna Galloway Mallett Wilson , filed a Notice of Appeal and perfected same to the Mississippi Supreme Court on July 8, 2008. (CP 173)

SUMMARY OF THE ARGUMENT

The argument of the Appellant, Margie Edna (Galloway) Mallett Wilson , is summarized as follows:

ISSUE I: DID THE CHANCELLOR ABUSE HER DISCRETION IN REFUSING TO HEAR THE A 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 BY THE APPELLANT ON JULY 7TH, 2008, UNTIL AUGUST 18, 2008 , MORE THAN A MONTH AFTER IT WAS FILED

The Chancellor abused her discretion in refusing to set a hearing less than a month and a half after the entry of the agreed order on the Motion to Set Aside Judgment Pursuant to Rule 59 and Rule 60 (b) of the Mississippi Rules of Civil Procedure . When clearly it was an emergency situation that could have been set for hearing at a reasonable more convenient time by the Chancellor.

ISSUE II: DID THE CHANCELLOR BY HER REFUSAL 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 FILED ON JULY 7, 2008 AND THE 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 Chancellor in refusing to set the hearing on the Motion for Reconsideration in light of the circumstances on the part of both parties' situation that was clearly an emergency, was an abuse of discretion and denial of due process to the appellant, Margie Edna Galloway Mallett Wilson, on the part of the Chancellor, by her actions in refusing to hear or consider the Motion until a month and a half later on August 18, 2008. Basically delaying a hearing to both parties, and essentially denying same.

ARGUMENT

A. STANDARD OF REVIEW

The standard of review for factual determinations made by a trial judge sitting without a jury is the substantial evidence standard. Hill v. Thompson, 564 So.2d 1, 10 (Miss.1989); UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc., 525 So.2d 746, 753 (Miss.1987). We will not disturb the findings of a chancellor when they are supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard. Herring Gas Co. v. Whiddon, 616 So.2d 892, 894 (Miss.1993)

B. ISSUE I: DID THE CHANCELLOR ABUSE HER DISCRETION IN REFUSING TO HEAR THE A 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 BY THE APPELLANT ON JULY 7TH, 2008, UNTIL AUGUST 18, 2008 , MORE THAN A MONTH AFTER IT WAS FILED.

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 filed by the Appellant on July 7th, 2008 was timely filed by the Appellant, Margie Edna Galloway Mallett Wilson , within 5 days of the Agreed Order of Modification that was entered on July 2, 2008. Rule 59 (b) of the Mississippi Rules of Civil Procedure , and the Motion to Alter and Amend contained therein was also filed with in the same time period. (CP 149, MRE 36)

The basis 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 was that Order entered on July 2, 2008, recorded in Chancery Court Minute Book 479 Page 314 of the Chancery Court minutes of DeSoto County, Mississippi, setting forth the background and intention of the parties concerning the entry of the agreed order . That the

communications were between the attorneys and that each attorney informed their respective clients of the intention and import of the agreement. That alleged by the Appellant, Margie Edna Galloway Mallett Wilson , in said motion as follows:

" 8. That unbeknownst to the Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson, and her attorney, H.R. Garner, the following provision had been inserted and misconstrued as follows:

> **"H. Summer The Mother shall have physical custody with the minor child eight (8) weeks during the summer. The Father shall have physical custody of the minor child for five to six days immediately after school and for five to six days before school begins.**
>
> **The Mother shall notify the Father in writing by May 15th of each year of her intended eight(8) straight weeks periods of physical custody. That the parties also agree that the Father will be allowed to have dinner with the minor child, Byron, once a week, every week any time between 5:30 p.m. and 7:30 p.m. for an hour and a half during the Wife's summer periods of physical custody. (interlined and included: Father shall notify Mother on or before May 15th of 5 days during summer in which to have vacation with the child. Initialed by L A J and H R G).**
>
> **I. That when the Mother has physical custody of the minor child and the child needs to attend any kind of tutoring, the parties agree that either the Father or the Father's wife shall be afforded the opportunity of picking the child up and transporting him to the sessions."**

9. This was understood by the Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson, and her attorney, H.R. Garner, that she would have the child for the remainder of the summer of 2008 with her, with the Respondent/Counter-Petitioner, Byron Keith Mallett, to have alternating visitation on the weekends, and one night during the week for the supper provision. At no time was it mentioned therein that the provision set forth above for the school year 2008-2009 would be automatically applied retroactive to the time school was out in May, 2008. In other words, the Mother and Petitioner/Counter-

Respondent, Margie Edna (Galloway) Mallett Wilson, was to have the child the remainder of the week of July 1-5, the week of July 6-13, the week of July 13-20, the week of July 20-27, 2008, with alternating weekends. That in addition thereto, she would have the child with her until August 2, 2008 when the child would be in the physical custody of the Respondent/ Counter-Petitioner, Byron Keith Mallett, with alternating weekends and holidays and scheduled summer period of custody for the school year 2008-2009.

10. That on July 2, 2008 as a gesture of good faith, the Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson, authorized her attorney to pay from her escrow account by check number 6248 the sum of $412.50 to Respondent/Counter-Petitioner, Byron Keith Mallett, which represented $100.00 July 2008 child support, $62.50 July medical premium, and refund of $250.00 July 2008 child support check from Respondent/Counter-Petitioner, Byron Keith Mallett to Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson.

11. That the Order was entered on July 2, 2008, which was thought to contain these provisions as mutually agreed by the parties and their attorneys.

12. That unbeknownst to the Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson, and her attorney, H.R. Garner, there was a different interpretation as to the agreement and the Order by Respondent/Counter-Petitioner, Byron Keith Mallett , and his attorney, L. Anne Jackson-Hodum.

13. That on the morning of July 7, 2008, a letter from L. Anne Jackson-Hodum to H.R. Garner was delivered by United States Mail. The letter stated as follows:

"Be advised that with respect to the above referenced case, Byron Mallett's school has been out of session since May 15,2008. Thus, your client

will have had the minor child for her entire eight (8) weeks by July 10,2008. Unfortunately, when my client contacted Ms. Wilson in order to make arrangements to exchange the child, Ms. Wilson politely informed him that he would not be having the child with the exception of alternate weekends until *the end of the year,* whatever that means.

If you would forward this correspondence on to your client, I would appreciate same as I wish everyone to be on notice as to when Mr. Mallet intends to take physical custody. Also advise as to whether or not you will be continuing to represent Mrs. Wilson if a contempt petition is necessary some time in the future."

15. That the Order did not provide, nor was it agreed that the Respondent/Counter-Petitioner, Byron Keith Mallett, would be entitled to immediate physical custody of the parties' minor child. In addition thereto, it was understood and the Order is unclear as to what school year that was actually being discussed or agreed upon by the parties.

16. That the Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson, and her attorney never agreed to the provision that the child would be in the immediate physical custody of the Respondent/Counter-Petitioner, Byron Keith Mallett for the remainder of the summer 2008.

17. Further, it is asserted that the Respondent/Counter-Petitioner, Byron Keith Mallett, and his attorney, L. Anne Jackson-Hodum, are going to immediately file a Petition to Cite for Contempt against the Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson, if she fails to surrender the child.

18. That the Order entered does not contain an execution clause and is unenforceable for ten (10) days. Further, that the agreement of the parties is not set forth in the Order as agreed upon and further, that the Order as written is unenforceable in that it requires that before a person may be held in contempt of a court judgment, the judgment must "be complete within itself--containing no extraneous references, leaving open no matter or description or designation

out of which contention may arise as to the meaning. Nor should a final decree leave open any judicial question to be determined by others, whether those others be the parties or be the officers charged with execution of the decree...." Morgan v. U.S. Fidelity & Guaranty Co., 191 So.2d 851, 854 (Miss. 1966), quoting Griffith, supra, §. 625; see also, Miss. R. Civ. P. 65(d)(2); Hall v. Wood, 443 So.2d 834, 841-42 (Miss.1983); Aldridge v. Parr, 396 So.2d 1027 (Miss.1981); Webb v. Webb, 391 So.2d 981 (Miss. 1980).

19. That in addition thereto the Order is in sufficient and invalid under the following provisions:

> **"5. The patties agree that the Mother shall pay the Father One Hundred Dollars ($100.00) per month as child support for said minor child, via Withholding Order, with the first of said child support payment in the amount of $100.00 with the first payment being due on the 1st day of July, 2008, with a like amount being due and payable on the first (1st) day of each month thereafter until the child is emancipated, being defined pursuant to Miss. Code Ann. Section 93-5-23 and 93-11-65 (1972 As Amended 1996) "**

20. In the case of Yelverton v. Yelverton, 961 So.2d 19 (Ms. S. Ct. decided July 26, 2007), the Mississippi Supreme Court held that the Chancellor must make a finding into the record as to the reason or reasons that the child support guidelines do not apply. The Court went on to state that Section 43-19-101 provided for the guidelines and support thereunder of 14%, it also went on to state that when the amount awarded by the Court was either in excess or less than the guidelines, then the Court must make a finding into the record under Section 43-19-103 of the Mississippi Code Annotated Section 1972. The Order as written is certainly less than the guidelines on child support that was to be paid by the Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson, to the Respondent/Counter-Petitioner, Byron Keith Mallett. The Order contained no basis or reason for same as required by Mississippi Code Annotated

Sections 43-19-101 and 43-19-103 (1972, As Amended). And the Court Order should be set aside.

21. That clearly there was a misunderstanding and error made regarding what the parties actually agreed upon and presented to the Court. That same was submitted by mistake and misinterpretation of the agreement of the parties. i.e. what year was the summer visitation to be modified in the Order? 2007-2008? or 2008-2009? When was the summer visitation to begin in 2008 and end in 2008?

22. That the parties both have meritorious causes of action one against the other, and that this Order should be set aside and this matter scheduled for trial on the merits.

23. Further, the enforcement of the Order entered July 2, 2008, pursuant to Rule 62 of the Mississippi Rules of Civil Procedure should be stayed pending this cause being heard on its merits.

Rule 62 provides as follows:

"RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT

(a) Automatic Stay; Exceptions. Except as stated herein or as otherwise provided by statute or by order of the court for good cause shown, no execution shall be issued upon a judgment nor shall proceedings be taken for its enforcement until the expiration often days after the later of its entry or the disposition of a motion for a new trial. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) Stay on Motion. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60(b), or of a motion to set aside a verdict made pursuant to Rule 50(b), or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

Davidson v. Hunsicker, 224 Miss. 2003, 79 So.2d 839 (1955) held that a Judgment is not final until the Motion for a New Trial is overruled; the time

period for perfecting an appeal commences on the day after a Motion for New Trial is overruled. "

24. That attached herewith is the Affidavit of Attorney for Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson, and the Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson, in support hereof."

The Appellant, Margie Edna Galloway Mallett Wilson , prayed that the Chancellor alter, amend, set aside, stay and/or grant a new trial on all issues contained in the Order of July 2, 2008, entered by this Court. (CP 140, MRE 29)

The Motion for Emergency Hearing filed on July 8th , 2008 by the Appellant , Margie Edna Galloway Mallett Wilson , requested the Court to set an Emergency 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 filed by the Appellant on July 7th, 2008 . (CP 149, MRE 36)

The Motion for Emergency hearing set forth as follows:

"1. That pending in this Court filed on July 7, 2008 is a 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 by the Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson.

2. That a copy of said Motion was served upon the Respondent/Counter-Petitioner, Byron Keith Mallett and his attorney, L. Anne Jackson-Hodum, via telefax on July 7, 2008.

3. That this matter involves the issue of whether or not the Court should set aside its Order of July 2, 2008 and grant a new hearing, alter or amend the Judgment.

4. That the Respondent/Counter-Petitioner, Byron Keith Mallett and his attorney, L. Anne Jackson-Hodum, are threatening to have the Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson, cited for contempt and other punitive action if she refuses or fails to turn over the custody of the child pursuant to the Court's Order of July 2, 2008.

5. There is pending before the Court an Emergency situation, which is outlined and provided in 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 filed by the Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson. That until this matter is heard, it is the Petitioner/Counter-Respondent's position that the Order is void or invalid, and should be set aside, altered or amended, and a new trial granted.

WHEREFORE, PREMISES CONSIDERED, Petitioner/Counter-Respondent, Margie Edna (Galloway) Mallett Wilson, moves the Court for an emergency hearing in the above styled and numbered cause, on either July 9th or 11th at such time and place as the Court has available to hear this Motion.

That this Motion is made on an emergency basis and not for the purposes of delay but in the interest of justice." (CP 167, MRE 54)

On July 8, 2008, Attorney for Appellant , Margie Edna Galloway Mallett Wilson , attempted to communicate with the Chancellor through the Court administrator , who was holding Court on that particular date in another portion of the third Chancery Court District . Copies of he Motions and attachments were mailed and telefaxed to the Court Administrator by attorney for Appellant, Margie Edna Galloway Mallett Wilson . A copy of the letter was to the

Court Administrator requesting a hearing be set on either the 9th or 11th of July, 2008. On the afternoon , of July 8th , 2008, the Court Administrator telephoned attorney for Appellant, Margie Edna Galloway Mallett Wilson , advising that she had discussed setting the matter on the docket for hearing with the Chancellor. The Chancellor advising through the Court Administrator, that she had reviewed the Motions, documentation, and Correspondence , and felt that the matter was not an emergency , but the Attorney for Appellant, Margie Edna Galloway Mallett Wilson , was free to present same on the Morning of July 9, 2008 before the Court in Winona . (The Court in Winona is located approximately one hundred miles(100) from the DeSoto County Courthouse in Hernando) The Chancellor also advised through the Court Administrator that the Motion was not a Motion pursuant to Rule 59, 60, and 62 of the Mississippi Rules of Civil Procedure , that could not be heard at the next regular Ex Parte Term on August 18, 2008, in DeSoto County, Mississippi . (A period of time of approximately a month and a half after the Agreed Order was entered , and over a month after the Motion for Reconsideration was filed by the Appellant, Margie Edna Galloway Mallett Wilson). By letter dated July 8, 2008, attorney for the appellant, Margie Edna Galloway Mallett Wilson, basically set out the circumstances of the conversation via Court Administrator and re-noticed same for hearing on the 18th of August, 2008, pursuant to the Chancellor's instruction . A copy of the letter dated July 8, 2008 to the Chancellor from Attorney for Appellant, Margie Edna Galloway Mallett Wilson, was made a part of the Court Record . (CP 175, MRE 60).

At this point, the Chancellor merely needed to set a hearing on the 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 was that Order entered on July 2, 2008. Which the Court could at that time either alter, amend, set aside, stay

and/or grant a new trial on all issues contained in the Order of July 2, 2008, entered by this Court. At which time, if the Appellant , Margie Edna Galloway Mallett Wilson , was aggrieved of the decision of the Chancellor could have appealed the decision of the Chancellor, if she so chose.

However, the Chancellor chose to require the Appellant, Margie Edna Galloway Mallett Wilson , to wait until August 18, 2008, to present her Motion . Being some forty seven (47) days after entry of the "Agreed Order" and some forty-two (42) days after 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 was that Order entered on July 2, 2008.

The Mississippi Supreme Court enacted orders whereby the three chancellors in the Third Chancery Court district are to have an equal number of cases assigned to them in each county of the district. This is done by a random selection method in the office of each clerk's office in the district. The Senior Chancellor is required to enter a special order each year setting out the terms and Rule 81 (d) Ex Parte hearings of all three chancellors in each county in the District. The Third District consists of the counties of DeSoto, Tate , Panola, Yalobusha , Grenada, and Montgomery. The District encompasses an area geographically from the Mississippi -Tennessee State line due South to Winona , Montgomery County, Mississippi of approximately one hundred miles vertically. Two Chancellor are elected from all the Counties in the District , but Desoto. DeSoto County only elects one Chancellor. All three Chancellors hear cases in the entire District. What it amounts to if a Chancellor is assigned a DeSoto County case, then the Chancellor may set the case anywhere in the District besides DeSoto County, if the Chancellor so chooses. Requiring the parties , attorneys and witnesses to travel to said location for a trial or hearing of a case filed in another county in the District.

There is no question that the Chancellors are overburdened , especially in DeSoto County cases, which is the most populous county in the District.

The Chancellor for what ever reason, which she did not give, refused to hear the Motion the earliest which would have been the 18th day of August, 2008. At the same time, the Appellee, Byron Keith Mallett, Sr., and his attorney were threatening to have the Appellant, Margie Edna Galloway Mallett Wilson , held in contempt of court, if she failed to comply with their interpretation of the Order. To delay hearing this motion, which is submitted would take less than two hours by the Chancellor, would create almost instant and continuing litigation over the disagreement of the parties of the import of the order. The Chancellor would and should have heard the motion and ruled.

Did the Motions have merit? The Appellant, Margie Edna Galloway Mallett Wilson, and her attorney thought so . Were they ever able to have a hearing on same granted by the Court prior to August 18th, 2008? The Answer to that question is no.

"A written motion, other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than five days before the time fixed for the hearing, unless a different period is fixed by these rules or by order of the court." M.R.C.P. 6(d)

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.

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.

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.

C. 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.

Rogers v Morin, 791 So.2d 815(Miss. 2001) held that

"Trial judges are vested with considerable discretion in ruling on motions for new trial, and it has been noted on numerous occasions that '[t]his Court will reverse a trial judge's denial of request for new trial only when such denial amounts to a[sic] abuse of that judge's discretion.' "Muhammad v. Muhammad, 622 So.2d 1239, 1250 (Miss.1993) (citing Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, 560 So.2d 129, 132 (Miss.1989) "

In Rogers Id. the Court went on to explain in more detail the purposes of a Motion filed under Rule 59 of the Mississippi Rules of Civil Procedure saying

"In Mayoza v. Mayoza, 526 So.2d 547, 549 (Miss.1988), our Court stated that "Rule 59 imports a different, stricter standard. In this non-jury setting the Chancery Court necessarily focuses upon the merits of the case. The Court has the discretion to order a rehearing or to alter or amend the judgment if convinced that a mistake of law or fact has been made, or that injustice

would attend allowing the judgment to stand." Id. Again, this Court will not disturb a chancellor's findings unless the appellant (Donna) can demonstrate that they "were manifestly wrong and against the overwhelming weight of the evidence." Citing Richardson v Richardson, 355 So.2d at 668."

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 the 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 Chancellor by her refusal to hear 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 and Motion

for Emergency Hearing, for more than a month and a half after the Motion was filed and giving no reason for same , in essence, committed Judicial indiscretion causing untold hardship to both parties , which could simply have been remedied by the Court setting a reasonable date to hear same, or simply denying the Motion or Granting same with a hearing of very short duration .

That this cause should be reversed and remanded for either the presiding Chancellor , or another Chancellor 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 and rule according after permitting testimony to be adduced both parties at the hearing .

Respectfully submitted,

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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 BRIEF to:

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Dated this the 18th day of October, 2008.

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