IN THE COURT OF APPEALS
FOR THE STATE OF MISSISSIPPI

No. 2008-CA-01333-COA

TABATHA RENEE QUICK

Appellant

vs.

JEFFREY DALE QUICK

Appellee

On Appeal from the Chancery Court of Simpson County, Mississippi

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REPLY BRIEF OF APPELLANT TABATHA RENEE QUICK

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II. The Chancery Court of Simpson County, Mississippi, erred when it considered the *Albright* factors without both parents being present.

III. The Chancery Court of Simpson County, Mississippi, lacked jurisdiction to rule in this case.

IV. The Order entered by the Chancery Court of Simpson County, Mississippi, on January 10, 2008, was inequitable, unfair, not based on the evidence, and created an undue hardship on Tabatha Quick.

ARGUMENT

I. The attempted service of process on Tabatha Quick was insufficient and therefore, the Chancery Court of Simpson County, Mississippi, lacked personal jurisdiction over her at the time of the January 7, 2008, hearing and committed error by proceeding with the hearing in her absence.

Appellee Jeff Quick ("Jeff") only raises three arguments in his brief in opposition to this point of error: 1) the process server personally served Appellant Tabatha Quick (Tabatha); 2) Tabatha was served by certified mail; and 3) the process server gave Tabatha verbal notice of the hearing. As will be shown below, none of these attempts at service of process were valid.

A. The process server never accomplished personal service on Tabatha.

In his brief, Jeff simply misstates, misquotes, or misrepresents the testimony given by Ed Teal regarding his attempts to personally serve Tabatha with process. The testimony of Mr. Teal can be found in the *Appellee's Record Excerpts* at Tab 21, pp. 125-127 (transcript pp. 82-84) and is quoted verbatim below:

Q. Mr. Teal, you didn't hand this summons to Ms. Saint, did you?

A. I told her here's her paper.

Q. You threw them next to the house, didn't you? You threw them down, didn't you?

A. Not next to the house, no Ma'am.

Q. Where did you throw them?

A. Her husband was standing.

Q. You threw them towards her husband?

A. I did not throw them. I dropped them.

Q. Oh, you dropped the papers.

A. Yes Ma'am.

Q. And so you did not hand them to Ms. Saint?

A. No, but I did tell her, "Here's your papers, Tabatha."

Q. But you didn't hand them to her.

A. No.

Q. Ms. Saint was, in fact, inside the house when you handed the papers to her husband, was she not, or when you say you dropped them at her husband's feet?

A. She walked out at the time that I was trying to give them to her husband who would not accept them.

Q. Who wouldn't accept them. So you put them on the ground?

A. Yes.

The Court then questioned Mr. Teal, and he gave this further testimony:

The Court: Mr. Teal . . . did you attempt to hand the papers to Ms. Saint?

The Witness: No sir. She came out of the house as I was, you know, I turned around and looked and she was right there.

The Court: Where were you in relationship to her?

The Witness: No further than from here to you or from here to that corner.

The Court: How far is that?

The Witness: Ten to fifteen feet.

The Court: Why did you not hand her the papers?

The Witness: They were refusing to accept them.

The Court: When you say they, who are you talking about?

The Witness: Her and her husband.

The Court: Neither one would receive the papers.

The Witness: No Sir.

In Jeff's brief, he makes certain misstatements and/or misrepresentations about Mr. Teal's

testimony. He makes such statements as Mr. Teal "followed Ms. Quick into her driveway and left the paper with her" (p. 14 of his Brief), and that "Ms. Quick walked out of the room" (p. 14 of his Brief). Clearly, these statements are not found anywhere in Mr. Teal's testimony. In fact, as stated above, Mr. Teal clearly admits on cross examination that he did not hand the papers to Ms. Saint. *See Appellee's Record Excerpts* at Tab 21, p. 126 (transcript p. 83, lines 1-6). And again, on questioning by the Court, Mr. Teal again admitted that he did not even attempt to hand the papers to Ms. Saint. *See Appellee's Records Excerpts* at Tab 21, p. 127 (transcript p. 84, lines 5-8). It is clear, therefore, by Mr. Teal's own admission that he did not accomplish personal service upon Tabatha.

Mr. Teal's testimony further demonstrates that his attempt at residence service was defective as well. As stated above, Mr. Teal admits that Tabatha's husband was refusing to accept the papers. In order to effect residence service, Rule 4(d)(1)(a) clearly states that residence service can only be accomplished by leaving a copy of the summons and complaint with a spouse "*who is willing to receive service.*" Mr. Teal admits that Tabatha's husband refused to accept service. Jeff even acknowledges this in his brief. *See* p. 15 of Appellee's brief. Furthermore, Mr. Teal failed to thereafter mail a copy of the summons and complaint to Tabatha at the place where he left the summons and complaint as further required by M.R.C.P. 4(d)(1)(a).

> Mere delivery of the summons and complaint does not render service complete. M.R.C.P. 4(d)(1)(B) provides that when such service is made, it must be followed by the mailing of a copy of the documents by first class mail to the defendant at the residence where process was delivered. Service is only complete ten days after the mailing.

Williams v. Kilgore, 617 So. 2d 51, 56 (Miss. 1992). Therefore, Mr. Teal's own testimony establishes that his attempt at residence service failed to comply with M.R.C.P. 4(d)(1)(a) and was improper, insufficient, and ineffective.

B. Jeff's attempt at certified mail service pursuant to M.R.C.P. 4(c)(5) was insufficient.

In his Brief, Jeff places great weight upon the fact that he attempted to serve Tabatha by certified mail, return receipt requested, restricted delivery pursuant to M.R.C.P. 4(c)(5). M.R.C.P. 4(c)(5) clearly states and requires that "service by this method shall be deemed complete as of the date of delivery as evidenced by the return receipt or *by the returned envelope marked "Refused."* It is clear that attempted service pursuant to M.R.C.P. 4(c)(5) by certified mail is only effective if the return envelope is marked "*Refused.*" In this case, the envelope was not marked *"Refused"* but was marked *"Unclaimed"*. *See Appellee's Record Excerpts* Tab 24, p. 151. Jeff tries to argue that "*Unclaimed*" equals *"Refused."* However, this is not the law.

In the case of *Arceneaux v. Davidson*, 325 F. Supp.2d 742 (S.D. Miss. 2004), the Court held that under Mississippi law, "*Unclaimed*" does not equal *"Refused." Id.*, at 745, *citing Pittman v. Triton Energy Corp*, 842 F. Supp. 918, 922 (S.D. Miss. 1994) (stating that "There is a distinction between unclaimed mail and refused mail"). The Court further stated that unless the plaintiff can produce a return receipt signed by the defendant or evidence that the defendant has "*Refused*" to accept delivery of the certified or registered mail that is the summons and complaint, the plaintiffs must continue their efforts to serve process. *Id.* Until such time as the plaintiff files proof that the defendant has either signed for process or refused same, the requested relief cannot be granted. *Id.*, at 746.

Furthermore, the Attorney General for the State of Mississippi issued an opinion dated April 24, 1991, which states as follows:

> "Unclaimed" does not, in and of itself, establish a refusal to accept as must be shown in order to effect substitute process. Consistent with this line of cases, this office is of the opinion that a return marked "Unclaimed" is not, in and of itself, the equivalent to the term of "a refusal to accept" under Miss. Code Ann. § 13-3-63.

Attorney General Opinion to Louis Fondren, April 24, 1991; 1991 WL 577497 (Miss. A.G.)

Clearly, therefore, the envelope marked "*Unclaimed*" which Jeff sent to Tabatha does not satisfy the requirement under M.R.C.P. Rule 4(c)(5) that the envelope must be marked *"Refused."* Accordingly, Jeff's attempted service under Miss. R. Civ. P. 4(c)(5) by certified mail was insufficient and did not comply with the service of process requirements under Miss. R. Civ. P. 4(c)(5). As a result, the lower court still did not obtain personal jurisdiction over Tabatha for the January 7, 2008 hearing.

C. Mr. Teal's verbal notice of the hearing is insufficient to accomplish service of process.

Finally, Jeff argues that Mr. Teal laid the summons and complaint on the ground at the feet of Tabatha's husband and verbally called out to Tabatha, "Here's your papers." Jeff argues that this gave Tabatha notice of the hearing.

First of all, there is no authority in law that this is effective service, and Jeff cites no such authority in his Brief.

Secondly, the law is actually contrary to what Jeff argues. The fact that a party has actual notice of the pendency of a cause and when it is due to be tried, does not make him a party. *Burns v. Burns*, 133 Miss. 485, 97 So. 814, 815 (1923). A defendant cannot be gotten into court except in the manner laid down by law. He is under no obligation to notice what is going on in a cause against him unless the court has gotten jurisdiction of him in some manner recognized by law. *Id.* Even actual knowledge of a suit does not excuse proper service of process. *Mansour v. Charmax Industries, Inc.*, 680 So.2d 852, 855 (Miss. 1996). Complete absence of service of process offends due process and cannot be waived. *Id*

The case of *Mosby v. Gandy*, 375 So.2d 1024 (Miss. 1979), is very instructive here. In *Mosby*, the sheriff had not served the defendant with a formal legal summons but merely told the

defendant orally in the presence of many witnesses all about the suit and warned him to appear and when to appear. Furthermore, the defendant had actually gone to the courthouse and read all the papers in the case and had obtained certified copies of the case papers and knew everything about the case that he could have learned from a legal summons. However, even with the facts demonstrating that the defendant knew so much about the case, the court stated as follows:

> It is now so thoroughly well-settled as to make it too late to urge that knowledge by a defendant of a suit, however, definite and full, or however obtained, or whatever may have been the defendant's actions under that knowledge, is of any avail for advances the case a step, unless there has been a legal summons or a legal appearance.

Id., at 1028. One of the fundamental principles of justice is that no person may be divested of his rights until he has had an opportunity of being heard. In the absence of process on a defendant, even though the defendant may know of the pendency of the action, defendant's knowledge of the existence of the action does not supply the want of compliant requirements of valid process. *Id.* at 1027. The *Mosby* court also cited 21 C.J.S., Courts, § 83, p. 124 as follows:

> It is held that a person's knowledge of the existence of an action does not supply the want of compliance with statutory or legal requirements as to service, and that a person's mere presence in court does not give jurisdiction to enter a judgment against him when he was not brought there by any legal means.

The case of *Young v. Sherrod*, 919 So.2d 145 (Ct. App. Miss. 2005) is also very instructive here. In *Young v. Sherrod*, the plaintiff attempted to serve the defendant by mail pursuant to M.R.C.P. 4(c)(3) which requires the return of an acknowledgement of receipt. The defendant later acknowledged that he had, in fact, received a copy of the summons and complaint and even signed an affidavit to that effect. The plaintiff claimed that the defendant's admission amounted to sufficient proof of service and acknowledgment of service to satisfy the requirements or M.R.C.P. 4(c)(3). The court disagreed. The court stated:

> Our rules regarding service of process are clear. Service by mail on an in-state

> defendant is complete when the defendant returns the acknowledgment *within twenty (20) days* When a defendant does not return the acknowledgment within twenty (20) days, a plaintiff may complete service of process by some other means acceptable under M.R.C.P. 4. The Rules on service of process are to be strictly construed. Failure to serve process by "any other manner" equates to insufficient service of process.

Id., at 148-149. Again, it is clear from this case that actual knowledge of a pending lawsuit does not satisfy the requirements of service of process.

Finally, the court in *Lexington Ins. Co. v. Buckley,* 925 So.2d 859 (Ct. App. Miss. 2006) stated as follows:

> [T]he Mississippi Supreme Court has dictated that actual knowledge by a defendant of the pendency of a lawsuit against him is immaterial, unless there has been a legal summons or a legal appearance. (Citation omitted)
>
> In the absence of process on a defendant, even though the defendant may know of the pendency of the action, defendant's knowledge of the existence of the action does not supply the want of compliance with requirements of valid process. (Citation omitted)

Id., at 868-869.

It is overwhelmingly clear based on the preceding case law, that Mr. Teal's verbal statement to Tabatha that "Here's your papers" does not satisfy the requirements under the law for valid service of process. Therefore, once again, Jeff has failed to establish valid service of process on Tabatha.

In summary, it is clear that Tabatha was never properly served with process in this case:

1) The process server's own testimony is that he never handed the process to Tabatha;
2) The process server's own testimony is that Tabatha's husband refused to accept process on her behalf which is a requirement under M.R.C.P. 4(d)(1)(B);
3) The process server never mailed process to Tabatha as required by M.R.C.P. 4(d)(1)(B);
4) Even if Tabatha's husband had been willing to accept service on her behalf and even if

the process server had mailed a copy of the summons to Tabatha as required by M.R.C.P. 4(d)(1)(B), such service of process would not have been deemed complete until the tenth day after such mailing which would have been January 10, 2008, three days after the hearing had already occurred.

5) Jeff's attempt at certified mail was insufficient under M.R.C.P. 4(c)(5);

6) The process server's verbal notice to Tabatha was insufficient to accomplish service of process.

Based on these facts, it is clear that Jeff's attempts to serve process on Tabatha were defective and insufficient and that Tabatha was never properly served with process. As a result, the Chancery Court of Simpson County, Mississippi, did not have personal jurisdiction over Tabatha on January 7, 2008, when it attempted to go forward with a hearing on Jeff's petition. For the Court to proceed with the January 7, 2008, hearing in the absence of an appearance by Tabatha was error. Consequently, the findings and rulings of the Chancery Court of Simpson County arising out of the January 7, 2008, hearing were in error and should be set aside.

II. The Chancery Court of Simpson County, Mississippi, erred when it considered the *Albright* factors without both parents being present.

Jeff's response to this point of error is simply an attack on the *Wade v. Wade*, 967 So.2 682 (Ct. App. Miss. 2007) case. Jeff argues that the court did not hold that a chancellor should hear from both parents before considering the *Albright* factors in deciding child custody. Such a position ignores the language of the Court and is contrary to the position advocated by the Court. In *Wade*, the Court stated:

> It passes without citation that, in child custody cases, the paramount consideration is the best interest of the child ... a more prudent determination of custody may be made when based upon evidence presented from both parents rather than evidence presented by only one ... where the chancellor has the opportunity to consider the argument of both parents, the facts and circumstances affecting his determination

> are presumably more developed ... it follows that a chancellor is able to make a more informed decision, thereby ensuring to a higher degree of certainty that the best interest of the child is met.

Id., at 684. Clearly, the court is saying that a Chancellor will make a better child custody decision if he hears from both parents. Accordingly, where the chancellor has an opportunity to hear from both parents, he should make every effort to do so. The reasoning and logic of the Court is very clear and easy to follow—to achieve the goal of doing what is in the best interest of the child the chancellor should make every effort to hear from both parents on the matter. A clear reading of the *Wade* case indicates that the position of the Court of Appeals is that every effort should be made by a chancellor to hear from both parents before deciding issues of custody.

Certainly, a chancellor should make more of an effort to hear from both parents than was made in this case. As has already been established, the mother was not even properly served with process. Therefore, a serious question should have arisen in the mind of the chancellor as to whether or not he should have proceeded with a hearing to change custody. A change of custody is a big deal. It has tremendous impact on the lives of the children and should not be taken lightly. If the chancellor is interested in doing what is in the best interests of the children, he will carefully consider all the information he can get and make every reasonable effort to obtain that information. It is reasonable to expect that a part of that effort will include hearing from both parents. Clearly, if the Court is interested in doing what is in the best interest of the children, the Court will make every effort to hear from both parents before making a custody decision. That did not happen in this case.

Jeff argues that the language of the Court quoted above was merely an opinion and that if taken literally, a parent could delay a decision on custody indefinitely by simply not showing up

for Court. Such an argument is clearly an exaggeration and is not reasonable. Obviously, if a parent repeatedly and continuously refuses to appear for a hearing on custody, a court could reasonably and rationally conclude that the parent either has no interest in the custody issue or is intentionally trying to thwart the court's efforts to make a custody decision. At that point, a court could reasonably proceed with a hearing on custody after having given both parents ample opportunity to appear and plead their respective cases.

In this case, the trial court did not make such an effort. The hearing on January 7, 2008, was the first time since the divorce of the parties that this matter of child custody had been brought on for hearing. It was not as if the mother had repeatedly and intentionally not shown up for previous hearings. Clearly, the Court should have made inquiry as to why the mother was not present and what opportunities would be given to her to hear both sides of the case. Instead, the Court says it proceeded with a hearing on the *Albright* factors in the absence of the mother which certainly did not provide the Court with all the information it needed to make a decision that was in the best interest of the children. Clearly, the Court could not achieve the "paramount consideration" of doing what is in the best interest of the children. Considering the magnitude of the decision the court was about to make, it certainly seems reasonable to expect the Chancellor to have made more of an effort than he did to hear from both parents when making such a major decision regarding these children. For the Court to order a change in custody under these circumstances certainly does not reflect a desire to do what is in the best interest of the children. Therefore, it is not outside the scope of the ruling of the *Wade* case to find that the Chancellor erred in this case by not hearing from both parents before making his ruling on child custody.

Moreover, the law requires that a chancellor should make "on the record findings of fact" as to each applicable *Albright* factor. *Wade,* at 685. There is nothing in the record to indicate

that the Chancellor complied with this requirement. There is nothing in the record to show the basis of the Chancellor's decisions as to each *Albright* factor, to show what his findings were as to each *Albright* factor, to show why a change in custody was in order, or to show why a change in custody would be in the best interests of the children. Therefore, the Simpson County Chancery Court was in error by not making on the record findings of each applicable *Albright* factor.

III. The Chancery Court of Simpson County, Mississippi, lacked jurisdiction to rule in this case.

During the course of this litigation, Jeff filed two separate pleadings in which he admitted that he was a resident of Louisiana. On June 27, 2007, Jeff filed a *Petition for Citation of Contempt and for Modification* in which he affirmatively stated that he was "an adult resident citizen of the State of Louisiana." Appellee's R.E., Tab 4 p. 38. Five months later on November 13, 2007, he filed another *Petition for Citation for Contempt and for Modification* and once again affirmatively represented to the Court that he was "an adult resident citizen of Kaplan, Louisiana." Appellee's R.E., Tab 10, p. 99. Furthermore, during the hearing on Tabatha's motion to transfer jurisdiction, Jeff, during cross examination, stated under oath as follows:

Q. Please state you name for the Court.

A. Jeffrey Dale Quick.

Q. Mr. Quick, what is your address?

A. It is 102 Ferdinand Street, Kaplan, Louisiana.

Q. How long have you lived in Kaplan, Louisiana/

A. For about a year and a half.

Appellee's R.E., Tab 22, p. 131.

Clearly, on three separate occasions, Jeff represented to the Court that he was a resident of the State of Louisiana. It was during this time that Tabatha moved to transfer jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA). For Jeff to now claim that he was not a resident of Louisiana during the time that he made his representations is a misrepresentation to this Court. If he was not a resident of Louisiana, then why did he say that he was?

Based upon these representations, Tabatha filed her motion to transfer jurisdiction under the UCCJEA. Miss.Code Ann. § 93-27-202(b) provides that a court of this state which made a child custody determination has jurisdiction *until* a court of another state determines that the child, the child's parents, and any person acting as a parent currently do not reside in the State of Mississippi. Clearly, therefore, at the time Tabatha moved to transfer jurisdiction, she was in full compliance with Miss. Code Ann. § 93-27-202(1)(b). Tabatha and the children were all residing in the State of Alabama at that time, and Jeff was residing in Louisiana. Neither the parties nor the children had any further connection with the State of Mississippi The Chancery Court of Simpson County should have recognized this and should have transferred jurisdiction to the State of Alabama pursuant to the UCCJEA and Miss. Code Ann. § 93-27-202(1)(b).

It should also be noted that M.R.C.P. 11(a) states as follows:

> Every pleading or motion of a party represented by an attorney shall be signed by at least one attorney of record in that attorney's individual name, whose address shall be stated. *A party who is not represented by an attorney shall sign that party's pleading or motion and state the party's address.*
>
> The signature of an attorney constitutes a certificate that the attorney has read the pleading or motion; that the to the best of the attorney's knowledge, information and belief, there is good ground to support it; and that it is not interposed for delay.

Clearly, the purpose of the attorney's signature and/or the party's signature is to certify that the

information contained within the pleading is accurate and correct. In this case, Mr. Quick signed both the June 27, 2007, and the November 13, 2007, petitions that he filed with the Court. He represented to the Court that he was a resident of Louisiana at the time he signed them. He should not now be allowed to retreat from these representations just because it benefits his purpose.

Finally, Jeff wants to argue that the *Jones v. Starr* case is controlling in this matter. *Jones v. Starr* was a case issue by the Mississippi Supreme Court in 1991. Since then, the Mississippi legislature passed and adopted the UCCJEA in 2004, and it has been codified it at Miss. Code Ann. § 93-27-101, *et seq.* The intent of the legislature was to bring Mississippi into uniformity with other states on matters of child custody jurisdiction; to create a uniform law which could be carried across state lines to provide uniform handling of child custody matters. Clearly, the passage of the UCCJEA by the Mississippi legislature supplanted and superseded the case law which had been passed up to that point in time. The UCCJEA has been controlling in the matters of child custody since 2004. The *Jones v. Starr* case may not have been officially overruled, but it has certainly been superseded by the UCCJEA. Therefore, if there is any conflict between the two, the UCCJEA should control. Jeff's reliance upon *Jones v. Starr* is therefore misplaced and should be disregarded.

Clearly, Tabatha's *Motion to Transfer Jurisdiction* set forth sufficient evidence establishing that neither the parties nor the children had any significant connection with the State of Mississippi any longer, and Alabama was clearly now a more convenient forum to handle this matter. Also, as stated previously, the Chancery Court of Simpson County also failed to comply with Miss. Code Ann. § 93-27-110: 1) when it failed to include the parties in its communication with the Circuit Court of Marshall County, Alabama; 2) when it failed to make a record of its

communication with the Circuit Court of Marshall County, Alabama; 3) and when it failed to promptly inform the parties of the communication and grant them access to the record.

For these reasons, the Order entered by the Court retaining jurisdiction should be set aside and this matter transferred to the Circuit Court of Marshall County, Alabama.

IV. The Order entered by the Chancery Court of Simpson County, Mississippi, on January 10, 2008, was inequitable, unfair, not based on the evidence, and created an undue hardship on Tabatha Quick.

The January 10, 2008, order of the Court:

1) transferred custody of the children to Jeff without stating any basis as to why a change in custody was in the best interests of the children;
2) transferred custody of the children to Jeff without hearing from Tabatha as to what the best interest of the children should be;
3) made no on-the-record findings of the *Albright* factors;
4) suspended all visitation rights of Tabatha without stating why it would be in the best interest of the children for their visitation rights with their mother to be suspended.
5) ordered Tabatha to pay $420.00 a month in child support without setting forth the basis for such a determination or even whether this complies with the statutory guidelines for child support.

Clearly, such an order is harsh when the Court had no personal jurisdiction over Tabatha and when the Court obviously did not have sufficient evidence to make such a ruling, because all the parties were not before the Court.

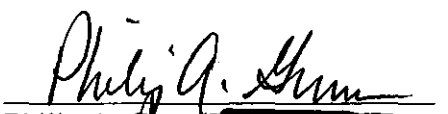
The ruling of the Court was designed to punish Tabatha for what it perceived to be contempt of court, not designed to do what was in the best interests of the children. The orders of the court were inequitable, unjust, and, most importantly, hurt the children and were not in

their best interest.

CONCLUSION

Based on the foregoing errors, the January 10, 2008, and the July 14, 2008, orders of the Chancery Court of Simpson County should be voided and set aside, the custody of the children should be returned to Tabatha Quick, and this matter should be transferred to the Circuit Court of Marshall County, Alabama.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Philip A. Gunn, attorney for the Appellant, do hereby certify that I have this day served five (5) copies of the foregoing Reply Brief of Appellant Tabatha Renee Quick via U. S. Mail, postage prepaid, on:

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This the 21st day of July, 2009.

Philip A. Gunn

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