Docket NO.2008-CP-01692

COPY

IN THE

SUPREME COURT OF MISSISSIPPI

February Term 2009

FILED
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OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

GREGORY WILLIAMS PATTERSON,

Appellant,

v.

TARA PATTERSON,

Appellee.

REPLY BRIEF FOR THE APPELLANT

Greg Patterson
Pro Se

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Argument

> *[A] simple reading of the transcript clearly shows that this was a twenty-minute hearing on motions, not a "trial." No witnesses were called, and the Chancellor heard only the arguments of counsel.*
>
> -Brief of the Appellee, 8.

> *THE COURT: Nancy, you want to make a few statements first or do you want to start with a witness?*
> *MRS. MADDOX: Let me just real briefly --*
> *THE COURT: Okay.*
> *MRS. MADDOX: -- because I think it's pretty clear cut, your Honor.*
>
> -Trial Transcript, 4:18-25.

I. Appellee's Failure to Offer Evidence Is Not Mitigated By Her Erroneous Claim that the Trial Was Limited in Scope to Hearing Appellant's Motions.

Mrs. Patterson's assertion that the trial in this cause was a mere hearing on motions is a stunning prevarication. Nothing in the Clerk's Record or Trial Transcript suggests that the trial was limited in scope to hearing motions. The RULE 81 SUMMONS, served June 19, 2008, noticed Mr. Patterson that he was "summoned to appear and defend against said complaint or petition at 9:00 a.m. on the 30th day of June, 2008, in the Chancery courtroom of the Desoto County Courthouse at Hernando, Mississippi, and in case of [his] failure to appear and defend a judgment [would] be entered against [him] for the money or other things demanded in the complaint or petition."[1] After Mr. Patterson filed a Motion for Continuance, the June 30, 2008 trial date was continued to August 18, 2008 by the Chancery Court's Order of Continuance.[2] Nothing in the Chancery Court's Order of Continuance limited the scope of the proceeding in any way. As stated by the RULE 81 SUMMONS, the trial was still intended to resolve "the

[1] Clerk's Record, 37; RULE 81 SUMMONS.
[2] Clerk's Record, 83; Order of Continuance (June 30, 2008).

money or other things demanded in the complaint or petition."[3] Even the Trial Transcript entitles the proceeding as "THE TRIAL OF THE ABOVE STYLED AND NUMBERED CAUSE."[4] The trial began with the Chancery Court inviting Ms. Maddox to call witnesses for the purpose of proving her case-in-chief, which she declined to do because, in her words, "it's pretty clear cut, your Honor."[5] Subsequent to that statement, the Trial Transcript reveals that the Chancery Court proceeded to hear arguments and evidence *comprehensively* addressing Mrs. Patterson's Petition for Contempt. These arguments and evidence were not limited to addressing the merits of Mr. Patterson's motions, which, somewhat ironically, Ms. Maddox did not even mention in her opening remarks, the Chancery Court was unaware had even been filed, and Mrs. Patterson completely failed to respond to.

Mrs. Patterson cannot now complain that she did not have an opportunity to call witnesses or testify herself. The August 18, 2008 trial date was intentionally selected by Mrs. Patterson with full knowledge that the contested matter would be heard on the uncontested docket. Nevertheless, Mrs. Patterson could have testified at trial as a fact witness or called other fact witnesses to counter Mr. Patterson's testimony, but failed to do so.[6] Mrs. Patterson could have offered exhibits or other evidence at trial, but failed to do so. Mrs. Patterson could have requested a record and offered sworn testimony at the September 29, 2008 post-trial hearing, but failed to do so. Mrs. Patterson could have introduced exhibits or offered other evidence at the September 29, 2008 post-trial hearing, but failed to do so. And Mrs. Patterson's assertion that

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[3] Clerk's Record, 37; RULE 81 SUMMONS.
[4] Trial Transcript, cover page.
[5] Trial Transcript, 4:25.
[6] **Mrs. Patterson's complete silence at trial was perhaps the loudest evidence offered.** The true reason Ms. Maddox declined to elicit testimony from Mrs. Patterson is that truthful testimony would have been detrimental to her case. Mrs. Patterson had notice of the arguments Mr. Patterson would offer at trial. Nevertheless, she failed to challenge Mr. Patterson's testimony with competent argument or evidence.

"[n]o witnesses were called, and the Chancellor heard only the arguments of counsel"[7] is patently false. Mr. Patterson *was* a sworn fact witness at trial and testified to numerous facts pertinent to Mrs. Patterson's Petition for Contempt. That Mr. Patterson was also acting in the capacity of an attorney in no way detracts from this testimony's evidentiary weight. Mrs. Patterson cannot now reclassify the August 18, 2008 trial as a mere hearing on motions in an attempt to mitigate or distract from her complete failure to prove up her case or rebut Mr. Patterson's trial testimony.

Finally, because Mrs. Patterson failed to offer evidence into the record at the September 29, 2008 post-trial hearing, she cannot rely on her dubious averment that "[t]he scheduled hearing proceeded without Mr. Patterson, *evidence was presented in his absence*, and the Chancellor correctly held him in contempt [emphasis added]."[8] Under Mississippi law, it is well established that "[t]he Supreme Court may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record." Adams v. Baptist Memorial Hospital-Desoto, Inc., No. 2006-IA-00455-SCT (¶25) (Miss. 2007); see also Phillips v. State, 421 So.2d 476, 478 (Miss. 1982) ("[C]onsideration of matters on appeal is limited strictly to matters contained in the trial record.... Review will include only those facts actually contained in the record and to those arguments contained in the appellant's brief, the appellee's brief, and the appellant's rebuttal brief."). Thus, this Court should consider the merits of Mr. Patterson's appeal in light of the facts and evidence actually contained in the Trial Transcript and Clerk's Record. Notably, Mrs. Patterson failed to utilize any of the various provisions of M.R.A.P. 10 to supplement the Clerk's Record with a statement conveying a

[7] Brief of the Appellee, 8.
[8] Brief of the Appellee, 16.

complete and accurate account of what transpired at the September 29, 2008 post-trial hearing. This is certainly because no additional evidence or testimony was actually presented.

II. Appellant's Non-Appearance at the September 29, 2008 Post-Trial Hearing Did Not Waive His Right to Appeal the Issues Presented to this Court.

Although this issue was partially briefed to this Court by Appellee's [denied] Motion to Dismiss Appeal and Appellant's Opposition, it constitutes the bulk of the argument presented by the Brief of the Appellee. Mrs. Patterson's argument can be summarized by the following passage from the Brief of the Appellee: "Because Mr. Patterson did not raise any of the issues contained in his brief at the final hearing on this matter ... these issues are necessarily precluded on appeal."[9] Mrs. Patterson cites no authority whatsoever for this fictitious proposition of law. Instead, Mrs. Patterson relies [again] on Luse v. Luse, No. 2007-CA-00171 (Miss. App. 2008) and Vincent v. Griffin, 852 So.2d 620 (Miss. App. 2003) for the undisputed principle that "a litigant who failed to defend a suit in the chancery court cannot do so on appeal." But here, even a cursory review of the Clerk's Record and Trial Transcript reveals that Mr. Patterson did not fail to defend against Mrs. Patterson's suit in the Chancery Court. Mr. Patterson filed an answer to Mrs. Patterson's Petition for Contempt. Mr. Patterson filed a pre-trial Motion for Dismissal and Summary Judgment, supported by evidence, to which Mrs. Patterson failed to respond. Mr. Patterson appeared at trial, restated his arguments and raised additional arguments before the Chancery Court on the record. Mr. Patterson's appellate arguments are based upon that record. These actions easily satisfy the more relevant point of law that "before an issue may be assigned and argued in appellate court, it must first be presented to the trial court." Wilburn v. Wilburn, No. 2007-CA-01385-SCT (¶4) (Miss. 2008).

[9] Brief of the Appellee, 15-16.

With respect to Mrs. Patterson's citations of authority, Vincent is detrimental to Mrs. Patterson's position and Luse is irrelevant. In Vincent, appellant made an initial appearance in the case but failed to attend trial because of an alleged lack of notice. 852 So.2d 620 (Miss. App. 2003). The chancery court found appellant in contempt of court, awarded a substantial monetary judgment to appellee and modified the parties' custody order. Id. In a three-part appeal to the Court of Appeals of Mississippi, appellant asserted that (1) his right to procedural due process was violated by a lack of notice of trial; (2) he could not be subject to judgment for past due child support; and (3) his former spouse was not entitled to award of attorney fees. Id. The Court of Appeals denied appellant's procedural due process argument because of a simple fact: "[Appellant] admits that he received the February 21, 2001 motion for a trial date." Id, at ¶11. The Court then found that "equity aids the vigilant and not those who slumber on their rights." Id. Here, Mr. Patterson does not seek a new trial on faulty grounds that he did not receive notice of trial. Nor does Mr. Patterson allege a failure of due process. Thus, this portion of the Vincent opinion is irrelevant. But more importantly, **after denying appellant's first argument, the Court proceeded to adjudicate appellant's remaining two arguments on the merits**. The Court declined to throw out appellant's second and third issues despite holding that appellant had slumbered on his rights by failing to appear at trial. Thus, Mrs. Patterson asks this Court to do what the Court of Appeals declined to do in Vincent – disregard the merits of Mr. Patterson's appeal because of his nonappearance at the September 29, 2008 post-trial hearing – even though Mr. Patterson appeared at trial and did not slumber on his rights!

Luse is even less supportive of Mrs. Patterson's position than Vincent. In Luse, appellant challenged a chancery court's granting of a divorce on grounds that the proceedings were not held in open court as required by law. No. 2007-CA-00171 (Miss. App. 2008). In denying

appellant's challenge, the Court of Appeals of Mississippi noted that appellant "never responded to the complaint and never made an appearance in the case until after the final judgment was rendered.... In fact, he had not responded in any manner to Mrs. Luse's complaint until over one month after the final judgment was entered." Id., at ¶¶ 3, 4. The Court also noted that "no transcription was made" of the lower court proceeding. Id., at ¶8. The Court concluded that because "there is nothing in the record to contradict the chancellor's finding in this regard, and Mr. Luse failed to follow the procedural rule which might have created such a record, we find no error." Id., at ¶ 9. Here, such a record was created and Mr. Patterson's arguments are based upon that record. And, unlike the appellant in Luse, Mr. Patterson: (1) answered Mrs. Patterson's Petition for Contempt; (2) filed a Motion for Dismissal and Summary Judgment of Mrs. Patterson's Petitioner for Contempt, denied by Chancery Court in its August 22, 2008 Order; and (3) appeared at trial, offered evidence at trial, restated his arguments and presented additional arguments on the record. Overall, Mrs. Patterson has failed to present any competent authority or make any cognizable argument as to how Mr. Patterson's nonappearance at the September 29, 2008 post-trial hearing waived his right to appeal the issues presented to this Court.

Appellant affirmatively offers the following argument as to why it could not have. This issue may be resolved by examining § 11-51-3 of the Mississippi Code in conjunction with Rule 55 of the Mississippi Rules of Civil Procedure. § 11-51-3 codifies a party's right of appeal and limits that right to judgments that are not the result of default. It provides that "an appeal may be taken to the Supreme Court from any final judgment of a circuit or chancery court in a civil case, *not being a judgment by default*, by any of the parties or legal representatives of such parties [emphasis added]." (West 2008). The Mississippi legislature has thus already defined the

threshold requirement that is dispositive of this issue: the underlying judgment must not have been a judgment by default. Absent that quality, an unsuccessful party has standing to appeal the judgment – or, put another way – the judgment is one that may be appealed by an unsuccessful party.[10] Defining what constitutes "judgment by default," Rule 55(a) provides that "when a party against whom a judgment for affirmative relief is sought *has failed to plead or otherwise defend* as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default [emphasis added]." Id. Additionally, Rule 55(b) requires that "[i]n all cases the party entitled to a judgment by default shall apply to the court therefor." Id. Here, neither 55(a) nor 55(b) was satisfied. Mr. Patterson did not fail to plead or otherwise defend as contemplated by Rule 55(a) and Mrs. Patterson did not secure a default judgment by application to the Chancery Court as contemplated by Rule 55(b). And although Rule 55 does not represent the only source of authority for the entry of a default that may lead to judgment (for example, Rule 37(b)(2)(C) and Rule 37(d) both provide for the use of a default judgment as a sanction for violation of the discovery rules), none of those alternative legal mechanisms are applicable here. Therefore, the Chancery Court's Final Order was, in theory, based upon the evidence contained in the record – which included Mr. Patterson's testimony offered at the August 18, 2008 trial – and Mr. Patterson cannot properly be considered in *default* in this cause as contemplated by § 11-51-3 of the Mississippi Code. Thus, he has standing to appeal pursuant to that statute.

Once it is established that a party has standing to appeal a judgment, the question then becomes: Did that party properly preserve in the lower court the issues presented for appellate review? Hemba v. Mississippi Dept. of Corrections, No. 2007-CA-01777-SCT (¶16) (Miss. 2009) ("[a]n appellant is not entitled to raise a new issue on appeal, because to do so prevents the

[10] Jurisdictions have split on whether this is to be treated as an issue of party standing.

trial court from having an opportunity to address the alleged error."). Here, the clear answer to this question is "yes." The Opening Brief for the Appellant catalogues how each individual issue was preserved for appellate review and each is supported by the Clerk's Record and Trial Transcript. With only one exception, Mrs. Patterson has not challenged these assertions.[11] Moreover, several of the issues presented by this appeal were expressly denied by the Chancery Court's August 22, 2008 Order, which came after trial but well before the September 29, 2008 post-trial hearing. The Order states: "Respondent's Motions to Dismiss, both on the grounds of jurisdiction **and on the other grounds asserted by Respondent**, are denied.... The Court finds that this Court has both **subject matter** and personal jurisdiction in this matter [emphasis added]."[12] And because the Chancery Court's denial of this relief was based on the evidentiary record at the time the Order was issued, the gravamen of Mr. Patterson's appeal is entirely unaffected by his nonappearance at the September 29, 2008 post-trial hearing – the Chancery Court had already ruled. This fact weighs heavily against Mrs. Patterson's overarching assertion that "[b]ecause Mr. Patterson did not raise any of the issues contained in his brief at the final hearing on this matter ... these issues are necessarily precluded on appeal." Finally, Mrs. Patterson has made no showing of prejudice arising from Mr. Patterson's nonappearance at the post-trial hearing and no such showing can be made. Mrs. Patterson could have requested a record and offered sworn testimony and other evidence at the September 29, 2008 post-trial hearing, but failed to do so.

III. Appellant Preserved the Chancery Court's Lack of Subject-Matter Jurisdiction Over the Modification of the Support Order.

[11] Mrs. Patterson asserts that Mr. Patterson failed to preserve his challenge to the Chancery Court's subject-matter jurisdiction over the modification of the Support Order.
[12] Clerk's Record, 84; Order, ¶1.

The sole issue that Mrs. Patterson asserts Mr. Patterson failed to preserve is whether the Chancery Court possessed the requisite subject-matter jurisdiction to modify the out-of-state Support Order. Before addressing the merits of this assertion, it should first be noted that Mrs. Patterson prevaricates in her Brief of the Appellee that she "did not seek to modify a child support order."[13] In fact, Ms. Maddox very clearly asked the Chancery Court to modify a child support order:

> The medical bills total about $3,000.00, your Honor, but what my client is asking for the Court to do today is to allow Matthew to stay on her insurance because he is covered here and they live in Mississippi. Mr. Patterson lives in California currently, and to **modify** that to include him paying all of the uncovered medical expenses since she is going to have him covered under her insurance, which she has done [emphasis added].[14]

As discussed in footnote 41 of the Opening Brief for the Appellant, the Chancery Court's modification of the Divorce Decree holding Mr. Patterson responsible for all of Matthew's uninsured health expenses constituted a modification of the Support Order under Mississippi law. § 93-25-3(w) of the Mississippi Code includes in its definition of "support order" health care expenses incurred for the benefit of a child. Thus, Mrs. Patterson cannot pretend that she did not request and receive the relief that the Chancery Court was not entitled to give.

Mrs. Patterson's more central assertion that Mr. Patterson failed to preserve the issue for appellate review is equally erroneous. Mr. Patterson challenged the Chancery Court's exercise of subject matter jurisdiction at every phase of litigation. In his Original Answer, Mr. Patterson asserted:

> The Court lacks subject matter jurisdiction in this cause.[15]

In his Motion for Dismissal and Summary Judgment, Mr. Patterson asserted:

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[13] Brief of the Appellee, 10.
[14] Trial Transcript, 5:13-24.
[15] Clerk's Record, 39.

> Dismissal under Rule 12(b)(1) is appropriate because this Court lacks subject matter jurisdiction to hear Petitioner's claims.[16]

At trial, Mr. Patterson asserted:

> Moreover, this Court does not, with respect, have jurisdiction to hear this case at all.[17]

Each time, Mr. Patterson's argument was expressly rebuffed by the Chancery Court. At trial, the Chancery Court stated "[w]ell, I am going to deny your request for dismissal for lack of jurisdiction because I find this Court does have jurisdiction."[18] In its August 22, 2008 Order, the Chancery Court ruled that "this Court has both **subject matter** and personal jurisdiction in this matter."[19] Thus, it simply cannot be said that the matter was not submitted to the Chancery Court and preserved for appellate review. Mrs. Patterson avers in her Brief that Mr. Patterson did not specifically cite the applicable UIFSA provisions to the Chancery Court, and that this purported shortcoming waived the issue. But Mrs. Patterson points to no authority imbuing Mr. Patterson with such a duty, and indeed no such authority exists. Mr. Patterson's assertions were sufficient to put the Chancery Court on notice that its jurisdiction over Mrs. Patterson's claims was being challenged on grounds that the Support Order originated in New Hampshire.

In the alternative, the Chancery Court's improper exercise of subject matter jurisdiction was plain error. Mississippi Mun. Liability Plan v. Jordan, No. 2001-IA-01590-SCT (¶16) (Miss. 2003) ("[W]e hold that the chancery court's lack of subject matter jurisdiction is plain error requiring reversal."). Thus, the Chancery Court's modification of the Support Order should be reversed whether the issue was preserved or not.

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[16] Clerk's Record, 47.
[17] Trial Transcript, 9:12-14.
[18] Trial Transcript, 23:23-25.
[19] Clerk's Record, 84; Order, ¶1.

VI. Appellee Generally Failed to Respond to the Merits of the Appeal.

The majority of Mr. Patterson's appeal went unanswered. Mrs. Patterson wholly failed to even address the following issues presented by the Opening Brief of the Appellant:

(1) That Mrs. Patterson had unclean hands and could not properly petition for equitable modification of the Support Order;

(2) That the Chancery Court's modification of the Support Order was an abuse of discretion;

(3) That Mrs. Patterson failed to satisfy material conditions of the Divorce Decree and thus could not seek equitable relief;

(4) That Mr. Patterson's conduct did not give rise to the Chancery Court's finding of contempt of court;

(5) That Mr. Patterson did not willfully violate the Divorce Decree;

(6) That paragraph 16(B) of the Divorce Decree is too ambiguous to support a finding of contempt;

(7) That Mrs. Patterson's breach of the divorce decree discharged Mr. Patterson's obligation to pay the rent stipend;

(8) That Mrs. Patterson failed to offer evidence supporting her claim for past due medical bills; and

(9) That the amount requested by Ms. Maddox for past due medical bills was inconsistent with the Chancery Court's Final Order.

Under Mississippi law, Mrs. Patterson's complete failure to respond to these issues constitutes a confession that Mr. Patterson's position is correct. Trammell v. State, 622 So.2d

1257 (Miss. 1993); see also Gordon by Lewis v. Wheat, 465 So.2d 1087 (Miss. 1985), and Jackson v. Walker, 240 So.2d 606 (Miss. 1970).

Conclusion

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Court will:

1) Vacate the Chancery Court's modification of the Support Order;

2) Vacate the Chancery Court's finding of contempt of court;

3) Vacate or Reduce the Chancery Court's award of $1900.00 for uninsured medical expenses.

4) Vacate or Remand the Chancery Court's award of $18,000.00 in outstanding rent stipend payments;

5) Vacate the Chancery Court's award of $2,600.00 for attorney fees.

Respectfully Submitted,

Date Filed: April 22, 2009

Greg Patterson
Pro Se

CERTIFICATE OF SERVICE

A true and correct copy of the above Opening Brief for the Appellant has been properly delivered by overnight express mail on April 22, 2009 to all known counsel of record: Nancy M. Maddox, Attorney for Appellee, P.O. Box 1249, Olive Branch, MS 38654.

A true and correct copy of the above Opening Brief for the Appellant has been properly delivered by overnight express mail on April 22, 2009 to the Chancery Court of Desoto County: Chancellor Vicki Cobb, 2535 Highway 51 South, Room 104, Hernando, MS 38632.

Respectfully Submitted,

Date Filed: April 22, 2009

Greg Patterson
Pro Se