SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. CASE NO. 2009-CA-00062-COA

L. DENNIS COBB — APPELLANT

VS.

SHERYL JEAN COBB — APPELLEE

APPEAL from THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI

Lee County Chancery Court Cause No. 06-0595-41-H

REPLY BRIEF OF APPELLANT L. DENNIS COBB

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1. STATEMENT OF THE ISSUES

A. Appellee asserts that Mississippi Code Section 11-3-15 requires the dismissal of the present appeal on the ground that the Appellant's appeal was previously dismissed on the ground of late submission. After the appeal was dismissed, the Appellant filed a motion to dismiss asserting that the judgment was void. Appellee did not raise this defense in the lower court. If the judgment on which the appeal was based is void, would Section 11-3-15, raised for the first time on appeal, prohibit the Appellant from appealing the judge's ruling that the judgment was not void as a matter of law?

B. Where a proper consent is entered by the parties under the provisions of MCA 93-5-2, the Supreme Court's most recent pronouncement makes plain that the parties need not withdraw his or her consent. Appellant asserts that where the parties do not enter a formal consent, the parties must withdraw consent for the court to properly grant an irreconcilable differences divorce.

C. Rule 502, Mississippi Rules of Evidence, protects the attorney/client privilege. At the hearing on the motion to set aside the Final Judgment for Divorce, the Chancellor required the Defendant/Appellant to testify (over his objection) as to privileged communications between himself and his former attorney, and further allowed his former attorney to testify as to confidential communications between her and the Defendant/Appellant over the objection of the Defendant/Appellant. The Chancellor took the objection as to privilege under advisement, and in his Opinion and Judgment given after the hearing, the Chancellor sustained the Defendant/Appellant's objection to the testimony. Is it a sufficient protection of the attorney/client privilege if the court forces clients and attorneys to testify as to their privileged communications, take the objections under advisement, and after the trial, sustain the objection?

2. ARGUMENT

A. Appellee failed to assert MCA Section 11-3-15 in the lower court. This code section was not intended to prohibit an appeal under the circumstances of this case, and does not prohibit appeal of a void judgment.

On the day set for trial, the 28th of November, 2007, the parties and counsel appeared in court in Booneville, Mississippi. No testimony was ever taken in the matter, but a Final Judgment for divorce was entered by the Chancellor on November 28, 2007. The Final Judgment for Divorce shows that the divorce was entered on the ground of irreconcilable differences. No consent for a divorce was ever entered by the parties, and no property settlement agreement was ever entered into by the parties. Additionally, the parties did not withdraw their

fault grounds. There was no separate property settlement agreement, but the Final Judgment for Divorce sets out all of the property settlement between the parties. Nowhere in the Final Judgment does it recite that the Chancellor found that "provisions of the written agreement for the settlement of any property rights are adequate and sufficient." On the 29th day after the entry of Final Judgment for Divorce, and one day before the 30 day time for appeal ran, the Appellant retained new counsel.

A Notice of Appeal was filed the same day by Attorney Jak M. Smith on December 27, 2007. Appellant's counsel requested several extensions of time from the Supreme Court but did not get the brief in on the schedule of the Supreme Court. The brief was due July 18, 2008. On July 22, 2008, the Supreme Court clerk's office issued a show cause notice pursuant to M.R.A.P. 2(a)(2) informing Appellant that the appeal would be dismissed if Appellant's brief was not received by August 5, 2008. On August 4, 2008, Appellant filed a motion for additional time. An order was entered on August 5, 2008, denying the motion for additional time. On August 12, 2008, Appellant mailed to the Court his brief along with a motion to file brief out of time. On August 29, 2008, Appellee's attorney replied to the motion to file brief out of time, but the Court denied the motion to file brief out of time and dismissed the appeal.

On November 10, 2008, Appellant filed a motion in the Chancery Court of Lee County, Mississippi, to set aside the judgment and/or to alter and/or to amend judgment, alleging that the Final Judgment for Divorce entered November 28, 2007, was void in that the parties never entered a valid consent and did not withdraw fault grounds prior to the entry of the Final Judgment for Divorce, and stating other reasons for setting aside the judgment as void.

The Appellee did not specifically assert Section 11-3-15 as a defense. However, Appellee did assert Res Judicata since the appeal had been dismissed. The Appellee stated to the Court the trail through the court system through which this matter had gone and represented to the court that the Court of Appeals had dismissed this appeal. The Chancellor did not find the Appellee's argument compelling and ruled against Appellee's Res Judicata defense stating: "...but as this

was not a dismissal on the merits but a procedural dismissal this Defense is not applicable:" (Page 10 of OPINION)

Unquestionably, the initial appeal of the Defendant/Appellant was dismissed due to the lateness of the filing of the brief. Unlike the party in *First American National Bank of Iuka v. Alcorn, Inc,* 361 So. 2d 481, 493 (Miss. 1978), Dennis Cobb, Appellant, filed a brief with the Court which subsequently found it was filed too late. In *First American,* the party had filed the appeal but never did anything else and "...made no effort to prosecute the appeal..." *First American* at 492.

In any event, the Chancellor undertook to hear the case on its merits of the Appellant's allegation that the Judgment was void. Despite the language of Section 11-3-15, if a judgment is void, M.R.C.P. 60(b)(4) provides a right to challenge such a void judgment at any time. See *O'Neal v O'Neal,* 2008-CA-01947-SCT (Miss. 9-17-2009). Also, *Pittman v. Pittman,* 4 So. 3d 395 (Miss. App. 2009):

> "It is equally well settled that a judgment rendered by a court having no jurisdiction of the subject matter is void, not merely voidable, and may be attacked directly or collaterally, anywhere, and at any time. Such a judgment is a usurpation of power and is an absolute nullity." *Stevens v. Stevens,* 346 So.2d 909, 912 (Miss. 1977) (quoting *Duvall v. Duvall,* 224 Miss. 546, 552, 80 So.2d 752, 754 (1955)). *Pittman* at 399.

Appellant, Dennis Cobb, had the right to challenge a void judgment, as recognized by the Chancellor, and Section 11-3-15 was never intended, under these circumstances, to clothe an "absolute nullity" with unassailable protection it was never intended to have.

B. Where a proper consent is entered by the parties under the provisions of MCA 93-5-2(3), the Supreme Court's most recent pronouncement makes plain that the parties need not withdraw his or her consent. However, Appellant asserts that where the parties do not enter a formal consent, the parties must withdraw consent, as required by MCA 93-5-2(5) for the court to properly grant an irreconcilable differences divorce.

In his OPINION AND JUDGMENT, dated December 3, 2008, the Chancellor ruled that the parties had never entered a "... separate Consent for Divorce, signed by the parties, as set forth in Section 93-5-2(3)." (Page 5 of OPINION) The Court also found that "...there was no

specifically stated withdrawal of fault grounds for divorce or denial thereto in said Final Judgment... ." (Page 5 of OPINION) In these two statements, the Court is correct. However, the Court's error was that after it found neither a consent nor an order of withdrawal was entered, it found that this defect was cured by the parties' statement in the Final Judgment of Divorce that "All further relief herein requested by either parties is denied." (Page 7 of OPINION) The Court found this statement in the final sentence of the Final Judgment was tantamount to the order of withdrawal required by Section 93-5-2(3).

This court is very familiar with the recent case of *O'Neal v. O'Neal*, 2008-CA-01947-SCT (Miss. 9-17-2009). In *O'Neal,* the Supreme Court ended any meaningful debate over whether the parties in a divorce case, *in which a valid consent is entered*, must withdraw fault grounds by a separate document. Citing a recent Supreme Court case of *Irby v. Irby*, 7 So. 3d 223 (Miss. 2009), the Supreme Court stated:

> "¶ 17. This Court recently addressed this very issue on nearly identical essential facts in *Irby v. Irby*, 7 So. 3d 223 (Miss. 2009). In Irby, the parties filed complaints and counter-complaints for divorce, both alleging fault-based grounds, and then subsequently entered a consent agreement to proceed with the divorce based on irreconcilable differences. As here, neither party formally withdrew the fault-based grounds, and Ms. Irby sought to have the judgment of divorce declared void for the absence of any such withdrawal. *Id.* at 236.
>
> ¶ 18. The Irby decision made it exceedingly clear that, pursuant to Mississippi Code Section 93-5-2, no such withdrawal of the initially asserted fault-based grounds is necessary." *O'Neal* at para. 18 and 19.

These two opinions, *Irby* and *O'Neal,* must be read very carefully, as they are limited to situations in which the court hears the case after the parties have entered a valid consent under MCA 93-5-2(3).

> ¶ 25. To clear up any future questions on this point, we explicitly overrule Pittman and hold as much now. As explained in Irby v. Irby, 7 So. 3d 223 (Miss. 2009), pursuant to Mississippi Code Section 93-5-2(3) and (5), when the parties fully and properly execute a mutual-consent agreement to a divorce based on irreconcilable differences, under the requirements prescribed by the Legislature in subsection (3), [fn1] [1]the Act establishes that the parties intend to and do

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[1] COURT'S FOOTNOTE: [fn1] These requirements are that the consent must: (1) be in writing and signed by both parties; (2) state that the parties voluntarily consent to permit the court to decide the issues upon which the parties cannot agree; (3) specifically set forth the issues upon which the parties are unable to agree; and (4) state that the parties understand that the decision of the court

> withdraw all contests and denials. Thus, the consent agreement operates as a withdrawal and cancellation of any previously asserted fault-based grounds for divorce made by either party. *O'Neal* at para. 25.

The Court in O'Neal did not mean for any of the requirements of MCA 93-5-2 to be waived when no consent was entered as was the case here in the Chancery Court of Lee County. When no consent is entered, then the parties must withdraw fault grounds in conformity with MCA 93-5-2 (5):

> (5) Except as otherwise provided in subsection (3) of this section, no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial; provided, however, that a divorce may be granted on the grounds of irreconcilable differences where there has been a contest or denial, if the contest or denial has been withdrawn or cancelled by the party filing same by leave and order of the court.

As the Court pointed out in O'Neal, subsection (3) is the part of MCA 93-5-2 that relates to entry of a "consent" for the Chancellor to decide the issues, and the requirement of formally withdrawing the fault grounds still applies when no such consent is entered. In the instant case, the Chancellor found no consent was entered. The Chancellor heard absolutely no testimony in the case. The Chancellor erred when he found that the parties recitation in the Final Judgment of Divorce that "*All further relief herein requested by either parties is denied*"[2] was tantamount to the requirement in Section (5), that the party must withdraw or cancel the grounds "...by leave and order of the court." This requirement in Section (5) is jurisdictional and it voids any Final Judgment for divorce in which the parties fail to comply. Even though *Pittman v. Pittman,* 4 So. 3rd 395 (Miss. App. 2009) has been expressly overruled by the Supreme Court, in *O'Neal* insofar as the requirement of withdrawal of fault grounds is required when a formal consent is entered, the language of *Pittman* is still appropriate when a party fails to comply with Section 93-5-2 in other than a Section (3) consent:

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shall be a binding and lawful judgment. Irby, 7 So. 3d at 238 (citing *Massingill*, 594 So. 2d at 1177).

2 Page 7 of the Chancellor's OPINION.

> ¶ 15. We, therefore, hold that the chancellor manifestly erred in granting the divorce on the ground of irreconcilable differences, as the statutory authority for her doing so was not met by the parties. In reaching this conclusion, we are well aware that neither party has raised the issue of the chancellor's authority to grant the divorce on the ground of irreconcilable differences. However, "[i]t is the primary duty of [an appellate court], on its own motion, to determine its jurisdiction." *Byrd v. Sinclair Oil & Refining Co.*, 240 So.2d 623, 623 (Miss. 1970) (citing *Roach v. Black Creek Drainage Dist.*, 206 Miss. 794, 795, 41 So.2d 5, 5 (1949)). "It is equally well settled that a judgment rendered by a court having no jurisdiction of the subject matter is void, not merely voidable, and may be attacked directly or collaterally, anywhere, and at any time. Such a judgment is a usurpation of power and is an absolute nullity." *Stevens v. Stevens*, 346 So.2d 909, 912 (Miss. 1977) (quoting *Duvall v. Duvall*, 224 Miss. 546, 552, 80 So.2d 752, 754 (1955)). *Pittman* at 399.

In remains the law, that in situations other than consent agreements, such as when an irreconcilable difference divorce is sought, and the court is presented a property settlement agreement signed by the parties, the parties must withdraw the fault grounds by a separate order as required by Section 93-5-2 (5). Only when the parties cannot resolve their differences and wish the chancellor to decide the issues, and enter into a consent agreement strictly following the requirements of Section (3), are the parties exempted from obtaining an order of withdrawal of fault grounds under Section (5) of MCA 93-5-2. The parties in the instant case did not enter a consent under Section (3) and therefore they should have withdrawn fault grounds as required by Section (5). The fact they did not comply with the statute, MCA Section 93-5-2(5) voids the judgment.

C. Rule 502, Mississippi Rules of Evidence, protects the attorney/client privilege. At the hearing on the motion to set aside the Final Judgment for Divorce, the Chancellor required the Defendant/Appellant to testify (over his objection) as to privileged communications between himself and his former attorney, and further allowed his former attorney to testify as to confidential communications between her and the Defendant/Appellant over the objection of the Defendant/Appellant. The Chancellor took the objection as to privilege under advisement, and in his Opinion and Judgment given after the hearing, the Chancellor sustained the Defendant/Appellant's objection to the testimony. Is it a sufficient protection of the attorney/client privilege if the court forces clients and attorneys to testify as to their privileged communications, take the objections under advisement, and after the trial, sustain the objection?

The Appellee makes the argument in her brief that the Appellant waived all his defenses to Rule 502 privileged communications with his attorney when he alleged he had been misrepresented by his attorney. That would be a very good argument **if** the Appellant had raised misrepresentation as a defense in his Motion to Set Aside the Final Judgment, or even in his defense in his part of the case, but the truth is that the Appellant never mentioned misrepresentation by his attorney as any defense to the void judgment. The only time it was ever raised was when the Appellee's attorney called the Appellant as an adverse witness and began asking him questions[3] about whether he thought he had been misrepresented by his attorney. At no point in his Motion to Set Aside did he ever raise this issue and in any way make any claim that he had been misrepresented by his attorney. After numerous objections to this line of inquiry, the Court threatened the Appellant with contempt if the Appellant did not answer the questions most of which were clear violations of the attorney-client privilege.

> OBJECTION BY DEFENDANT'S ATTORNEY WAS: As long as there is no communication about what you told her and what she told him, I don't have any problem with him answering it if he can.
>
> CHANCELLOR HATCHER: Whether you do or do not have a problem, Mr. Smith, I expect him to answer, and you have a continuing objection, and if he doesn't answer the question, he will be in contempt, regardless of how you advise him. (Transcript page 11).

The Appellant, Dennis Cobb, never brought up this issue of misrepresentation except on the direct questioning by the Appellee's counsel. As was stated in Appellant's original brief, the Chancellor eventually recognized in his OPINION AND JUDGMENT, that he had been wrong and sustained the Appellant's objection to suppress this testimony[4]. However, the "bell had already been rung." Appellant seeks a ruling and guidance from this court, that a Chancellor, or any judge, may not compel a party to testify as to Rule 502 privileged communications between the attorney and the client, hold in abeyance a ruling on the objection as to privilege, force the

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3 Over the objection of his attorney

4 Judge Hatcher used the Defendant's statements against him in his opinion even though he sustained the objections. See p 14-15 of his OPINION.

witness and his attorney to testify as to privileged communications and then sustain the objection. Why have the rule if a judge can evade the rule's strictures so easily? This court should make clear that the communications between an attorney and his or her client may not be made the subject of testimony unless expressly waived by the client on the record or by a pleading. In the instant case, no such waiver was made.

3. CONCLUSION

In short, the parties failed to properly withdraw the contested grounds of divorce, and for that reason alone, this matter is a void judgment, and this Court should set the judgment aside. As was stated in *Massingill*, this Court should "wipe the slate clean and put the parties back where they were prior to trial." The other problems of this case also strongly argue for reversal and require this case be sent back to the trial court to begin the process properly.

The Court should instruct the Chancellor as to the proper role of attorney/client privilege in our search for the truth; that this privilege should not be easily violated. While the Chancellor reached the right conclusion, his method and reasoning vitiates the attorney/client privilege.

RESPECTFULLY SUBMITTED, this the 5th day of October, 2009.

Jak M. Smith J.

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CERTIFICATE OF SERVICE

I, Jak M. Smith, Attorney for Appellant, L. DENNIS COBB, certify that I have this day filed this *REPLY BRIEF OF APPELLANT L. DENNIS COBB* with the Clerk of this Court, and have served a copy of this *BRIEF* by United States Mail with postage prepaid on the following person(s):

Honorable John Hatcher, Chancellor
P. O. Box 118
Booneville, MS 38829

Honorable Edwin H. Priest
Attorney at Law
P. O. Box 46
Tupelo, MS 38802
(Attorney for Plaintiff/Appellee)

This the 5th day of October, 2009.

Jak M. Smith J Colarusi
JAK M. SMITH