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

CASE NO. CASE NO. 2009-CA-00062

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

BRIEF OF APPELLANT L. DENNIS COBB

Appellant requests oral argument.

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[redacted]

ATTORNEY FOR APPELLANT

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 judges of this Court may evaluate possible disqualification or recusal:

1. L. Dennis Cobb, Appellant;
2. Sheryl Jean Cobb, Appellee;
3. Honorable John Hatcher, Chancellor;
4. Jak M. Smith, Attorney for Appellant;
5. Edwin H. Priest, Attorney for Appellee.

Respectfully submitted,

L. Dennis Cobb, APPELLANT

BY: _____

JAK M. SMITH MSB No [redacted]

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B. The Final Judgment for Divorce in this cause recited that ". . . the parties both being present and giving testimony in court . . ." was inaccurate as no testimony was taken from anyone. No separate property settlement agreement was entered nor was any consent entered. This judgment should be set aside as void for those reasons.

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. STATEMENT OF THE CASE

On April 17, 2006, the Appellee, Sheryl Jean Cobb, filed a Complaint for Divorce in the Chancery Court of Lee County, Mississippi. The Appellee was represented by the Honorable Edwin H. Priest of Tupelo, Mississippi. This Complaint was grounded on habitual cruel and inhuman treatment and adultery and, in the alternative, irreconcilable differences.

The Appellant, L. Dennis Cobb, represented by Honorable Luann Thompson, filed an Answer to the Complaint on April 20, 2006. In the Answer to Complaint the Appellant, as Defendant, denied the Plaintiff, Appellee, herein, was entitled to a divorce on the grounds of habitual cruel and inhuman treatment, adultery or on irreconcilable differences. No Counter or Cross-Complaint was ever filed by the Appellant.

The original chancellor, Honorable Jacqueline Estes Mask, recused herself on the 9th day of October, 2007, and the matter was reassigned to Chancellor John A. Hatcher.

A temporary hearing was held in this matter on October 9, 2007, and a temporary order entered on November 16, 2007, nunc pro tunc to October 9, 2007. On the 17th of October, 2007, an order was signed by the Chancellor setting the matter for a final hearing on the merits on the 28th of November, 2008.

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." The Appellant asserted that he did not want to sign the Final Judgment for Divorce as he felt it was not fair but signed it anyway. 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 29,2 008, 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 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. Appellee filed a response to the motion, and the Chancellor had a hearing on this matter on November 26, 2008, at the Lee County Justice Center in Tupelo, Mississippi. On the 4th day of December, 2008, the Chancellor entered an Opinion and Judgment overruling the Appellant's request. On December 31, 2008, Appellant filed his notice of appeal.

3. SUMMARY OF THE ARGUMENT

After the Final Judgment for Divorce was entered, the Appellant eventually moved to set the judgment aside on the ground that neither of the parties had withdrawn fault grounds prior to the entry of the Final Judgment for Divorce as required by § 93-5-2, Miss. Code Ann. Appellant contends that the Final Judgment for Divorce is void, not voidable, because fault grounds were not withdrawn. Additionally, no consent to divorce was entered, no separation agreement was filed prior to the entry of the Final Judgment for Divorce, the Final Judgment recited that testimony had been taken when none had been taken, and the Final Judgment did not indicate that the Chancellor found the agreement incorporated into the Final Judgment to be adequate and sufficient.

At the hearing to set aside the Final Judgment for Divorce, the Chancellor required the Appellant to violate the attorney/client privilege and further violated attorney/client privilege by overruling Appellant's objection to his former attorney testifying at the hearing as to private communications between them.

4. ARGUMENT

A. Under Mississippi law, in an irreconcilable differences divorce, without a written consent, parties must withdraw all fault grounds prior to the entry of a final judgment for divorce. In his Opinion and Judgment on Appellant's motion to set aside the Final Judgment for Divorce, the Chancellor found that the statement in the Final Judgment for Divorce that "all further relief herein requested by either parties is denied" was a withdrawal of fault grounds. Is such language a sufficient withdrawal of fault grounds, or must there be a specific written statement that withdraws all fault grounds?

This matter was set for a final trial on the merits of the divorce on November 28, 2007. On that date set for trial, all parties, and their attorneys, appeared. The Final Judgment for Divorce was entered on the same day as the trial. The strictures of the Mississippi Code, Section 93-5-2 (1994), were not followed in this case in that the Plaintiff/Appellee, CHERYL JEAN COBB, did not withdraw her fault grounds, nor did the Defendant withdraw his denial. As was stated in the case of *Perkins v. Perkins*, 787 So.2d 1256 (Miss. 2001):

> Miss. Code Ann. § **93-5-2** (1994), states the statute governing irreconcilable differences, provides for a party to withdraw the contest by leave and order of the court:
>
> (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. *Perkins* at 1262.

The Plaintiff in this case did file a fault divorce, and the Defendant answered the complaint contesting the grounds for divorce, but did not file a counter-complaint. The recent case of *Pittman v. Pittman*, 4 So.2d 395 (Miss. App. 2009), when read in conjunction with the more recent Supreme Court case of *Irby v. Estate of Irby*, 2007-CA-00689-SCT (Miss. 4-23-2009), fairly well puts this whole question to rest. In *Pittman*, the parties did file a consent. The Court found that:

> However, the record is devoid of any order permitting the parties to withdraw their contest or denial. Nor is there any record of a contest or denial being withdrawn. We are fully aware that James, in his answer and counter-claim, agreed that Peggy was entitled to a divorce on the ground of irreconcilable differences while denying that she was entitled to a divorce on either of the fault grounds alleged by her. That fact notwithstanding, James' answer and counter-claim amounted to a contest or denial until withdrawn or cancelled by leave and order of the chancery court. See *Massingill*, **594 So.2d at 1178** (holding that, by virtue of Mississippi Code Annotated Section 93-6(sic)-

2(5), the filing of a cross-complaint or counter-claim amounts to a contest until withdrawn or cancelled by leave and order of the chancery court).

It is the intent of the legislature, as expressed in Section **93-5-2**, 'that there be no [pending] contest or denial of *any* ground for divorce' if the parties are to be divorced on the ground of irreconcilable difference. Id. at 1178 (citing *Alexander v. Alexander*, **493 So.2d 978, 980** (Miss. 1986)).

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 grounds of irreconcilable difference. However, "[I]t is the primary duty of [an appellate court] on its own motion, to determine its jurisdiction." *Byrd v. Sinclair Oil and Refining Company*, **240 So.2d 623, 623** (Miss. 1970) (citing *Roach v. Black Creek Drainage District*, **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 anytime. Such a judgment is a usurpation of power and is an absolute nullity." *Pittman* at 399.

The Chancellor's Opinion and Judgment of December 3, 2008, specifically found that the parties were in agreement that "there was no specifically stated withdrawal of fault grounds for divorce or denial thereto in said final judgment, which the Defendant contends voids the final judgment, and which the Plaintiff disputes." (Opinion and Judgment, page 5) The Chancellor also found that the parties were in agreement that there was no separate consent for divorce signed by the parties (Opinion and Judgment, page 5).

Attorney Luanne Thompson confirmed that there had never been a withdrawal of fault grounds:

Q . . . There was never any kind of withdrawal of any fault or denial grounds on either side of this, were there?

A No, there was not. ... (Transcript, page 29)

. . .

Q That fault ground, or Mr. Cobb's denial, on neither party's side was cancelled or withdrawn?

A No, it wasn't cancelled or withdrawn. (Transcript, page 28)

The Chancellor committed reversible error in finding that the parties had withdrawn their consent. The Chancellor stated:

In applying these binding legal precedents, which this court does, the court notes: (1) in her complaint for divorce and temporary leave, the plaintiff proceeded against the

> defendant on the fault grounds for divorce of habitual, cruel and inhuman treatment and adultery, and prayed for a divorce from the defendant on either of those grounds, or in the alternative on the grounds of irreconcilable differences; (2) in his answer to complaint, the defendant denied all the plaintiff's grounds and denied the plaintiff was entitled to any relief prayed for by her; (3) the final sentence of the parties' Final Judgment for Divorce, which encompassed their agreement states, "All further relief herein requested by either party is denied." The Court construes this as a withdrawal by the parties of their fault grounds, answer and denials. (Opinion and Judgment, page 7)

In the case of *Irby v. Estate of Irby*, decided in April of this year, the Mississippi Supreme Court somewhat modified the *Pittman* decision so as to find that if the parties enter a consent (which was not done in the instant case), then there is no need to withdraw fault grounds. The Supreme Court agreed with the Chancellor who stated in his opinion: "Logically, if the parties consent to a divorce on the ground of irreconcilable differences and meet the requirements of subsection (3)[file a consent], such an act necessarily shows and establishes that the parties intend to and do withdraw all contests and denials."*Irby* at 22. However, the Court upheld the *Pittman* decision as long as it relates to an irreconcilable difference divorce without a consent: "It is the opinion of this court that the requirements of subsection (5) are applicable only where a divorce commences as a contested divorce with grounds asserted and is concluded with a written agreement containing adequate and sufficient provisions for the custody and maintenance of any children and for the settlement of any property rights between the parties." *Irby* at 22. The Court in *Irby* went through a lengthy analysis of why this requirement is so important in Mississippi law. It concluded with the following:

> It is well understood that divorce in Mississippi is governed by statute, and that its provisions must be strictly complied with. ***Perkins,* 787 So.2d at 1264**. The plain language of subsection (5) mandates that a contest or denial be withdrawn or cancelled, by leave and order of the court, by the party who filed the contest or denial. This is a procedural safeguard which has existed within the framework of Section **93-5-2** since its promulgation. See, e.g., ***Alexander v. Alexander*, 493 So.2d 978, 979** (Miss. 1986) (discussing Mississippi Code Annotated § **93-5-2** (Supp. 1985)). However, the exception clause, which was added in1990 when the statute was amended to provide for 'trial by mutual consent,' clearly indicates that subsection (5) should be read in conjunction with subsection (3). Once the parties fully and properly acceded to the procedural strictures of subsection (3), the safeguards provided by subsection (5) were no longer necessary. *Irby* at 27.

It is clear that the Chancellor was in error when he found that the parties had withdrawn their fault grounds by reciting in the Final Judgment for Divorce, "all further relief herein

requested by either parties is denied." This is not a withdrawal of the fault grounds as required by Section 93-5-2.

The effect of failing to withdraw fault grounds under Section 93-5-2 is severe:

> Since we have found that no divorce should have been granted, it necessarily follows that no property division should have been made. Additionally, because the chancellor exceeded her statutory authority in granting the divorce on the ground of irreconcilable differences, we follow our Supreme Court's lead in *Massingill* and, wipe the slate clean and put the parties back where they were prior to trial. *Massingill,* **594 So.2d at 1179**. *Pittman* at 399.

B. The Final Judgment for Divorce in this cause recited that ". . . the parties both being present and giving testimony in court . . ." was inaccurate as no testimony was taken from anyone. No property settlement agreement was entered nor was any consent entered. This judgment should be set aside as void for those reasons.

It is uncontradicted that on the day set for trial on the merits no testimony was taken in this matter from any party nor did the Chancellor make any inquiries, in open court, to the parties at any time. Despite the fact that no testimony was taken, the Final Judgment for Divorce states:

> "This day this civil action came on for hearing on the Complaint for Divorce filed by the Plaintiff, Sheryl Jean Cobb, and on the Counter-Complaint for Divorce filed by Defendant, L. Dennis Cobb, and the parties both being present and giving testimony in court, the Court finds that the parties are entitled to a divorce on the grounds of irreconcilable differences based in part on Defendant's adultery subsequent to the separation of the parties. The Complaint for Divorce having been on file for sixty (60) days or more prior to the date of this judgment and the Court having considered same and finding that it has jurisdiction of the parties and the subject matter, finds as follows:"

Despite the recitation in the Final Judgment for Divorce that the parties "gave testimony" it is uncontradicted that no testimony was taken from anyone. The remainder of the Final Judgment for Divorce reads and even recites itself as a "property settlement." However, there in no separate property settlement agreement, but the so-called settlement is contained in the Final Judgment for Divorce.

First of all, nowhere in the Final Judgment for Divorce does it appear that the Chancellor found the provisions of the written agreement(incorporated into the Final Judgment for Divorce) for the settlement of any property rights to be "adequate and sufficient" as required by Mississippi Code Annotated § 93-5-2 (2) (1994). In the case of *Perkins v. Perkins*, 787 So.2d 1256 (Miss. 2001), this Court found a somewhat analogous situation. The parties in the *Perkins*

case entered into an actual property settlement agreement on the day of court. However, no record was made at the hearing. The Court stated:

> Because no record was made, we do not know what, if anything, the chancellor asked about the settlement, nor whether he even reviewed the agreement which was incorporated by reference into his final judgment for divorce which was granted on irreconcilable differences. [1] What we do know for sure is that the final judgment nowhere recites that the chancellor found the 'provisions [of the written agreement for the settlement of any property rights] are adequate and sufficient' as required by Miss. Code Ann. § **93-5-2 (2)** (1994). For that reason alone, this Court must reverse and remand. However, there are other deficiencies which we also address infra. *Perkins* at 1260.

Therefore, this Court should reverse the Chancery Court in that the Final Judgment for Divorce (which seems to incorporate some form of a property settlement agreement) did not recite that the provisions of the written agreement for the settlement of any property rights are adequate and sufficient as required by Mississippi Code Annotated § 93-5-2 (2).

As stated in *Perkins*, the Supreme Court has found,

> "Divorce in Mississippi is a creature of statute." *Gardner v. Gardner, **618 So.2d 108***, 111-13 (Miss. 1993) (Citing *Massingill v. Massingill,* **594 So.2d 1173**, 1175 (Miss. 1992)). A divorce based on irreconcilable differences has certain statutory requirements that must be met. "The starting point is that an irreconcilable differences divorce in Mississippi requires that neither spouse contest its granting." *Perkins* at 1261.

The parties must consent to a divorce on the grounds of irreconcilable differences before a chancellor can take testimony in such a case. Section 93-5-2(3) requires:

> "If the parties are unable to agree upon adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between them, they may consent to a divorce on the ground of irreconcilable differences and permit the court to decide the issues upon which they cannot agree. Such consent must be in writing, signed by both parties personally, must state that the parties voluntarily consent to permit the court to decide such issues, which shall be specifically set forth in such consent, and that the parties understand that the decision of the court shall be a binding and lawful judgment."

Therefore, if the Chancellor heard testimony in this case, which the Final Judgment recites that it did, then there was no consent entered by the parties or the Court, and the Final Judgment is void for failure to comply with Sec 93-5-2(3). Of course, the record contains no

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[1] No testimony was taken at all in the instant case.

testimony, and the record has no transcript because no testimony was taken. This is a material variance in the Final Judgment for Divorce that makes the Final Judgment void.

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?**

On November 26, 2008, the Chancellor heard the Plaintiff's motion to set aside the Final Divorce. This hearing was also a hearing on Plaintiff's Motion for Contempt. Plaintiff called the Defendant/Appellant as an adverse witness on Plaintiff's motion for contempt. During the testimony, Plaintiff attempted to question him about his communications with his attorney. Defendant's counsel promptly objected and asserted attorney/client privilege. The Chancellor stated, "The Court will reserve ruling on that particular objection, but the question that was directed at him does not call for a response that requires him to state any communications directly back and forth between each other. He just said why were you dissatisfied with the representation." (Transcript, page 10)

> 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.
>
> BY MR. SMITH: Well, Your Honor, I'm certainly respectful to the Court's opinion, but if it gets into privilege -
>
> CHANCELLOR HATCHER: I'm withholding a ruling on whether it does or does not. (Transcript, page 11)

The Chancellor then let Plaintiff's counsel, over Defendant's objection, question Defendant about communications between him and his attorney.

Q (BY MR. PRIEST) Why did you believe that you were misrepresented and by whom?

A By Mrs. Thompson. We never went to court. It was all done behind closed doors, and she told me that the judge had made a decision as to the terms of the divorce, and I had two choices. The first choice was stay married to her, or I could sign it and be divorced. (Transcript, page 11-12)

. . .

Q And why do you not understand that question?

A Because I was told by Mrs. Thompson that Judge Hatcher had made a decision as to who gets what.

The Defendant objected to having to comply with the Final Judgment for Divorce on the grounds that the matter was on appeal and that his attorney had stated it was a void judgment. (Transcript, page 15)

Then counsel for the Plaintiff called Defendant's previous counsel, Honorable Luanne Thompson, who had represented him at the trial level. (Transcript, page 18)

Objection was made by Defendant's counsel as follows:

> BY MR. SMITH: Your Honor, before Mrs. Thompson comes in here, I'm going to object again. This is privileged information, and I don't' think this is something that he can go into with his attorney. I mean, this is a fundamental right to privilege under the Rules that nobody can ask someone, even in a criminal case, what their attorney advised them to do or not advised them to do, and I object to this, Your Honor. This is a fundamental right of my client to be protected in this regard. My issue is in this case, Ed can ask all of his questions on contempt that has nothing to do with conversations between them. I'm asking that the judgment be set aside as void on its face, and it has nothing to do with questions that arose between my client and his former attorney, and I find these questions to be improper if you are asking somebody to divulge what he said to his attorney or what his attorney told him. This is just a fundamental right.
>
> CHANCELLOR HATCHER: I am going to take into consideration your objection, and I will allow it to be a continuing objection, Mr. Smith.
>
> The issue, though, does seem to be one that your client has raised as one of his defenses to the contempt action that's been brought against him based upon his own testimony here today.
>
> Now, I am very mindful and appreciative of the attorney/client privilege. I am going to hear what she's got to say, and I am going to research the law just a little bit on that point, and then I will rule on it before I make a determinative ruling in this particular case.
>
> If I sustain your objection, I'll assure it will not be considered in my final determination on th is, but, otherwise, the objection is held in abeyance at this time.

BY MR. SMITH: I know, Your Honor, and I'm not trying to argue with the Court.

CHANCELLOR HATCHER: You did. You are now.

BY MR. SMITH: Yes, sir, but I just want to state for the record my...

CHANCELLOR HATCHER: You did. It's there.

BY MR. SMITH: ...objection that it's just not proper to listen to the testimony and then determine whether it's – it is clearly a violation of privilege, Your Honor.

CHANCELLOR HATCHER: I disagree with you at this point in time.

. . .

BY MR. SMITH: We contend on the legal argument of this it's void on its face, and it has nothing to do with communication between them, and I just strenuously object to this, Your Honor.

CHANCELLOR HATCHER: Your strenuous objection is noted and is taken under consideration.

At this point, Attorney Luanne Thompson was questioned. At no time did Luanne Thompson assert the attorney/client privilege as she should have done.

During the testimony of Attorney Luanne Thompson, Mr. Priest asked her:

Q At any time, did you ever pressure Mr. Cobb into signing his name?

A No.

Q Did you ever threaten Mr. Cobb into signing his name?

BY MR. SMITH: Your Honor, at this time, I'm going to object one more time for the record and have a continuing objection on attorney/client privilege and ask that of record that Mrs. Thompson not comment on privileged information, and the Court can rule whatever it wants, but I want that as a continuing objection.

CHANCELLOR HATCHER: You had a continuing objection, Mr. Smith. It is noted. I ask you not to interrupt us again.

BY MR. SMITH: I won't, Your Honor.

CHANCELLOR HATCHER: You do have a continuing objection. Now, let's not test me on this situation.

BY MR. SMITH: I'm not, Your Honor. I was making sure the record was clear on that.

CHANCELLOR HATCHER: It's very clear.

BY MR. SMITH: Thank you, Your Honor. (Transcript, pages 19, 20)

Luanne Thompson went ahead and answered extensive questions posed to her by the Plaintiff's attorney about comments, communications, and a host of privileged information regarding discussions between herself and the Defendant.

Even Judge Hatcher questioned the Luanne Thompson as to privileged communications between her and her client:

> Q All right. Did you relate to your client that he would stay married unless he did, in fact, sign this document and that that's what I told you?
> A No, judge, I didn't. No, sir. (Transcript, page 38)

In his Opinion and Judgment, the Chancellor ruled:

> "The Defendant's motion ore tenus to exclude testimony by the Defendant and his trial attorney, the Honorable Luanne Thompson, based on the lawyer-client privilege set forth in Rule 502 of the Mississippi Rules of Evidence is sustained, and said testimony is excluded, except to the extent the Defendant volunteered same in his case in chief and the exceptions of Rule 502(d)(3) and (4) of the Rules of Evidence, as to the signing of the Final Judgment for Divorce by the Defendant and his trial attorney, which motion is overruled for such." (Opinion and Judgment, page 15)

If it is the law of the State of Mississippi that the attorney/client privilege means that a chancellor can force a client to divulge confidential communications between himself and the attorney and then force the attorney to reveal confidential communications between the attorney and the client, and "take this under advisement," hear all the testimony and then sustain the objection to the divulgence of that information, then the attorney/client privilege means nothing.

Rule 502 of the Mississippi Rules of Evidence states in paragraph (b), "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer...."

In the case of *Nester v. Jernigan*, 908 So.2d 145 (Miss. 2005), Jernigan claimed that

Nester slandered him and filed suit. Jernigan sought to discover the name of the person who had told Nester certain derogatory facts about Jernigan. Nester asserted the attorney-client privilege. In upholding the attorney-client privilege the Court stated that:

> In *Hewes v Langston*, 853 So. 2d 1237 (Miss. 2003), this Court discussed the breadth and scope of the attorney-client privilege:
>
> > This Court has interpreted the scope of the attorney-client privilege under Mississippi law broadly, stating: the privilege relates to and covers all information regarding the client received by the attorney in his professional capacity and in the course of the representation of his client. Included are communications made by the client to the attorney and by the attorney to the client. In that sense it is a two-way street. *Barnes v. State*, **460 So. 2d 126,131** (Miss. 1984) (emphasis added). Further: "[the] privilege does not require the communication to contain purely legal analysis or advice to be privileged." *Dunn v State Farm Fire and Cas. Co.*, **927 So. 2d 869, 875,** (5th Cir. 1991),(applying Mississippi law). "Instead, if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged."*Id.* at 875.
>
> *Hewes v. Langston,* **853 So. 2d 1244**. See also *Williamson v. Edmonds*, **880 So. 2d 310, 319** (Miss. 2004) (reaffirming the position stated in *Hewes*). Both *Hewes* and *Williamson* recognize that "the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law," and "[i]ts purpose is to encourage full and frank communication between attorney and their clients." *Nester* at 148-149.

There was no statement or allegation in the Motion to Set Aside the Judgment, filed by the Appellant, that in any way waived the attorney-client privilege.

5. 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 reasoning vitiates the attorney/client privilege.

RESPECTFULLY SUBMITTED, this the 17th day of June, 2009.

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(662) 844-7221
Mississippi Bar No. [redacted]
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, Jak M. Smith, Attorney for Appellant, L. DENNIS COBB, certify that I have this day filed this *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 17th day of June, 2009.

JAK M. SMITH