IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
RE: NO. 2009-CA-01200-SCT

LAURA CARPENTER **APPELLANT**

V.

TANGELA BERRY, ET AL. **APPELLEE**

ON APPEAL FROM THE CHANCERY COURT
OF ADAMS COUNTY, MISSISSIPPI
TRIAL COURT NO.: 2005-432

REPLY BRIEF FOR APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

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STATEMENT OF THE CASE

The "Statement of the Case" presented in the Appellee Brief of Tangela Berry Banks and Ricky Banks is rife with unsubstantiated conjecture and internal contradiction. Mrs. Carpenter insists that the procedural posture and the record in this case speak for themselves. Where the Banks' characterization of the facts bears special attention, it is reserved for the Argument section. Without more, Mrs. Carpenter would only restate the issue on appeal: Judge Middleton abused his discretion under Miss. R. Civ. P. 60(b) in setting aside his approval of a fully-performed settlement.

ARGUMENT

The Appellees' arguments attack the procedure of the settlement's approval in 2005 and therefore appeal Judge Middleton's original approval instead of supporting Judge Middleton's discretion under Rule 60(b) and applicable law. These discussions avoid Judge Middleton's abuse of discretion under Rule 60(b) to set aside the settlement in 2009.

The letter and intent of Miss. Code Ann. § 93-13-59 and Rule 6.10 of the Uniform Chancery Court Rules were adhered to in 2005 and the settlement was accordingly approved. Mrs. Carpenter's counsel in no way represented the Banks in any fashion and provided the forms for settlement as a professional courtesy to the Banks and their counsel; all filings were approved, signed, and filed by the Banks and their counsel. With regard to *Union Chevrolet Co. v. Arlington, et al.*, 162 Miss. 816, 138 So. 593 (Miss. 1932), the record speaks for itself. The Banks' counsel testified to the evidence of liability against Mrs. Carpenter and to the damages suffered by young Ryhiem. T. at 3:4 – 4:5. The Banks' testified to their understanding of the settlement on behalf of Ryhiem. T. at 4:27 – 8:21. This testimony satisfied the provision of "witnesses who will give the full facts in behalf of the minors". *Union Chevrolet*, 138 So. at 827. Finally, Judge Middleton had the opportunity to ask any

questions necessary for Court approval of the settlement; he asked no questions and approved the settlement after the Banks' testimony. T. at 9:1-15.

All necessary procedure was followed and all necessary information was presented to Judge Middleton at the 2005 hearing. Judge Middleton nevertheless abused his discretion in setting aside the settlement under Rule 60(b) in 2009.

I. Judge Middleton Abused His Discretion by Setting Aside the 2005 Settlement for Additional Evidence after Six Months.

As the Banks' stated in their Brief, Rule 60(b)(6) is to be used "when relief is not warranted by the preceding clauses, or when it is uncertain that one or more clauses affords relief." *Page v. Siemens Energy & Automation, Inc.*, 728 So. 2d 1075, 1079 (Miss. 1998), *quoting Accredited Sur. and Cas. Co. v. Bolles*, 535 So. 2d 56, 59 (Miss. 1998). The Banks' reliance on Rule 60(b)(6) is in conflict with Judge Middleton's 2009 order to set aside the settlement for additional evidence. R. at 206. This conflict exposes Judge Middleton's abuse of discretion in setting aside the settlement.

The justification for an order setting aside Mrs. Carpenter's negotiated settlement for "insufficient evidence" and for "additional evidence" is Rule 60(b)(3) of the Mississippi Rules of Civil Procedure. While motions pursuant to Rules 60(b)(1) - (3) must be filed within six months of the judgment, a motion under 60(b)(6) must be filed within a reasonable time. Miss. R. Civ. P. 60(b). According to *Page* and *Accredited Surety*, Rule 60(b)(6) relief, and its reasonable time limit, is unavailable when one of the preceding clauses may be applied. Judge Middleton's express reliance on additional evidence bars the use of Rule 60(b)(6) and its reasonable time limit. Furthermore, Judge Middleton's decision to set aside his 2005 Decree for additional evidence after six months was an abuse of discretion.

II. Judge Middleton Abused His Discretion by Failing to Weigh Mrs. Carpenter's Prejudice and the Banks' Dilatory Tactics.

Despite the plain language of Judge Middleton's 2009 Order and the Banks' own arguments regarding additional evidence, the Banks insist that Judge Middleton properly relied on Rule 60(b)(6), and its reasonable time limit, to set aside the settlement over three years after Judge Middleton approved it. The Banks' Brief argues that their Amended Petition to set aside the settlement approval was made within the reasonable time prescribed by Rule 60(b)(6) based on the balancing testing referred to *Briney v. United States Fidelity & Guaranty Co.*, 714 So. 2d 962 (Miss. 1998). However, the Banks fail to support this argument with evidence that Judge Middleton conducted such an analysis. Judge Middleton's failure to conduct such an analysis and find that the motion was presented in a reasonable time was an abuse of discretion.

The record is absent Judge Middleton's analysis of the test referred to in *Briney*:

> What constitutes reasonable time must of necessity depend upon the facts in each individual case. The Courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and whether the moving party has some good reason for his failure to take appropriate action sooner.

Briney, 714 So. 2d at 966-67, *quoting Heirs-at-Law & Beneficiaries of Gilbert v. Dresser Industries, Inc.*, 158 F.R.D. 89, 96 (N.D. Miss. 1993). In *Briney*, the trial court made specific findings that the amount of time in which the petitioner took to seek relief from a judgment was unreasonable. *Briney*, 714 So. 2d at 967. The Supreme Court nevertheless held that the petitioner was entitled to relief from a judgment which permitted a subrogation claim to be satisfied by the estate over which the petitioner had been appointed administrator. *Id.* at 969. The Court found that the petitioner filed her motion within a reasonable time - eleven days after being appointed as administratrix of the estate and having standing to file the motion. *Id.* at 968.

Judge Middleton's 2009 order contained no findings regarding the reasonableness of the time period in which the Banks' filed their petition to set aside the settlement. R. at 206. The absence of Judge Middleton's analysis is in spite of numerous showings of Mrs. Carpenter's prejudice caused by delay of the Banks' petitions. T. at 18:26-29, 19:2-12, 20:8-12, 22:26 – 23:3, 23:12-17; R. at 166. This prejudice was fully presented by Mrs. Carpenter's counsel to Judge Middleton in August 2008, and incompletely quoted by the Banks' in their Brief:

> I think the prejudice is obvious on its face *to bring a defendant back into a case three years after the fact when the plaintiffs were represented by competent and able counsel. This was presented to the Court in all facets and it was agreed to by consenting parties and the consideration was paid...*

T. at 23:12-17, (emphasis added). The same showing is found in Mrs. Carpenter's response to the Banks' Amended Petition. R. at 166. The Banks' delay in seeking Rule 60(b) relief prejudiced Mrs. Carpenter by collaterally attacking a negotiated and completed settlement agreement years after the fact. After the acceptance of consideration paid by Mrs. Carpenter, the Banks dismissed her from civil litigation and have continued to pursue other defendants on separate claims. The delay of the Banks' petitions required Mrs. Carpenter to expend time and money to defend the collateral attack on the 2005 Decree and to catch-up on years of parallel litigation in the event Mrs. Carpenter became a party.

The reason for the Banks' delay, according to their Brief, was the discovery of Mrs. Carpenter's insurance coverage in 2008. Appellee Brief, p.12.[1] However, this fails to explain why quicker action was not taken. According to the record, the Banks' current counsel accepted representation in October 2006 and filed their original petition in July 2008, based on their *original*

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[1] The Banks' reliance on the discovery of additional evidence for the delay of their petition further underlines Judge Middleton's reliance on Rule 60(b)(3) to set aside the settlement.

theory that case law retroactively affected the settlement contract. T. at 22:13-23. The Banks conspicuously filed their Amended Petition because of "additional evidence" on October 28, 2008 - after this Court's opinion that the retroactive application of *J & J Timber Co. v. Broome*, 932 So. 2d 1 (Miss. 2006), was unconstitutional. *Whitaker v. T & M Foods, Ltd.*, 2008 WL 4427231 (Miss. October 2, 2008)(withdrawn and replaced at 7 So. 3d 893 (Miss. 2009)); *See* R. at 128. Yet the Banks' arguments in the Amended Petition were available to them in 2006. R. at 128-154; T. at 1-9.

According to the record, Judge Middleton failed to conduct the *Briney* balancing test to determine whether the Banks' Petition to Set Aside the Settlement was made within a reasonable time. This alone was an abuse of discretion. Nevertheless, Mrs. Carpenter was actually prejudiced by being ambushed years after the fact while the Banks' counsel delayed petitioning Judge Middleton in order to come up with an alternate argument. The Banks failed to seek relief within a reasonable time under the *Briney* test. Therefore, a finding that the Banks' Amended Petition was made within a reasonable time was an abuse of discretion.

III. Judge Middleton Abused His Discretion by Upsetting a Final Judgment in Full Disregard of the *Page* Factors.

Both Mrs. Carpenter and the Banks acknowledge the importance of the factors outlined in *Page v. Siemens Energy & Automation, Inc.*, 728 So. 2d 1075 (Miss. 1998)[2], in determining whether

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[2] "This Court also has recognized and applied several other factors when deciding if relief should be granted under Rule 60(b): (1) that final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether-if the judgment was rendered after a trial on the merits-the movant had a fair opportunity to present his claim of defense; (6) whether there are intervening equities that would make it inequitable to grant relief; and (7) any other factors relevant to the justice of the judgement under attack." *Page*, 728 So. 2d at 1079-80, *citing Briney*, 714 So. 2d 962, 968.

relief should be granted under Rule 60(b)(6). Yet Mrs. Carpenter disagrees with the Banks' contention that these factors are "intentionally broad" to allow a trial judge to do whatever he or she feels. Appellee Brief, p. 12. "Generally, consideration of a Rule 60(b) motion requires that a 'balance ... be struck between granting a litigant a hearing on the merits with the need and desire to achieve finality.'" *Lose v. Central Gulf Railroad Co.*, 584 So. 2d 1284, 1286 (Miss. 1991), *quoting Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984). The *Page* factors provide specific guidance for courts to conduct the "balance of the equities" necessary for the consideration of a Rule 60(b) motion. *See Lose*, 584 So. 2d at 1286, *according Guaranty Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 388 (Miss. 1987). The record is clear that Judge Middleton failed to conduct such a balancing testing and this failure was an abuse of discretion.

Had Judge Middleton conducted any such analysis, he would have found the *Page* factors tipping the balance of the equities to deny the Banks' attack on the 2005 settlement. For example, under factor (2), the Banks' petitions ultimately have turned out to be an appeal of Judge Middleton's 2005 approval process and failed to present legal grounds for relief under Rule 60(b). Under factor (3), Judge Middleton's construction of Rule 60(b) violated substantial justice by overturning a consummated settlement without legal authority and in spite of Mrs. Carpenter's prejudice. Pursuant to (4), the petition was made beyond a reasonable time considering that the Banks' delayed their petition to search for colorable grounds for relief and that this delay prejudiced Mrs. Carpenter. Under (5), Judge Middleton's approval of the settlement in 2005 was rendered after a hearing where the Banks' counsel testified regarding Mrs. Carpenter's potential liability and the Banks' damages, the Banks' testified concerning their understanding of the settlement, and Judge Middleton had ample opportunity to question the Banks and all counsel present. T. at 1 – 9.

Considering factor (6), intervening equities which make the Banks' relief inequitable include the actual prejudice of Mrs. Carpenter (the dissolution of her agreement with the Banks for which she paid consideration; her expenses preparing for her involvement as a party to litigation from which she was dismissed almost four years prior) and prejudice to the Banks (their return of all settlement proceeds, including proceeds paid to their former counsel, who they now allege was malfeasant).

The preeminent factor in the *Page* analysis is "that final judgments should not be lightly disturbed". *Page*, 728 So. 2d at 1079. That this factor supports the denial of the Banks' petition is apparent, but it also highlights policy concerns wholly ignored by Judge Middleton. Final judgments cannot be so easily overturned that a fully negotiated and fully performed settlement agreement can be unraveled *without reason and years after approval by the same judge*.

The metaphor of Rule 60(b) as a "grand reservoir of equitable power" illustrates these policy concerns. Rule 60(b) and its interpretive case law form the bulwark of a reservoir which reassures all litigants in the finality of judgments. This reservoir protects litigants' confidence in judgments by damming up spurious collateral attacks on judgments. More than just a dam, Rule 60(b) and its case law provide certain locks and releases which allow equitable relief from judgments in certain circumstances and with specific safeguards. Judge Middleton ignored these safeguards in 2009 at the expense of the finality of all judgments. Despite clear dictates under the law, he drilled a hole into the reservoir to allow allegedly equitable relief. Judge Middleton's decision to set aside his 2005 approval of the settlement was not only an abuse of discretion, but it will erode Rule 60(b) and its protection of the finality of judgments.

CONCLUSION

The Banks fail to explain Judge Middleton's abuses of discretion in setting aside his 2005 Decree approving the settlement between the Banks and Mrs. Carpenter. Judge Middleton's order that the settlement should be set aside for additional evidence was an abuse of discretion because it considered additional evidence after the six month time limit in Rule 60(b). While the Banks argue that Judge Middleton's order was justified under Rule 60(b)(6) and its reasonable time limit, the record is absent Judge Middleton's analyses regarding whether the petition was made within a reasonable time and whether such relief was justified after "balancing the equities." After analyzing each test, the record shows that the Banks' petition for relief was not made within a reasonable time and that the "balance of equities" tipped in favor of denying the Banks' relief. Judge Middleton's decision will ultimately weaken the confidence in the finality of judgments.

For these reasons, as well as those contained in Mrs. Carpenter's Appellate Brief, Mrs. Carpenter insists that Judge Middleton's 2009 Order overturning his 2005 Decree was an abuse of discretion pursuant to Rule 60(b) and relevant case law. As such, Judge Middleton's 2009 Order should be reversed and the Banks' Petition and Amended Petition to Set Aside the 2005 Decree should be denied.

This, the 25th day of May, 2010.

Respectfully submitted,

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