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

BRIEF FOR APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

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This the 16th day of February, 2010.

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STATEMENT OF ISSUES

The sole issue on appeal is whether the Honorable Kenneth Middleton of the Chancery Court of Adams County abused his discretion under Miss. R. Civ. P. 60(b) in setting aside a fully-performed settlement.

STATEMENT OF THE CASE

This is an appeal from an Order of the Adams County Chancery Court, Hon. Kenneth Middleton, setting aside a settlement between Laura Carpenter and Petitioners Tangela Berry and Ricky Banks. R. at 206. This Order was signed on June 30, 2009, and relieved Petitioners from a previous Chancery Court Decree authorizing the settlement between the parties pursuant to Rule 60(b). The original Decree Authorizing Settlement of Claim was signed by Judge Middleton after a hearing on August 11, 2005. R. at 30-41. This appeal comes before the Supreme Court on the Court's Order converting Ms. Carpenter's Petition for Interlocutory Appeal into a timely notice of appeal of a final judgment. R. at 207.

Ms. Berry and Mr. Banks petitioned the Chancery Court of Adams County, Mississippi, to be appointed as Guardians of the estate of their Minor son on July 7, 2005. R. at 2-5. According to the Petition, the Minor child was born on September 24, 2003, and was, by and through Ms. Berry and Mr. Banks, a Plaintiff in a civil suit before the Circuit Court of the First Judicial Circuit of Adams County against Tom Carey, Jr. M.D., Natchez Community Hospital, Inc., OB-GYN Clinic, Inc., Donielle Daigle, M.D. and Laura Carpenter. R. at 2; see also R. at 18-28. The Chancery Court ordered that Ms. Berry and Mr. Banks be appointed as their son's guardians on July 13, 2005, and the Chancery Court issued Letters of Guardianship on July 18, 2005. R. at 6; 9-10.

On August 4, 2005, Ms. Berry and Mr. Banks petitioned the Chancery Court to settle the Minor's claims against Defendant Laura Carpenter. R. at 11-29. According to the Petition signed by Ms. Berry and Mr. Banks, "[o]n June 13, 2005, the Plaintiffs and Defendant Laura Carpenter conducted settlement negotiations between themselves, which resulted in a negotiated settlement". R. at 12. The Petition provided that the Minor, by and through Ms. Berry and Mr. Banks, had the full benefit of counsel during these negotiations and Ms. Berry and Mr. Banks believed that the

Chancery Court's approval of the settlement was is the best interest of the Minor. R. at 12-13; [Ex. A]. In the Petition for Authority to Settle Minor's Claim, Ms. Berry and Mr. Banks expressly stated "that any and all claims which could be brought by them individually or by them on behalf of said Minor, ... will be forever terminated and extinguished as to Defendant, Laura Carpenter." R. at 13.

In their Petition for Authority to Settle Minor's Claim, Ms. Berry and Mr. Banks requested that the Chancery Court provide authority for them to execute an Agreed Order of Dismissal with Prejudice as to all claims against Defendant Laura Carpenter before the Circuit Court as well as all necessary Releases and/or Parent Guardian Indemnification Agreements to terminate all claims against Laura Carpenter. Id. The petitioners also requested that the Chancery Court entitle their attorney to an award of attorney's fees from the settlement for "good and valuable services". Id.

A hearing on the Petition for Authority to Settle Minor's Claim transpired on August 11, 2005, before the Honorable Kennie Middleton. T. at 1-9. Everett Sanders, counsel for Ms. Berry and Mr. Banks, began by stating that Laura Carpenter's involvement in the medical negligence case was negligible and that Ms. Carpenter's counsel had offered to settle. T. at 3:1-8. "In light of the evidence that we have of personal liability", stated counsel for Petitioners, "we think that while it's nuisance value we think that it is something that would be appropriate." T. at 3:9-11. After addressing how the settlement amount would be split among the Petitioners, the Minor, and their counsel, Mr. Sanders told the Court the extent of the Minors injuries:

> There are a number of outstanding bills that are owed to Medicaid, some $400,000.00 has been billed in connection with the treatment of the minor. Medicaid is making a claim for some $150-something thousand dollars. We have spoken with Medicaid and we are attempting to get them to waive any claim that they have against these proceeds... This is being looked at administratively and I have reason to believe that they're going to agree to the waiver.

T. at 3:21 – 4:1. Accordingly, the parties agreed to structure the language in the Release so that the settlement was not required to pay off any Medicaid lien. T. at 4:1-8.

Judge Middleton then proceeded to hear sworn testimony from Ms. Berry and Mr. Banks regarding the settlement under examination by counsel for Laura Carpenter. T. at 4:27 – 8:26. The Petitioners testified that they were petitioning for authority to settle the claim related to their son, on his behalf and in their own individual capacities. T. at 5:6-15; 7:5-13. They stated that by accepting the settlement, they were settling and releasing all claims alleged by them against Laura Carpenter for the settlement amount. T. at 5:18-22; 7:16-20. They testified that they fully understood that the settlement would prevent them from bringing any further actions against Laura Carpenter. T. at 6: 5-9; 8:13-17. They testified that the settlement included all causes and claims against Laura Carpenter, her representatives, heirs, insurers, agents, and assigns. T. at 5:23-28; 7:21-26. They testified that in agreeing to the settlement, they would voluntarily dismiss their claims against Laura Carpenter and that their attorney would execute an Agreed Order of Dismissal with Prejudice. T. at 5:29 - 6:4; 8:7-12. Finally, they stated that their decision to settle the matter was made in conjunction with advice from their attorney. T. at 6:10-12; 8:18-20.

Judge Middleton approved the settlement after finding that the proposed settlement was reasonable. T. at 9:1-3. The Court authorized the parties "to execute any and all documents necessary to consummate the settlement arrangement and to execute releases fully and finally releasing any and all parties against whom claims are now pending in this particular aspect of the case". T. at 9:3-7. The Court allowed Petitioners to receive funds to pay "reasonable and proper" attorney's fees. T. at 9:7-11.

According to the Decree Authorizing Settlement of Claimed signed by the attorneys and Judge Middleton, the Court stated "that said settlement and compromise is a fair and reasonable

settlement of a doubtful claim and it is in the best interest of the minor and all others that such sums should be accepted and said settlement made and consummated." R. at 32; [Ex. B]. The Court noted that the offer of settlement was "conditioned upon the execution and delivery of a full, final and complete" release and acquittance of Laura Carpenter. Id. An unsigned copy of the Release was attached to the Decree as Exhibit I. R. at 34-41. The purpose and intent of the Release was not to release any claims that the Petitioners or the Minor had against any other defendant in the civil action. R. at 37. Furthermore, "Th[e] Release with Covenants contains the entire agreement between the parties hereto, and the terms of this Release are contracted, not mere recitals." Id. The Release was signed by Ms. Berry, Mr. Banks, and their attorneys on August 24, 2005. R. at 86-93.

On July 17, 2008, new counsel for Ms. Berry and Mr. Banks filed their Petition to Set Aside Settlement with the Chancery Court of Adams County. R. at 43-103; [Ex. C]. The Petitioners argued that because of the subsequent decision in *J & J Timber Co. v. Broome*, 932 So. 2d 1 (Miss. 2006), the settlement agreement entered into by Petitioners was not in the best interest of the Minor and must be set aside. R. at 45. The Petitioners explained that *J & J Timber* retroactively "made [the Chancery] Court's approval of the settlement agreement unworkable as a matter of law" because the decision changed established precedent regarding settlement agreements such that releasing a tortfeasor released the tortfeasor's employer for claims based on vicarious liability. R. at 47-48.

The Petition claimed that because of *J & J Timber*, the settlement reached with Laura Carpenter released a potential vicarious liability claim against Laura Carpenter's employer, Natchez Community Hospital, in addition to all claims against Ms. Carpenter personally. R. at 48. The Petitioners argued that the settlement must be set aside pursuant to Rule 60(b) because "this settlement on behalf of the minor was approved based on the fact that all claims, including vicarious liability claims, were being preserved against all remaining defendants." R. at 47. Petitioners

claimed that setting aside this settlement was warranted under 60(b)(6) because the settlement was based on an erroneous legal conclusion. R. at 49, *citing Williams v. Rembert*, 654 So. 2d 26, 28-29 (Miss. 1995).

The Petition presented *In re Guardianship of Lane*, 994 So. 2d 775 (Miss. App. 2008) to support that the settlement with Ms. Carpenter should be set aside because of *J & J Timber*. R. at 45-46. Petitioners argued that *Lane I* approved a Chancery Court decision to set aside a settlement because *J & J Timber* retroactively altered a settlement agreement which was approved on the condition that a similar vicarious liability claim would remain viable. Id. Petitioners also cited the chancellor's role as a guardian over minors before pleading that "this Court should not allow the minor... to be prejudiced by the omission and/or neglect of his guardians, attorneys, and other people involved with the settlement with Laura Carpenter." R. at 46. In addition to Rule 60(b), Petitioners also argued that the settlement should be set aside or rescinded for no meeting of the minds, an indemnity provision which was void as a matter of law, impossibility of performance, and for misrepresentation – all because *J & J Timber* allegedly released a potential vicarious liability claim. R. at 49-52.

On July 24, 2008, counsel for Laura Carpenter filed her Objection and Motion to Stay Pending Resolution of Writ of Certiorari. R. at 109-12; [Ex. D]. Ms. Carpenter asked the Chancery Court to stay the consideration of Petitioners' Motion to Set Aside Settlement until the Supreme Court considered a pending Petition for Writ of Ceritorari challenging *Lane I*. R. at 110. Petitioners responded to this motion that the Supreme Court's review of *Lane I* was irrelevant to the Chancery Court's ruling. R. at 117-20. Petitioners set their Motion to Set Aside the Settlement for hearing on August 26, 2008. R. at 121-22.

At the hearing on Petition to Set Aside Settlement, Judge Middleton interrupted and asked to conference with all counsel, as Petitioners' counsel began his argument. T. at 13:1-4. When the hearing re-convened, Judge Middleton stated: "In light of that we better make the record clear that we have had a conference concerning the fact that one of the parties in this case is the son of a former secretary of the Judge and that this is made known to all parties..." T. at 13:11-14. Judge Middleton had informed the parties that Petitioner Ricky Banks' mother had previously been a secretary for him. All parties agreed to proceed as none perceived a conflict. [1]

Counsel for Petitioners proceeded to argue that the result of *J & J Timber* undermined the purpose of the settlement to release only Laura Carpenter and that *Lane I* directed the Court to set aside the settlement by factual analogy. T. at 13:21 – 16:29. Counsel stated:

> given the catastrophic injuries of this minor child, given their legitimate and credible claims against Natchez Community Hospital, this Court, as the Superior Guardian and under your responsibilities, Your Honor, would not and could not have approved the settlement of a doubtful claim of a minor for that nominal amount of money if it meant releasing a credible claim against the hospital that did have the coverage that would help pay the damages, the catastrophic damages that this child has suffered...

T. at 14:9-18.

Counsel for Laura Carpenter distinguished *Lane I* on two grounds: that Petitioners and Minor had other claims against Laura Carpenter's employer that were not solely dependent on the hospital's vicarious liability for Laura Carpenter's actions and that the amount of time between the *J & J Timber* decision and the motion to set aside prejudiced Laura Carpenter. T. at 17-20. Counsel for Ms. Carpenter stated:

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Judge Middleton failed to notify counsel that he served as Executive Director of the Jefferson Comprehensive Health Center, an organization Plaintiff Ricky Banks has worked for since 2003. This fact was not discovered until Judge Middleton's death.

> 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. In rebuttal, counsel for Petitioners stated that "the only thing that this Court has to consider is that at the time of this settlement, that the settlement was approved, that all parties under the understanding that there would be no claims dismissed against Natchez Community Hospital for vicarious liability." T. at 20:27 – 21: 3. Before the hearing adjourned, Petitioners maintained that *Lane I* was only a guide for the court and that "what we're asking [the Court] to do is apply Rule 60(b), apply contact [sic] law to this and have it set aside." T. at 24:17-19.

Thereafter, on October 28, 2008, counsel for Petitioners filed their Amended Petition to Set Aside Settlement. R. at 128-154; [Ex. E]. Petitioners conceded that under *Whitaker v. T & M Foods, Ltd.*, 2008 WL 4427231 (Miss. October 2, 2008)(withdrawn and replaced at 7 So. 3d 893 (Miss. 2009)), the retroactive application of *J & J Timber* was prohibited by the Contracts Clause of the Mississippi Constitution and was inapplicable to the Minor's vicarious liability claim against Laura Carpenter's employer. R. at 128. Nevertheless, Petitioners argued that the settlement should be set aside because they had subsequently learned that Laura Carpenter had insurance coverage. R. at 128. Relying on correspondence from June 2005 (R. at 29; 141) and the hearing transcript from August 2005, Petitioners claimed that their prior counsel lied to the Court regarding their diligent efforts to effect a settlement. R. at 129. Further, they alleged that "counsel was complicit in the failure to provide [the insurance coverage] information to the Court", and that "defense counsel took undue advantage of this disabled minor and his poor representation of counsel." R. at 129.

Petitioners' Amended Petition asserted that the settlement should be set aside "as it is based on incorrect facts and not in the best interest of the minor" and "because the settlement amount was

nominal, especially in relation to Ms. Carpenter's insurance coverage" R. at 130-131. Petitioners pointed to the phrase "nuisance value" to indicate that the settlement was in the best interest of counsel and not the Minor. R. at 130. Petitioners argued that "[i]t is absurd to release what appears to be the most culpable tortfeasor for such a nominal amount when coverage exists that could contribute to make this minor whole." R. at 130. The Petitioners prayed that Judge Middleton "set aside the settlement contract between the Plaintiffs and Laura Carpenter pursuant to Rule 60(b) and other reasons discussed *supra*." R. at 131.

On December 11, 2008, counsel for Laura Carpenter filed her Response to the Petition and Amended Petition to Set Aside Settlement with the Chancery Court. R. 157 – 189; [Ex. F]. Ms. Carpenter's response noted that *Lane I* was reversed by the Supreme Court in *In re Guardianship of Lane*, 994 So. 2d 757 (Miss. 2008), because the settlement had been fully performed, thereby precluding an argument that performance was impossible. R. at 160. Similarly, Laura Carpenter's settlement was complete, and therefore not impossible to perform, after the execution of the Release Agreement (See R. at 86-93), the payment of the settlement proceeds, and Laura Carpenter's dismissal with prejudice from the related circuit court case. R. at 162. The response also recognized Petitioner's concession that the Minor's vicarious liability claims remain viable under the Contract Clause of the Mississippi Constitution. R. at 161-162. (citing *Whitaker*, 7 So. 3d 893 (Miss. 2009)).

Regarding the arguments proffered in the Amended Petition, Ms. Carpenter's response noted that any application of Rule 60(b)(1), (2), and (3) was expressly time barred. R. at 163. The response then confronted the Amended Petition's allegations with the corresponding section of Rule 60(b) and case law. R. at 164 - 166. Petitioners failed to provided clear and convincing evidence of fraud or misrepresentation to support Rule 60(b)(1). R. at 164. Petitioners failed to show

exceptional circumstances to justify an accident or mistake under Rule 60(b)(2). R. at 165. Petitioners' use of Rule 60(b) was an improper attempt to relitigate what the Petitioners and the Chancery Court had determined to be in the best interest of the Minor. R. at 166. Finally, the response reiterated the "complete injustice to Laura Carpenter" if the settlement were set aside as Ms. Carpenter would be forced back into circuit court "to relitigate a case which was dismissed with prejudice some three years earlier." R. at 166. The response requested that the Petitions be denied because the settlement had been fully performed and that the Petitions failed to satisfy the requirements of Miss. R. Civ. P. 60(b). R. at 166 – 167.

Five months after Laura Carpenter's Response, counsel for Petitioners filed a Supplement to Petitioners' Amended Petition to Set Aside Settlement. R. at 194 – 201. The Supplement attached affidavit testimony of Ms. Berry and Mr. Banks and claimed that neither parent was "fully appraised of the settlement or the potential ramifications" of releasing Ms. Carpenter. R. at 194. The supplement claimed that Petitioners' counsel did not inform them of Ms. Carpenter's potential liability in the case, any expert opinions, the value of Petitioners' case, or the amount of Ms. Carpenter's insurance. R. at 194. The parents stated as much in their Affidavits. R. at 198; 200; [Ex. G].

The supplement claimed that the Petitioners "relied to their detriment on the misrepresentations of counsel to Petitioners and the Court that the settlement was the best they could receive from this Defendant and was in the best interest of the minor." R. at 195. The Petitioners averred that had they been fully informed beforehand of the circumstances surrounding the settlement, including Ms. Carpenter's insurance coverage, they would not have agreed to the settlement. R. at 198 – 199; 200 – 201. The supplement concluded that, "the Court's ruling allowing the settlement should be set aside as it is based on erroneous and misleading facts and

counsel's misrepresentations" and "because it is not in the best interest of the minor." R. at 195-196.

A notice for a July 1, 2009, status conference by telephone of the parties before Judge Middleton was filed by Petitioners' counsel on June 30, 2009. R. at 204. This hearing was preempted by Judge Middleton's Order Granting Petitioners' Petition to Set Aside Settlement pursuant to Rule 60(b), which was signed on June 30, 2009. R. at 206; [Ex. H]. According to the Order, the Court examined "said Original and Amended Petitions and Supplement thereto and the facts as established by pleadings and supporting evidence" and found:

> that the Petition... [is] well taken as there was insufficient evidence at the time of settlement and at the August 11, 2005, hearing on Petition to Approve Settlement to establish that Petitioners' settlement with Defendant Laura Carpenter was fair and reasonable and in the best interest of the minor,... Further, additional evidence has been presented to the Court which demonstrates that the... settlement with Ms. Carpenter was not fair and reasonable and in the minor's best interest.

R. at 206 (emphasis added).

Thereafter, Laura Carpenter filed her Petition for Interlocutory Appeal. The Supreme Court treated Ms. Carpenter's Petition for Interlocutory Appeal as a timely Notice of Appeal of Judge Middleton's Order setting aside the settlement. R. at 207.

SUMMARY OF THE ARGUMENT

Judge Middleton abused his discretion by setting aside the settlement between Laura Carpenter and Petitioners. The Order fails to evoke any subsection of Rule 60 (b) for authority. The Order's references to additional evidence suggests a reliance on Rule 60(b)(3), which is an abuse of discretion as the Petition to Set Aside Settlement was filed more than six months after the settlement. The extensive lapse of time between the judgment and the petitioned-for relief as well as the "best interests of the minor" suggest a reliance by Judge Middleton on either Rule 60(b)(5) or (6). The judge's reliance on either subsection is an abuse of discretion because the facts do not apply to subsection (5) and because no regard was given to the prejudice suffered by Ms. Carpenter because of the relief demanded.

Despite the abuses of discretion on the face of Judge Middleton's Order, the record reveals Petitioners' failed claims under Rule 60(b)(1), (2), and (4). Judge Middleton's reliance on any of these subsections is an abuse of discretion because Petitioners' claims are expressly time-barred under Rule 60(b)(1) or (2) and because the settlement was not void to satisfy Rule 60(b)(4). Additionally, Judge Middleton's failure to make findings of fact and conclusions of law was an abuse of discretion under *Tricon Metals & Services, Inc. v. Topp*, 516 So. 2d 236 (Miss. 1987). Finally, Judge Middleton's refusal to address the policy concerns inherent in overturning a fully-performed damages settlement is also an abuse of discretion.

For these abuses of discretion within Judge Middleton's Order, Laura Carpenter asks that the Mississippi Supreme Court reverse the decision of the Adams County Chancery Court.

ARGUMENT

I. Standard of Review

The grant or denial of a Rule 60(b) motion is reviewed for an abuse of discretion. *Page v. Siemens Energy & Automation, Inc.*, 728 So. 2d 1075, 1079 (Miss. 1998). Rule 60(b) motions should be denied where they are merely an attempt to relitigate the case. *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984), *citing Mastini v. American Telephone and Telegraph Co.*, 369 F. 2d 378 (2nd Cir. 1966), *cert. den.* 387 U.S. 933 (1967). Consideration of a Rule 60(b) motion requires that a balance be struck between granting a hearing on the merits and the need to achieve finality, and it is this "balancing act" which is reviewed for an abuse of discretion. *Lose v. Illinois Cent. Gulf R.R. Co.*, 584 So. 2d 1284, 1286 (Miss. 1991), *citing Stringfellow*, 451 So. 2d at 221, *and according Guaranty Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 388 (Miss. 1987).

Normally, the findings of a chancellor will not be disturbed unless manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Montgomery v. Montgomery*, 759 So. 2d 1238, 1240 (Miss. 2000), *citing Bell v. Parker*, 563 So. 2d 594, 596-97 (Miss. 1990). Yet in cases of particular complexity tried upon the facts without a jury, a trial court should find the facts specially and state its conclusions thereon. *Tricon Metals & Services, Inc. v. Topp*, 516 So. 2d 236, 239 (Miss. 1987). "Where a case is hotly contested and the facts greatly in dispute and where there is any complexity involved therein, failure to make findings of ultimate fact and conclusions of law will generally be regarded as an abuse of discretion." *Id.*

II. Judge Middleton Abused His Discretion to Set Aside Laura Carpenter's Settlement under Rule 60(b)

On a motion based "upon such terms as are just", Rule 60(b) of the Mississippi Rules of Civil Procedure enables a trial court to relieve a party from a final judgment, order, or proceeding for a

limited number of reasons. *Miss. R. Civ. P. 60(b).* These reasons are: (1) fraud, misrepresentation, or other misconduct of an adverse party; (2) accident or mistake; (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; and (6) any other reason justifying relief from judgment. *Id.* Under Rule 60(b)(1), (2), or (3), "[t]he motion shall be made... not more than six months after the judgment order or proceeding was entered or taken." *Id.* Otherwise, motions pursuant to Rule 60(b)(4), (5), or (6) "shall be made within a reasonable time". *Id.*

On August 11, 2005, Judge Middleton decreed "[t]hat this Court has reviewed and heard evidence concerning the relevant information, [and] that [the settlement] is the best offer that can be had after long, hard and diligent efforts by Petitioners and that it is in the best interest of Ryheim Banks, a minor, and Petitioners". R. at 31. The Decree approved the settlement because it "is a fair and reasonable settlement of a doubtful claim and it is in the best interest of the minor". R. at 32. Almost four years later, on June 30, 2009, Judge Middleton reversed his previous decree, citing "insufficient evidence" in 2005 to approve the settlement, and "additional evidence" which demonstrated the "settlement with Ms. Carpenter was not fair and reasonable and in the minor's best interest." R. at 206. Judge Middleton did not invoke any of the 5 enumerated reasons in Rule 60(b), nor the catch-all subsection in Rule 60(b)(6), and generally issued the Order "pursuant to Rule 60(b)." Id.

Judge Middleton's decision to upset Ms. Carpenter's fully-performed settlement was an abuse of discretion under Rule 60(b). Though he failed to specify any subsection of Rule 60(b) as authority, Judge Middleton abused his discretion by setting aside the settlement through an order

whose language directly contravened Rule 60(b)(3), (5) and (6). Judge Middleton abused his discretion by dignifying Petitioners' arguments to set aside the settlement under Rule 60(b)(1), (2) and (4). Judge Middleton abused his discretion by failing to issue an order devoid of any factual findings or conclusions of law. Finally, Judge Middleton's decision violates the finality in judgments and undermines the public's confidence in the judicial system.

A. The Order Violated Rule 60(b)(1), (2) and (3)

Rule 60(b)(1) empowers a court to relieve a party from a judgment for the fraud, misrepresentation, or other misconduct of an adverse party. The burden is on the movant to prove fraud, misrepresentation or other misconduct by clear and convincing evidence. *Stringfellow v. Stringfellow*, 451 So. 2d at 221, *citing Rozier v. Ford Motor Company*, 573 F. 2d 1332 (5th Cir. 1978). The movant must show "(1) that the adverse party engaged in fraud or other misconduct and (2) that this misconduct prevented the moving party from fully and fairly presenting his case." *Washington v. Patlis*, 916 F. 2d 1036, 1039 (5th Cir. 1990), *as quoted in Moore v. Jacobs*, 152 So. 2d at 1018. No such proof was presented. Ever.

Petitioners argued in the Amended Petition to Set Aside the Settlement that counsel for Ms. Carpenter withheld information, specifically her insurance coverage, from the court to defraud the disabled minor. R. at 128-29. Petitioners later averred that they were "not informed by either [their] counsel or counsel for Defendant that Ms. Carpenter had $1,000,000.00 in insurance coverage for [their] claims in the above reference lawsuit." R. at 198-199 and 200-201. The Petitioners went on to claim that they would not have agreed to the settlement had they been informed by parties' counsel. The claims that (1) the minor was defrauded by the actions of Ms. Carpenter's counsel and/or that counsel for Ms. Carpenter misrepresented or improperly withheld information; and (2)

that the misconduct prevented the Petitioners from gaining a fair settlement places Amended Petition within the purview of Rule 60(b)(1). These claims are wholly unsupported and are time barred. The six month limit applies to bar the Petition and Amended Petition. Therefore Judge Middleton's grant of the Petition and Amended Petition in spite of the six month limit is an abuse of discretion.

Rule 60 (b)(2) allows a court to set aside a final judgment based on accident or mistake and it must be cited within six months of the judgment. *Miss. R. Civ. P. 60(b)(2)*; *Lose v. Illinois Cent. Gulf R.R. Co.*, 584 So. 2d 1284, 1286 (Miss. 1991). "[A] party is not entitled to relief merely because he is unhappy with the judgment, but he must make some showing that he was justified in failing to avoid mistake or inadvertence; gross negligence, ignorance of the rules, or ignorance of the law is not enough." *Stringfellow*, 451 So. 2d at 221, *citing* 11 Wright and Miller, *Federal Practice and Procedure*, § 2858, p.170 (1973). Relief from a judgment is not to be granted because the entry may have resulted from incompetence or ignorance on the part of the movant's attorney. *Id.*, *citing Clarke v. Burkle*, 570 F. 2d 824, 831 (5th Cir. 1978).

Petitioners asked Judge Middleton in their Petition to Set Aside the Settlement that "this Court should not allow the minor... to be prejudiced by the omission and/or neglect of his guardians, attorneys, and other people involved with the settlement with Laura Carpenter." R. at 46. In their Amended Petition, they argued that the settlement should be set aside because "it is based on incorrect facts and not in the best interest of the minor." R. at 130. Petitioners claim that they were mistaken that the settlement amount was incompatible with the value of the Petitioners' potential claim. R. at 130. Consequently, the Petitioners argue that their mistake led them to accept an unreasonable settlement: "It [was] absurd to release what appears to be the most culpable tortfeasor for such a nominal amount..." R. at 130. The mistakes claimed in the Petition and the Amended

Petition fall under the authority of Rule 60(b)(2) and are subject to the six month time limitation. Judge Middleton's setting aside the settlement more than six months after the settlement was an abuse of discretion.

Judge Middleton's use of the words "insufficient evidence" and "additional evidence" in his Order strongly supports his reliance on Rule 60(b)(3) to set aside the settlement. Judge Middleton's reliance on Rule 60(b)(3) was an abuse of his discretion in considering newly discovered evidence more than six months after the judgment.

Rule 60(b)(3) states that a court may relieve a party from a final judgment for "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial un Rule 59(b)." *Miss. R. Civ. P. 60(b)(3).* A motion for relief under Rule 60(b)(3) must be made within six months after the final judgment was entered. *Id.* Under this rule, "new evidence is 'evidence in existence of which a party was excusably ignorant, discovered after trial. In addition, facts implying reasonable diligence must be provided by the movant. The evidence must be material, and not cumulative or impeaching, and it must be such as to require a different result.'" *Page v. Siemens Energy and Automation, Inc.*, 728 So.2d 1075, 1079 (Miss. 1999), *quoting January v. Barnes*, 621 So. 2d 915, 920 (Miss. 1992).

The Supreme Court's analysis in *Sartain v. White*, 588 So. 2d 204 (Miss. 1991), is helpful here. After Ms. Sartain's lawsuit was dismissed, a jury awarded damages against her for counterclaims of slander and libel. *Sartain*, 588 So. 2d at 205-06. After retaining new counsel, Ms. Sartain moved for relief from the judgment on the grounds that her counsel had newly discovered evidence. *Id. at 206.* Appealing the denial of this motion, Mrs. Sartain argued that the discovery of her mental condition was newly discovered evidence. *Id. at 212.* This argument was refuted by the Court:

> Mrs. Sartain's mental condition... was open and obvious to anyone who cared to observe it. That [her current attorney] was not the attorney of record at that time so that a "discovery" of incompetence or insanity could not be made until later will not work to Mrs. Sartain's benefit at this point.

Id. at 212. Additionally, the Court recognized the trial court's findings that Mrs. Sartain was not legally incompetent. *Id.*

The record here is indisputable: the Petition to Set Aside the Settlement was filed on July 21, 2008, almost three years after Judge Middleton's decree authorizing the settlement in August 2005. Judge Middleton's Order Setting Aside the Settlement for "additional" and "insufficient evidence", signed in June 2009, was therefore a clear abuse of the court's discretion under Rule 60(b)(3).

Notwithstanding the six-month time limit, the Court's abuse under subsection (3) continues because Petitioners produced no new or "additional" evidence to Judge Middleton. The judge knew that Petitioners faced hundreds of thousands of dollars in medical expenses because their initial counsel so testified in 2005. T. at 3:21 – 4:1. Besides actual damages, the judge knew that Petitioners were settling the Minor's pain and suffering claims because the Petitioners both testified as such. T. at 5:18-22; 7:16-20. The judge knew that Petitioners' first counsel failed to conduct discovery because of the June 2005 letter attached to the Petition to Authorized Settlement. R. at 29.

The extent of Ms. Carpenter's insurance coverage is not new evidence because, like Mrs. Sartain's mental condition, it was open and obvious to Petitioners' counsel under the Rules of Civil Procedure. The Complaint in the circuit court case was filed on June 4, 2004. R. at 18-28. The litigation from which Ms. Carpenter was dismissed had therefore been ongoing for four years when the Petition to Set Aside the Settlement was filed in July 2008, a period during which Ms. Carpenter could have been deposed, as a fact witness, and her insurance coverage discovered. According to

the Amended Petition, this information was freely given at the August 2008 hearing. R. at 129. Yet, even if it might be new evidence, it is not material. The amount of Ms. Carpenter's coverage is irrelevant because the judge knew in 2005 that the settlement would *always be* a small fraction of the damages already incurred in the treatment of the two year old child. This fraction was further reduced by the court's grant of attorneys' fees to Petitioners' original counsel in 2005 – despite the court's knowledge that counsel failed to conduct discovery as to insurance coverage. T. at 3:14-19.

Judge Middleton abused his discretion in setting aside the settlement between Petitioners and Laura Carpenter for "insufficient evidence" and "additional evidence" under Rule 60(b)(3). The Petition to Set Aside the settlement was filed in July 2008, nearly three years after the authorization of the settlement, and in direct contravention of the six month time limit of Rule 60(b)(3). Despite the time bar, Judge Middleton abused his discretion by setting aside the settlement where no new evidence existed. Judge Middleton's order should be reversed.

B. The Order's Failure Under Rule 60(b)(4)

In their Petition to Set Aside the Settlement, Petitioners argued that the ruling in *J & J Timber Co. v. Broome*, 932 So. 2d 1 (Miss. 2006), applied retroactively to their settlement with Ms. Carpenter. Petitioners argued that the result of this case law caused the settlement to be void as a matter of law because it released a vicarious liability claim against Ms. Carpenter's employer which was contrary to the intent of the settlement. Considering the Petitioners' concession in their Amended Petition that the Contracts Clause of the Mississippi Constitution prevents such retroactive action of case law on contracts, Judge Middleton abused his discretion in relying on Rule 60(b)(4) to set aside the settlement.

Judgments have been set aside for being void under Rule 60(b)(4) for jurisdictional problems and due process concerns. *Overby v. Murray*, 569 So. 2d 303 (Miss. 1990); *Bryant, Inc. v. Walters*, 493 So. 2d 933, 937 (Miss. 1986) (Default judgment rendered in violation of bankruptcy stay was void.). Arguments that a judgment should be set aside because the movant was potentially insane have also been recognized. *Sartain v. White*, 588 So. 2d 204, 212 (Miss. 1991). A judgment cannot be set aside as void because it is erroneous. *Bryant, Inc.*, 493 So. 2d at 937, *citing City of Starkville v. Thompson*, 260 So. 2d 191 (Miss. 1972).

Petitioners presented no argument to Judge Middleton that the decree authorizing the settlement was a nullity and should be set aside under Rule 60(b)(4), but rather that the settlement agreement was void as a matter of law. Petitioners later conceded that the Mississippi Constitution prevents the retroactive effect of case law which might have otherwise influenced the intentions of the settling parties. *Whitaker*, 7 So. 3d 893 (Miss. 2009). In any event, the performance of this settlement was completed, thereby foreclosing any argument that the parties' intentions could not be satisfied. *See In re Guardianship of Lane*, 994 So. 757, 764 (Miss. 2008). Judge Middleton therefore abused his discretion in setting aside the settlement under Rule 60(b)(4).

To conclude, the Court of Appeals recognized that the six month time limitation on Rule 60(b)(1), (2), and (3) is the result of equitable tension between the need to achieve finality in litigation and the inevitability that parties and witnesses may misrepresent facts which are difficult to contemporaneously discover . *Brown v. Estate of Johnson*, 822 So. 2d 1072, 1074 (Miss. App. 2002). The time period following a judgment provides litigants an opportunity to discover evidence of fraud, misrepresentation, or mistake and protects a valid judgment from collateral attacks once this window is closed. *Id.* Here, Petitioners could have presented claims of fraud, misrepresentation, and mistake to Judge Middleton within six months of his decree authorizing the settlement. Their

failure to do so prevents an attack on a fully performed settlement which the record shows was entered into in good faith after negotiations between the parties. Judge Middleton's failure to recognize this time constraint in setting aside the settlement is an abuse of discretion which requires his order to be reversed. Additionally, the order should be reversed because of Judge Middleton's abuse of discretion under Rule 60(b)(4) as the settlement decree was not void.

C. The Order Abused Rule 60(b)(5)

In addition to new evidence, Judge Middleton refers to "the best interests of the minor" in setting aside the Petitioners' settlement. Judge Middleton avoids any mention of the nearly four-year gap between his authorization of the settlement and his Order setting it aside, implying, but not stating, that the court found authority under the "reasonable time limit" proscribed for Rule 60(b)(5) and (6). A reliance on Rule 60(b)(5) can also be inferred from the references elsewhere in the record to a chancellor's duty to protect the minor's best interests. R. at 46; T. at 14:9-18. However, Judge Middleton's use of Rule 60(b)(5) was an abuse of discretion because Petitioners' settlement required no prospective maintenance by the court. Further, Judge Middleton abused his discretion under subsection (5) by failing balance the equities of the parties before issuing his order.

Under Rule 60(b)(5), relief from judgment is permissible if "it is no longer equitable that the judgment should have prospective application..." *Miss. R. Civ. P. 60(b)(5).* A motion for relief under Rule 60(b)(5) must be made within a reasonable time. *Id.* The reasonable time limit of Rule 60(b)(5) depends on the facts of the individual case regarding whether the party opposing the motion has been prejudiced by the delay and whether the moving party had good reason for failing to take appropriate action sooner. *Briney v. United States Fidelity & Guaranty Co.*, So. 2d 962, 966-67 (Miss. 1998), q*uoting Gilbert v. Dresser Indust., Inc.*, 158 F.R.D. 89, 96 (N.D. Miss. 1993). In

considering a Rule 60(b)(5) motion for relief from a default judgment, this Court has stated:

> Ascertaining the meaning of the provisions of Rule 55(c) and Rule 60(b)(5) and (6) with any degree of precision simply may not be done for the language is hopelessly open textured. A consideration of the criteria of those rules together boils down almost to a balancing of the equities-in whose favor do they preponderate, the plaintiff or the defendant?

Guaranty Nat'l Ins. Co. v. Pittman, 501 So. 2d 377, 388 (Miss. 1987); *see also Chassaniol v. Bank of Kilmichael*, 626 So. 2d 127 (Miss. 1993)(Reversing denied Rule 60(b)(5) motion to set aside default judgment). This equitable consideration is similar to the analysis in consideration of Rule 60(b)(6) motions. *See Lose v. Illinois Cent. Gulf R.R. Co.*, 584 So. 2d 1284, 1286 (Miss. 1991)(giving accord to *Pittman*'s "balance of the equities").

The application of Federal Rule of Civil Procedure 60(b)(5) to a money settlement between parties is outlined in *In re Master Key Antitrust Litigation*, 76 F.R.D. 460 (D.C. Conn. 1977).[2] In *Master Key*, defendants settled out of a lawsuit without admitting liability and later sought to have the settlement set aside after a subsequent law would have removed them from liability. *In re Master Key Antitrust Litigation*, 76 F.R.D. at 462. The court noted that "[t]he language of Rule 60(b)(5) providing for relief from final judgment... embodies the traditional power of a court of equity to alter an injunctive decree to adapt to new or unforeseen conditions." *Id.* at 463. The rule does not cover a judgment for money damages. *Id.*, *citing Ryan v. United States Lines Co.*, 303 F. 2d 460, 434 (2d Cir. 1962). "When the court had approved the settlement and the money had been paid," the magistrate held, "the settlement was consummated, and the actions were dismissed with prejudice. Thus, defendants no longer have any interest in the fund." *Id.*

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Mississippi's Rule 60 has been found to be virtually identical to federal Rule 60 and in situations involving similar state and federal rules, the Mississippi Supreme Court will consider authoritative federal constructions when determining what Mississippi's construction should be. *Lose v. Illinois Cent. Gulf R.R. Co.*, 584 So. 2d 1284, n.1 (Miss. 1991).

Judge Middleton abused his discretion under Rule 60(b)(5) because the rule does not apply to a settlement with no proscriptive application. The use of Rule 60(b)(5) in this case set aside a monetary settlement which was negotiated between two consenting and represented parties. In 2005, the judge ordered that the settlement "is a fair and reasonable settlement of a doubtful claim and it is in the best interest of the minor and all others that such sums should be accepted and said settlement made and consummated." R. at 32. The settlement was conditioned on the execution and delivery of a settlement agreement, payment of the settlement proceeds, and Ms. Carpenter's dismissal with prejudice from the related circuit court case. Id. Therefore, the Petitioners' execution of the release, payment of the settlement proceeds, and Ms. Carpenter's dismissal with prejudice consummated the settlement and ended Judge Middleton's involvement. Unlike a chancellor's role in an injunction, there was no need for Judge Middleton to supervise settlement after 2005; there were no changing circumstances which turned the court's mandate "into an instrument of wrong." *United States v. Swift & Co.*, 286 U.S. 106, 114-15, 52 S.Ct. 460, 462 (1932), *as quoted in In re Master Key*, 76 F.R.D. at 463. Judge Middleton's setting aside the settlement was therefore an abuse of discretion.

Judge Middleton's reliance on Rule 60(b)(5) was also an abuse of discretion because he ignored the unreasonable time period between the decree authorizing settlement and the Petition to Set Aside the Settlement. Over three years elapsed between Ms. Carpenter's dismissal with prejudice from Petitioners' circuit court case and Petitioners' collateral attack on the settlement. T. at 23:12-17; R. at 166. During this period, Ms. Carpenter was resolved to never again be embroiled in litigation with Petitioners, having paid the agreed consideration to Petitioners. Also during this period, litigation continued against the remaining defendants. To drag Ms. Carpenter back into litigation following her dismissal with prejudice and three years of no involvement in the case is a

severe prejudice. What is more, Petitioners have no reason why they failed to provide notice to the Court of any problem with the settlement for more than three years. As a fact witness, Ms. Carpenter was available to be deposed by Petitioners' counsel; therefore any information regarding her insurance coverage was available.

Judge Middleton abused his discretion under Rule 60(b)(5) by setting aside the monetary settlement which had no prospective application. Judge Middleton also abused his discretion by failing to consider the prejudice to both parties as a result of the dissolution of the settlement. Because of these abuses of discretion, Judge Middleton's order must be reversed.

D. The Order Lacked Justification Under Rule 60(b)(6)

Without authority from any other subsection of Rule 60(b), Judge Middleton's Order is an improper reliance on Rule 60(b)(6). That the Order was handed down four years after the settlement was fully performed suggests the court's abuse of the reasonable time limit of Rule 60(b)(6). Judge Middleton abused his discretion under Rule 60(b)(6) because the court failed to balance the equities at stake in setting aside the settlement. Judge Middleton also abused his discretion because the record presents no exceptional circumstances to justify such a motion.

Rule 60(b)(6) allows a court to relieve a movant from a judgement for "any other reason justifying relief from judgment." *Miss. R. Civ. P. 60(b)(6)*. Such a motion must be made within a reasonable time and is not required to be made within six months after the judgment. *Id.* The reasonable time limit of Rule 60(b)(6) depends on the facts of the individual case regarding whether the party opposing the motion has been prejudiced by the delay and whether the moving party had good reason for failing to take appropriate action sooner. *Briney v. United States Fidelity & Guaranty Co.*, So. 2d 962, 966-67 (Miss. 1998), q*uoting Gilbert v. Dresser Indust., Inc.*, 158 F.R.D.

89, 96 (N.D. Miss. 1993). A motion under this subsection must not be based on some other reason other than those outlined in the first five subsections of Rule 60(b). *Page v. Siemens Energy and Automation, Inc.*, 728 So.2d at 1079, *quoting Sartain v. White*, 588 So. 2d 204, 212 (Miss. 1991).

Relief under Rule 60(b)(6) is reserved for exceptional and compelling circumstances. *Sartain*, 588 So. 2d at 212. Rule 60(b)(6) is often cited as a "grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses, or when it is uncertain that one or more of the preceding clauses afford relief" *Page*, 728 So. 2d at 1080, *quoting Accredited Sur. And Cas. Co. v. Bolles*, 535 So. 2d 56, 59 (Miss. 1988). However, the rule is not an escape hatch for litigants who failed to pursue other procedural opportunities. *Page*, 728 So. 2d at 1080, *quoting State ex rel. Mississippi Bureau of Narcotics v. One (1) Chevrolet Nova Automobile*, 573 So. 2d 787, 790 (Miss. 1990).

In determining whether an agreement to settle should be set aside, a court must "balance the equities." *Lose v. Illinois Cent. Gulf R.R. Co.*, 584 So. 2d 1284, 1286 (Miss. 1991). "Only in cases inhering 'extraordinary circumstances' will this Court conclude that the balance of the equities tilt in favor of the movant." *Id.*, *citing Ackermann v. United States*, 340 U.S. 193 (1950), and *Klapprott v. United States*, 335 U.S. 601 (1949).[3]

The Mississippi Supreme Court has applied several factors when deciding if relief should be granted under Rule 60(b)(6):

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"Notably this Court has granted relief under Rule 60(b)(6) in only two cases." *Lose*, 584 So. 2d at n.4. Besides the cases cited in *Lose*, the Mississippi Supreme Court has approved 6 other Rule 60(b)(6) motions. *Briney v. United States Fidelity & Guaranty Co.*, 714 So. 2d 962 (Miss. 1998); *Page v. Siemens Energy and Automation, Inc.*, 728 So. 2d 1075 (Miss. 1999); *Telephone Man, Inc. v. Hinds County*, 791 So. 2d 208 (Miss. 2001); *M.A.S. v. Mississippi Dept. of Human Services*, 842 So. 2d 527 (Miss. 2003); *Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888 (Miss. 2006); *Cucos, Inc. v. McDaniel*, 938 So. 2d 238 (Miss. 2006); *see also Accredited Sur. And Cas. Co., Inc. v. Bolles*, 355 So. 2d 56 (Miss. 1988).

> (1) that the 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 or 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 judgment under attack.

Page, 728 So. 2d 1075, 1079-1080 (Miss. 1998), *citing Briney v. United States Fidelity & Guaranty Co.*, 714 So. 2d 962, 968 (Miss. 1998).

Judge Middleton's Order setting aside Petitioners' settlement failed to conduct any balance of equities and is therefore an abuse of discretion[4]. The judge ignored the arguments regarding the prejudice to Ms. Carpenter presented to him by her counsel. T. at 23:12-17; R. at 166. Additionally, Judge Middleton's actions prejudiced Petitioners because Petitioners and the Minor child will lose their settlement. The Petitioners must forfeit the proceeds they received in 2005, *including all monies paid to the former attorneys under the settlement.* Judge Middlteon therefore abused his discretion in setting aside the settlement without considering the prejudicial consequences of his actions.

Without considering the prejudice faced by the parties in setting aside the settlement, Judge Middleton neglected the first and sixth factors in *Page* which favor the denial of the Petition. As noted previously, the judge neglected to consider the nearly three year time lapse between the settlement's consummation and the Petition, which would have satisfied the fourth factor in favor of denying the petition. The 2005 hearing transcript weighs the fifth factor in favor of denying the petition because the Petitioners testified to the reasonableness of the settlement. T. at 5:18-22; 7:5-13.

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4 Judge Middleton also abused his discretion in failing to address the unreasonable time delay between Ms. Carpenter's dismissal and the filing of the Petition to Set Aside Settlement.

The second factor supports denial of the Petition under *Page* because the Petition allowed Judge Middleton to act as his own appellate court. The record from 2005 and 2008 includes the same facts, but different arguments: a nuisance settlement of a dubious claim is three years later a nominal settlement with the primary tortfeasor. Petitioners may point to Ms. Carpenter's insurance coverage as new "evidence" which supports the seventh factor. However, the judge knew of Petitioners' lack of discovery and knew that the Petitioners' settlement proceeds were a fraction of the medical expenses faced by Petitioners. Furthermore, this information was always available to Petitioners. Ms. Carpenter's insurance coverage fails to weigh the balance of equity in favor of setting aside the settlement. To find otherwise demands accepting as fact an assumption that Ms. Carpenter will be found liable at trial. Judge Middleton's order overruled his 2005 decision under a cloak of equity. In so doing, the judge ignored the third factor in *Page* and construed Rule 60(b)(6) so liberally that he avoided upholding a settlement entered into in good faith by Ms. Carpenter.

Petitioners argued in the Amended Petition that their former counsel lied to the court, that Ms. Carpenter's colluded with Petitioners' counsel, and that both sides defrauded the Minor under the settlement. R. at 129. Such arguments suggest a fraud on the court like that in *Telephone Man, Inc. v. Hinds County*, 791 So. 2d 208 (Miss. 2001), yet arguments are quite different from the substantive facts which support the elements of fraud. *See Telephone Man*, 791 So. 2d at 211. No facts were found by Judge Middleton. In a supplement to the Petition and Amended Petition, Petitioners swore that but for the actions of their former counsel, they would not have agreed to the settlement. R. at 198-199 and 200-201. While insightful in a professional negligence claim against their former attorneys, the contents of the Affidavits do not present such exceptional circumstances to overturn a fully-performed settlement which was negotiated by the parties in good faith.

Judge Middleton abused his discretion under Rule 60(b)(6) because the Petition and

Amended Petition to Set Aside the Settlement were merely an attempt to relitigate the judge's 2005 Order approving the settlement. No interpretation of the record reveals "exceptional circumstances" that would justify the extraordinary relief granted by the court. Without any exceptional or compelling circumstances, the balance of equities weighs in favor of denying the petition and not permitting the settlement to be set aside. Due to these abuses of Judge Middleton's discretion, his Order must be reversed.

In conclusion, Judge Middleton abused his discretion in setting aside the settlement under Rule 60(b) by acknowledging Petitioners' claims for newly discovered evidence more than six months after the judgement and ignoring the prejudice faced by Ms. Carpenter, as well as Petitioners. As shown above, this prejudice as well as other facts before the court factored into a "balance of equities" required of a trial court in assessing a Rule 60(b) motion. Judge Middleton's failure make this equitable determination was an abuse of discretion. *Lose v. Illinois Cent. Gulf R.R. Co.*, 584 So. 2d 1284, 1286 (Miss. 1991), *citing Stringfellow v. Stringfellow*, 451 So. 2d at 221.

III. Judge Middleton Failed to Substantiate His Order with Findings of Fact and Conclusions of Law

The body of Judge Middleton's Order setting aside the Petitioner' settlement with Ms. Carpenter is a mere 144 words. R. at 206. The Order neglected to reference any specific fact on which the court based its judgment. Without any facts, the Order failed to analyze any subsection of Rule 60(b), much less balance the equities at issue. The Order simply stated that the original judgment was based on insufficient evidence, that additional evidence was presented, and that the settlement should be set aside because it was "not fair and reasonable and in the minor's best interest." R. at 206. Judge Middleton's Order was an abuse of discretion because the facts at issue

were in such dispute that Judge Middleton *himself* could not interpret the same facts the same way twice.

Uniform Chancery Court Rule 4.01 states that a chancellor shall find the facts specially and state conclusions of law thereon in all actions where it is required or requested, pursuant to Rule 52 of the Mississippi rules of Civil Procedure. In all actions tried upon the facts without a jury, the court may find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly. *Miss. R. Civ. P. 52(a).*

The permissive language of Rule 52(a) is modified by *Tricon Metals & Services, Inc. v. Topp*, 516 So. 2d 236 (Miss. 1987), in cases of "significant complexity". *Id.*, Comment. In *Tricon Metals*, a chancery court ruled on Tricon's complaint and Mr. Topp's counterclaims for damages with an opinion that stated "nothing remotely resembling findings of fact or conclusions of law". *Tricon*, 516 So. 2d at 237-38. The Court acknowledged the assumption that a chancellor resolves facts to support a judgment, but noted the limitations of this assumption when the chancellor provides so little information across multiple variables. *Id.* at 238, *quoting Pace v. Owens*, 511 So. 2d 489, 492 (Miss. 1987). "Logic is strained at the thought of an appellate court affirming or reversing a decision never made." *Id.* at 239. The Court reasoned that "the word 'may' in Rule 52(a) should be construed to read 'generally should'" and in cases of "any complexity, tried upon the facts without a jury, the [Chancery] Court generally should find the facts specially and state its conclusions of law thereon." *Id.* Failure to make such findings of fact and legal conclusions was regarded as an abuse of discretion. *Id.*

Judge Middleton's Order is similarly devoid of factual findings and legal conclusions and is therefore an abuse of discretion. Yet the unique procedural history of this appeal and the lack of facts in the record require that Judge Middleton's abuse of discretion deserves reversal of the Order

and not remand with instructions per *Tricon Metals*. In 2005, Judge Middleton approved the settlement on the grounds that it was fair and reasonable and in the best interests of the minor. Nearly four years later, Judge Middleton completely reverses his 2005 decision without any new, material evidence put before him.

The rule in *Tricon Metals* is that in matters where the facts and legal analysis are complex, the trial court must outline its findings and conclusions for the benefit of appellate review. In the present matter, the issue is apparently so complex that Petitioners and Judge Middleton take opposite positions on the same set of facts at two points in time. Judge Middleton's 144-word Order reversing his own decision after more than three years is therefore an abuse of discretion under *Tricon Metals* because it was devoid of any factual finding or legal conclusion. This abuse of discretion demands reversal and not remand with instruction because the record fails to support any findings of fact or legal conclusions which would support the Petition to Set Aside Settlement. In short, Judge Middleton's Order was not only the result of the Petitioners seeking to relitigate their claim; it was the product of Judge Middleton acting as his own appellate court and is therefore a reversible abuse of discretion.

IV. Judge Middleton Abused His Discretion in Setting Aside the Settlement by Neglecting the Injustice to Future Cases and the Public's Confidence in the Judicial System

Judge Middleton failed to address any of the policy concerns at issue in setting aside the settlement. A foremost concern is the balance between granting a litigant a hearing on the merits with the need and desire to achieve finality in litigation. *Lose v. Illinois Cent. Gulf R. R.*, 584 So. 2d 1284, 1286 (Miss. 1991), *quoting Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984). Additional considerations include "the risk of injustice to the particular parties, the risk that the

denial of relief will produce injustice in other cases, and the risk to undermining the public's confidence in the judicial process." *Montgomery v. Montgomery*, 759 So. 2d 1238, 1240-41 (Miss. 2000), *citing Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988). Judge Middleton ignored these policy considerations in setting aside the settlement in this case and his Order must be reversed.

The Order neglects the need of parties seeking relief through civil litigation to have confidence in the finality of court judgments. Settlements must not be threatened by parties who feel, years afterward, that they can get a better deal. Without such protection, parties will lose faith in a civil judicial system whose purpose is to provide a forum for the resolution of disputes. The injustice to Ms. Carpenter was that three years after she negotiated, paid for and received a dismissal with prejudice, her resolution was taken from her. Because of Judge Middleton's actions in this case, what settlement is ever truly consummated after proceeds are exchanged and a dismissal with prejudice is entered? Under Judge Middleton's decision there is no settlement which cannot be undone through the use of Rule 60(b), even without "such terms that are just". Judge Middleton's decision will severely damage the public's confidence in the judicial system, unless the decision is reversed.

CONCLUSION

Judge Middleton's Order setting aside the settlement between Ms. Carpenter and Petitioners was an abuse of discretion under Rule 60(b). The Order can find no authority under any subsection of Rule 60(b) to permit Judge Middleton to undo a fully-performed settlement. The record before Judge Middleton lacked any indication that destruction of the settlement was undertaken on just terms. The attack on the settlement was an attempt to relitigate the approval of the settlement and Judge Middleton's response was akin to acting as his own appellate court. For these reasons, Judge Middleton abused his discretion in setting aside the settlement and his Order must be reversed.

This, the 16th day of February, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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