

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

---

**No. 2009-CP-00470-COA**

---

**ROBERT S. PARKER**

**APPELLANT**

**v.**

**TESSECCA BLIVEN**

**APPELLEE**


**APPEAL FROM THE CHANCERY COURT OF  
LAMAR COUNTY, MISSISSIPPI**

---

**BRIEF OF APPELLEE**

---

**ORAL ARGUMENT NOT REQUESTED**

SHEILA H. SMALLWOOD, MB   
POST OFFICE BOX 933  
PETAL, MISSISSIPPI 39465  
(601) 450-2323

**ATTORNEY FOR APPELLEE**

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2009-CP-00470-COA

ROBERT S. PARKER

APPELLANT

v.

TESSECCA BLIVEN

APPELLEE

**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 justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Judge Sebe Dale, Jr.  
Chancellor for the 10<sup>th</sup> District including Lamar County
2. Robert S. Parker (Appellant)
3. Tessecca Bliven (Appellee)
4. Sheila H. Smallwood, Attorney for Appellant

  
SHEILA H. SMALLWOOD

## TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PERSONS .....	I
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iii
RESTATEMENT OF THE ISSUES .....	1
RESTATEMENT OF THE CASE .....	2
SUMMARY OF THE ARGUMENT .....	5
ARGUMENT .....	5
CONCLUSION .....	11
CERTIFICATE OF SERVICE .....	12

## TABLE OF AUTHORITIES

### Cases:

<i>Askew v. Askew</i> , 699 So.2d 515 (Miss. 1997) .....	6
<i>Bullard v. Morris</i> , 547 So.2d 789 (Miss. 1989) .....	6
<i>Chasez v. Chasez</i> , 957 So.2d 1031 (Miss. Ct. App. 2007) .....	5,6
<i>Conservator of Elridge v. Sparkman</i> , 813 So.2d 753 (Miss. Ct. App. 2001) .....	7
<i>Davison v. Dep't. Of Human Servs.</i> , 938 So.2d 912 (Miss. Ct. App. 2006) .....	9
<i>Dennis v. Dennis</i> , 824 So.2d 604 (Miss. 2002) .....	7
<i>Elliot v. Rogers</i> , 775 So.2d 1285 (Miss. Ct. App. 2000) .....	10
<i>Fancher v. Pell</i> , 831 So.2d 1137 (Miss. 2002) .....	5
<i>Goodin v. Dep't of Human Servs.</i> , 772 So.2d 1051 (Miss. 2000) .....	6
<i>Hunt v. Asanov</i> , 975 So.2d 899 (Miss. Ct. App. 2008) .....	8
<i>Kelley v. Day</i> , 965 So.2d 749 (Miss. Ct. App. 2007) .....	8
<i>Lauro v. Lauro</i> , 924 So.2d 584 (Miss. Ct. App. 2006) .....	11
<i>Morreale v. Morreale</i> , 646 So.2d 1264 (Miss. 1994) .....	10
<i>Moulds v. Bradley</i> , 791 So.2d 220 (Miss. 2001) .....	9

<i>Newell v. Hinton</i> , 556 So.2d 1037 (Miss. 1990) .....	9
<i>R.K. v. J.K.</i> , 946 So.2d 764 (Miss. 2007) .....	5
<i>Seely v. Stafford</i> , 840 So.2d 111 (Miss. Ct. App. 2003) .....	8
<i>Stuart v. Stuart</i> , 956 So.2d 295 (Miss. 2006) .....	6
<i>Varner v. Varner</i> , 588 So.2d 428 (Miss. 1991) .....	8
<i>Webster v. Webster</i> , 2008-CA-00518-COA (August 25, 2009) .....	5
 <b><u>Statutory Authority</u></b>	
Miss. Code Ann. §73-3-55 (2006) .....	4
Miss. Code Ann. §93-11-71 (1) (2004) .....	8
Miss. Code Ann. §43-19-31 (h) (2004) .....	8
 <b><u>Constitutional Authority:</u></b>	
Mississippi Constitution, Art. 3, Section 24 .....	6
 <b><u>Other Authority:</u></b>	
Mississippi Rules of Appellate Procedure Rule 3 ( c ) .....	7

## **RESTATEMENT OF ISSUES**

- I. WHETHER THE CONSTITUTIONAL RIGHTS OF ROBERT S. PARKER WERE VIOLATED.
- II. WHETHER THE ISSUES SET FORTH IN ROBERT S. PARKER'S BRIEF PERTAINING TO THE JUDGMENTS ENTERED ON APRIL 26, 2007, AND MAY 8, 2008 ARE PROPERLY BEFORE THE COURT BASED ON THE NOTICE OF APPEAL.
- III. WHETHER THE COURT ERRED IN DISMISSING THE PETITIONS FILED BY ROBERT PARKER UNDER THE THEORY OF UNCLEAN HANDS.
- IV. WHETHER THE CHANCELLOR MADE A PROPER FINDING OF CONTEMPT FOR THE FAILURE OF ROBERT S. PARKER TO PAY HIS MONTHLY CHILD SUPPORT OBLIGATION.
- V. WHETHER THE CHANCELLOR ERRED IN HIS DECISION TO INCARCERATE ROBERT S. PARKER BASED ON HIS FINDING OF CIVIL CONTEMPT.
- VI. WHETHER THE AWARD OF ATTORNEY FEES TO COUNSEL FOR TESSECCA BLIVEN WAS PROPER.
- VII. WHETHER OR NOT ADDITIONAL ATTORNEY FEES SHOULD BE AWARDED TO COUNSEL FOR TESSECCA BLIVEN BASED ON THE DEFENSE OF THE APPEAL.

## RESTATEMENT OF THE CASE

Robert S. Parker [hereinafter “Robert”] and Tessecca Bliven [hereinafter “Tessecca”], were never married but established a relationship which produced a child, Gabrielle L. Parker, born October 27, 2004. On or about January 25, 2006, Tessecca filed her Complaint for Paternity and Custody seeking an adjudication of paternity, a determination of custodial rights and a monthly child support obligation ®. at 12). Robert was represented by Attorney William “Bill” Ducker and a Temporary Order was entered on May 22, 2006, which established paternity, granted joint legal custody between the parties with Tessecca having physical custody and granted Robert visitation ®. at 29). The Temporary Order directed Robert to pay a monthly child support obligation of \$300.00 per month based on the Financial Disclosure provided by Robert on April 28, 2006 ®. at 21) and certain income information provided by his attorney. On April 26, 2007, a Judgment of Paternity, Support and Other Relief was entered. ®. at 29). Robert’s child support obligation remained at \$300.00 per month and his visitation was expanded to standard visitation plus one additional evening during the week ®. at 29). The Judgment declined to make a finding of contempt but held that Robert was in arrears the sum of \$700.00 and owed retroactive support in the amount of \$800.00.

On July 31, 2007, Robert filed his Respondent’s Petition for Modification seeking to reduce his monthly child support obligation . On the same day, he filed a financial disclosure statement reflecting his adjusted gross income to be \$2,454.00 per month ®. at 57) which would have ironically resulted in an increase in support if the child support guidelines were applied to that figure. Robert never served Tessecca with process of that action. Thereafter, he fired his attorney and on January 24, 2008, he filed, purportedly *pro se*, his second Petition to Modify Custody and Visitation which again included a claim to reduce his child support and sought to

expand his custody and visitation rights @. at 68). Tessecca, through counsel, filed her Answer and Counter Complaint on February 29, 2008, listing the affirmative defense of unclean hands. She also requested a finding of contempt for the failure to pay child support and sought attorney fees in the amount of \$2,500.00 @. at 84). Over the course of the next 5 months, Parker filed seven separate motions, five memorandum briefs and issued and served seventeen subpoena duces tecum all under the auspice of representing himself. @. 5-10 is the certified docket sheet) On April 21, 2008, Judge Dale bifurcated the proceedings seeking limited testimony on the affirmative defense of unclean hands. Based on the testimony and proof presented, the Court found that Robert was delinquent in his child support obligation in the amount of \$1,047.00 and found him in civil contempt and incarcerated him in the Lamar County Jail “to remain until he purges himself of contempt by the payment of that which is due and owing of his child support” (Tr. at 22). Robert immediately paid the arrearage amount and was released. The Chancellor also dismissed the Petitions filed by Robert on July 31, 2007 and January 24, 2008, under the theory of unclean hands (Appellant’s R.E. Exhibit “A”). Thereafter, Robert filed a Notice of Appeal (R.at 315) which was eventually dismissed because the Counterclaim filed by Tessecca was still pending and scheduled for trial on September 10, 2008 @. at 374) The case was continued at Robert’s request and rescheduled for February 25, 2009, on the remaining issues contained in the Counterclaim of the Tessecca. Although the parties had resolved their issues concerning custody, visitation and support, the Court on February 25, 2009, found that based on Robert’s contempt, that attorney fees were warranted in the amount of \$2,500.00 @. at 377). The amount of attorney fees awarded was limited to that figure since the Counter Complaint sought that amount specifically. This despite the fact that counsel for Tessecca had expended approximately \$7,612.50 in time and fees associated with the this case due to the overwhelming



amount of pleadings that were filed in the case along with both appeals.

Based on Robert's admission that he had a 7<sup>th</sup> grade education and based on the complexity of the pleadings filed, Counsel for Tessecca sought assistance from the Mississippi Bar to investigate whether or not Robert's wife, a paralegal, was the individual drafting these documents on her husband's behalf in violation of §73-3-55 of the Mississippi Code Annotated. The Mississippi Bar closed the investigation based on Robert's claim that a Father's Rights Advocacy Group "assisted" him in the filings of the pleadings (Appellee's R. E. 3 ) despite testifying under oath that "I'm drafting them" [(Appellee's R. E. #4, pgs. 12-14).

A Notice of Appeal @. at 379) was filed in the matter on March 23, 2009 "from the final Judgment of the Court entered in this case on February 25, 2009". [Emphasis added]. Robert thereafter deemed himself a pauper and proceeded to redress his grievances in the appellate court. Tessecca filed her Motion to Suspend Briefing Scheduling, Motion to Dismiss Appeal and Motion for Additional Time to File Appellee's Brief based in part on the failure of Robert to get proper approval to file *in forma pauperis* under Rule 6 of the Mississippi Rules of Appellate Procedure. The Chancery Court heard testimony on Robert's Motion to proceed *in forma pauperis* on November 12, 2009, and found that the proof was insufficient to qualify Robert Parker as a pauper (Appellee's R. E. #4, p.15). After the costs of the appeals were paid by Robert Parker, an Order was issued and the briefing schedule was reinstated making the appeal ready for review by the Mississippi Court of Appeals.

## SUMMARY OF ARGUMENT

The constitutional rights of Robert S. Parker were not violated at any time during these proceedings. The Petitions Robert filed on July 31, 2007 and January 24, 2008, were properly dismissed on the Defendant's affirmative defense of unclean hands. The issues on appeal are limited to the findings set forth in the trial Court's Judgment of the Court entered on February 25, 2009 as indicated in the Notice of Appeal filed on March 23, 2009. Therefore, the only issue for consideration by this Court is whether or not the award of attorney fees was proper. The proof presented at the hearing on April 21, 2008, through testimony and documentary proof was sufficient to find Robert in contempt for his failure to pay child support. That incarceration for the civil contempt was an appropriate directive based on the contempt finding. Also, the award of attorney fees in the amount of \$2,500.00 was proper based on the finding of contempt. Finally, this Court should award an additional \$1,250.00 in attorney fees based on the defense of this appeal.

## ARGUMENT

A chancery court's finding of fact will generally not be overturned on appeal unless they are found to be manifestly wrong. *Webster v. Webster*, 2008-CA-00518-COA, ¶6 (August 25, 2009) citing *Fancher v. Pell*, 831 So.2d 1137, 1140 (Miss. 2002). An appellate court "will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal stand was applied". *Webster* at ¶6, citing *R.K. v. J.K.*, 946 So.2d 764,772 (Miss. 2007). Further, the Chancellor's finding of civil contempt is subject to review under a manifest error standard. *Chasez v. Chasez*, 957 So.2d 1031, 1035 (Miss. Ct. App. 2007), citing *Dennis v. Dennis*, 824 So.2d 604, 608 (Miss. 2002).

I. WHETHER THE CONSTITUTIONAL RIGHTS OF ROBERT S. PARKER WERE VIOLATED BASED ON HIS CLAIM THAT HE COULD NOT AFFORD AN ATTORNEY AND HIS CLAIM THAT HIS DUE PROCESS RIGHTS WERE VIOLATED.

There is no constitutional right to counsel in civil matters, including child support contempt matters. *Goodin v. Dep't of Human Servs.*, 772 So.2d 1051, 1055 (Miss. 2000). The Mississippi Supreme Court has rejected a Defendant's argument that a chancellor should not have heard a petition for contempt for failure to pay child support without appointing counsel to represent him. *Goodin* at 1055. However, parties do have a constitutional right to appear *pro se* in civil actions, including family law matters. Miss. Const. Art. III § 24. A *pro se* litigant is also bound by the same rules of practice and procedure as an attorney. *Bullard v. Morris*, 547 So.2d 789, 790 (Miss. 1989). In this case, Robert retained counsel that represented him initially in the matter and a Judgment ®. at 29) was entered requiring the payment of child support. That Judgment was entered in April 27, 2007, after a conference with the Judge and an agreement was reached to the terms set forth therein. That initial Judgment was never appealed nor modified. Therefore, Robert has waived the right to fully litigate these issues and he should not be allowed to re-litigate them on appeal. *Chasez* at 1037, citing *Askew v. Askew*, 699 So.2d 515, 520 (Miss. 1997).

Robert also claims that his constitutional due process rights have been violated pursuant to Article 3, Section 24 of the Mississippi Constitution and the Court's ruling in *Stuart v. Stuart*, 956 So.2d 295 (Miss. 2006). The *Stuart* case is not applicable. The trial Court denied Mr. Stuart's due process argument because his speedy trial argument applies only in criminal cases. The Court found this argument not only devoid of merit, but absolutely frivolous. *Stuart* at 300. In the case at hand, Robert had notice of the contempt proceedings set forth in the Answer and

Counterclaim filed by Tessecca and had an opportunity to be heard during the hearing held on April 21, 2008. This satisfies the constitutional requirements of due process. Further, these due process violations were never raised in the lower court and thus not preserved for appeal, therefore this issue is not proper for appeal. *See Dennis v. Dennis*, 824 So.2d 604, 611 (Miss. 2002).

II. WHETHER THE ISSUES SET FORTH IN ROBERT S. PARKER'S BRIEF THAT ARE OUTSIDE THE FEBRUARY 25, 2009 ARE PROPERLY BEFORE THE COURT BASED ON THE NOTICE OF APPEAL.

Rule 3 ( c ) of the Mississippi Rules of Appellate Procedure requires that the notice of appeal specify the party against whom the appeal is taken and designate "as a whole or in part the judgment or order appealed from". The Notice of Appeal @. at 379) filed by Robert on March 23, 2009, seeks an appeal from the Judgment dated February 25, 2009. The only contested issue set forth in that Judgment was the grant of attorney fees in the amount of \$2,500.00. All other issues had been resolved as stated in the February 25, 2009 Judgment and the letter that Robert forwarded to counsel opposite on December 16, 2008, indicating that "[a]s far as I am concerned, this matter has been resolved in the best interests of all involved". (Appellee's R. E. #1). As such, the only issue that is properly before the Court is the award of attorney fees. All other issues cannot be considered since they are outside the scope of review by the appellate court. This Court has previously found that issues not contained in the judgment designated for review in the notice of appeal were not properly before the court and refused to hear them on appeal. *Conservator of Elridge v. Sparkman*, 813 So.2d 753, 755 (Miss. Ct. App. 2001). Only the issue of attorney fees should be reviewed and considered by this court with all other issues set forth in Robert's appeal dismissed.

III. WHETHER THE COURT ERRED IN DISMISSING THE PETITIONS FILED BY ROBERT PARKER UNDER THE THEORY OF UNCLEAN HANDS.

Tessecca, in her Answer and Counterclaim, set forth the affirmative defense of unclean hands. Mississippi courts recognize this doctrine and have upheld its application in barring those responsible for paying child support from receiving a downward modification. The Court in *Seely v. Stafford*, 840 So.2d 111 (Miss. Ct. App. 2003), applied the clean hands doctrine to bar modification by a father who was behind in his child support obligation. Additionally, the court of appeals affirmed the application of the doctrine to bar modification by a father who promptly filed a modification petition, but failed to pay support after the filing. *Kelley v. Day*, 965 So.2d 749, 757 (Miss. Ct. App. 2007); see also *Hunt v. Asanov*, 975 So.2d 899, 902-03 (Miss. Ct. App. 2008) (finding that the doctrine of unclean hands bars payor in willful contempt from seeking downward modification). Therefore, based on the applicable case law and authority, the doctrine of unclean hands is alive and well and thus the Chancellor's dismissal of the prior Petitions based on Robert's child support delinquency was proper.

IV. WHETHER THE CHANCELLOR MADE A PROPER FINDING OF CONTEMPT FOR THE FAILURE OF ROBERT S. PARKER TO PAY HIS MONTHLY CHILD SUPPORT OBLIGATION.

The Mississippi Code Annotated provides that whenever child support is more than thirty days delinquent a judgment by operation of law shall arise against the obligor in an amount equal to all payments that are then due and owing. *Miss. Code Ann.* §93-11-71 (1) (2004). Further, court ordered child support payments vest in the child as they accrue and may not thereafter be modified or forgiven, only paid. *Varner v. Varner*, 588 So.2d 428, 434 (Miss. 1991). Robert claims through his appeal that he should not have been held in contempt because the Lamar County Department of Human Services exercised their unique ability to seize his tax refund to

satisfy his arrearage amount under Miss. Code Ann. §43-19-31(h)(2004). However, the proof of the arrearage amount was entered into evidence at the April 21, 2008 hearing. It consisted of the Affidavit of Accounting prepared and sworn to by the Lamar County Department of Human Services as of the date of the hearing reflecting the proper arrearage amount of \$1,047.00 (See Trial Exhibit 3). The evidence is clear that Robert failed to pay his child support obligation in a timely manner. In fact, he testified under direct examination that his taxes had been intercepted in prior years for his failure to pay support. He states “[a]s always when I would get in arrears ....when my taxes would come in, they would take the money” (Tr. at 11). To accept Robert’s argument that an intercepted tax refund prevents a finding of contempt would set a dangerous precedent. That holding would actually encourage nonpayment of child support in lieu of allowing tax refunds be intercepted since that course of action would come without the consequences that a contempt action can bring. Clearly the proof presented was sufficient to find Robert in contempt for his failure to pay child support.

V. WHETHER THE CHANCELLOR ERRED IN HIS DECISION TO INCARCERATE ROBERT S. PARKER BASED ON HIS FINDING OF CIVIL CONTEMPT.

Pursuant to the transcript, the lower court held that:

“[I] find him in contempt of court, order the sheriff to take him into custody, and place him in the common jail or other appropriate place of confinement there to remain until he purges himself of contempt by the payment of that which is due and owing of his child support” (Tr. at 22)

This finding of civil contempt was granted to secure Robert’s compliance with the previous child support order. The law provides that a finding of civil contempt may be punished by fines or imprisonment. Certainly the Chancellor was within his discretion to incarcerate

Robert and require that he pay his support obligation in full prior to his release. See *Moulds v. Bradley*, 791 So.2d 220, 224 (Miss. 2001); *Newell v. Hinton*, 556 So.2d 1037,1044 (Miss. 1990); *Davison v. Dep't. Of Human Servs.*, 938 So.2d 912, 915-916 (Miss. Ct. App. 2006).

VI. WHETHER THE AWARD OF ATTORNEY FEES TO COUNSEL FOR TESSECCA BLIVEN WERE PROPER.

Based on the contempt finding, the Court in this matter awarded Tessecca's attorney fees in the amount of \$2,500.00. The amount of attorney fees awarded by the lower court was limited since Tessecca's Counter Complaint sought that amount specifically, despite the fact that counsel for Tessecca had expended approximately \$7,612.50 in time and fees associated with the review and response to the overwhelming amount of pleadings in this case. Tessecca was unable to pay those additional fees, thus the work performed on her behalf after the initial retainer was depleted has been on a pro bono basis along with the time and expense associated with the reply to this appeal and the previous appeal. A party who successfully prosecutes a contempt action is entitled to attorneys' fees without regard to inability to pay. *Morreale v. Morreale*, 646 So.2d 1264, 1271 (Miss. 1994). Further, the Court has held that when a party is held in contempt for violating a valid judgment of the court, then attorney's fees should be awarded to the party that has been forced to seek the court's enforcement of its own judgment. *Elliot v. Rogers*, 775 So.2d 1285, 1290 (Miss. Ct. App. 2000). That based on the lower court's finding of contempt against Robert for his failure to pay child support, the award of attorney fees in the amount of \$2,500.00 was proper.

VII. WHETHER OR NOT ADDITIONAL ATTORNEY FEES SHOULD BE AWARDED TO COUNSEL FOR TESSECCA BLIVEN BASED ON THE DEFENSE OF THE APPEAL.

That if the Court finds that the assessment of attorney fees was proper, the Court should

assess an additional amount equaling one-half of what was awarded in the lower court pursuant to the findings in *Lauro v. Lauro*, 924 So.2d 584, 592 (Miss.Ct. App. 2006). Therefore, Tessecca seeks an additional amount of attorney fees in the amount of \$1,250.00 plus costs.

### CONCLUSION

For the foregoing reasons, the Chancery Court of Lamar County properly found Robert Parker in contempt for his failure to pay child support. As a result of the finding of contempt, the Chancellor's incarceration of Robert Parker was appropriate and not manifest error. Further, the award of attorney fees based on the contempt finding were proper. As a result of the appeal, Tessecca should be awarded an additional \$1,250.00 in attorney fees.

RESPECTFULLY SUBMITTED,

  
SHEILA H. SMALLWOOD, MBN [REDACTED]  
COUNSEL FOR TESSECA BLIVEN

*SHEILA H. SMALLWOOD, PA*  
*P. O. Box 933*  
*PETAL, MS 39465*  
*(601) 450-2323*



**CERTIFICATION OF SERVICE**

I, Sheila H. Smallwood, counsel for Tessecca Bliven, hereby certify that I served a copy of the foregoing Brief of Appellee on all parties to this matter by United States Mail, postage prepaid to the following on the date listed below:

Robert Parker, Appellant  
134 Jervis Mims Road  
Hattiesburg, MS 39401

Chancellor Sebe Dale, Jr.  
Lamar County Chancery Court  
P. O. Box 1248  
Columbia, MS 39429

This the 19<sup>th</sup> day of January, 2010.

  
\_\_\_\_\_  
SHEILA H. SMALLWOOD