

IN THE SUPREME COURT OF MISSISSIPPI

JOEY K. SIMMONS

APPELLANT

VS.

CAUSE NO. 2010-CA-00205

BETTY C. SIMMONS

APPELLEE

BRIEF OF APPELLEE

FROM THE CHANCERY COURT OF WARREN COUNTY

**David M. Sessums, MSB # [REDACTED]
ATTORNEYS FOR BETTY C. SIMMONS, APPELLEE
VARNER, PARKER & SESSUMS, P.A.
1110 Jackson St.
Vicksburg, MS 39181
Ph: (601)638-8741**

IN THE SUPREME COURT OF MISSISSIPPI

JOEY K. SIMMONS

APPELLANT

VS.

CAUSE NO. _____

BETTY C. SIMMONS

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following have an interest in this action. These representations are made so that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Wren C. Way
Way, Field and Bodron
Attorney for Appellant
1001 Locust Street
Vicksburg, MS 39180
2. David M. Sessums
Varner, Parker & Sessums, P.A.
Attorney for Appellee
1110 Jackson Street
Vicksburg, MS 39180
3. Joey K. Simmons
Vicksburg, MS 39180
4. Betty C. Simmons
977 Warriors Trail
Vicksburg, MS 39180

Respectfully submitted,

By: 

DAVID M. SESSUMS

MSB # 

OF COUNSEL:

VARNER, PARKER & SESSUMS, P.A.

Post Office Box 1237

1110 Jackson Street

Vicksburg, Mississippi 39181-1237

Telephone: 601/638-8741

Facsimile: 601/638-8666

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	4
STATEMENT OF THE FACTS	6
ARGUMENT	8
SUMMARY	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

1. Stinson v. Stinson, 738 So. 2d 1259 (Miss. Ct. App. 1999)
2. Mayoza v. Mayoza, 526 So. 2d 547 (Miss. 1998)
3. Rule 59 MRCP
4. Rule 60 MRCP

STATEMENT OF THE ISSUES

1. There was no fraud involved in the obtaining of the Judgment of Divorce.
2. The lower court did not err in entering the Judgment of Divorce of August 21, 2009;
3. The lower court did not err in entering its Final Judgment of December 29, 2009;
4. It is incumbent upon an appellant to show there is error in the record and not upon an appellee to show that there is no error in the record.

STATEMENT OF THE CASE

Appellee agrees with Appellant's statement of the case as far as said statement of the case goes.

However, certain alleged facts are in fact disputed.

The Affidavit of David M. Sessums was filed with the Court on November 20, 2009. Thereafter, on November 25, 2009, the Affidavits of Joey K. Simmons and Heather McCardle were filed.

Because the contents of the affidavits of Joey K. Simmons and Heather McCardle were not pertinent to the issues under consideration by the Chancery Court of Warren County, no subsequent affidavits on behalf of Appellee were filed with the trial court.

However, it bears mention that statements contained in the affidavits of Joey K. Simmons and Heather McCardle about what was said at a hearing before the Justice Court of Warren County, Mississippi on August 26, 2009, are incorrect. It is disputed that Mr. Simmons stated in Justice Court that he "had Wren Way as his divorce attorney" and the similar portion of Ms. McCardle's affidavit that it was stated in the presence of David M. Sessums that Mr. Simmons had a divorce attorney, and that said attorneys name was Wren Way, is also disputed. Those words were simply never uttered.

What transpired in Justice Court was that Justice Court Judge Edwin Woods inquired of Mr. Simmons and Ms. McCardle as to whether or not Mr. Simmons and Mrs. Simmons were still living under the same roof to which all the parties replied in the affirmative and there was no representation, indication, statements or otherwise that in the divorce action Mr. Simmons was represented by Wren C. Way.

SUMMARY OF THE ARGUMENT

Betty C. Simmons filed her Complaint for Divorce on June 4, 2009.

On June 24, 2009, Joey K. Simmons was personally served with process.

On August 19, 2009, Betty C. Simmons and a corroborating witness appeared before the Chancery Court of Warren County in open court and testified to and substantiated Mrs. Simmons' grounds for divorce and on August 21, 2009, a Judgment for Divorce and Other Relief was entered by the Chancery Court of Warren County.

On September 30, 2009, Joey K. Simmons filed his Motion to Set Aside Judgment.

On October 5, 2009, Betty C. Simmons filed her Response to Motion to Set Aside Judgment.

On November 20, 2009, the Affidavit of David M. Sessums was filed.

On November 25, 2009, the Affidavits of Wren C. Way, Joey K. Simmons and Heather McCardle were filed.

On December 29, 2009, the lower Court entered its Final Judgment denying Mr. Simmons' Motion to Set Aside Judgment.

Because Mr. Simmons did not file an answer or enter an appearance after being personally served with process Mrs. Simmons was not required to give him notice of the uncontested divorce hearing and, further, because Mr. Simmons did not file his Motion to Set Aside Judgment within ten (10) days of the entry of the

Judgment of Divorce and there was no fraud his Motion to Set Aside Judgment was properly denied by the Chancery Court.

STATEMENT OF THE FACTS

On June 4, 2009, Betty Simmons filed her Complaint for Divorce against Joey K. Simmons who was personally served with process on June 24, 2009, and who thereafter never filed any documents or made any appearance with the Court.

On August 19, 2009, Betty Simmons and a corroborating witness appeared before the Chancery Court and testified to and substantiated Mrs. Simmons' grounds for divorce resulting in a Judgment for Divorce and Other Relief being entered on October 21, 2009.

On August 26, 2009, Ms. Simmons and Mr. Simmons and a daughter, Heather McCardle, appeared before the Justice Court of Warren County, Mississippi because of ongoing disputes and disturbances between them. At this time both parties were still residing at the former marital domicile.

On August 26, 2009, Justice Court Judge Edwin Woods inquired of the parties as to whether the parties were still living together at the same address to which both parties replied in the affirmative. No other representations were made to the Justice Court or in the presence of David M. Sessums who was present representing Betty Simmons. No attorney appeared before the Justice Court on behalf of Mr. Simmons.

On September 30, 2009, Mr. Simmons filed his Motion to Set Aside Judgment and on October 5, 2009, Ms. Simmons filed her response thereto.

The Affidavit of David M. Sessums was filed with the Court on November 20, 2009, which affidavit was then and has at all times since remained completely and factually accurate.

On November 25, 2009, the Affidavits of Wren C. Way, Joey K. Simmons and Heather McCardle were filed. No subsequent response by way of affidavit, testimony or otherwise was filed by Ms. Simmons.

On December 29, 2009, the Chancery Court entered its Final Judgment denying the Motion to Set Aside Judgment and directing that the all prior orders of the Court would remain in full force and effect.

ARGUMENT

First, Wren C. Way is an excellent attorney who has practiced in Vicksburg and Warren County, Mississippi for a considerable period of time whose reputation and integrity for honesty and ethics is unquestionable. The Affidavit of David M. Sessums did not, and does not, in any way attempt to contradict any affidavit of Wren C. Way. However, at the same time, in all fealty to Betty Simmons, the contents of said affidavit also can not be admitted.

There was simply no recollection by the undersigned of Wren C. Way contacting David M. Sessums and the recollection of the undersigned was that an attorney other than Mr. Way had made contact on behalf of Mr. Simmons. When counsel's recollections about the identity of the telephoning counsel turned out to be erroneous a search of the client's file did not reveal anything which would or did trigger any recollection of Mr. Way being the one making the telephone call he professes to have made.

However, Mr. Way says he made the telephone call to David Sessums as counsel for Mrs. Simmons, and the undersigned has no reason to disbelieve Mr. Way there simply being no recollection either one way or the other.

The honesty, integrity and ability of Wren C. Way having thus been affirmed by Mrs. Simmons and her counsel herein, the ruling of the lower court was legally correct.

Mr. Simmons admits having been personally served with process. Once Mr.

Simmons was personally served with process somebody had to do something. Without question Mr. Simmons should have filed his answer with the clerk of the court. He did not do so. Possibly, Mr. Simmons could have written a letter to the clerk thereby providing a contest of sort of record but he did not do so. Perhaps an entry of appearance could have been entered on behalf of Mr. Simmons but no such appearance was entered. Perhaps a letter could have been written to counsel for Mrs. Simmons but no such letter was written or delivered.

Certainly had the undersigned counsel for Mrs. Simmons recalled that Wren C. Way had contacted him on behalf of Mr. Simmons, simple common courtesy would have mandated at least the minimum of a telephone call to Mr. Way advising him that Mrs. Simmons was proceeding with the uncontested divorce. However, transferring the requirement of Mr. Simmons filing a response with the clerk and shifting it to counsel for Mrs. Simmons is not the law. Perhaps a followup call to counsel for Mrs. Simmons may have been in order but the onus of recollecting every phone call and its contents is not on Ms. Simmons or her attorney.

The Chancery Court correctly relied upon Stinson v. Stinson, 738 So. 2d 1259 (Miss. Ct. App. 1999) where the Stinson Court ruled that notice of hearings must be sent to those persons who have answered complaints but that the threshold issue is to determine whether someone who has been served and who has not appeared, either by filing an answer or by taking some alternative step,

is to receive any further notice. Applying Stinson, the lower court in this matter correctly found that Mr. Simmons did not need to be sent any notice of the hearing on August 19, 2009, because he never answered the complaint and never took any other actions to cause him to be recognized as a party participating in the action.

Therefore, the Chancery Court was correct in its finding and holding that Mr. Simmons was not entitled to any additional or other notice of the hearing of August 19, 2009.

Turning to the issue of Mr. Simmons' Motion for Reconsideration the Chancellor took note of Mayoza v. Mayoza, 526 So. 2d 547 (Miss. 1998) where the Mississippi Supreme Court ruled that nothing in Mississippi's divorce statutes describe or set forth any procedure for reconsideration or reopening of an uncontested divorce and for that reason, as in the instant matter, that Mr. Simmons' Motion for Reconsideration would be determined under either Rule 59 or Rule 60 of the Mississippi Rules of Civil Procedure.

Rule 59 of the Mississippi Rules of Civil Procedure clearly provides that a motion to alter or amend a judgment shall be filed not more than ten (10) days after the entry of the judgment. Because the Judgment of Divorce was entered in this case on August 21, 2009, and because Mr. Simmons' Motion to Set Aside Judgment was not filed until September 30, 2009, Rule 59 MRCP was clearly unavailable to Mr. Simmons.

The Chancery Court then obviously considered the provisions of Rule 60 of the Rules of Procedure and discussed Rule 60 (b)(6) correctly finding that the facts and circumstances of this case did not qualify for relief thereunder, finding that the case was not one of extraordinary and compelling circumstances.

The Chancellor by referencing MRCP 60(b)(6) under the uncontradicted facts concluded that no relief was warranted under MRCP 60 (a)(clerical mistakes) nor under MRCP 60(b) (mistakes, inadvertence and nearly discovered evidence) -(1) fraud misrepresentations or other misconduct of an adverse party; (2) accident or mistake; (3) newly discovered evidence; (4) the judgment is void; or (5) the judgment has been satisfied))

In short, based upon the facts presented to her the Chancellor did not have any discretion and was required to follow controlling case law and the clear provisions of the Rules of Civil Procedure and did so.

SUMMARY

With utmost confidence in and reaffirmation of the honesty and integrity of counsel for Mr. Simmons, and his representations both to the lower court and to this Court regarding his personal actions (but in complete dispute of what was or was not represented or stated in the Justice Court) Mr. Simmons' burden of complying with the rules and case law can not be shifted from Mr. Simmons to Mrs. Simmons or her counsel who were not required to recollect an undocumented phone call from Mr. Simmons' lawyer. Once the recollection of Mrs. Simmons counsel (that it was Bill Bost who had called on behalf of Mr. Simmons) turned out to be incorrect it was not incumbent upon Mrs. Simmons or her counsel to call every attorney in Vicksburg or the State of Mississippi to determine whether or not they had called on behalf of Mr. Simmons. The Chancellor could not have rendered any other decision than she did in first entering the Judgment of Divorce and then entering her Final Judgment denying Mr. Simmons' Motion to Set Aside Judgment.

Respectfully Submitted:

BETTY C. SIMMONS

BY:

DAVID M. SESSUMS

OF COUNSEL:

Varner, Parker & Sessums, P.A.
1110 Jackson Street
P.O. Box 1237
Vicksburg, MS 39181-1237
Telephone: 601-638-8741
Facsimile: 601-638-8666

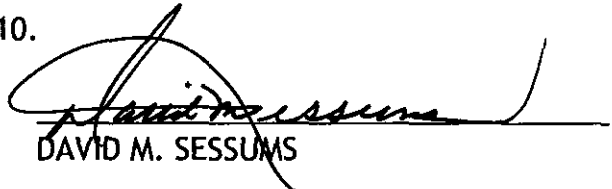
CERTIFICATE OF SERVICE

I, DAVID M. SESSUMS, do hereby certify that I have this date mailed via United States Mail, postage prepaid, or hand delivered a true and correct copy of the above and foregoing Brief of Appellee to the following counsel:

Wren C. Way, Esquire
P.O. Box 1113
Vicksburg, MS 39181-1113

Hon. V. R. Barnes, Chancellor
Warren County Courthouse
Vicksburg, MS 39180

THIS the 3rd day of August, 2010.


DAVID M. SESSUMS