



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

NO. 2010-CA-00205

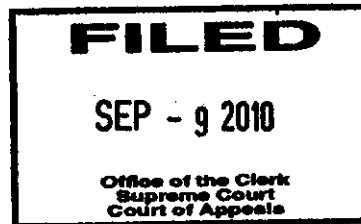
JOEY K. SIMMONS

APPELLANT

VS

BETTY C. SIMMONS

APPELLEE



On Appeal from Warren County Chancery Court
Cause Number 2007-170 GN

APPELLANT'S REPLY BRIEF
JOEY K. SIMMONS

WREN C. WAY

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following 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. Joey K. Simmons, Appellant
2. Wren C. Way, Esq.
3. Betty C. Simmons, Appellee
4. David M. Sessums, Esq.
5. Chancellor Vicki R. Barnes, Chancery Court Judge, Vicksburg, Warren County, Mississippi.

SO CERTIFIED this the 12 day of August, 2010.



WREN C. WAY
Attorney for Appellant
Joey K. Simmons

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RULES

Mississippi Rules of Civil Procedure 60(b)(1)	1,2
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REBUTTAL ARGUMENT

In her argument, Betty cites *Mayoza v. Mayoza*, 526 So.2d 547 (Miss.1998), as did appellant. Mr. Mayoza had sought relief from the uncontested judgment of divorce under Mississippi Rules of Civil Procedure 60(b)(6), “any other reason justifying relief from the judgment.” As stated in appellant’s brief at pages 8 and 9, the facts in *Mayoza* as to the “reason justifying relief” are significantly different from those facts established in the instant case.

Equity principles are applied when the court considers the applicable facts upon which relief from the judgment is sought under Mississippi Rules of Civil Procedure 60(b)(6). The basis for the decision is fact driven and the proponent of the motion must show that the “other reasons” must be founded upon equitable principle that calls upon the court’s “grand reservoir of equitable power to do justice in a particular case.” (See *Montgomery v. Montgomery*, 759 So.2d 839 (Miss.2000)) Joey was certainly entitled to an equitable division of the marital assets which consisted of the marital home and its furnishings and appliances. If, on a hearing, the lower court awarded Betty the entirety of the couple’s marital assets, could that be said to be an equitable division of the assets acquired during the marriage? The answer, of course, is in the negative. Joey should have been granted the equitable relief available to him under M.R.C.P. 60(b)(6).

Likewise, M.R.C.P. 60(b)(1) affords Joey relief where the facts show clear misconduct of an adverse party. All facts pertinent to a decision by the court as to whether or not this misconduct has occurred was presented to the court by affidavit. In the affidavits of Joey and the couple’s daughter, it was clearly stated as to what Betty represented to Justice Court Judge Woods on the 6th day after the divorce was granted, unknown to Joey. Joey believed that a divorce was still pending, and when

the court queried Joey if he had a lawyer for the divorce Joey replied in the affirmative, giving Betty (again) the attorney's name. (T.40). Also, when the judge asked if they were married, both replied "yes" (T.39, 40). No counter affidavits were filed in any opposition whatsoever to these stated facts. In her brief, Betty, for the first time, denies that anything like that was said. This Court should consider only the facts at trial and should not consider for, the first time in a brief, a statement of fact that has no reference to where that "fact" appears in the record—because it does not so appear in this case.

Betty wanted a divorce and all marital assets of the parties. She achieved what she wanted by deception amounting to misconduct by an adverse party. This Court should reverse this cause under M.R.C.P. 60(b)(1) for this obvious misconduct by Betty.

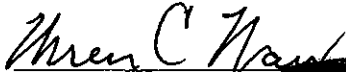
Reversal is likewise called for under M.R.C.P. 55 (b)(c) and (e), Joey had entered his appearance and, thereafter, received no notice of the hearing, either personally or through his attorney. Betty's attorney had been contacted by Joey's attorney seeking an irreconcilable differences divorce but seeking an equitable division of marital assets. This contact cannot be proved by a document, but is proved by all affidavits filed herein, including that of Betty's attorney. In her Brief, Betty admits the contact between the attorneys, but her attorney could not remember who the attorney was. That contact was an appearance, whether formal or informal, between the attorneys. If Betty, through her attorney, could not remember who the attorney was in the few weeks prior to obtaining the divorce, it would have been a simple matter for her to notice Joey directly. Betty knew exactly where Joey would be able to receive this notice—they lived in the same house. See *Journey v. Long*, 585 So.2d 787 n.5 (Miss.1991).

Joey Simmons respectfully submits that both equity and the rule of law demand reversal and remand of this cause.

Respectfully submitted,

JOEY K. SIMMONS

BY:


Wren C. Way, MSP
Counsel for Appellant

CERTIFICATE OF SERVICE

I, R. Louis Field, do hereby certify that I have this date sent by regular U.S. Mail, postage pre-paid, a true and correct copy of the above and foregoing Appellant's Reply Brief to:

Chancellor Vicki Barnes
P. O. Box 351
Vicksburg, MS 39180

David M. Sessums, Esq.
P. O. Box 1237
Vicksburg, MS 39181

SO CERTIFIED this the 12 day of August, 2010.


WREN C. WAY