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

JOEY K. SIMMONS — APPELLANT

VS. — NO. 2010-CA-00205

BETTY C. SIMMONS — APPELLEE

APPEAL FROM THE CHANCERY COURT OF WARREN COUNTY, MISSISSIPPI

BRIEF OF APPELLANT
JOEY K. SIMMONS

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JOEY K. SIMMONS	**APPELLANT**
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BETTY C. SIMMONS	**APPELLEE**

I.

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 this Court may evaluate possible disqualifications or recusal.

1. Joey K. Simmons
   Appellant

2. Betty C. Simmons
   Appellee

3. Wren C. Way, Esquire
   Attorney for the Appellant
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   Vicksburg, MS 39181-1113

4. David M. Sessums, Esq., attorney for Appellee
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5. Honorable Vicki R. Barnes, Chancellor
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II.

TABLE OF CONTENTS

III.

TABLE OF AUTHORITIES

IV.

STATEMENT OF THE ISSUES

1. The lower court erred in holding that appellant was required to file his Motion to Set Aside Judgment of divorce within ten (10) days from the date of the judgment.
2. The lower court erred in its application of Mississippi Rules of Civil Procedure, Rule 60 (b) (1) in failing to find that the judgment was obtained by "fraud, misrepresentation, or other misconduct of an adverse party."
3. The lower court erred in its application of Mississippi Rules of Civil Procedure, Rule 60 (b) (6) in failing to find from the facts presented "any other reason justifying relief from the judgment of divorce."
4. The lower court erred in its application of Mississippi Rules of Civil Procedure, Rule 55 (b) (c) and (e) in failing to find that appellant had "appeared" in the cause below, as set forth in said rule requiring that appellant be given notice of the hearing.
5. There is no record of the testimony in the court below; hence no evidence exists that would support the lower court's inequitable finding that appellee was entitled to all of the marital assets of the parties, as well as attorney's fees.

V.

STATEMENT OF THE CASE

This is an appeal from the denial, by the Chancery Court of Warren County, Mississippi, of appellant's Motion to Set Aside Judgment of Divorce with supporting affidavits. The judgment was rendered after an uncontested divorce hearing of which appellant had no notice or knowledge, even though appellant had appeared in the matter. The lower court awarded appellee a divorce on the grounds of cruel and inhumane treatment, all of the parties' marital assets consisting of the home and all furniture and appliances, and attorney's fees in the amount of $600.00. Appellant appeals therefrom.

VI.

SUMMARY OF THE ARGUMENT

Upon learning of the judgment of divorce, Joey filed his Motion to Set Aside Judgment predicated under Mississippi Rules of Civil Procedure 60 (b) which allows relief from any judgment on the grounds of (1) fraud, misrepresentation, or other misconduct of an adverse party, or (2) any other reason justifying relief from the judgment(T-13). Joey's Motion and attached affidavits recite the facts previously set out in this Brief. Betty, in her Response to the Motion and affidavit by the attorney, does not deny any of the allegations put forward by Joey except to deny, only in the Response, the allegation that the parties lived together after the divorce. The fact that they continued to live together is supported by all of Joey and his child's affidavit and disputed by no affidavit. Similarly, all affidavits filed in this cause, including that of Betty's attorney, confirm that there was contact between Betty's attorney and the attorney for Joey relating to a settlement of the divorce matter by agreeing to the divorce and to a proposal for an equitable division of the marital assets.

All affidavits confirm that after Joey was served with process, his attorney contacted Betty's attorney agreeing to an irreconcilable difference divorce and seeking a discussion with regard to an equitable division of the marital assets. Such contact constitutes an appearance under the Mississippi rules of Civil Procedure 55 (b), which Rule requires that Joey be given notice of the hearing, which was not done.

IN THE SUPREME COURT OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOEY K. SIMMONS **APPELLANT**

VS. **NO. 2010-CA-00205**

BETTY C. SIMMONS **APPELLEE**

STATEMENT OF FACTS

On June 4, 2009, Betty C. Simmons ("Betty") filed her Complaint in the Chancery Court of Warren County, Mississippi, seeking a divorce from Joey K. Simmons ("Joey"). The Complaint charged that Joey "... has been guilty of habitual cruel and inhuman treatment of Plaintiff or, in the alternative, that the marriage of the parties met with irreconcilable differences..." Betty asked for the exclusive use and possession of the marital domicile and all furnishings therein, temporary, periodic alimony and attorney's fees. (T 4-5)

Joey and Betty had been married for 28 years until a Judgment for Divorce and Other Relief was entered by the Court on August 21, 2009 (T-3) (T-11). Joey was aware of Betty's filing for divorce since he was served with a Rule 4 summons and copy of the Complaint on June 24, 2009. But Joey was totally unaware of the actual divorce being heard and entered on August 21,2009, until more than a month later, on September 30, 2009. Even after the filing of the Complaint and entry of the Judgment the parties continued to live together at the family domicile, and with the same relationship they had for the past several years (T-21, Joey's Affidavit).

Joey Simmons, Jr. And Heather McCardle, two of the couple's adult children, were likewise unaware of their parents being divorced (T-24).

After entry of the Final Judgment on August 21,2009 (T-11), Betty continued to live with Joey in the marital domicile as though nothing had changed and did not inform Joey of the divorce. (T-21, T-24)

On August 26, 2009, five (5) days after the divorce, Joey and Betty appeared before a Justice Court Judge in order that Betty answer charges of simple assault brought by Joey. Betty was accompanied by her attorney, David Sessums, who had prepared the Final Judgment of Divorce. When directly questioned by the Judge, whether the parties were married, both Joey and Betty replied "yes", which response was not contradicted by Betty's attorney who knew the parities were no longer married. (T-21, T-24). When Joey was questioned if he had an attorney, he responded " Yes, Wren Way for a divorce matter" (T-21). Had Joey been told the truth that the divorce judgment had been entered five days earlier and that all of his worldly possessions had been awarded to Betty, Joey would have had ample time to file his motion to set aside the judgment and seek a more equitable distribution of the couple's marital assets (T-13) The lower court found that Joey's Motion to Set Aside Judgment was not filed until September 30,2009, which was more than 10 days after entry of the divorce decree, and dismissed Joey's motion (T-15), and further found that Joey had not entered an appearance in the matter, and that "this case is not one of extraordinary and compelling circumstances." (T-46)

APPEARANCE

The contact between the attorney's representing both Joey and Betty was sufficient, under the procedural Rules, to require that Joey recieve actual notice of the hearing date. In ***Rawson v. Buta,*** 609 So2d 426 (Miss.1992) the Court held:

> " As a general rule, the failure of a party to answer a complaint opens the party to default judgment. Mississippi Rules of Civil Procedure 55 (a). In a divorce case, however, the rule for default judgment imposes special requirements:

PROOF REQUIRED DESPITE DEFAULT IN CERTAIN CASES. No judgment by default shall be entered against... a party to a suit for divorce... unless the claimant establishes his claim or rights to relief by evidence, provided, however, that divorces on the grounds of irreconcilable differences may be granted pro confesso as provided by statute. Miss Rules of Civil Procedure 55 (e) (1990)" (at page 430)

Likewise, Rule 55 (c) states that, for good cause shown, the court may set aside such judgment in accordance with Rule 60 (b). Rule 55 (b) requires that if the defendant has "appeared", he is entitled to no less than three (3) days notice prior to the hearing.

Nonetheless, the Chancellor below held:

"The Court finds that Mr. Simmons did not file an Answer or enter an appearance after being served.

The Court finds that Mrs. Simmons was not required to give Mr. Simmons notice of the uncontested divorce hearing.

The Court finds that Mr. Simmons did not file his Motion to Set Aside Judgment within ten (10) days of the Judgment of divorce." (T-15)

It is respectfully submitted that all three of these findings are error requiring remand of this matter.

Clearly this Court has expanded the meaning of "appearance" as used in M.R.C.P. 55(b) and Rules 55(c) and Rule 60 (b). Also, Rule 40 (b) requiring notice of trial settings in divorce cases where, although filing no answer, a party is entitled to such notice where an "appearance" has been entered. ***Brown v. Brown,*** 872 So 2d 787 (Miss. App. 2004)

The often cited footnote #5 in ***Journey v. Long,*** 585 So 2d 787 (Miss.1991), cites cases and instances of application of the term "appearance" from other jurisdictions, since there are no Mississippi cases directly on point:

"5. Because it was not raised, we do not reach the question

whether defendants made an "appearance" sufficient to be entitled to notice of any hearing on application for default judgment. No cases in Mississippi have addressed this issue. Thus, we would analyze decisions from courts of the United States construing and interpreting Rule 55 (b) of the Federal Rules of Civil Procedure which contains provisions essentially identical with our state rules. ***Bryant, Inc v. Walters,*** So. 2d 933, 935-36 (Miss. 1986).

Traditionally, for an action to constitute an appearance, one had to file documents in or actually physically appear before a court. ***Trust Co. Bank v. Tingen-Milford Drapery Co.,*** 119 F.R.D. 21, 22 (E.D.N.C. 1987). Today, however, those requirements have been relaxed considerably for Rule 55 purposes. " Courts now look beyond the presence or absence of such formal actions...." ***Lutomski v. Panther Valley Coin Exchange,*** 653 F. 2d 270, 272 (6th Cir. 1981). The appearance commanded by Rule 55 (b) has been defined broadly and interpreted liberally and is not limited to formal court appearance. ***Heleaseco Seventeen, Inc. v. Drake,*** 102 F. R. D. 909, 912 (D. Del. 1984) quoting ***H.F. Livermore Corp .v Aktiengesellschaft Gebruder Loepfe***, 432 F. 2d 689 (D.C. Cir.1970). Indeed, several cases have held that informal contacts between parties may constitute an appearance. See, e.g. ***H.F. Livermore Corp.***, 432 F.2d (689) (D. C. Cir. 1970) (defendant found to appear in action where the court was informed that during settlement negotiations, letters, in which the defendant made clear its intention to defend suit, were exchanged between the attorneys for the parties) ; ***Hutton v. Fischer,*** 359 F.2d 913 (3d Cir. 1966) (court found that telephone call from defendants counsel for more

time, sufficient to meet the appearance standard of Rule 55 (b)(2)); ***United States v. One 1966 Chevrolet Pickup Truck***, 56 F.R.D. 459 (E.D. Tex. 1972) (court held that the defense attorney's filing with the I.R.S. of a claim to the property forfeited and a court bond to transfer jurisdiction was sufficient notice of claimant's clear purpose to defend and sufficient to constitute appearance) ; ***Heleasco Seventeen, Inc.***, 102 F.R.D. 909 (D. Del. 1984) (defendants made appearance where their attorney initiated telephone conversations with plaintiff's attorney and defendant's attorney conveyed to plaintiff's attorney problems defendants were having due to the complexity of the case); ***Trust Co. Bank*** 119 F.R.D. 21 (E.D.N.C.) (telephone conversations between defendant's attorney and plaintiff's attorney inquiring as to date on which answer had been filed constituted an appearance by implication).

It is clear that defendants have now made an appearance by any standard and they are therefore entitled to notice and to be heard on any motion to assess damages on remand." (at page 1272-1273.

In ***Mayoza v. Mayoza***, 526 So 2d 547, Laura Beth filed her complaint for divorce from Nathaniel citing the ground of cruel and inhumane treatment. No answer was filed and the matter was heard uncontested with the court granting the divorce and awarding Laura alimony and use and possession of the marital home. Nathaniel filed a Rule 60(b) motion to have the judgment set aside, alleging that he did not file an answer because he could not afford an attorney and did not know that he could have contested the matter *pro se*. The Supreme Court upheld the Chancellor's decision to dismiss the motion, stating that Nathaniel was an educated person and found the excuse "... rather unbelievable considering that Nathaniel was no newcomer to divorce court ,

having on three prior occasions been a party to uncontested divorce proceedings." (at page 549)

The ***Mayoza*** court generally discussed the applicability of our Rules of Civil Procedure and, in particular, Rule 60 (b) as it relates to a claim for relief from the lower court's refusal to vacate a final judgment of divorce entered following a uncontested divorce hearing:

> " Seen in this light, we are concerned with a special kind of default judgment." " Rule 55 (e) provides that judgment by default in actions for divorce or annulment of marriage may only be granted where the claimant establishes his claim or rights to relief by evidence, provided, however, that divorces on the grounds of irreconcilable differences may be granted pro confesso as provided by statute." (At page 548).

In the case below, Joey's attorney had contacted Betty's attorney to express that Joey did not wish to contest the divorce, but he did have a problem with Betty being awarded the marital home and everything in it as she had requested in her complaint, since such an award would give Betty virtually 100% of the marital assets of the parties. As soon as he became aware that a divorce decree had been entered giving Betty all of the family's assets, Joey filed immediately this motion to set the judgment aside. Betty had conveniently, or by design, let the 30-day period run before informing Joey and their children of the divorce and that she now owned the home, all furniture and appliances and was awarded attorney's fees. Also, during the 30-day interim after entry of the divorce, she falsely led a Justice Court judge, and Joey, to believe the parties were still married in an affirmative response to a direct question as to their marital status.

M.R.C.P. 60 clearly lies to remedy a wrongful judgment for "fraud, misrepresentation, or other misconduct of an adverse party" (Rule 60 (b) (1)), or " any other reason justifying relief from the judgment." (Rule 60 (b) (6)). Betty's misrepresentations were intentional and material and deprived Joey of his fundamental rights. See ***C.M. v. R.D.H,*** 947 So 2d, 1023 (Miss.App. 2007), and ***Iuka Guaranty Bank v. Beard,*** 658 So 2d, 1368 (Miss.1995). It is respectfully submitted that, for the lower court erred in its findings ,from all facts and circumstances surrounding this case as set forth in affidavits, Joey was not entitled to relief because " this case

is not one of extraordinary and compelling circumstances." (T-45), or that the motion was not filed within ten (10) days from the date of the judgment(T-44) is an abuse of discretion as well as a misapplication of Rule 60 (b) which requires that the motion be filed " within a reasonable time" under Rule 60 (b) (6) and " not more than six months" after judgment is entered under Rule 60 (b) (1).

The Court delved further into its ruling in ***Rawson***, supra, that Rule 55 (b) was applicable to uncontested divorce cases and required notice to the defendant who has entered their appearance in the case of ***Holmes v. Holmes***, 628 So 2d 1361 (Miss.1993). Citing the holding in ***Journey v. Long***, supra, the ***Holmes*** court noted:

> "In the case at bar, Mrs. Holmes promptly contacted an attorney. Her attorney wrote her husband's attorney and informed him that Mrs. Holmes was represented by counsel and that she wished to settle the case if possible; however, he made clear Mrs. Holmes' intent to defend the suit should no settlement be reached. With knowledge of this letter, Mr. Holmes' attorney nevertheless proceeded to secure a divorce by default against Mrs. Holmes. In this regard, his conduct suggests gamesmanship. In the Comment to M.R.C.P. 1, it is stated that " properly utilized, the rules will tend to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies." Conversely, improper utilization of the rules invariably results in the type of gamesmanship and ambush techniques, employed in the case at bar, that the rules were designed to abolish. We refuse to condone such behavior and therefore reverse the judgment of the chancellor and remand for

proceedings consistent with the opinion rendered in this cause."

(at page 1364-1365)

In ***Journey v. Long***, the Court launched into a discussion of whether the defendant had "appeared' by allegedly sliding their answer under the door of the closed clerk's office, noting that the question was not raised by the parties but needed nationwide exploration since it was a mater of first impression. In ***Holmes***, Mrs. Holmes' attorney filed no answer but, instead, wrote a letter to Mr. Holmes' attorney seeking a settlement of the couple's marital assets, thereby evidencing an intent to defend the suit on that basis, which constituted an appearance under Rule 55 (b). In the subsequent case of ***Sanford v Sanford***, 749 So 2d 353 (Miss. App. 1999), Mrs. Sanford filed her Rule 60 (b) Motion for Relief from judgment based on the fact that she was not native to America. She did not file an answer because she felt that answering the complaint of her husband was unwifely, and that she believed that the granting of the divorce was automatic. The Court reversed and remanded the case, granting the motion for relief, stating:

> "Though an argument in this precise setting has not apparently arisen on a previous appeal, the general issues have been addressed. In one case a husband appealed the denial of his motion to set aside a judgment of divorce. The supreme court reversed the denial of the motion, saying through Justice Joel Blass that the "court has not favored final decrees which are the product of surprise, accident, mistake or fraud." ***King v. King***, 556 So. 2d 716, 719 (Miss. 1990). Though the facts are considerably different than here, in another appeal the supreme court reversed a chancellor's refusal to set aside a property settlement. ***Peterson v. Peterson***, 648 So 2d 54 (Miss. 1994). There was a procedural error, but the court also was concerned that confusion had surrounded the case from its

inception. *Id.* at 56-57. That is conclusively proven to be true here as well.

> Mrs. Sanford's persistent misunderstanding of Mississippi's divorce law was coupled with the fact that she was unrepresented by counsel. Her letters indicated an individual who found divorce repugnant to her personal values, so much so that she was willing to go to the extraordinary lengths of offering to reconcile with her husband and adopt his baby that he had with a mistress." (At page 360)

This ruling was made in reliance upon rights of litigants provided in Rule 60 (b).

In ***Sanghi v. Sanghi***, 759 So 2d 1250 (Miss. App. 2000), Dr. Sanghi sought relief from a divorce judgment where no answer was filed, but contended that he entered an appearance by contacting the court's administrator seeking a continuance. The Court held:

> " This raises the issue of whether Dr. Sanghi made an "appearance." The most expansive definition of "appearance" is under the rules applicable to default judgments. There, an appearance occurs when "the non-movant has manifested to the movant a clear intent to defend the suit." ***Dynasteel Corp. v. Aztec Industries, Inc.***, 611 So 2d 977,981 (Miss. 1992). The court held "formal court appearances" were not required; it cited another precedent that stated "informal contacts between parties may constitute an appearance," including seeking more time to answer. *Id.,* (citing ***Journey v. Long***, 585 So. 2d 1268, 1272 n. 5 (Miss 1991)

Though we find that Dr. Sanghi's contacting the court administrator to seek a later hearing date could be an appearance for default judgment purposes, it is a different matter of whether it is an appearance waiving a service of a summons under Rule 81. A defendant's appearance under default judgment analysis triggers the obligation to give that defendant three days notice prior to a hearing on the default. M.R.C.P. 55(b). For a default judgment a defendant wants to be found to have made an appearance so that notice will be given. On the other hand, merely contacting the court administrator would not be an appearance that waives defects in the service of a summons of a complaint. Lawrence J. Franck & J. Collins Wohner, Jr., *Commencement of the Action,* in 1 Jeffrey Jackson (ed.), Mississippi Civil Procedure, § 5:30 at 5-44 through 5-46 (1999).

We conclude that Rule 81 notice to revive a dormant action provides protections akin to those for beginning litigation. The Supreme Court has found that compliance with Rule 81 is mandatory. ***Powell,*** 644 So.2d at 274. We would read that to mean that it is mandatory unless the defendant has, as in ***Saddler***, done something to waive his right to insist upon proper service. We find that Dr. Sanghi's contact with the court administrator to seek a more convenient time for the hearing, was not a waiver of his right to object to the absence of proper service of a summons upon him.

The orders that we are called upon to review in this appeal arise from the April 13 hearing to which Dr. Sanghi was never properly summonsed. What occurred in July, especially the incarceration pending the defendant's purging of his contempt, had no basis without the findings made in April. Consequently we reverse and remand for further proceedings." (at page 1257,1258)

CONCLUSION

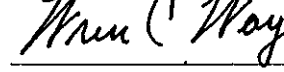
Joey Simmons made an appearance before the court below sufficient to satisfy the requirements of M.R.C.P. Rule 55 by agreeing that his marriage with Betty was beset with irreconcilable differences, but disagreeing that she was entitled to all of the couples's marital assets. Appellant was entitled to notice of the hearing pursuant to Rule 55 (b) (c) and (e) and Rule 60 (b) so that he could present to the lower court his case for an equitable division of marital assets and his defense to paying Betty's attorney's fees.

Given the facts and circumstances surrounding the obtaining of a divorce by default after the parties' attorneys had conferred as well as Betty's subsequent deception, the lower court abused its discretion in holding that Appellant had not entered his appearance and was not entitled to notice of the hearing, holding that Appellant had only ten (10) days from the date of the Judgment to file his motion to set the judgment aside under Rule 60 (b), and in holding that the case was not one of extraordinary and compelling circumstances that placed the matter within the court's "grand reservoir of equitable power to do justice in a particular case." Under Mississippi Rules of Civil Procedure Rule 55 (b) (c) and (e), Joey, having entered and appearance, was entitled to notice of the divorce hearing in order to defend his substantial rights.

Appellant respectfully asks that this matter be reversed and remanded so that equity may be finally served.

Respectfully submitted,

JOEY K. SIMMONS, Appellant

By: 

WREN C. WAY, Appellant's Attorney

CERTIFICATE OF SERVICE

I, Wren C. Way, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Appellant's Brief to Davis M. Sessums, Esq., attorney for appellee, at his usual address of P.O. Box 1237, Vicksburg, MS 39181, and to Honorable Vicki R. Barnes, Chancellor, at her address of Post Office Box 351, Vicksburg, Mississippi, 39180.

SO CERTIFIED, THIS THE 22nd DAY of JULY, 2010.

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