IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES CRAIG IRVING — APPELLANT

VS.

NO. 2010-IA-00310-SCT
CONSOLIDATED WITH
NO. 2010-CA-00355

JOHNNIE EVANS IRVING — APPELLEE

BRIEF OF APPELLEE
JOHNNIE EVANS IRVING

APPEAL FROM THE CHANCERY COURT
OF DESOTO COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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. James Craig Irving, Appellant.
2. Johnnie Evans Irving, Appellee.
3. Perry, Winfield & Wolfe, P.A., Attorneys for Johnnie Evans Irving, 224 East Main Street, Post Office Box 80281, Starkville, Mississippi 39759.
4. Law Offices of Meacham and Jackson, Attorneys for Johnnie Evans Irving, Post Office Box 566, Hernando, Mississippi 38632.
5. John T. Lamar, Jr. and Lamar & Hannaford, P.A., Attorneys for James Craig Irving, 214 South Ward Street, Senatobia, Mississippi 38668.
6. Honorable Percy Lynchard, DeSoto County Chancery Court, 2535 Highway 51 South, Hernando, Mississippi 38632.

SO CERTIFIED this the 17th day of February, 2011.

Respectfully submitted,

Joy Wolfe Graves, MB #[redacted]
Attorney for Johnnie Evans Irving

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I. STATEMENT OF THE ISSUE

1. Whether the Chancellor properly limited the evidence relevant to James Craig Irving's Petition for Modification to evidence of a material change in circumstance arising after December 3, 2008 (the date of the prior child support order) on the grounds of res judicata.

II. STATEMENT OF THE CASE

A. Nature of the Case and Disposition Below

This appeal was filed by James Craig Irving (hereinafter "Mr. Irving") following the entry of the Chancellor's Order on his Amended Motion for Reconsideration entered on January 26, 2010 nunc pro tunc to November 17, 2009.[1] (Record at 81-82 (hereinafter R. 81-82); Appellant's Record Excerpts at 60-61 (hereinafter JCIRE 60-61)). The Order held that Mr. Irving was limited to evidence of events occurring after December 3, 2008 in support of his Petition to Modify. (R. 81-82; JCIRE 60-61). The effect of the Order was to prevent Mr. Irving from presenting testimony regarding his loss of employment on November 18, 2008, because that date preceded the entry of an Order setting child support on December 3, 2008. (R. 8-10; JCIRE 24-26).

The Chancery Court proceedings that give rise to this appeal are set forth in the following section, as those procedural facts are the only facts relevant to this appeal. In the interest of economy, Johnnie Evans Irving (hereinafter "Ms. Irving") will rely on the following section to inform the Court of the disposition of the case below.

B. Statement of Facts Relevant to Appeal

This divorce proceeding originated almost 10 years ago in the Chancery Court of DeSoto County. (R. 1, Docket Entry 1; JCIRE 1, Docket Entry 1). The Final Decree of Divorce was entered on January 29, 2002. (R. 1, Docket Entry 3; JCIRE 1, Docket Entry 3). The parties have been before the Chancery Court on a number of occasions since that date; however, for purposes of this appeal, only the following facts are relevant:

On November 5, 2008, a hearing was held regarding the amount of child support to be paid by Mr. Irving. (R. 8-10; JCIRE 24-26).

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[1] The Final Order was filed on February 2, 2010. (Record at 81-82).

On or about November 18, 2008, Mr. Irving lost his job. (R. 63; JCIRE 49).

Upon the loss of his job, Mr. Irving did not file any motion or otherwise attempt to get the evidence of his job loss before the court. (R. 1-7; JCIRE 1-7).

Mr. Irving's then-counsel reviewed and executed the Order that was forwarded to the Court for review and entry and no objection was raised based on Mr. Irving's change in employment status. (R. 8-10; JCIRE 24-26).

On December 3, 2008, the Court entered its Order establishing the modified amount of child support to be paid by Mr. Irving. The Order was entered nunc pro tunc to November 5, 2008. (R. 8-10; JCIRE 24-26).

Mr. Irving again did not any motion to reconsider or otherwise seek to have the Order revised in light of his change in employment status. (R. 1-7; JCIRE 1-7).

On January 14, 2009, Ms. Irving filed a Petition for Contempt seeking to enforce the December 3, 2008 Order, along with that portion of the divorce decree that required the parties to share uncovered medical or dental expenses for their children. (R. 11-19; JCIRE 27-35).

On April 1, 2009, Mr. Irving filed a Motion to Dismiss, Affirmative Defenses, Answer to the Petition for Contempt and Counter-Petition for Modification, Etc., seeking among other things a modification of his child support obligations on the basis of his change in employment status. (R. 20-25; JCIRE 36-41).

On May 26, 2009, a hearing on the Petition for Contempt was held and on May 27, 2009, an Order was entered finding Mr. Irving in contempt and ordering the payment of back child support, one-half of certain unpaid dental expenses and attorney's fees. Prior to entry of that Order, Mr. Irving requested that his Counter-Petition for Modification be dismissed without prejudice. (R. 38-40; JCIRE 42-44).

On May 29, 2009, Mr. Irving satisfied the May 27, 2009 Order of Contempt by paying the $8,325.06 as ordered. (R. 41-42; R. 38-40; JCIRE 42-44).

Also on May 29, 2009, Mr. Irving filed a Petition for Modification, Etc., requesting that his child support and other financial obligations be downwardly modified in light of his termination, in November 2008, from his previous employment. (R. 43-44; JCIRE 45-46).

On June 24, 2009, Ms. Irving filed a Response to Petition for Modification, Etc., raising among her defenses, the doctrine of res judicata. (R. 45-48).

On July 3, 2009, Ms. Irving filed a Motion to Dismiss on the same res judicata grounds, specifically that the change in circumstances upon which Mr. Irving based his request for modification occurred prior to the date of the December 2008 Order modifying his child support obligation and therefore, Mr. Irving should be barred from litigating regarding that change in circumstance. (R. 49-50; JCIRE 47-48).

On July 8, 2009, a hearing on Ms. Irving's Motion to Dismiss was held and on July 21, 2009, the Court granted the Motion to Dismiss, finding that Mr. Irving could not litigate with respect to an alleged material change in circumstances that occurred prior to the entry of the December 3, 2008, Order because he failed to avail himself of the mechanism for review afforded by Rule 59 of the Mississippi Rules of Civil Procedure. (R. 63-65; JCIRE 49-51).

On July 24, 2009, Mr. Irving filed a Motion to Reconsider the July 21, 2009 Order. (R. 66-67).

On July 29, 2009, Mr. Irving filed an Amended Motion to Reconsider. (R. 70-71; JCIRE 58-59).

On November 17, 2009, a hearing was held on the Motion for Reconsideration. An Order was signed on January 26, 2010 (nunc pro tunc to November 17, 2009) and filed February 2, 2010, amending the prior order to "make it a declaratory judgment reflecting that the only

relevant evidence pertaining to the motion would be any evidence arising after the entry of the decree of December 3rd, 2008." (R. 81-82; JCIRE 60-61).

Mr. Irving filed a Notice of Appeal from the Order filed February 2, 2010. (R. 83).

III. SUMMARY OF THE ARGUMENT

The Chancellor's Order modifying Mr. Irving's child support obligation was entered December 3, 2008. (R. 81-82; JCIRE 60-61). Mr. Irving lost his job on or about November 18, 2008. (R. 63; JCIRE 49). Mr. Irving did not avail himself of the various procedural mechanisms available to him for seeking relief from the judgment in light of his job loss. Therefore, he cannot now be allowed to allege that a material change in circumstances occurred prior to December 3, 2008 should serve to modify his child support obligations under the December 3, 2008 Order. That issue could have been, and should have been, litigated in the 2008 proceeding.

IV. STANDARD OF REVIEW

The Chancellor's determination that the doctrine of res judicata barred the pleading of an alleged material change in circumstances that occurred prior to December 3, 2008 (the date of the child support order sought to be modified) involves a question of law. Therefore, this Court will review the issue de novo. *See, e.g., J.C. v. Adoption of Minor Child Named Herein,* 797 So. 2d 209 (Miss. 2001).

V. ARGUMENT

A. The Chancellor Properly Ruled that Res Judicata Barred the Consideration of An Alleged Material Change In Circumstances That Occurred Prior to December 3, 2008.

Mr. Irving lost his job on or about November 18, 2008. (R. 63; JCIRE 49). The Order setting his child support obligation at $1,050.00 per month was signed December 3, 2008 and entered nunc pro tunc to November 5, 2008. (R. 81-82; JCIRE 60-61). In spite of his knowledge of the change in his employment status and his knowledge that the issue of child support was before the chancery court, Mr. Irving made no effort to supplement the evidence before the court to include evidence of the job loss, either before the December 3, 2008 Order was entered or, pursuant to Rule 59 of the Mississippi Rules of Civil Procedure, after the entry of the Order. (R. 1-7; JCIRE 1-7). The failure of Mr. Irving to raise his alleged material change in circumstances that occurred prior to the entry of the order he wishes to modify precludes him from now asserting that same event as a material change in circumstances justifying a modification of his child support obligations.

It is settled law in Mississippi that modification of child support will be had only if there has been a **material change in circumstances "since the entry of the decree** [and that] such change was **unforeseeable at the time of the decree."** *Leiden v. Leiden,* 902 So. 2d 582 (Miss. Ct. App. 2004) (emphasis added). Not only was the change of circumstance about which Mr. Irving now complains not unforeseeable at the time of the December 3, 2008, Order, **it had already occurred.** Mr. Irving had several opportunities to raise the issue of his November 14, 2008 loss of employment and to seek to have the December 3, 2008 Order modified on that basis. He failed to do so, and the Chancellor properly held that his failure precluded introduction of evidence of the job loss (as an alleged material change in circumstances) in subsequent modification hearings.

This family law version of the doctrine of res judicata works to prevent the litigation of claims that were raised or **could have been raised** during prior litigation. *See, e.g., Howard v. Howard,* 968 So. 2d 961, 973 (Miss. Ct. App. 2007). It does not matter whether an argument, position, claim or defense was actually litigated or asserted in the prior action, so "long as those grounds were available . . . and should have been asserted." *Howard,* 968 So. 2d at 973, *see also Clements v. Young,* 481 So. 2d 263 (Miss. 1985). Where, as here, a party clearly had the opportunity to raise the issue of a material change in circumstances in a prior proceeding – Mr. Irving could have sought relief immediately upon loss of his job (almost two weeks before entry of the Order) or he could have timely filed a Motion pursuant to Rule 59 raising the issue of his job loss or he could have filed a Motion pursuant to Rule 60 of the Mississippi Rules of Civil Procedure raising the same issue – that party should not be heard to subsequently complain about the same issue.[2] Mr. Irving did none of the above and, therefore, he is now barred from alleging that a material change of circumstances justifying relief occurred prior to December 3, 2008. (R. 1-7; JCIRE 1-7).

Mr. Irving, in fact, sought no relief whatsoever from the Court's December 3, 2008 Order until April 1, 2009, when he filed his Answer to the Petition for Contempt and a Counter-Petition for Modification, alleging for the first time that his change in employment status in November 2008 should result in a change in his child support obligations. (R. 20-25; JCIRE 36-41). Thus, Mr. Irving, in spite of losing his job and purportedly being unable to fulfill his child support obligations (and in fact, failing to pay those obligations as evidenced by the May 27, 2009 Order of Contempt (R. 38-40; JCIRE 42-44)), did not attempt to bring this matter to the Chancellor's attention until 4 1/2 months after the loss of his job and 4 months after entry of the child support

[2] By suggesting these avenues by which Mr. Irving could have sought relief, Ms. Irving in no way suggests that such efforts would have been successful, as that determination could only be made after a detailed hearing on the issue of Mr. Irving's financial condition.

Order. (R. 20-25; JCIRE 36-41). Mr. Irving then voluntarily withdrew that Counter-Petition for Modification. (R. 38-40; JCIRE 42-44).

Mr. Irving then, after purging himself of contempt through the payment of over $8,000 (R. 41-42; R. 38-40; JCIRE 42-44),[3] refiled a Petition for Modification, again alleging, as his material change in circumstance since the entry of the last child support order (that would support his requested modification) the loss of his job in November 2008. On appeal, Mr. Irving suggests that his original Counter-Petition for Modification (which he voluntarily dismissed) and his refiled Petition for Modification (which resulted in the court's ruling as to his ability to use evidence of pre-December 3, 2008 events to support his request and gave rise to this appeal) could have been considered as Rule 60 Motions by the Court. Assuming for purposes of this appeal only that the issues raised by Mr. Irving would give rise to a valid Rule 60 Motion for relief from judgment, his argument must fail. First, Mr. Irving's pleadings give no suggestion that he is filing them pursuant to Rule 60, instead they request relief from not only the December 2008 Order but the original divorce decree as well (R. 20-25 and 43-44; JCIRE 36-41 and 45-46) and second, his delay in bringing this issue before the Chancellor should defeat any such motion. While Rule 60(b)(6) provides that a court may relieve a party from an order for "any other reason justifying relief," such a motion must be made "within a reasonable time." Miss. R. Civ. P. 60(b). The determination of whether a Rule 60 Motion is filed within a reasonable time is determined on a case-by-case basis. *See, e.g., Cucos, Inc. v. McDaniel,* 938 So. 2d 238, 245 (Miss. 2006). However, "the remedy provided under Rule 60(b) is not a means for those who had procedural opportunity for remedy under other rules and failed, without case, to pursue such

[3] By complying with the Chancellor's Order of Contempt, Mr. Irving has demonstrated that, at least as of the end of May 2009, he had the financial means to comply with the child support and other obligations imposed upon him by the Court, regardless of his employment status. Therefore, the issue of the loss of his job in November 2008 may well be moot as constituting a material change in circumstances in and of itself.

avenues." *Netterville v. Weyerhauser Co.*, 963 So. 2d 38 (Miss. Ct. App. 2007). Mr. Irving delayed almost 6 months after entry of the December 3, 2008 Order before advancing his argument that his loss of employment justified a modification of child support. He did not seek to take advantage of any other procedural mechanism for relief before filing his Petition for Modification, which he now contends should be considered a Rule 60 motion. He should not be heard to complain regarding the December 3, 2008 Order under Rule 60 after such a delay in raising the issue (about which he clearly had knowledge) and after failing to avail himself of the other avenues of relief.

It has been stated that "[e]quity aids the vigilant and not those who slumber on their rights." Griffith's Mississippi Chancery Practice § 41 (2000 ed.). Mr. Irving slumbered on his rights and failed to raise his alleged material change in circumstances prior to the entry of the December 3, 2008 order setting child support. This is exactly the situation that is designed to be prevented by Mississippi law related to child support orders and vesting of support payments as they become due and payable each month and the related doctrine of res judicata. The Chancellor was correct in his application of these doctrines to Mr. Irving's claims,[4] and the ruling of the Chancellor should be affirmed in all respects.

VI. CONCLUSION

Mr. Irving has failed to demonstrate that the Court erred in limiting the evidence that he could present in support of his Petition for Modification to facts arising after December 3, 2008.

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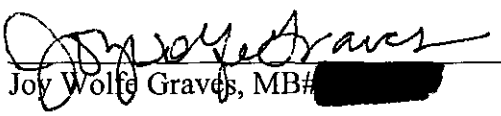
[4] In his brief, Mr. Irving suggests that this Court should "rescind [the Chancellor's] order and allow the petitioner to go forward with the petition for modification." (Brief at page 3). The Chancellor's order did not dismiss Mr. Irving's Petition; instead, the Chancellor ruled that his "previous order . . . shall be amended to make it a declaratory judgment reflecting that the only relevant evidence pertaining to the motion would be any evidence arising after the entry of the decree of December 3, 2008." (R. 81-82; JCIRE 60-61). It is not inequitable for Mr. Irving to be limited to material changes since the Order's entry. Unemployment in and of itself is not sufficient to modify a parent's obligation to support children. Unemployed parents frequently have non-earned income resources to use to support, feed and clothe the children living in their homes. The same is true of the unemployed parent's obligation to meet his or her children's needs through child support obligations.

Mr. Irving had several mechanisms available to him at the time the December 3 Order was entered (or prior to entry of that Order) that would have allowed him to seek reconsideration of that Order. Having failed to do so, he cannot now be allowed to relitigate that issue. The doctrine of res judicata and settled Mississippi law related to modification of child support demand such an outcome. Therefore, the Chancellor's ruling on the Motion for Reconsideration should be affirmed, and Mr. Irving should be precluded from introducing any evidence of an alleged material change in circumstances arising prior to December 3, 2008, in support of his Petition to Modify, and Ms. Irving should be granted all other relief to which she may be entitled.

Respectfully submitted,

JOHNNIE EVANS IRVING



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CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that this day a true and correct copy of the foregoing instrument has been delivered to the following persons:

John T. Lamar, Jr.
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Honorable Percy Lynchard
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So certified, this the 17th day of February, 2011.

Joy Wolfe Graves