IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES CRAIG IRVING, APPELLANT

v.

CASE NO. 2010-M-00310-SCT
Consolidated with
CASE NO. 2010-TS-00355

JOHNNIE EVANS IRVING, APPELLEE

BRIEF FOR APPELLANT

APPEAL FROM THE DECISION OF THE
CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI

John T. Lamar, Jr.
MSB [redacted]
OF COUNSEL FOR APPELLANT
LAMAR & HANNAFORD, P.A.
Attorneys at Law
214 S. Ward St.
Senatobia, MS 38668
1-662-562-6537

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES CRAIG IRVING, APPELLANT

CASE NO. 2010-M-00310-SCT
V. Consolidated with CASE NO. 2010-TS-00355

JOHNNIE EVANS IRVING, 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 this Court may evaluate possible disqualification or recusal.

1.	James Craig Irving	Plaintiff/Appellant
2.	John T. Lamar, Jr. and the law firm of Lamar & Hannaford, P.A.	Counsel for Appellant
3.	Johnnie Evans Irving	Defendant/Appellee
4.	Malenda H. Meacham	Counsel for Appellee
5.	Honorable Percy L. Lynchard, Jr.	Chancery Court Judge

Respectfully submitted,
LAMAR & HANNAFORD, P.A.
Attorneys at Law
214 South Ward Street
Senatobia, MS 38668
Phone: (662) 562-6537

BY: _____
JOHN T. LAMAR, JR.
MS State Bar [redacted]

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES. iii

STATEMENT OF ISSUES ON APPEAL iv

STATEMENT OF THE CASE 1

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW 1

SUMMARY OF ARGUMENT 3

ARGUMENT. 3

A. STANDARD OF REVIEW 3

B. ISSUE: WHETHER THE CHANCELLOR WAS MANIFESTLY IN ERROR IN GRANTING THE APPELLEE'S MOTION TO DISMISS THE APPELLANT'S PETITION FOR MODIFICATION ON THE DOCTRINE OF RES JUDICATA. 4

CONCLUSION. 7

CERTIFICATE OF SERVICE. 8

TABLE OF AUTHORITIES

STATE CASES

Cannon v. Cannon, 571 So.2d 976 (Miss. 1990). 7

Department of Human Services v. Gaddis, 730 So2d 1116, 1117 (Miss. 1998) 4

Dunaway v. W. H. Hopper and Associates, Inc., 427 So.2d 749 (Miss. 1982) 5

Green v. Myrick, 177 Miss. 778, 171 So. 774, 774 (1937). . . . 5

Griffis Mississippi Chancery Practice, 2000 Edition. 6

Henderson v. Henderson, 27 So.3d 462 (Miss. App. Ct. 2010) 464. 5

Howard v. Howard, 968 So.2d, 961 (Miss. App. 2007). 6

McEwen v. McEwen, 631 So. 2d 821 (Miss. 1994). 4

Meek v. Warren, So.2d 1292 (Miss. App. 1998) 4

Sample v. Davis, 904 So.2d 1061 (1063-64) (Miss. 2004) 4

State v. Bapt. Mem'l Hosp.-Golden Triangle, 726 So. 2d 554, 557 (Miss. 1998) 4

Tedford v. Dempsey , 437 So. 2d 410, 417 (Miss. 1983). 4

Thrash v. Thrash, 385 So.2d 961 (Miss. 1980) 5

RULES

Mississippi Rules of Civil Procedure 3

STATEMENT OF ISSUES

The issue presented by Appellant in this appeal is:

1. ISSUE: WHETHER THE CHANCELLOR WAS MANIFESTLY IN ERROR IN GRANTING THE APPELLEE'S MOTION TO DISMISS THE APPELLANT'S PETITION FOR MODIFICATION ON THE DOCTRINE OF RES JUDICATA

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

1. On January 29, 2002, the Chancery Court of DeSoto County, Mississippi, granted a divorce between the Appellant, James Craig Irving, hereinafter referred to as the petitioner, and the Appellee, Johnnie Evans Irving, hereinafter referred to as respondent. See R. 8.

2. On November 5, 2008, Chancellor Cobb issued an oral opinion modifying the decree of divorce and increased the amount of child support the petitioner was to pay to the sum of $1,050.00 per month. The order was not entered until December 3, 2008. See R. 24.

3. The petitioner, James Craig Irving, was laid off as a normal reduction in force by his employer, Yates Construction Company, on November 14, 2008, nine days after the Chancellor had rendered her decision. See Exhibit "C" to the Petition for Interlocutory Appeal and R.49

4. On January 14, 2009, the respondent, Johnnie Evans Irving, filed a petition for contempt. The petitioner, James Craig Irving, filed a Motion to Dismiss, Affirmative Defenses, Answer to Petition for Contempt and Counter-Motion for Modification. See R.27 and R. 36.

5. On May 26, 2009, Chancellor Lynchard signed an order of contempt, which was entered nunc pro tunc on May 27, 2009, awarding

back child support and medical bills in the amount of $3,550.00 and attorney's fees of $4,775.06. See R. 42.

6. On May 29, 2009, the petitioner filed a petition for modification of Chancellor Cobb's November 5, 2008, ruling, seeking a reduction in support, based on the change of circumstances brought about by the loss of his job at Yates Construction Company. See R. 45.

7. On July 3, 2009, the respondent filed a motion to dismiss the Petition for Modification filed by the petitioner on the theory of res judicata. See R. 47.

8. On July 8, 2009, Chancellor Lynchard conducted a hearing on the motion to dismiss, and subsequently entered an order on July 21, 2009, granting the motion to dismiss finding that although the Chancellor rendered a decision on November 5, 2008, the order was not entered until December 3, 2008, and anything that occurred prior to December 3, 2008, was res judicata. See R. 49.

9. On July 10, 2009, the respondent filed a counter-petition for wilful contempt, requesting the Court to hold the petitioner in contempt for non-payment of child support. See R. 52.

10. On July 29, 2009, the petitioner filed an amended motion to reconsider the Court's July 21, 2009, order. See R. 58.

11. On February 2, 2010, the Court ruled on the amended motion to reconsider and modified its prior July 21, 2009, order. See R. 60. It is this order and the order of July 21, 2009, we

seek to appeal.

(C)

SUMMARY OF ARGUMENT

The Chancery Court of DeSoto County, Mississippi, erred, as a matter of law, when it ruled the petitioner could not bring into evidence his loss of employment, which occurred after the hearing and ruling by Judge Cobb on November 5, 2008. As a result his ruling, the Supreme Court should rescind his order and allow the petitioner to go forward with the petition for modification.

(D)

ARGUMENT

A. STANDARD OF REVIEW

The Chancery Court of DeSoto County, Mississippi, in its order of July 21, 2009, ruled the petitioner, James Craig Irving, could not present any evidence of his loss of employment, which took place after the previous hearing for modification, but before the ruling by the Court on November 5, 2008, and the entry of the order nunc pro tunc, on December 3, 2008. R. 63. The Chancellor's decision was based on the failure of the petitioner to file a Rule 59 motion for a new trial pursuant to the Mississippi Rules of Civil Procedure. As such, the Chancellor was making a ruling on a matter of law. In domestic relations cases, the scope of review is limited to the substantial evidence/manifest error rule. *Sample v. Davis,* 904 So.2d 1061 (1063-64) (Miss. 2004). However, the

familiar manifest error/substantial evidence rule has no application to questions of law. *Meek v. Warren,* So.2d 1292 (Miss. App. 1998). Questions of law are reviewed under the de novo standard. *Department of Human Services v. Gaddis,* 730 So2d 1116, 1117 (Miss. 1998. The Mississippi Supreme Court has the final say regarding interpretations of law. *State v. Bapt. Mem'l Hosp.-Golden Triangle,* 726 So. 2d 554, 557 (Miss. 1998).

B. ISSUE 1: WHETHER THE CHANCELLOR WAS MANIFESTLY IN ERROR IN GRANTING THE APPELLEE'S MOTION TO DISMISS THE APPELLANT'S PETITION FOR MODIFICATION ON THE DOCTRINE OF RES JUDICATA.

The ruling of the Chancery Court through his orders of July 21, 2009 and January 26, 2010, which limits the petitioner from putting into evidence those matters which occurred after December 3, 2008, due to res judicata, is in error. A party seeking modification of child support must show a substantial and material change in circumstances. *McEwen v. McEwen,* 631 So. 2d 821 (Miss. 1994). This rule is little more than a family law variant of the doctrine of res judicata. *Tedford v. Dempsey* , 437 So. 2d 410, 417 (Miss. 1983). It is the position of the appellant that Chancellor Lynchard erred in granting respondent's motion to dismiss his petition for modification on the doctrine of res judicata, and later modifying it so that only evidence after December 3, 2008, be allowed, effectively not allowing any evidence of his loss of employment to be put into evidence. Generally, four identifiers must be present before the doctrine of res judicata will be

applicable. They are as follows:

1. Identity of the subject matter of the action.
2. Identity of the cause of action.
3. Identity of the parties to the cause of action.
4. Identity of the quality or character of a person against whom the claim is made.

If these four identifiers are present, the parties will be prevented from re-litigating all issues tried in the prior lawsuit, as well as all matters which should have been litigated and decided in the prior lawsuit. See *Dunaway v. W. H. Hopper and Associates, Inc.*, 427 So.2d 749 (Miss. 1982).

The Chancellor's opinion was rendered orally on November 5, 2008. The change of circumstances occurred on November 14, 2008, when the petitioner lost his job, due to work force reduction. The Chancellor's oral opinion was memorialized, nunc pro tunc, by written judgment on December 3, 2008. Nunc pro tunc relates to a ruling or action previously made or done but for some reason the record of said ruling is defective or omitted. *Thrash v. Thrash,* 385 So.2d 961 (Miss. 1980). "[C]ourts may by nunc pro tunc orders supply omissions in the record of what had previously been done, and by mistake or neglect, not entered." *Green v. Myrick*, 177 Miss. 778, 171 So. 774, 774 (1937). "The later record making does not itself have a retroactive effect but it constitutes the later evidence of a prior effectual act." *Henderson v. Henderson*, 27 So.3d 462 (Miss. App. Ct. 2010) 464. "When a judgment is entered nunc pro tunc, it becomes operative between the parties as of the date when it should have been entered." *Griffis Mississippi*

Chancery Practice, 2000 Edition.

Simply put, the issue of change of circumstances resulting from petitioner's job loss was not litigated in the November 5, 2008, hearing because it did not occur until November 14, 2008. Res judicata does not apply because the fourth identifier, identity of quality or character of a person against whom the claim is made, was not litigated.

Chancellor Lynchard, sua sponte, held that the petitioner should have filed a timely motion under Rule 59. Following Chancellor Lynchard's logic, any issues which occurred between November 5, 2008, and December 3, 2008, can never be litigated unless petitioner files a Rule 59 motion. This simply cannot be the law. See *Howard v. Howard*, 968 So.2d, 961 (Miss. App. 2007). While we agree that a motion for amendment of judgment could have been filed under Rule 59, we submit that is not the only vehicle through which this matter could be presented to the Chancery Court.

The petition for modification was originally filed on April 1, 2009, and again filed on May 29, 2009. This could be considered as any other modification or as a request for relief from judgment under Rule 60, and was done well within the time period for such. If a motion for relief from judgment is not designated as being brought under a particular rule, it cannot be considered under Rule 59 if it is filed more than ten days after entry of the judgment, but can be considered as brought under Rule 60(b). *Cannon v. Cannon*, 571 So.2d 976 (Miss. 1990). Furthermore, the Motion to

modify the order is not procedurally barred because the Motion to Modify the Judgment was brought forward by the appellant in its Petition to Modify filed on April 1, 2009, and again on May 29, 2009. See: In re Dissolution of Marriage of Profilet, 826 So.2d 91 (Miss. 2002).

The issue of employment was not litigated at the November 5, 2008 hearing, nor was it anticipated at the time that the Court made its ruling, and the appellant should be entitled to proceed with a modification proceeding based on the fact that he lost his job through no fault of his own.

CONCLUSION

It is the position of the petitioner that the honorable and learned Chancellor, as a matter of law, committed reversible error when he ruled that the petitioner could not put into evidence his termination of employment from his previous employer. The four elements of the doctrine of res judicata were not met. Therefore, the petitioner respectfully requests this Court to reverse the Chancellor's decision and allow the petitioner to introduce this evidence at the modification proceeding currently pending before the Chancery Court of DeSoto County, Mississippi.

Respectfully submitted,
LAMAR & HANNAFORD, P.A.
Attorneys at Law
214 South Ward Street
Senatobia, MS 38668
Phone: (662) 562-6537

BY: _____
JOHN T. LAMAR, JR.
MS State Bar [redacted]

CERTIFICATE OF SERVICE

I, John T. Lamar, Jr., attorney for Appellant, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief to the Honorable Malenda H. Meacham at her address of P. O. Box 566, Hernando, Mississippi 38632, and the Honorable Percy L. Lynchard, Jr., Chancellor, at his address of P.O. Box 340, Hernando, Mississippi 38632.

This the 17th day of November, 2010.

John T. Lamar, Jr.
Certifying Attorney