

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ELLIS TURNAGE

APPELLANT

V.

NO. 2014-CA-00966-COA

ELLIS CHRISTOPHER BROOKS, ET. AL.

APPELLEES

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ON APPEAL FROM THE CHANCERY COURT OF THE SECOND  
JUDICIAL DISTRICT OF BOLIVAR COUNTY, MISSISSIPPI

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APPELLANT'S MOTION FOR REHEARING

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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 Judges of this Court may evaluate possible disqualifications or recusal.

1. Ellis Turnage - Defendant-Appellant
2. Tamekia R. Goliday - Counsel for Defendant-Appellant
3. Ellis Christopher Brooks, Alex Jarrett Brooks and Mary Brooks - Plaintiffs-Appellees
4. Terrence L. High - Counsel for Plaintiffs-Appellees

S/TAMEKIA R. GOLIDAY  
TAMEKIA R. GOLIDAY, Counsel of Record  
for Ellis Turnage, Defendant-  
Appellant

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MOTION FOR REHEARING

COMES NOW, appellant Ellis Turnage, by and through legal counsel, pursuant to MRAP 40(a), and moves the Court for rehearing for the following reasons:

I. Introduction

In this domestic relations civil action, on June 4, 2014, Special Chancellor Edward C. Priscock, signed and mailed and the Bolivar County, Mississippi (BCM) Chancery Clerk filed on June 10, 2014, a document labeled "Final Decree", but in substance the document is interlocutory in nature (non-final) and is a non-appealable order within the meaning of MRCP 54(b) and MRCP 58. This motion for rehearing begins by demonstrating the document labeled " Final Decree" filed on June 10, 2014 does not grant full relief on all issues before the chancery court and fails to satisfy the MRCP procedural requirements necessary for this Court to exercise appellate jurisdiction, since there is no final appealable judgment within the jurisdiction of this Court.

## II. Factual and Procedural Summary

On November 13, 2009, pursuant to Miss. Code Ann. §43-19-101 (Rev. 2009), appellees filed this civil action against appellant seeking child support and college expenses. R. 5-10.

On June 4, 2014, Special Chancellor Priscock signed a document titled "Final Decree", but the last paragraph of the document demonstrates the document is interlocutory in nature (non-final) and is a non-appealable order, under MRCP 54(b) and MRCP 58. R. 113-121. No judgment has been entered.

On June 10, 2014, the chancery clerk filed, the Special Chancellor's document titled "Final Decree". R. 113-121.

On July 9, 2014, appellant's former trial counsel of record, Hon. William O. Luckett, Jr. filed a notice of appeal. R. 137-138.

By opinion dated August 23, 2015, the Mississippi Court of Appeals affirmed the Chancellor's non-appealable interlocutory (non-final) order filed on June 10, 2014, but did not mention or address the issue of appellate jurisdiction.

Pursuant to the provisions of MRAP 40, appellant timely moves for rehearing, for lack of appellate jurisdiction. The Court is required to note its own lack of appellate jurisdiction. Darnell v. Darnell, -- So.3d -- (2016), 2016 WL 4493194 \*1 (Miss.).

## II. LEGAL ARGUMENTS

### A. Legal Standard For Motion For Rehearing

Motions for Rehearing are governed by Rule 40 of the

Mississippi Rules of Appellate Procedure, which provides in pertinent part as follows:

The motion shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misapprehended . . . . The motion for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain; the motion for rehearing is not intended to afford an opportunity for a mere repetition of the argument already considered by the court.

MISS. R. APP. P. 40 (a). In applying Rule 40 and discussing the purpose of motions for rehearing that are provided for by that Rule, the Mississippi Supreme Court has stated:

The purpose of a [motion] for rehearing is not to allow counsel to add assignments of error which, for whatever reason, were not included in the appellant's original brief to this Court. Judicial economy dictates that we consider only those assignments of error set forth in the original brief. The purpose of the rehearing is to allow the parties to point out 'the points of law or facts which in the opinion of the petitioner this court has overlooked or misapprehended . . . .' We cannot misapprehend or overlook that which is not presented for our review.

MST, Inc. v. Mississippi Chemical Corp., 610 So. 2d 299, 304 (Miss. 1992) (emphasis in original); see also Brandau v. State, 662 So. 2d 1051, 1053 (Miss. 1995). Similarly, as stated by this Court in White v. State, 761 So. 2d 221, 225 (Miss. Ct. App. 2000):

The purpose of a motion for rehearing is to provide this Court an opportunity to correct any errors on issues already presented and decided. A rehearing does not encompass a new set of arguments; therefore, it was improper for [the movant] to raise a new legal or factual argument in his motion for rehearing.

Based on the foregoing, appellant's motion for rehearing



should be granted.

B. This Court Lacks Appellate Jurisdiction  
Because The Chancellor's June 10, 2014  
Final Decree Is Interlocutory (Non-Final)  
And Is Non-Appealable

This Court's August 23, 2016 opinion does not note or mention this Court assessed its appellate jurisdiction, to review this appeal. Appellate jurisdiction cannot be waived, by the parties. Darnell, 2016 WL 4493194 \*1; Brown v. Collections, Inc., 188 So.3d 1171, 1174-1-75 (Miss. 2016).

In this appeal, despite the fact the document is labeled "Final Decree", the Chancery Court's ruling or memorandum opinion filed on June 10, 2014 is not a final judgment and does not grant full relief on the issues, claims and credits due to appellant; furthermore, the interlocutory was not subject to a notice of appeal, nor did the June 10, 2014 filing begin ticking the clock for the time to file a notice of appeal. Appellant's notice of appeal was premature and legally ineffective to confer appellate jurisdiction. The now deceased Special Chancellor's nine (9) page written ruling's last paragraph provides:

Although specific sums for credits and support awards are not in some instances included in this decree, the evidence introduced at trial should be sufficient to make the needed calculation. If there is a dispute as to amounts, the parties may petition the Court for clarification within 10 after filing. The court costs of this action are assessed to the defendant.

Ordered, Adjudged and Decreed, this the 4<sup>th</sup> day of June, 2014.

Edward C. Priscock

Edward C. Priscock  
Special Chancellor

R. 121. The purported "Final Judgment" does not finally dismiss the civil action, but envisioned the entry of a supplemental order or judgment in future or an evidentiary hearing, to finally resolve all issues claims and credits asserted before the Court.

MRCP 54(b) requires a certification of judgment by the trial judge or a separate "Final Judgment" document be entered under MRCP 58 subsequent to a trial court's bench opinion. At best, although the Court's ruling is labeled "Final Decree", it is perfectly clear that the filed June 10, 2014 ruling did not finally terminate the litigation in the trial court and clearly contemplated further actions by the Special Chancellor was necessary and required, prior to the entry of a final judgment within the meaning of MRCP 58. On appeal, neither party raised the non-waivable issue of appellate jurisdiction and this Court's August 23, 2016 opinion does not note or mention appellate jurisdiction.

Pursuant to MRAP 40(a), in the absence of an appealable final judgment, this Court lacks appellate jurisdiction. The June 10, 2014 ruling is not a final judgment as the Special Chancellor reserved authority to amend his ruling concerning "credits" in appellant's favor. As long as a judgment is not final, a lower court has authority to amend its ruling. Griffin v. Tall Timbers

Dev., Inc., 681 So.2d 546, 552 (Miss.1996).

The clear, unambiguous language of MRCP 58 provides: "Every judgment shall be set forth on a separate document which bears the title of "Judgment." A judgment shall be effective only when so set forth and when entered as provided in MRCP 79(a)." There is no question that the document, though labeled "Final Decree" filed by the BCM chancery clerk on June 10, 2014 does not bear the title of "Judgment." In further support of the conclusion the order was non-final, the comment to MRCP 54(a) provides in relevant part:

The terms "decision" and "judgment" are not synonymous under these rules. The decision consists of the court's findings of fact and conclusions of law; the rendition of judgment is the pronouncement of that decision and the act that gives it legal effect.

In bench a trial, the parties need clearly illuminated guide posts to determine when there is a final judgment, so they can file post-trial motions under MRCP 52(b), MRCP 59 and MRCP 60 to determine with clarity when to perfect an appeal, pursuant to the MRAP 4. Bruce v. Bruce, 587 So.2d 898 (Miss.1991); Allen v. Mayer, 587 So.2d 255, 260 (Miss.1991). Pursuant to MRCP 58, all judgments must bear the title of "Judgment." The purported "Final Decree" does not include "Judgment" within the meaning of MRCP 54(b) and MRCP 58.

The Special Judge's ruling filed June 10, 2014 does not comply with Rule 54(b) or Rule 58 since it is not titled "Judgment". The "Final Decree" was filed on June 10, 2014 and

entered in Minute Book V6 at page 517, but these purely ministerial functions did not render a final judgment.

The primary issue overlooked by this Court in its August 23, 2016 opinion is whether the document titled "Final Decree" constituted a final judgment from which an appeal was required or could have been taken. Since the Special Chancellor's ruling was not styled "Judgment" or "Final Judgment," document "Final Decree" was not a final appealable judgment within the meaning of MRCP 54(b) or MRCP 58. Therefore, this Court lacks appellate jurisdiction. Bell v. Certain Underwriters at Lloyd's London, 2016 WL 4442961 \*3 (Miss. Ct. App.); Darnell v. Darnell, 2016 WL 4493194 \*1 (Miss.); Brown v. Collections, Inc., 188 So.3d 1171, 1174-75 (Miss. 2016).

In Mullen v. Green Tree Fin.-Corp., 730 So.2d 9, 12 (Miss.1998), the Mississippi Supreme Court held that the language of Rule 58 is "clear and unambiguous" in that it requires a separate document entitled "Judgment" as a final order. Id. at 12. In support of a literal interpretation of Rule 58, the Mississippi Supreme Court noted that in the Comments to MRCP 54(a) "[t]he terms 'decision' and 'judgment' are not synonymous under these rules. The decision consists of the court's findings of fact and conclusions of law; the rendition of judgment is the pronouncement of that decision and the act gives it legal effect." Id. at 12. The Court went on to describe the need for parties to know the

date of a final judgment so they can proceed under MRCP for filing the various time sensitive motions. Id. at 12 (citing Bruce v. Bruce, 587 So.2d 898 (Miss.1991); Allen v. Mayer, 587 So.2d 255, 260 (Miss.1991); Miss. R. App. P. 4. The Supreme Court explained that the "need supports the requirement of Rule 58 that all judgments must bear the title of 'Judgment'." Id. at 12.

Furthermore, in Mullen, the Court held that a ruling by a trial court was not a final judgment even though it was "treated as a judgment, as reflected by its enrollment on the Minutes of the County Court" and the "judge contemplated that a judgment was incorporated [sic] within the Court's ruling ... as the last paragraph of the Ruling goes beyond that decision reached" to order an express action. Id. at 12.

In Roberts v. Grafe Auto Co., the Mississippi Supreme Court reinstated an appeal which had been dismissed for not being timely filed on the basis that no final judgment was entered. Roberts v. Grafe Auto Co., 653 So.2d 250-251 (Miss.1994). In Roberts, three (3) printed form documents entitled "Jury Verdict for Defendant" were not considered a final judgment from which an appeal could have been taken. Id. Even though the "Jury Verdict for Defendant" in Roberts was not entered in the court docket as required by M.R.C.P. 79(a) and a notice of entry was not served upon the parties as required by MRCP 77(d), the pronounced law still applied. Roberts, 653 So.2d at 250-251.

A trial court order which disposes of less than all of the claims and issues raised and that reserves a ruling is interlocutory. M.W.F. v. D.D.F., 926 So.2d 897, 900 (Miss. 2006) (citing Owens v. Nasco Int'l, Inc., 744 So.2d 772, 774 (Miss.1999)) (citing Williams, 740 So.2d at 285). See also Salts v. Gulf Nat. Life Ins. Co., 849 So.2d 848, 850-51 (Miss.2002); Gilchrist v. Veach, 754 So.2d 1172, 1173-74 (Miss.2000). Brown v. Collections, Inc., 188 So.3d 1171, 1174-75 (Miss. 2016).

"A final, appealable, judgment is one that 'adjudicat[es] the merits of the controversy which settles all issues as to all the parties' and requires no further action by the lower court." Walters v. Walters, 956 So.2d 1050, 1053(8) (Miss.Ct.App.2007) (quoting Banks v. City Fin. Co., 825 So.2d 642, 645(9) (Miss.2002)).

On appeal, jurisdictional issues are reviewed de novo. R.A.S. v. S.S., 66 So.3d 1257, 1259 (¶ 10) (Miss.Ct.App.2011) (citing Calvert v. Griggs, 992 So.2d 627, 631 (¶ 9) (Miss.2008)). The Court must examine the finality of a judgment. Id. at 1259 (citing M.W.F. v. D.D.F., 926 So.2d 897, 899 (¶ 4) (Miss.2006)). "As a general rule, only final judgments are appealable." Maurer v. Boyd, 111 So.3d 690, 693 (¶ 11) (Miss.Ct.App.2013). Therefore, this Court must dismiss the appeal for lack of appellate jurisdiction. The failure of a trial judge to rule on all pending issues in a domestic matter means the decision that was not a

final, appealable judgment. R.A.S., 66 So.3d 1257, 1261 (¶¶ 19-20).

### III. CONCLUSION

Based on the preceding arguments, appellant respectfully requests that the Court to grant a rehearing pursuant to MRAP 40 appellant respectfully submits that the motion for rehearing concerning this Honorable Court's Opinion of August 23, 2016, meets the guidelines and criteria established by MRAP 40. Appellant urges this Court to consider the particular points of fact and law application which appellant contends have been clearly overlooked, misapprehended and/or misapplied including the lack of appellate jurisdiction, due to the absence of an appealable final judgment. Accordingly, appellant submits that this Honorable Court of Appeals should review and rehear its decision and opinion of August 23, 2016, and dismiss this appeal for the lack of appellate jurisdiction.

SO MOVED, this the 6<sup>th</sup> day of September, 2016.

Respectfully submitted,

ELLIS TURNAGE, Appellant

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CERTIFICATE OF SERVICE

I, TAMEKIA R. GOLIDAY, attorney for appellant Ellis Turnage, certify that I have this day served a copy of appellant's motion for rehearing to the following:

Hon. Terence High  
HIGH LAW FIRM  
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This the 6<sup>th</sup> day of September, 2016.

S/TAMEKIA R. GOLIDAY  
TAMEKIA R. GOLIDAY