3IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00074 COA

BUNRAT P. BURNETT **APPELLANT**

v.

WILLIAM A. BURNETT **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	08/14/95
TRIAL JUDGE:	HON. JASON H. FLOYD JR.
COURT FROM WHICH APPEALED:	HANCOCK COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	MORRIE A. BISHOP
	JOHN F. KETCHERSIDE
ATTORNEY FOR APPELLEE:	CLEMENT S. BENVENUTTI
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	DENIED APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT
DISPOSITION:	REVERSED AND RENDERED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE McMILLIN, P.J., COLEMAN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This appeal arises from the denial by the Chancery Court of Hancock County of Bunrat Burnett's motion for relief from judgment pursuant to the Mississippi Rules of Civil Procedure 60(b). Finding error in this denial, we reverse and render.

FACTS

Bunrat and William Burnett filed a joint complaint for divorce because of irreconcilable differences on January 15, 1992. Seventeen months later, on June 18, 1993, the chancellor dismissed the petition for failure to prosecute. On August 9, 1995, William filed a motion to reopen the petition for divorce, indicating that both parties wished to proceed with the divorce as originally filed. William's motion to reopen was granted on August 9, 1995. Five days later, the chancellor entered a final judgment, granting the divorce on the basis of irreconcilable differences.

Bunrat claims that during the three year period between the original petition for divorce and William's motion to reopen the divorce petition, an attempt at reconciliation had failed and that she subsequently learned that marital property existed. Bunrat claims that she made William aware of her knowledge of this information and that she had informed William that she intended to hire an attorney to insure that she received her fair share of the marital property. Bunrat contends that William, having knowledge of her intent to fight for the marital property, fraudulently indicated to the court in his motion to reopen that both parties wanted to proceed with the divorce as originally filed. Bunrat claims that she had no notice of the motion to reopen and did not receive notice of the final judgment until thirty days after its entry. On September 18, 1995, Bunrat filed a motion for relief from judgment pursuant to **M.R.C.P. 60(b)**. Bunrat's motion was overruled and this appeal followed.

ANALYSIS

I. WHETHER THE CHANCELLOR ERRED IN FAILING TO GRANT BUNRAT BURNETT'S MOTION FOR RELIEF FROM JUDGMENT.

While Bunrat raises three issues in her appellant's brief, we find that this case hinges on a single issue: Whether the chancellor erred in failing to grant Bunrat's motion for relief from judgment.

Bunrat argues that her motion for relief from judgment should have been granted per **M.R.C.P. 60(b)** which provides in pertinent part as follows:

> (b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (2) accident or mistake;
>
> (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
>
> (6) any other reason justifying relief from the judgment.

Bunrat contends that she received no notice of William's motion to reopen nor was she notified of the chancellor's decision to grant the motion and proceed to final judgment. Bunrat argues that she knew nothing about the proceeding's being held in her absence and only became aware of the chancellor's decision to grant the divorce thirty days after judgment had in fact been entered. Bunrat argues further that William's motion to reopen the petition was a fraud upon the court as his motion stated that both parties wished to proceed with the divorce under the terms of the joint complaint. Bunrat contends that William was aware, prior to the filing of his motion, that Bunrat intended to hire an attorney and seek fair division of the marital assets.

Bunrat filed her motion for relief from judgment three days after she received notice of final judgment. ***See*** **M.R.C.P. 60(b)** ("The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six months after the judgment, order, or proceeding was entered or taken"). Bunrat cites to ***H & W Transfer & Cartage Service, Inc. v. Griffin,*** **511 So. 2d 895 (Miss. 1987)**, for the test against which the trial court's discretion is to be measured when considering a Rule 60(b) motion:

> Specifically, the Circuit Court is directed to consider (1) the nature and legitimacy of defendant's reasons for his default, i.e., whether the defendant has good cause for default, (2) whether defendant in fact has a colorable defense to the merits of the claim, and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default judgment is set aside.

Id. **at 898**. Bunrat argues that there is no record that the trial court followed the directive of the supreme court and applied the necessary test before denying her requested relief. However, Bunrat argues that there was ample evidence before the chancellor by which he could have determined that no notice had been given in this case.

William argues that Bunrat's reliance on *H & W Transfer* is misplaced because it deals with default judgments not divorce judgments. William also argues that Bunrat cannot rely on the dismissal and reinstatement of the joint complaint of divorce without notice because: (1) there was no evidence that Bunrat was ever aware of the dismissal in the first place thus the reinstatement should have no effect on her, and (2) the order of dismissal was defective and void because the chancery clerk failed to give notice to each party that the petition for divorce was being dismissed as is required by M.R.C.P. 41(d)(1). William argues further that Bunrat never filed any documents indicating to the court that she no longer desired to be divorced on the terms set out in the joint complaint. Finally, William argues, that the burden of proof on the motion for relief from judgment lies on the appellant and that Bunrat failed to sustain this burden.

While we agree that the chancellor erred in failing to grant Bunrat's rule 60(b) motion for relief from judgment, we do not find Bunrat's argument regarding notice to be the dispositive point in this case. Rather, we find, sua sponte, that this case hinges on the chancellor's erroneous reinstatement of the divorce petition upon motion by William two years after the chancery clerk entered the order for dismissal. William is correct to the extent that the chancery clerk erred in failing to notice all parties involved that the petition for divorce was being dismissed. **M.R.C.P. 41(d)(1).**However, William's argument that the clerk's failure to notice the parties renders the dismissal order void is incorrect. The lack of notice does not make the order void but merely voidable. ***See*****M.R.C.P. 60(b)(2).** Rule 60(b)

(2) permits judgments to be set aside if the judgment was entered by accident or mistake. We are of the opinion that the clerk's failure to notify the parties that the petition for divorce was being dismissed falls into this category of accident or mistake. As such, William's remedy following the erroneous entry of the dismissal order was to file a Rule 60(b) motion. A review of Rule 60(b) clearly indicates that a motion to set aside a judgment or order entered by accident or mistake must be made "not more than six months after the judgment, order, or proceeding was entered or taken." William made no such motion. Instead, he waited two years and moved for reinstatement of the divorce petition. Thus, William's failure to timely move the court to set aside its order of dismissal results in the order of reinstatement's being void, thereby making the subsequent judgment for divorce void as well. We therefore find that Bunrat was entitled to dismissal on her own Rule 60(b) motion for the reason that the judgment granting the divorce was void.

THE JUDGMENT OF THE CHANCERY COURT OF HANCOCK COUNTY IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEE.

McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR. BRIDGES, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, P.J.

BRIDGES, C.J., DISSENTING:

I respectfully dissent from the majority's reasoning in this matter. Although I concur in the result, I disagree as to how the result was reached. Specifically, I would agree that the judgment should have been set aside, but not for the reasons the majority has stated. The majority relies on **M.R.C.P. 60(b)** stating that it "permits judgments to be set aside if the judgment was entered by accident or mistake." The majority states that the Order dismissing the case was voidable for lack of notice. I disagree. Notice is a due process issue under the Fourteenth Amendment and failure to provide notice renders any subsequent proceeding void. Thus, the case would still be considered "active" since it had not been dismissed as a stale case.

In any event, prior to the clerk's failure to give notice, the judgment should not have been entered because the parties reconciled. According to the Mississippi Supreme Court, a "parties' reconciliation and resumption of cohabitation was equivalent of formal dismissal . . . ." ***Miller v. Miller*, 323 So. 2d 533 (Miss. 1975).** Additionally, the supreme court has stated:

> Where divorce decree obtained by husband did not become absolute or effective until six months after its date as required by statute, reconciliation of parties and resumption of their marital relationship within six-month period . . . was all that was necessary to restore marriage . . . .

***Zwerg v. Zwerg*, 254 Miss. 8, 179 So. 2d 821 (Miss. 1965)**. In that case, the chancellor found that the divorce decree was not void, but voidable for the period of six months. Thus, the parties could

resume marital relations within that time period and the divorce decree would not be considered a final judgment and would be rendered nugatory. ***Id.* at 823.** As stated in **27A C.J.S. Divorce § 161(4) at 623 (1959):**

> Condonation, reconciliation, cohabitation, or resumption of the marital relation after entry of an interlocutory decree destroys, or estops a party to assert, the right to a final decree and justifies the court in refusing a final decree in vacating or setting aside the interlocutory decree, or in setting aside a final decree, if it has been obtained by one party without the knowledge of the other, or it makes it the duty of the court to refuse to grant a final judgment of divorce. Thereafter the parties are entitled to such rights as arise from the legal relations of husband and wife, and the grounds for divorce which led to the grant of the interlocutory decree are not available on subsequent proceedings between the parties.

In the case sub judice, the parties initially filed a joint complaint for divorce on January 15, 1992. The parties actually separated on February 1, 1992, and the wife left the United States to return to her home overseas. On May 25, 1993, the wife returned to the United States and the parties reconciled. As stated in her sworn affidavit, with attachments:

> In summary I married Bill for a better life. Instead I was treated like a "maid", not a wife. This eventually led to many arguments because I was just not allowed to live a reasonable life. I first left Bill at the end of January 1992. After much pleading by him for me to return and he would "change his ways", I eventually agreed and returned in [sic] for a trial reunion in May 1993. However, nothing did change and in October 1993 I left for good.

The parties' reconciliation was considered a dismissal of the divorce action and thus, there was no final judgment and the parties were returned to their original *status quo.* Therefore, the trial judge should have set aside the judgment as voidable after the affidavit had been filed and the parties had reconciled under M.R.C.P. Rule 60 (b)(6), not M.R.C.P. 60(b)(2) for accident or mistake, as the majority has stated.

THOMAS, P.J., JOINS THIS SEPARATE WRITTEN OPINION.