

IN THE COURT OF APPEALS 10/31/95
OF THE
STATE OF MISSISSIPPI
NO. 94-CA-00511 COA

JAMES E. MILES

APPELLANT

v.

PHANEE MILES

APPELLEE

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

TRIAL JUDGE: HON. JASON H. FLOYD, JR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

BRENT M. BICKHAM

ATTORNEY FOR APPELLEE:

ALBERT H. PETTIGREW

NATURE OF THE CASE: DIVORCE

TRIAL COURT DISPOSITION: ORIGINAL DIVORCE VALID; JUDGMENTS AWARDED ON
ALIMONY ARREARAGE, MEDICAL BILLS, ATTORNEY FEES, AND COURT COSTS

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

PAYNE, J., FOR THE COURT:

STATEMENT OF THE FACTS

This divorce case is appealed from the Chancery Court of Harrison County. James E. Miles (James) and Phanee Miles (Phanee) were married in May 1973. In July 1985, Phanee filed for divorce on the grounds of habitual cruel and inhuman treatment or, in the alternative, irreconcilable differences. In March 1987, Phanee obtained a divorce on the ground of habitual cruel and inhuman treatment. The divorce judgment included: a finding that the parties had separated in July 1985; an award to Phanee of the exclusive use, possession, and title to a 1985 Toyota automobile; an award to Phanee of the exclusive use, possession, and title to all household furnishings obtained during the marriage; and a requirement of James to pay four credit card bills in full, to pay Phanee \$25,000 lump sum alimony in \$200 monthly installments beginning October 1, 1985, to pay all of Phanee's future necessary medical bills, and to pay Phanee \$300 toward her attorney fees. A corrected judgment of divorce was filed later in March 1987, incorporating the original decree. James never appeared at the divorce hearing. Phanee stated that she told James of the hearing the day before, he said he did not care, and he failed to show up at the hearing. James stated that he never received notice of a hearing. James and Phanee continued to live in the same on-base (Keesler Air Force Base) residence until they both moved off-base together. In March or April 1987, James and Phanee had an argument and Phanee handed James the divorce judgment papers. James testified that he took no action after Phanee showed him the judgment papers since he did not want a divorce. He testified that she agreed to continue living together "to see how it goes." While living together, record testimony differs as to the arrangements. Phanee said she and James never had sex together after the corrected judgment of divorce was entered (March 31, 1987). Prapa Olson (Prapa), Phanee's daughter who had lived with Phanee and James off and on, stated that her mother and James shared separate bedrooms while divorced and living together. James testified that nothing changed while they lived together and that, while in their off-base residence, Phanee slept sometimes in another bedroom and sometimes with him.

In March 1989, Phanee and Prapa decided to get a place of their own. James then rented an apartment on his own. In March 1992, James married Cynthia Mathews Miles. In August 1992, Phanee filed a motion for contempt and additional relief for failure to make court-ordered payments of alimony, medical care, and attorney fees. In December 1992, James filed an answer and in April 1993, he filed a motion for modification and/or to set aside the corrected judgment of divorce, in which he alleged that the divorce was void due to fraud. Phanee filed an answer and counterclaim, which included a motion to dismiss and a defense that James's motion was untimely under the rules and barred by the doctrine of laches. In April 1994, the chancery court held a hearing where it found that James was estopped, due to his conduct subsequent to the divorce, from arguing that the original divorce was invalid due to fraud. It overruled James's motion to set aside the divorce decree and subsequently held a hearing on the contempt and modification issues. The court subsequently found that James was in contempt of court for failure to pay attorney fees, medical bills, and lump sum alimony and awarded Phanee judgments of \$300.00, \$1,670.00, and \$3,150.00 toward the attorney fees, medical bills, and his arrearage in alimony payments, respectively, to accrue interest at eight percent from the judgment date. The court also found that James's current balance of lump sum alimony was \$8,000.00, to be paid at \$200.00 per month until paid in full. Finally, the court ordered James to pay all costs of court and to pay Phanee \$2,500.00 for attorney fees for the trial. James now appeals and assigns as error the following:

I. WAS THE DIVORCE GRANTED TO PHANEE MILES ON THE GROUNDS OF

HABITUAL CRUEL AND INHUMAN TREATMENT VOID DUE TO FRAUD, SO THAT THE COURT WAS IN ERROR IN IT'S DETERMINATION THAT JAMES WAS ESTOPPED FROM DENYING THE VALIDITY OF THAT SAME DIVORCE?

II. DID THE TRIAL COURT ERR BY REFUSING TO SET ASIDE THE DIVORCE UNDER M.R.C.P. RULE 60(b)?

ARGUMENT AND DISCUSSION OF THE LAW

I. WAS THE DIVORCE GRANTED TO PHANEE MILES ON THE GROUNDS OF HABITUAL CRUEL AND INHUMAN TREATMENT VOID DUE TO FRAUD, SO THAT THE COURT WAS IN ERROR IN IT'S DETERMINATION THAT JAMES WAS ESTOPPED FROM DENYING THE VALIDITY OF THAT SAME DIVORCE?

James argues that the original divorce decree granted to Phanee was obtained by fraud and is therefore null and void, and therefore can be attacked at any time under the rule in *Zwerg v. Zwerg*, 179 So. 2d 821, 823 (Miss. 1965) (citation omitted). James contends the court erred by utilizing an estoppel theory, based on his remarriage subsequent to the divorce, to hold that the divorce was valid. Finally, he argues that the parties' cohabitation after the divorce and Phanee's failure to plead estoppel as an affirmative defense, as required by Mississippi Rule of Civil Procedure 8(c), resulted in trial court error.

The Mississippi Supreme Court has held that "the purpose of a pleading 'is to give notice, not to state facts and narrow the issues as was the purpose of pleadings in prior Mississippi practice.'" *Christian Methodist Episcopal Church v. S & S Constr. Co.*, 615 So. 2d 568, 572 (Miss. 1993). There the appellant, Christian Methodist Episcopal Church (CME), argued that the chancellor's finding of equitable estoppel could not be affirmed since the appellee, S&S, failed to assert an estoppel theory in its pleadings. *Id.* The Court stated that S&S' complaint clearly put CME on notice that S&S detrimentally changed its position in reliance on funding assurances of CME. *Id.* The Court said that there was no error in the chancellor's conclusion of law that equitable estoppel should be enforced, even though S&S did not plead an estoppel theory, since its complaint covered all the elements of equitable estoppel and that was all the rules of civil procedure required. *Id.* Pleading rules place *answers* within the same regime of quasi-notice pleadings as *complaints*, and the Court construes them by the same rules. *Hertz Commercial Leasing Div. v. Morrison*, 567 So. 2d 832, 836 n.1 (Miss. 1990) (emphasis added).

The Court has also held that where one party relies on the validity of a former divorce and subsequently remarries, that party is estopped from asserting the invalidity of the former divorce. *Scribner v. Scribner*, 556 So. 2d 350, 353 (Miss. 1990); *see also Klumb v. Klumb*, 190 So. 2d 454, 454 (Miss. 1966) (appellant's remarriage estopped him from appealing from that part of the decree

granting the divorce, although he was not estopped from appealing from those parts of the divorce decree that involved financial matters); *Zwerg*, 179 So. 2d at 825 (appellant was precluded by his own acts after obtaining a divorce in Oklahoma, and therefore estopped, from asserting that the Oklahoma divorce decree was *res judicata*). Although the *Scribner*, *Klumb*, and *Zwerg* opinions do not indicate whether or not estoppel was pled, the rule of law emerging from all three cases still stands: a party is estopped from claiming his or her former divorce is invalid if that party relies on its validity and subsequently remarries.

Federal law also provides us with guidance here. The United States Court of Appeals for the Fifth Circuit has stated that, under Federal Rule of Civil Procedure 8(c), collateral estoppel is an affirmative defense that is waived if not pleaded. *American Casualty Co. v. United S. Bank*, 950 F.2d 250, 253 (5th Cir. 1992) (citing *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 172 (5th Cir. 1985)). Nevertheless, "[w]here the matter is raised in the trial court in a manner that does not result in unfair surprise, however, technical failure to comply precisely with Rule 8(c) is not fatal." *Id.* (quoting *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983)). As long as the party complaining of the failure to plead an affirmative defense is not prejudiced in its ability to respond, there is no error. *Id.* Failure to plead a matter that unquestionably constitutes an affirmative defense does not preclude a party from taking advantage of an opposing party's proof, if that proof establishes a defense. *Lomartira v. American Auto Ins. Co.*, 245 F. Supp. 124, 129 (D. Conn. 1965), *aff'd*, 371 F.2d 550 (2nd Cir. 1967). If an opposing side offers evidence of a defense, then a failure to plead "is simply noncompliance with a technicality and does not constitute a waiver." *Jones v. Miles*, 656 F.2d 103, 108 (5th Cir. 1981). A trial court has the discretion to consider evidence supporting an affirmative defense which was not specifically pled. *Depositor's Trust Co. v. Slobusky*, 692 F.2d 205, 208 (1st Cir. 1982). Finally, it is true that:

[f]ailure to plead [a] matter which constitutes an affirmative defense does not, however, preclude a party from taking advantage of the opposing party's proof, if such proof establishes the defense. Thus although illegality is normally an affirmative defense, if the illegality appears on the face of the contract, or from the opening statement of plaintiff's counsel, or from plaintiff's proof, the defendant may take advantage of it by proper motion, and *if necessary the court will raise the objection itself.*

2A James W. Moore et al., *Moore's Federal Practice* p 8.29[3] (2d ed. 1989) (emphasis added).

Laches is defined as "neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to [an] adverse party, operates as [a] bar in [a] court of equity." *Black's Law Dictionary* 875 (6th ed. 1990) (citation omitted). A basis of laches is "[c]onduct of [a] party which has placed [the] other party in a situation where his [or her] rights will be imperiled and his [or her] defenses embarrassed." *Id.* "Laches requires an element of estoppel or neglect which has operated to [the] prejudice of [a] defendant." *Id.* Estoppel by laches, a species of equitable estoppel, is defined as "[a] failure to do something which should be done or to claim or enforce a right at a proper time." *Id.* "An element of the doctrine is that the defendant's alleged change of position for the worse must have been induced by or resulted from *the conduct*, misrepresentation, or silence of the plaintiff." *Id.* (emphasis added). Estoppel is defined as the situation whereby a "party is

prevented by his own acts from claiming a right to [the] detriment of [the] other party who was entitled to rely on such conduct and has acted accordingly." *Id.* at 551 (citation omitted). Estoppel is "a bar or impediment which precludes allegation or denial of a certain fact or state of facts . . . [and] [i]t operates to put [the] party entitled to its benefits in [the] same position as if [the] thing represented were true. *Id.* "Estoppel is or may be based on . . . laches." *Id.* Finally, equitable estoppel is defined as "[t]he doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had." *Id.* at 538 (citation omitted). "Elements of essentials of such estoppel include . . . conduct by [the] party estopped such that it would be contrary to equity and good conscience for him to allege and prove the truth." *Id.*

In the present case, allegations and testimony regarding misinformation within Phanee's divorce complaint, lack of notice of a court date regarding the divorce hearing, and continued cohabitation are irrelevant in light of James's conduct subsequent to the divorce decree. The facts show that, subsequent to the divorce decree, James paid alimony to Phanee and remarried in reliance on the validity of the original divorce decree. He cannot now come into court, particularly at a time when Phanee wants him to "pay up", and claim the divorce was invalid. Phanee asserted the doctrine of laches in her answer to James's motion. Laches, estoppel, and equitable estoppel are parallel and inextricably intertwined by definition and, therefore, by their elements. Each involves conduct, action, or inaction by one party that precludes that party from asserting a right that *could* have been asserted. An answer is within the same pleading rule category as a complaint, so the *Christian Methodist Episcopal Church* rule applies here since the elements of both laches and estoppel existed. The court's ruling on an estoppel theory also covered the theory of laches. Moreover, this technical failure to comply precisely with Rule 8, where the basis of the court's ruling did not match Phanee's assertion in her answer, does not render a fatal result. James was not prejudiced in his ability to respond. Here, the court took advantage of factual proof that supported an estoppel ruling. The facts showed that James had paid Phanee alimony and had remarried subsequent to the divorce. The court was well within its discretion to consider the affirmative defense of estoppel even though Phanee did not specifically plead it. We believe that technical failure to comply precisely with Rule 8 (c) was not fatal here. Accordingly, we hold that the trial court did not err in finding that James was estopped from claiming the divorce was invalid.

II. DID THE TRIAL COURT ERR BY REFUSING TO SET ASIDE THE DIVORCE UNDER M.R.C.P. RULE 60(b)?

James contends that Phanee fraudulently procured the divorce, rendering it void, so that the six-month time limitation for attacking judgments under Mississippi Rule of Civil Procedure 60(b) (1) does not apply. He argues that since it was void, the divorce could be validly attacked within the limits of "within a reasonable time" under Rule 60(b)(4). Finally, James also believes *Zwerg* allows him to attack the original divorce decree at any time, and without any time limitations under Rule 60(b), since he claims it was void *ab initio*. In the conclusion of his brief, James requests this Court to dissolve the *res* of the marriage and to reverse and remand the lower court's resolution of issues regarding property division, alimony, and financial matters. It is unclear from his brief whether James is arguing that Rule 60(b) and *Zwerg* control the appeal of the judgment regarding the divorce decree

itself, the money judgments, or both. We will assume that both are intended for the purposes of this appeal.

The Mississippi Supreme Court has stated that a divorce itself is severable from other parts of that same decree. *Klumb*, 190 So. 2d at 454. An appellant who has remarried is estopped from appealing from that part of the decree granting the original divorce. *Id.* However, that same appellant is not estopped from appealing from those parts of the divorce decree that involve financial matters. *Id.* (citation omitted). Mississippi Rule of Civil Procedure 60(b)(1) allows one to attack a final judgment based upon fraud within six (6) months, while Rule 60(b)(4) allows an attack based on a void judgment within a reasonable time.

In the present case, James is estopped from appealing the granting of the original divorce due to his remarriage to Cynthia Mathews Miles. Moreover, his argument that Rule 60(b) should have been used to allow an attack is misplaced. Rule 60(b)(1) and (4) clearly provide a six-month and a reasonable time limitation, respectively, on any attack on the original divorce judgment. The original divorce decree was granted in March, 1987. James's motion for modification and/or to set aside the corrected judgment of divorce, in which he first alleged that the divorce was void due to fraud, was filed in April, 1993. His attack of the divorce decree as being void occurred over six years after the divorce was granted, taking it completely out of both the six-month and the reasonable time limitations under Rule 60(b). James's argument under *Zwerg* that he can attack the decree at any time since it was void from the beginning is likewise unpersuasive. Mississippi caselaw has firmly established the rule that a party who relies on the validity of an earlier divorce decree and remarries is estopped from later claiming the original divorce was invalid. James cannot successfully attack the original decree since he relied on its validity and remarried.

James argues that the financial matters of the judgment regarding alimony, medical bills, attorney fees, and court costs should be revisited since the original divorce was void. The *Klumb* opinion does hold that an appellant can argue, on appeal, the status of property and financial matters of a divorce between the parties. However, the lower court held, and we agree, that the original divorce was valid due to James's remarriage. Moreover, we believe that Rule 60(b) is applicable to both the final judgment, order, or decree itself and therefore to all financial matters related to that judgment, order, or decree. James failed to meet the Rule 60(b) time limitations of six months or a reasonable time following judgment since six years passed between the original judgment and James's motion to set aside. As a consequence, James should not now be allowed to argue financial aspects of the original divorce decree, and of the lower court's judgment, under his contention that the divorce was invalid for two reasons: (1) the original divorce decree was valid; and (2) Rule 60 (b) time limitations were not met. Finally, the Mississippi Supreme Court has stated that an appellate court's scope of review is limited since it cannot disturb a chancellor's findings unless manifestly wrong or clearly erroneous, or if an erroneous legal standard was applied. *Davis v. Davis*, 643 So. 2d 931, 934 (Miss. 1994) (citations omitted); *Steen v. Steen*, 641 So. 2d 1167, 1169 (Miss. 1994) (citation omitted). An appellate court is required to respect a chancellor's findings of fact that are supported by credible evidence, particularly in the areas of divorce and child support. *Steen*, 641 So. 2d at 1169 (citations omitted). A review of the record indicates that the lower court's findings, both financial and otherwise, were not manifestly wrong or clearly erroneous, nor was an erroneous legal standard applied. We will not disturb the chancery court's judgment finding that the original divorce was valid and its denial of James's motion to set aside the original decree on the grounds of fraud. Additionally,

we affirm the chancery court's judgment regarding all financial matters between the parties.

CONCLUSION

The chancery court was not in error in determining that James was estopped from claiming that the divorce granted to Phanee was invalid. James's subsequent remarriage precluded his argument that the prior divorce decree was void. The court did not err by refusing to set aside the divorce under Mississippi Rule of Civil Procedure 60(b) or the rule announced in *Zweg*. Both the divorce decree itself and the related monetary judgment were not properly challenged by motion under Rule 60(b) within the time limitations prescribed. Finally, the record does not indicate that the court's findings regarding the original decree's validity and its monetary judgment for alimony, medical bills, attorney fees, and court costs were manifestly in error. Accordingly, we affirm the chancery court's judgment in its entirety.

THE JUDGMENT OF THE CHANCERY COURT OF HARRISON COUNTY, UPHOLDING THE VALIDITY OF THE ORIGINAL DIVORCE DECREE, DENYING THE MOTION TO SET ASIDE THE DECREE ON THE GROUNDS OF FRAUD, FINDING OF WILFUL AND CONTUMACIOUS CONTEMPT OF COURT, AND AWARDING OF MONETARY JUDGMENTS, IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE TO BE ASSESSED AGAINST THE APPELLANT. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.J.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.