# IN THE COURT OF APPEALS 02/11/97

# OF THE

# STATE OF MISSISSIPPI

## NO. 95-CA-00911 COA

**DIANNE MILLS**

**APPELLANT**

**v.**

**LANNY BYRD**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HARVEY T. ROSS

COURT FROM WHICH APPEALED: COAHOMA COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

CHERYL ANN WEBSTER

ATTORNEYS FOR APPELLEE:

W. O. LUCKETT, JR.

N. J. MCMULLEN, JR.

NATURE OF THE CASE: CIVIL PROCEDURE - PLEADINGS -

TRIAL COURT DISPOSITION: MODIFICATION OF CHILD SUPPORT DENIED

EN BANC:

BARBER, J., FOR THE COURT:

This case involves an appeal by Dianne Mills from the judgment of the Coahoma County Chancery Court denying her petition for modification of child support. At the July, 1995 hearing on the petition, Dianne attempted to introduce evidence that her ex-husband, Lanny Byrd, misrepresented his income during a child support modification hearing conducted in October of 1991. Dianne argued that the alleged misrepresentations were relied upon by her and the court in approving the 1991 agreed order between the parties designating the amount of child support payments Lanny was to make. The chancellor, upon objection by Lanny, held that the testimony offered by Dianne was inadmissible because it was not relevant to the issue pled in her petition, *i.e.* whether Lanny's increase in income subsequent to the 1991 agreed order constituted a material change in circumstances necessitating a modification of his child support obligation. Dianne appeals the chancellor's ruling on the following assignments of error:

> I. WILL THE STATE OF MISSISSIPPI ALLOW A FATHER AND MOTHER TO BARGAIN OR CONTRACT AWAY A CHILD'S PARENTAL SUPPORT WHILE THE FATHER IS PERPETRATING A FRAUD ON THE COURTS OF THIS STATE BY ALLOWING THE CHANCERY COURT TO REDUCE HIS CHILD SUPPORT OBLIGATION TO THE MOTHER ALL THE WHILE KNOWING HIS ADJUSTED GROSS INCOME WAS GREATER THAN THAT REPORTED TO THE MOTHER, AND ONCE CAUGHT IN THE FRAUD, WILL THE COURTS NOT CORRECT THE INJUSTICE BY RAISING THE AMOUNT OF THE CHILD SUPPORT TO THE APPROPRIATE LEVEL?
>
> II. IS IT ERROR FOR THE STATE OF MISSISSIPPI TO DENY THE MOTHER THE OPPORTUNITY TO PROVE THAT THE FATHER GAVE HER FALSE INFORMATION CONCERNING HIS WAGES AND THAT SHE RELIED ON THIS INFORMATION TO HER DETRIMENT IN AUTHORIZING THE ENTRY OF THE 1991 CHILD SUPPORT ORDER WITHOUT BENEFIT OF COURT HEARING?
>
> III. WHEN SEEKING A MODIFICATION OF CHILD SUPPORT BASED ON PRIOR FALSE INFORMATION, WHICH CAME TO LIGHT IN THE DISCOVERY PROCESS PRIOR TO TRIAL, IS THE MOTHER REQUIRED TO PETITION THE COURT TO AMEND HER PLEADINGS SO AS TO INCLUDE A PRAYER TO SET ASIDE THE VOID ORDER, IN ORDER TO BE ENTITLED TO PUT ON PROOF AS TO THE BASIS OF THE MATERIAL CHANGE IN CIRCUMSTANCE?
>
> IV. WHEN THERE HAS BEEN AN AGREED ORDER ENTERED BY AND BETWEEN THE MOTHER AND THE FATHER OF CHILDREN AND THE SAID ORDER WAS ENTERED WITHOUT BENEFIT OF A FINDING BY THE COURT OF THE FATHER'S INCOME, AND THERE HAS BEEN A PETITION FOR MODIFICATION IN CHILD SUPPORT FILED, IS IT REVERSIBLE ERROR TO DENY THE MOTHER THE OPPORTUNITY TO RAISE ALL ISSUES TOUCHING ON THE WELFARE AND MAINTENANCE OF THE CHILDREN AS WELL AS ALL ISSUES WITH REGARD TO THE FATHER'S INCOME?

V. CONSIDERING THE STATE OF MISSISSIPPI IS A NOTICE PLEADING STATE, CAN THE COURT LIMIT THE MOTHER'S PROOF BASED SOLELY ON HIS READING OF HER PLEADINGS, CLAIMING THE FATHER DID NOT HAVE NOTICE OF THE ISSUES WHEN SAID ISSUES TOUCH ON THE WELFARE, CARE, AND MAINTENANCE OF THE PARTIES' CHILDREN?

VI. WAS THE MOTHER ENTITLED TO HAVE THE FATHER'S COMMISSIONS INCLUDED IN THE ADJUSTED GROSS INCOME AS PART OF HIS INCOME IN DETERMINING THE CHILDREN'S SUPPORT?

## FACTS

In July of 1991, Dianne Mills filed a "motion to find in contempt and for modification of final decree of divorce" in the Chancery Court of Coahoma County. Contained in this motion was a prayer to have Lanny Byrd's child support obligation increased by $200 per month and to deny Lanny the right to claim both of the couple's children as dependants for income tax purposes. Lanny asserted a counterclaim to Dianne's motion seeking a reduction of his child support obligation based on the parties' respective incomes and ability to pay. After a hearing on the motion, the chancellor approved an agreed order between the parties ordering that Lanny's child support payment be reduced and that the parties should each claim one child as a tax dependent.

In May of 1995, Dianne filed a petition seeking increased child support, pleading that Lanny had obtained a substantial increase in his wages so as to constitute a "material change in circumstances." At the hearing on the petition, Dianne attempted to introduce testimony of alleged misrepresentations by Lanny concerning his 1991 income, representations which were alleged relied upon by her and the chancellor in approving the 1991 agreed order for child support. Upon objection by Lanny, the chancellor ruled that the testimony offered by Dianne was inadmissible because it was not relevant to the issue before the court. The chancellor held that although the alleged misrepresentation would have been a "fair issue" had Dianne raised it, her failure to include the issue of bad faith or misrepresentation barred the court from addressing the issue.

## ANALYSIS

While Dianne has chosen to address this matter as consisting of six distinct points of error, this Court is of the opinion that only one issue was raised before the trial court and properly preserved for appeal. Accordingly, this Court will focus its analysis on whether the chancellor erred in confining the proof allowed at the motion hearing to the allegations in the petition. However, this Court will also address each point of error as framed by Diane.

In reviewing the chancellor's ruling to exclude testimony relating to the alleged misrepresentations made by Lanny in 1991, this Court is bound by the time-honored rule that "[t]he proof [at trial] should conform to the allegations of the declaration . . . ." *Terrell Investment Co. v. Dunn*, 176 So. 2d 291, 293 (Miss. 1965) (holding that party "should not have been permitted to base her claim on one theory and then introduce evidence to recover a verdict based on an entirely different theory"). Furthermore, "[p]roof is received and is considered only as to those matters of fact that are put in

issue by the pleadings and never beyond or outside of them." George D. Warner, Jr., Warner's Griffith Mississippi Chancery Practice § 564 (Rev. Ed. 1991). It is elementary that "[t]estimony on any issues not within the pleadings is usually irrelevant and incompetent." Warner § 567. Most importantly, due process of law requires that a party be given fair notice of the issues that are to be under consideration. *See Fortenberry v. Fortenberry*, 338 So. 2d 806, 807 (Miss. 1976) (holding due process of law required appellant be given fair notice by appropriate pleading that question of support would be under consideration).

In this case, the allegations pled by Dianne in her petition to modify child support focused on Lanny's pay raise that occurred after the 1991 agreed order was entered. Dianne alleged that this pay raise constituted a material change in circumstances necessitating an increase in the amount of child support Lanny was obligated to pay. The petition made no reference to bad faith or misrepresentation by Lanny in his disclosures regarding his gross income level during the 1991 proceedings. Furthermore, any misrepresentations made four years earlier at a hearing on a different motion were irrelevant to whether Lanny's subsequent pay raise constituted a material change in circumstances. Had the chancellor permitted Dianne to introduce evidence regarding the alleged misrepresentations made by Lanny at the 1991 proceeding, Lanny would have been deprived of his due process right to fair notice of the issues he was to be confronted with at the 1995 hearing. Based on the foregoing reasons, the chancellor was correct in barring the introduction of evidence regarding this issue. Addressing the assignments of error as framed by Dianne, this Court holds as follows:

> I. WILL THE STATE OF MISSISSIPPI ALLOW A FATHER AND MOTHER TO BARGAIN OR CONTRACT AWAY A CHILD'S PARENTAL SUPPORT WHILE THE FATHER IS PERPETRATING A FRAUD ON THE COURTS OF THIS STATE BY ALLOWING THE CHANCERY COURT TO REDUCE HIS CHILD SUPPORT OBLIGATION TO THE MOTHER ALL THE WHILE KNOWING HIS ADJUSTED GROSS INCOME WAS GREATER THAN THAT REPORTED TO THE MOTHER, AND ONCE CAUGHT IN THE FRAUD, WILL THE COURTS NOT CORRECT THE INJUSTICE BY RAISING THE AMOUNT OF THE CHILD SUPPORT TO THE APPROPRIATE LEVEL?

This assignment of error apparently concerns the concealment of income by Lanny that Dianne alleges occurred at the 1991 hearing. The question that Dianne proposes to this Court, of what the chancellor should have done *if* he found that one of the parties to an agreement approved by him had engaged in fraud during the agreement negotiations, was not included in her pleadings before the lower court. Dianne's 1995 petition for modification of child support was based solely upon the alleged material change in circumstance of Lanny having recently achieved an increased level of income. As reviewed at length, *supra*, the petition before the chancellor contained no allegations pertaining to the 1991 agreed order between Dianne and Lanny. Therefore, as correctly held by the chancellor, it would have been improper for him to consider matters pertaining to the 1991 agreed order. Since this Court is a court of appellate review and sits to review actions of trial courts, "we should undertake consideration of no matter which has not first been presented to and decided by the trial court." *Educ. Placement Serv. v. Wilson*, 487 So. 2d 1316, 1320 (Miss. 1986). This assignment of error presents no issue for this Court to review and is therefore without merit.

> II. IS IT ERROR FOR THE STATE OF MISSISSIPPI TO DENY THE MOTHER THE

OPPORTUNITY TO PROVE THAT THE FATHER GAVE HER FALSE INFORMATION CONCERNING HIS WAGES AND THAT SHE RELIED ON THIS INFORMATION TO HER DETRIMENT IN AUTHORIZING THE ENTRY OF THE 1991 CHILD SUPPORT ORDER WITHOUT BENEFIT OF COURT HEARING?

This assignment of error also apparently pertains to issues relating to the 1991 agreed order between Dianne and Lanny. Again, the chancellor was correct in excluding evidence pertaining to the 1991 agreement as it was not placed at issue in the pleadings and was irrelevant to the issue under consideration. It is fundamental to our law that "[a] trial judge will not be put in error on a matter which was not presented to him for his decision." *Parker v. Game and Fish Comm'n*, 555 So. 2d 725, 730 (Miss. 1989). There is no merit to this assignment of error.

III. WHEN SEEKING A MODIFICATION OF CHILD SUPPORT BASED ON PRIOR FALSE INFORMATION, WHICH CAME TO LIGHT IN THE DISCOVERY PROCESS PRIOR TO TRIAL, IS THE MOTHER REQUIRED TO PETITION THE COURT TO AMEND HER PLEADINGS SO AS TO INCLUDE A PRAYER TO SET ASIDE THE VOID ORDER, IN ORDER TO BE ENTITLED TO PUT ON PROOF AS TO THE BASIS OF THE MATERIAL CHANGE IN CIRCUMSTANCE?

This assignment of error is misleading, as it seems to indicate that the petition at issue in this case used the existence of "prior false information" as the basis for Dianne's claim that a material change in circumstances had occurred. This is an inaccurate characterization of the issue at bar and does not serve to advance Dianne's claim. As with all of Dianne's assignments of error, this point is merely another attempt to have this Court address issues that were not before the chancellor and were therefore not ruled upon by him. As this opinion has indicated previously, the chancellor was correct in excluding evidence of matters extraneous to the issue of whether Lanny's increased earnings subsequent to the 1991 agreed order constituted a material change in circumstances. The bottom line is that Dianne's 1995 petition did not include a claim that Lanny engaged in fraud or misrepresentation during the 1991 proceedings. As the chancellor correctly stated, Dianne should have included in her original pleading a prayer that the 1991 order be vacated or have made a timely motion to amend. However, it must be noted that any attempt by Dianne to amend her pleadings during the hearing would have properly been denied by the chancellor, considering the untimeliness of the motion and the substantial likelihood of prejudice to Lanny. *See Hester v. Bandy*, 627 So. 2d 833, 839 (Miss. 1993) (holding that while trial court has discretion to allow amendment and should do so freely under proper circumstances, amendment should not occur when to do so would prejudice defendant); *see also* Miss. R. Civ. Pro. 15(a) cmt. (stating that amendment to pleading should be denied if amendment would cause actual prejudice to opposite party). This assignment of error is without merit.

IV. WHEN THERE HAS BEEN AN AGREED ORDER ENTERED BY AND BETWEEN THE MOTHER AND THE FATHER OF CHILDREN AND THE SAID ORDER WAS ENTERED WITHOUT BENEFIT OF A FINDING BY THE COURT OF THE FATHER'S INCOME, AND THERE HAS BEEN A PETITION FOR MODIFICATION IN CHILD SUPPORT FILED, IS IT REVERSIBLE ERROR TO DENY THE MOTHER THE OPPORTUNITY TO RAISE ALL ISSUES TOUCHING ON THE WELFARE AND MAINTENANCE OF THE CHILDREN AS WELL AS ALL

ISSUES WITH REGARD TO THE FATHER'S INCOME?

This assignment of error is also deceptive and misleading. As detailed previously, the validity of the agreed order of 1991 was not raised in the 1995 petition to modify child support. Furthermore, it is apparent from the record that the chancellor did in fact allow Dianne to put on proof as to all issues regarding Lanny's income that were material to the issue at the 1995 hearing. This Court points out, again, that the income at issue in this case was Lanny's gross income *subsequent* to the 1991 agreed order, not whether the income amount upon which the parties based the 1991 agreed order was accurate. This assignment of error presents no issue for this Court to review.

V. CONSIDERING THE STATE OF MISSISSIPPI IS A NOTICE PLEADING STATE, CAN THE COURT LIMIT THE MOTHER'S PROOF BASED SOLELY ON HIS READING OF HER PLEADINGS, CLAIMING THE FATHER DID NOT HAVE NOTICE OF THE ISSUES WHEN SAID ISSUES TOUCH ON THE WELFARE, CARE, AND MAINTENANCE OF THE PARTIES' CHILDREN?

Dianne's fifth assignment of error contains the issue addressed by this Court. As previously discussed at length, the chancellor was correct in limiting the 1995 motion hearing to the issue pled in Dianne's petition, *i.e.* whether Lanny's increase in earnings subsequent to the 1991 agreed order constituted a material change in circumstances so as to necessitate a modification of child support. Notwithstanding Dianne's characterization of the chancellor's ruling as creating five additional points of error, there are simply no other issues for this Court to address.

VI. WAS THE MOTHER ENTITLED TO HAVE THE FATHER'S COMMISSIONS INCLUDED IN THE ADJUSTED GROSS INCOME AS PART OF HIS INCOME IN DETERMINING THE CHILDREN'S SUPPORT?

Dianne's final assignment of error, like all her others, pertains to the 1991 agreed order. As recorded in the 1995 motion hearing transcript, Dianne was attempting to argue that Lanny had mislead her, at the 1991 hearing, as to his income level by failing to include his commissions in the income figures he presented to her. Once again, this issue was not pled in the lower court and was irrelevant to the issue before the chancellor. This Court has scrutinized the transcript of the 1995 hearing for Lanny's representations of his income. The record indicates that Lanny provided the chancery court with copies of his income statements as used to report his income for tax purposes. It is assumed that, in compliance with federal and state tax codes, any commissions received by Lanny (in addition to his base salary) would have been included in his gross income as reported on his tax returns. Since Dianne did not raise this issue at the hearing and the chancellor, therefore, did not have a chance to address it, there is nothing for this Court to review. *See Crowe v. Smith*, 603 So. 2d 301, 305 (Miss. 1992) (holding that appellant is not entitled to raise new issue on appeal since to do so prevents trial court from having opportunity to address alleged error). Accordingly, this assignment of error contains no issue for this Court to review.

**THE JUDGMENT OF THE COAHOMA COUNTY CHANCERY COURT IS AFFIRMED. COSTS ARE ASSESSED AGAINST THE APPELLANT.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY COLEMAN, J. HERRING, J., NOT PARTICIPATING.**

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PAYNE, J., DISSENTING:

With all due respect, I must dissent from this opinion. The majority affirms the trial court's determination that Mills failed to properly plead her case. The record indicates that Mills' petition for modification reads in part:

> There has been a material change in circumstances in that Lanny Byrd has been given substantial raises in his wages and his children are entitled to a modification of child support pursuant to the guidelines.

The majority seems to be ignoring the obvious. In his own defense, Lanny Byrd introduced his 1991 and 1994 tax returns to show that there was no substantial change in his adjusted gross income which would require a modification in his child support obligation: adjusted gross income of $21,771.35 in 1991 as compared with $22,308.10 in 1994. However, Byrd's figures have also established that the amount of child support he has been paying since the 1991 modification has no relationship to the statutory guidelines prescribed in Miss. Code Ann. § 43-19-101. These guidelines are binding on the

chancellor unless there is a written explanation in the order for his departure therefrom. The record in the present case reflects that none of the orders in this case (divorce in 1989; orders in 1990 and 1991) mention the guidelines, much less explain a departure or why they should not apply.

The statutory percentage for the support of two children is 20%. Simple mathematics shows:

1991 adjusted gross income--

$21,771.35 x 20% = $4,354.27 divided 12 is $362.86 a month

1994 adjusted gross income--

$22,308.10 x 20% = $4,461.62 divided by 12 is $371.80 a month

However, Byrd's current obligation of $283.13, which he claims should not be changed, is 20% of $1415.65 a month, reflecting an annual adjusted gross income of only $16,987.80 in 1991.

Either there has been a substantial increase in his income from $16,987.80 to $22,308.10, which is addressed by Mills in the first part of her pleading, or there has never been a valid award of child support under the statutory guidelines which is addressed under the second part of her pleading. I believe Mills' pleading allows the trial court to hear evidence on the issue modification so as to conform Byrd's obligation with the statutory guidelines.

All of this is before us in the record of evidence which the trial court allowed in without any discussion of whether Byrd deceived Mills in 1991 about his income, thus enticing her to agree to an amount of child support below his ability to pay.

A court of equity cannot ignore the pleadings and evidence before it and hide behind rigid adherence to some rule of pleading when the court itself never applied the guidelines. "Equity delights to do complete justice and not by halves." *Warner's Griffith, Mississippi Chancery Practice* (Rev. Ed.), §36.

Even if this Court finds that Mill's petition was inartfully drawn and the chancellor was merely memorializing the parties' agreement in 1991, this Court cannot perpetuate the avoidance of a statutory mandate now that the correct adjusted gross income is known.

Mississippi Supreme Court cases have consistently held that parents cannot contract away their duty of child support. *See Tanner v. Roland*, 598 So. 2d 783, 786 (Miss. 1992). The present award has not and does not fit the guidelines established by §43-19-101 when applied to Byrd's 1994 income.

I would reverse the judgment in the lower court and remand for an evidentiary hearing on Byrd's income from 1994 forward to determine the adjusted gross income for those years, and at the very least award child support from that point forward based on the guidelines.

**COLEMAN, J., JOINS THIS SEPARATE WRITTEN OPINION.**