IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01412-COA

TOULMAN D. BOATWRIGHT JR. **APPELLANT**

v.

GRACE BONDS BOATWRIGHT **APPELLEE**

DATE OF JUDGMENT:	03/10/2009
TRIAL JUDGE:	HON. EDWIN H. ROBERTS JR.
COURT FROM WHICH APPEALED:	MARSHALL COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	HELEN KENNEDY ROBINSON
ATTORNEYS FOR APPELLEE:	AMANDA WHALEY SMITH KENT E. SMITH
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	HUSBAND FOUND IN CONTEMPT AND ORDERED TO PAY A FINE AS WELL AS WIFE'S ATTORNEYS' FEES; ALSO SET VISITATION, ORDERED PARTIES TO ATTEND COUNSELING, AND MODIFIED HUSBAND'S CHILD SUPPORT
DISPOSITION:	REVERSED AND REMANDED - 10/04/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

CONSOLIDATED WITH

NO. 2008-M-01855-COA

TOULMAN D. BOATWRIGHT JR. **APPELLANT**

v.

GRACE BONDS BOATWRIGHT **APPELLEE**

DATE OF JUDGMENT:	10/08/2008
TRIAL JUDGE:	HON. EDWIN H. ROBERTS JR.

COURT FROM WHICH APPEALED:	MARSHALL COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	HELEN KENNEDY ROBINSON
ATTORNEYS FOR APPELLEE:	KENT E. SMITH AMANDA WHALEY SMITH
NATURE OF THE CASE:	DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	DENIED MOTION TO RECUSE
DISPOSITION:	DENIED - 12/10/2008
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

LEE, C.J., FOR THE COURT:

FACTS AND PROCEDURAL HISTORY

¶1. This case involves the aftermath of a contentious divorce and the recusal of the chancellor who presided over the lengthy proceedings.

¶2. On May 12, 2004, Judge Edwin Roberts of the Marshall County Chancery Court granted Grace Bonds Boatwright and Toulman D. Boatwright Jr. a divorce on the ground of irreconcilable differences. Grace was awarded primary physical custody of the couple's three minor children, Wynne, Hannah, and Dunn. Toulman was ordered to pay $320 per month in child support, as well as $80 per month for health insurance, one-half of the out-of-pocket medical expenses, and a portion of the children's school tuition. Toulman was also ordered to maintain a life-insurance policy with the three children as beneficiaries.

¶3. Since the divorce decree, the relationship between Grace and Toulman has deteriorated such that the parties have been unwilling to communicate, resulting in the filing

of numerous motions and petitions over the years.

¶4. The instant case stems from a petition for contempt and modification filed by Grace on October 19, 2007. An agreed temporary order was entered that, among other things, gave Toulman additional visitation with Hannah and appointed Jennifer Shackelford as guardian ad litem (GAL) for the children. On May 20, 2008, Grace filed a motion for emergency relief alleging that recordings between Toulman and Hannah, who was sixteen years old at the time, evidenced that Toulman's visitation with his minor children should be restricted. These recordings indicate a desire on Toulman's behalf and a willingness on Hannah's behalf that Hannah engage in violent activities against Grace and her older sister, Wynne. Judge Roberts subsequently suspended Toulman's visitation with Dunn, who was approximately five years old at that time. The day after Grace filed her motion for emergency relief, L. Anne Jackson, Toulman's counsel since November 2007, filed a motion to withdraw as counsel. On May 23, 2008, Helen Kennedy Robinson was substituted as Toulman's counsel.

¶5. At some point after this, Hannah went to live with her paternal grandparents. Per Toulman's request, Judge Roberts entered a temporary order allowing Toulman to pay Hannah's portion of his child-support payment to the paternal grandparents.

¶6. On October 6, 2008, Toulman filed a motion for Judge Roberts to recuse. In response, Grace filed a counter-motion for sanctions. After a hearing on the matter, Judge Roberts took the matter under advisement. On October 28, 2008, Judge Roberts denied Toulman's motion to recuse, delivering a lengthy opinion in which he found that Toulman was unable to substantiate any of the allegations made in support of his motion. It was determined that

Grace's motion for sanctions would be heard at a later date. Toulman subsequently filed a petition with the Mississippi Supreme Court to review the denial of his motion to recuse. The supreme court denied Toulman's petition by order dated December 10, 2008.

¶7. A hearing on the merits of all pending motions and petitions was held for three days in mid-February 2009. Judge Roberts heard Grace's motion for sanctions on March 10, 2009, and ultimately awarded Grace $4,305 in attorneys' fees and $733.11 in expenses. Toulman was also ordered to pay $900 to Shackelford, the GAL, for a total of $5,938.11. The order imposing sanctions was executed on April 14, 2009, nunc pro tunc to March 10, 2009.

¶8. In regard to the original petition for contempt and modification filed by Grace, Judge Roberts found Toulman to be in contempt and ordered him to pay a fine for each instance of contempt. Judge Roberts also ordered Toulman to pay Grace's attorneys' fees in regard to the contempt proceeding, but he further directed a writ of inquiry to determine the amount of attorneys' fees attributed to the contempt action. Judge Roberts further found that it was in Hannah's best interest to remain living with her paternal grandparents until the end of the school year. Judge Roberts also set visitation, ordered the parties to attend counseling sessions, and modified the child support. This order was executed on April 9, 2009, nunc pro tunc to March 10, 2009. However, Judge Roberts determined that issues regarding Hannah and her custody, visitation, and support were temporary and would be reviewed on August 14, 2009.

¶9. On the morning of April 9, 2009, the parties presented for the scheduled writ of

inquiry regarding attorneys' fees. Toulman's attorney, Robinson, requested a conference in chambers, wherein she informed Judge Roberts that she had received information which required her to file another motion to recuse. The issue of attorneys' fees was never resolved. On April 16, 2009, Judge Roberts granted Toulman's motion to file a sealed motion to recuse. That same day, Toulman filed a motion to alter or amend or for a new trial based on newly discovered evidence. Robinson had discovered that Judge Roberts had gone turkey hunting with one of Grace's attorneys, Kent Smith, on April 8, 2009. Grace's other attorney is Kent Smith's wife, Amanda Whaley Smith.

¶10. On April 20, 2009, Judge Roberts, on his own motion, recused himself from the case. The case was then assigned to Judge Glenn Alderson, who conducted a hearing on Toulman's motion for a new trial. Judge Alderson decided that rather than conduct a new trial on the merits, the most economical decision would be for the parties to appeal and allow the appellate court to determine whether there was any wrongdoing. Judge Alderson ultimately denied the motion.

¶11. Toulman now appeals, asserting the following issues: (1) Judge Alderson erred in denying his motion for a new trial; (2) Judge Roberts erred in refusing to recuse himself; (3) Judge Roberts erred in failing to disclose his personal relationship with Kent Smith; (4) Judge Roberts erred in sanctioning him for filing a motion for recusal; (5) Judge Roberts erred in refusing to order that Toulman be reimbursed money paid for Hannah's benefit when she was living with her paternal grandparents; (6) Judge Roberts erred in holding him in contempt for failing to pay certain expenses of Wynne; (7) Judge Roberts erred in ordering

him to pay a fine; (8) Judge Roberts erred in ordering him to continue supporting Wynne; (9) Judge Roberts erred in ordering him to pay attorneys' fees in regard to being found in contempt; and (10) Judge Roberts's rulings were the result of bias against him. Finding reversible error in regard to Issue I, we reverse and remand.

DISCUSSION

¶12. During the hearing on Toulman's motion to alter or amend or for a new trial, Judge Alderson stated the following: "There is no way that I can do equity to [Toulman] or [Grace] with no more than I know about this case. The only way that I could do equity or do justice to them would be to completely start anew." Judge Alderson also admitted that "it would be impossible" for him to rule on any pending issues regarding Hannah's custody and support without knowing anything about the case. Judge Alderson further stated that he would be unable to "set attorneys' fees without . . . going back and completely reviewing this whole thing. Having it transcribed, looking at it, and seeing so that [he could] know how to set attorneys' fees to see if the proof that's been put on [is] sufficient . . ."

¶13. Rule 63(b) of the Mississippi Rules of Civil Procedure states:

> If for any reason the judge before whom an action has been tried is unable to perform the duties to be performed by the court after a verdict is returned, or after the hearing of a non-jury action, then any other judge regularly sitting in or assigned under law to the court in which the action was tried may perform those duties; *but if such other judge is satisfied that he cannot perform those duties, he may in his discretion grant a new trial.*

(Emphasis added). Judge Alderson acknowledged that he was unprepared to hear the motion for a new trial and thought the better course of action would be for the parties to appeal. We

find that Judge Alderson abused his discretion as he failed to make a proper review of the record and hearings before ruling on the motion to alter or amend or for a new trial. Rather than reverse and remand for a new trial, we find the better course of action would be for Judge Alderson to obtain a transcript of the record to review and see if a new trial is necessary. *See* Miss. Att'y Gen. Op. No. 11-00011, *Davis*, 2011 WL 1500830, (Mar. 11, 2011). At that point Judge Alderson shall determine whether Judge Roberts should have recused earlier and, if so, require a new trial. Judge Alderson may otherwise conclude that Judge Roberts's rulings do not reflect an appearance of impropriety and, therefore, determine that a new trial is not warranted. Reviewing the entire record will further assist Judge Alderson in determining any pending issues or motions, especially regarding Hannah's custody and support.

¶14. Thus, we reverse and remand for proceedings consistent with this opinion.

¶15. **THE JUDGMENT OF THE MARSHALL COUNTY CHANCERY COURT IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED EQUALLY BETWEEN THE APPELLANT AND APPELLEE.**

MYERS AND ISHEE, JJ., CONCUR. RUSSELL, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY IRVING, P.J. GRIFFIS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY CARLTON, J. BARNES, ROBERTS AND MAXWELL, JJ., NOT PARTICIPATING.

GRIFFIS, P.J., DISSENTING:

¶16. My colleagues have concluded that Chancellor Alderson abused his discretion when he denied Toulman Boatwright's Amended Motion to Alter or Amend or for a New Trial Pursuant to Rule 59 and 60 (the "motion"). I do not. Therefore, I must respectfully dissent.

I am convinced that this Court should consider the issues raised in this appeal and decide the case on the merits.

¶17. In their opinions, both the majority and Judge Russell agree that this case should be reversed. They only disagree as to what should be done on remand. The majority would have Chancellor Alderson review the record, which we have before this Court, and then decide the motion. Judge Russell would make mandatory that which is discretionary, under Mississippi Rule of Civil Procedure 63(b), and require the parties to retry this case before Chancellor Alderson. Neither result advocated by my colleagues will lead to "the just, speedy, and inexpensive determination" of this action. M.R.C.P. 1.

¶18. We must begin with the proper standard of review for this appeal. In *Perkins v. Perkins*, 787 So. 2d 1256, 1260-61 (¶9) (Miss. 2001), the Mississippi Supreme Court held:

> "This Court's scope of review in domestic relations matters is limited." *Montgomery v. Montgomery*, 759 So. 2d 1238, 1240 (Miss. 2000). "The findings of a chancellor will not be disturbed by this Court unless the chancellor was 'manifestly wrong, clearly erroneous[,] or an erroneous legal standard was applied.'" *Id.* "Our standard of review when evaluating the denial of a [Rule] 60 motion is abuse of discretion." *Id.* An appeal from a denial of a Rule 59 motion may address the merits of the entire underlying proceeding, and review of a trial judge's denial of a Rule 59 motion is limited to abuse of discretion. *Bang v. Pittman*, 749 So. 2d 47, 52 (Miss. 1999) [, overruled on other grounds by *Cross Creek Productions v. Scafidi*, 911 So. 2d 958, 960 (¶6) (Miss. 2005)]; *Dissolution of Sanford v. Sanford*, 749 So. 2d 353, 357 (Miss. Ct. App. 1999). Review of a denial of a Rule 60(b) motion considers only whether a judge abused the broad discretion granted by that rule which provides for extraordinary relief granted only upon an adequate showing of exceptional circumstances, and neither ignorance nor carelessness on the part of an attorney will provide grounds for relief. *King v. King*, 556 So. 2d 716, 722 (Miss. 1990). A party is not entitled to relief merely because he is unhappy with the judgment, but he must make some showing that he was justified in failing to avoid mistake or inadvertence; gross negligence, ignorance of the rules, or

ignorance of the law is not enough. *Id*. at 722.

¶19. Rule 63(b) of the Mississippi Rules of Civil Procedure provides that the substitute chancellor "may in his discretion grant a new trial." The rule certainly does not require the chancellor to grant a new trial. Indeed, Judge Russell's opinion makes it mandatory, which the rule does not provide. Chancellor Alderson had the power to order a new trial, and he chose not to order the parties to start from the beginning with a new trial. I cannot say he abused his discretion in this decision.

¶20. The majority seems to question whether Chancellor Alderson actually considered the merits presented in the motion or whether he simply "punted" this case to the appellate courts. The majority quotes part of Chancellor Alderson's exchange with attorney Helen Robinson during her argument on the motion. The following is part of the exchange between Robinson and Chancellor Alderson:

> Robinson: . . . This Court cannot make a fair determination in this matter without hearing all the evidence Judge Roberts'[s] ruling was based on and as we suspected all along prior to the new evidence. We had planned on filing and appeal based on bias.
>
> The evidence will show that throughout the hearing Judge Roberts tried to find any reason he could to incarcerate Mr. Boatwright. The evidence, if you read just the judge's ruling without reading the whole transcript, his ruling was bias[ed]. No witness on Mr. Boatwright's side was credible. Nothing that was said regarding Mr. Boatwright was credible, but everything that was said on the other side is just etched in stone. I mean, I can't rehash every issue of bias before this Court and it's not what this Court's - -
>
> The Court: You know what this sounds like to me?

Robinson: - - really here to rule on.

The Court: Sounds like something the appellate courts need to be hearing rather than me hearing it.

Robinson: Well, Your Honor, I think a lot of cases when another - - I understand your position because you didn't hear any of the evidence and we're asking you to set aside another judge's judgment. I understand that - -

The Court: There is no way that I can do equity to Mr. Boatwright or to Ms. Boatwright with no more than I know about this case. The only way that I could do equity or do justice to them would be to completely start anew.

Robinson: That's what we're asking for.

The Court: I know that's what you're asking for, but what I'm trying to say is that rather than me starting anew, I think the proper way to do it is to let the appellate courts earn their dollar and let them hear it and let them determine whether or not there has been any wrongdoings in the matter. And if it has they'll send it back. Otherwise what will happen is we will go ahead and hear the thing and then regardless of how I rule it's going to go down to the Supreme Court. And then they can turn around and reverse it and send it back saying I shouldn't have done it. That's the reason I'm saying that this is an appellate matter right now as far as this Court's concerned.

¶21. After this exchange, Robinson called Kent Smith as a witness. When Smith's testimony finished, Chancellor Alderson ruled:

> You know this is a case that needs to get on down to the appellate courts. I'm overruling your motion for a new trial[,] and I'm telling you now that I will not be setting attorney's fees.
>
> We will see what the appellate courts [say] about that. If the appellate court decides that either side is entitled to attorney's fees they'll so state. And they might [set it] themselves or they might send it back, ...

¶22. The majority opinion is premised on the finding that Toulman, through his counsel Robinson, asked Chancellor Alderson to order a transcript of proceeds to review for his consideration of the motion. She did not. Therefore, I am of the opinion that this issue was not presented to the chancellor and that it was not preserved for appeal. *See Mabus v. Mabus*, 890 So. 2d 806, 811 (¶20) (Miss. 2003).

¶23. In response to Judge Russell's separate opinion, I find that Robinson specifically asked Chancellor Alderson to order a new trial that would start anew. Yet Chancellor Alderson considered this request and expressly denied it. Apparently, he was convinced that justice required the denial of the motion for new trial; and under Rule 63(b), it was within his discretion.

¶24. Having reviewed Toulman's motion, the arguments made to Chancellor Alderson and the chancellor's ruling, I conclude that Chancellor Alderson did not abuse his discretion in the denial of the motion. The only "newly discovered evidence" is related to his claim that the previous chancellor was biased and should have recused. That is the very same issue that is before this Court on appeal. We can, and should, resolve the issues raised in a more expeditious manner than if we send this case back to Chancellor Alderson with instructions to do what some members of this Court think he should have done.

¶25. For these reasons, I would not reverse and remand this case for further proceedings. Instead, I would consider the appeal on its merits.

CARLTON, J., JOINS THIS OPINION.

RUSSELL, J., CONCURRING IN PART AND DISSENTING IN PART:

¶26. I agree with the majority's decision to reverse and remand this case, but I respectfully disagree with its reasoning and directions on remand. I would reverse and remand for a new trial.

¶27. The majority finds "that [Chancellor] Alderson abused his discretion as he failed to make a proper review of the record and hearings before ruling on the motion to alter or amend or for a new trial." Chancellor Alderson had reviewed at least some of the record and determined that "there [was] no way that [he could] do equity to [Toulman] or to [Grace] with no more than [he knew] about this case. The only way that [he] could do equity or do justice to them would be to completely start anew."

¶28. Neither our procedural rules nor our case law authorized Chancellor Alderson to deny Toulman's post-trial motion on the basis that "[t]he appellate court [was] in a better position to decide [the] matter." Mississippi Rule of Civil Procedure 59(a) provides:

> A new trial may be granted . . . in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of Mississippi[.]
>
> On a motion for a new trial in an action without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. . . .

Mississippi Rule of Civil Procedure 63(b) authorizes a successor chancellor to perform the same duties as the earlier chancellor. "[B]ut if such other judge is satisfied that he cannot perform those duties, he may in his discretion grant a new trial." *Id.* Rule 63(b) gives the successor chancellor, Chancellor Alderson, two options: (1) to make a decision with the

available record or (2) to grant a new trial, in his discretion. Chancellor Alderson determined that he could not perform those duties and denied a new trial, stating that "[t]he appellate court is in a better position to decide this matter." While a new trial is not mandatory, to deny a new trial once a determination is made that the chancellor cannot make a decision without starting anew leaves the parties with no final resolution of the disputed issues at the trial level. The chancellor refused to make a decision on the merits, yet he refused to grant a new trial. The denial of the motion filed pursuant to Mississippi Rules of Civil Procedure 59(a) and 60(b) based on the reason provided by the chancellor is an abuse of discretion.

¶29. I recognize that once assigned to this case, Chancellor Alderson was placed in a quagmire of domestic litigation and alleged wrongdoing of the previous chancellor. But he had a constitutional and professional duty to address fully the parties' issues before simply denying the requested relief and encouraging them to invoke this Court's jurisdiction. The majority's directive to Chancellor Alderson that upon review of the record he "shall determine whether Judge Roberts should have recused earlier and, if so, require a new trial" or "may otherwise conclude that Judge Roberts's rulings do not reflect an appearance of impropriety and, therefore, determine that a new trial is not warranted" further complicates this matter. I am of the opinion that Chancellor Alderson would be acting beyond the scope of his authority by following such a directive to make a determination regarding the timing and propriety of Chancellor Roberts's recusal or rulings.

¶30. To avoid prolonging the litigation between these parties and to remove any appearance of partiality, Chancellor Alderson should completely start anew. Chancellor Alderson abused

his discretion by denying the motion for a new trial. I would reverse and remand for a new trial.

IRVING, P.J., JOINS THIS OPINION.