

IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00919 COA

H. W. (CHUCK) WILLIAMS

APPELLANT

v.

**WILLIAM H. AUSTIN, JR., GEORGE F. BARBER, III, BILL FULLER, LARRY JAMES,
BEN SMITH, AND JIMMY D. WEBSTER, JR.**

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. ANDREW C. BAKER

COURT FROM WHICH APPEALED: DESOTO COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

RANDALL D. NOEL

ROBERTSON M. LEATHERMAN, JR.

ATTORNEYS FOR APPELLEES:

F. EWING HENSON, III

GLEN REID, JR.

NATURE OF THE CASE: POST JUDGMENT MOTION FOR AWARD OF RULE 11(B)
SANCTIONS

TRIAL COURT DISPOSITION: DENIED POST JUDGMENT MOTION BECAUSE MOTION
UNTIMELY FILED AND BECAUSE COURT LACKED JURISDICTION OF MOTION AFTER
NOTICE OF APPEAL HAD BEEN FILED

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

COLEMAN, J., FOR THE COURT:

This is an appeal from the trial court's denial of H. W. Williams' motion for sanctions pursuant to Rule 11(b) of the Mississippi Rules of Civil Procedure. The trial court denied Williams' motion for sanctions for two reasons. First, the trial court found that it had no jurisdiction of the motion because the case had been appealed by the filing of a notice of appeal prior to Williams' filing his motion for sanctions. Secondly, the trial court further found that even if it had jurisdiction of the case, Williams' filing of the motion for sanctions was untimely pursuant to Rule 59(e) of the Mississippi Rules of Civil Procedure. We find that under the specific facts of this case, the trial court was correct, and we accordingly affirm its denial of Williams' motion for sanctions.

I. Facts

William H. Austin, Jr., George F. Barber III, Bill Fuller, Larry James, Ben Smith, and Jimmy D. Webster, Jr. sued The Peoples Bank & Trust Company, Sunburst Bank, H. W. Williams, the Appellant in the case *sub judice*, Ron Winkler, and Joe H. Bryan in the Circuit Court of DeSoto County. Defendants' fraud and conspiracy in the procurement of personal guaranties from the Plaintiffs were the basis for Plaintiffs' claim against them. Following the apparent completion of discovery, Williams filed a motion for summary judgment, and the trial court granted Williams' motion for summary judgment against all the Plaintiffs by its order entered on June 22, 1994. On July 20, 1994, the Plaintiffs, who are the Appellees in the case *sub judice*, filed their notice of appeal from the trial court's order granting Williams' motion for summary judgment entered on June 22, 1994. The trial court clerk's docket sheet shows that on July 25, 1994, five days after plaintiffs had filed their notice of appeal, Williams filed a motion of Defendant H. W. Williams for sanctions, for relief from the judgment, and for attorney's fees and costs. On August 19, 1994, the trial court entered an order which denied Williams' motion for sanctions. In its order, the trial court found *inter alia*:

4. That the jurisdiction of this matter became vested in the Mississippi Supreme Court upon the filing of the notice of appeal on June 20, 1994.

5. That the motion of the Defendant [Williams] was not timely filed, having been filed more than ten (10) days after the entry of judgment.

6. That this Court does not have jurisdiction over this matter.

While the court's order granting Williams' motion for summary judgment was entered on June 22, 1994, Williams alleges that he did not receive a copy of the order and opinion until Monday, July 11, 1994, nineteen days after the order had been rendered and entered. Williams further alleges that on Friday, July 8, 1994, he inquired of the trial court clerk about the status of his motion for summary judgment, in response to which he was told that an order had been entered on the motion for summary judgment. Appellees do not contest the veracity of these allegations.

II. Issues and the law

Appellant Williams in his brief poses three issues for this Court's resolution. They are:

1. Whether the Court erred in holding that it lacked jurisdiction over Williams' Motion for Sanctions.
2. Whether the Court erred in holding that Williams' Motion for Sanctions was not timely filed.
3. Whether the Court erred in denying Williams' Motion for Sanctions.

Appellees, William H. Austin, Jr., *et al.*, state two issues in their brief. They are:

1. Did the trial court err in denying appellant's motion for sanctions when the motion was not timely filed and was not filed until after a notice of appeal had been filed?
2. Does Rule 60 of the Mississippi Rules of Civil Procedure apply to enlarge the time for filing a motion for sanctions?

The Williams' first two issues and both of Appellees' issues involve two fundamental jurisprudential concepts -- jurisdiction and timeliness. In this case, the two concepts are so inextricable that we must simultaneously consider all four of these issues. We shall reserve Williams' third issue, "Whether the Court erred in denying Williams' Motion for Sanctions," until we have resolved these first four issues. We first consider whether the trial court had jurisdiction of Williams' motion for sanctions.

A. Jurisdiction

Prior to the adoption of the Mississippi Rules of Civil Procedure, which became effective for all civil actions filed in the Chancery, Circuit, and County Courts of this State on and after January 1, 1982, an appeal to the Mississippi Supreme Court, once it had been perfected to that court, denied further jurisdiction to the court from which the appeal originated. *See, e. g., Dunavant Enters, Inc. v. Ford*, 294 So. 2d 788, 792 (Miss. 1974) (when a final decree is entered and an appeal is perfected, the trial court no longer has jurisdiction of the cause); *Crocker v. Farmers & Merchants Bank*, 293 So. 2d 444, 445 (Miss. 1974) (appeal from chancery court decree divested such court of any jurisdiction subsequently to modify decree to include an additional person who had not been made an original party to the action). Since January 1, 1982, Rule 60 of the Mississippi Rules of Civil Procedure has conferred limited concurrent jurisdiction on the trial court to grant relief from a judgment even

though an appeal has been perfected. For example, in *Ward v. Foster*, 517 So. 2d 513, 516, (Miss. 1987), the trial court amended its judgment, originally for \$3,500.00, to credit the sum of \$1,691.50 which had already paid on plaintiff's claim. The trial court amended the judgment after the notice of appeal had been filed. The circuit court based its amendment of the judgment on Rule 60(b) of the Mississippi Rules of Civil Procedure.

B. Timeliness

In the introductory paragraph to his motion, Williams moved the court "for relief from the judgment pursuant to Rule 60 of the Mississippi Rule of Civil Procedure . . ." The case of *Russell v. Lewis Grocer Co.*, 552 So. 2d 113, 116-17 (Miss. 1989), required Williams to seek relief from the judgment pursuant to Rule 60, rather than amendment of the judgment pursuant to Rule 59(e), in order to pursue the trial court's award of sanctions against Appellees. In *Russell*, the Appellee, Lewis Grocer Company, cross-appealed the trial court's denial of its motion for Rule 11 sanctions. *Id.* at 116. Like Williams in the case *sub judice*, Lewis Grocer Company contended that the trial court should have entertained its motion for sanctions under Rule 60(b) of the Mississippi Rule of Civil Procedure, instead of Mississippi Rule of Civil Procedure 59(e). *Id.* at 117. In response to Lewis Grocer Company's motion for sanctions, the trial court found:

[T]hat it [did] not have authority to impose sanctions at this time because the motion for sanctions is, in effect, a motion to amend the judgment in this cause. The motion for sanctions was filed more than ten days after the entry of the judgment and is therefore not timely.

Id. at 117. Pursuant to its finding that the motion for sanctions was not timely filed, the trial court denied the motion for sanctions, although it also found that such Rule 11 sanctions were otherwise warranted. *Id.*

The supreme court agreed with the trial court's finding that the motion for sanctions was "in effect, a motion to amend the judgment" which Lewis Grocer Company had filed untimely. Interestingly enough, the Mississippi Supreme Court did require Russell and his attorney of record to show cause why sanctions for filing a frivolous appeal should not be imposed under what was then Mississippi Supreme Court Rules 38 and 46(d). *Id.* Thus *Russell v. Lewis Grocer Co.* clearly establishes that a trial court's award of Rule 11(c) sanctions made in response to a motion for their award, which is filed after the entry of final judgment, is an amendment of judgment which is regulated by Mississippi Rule of Civil Procedure 59(e) -- and only Rule 59(e).

Had the trial court clerk complied with Mississippi Rule of Civil Procedure 77(d) by timely serving a copy of the order which granted his motion for summary judgment on Williams, the next paragraph would be entitled "Conclusion." However, we must now consider whether the clerk's admitted failure to serve timely a copy of this order affects our ultimate resolution of these four issues.

We begin our consideration of this aspect of these four issues by reviewing the following schedule of events:

June 24, 1994 Trial court entered its order granting Williams summary judgment against all defendants.

July 8, 1994 Williams learned of trial court's entry of summary judgment by calling clerk.

July 20, 1994 Plaintiffs filed notice of appeal from summary judgment entered on June 24.

July 25, 1994 Williams filed motion for sanctions.

Appellees contend that Williams waited seventeen days after he learned on July 8 of the entry of summary judgment until he filed his motion for relief from judgment and sanctions on July 25. We note that had the judgment been entered on July 8, 1994, the date that Williams acknowledges he learned of its entry, his motion for sanctions filed seventeen days later would still have been untimely because he would not have filed it within ten days of the entry of the judgment as required by Rule 59(e). In *Russell v. Lewis Grocer Co.*, the Mississippi Supreme Court held that Rule 59(e) regulates the amendment of a judgment to award sanctions if the motion for sanctions has been filed after the judgment has been entered.

The notice of appeal filed on July 20 had already deprived the trial court of jurisdiction of this case unless the application of Mississippi Rule of Civil Procedure 60 preserved the trial court's concurrent jurisdiction of this case for the limited purpose of granting one of the parties relief from its judgment. Indeed, by his grounding his motion for relief on Rule 60 to grant sanctions, Williams acknowledged that he could not rely on Rule 59(e) to amend the judgment. If Williams cannot ground the amendment of the judgment to grant sanctions on Rule 60, then the trial court correctly held that it lacked jurisdiction of Williams' motion which he filed after Appellees filed their notice of appeal.

The glaring consequence of this Court's holding that Williams can proceed pursuant to Rule 60 is that we would per force enlarge from ten days for the filing of a motion to amend the judgment permitted by Rule 59(e) to seventeen days to file for the same relief pursuant to Rule 60 under the facts of this case. We recognize that the clerk failed to comply with the mandate of Rule 77(d) that she notify Williams of the entry of the summary judgment. As the Mississippi Supreme Court noted in *Johnson v. Weston Lumber & Building Supply Co.*, 566 So. 2d 466, 469 (Miss. 1990): "Notice, whether of the time and place of a hearing, the contents of a complaint, or of the specific nature of a criminal charge, is the essence of due process." However, on July 8, 1994, Williams was notified by the clerk's office that the trial court had entered its summary judgment for his benefit against all the Plaintiffs. Thus, notice of the entry of the summary judgment, "the essence of due process," was attained on July 8.

In *Lose v. Illinois Central Gulf Railroad Co.*, 584 So. 2d 1284, 1286 n. 2 (Miss. 1991), the Mississippi Supreme Court observed that "consideration of a Rule 60(b) motion may require application of other rules or guidelines." Thus we apply the Rule 59(e) ten-day period for filing a motion to amend or to alter a judgment to the facts in this case. Our application of that ten-day period results in our holding that Williams' having filed his motion seventeen days after he had received notice of the entry of the summary judgment rendered his motion for sanctions untimely pursuant to Rule 60, the only rule under which he sought this relief.

In *Accredited Surety & Casualty Company, Inc. v. Bolles*, 535 So. 2d 56 (Miss. 1988), the Mississippi Supreme Court dealt with the timeliness of a motion for relief from judgment filed pursuant to Rule 60(b). In that case, the supreme court quoted from the comment to Mississippi Rule of Civil Procedure 1 as follows: "The 'primary purpose' of our Rules of Civil Procedure is to 'secure the just . . . determination of every action' and 'promote the ends of justice.' Miss. R. Civ. P. 1, Comment." *Id.* at 59. Does it not seem unjust and unfair to the Appellees to permit Williams a longer period of time to seek an award of sanctions against them because of the clerk's error than the ten-day period to which he would have otherwise been entitled pursuant to Rule 59(e) had the clerk complied with Rule 77(d) by timely serving Williams with notice of the entry of the summary judgment? This Court's answer to that question, rhetorical as it may be, is "Yes."

Our determination that Williams untimely filed his motion for sanctions via the Rule 60 route of relief from judgment necessitates that we further find that the trial court lacked jurisdiction to rule on the motion after the Appellees had filed their notice of appeal. As we earlier noted, Appellees' filing of the notice of appeal removed the case *sub judice* from the trial court's jurisdiction; and only a proper Rule 60 motion could beget concurrent jurisdiction of both the trial and the appellate courts. Thus we conclude that the trial court correctly held that it lacked jurisdiction of Williams' motion because he had failed to file timely his motion for that relief.

Appellees propose a second ground on which this Court might rest its resolution of these four issues. They cite *Adduono v. World Hockey Ass'n*, 824 F.2d 617 (8th Cir. 1987), in which the court considered whether Rule 60(b) of the Federal Rules of Civil Procedure authorized a trial court to impose sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. The United States Court of Appeals for the Eighth Circuit held that Rule 60(b) did not authorize a trial court to impose Rule 11 sanctions. That court wrote: "Rule 60(b) is available . . . only to set aside a prior order or judgment. It cannot be used to impose additional affirmative relief." *Id.* at 620. It then held that the district court in that case did not have the authority to impose sanctions pursuant to Federal Rule of Civil Procedure 60(b). In *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984), the Mississippi Supreme Court opined:

MRCP 60(b) is very nearly identical to the Federal Rule of Civil Procedure; the difference being the time limitation within which 60(b) motions must be filed. In situations such as these, where the two rules are so similar, we have said that we will consider authoritative federal constructions when determining what our construction of our rule ought to be.

Our decision in this case is not inconsistent with a decision of one of the eleven United States Courts of Appeal.

C. Williams' third issue

Williams assigned as his third issue whether the Court erred in denying his motion for sanctions. Our resolution of the four issues which we have already reviewed renders this issue moot, and we therefore do not consider it.

III. Conclusion

This is a fact-specific decision. The trial court clerk's failure to comply with Rule 77(d) by serving Williams with notice of the entry of the summary judgment created the problem in this appeal. Had the clerk apprised Williams that the trial court had entered its summary judgment on June 24, then Rule 59(e) demanded that he file a motion to amend the judgment to award sanctions within ten days of the entry of the judgment. Had the clerk so apprised Williams, and had he waited until July 25 to file his motion for sanctions, the motion for sanctions as a Rule 59(e) motion to amend the judgment would obviously have been filed entirely too late. However, by his inquiry of the clerk on July 8, Williams learned that the judgment had been entered earlier.

The question then becomes, "Did the clerk's failure to comply with Rule 77(d) justify allowing Williams a greater than ten-day period permitted by Rule 59 in which to file his motion for sanctions pursuant to Rule 60? We have answered that question, "No." Williams ought to have filed his motion for sanctions as a Rule 60 motion within the same ten-day period which Rule 59(e) required. Because he filed it seventeen days later -- the equivalent of one full week later than Rule 59(e) allowed -- his filing of the motion for sanctions was untimely. Because he untimely filed his motion as a Rule 60 motion, he was entitled to no relief under the provisions of Rule 60. Only Rule 60 can invoke concurrent jurisdiction of both the trial and the appellate court. In the absence of Rule 60 concurrent jurisdiction, the trial court had no jurisdiction of this case because Appellees' filing of their notice of appeal removed this case from the jurisdiction of the trial court to the jurisdiction of the appellate court.

We can only conclude under the specific facts and order of procedural events in this case that the trial court correctly ruled as a matter of law that it had no jurisdiction of Williams' motion for sanctions which he filed pursuant to Mississippi Rule of Civil Procedure 60 because Williams filed it outside the period of ten days to which Rule 59(e) would have restricted him after he had received notice of the entry of the judgment which he sought to amend. Moreover, our affirming the trial court's order which denied the motion for sanctions is consistent with the decision of at least one of the eleven United States Courts of Appeal on an essentially similar issue even though the reasons for reaching this same result may only be similar.

THE ORDER OF THE DESOTO COUNTY CIRCUIT COURT DENYING APPELLANT'S MOTION FOR SANCTIONS IS AFFIRMED. COSTS ARE ASSESSED TO APPELLANT.

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

