

IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01339 COA

WEEMS TIMBER PRODUCTS, A CORPORATION APPELLANT

v.

JOHN W. DIVINE APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. WILLIAM F. COLEMAN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT: MARK HERNDON TYSON

J. RICHARD BARRY

ATTORNEYS FOR APPELLEE: MICHAEL J. MALOUF

CHARLES ERIC MALOUF

NATURE OF THE CASE: CIVIL: FILING OF FRIVOLOUS MOTION

TRIAL COURT DISPOSITION: CLAIM DISMISSED FOR IMPROPER PARTY; RULE 11  
SANCTIONS IMPOSED ON APPELLANT'S COUNSEL

MANDATE ISSUED: 8/19/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

KING, J., FOR THE COURT:

Weems Timber Products appeals a judgment of the Circuit Court of Hinds County, which dismissed John Divine's complaint against it, denied its motion for change of venue, and imposed sanctions against its counsel for the filing of a frivolous motion. We affirm the judgment.

### **FACTS**

On March 30, 1995, Divine filed a complaint against Weems Timber Products (WTP) in the Circuit Court of Hinds County seeking compensation for personal injuries sustained in an automobile accident which occurred in Madison County. After the complaint had been served, the parties discerned that WTP was a non-existent corporation and not the proper defendant. Danny Weems d/b/a Weems Forest Products was the proper defendant.

Despite knowledge that the proper defendant had not been joined in the action, on June 5, 1995, counsel for WTP filed a motion on behalf of WTP and Danny Weems d/b/a Weems Forest Products, requesting that the court transfer venue of the action to Jasper County, where Danny Weems was domiciled. Thereafter, Divine's counsel contacted WTP's counsel and advised him that the action would be dismissed. Because WTP's counsel refused to agree to dismissal of the action, Divine's counsel filed a motion to dismiss the action without prejudice and subsequently filed a complaint in the Circuit Court of Madison County against the proper defendant, Danny Weems d/b/a Weems Forest Products. Two weeks later, WTP's counsel requested a hearing on the motion for change of venue.

The court held simultaneous hearings on WTP's motion for change of venue and Divine's motion for dismissal without prejudice. Divine's motion for dismissal without prejudice was granted, and WTP's motion for change of venue was denied. Divine moved for sanctions, and after a hearing, the court ordered WTP's counsel to pay sanctions in the amount of \$450.00.

### **ANALYSIS OF THE ISSUES AND DISCUSSION OF LAW**

#### **I.**

## DID THE TRIAL COURT ERR BY DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE AND DISMISSING THE ACTION?

WTP argues that the trial court erred by denying the motion for change of venue and dismissing the action because Rule 82 (d) of the Mississippi Rules of Civil Procedure provides for the transfer, not dismissal of actions filed in the wrong county. We agree that Rule 82(d) of the Mississippi Rules of Civil Procedure mandates the transfer, not dismissal of actions filed in the wrong county. However, Rule 82(d) does not address the scenario present in the instant case. Not only was the suit commenced in an improper venue, a non-existent corporation was sued.

A court may not acquire jurisdiction over a non-existent entity and, absent jurisdiction, the court was without authority to grant the motion for change of venue. Lacking jurisdiction, the court had no authority to transfer the action's venue and correctly dismissed the complaint. This assignment of error lacks merit.

## II.

### DID THE TRIAL COURT ERR WHEN IT IMPOSED SANCTIONS UPON THE APPELLANT'S ATTORNEYS?

WTP argues that its counsel was improperly sanctioned pursuant to Rule 11 and the Litigation Accountability Act because the motion for change of venue was not frivolous, filed for the purpose of harassment or delay, or without substantial justification. When reviewing a court's award of sanctions pursuant to Rule 11 or the Litigation Accountability Act, this Court is limited to the familiar abuse of discretion standard. *Leaf River Forest Prod. Inc. v. Deakle*, 661 So. 2d 188, 196-97 (Miss. 1995). We will reverse only if we find that the trial court abused its discretion in imposing sanctions or employed an incorrect legal standard. *Deakle*, 661 So. 2d at 196.

Rule 11 of the Mississippi Rules of Civil Procedure authorizes a court to impose sanctions upon a party, the party's attorney, or both if a pleading or motion is frivolous or filed for the purpose of harassment or delay. *Deakle*, 661 So. 2d at 195-96. A pleading or motion is frivolous if, objectively speaking, the pleader or movant has no hope of success. *Tricon Metal & Serv., Inc v. Topp*, 537 So. 2d 1331, 1335 (Miss. 1989). For purposes of Rule 11, the filing of the pleading or motion triggers the possibility of sanctions; a party need not abandon the cause if he later discovers that the claim is frivolous. *Deakle*, 661 So. 2d at 195.

Similarly, the Litigation Accountability Act authorizes a court to impose sanctions upon a party, the party's attorney, or both if a claim or defense is without substantial justification or interposed for delay or harassment. *Id.* at 196. A claim is without substantial justification when it is "frivolous, groundless in fact or in law, or vexatious, as determined by the court." *Id.* (citation omitted). Frivolity for purposes of the Act is defined in the same manner as the Rule. *Id.* However, unlike Rule 11, the Act imposes upon a party a duty of continuing inquiry, allowing sanctions where an action, claim, or defense is not voluntarily dismissed within a reasonable time after the attorney or party responsible for the claim knows or reasonably should have known that he could not prevail on the

claim. *Id.* at 197 (citing Miss. Code Ann. § 11-55-5(2) (Supp. 1994)).

The following findings were made by the trial court prior to imposing sanctions against WTP's counsel:

1. The action should have never been filed in Hinds County;
2. Because Weems Timber Products was a non-entity, no answer could be filed on its behalf;
3. WTP's counsel filed the purported answer for the purpose of pursuing the change of venue;
4. Counsel for Divine filed a motion to dismiss the cause after learning that he had sued a non-existing corporation;
5. The cause should have been dismissed as a matter of routine because Divine had sued a non-existing corporation;
6. WTP's pursuit of the request for change of venue after Divine had moved to dismiss the action was frivolous and wasted the time of the court and Divine's attorney.

The record supports the court's findings, and we are unable to find any abuse of discretion by the court's imposition of sanctions against WTP's counsel. Moreover, the correct legal standard was employed by the court. WTP's counsel was aware that the corporate entity was non-existent; therefore, the court could not acquire jurisdiction over the non-existent entity and grant the motion for change of venue. WTP's counsel also knew that dismissal was being sought by Divine, but chose to pursue the matter for the purpose of acquiring a change of venue for an individual, not yet named as a party to the action. Requesting a change of venue under these circumstances was frivolous and would justify the imposition of sanctions under Rule 11 and the Litigation Accountability Act. Therefore, we affirm the court's imposition of sanctions against WTP's counsel.

**THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY DISMISSING THE ACTION AND AWARDING SANCTIONS TO THE APPELLEE IS AFFIRMED. STATUTORY PENALTIES AND INTERESTS ARE AWARDED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.J.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**