IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00496 COA

TYREE W. BROWN

APPELLANT

v.

THE DOW CHEMICAL COMPANY AND SONFORD PRODUCTS CORPORATION

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. HON. JAMES E. GRAVES, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

TYREE W. BROWN, *PRO SE*

ATTORNEY FOR APPELLEES:

CAMILLE HENICK EVANS

NATURE OF THE CASE: WRONGFUL DEATH

TRIAL COURT DISPOSITION: CASE DISMISSED

BEFORE FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

ON SHOW CAUSE ORDER ENTERED ON JULY 2, 1996

This case came to us on appeal as part of Tyree Brown's extensive efforts to undo the settlement of a lawsuit brought by the Calvin Brown estate. Mr. Brown is an heir of that estate and had assigned as error the refusal of the Circuit Court of the First Judicial District of Hinds County to set aside the dismissal of his lawsuit following the settlement of the Calvin Brown estate. In response to that appeal, this Court issued an opinion on July 2, 1996, affirming the lower court's decision and ordering the Appellant to show cause why his actions were not frivolous under Mississippi Rule of Appellate Procedure 38 and why sanctions should not be imposed. We now address the responses of each party to that order.

DISCUSSION

Brown responded to our request by building on his list of allegations against the judiciary, apparently believing that by increasing the list of tainted judges he has shown cause why his actions in this case were not frivolous and why sanctions should not be imposed.

1. Recusal of Judges

Brown now alleges that four judges are guilty of improper judicial conduct. Only one was a named target of earlier allegations, and Brown's most recent pleading names three more. He argues that because of this judicial misconduct, the supreme court should have retained jurisdiction pursuant to Mississippi Rule of Appellate Procedure 16(d)(e). That rule requires the supreme court to retain cases dealing with judicial performance. Although this case is not a judicial performance case, we will address Brown's accusations. Three members of this Court are accused of having an interest in the litigation that disqualifies them, as is also a federal judge involved in previous proceedings.

Brown for the first time during his response to our show cause order, points out that ten years ago, one of the members of this Court, Presiding Judge Billy Bridges, presided over an early stage of this litigation. The Mississippi Supreme Court has stated:

> Judges do not have any desire to sit in cases where they are disqualified for any reason, and it is only fair that notice be given the judge of any such disqualification before he hears the case so that he may recuse himself. Any other rule might result in an unfair advantage being taken in a case where an attorney, who moves against a judge, might wait until after he could ascertain whether the decision would be for or against him; and, if against him, he would file a motion to recuse, but if for him, he would accept it without complaint.

Ryals v. Pigott, 580 So. 2d 1140, 1175 (Miss. 1990).

Judge Bridges was not on the initial panel that heard the case and only voted when the opinion was completed by those three judges and circulated to the remainder of the court. The supreme court has stated that parties are charged with a responsibility to know the composition of the court. *Id.* Along with this responsibility comes the duty to reveal any information that might warrant a judge's recusal from the case.

> A party who fails, through wilful ignorance or otherwise, to timely apprise itself of such critical information waives the right to have the issue addressed on the merits. The principle of well-entrenched law is designed particularly to nullify the "rewards" of "sandbagging" through employment of dilatory tactics.

Ryals 500 So. 2d at 1175. Brown at no time until this show cause response brought up disqualification or named the judge that allegedly was an interested party. Pursuant to *Ryals*, Brown should have known the composition of the court.

In *Ryals*, the supreme court rejected the appellees' argument that Justice Edwin Pittman should have been disqualified from participating in the appeal of that case because he had been involved in submitting a brief as amicus curiae "to assist" the chancery court in the disposition of the case while he served as attorney general. Three days after the appellees mailed their brief, Justice Pittman took his seat on the supreme court. The appellees argued that because Justice Pittman had so recently been elevated to the supreme court, they should have been excused for not naming him as an interested party. The appellees did, in fact, name Honorable Mike Moore in their certificate of interested persons filed two months later and argued that they thought that this was the correct procedure. The court rejected this excuse and said the parties' knew or should have known the composition of the court and if they did not know before filing their brief, they must have acquired this information prior to the final disposition of the case.

Ten years have passed since the probate hearing that is the basis for disqualification. It is not unusual that a judge would not recall having participated in a case so long ago. Although at a hearing on April 8, 1994 in the Hinds County Circuit Court, Brown made a nebulous claim against the Rankin county court that heard the initial 1986 case, he did not mention the judge by name. All he said on this point at the 1994 hearing was this:

> THE COURT: What is different about this claim from the claim that was raised in the Federal Court hearing that . . . .?

> MR. BROWN: Okay, the difference about this claim is that we just now recently learned that it originated in the Rankin County Court and that it involved the judge in the Rankin County Court. . .

However, the judge was not named in the motions or petitions as an interested party. This was not completed until after Brown received an unfavorable ruling by this Court. Cases have long held that a party cannot "take his chances with a judge about whom he knows of grounds for recusal and then, after he loses, file his motion." *Buchanan v. Buchanan*, 587 So. 2d 892, 897 (Miss. 1991). If a party has a reasonable basis for moving to disqualify a judge, he cannot delay in the hope of first obtaining a favorable ruling and then complain only if the result is unfavorable. *Ryals* 580 So. 2d at 1177.

Now that the judge has been made aware of his earlier involvement in this case, he has recused

himself from further participation.

Two other judges of this Court are said to be unduly interested in the outcome because of their being related to other trial judges who handled aspects of this case. The allegations are based on mere speculation derived from similar last names. Nonetheless, this Court has inquired of Judge Frank Barber and has been informed that he is not related to the Charles Barber previously involved in this case. Judge Thomas Coleman of this Court is aware of a very distant relationship between himself and Judge William Coleman, but it is sufficiently distant that Judge Thomas Coleman cannot categorize it. Whatever that relationship may be does not disqualify Judge Thomas Coleman. The supreme court has stated that the test is not whether someone is related by blood or marriage, but whether they "have an interest that could be substantially affected by the outcome of the proceeding." *Buchanan,* 587 So. 2d at 896 (quoting Code of Judicial Conduct Canon 3 C(1)(d)(iii)). Brown has offered us no proof that his legal interests have been affected by these judges hearing his case.

Finally, Brown alleges that federal District Judge Henry Wingate was involved in fraudulent activity when he presided over the case. More specifically, Brown states:

> The Honorable Henry T. Wingate Presiding [sic] and the hearing approval settlement proceeding and procedures had the *apparent appearance* of *possible fraudulent involvement* of judicial mistake *or* bad faith of the attorneys of record. . . (emphasis added).

Again, Brown bases his allegations on mere speculation. He again accuses the judiciary of fraudulent misconduct without any basis for such accusations. That argument was addressed and disposed of in the circuit court hearing of April 8, 1994. Brown stated:

> BROWN: The fraud also involved the judge in this Court, Your Honor, and also in the federal court, Your Honor, as far as when we raised the issue it also involved the federal judge that was on the bench, who is also now on the bench, Judge Henry T. Wingate. He was a party in the perpetration of the this fraud. We are alleging that he was paid --

COURT: You're alleging that a federal judge is guilty of fraud?

BROWN: Yes sir. Unfortunately, Your Honor, that's what we're saying.

COURT: I would suggest that you be very careful when you make allegations like that.

BROWN: *That's based on my belief, Your Honor*. . .

This was the extent of the allegations against Judge Wingate. There was no proof offered as to the basis for these allegations. They were based on Brown's belief. None of the elements of fraudulent conduct was presented, and we do not feel compelled to address such obscure allegations. The circuit court found this argument to be without merit. We have already affirmed the circuit court's findings and will not disturb that ruling.

2. Sanctions for Frivolous Appeal

In our July 2, 1996 opinion, we allowed Brown thirty days to show cause why his actions in this case did not amount to a frivolous appeal under Mississippi Rule of Appellate Procedure 38 and why sanctions should not be imposed.

Rule 38 states:

> In a civil case to which Miss. Code Ann. § 11-3-23 (1991) does not apply, if the Supreme Court or Court of Appeals shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee.

M.R.A.P. 38 (1995).

The supreme court has evaluated Rule 38 frivolousness by reference to Rule 11. *Ivy v. Merchant*, 666 So. 2d 445, 450 (Miss. 1995). The court ruled that "a pleading or motion is frivolous within the meaning of Rule 11 only when objectively speaking the pleader or movant has no hope of success." *Id.* (quoting *Tricon Metals & Servs., Inc. v. Topp*, 537 So. 2d 1331, 1335 (Miss. 1989)). In order to determine if a party has any hope for success, the inquiry is measured using an objective standard; *i.e*., a reasonable party in the litigant's position. *Id.* As we indicated in our previous July 2nd opinion, Brown has in several state and federal court proceedings attempted to undo the settlement of a lawsuit against Dow and Sonford relying on the most tenuous arguments. He has offered nothing new to this Court that shows cause why sanctions should not be imposed. It can not be said that he objectively believed that he had any hope for success in this case because his reasons why sanctions should not be imposed have already been decided. These issues have been argued repeatedly before different courts. Until *Ivy* 666 So. 2d in 1995, the supreme court had not imposed Rule 11 sanctions against a pro se plaintiff. However, the court in *Ivy* realized the impact that frivolous lawsuits could have upon the judicial system. The court stated: "We cannot allow rampant, frivolous filings to clog up a judicial system replete with meritorious claims." *Ivy* at 451. Brown has been given opportunity after opportunity to prove his allegations. He was offered yet another opportunity by this Court to show cause why his actions were not frivolous. He has failed to do so; therefore, this Court will impose Rule 38 sanctions upon him for filing a frivolous appeal. The damages to be awarded may include attorneys' fees and expenses incurred by an appellee. *Russell v. Lewis Grocer Co.*, 552 So. 2d 113, 116 (Miss. 1989).

The Appellees have filed an affidavit supporting its request for fees and expenses. After examining the affidavit, we find that the fees and expenses are reasonable and should be assessed against Tyree

Brown. Total fees and expenses amount to $4,001.10. Upon receipt, that sum will be paid to the Appellees.

We, therefore, order Brown to pay the attorneys' fees and other expenses incurred by the Appellees. We have already assessed costs to him. We do not impose any additional penalty as authorized by the appellate rules.

TYREE BROWN IS ASSESSED AS A SANCTION FOR FILING A FRIVOLOUS APPEAL THE AMOUNT OF $4,001.10, TO BE PAID TO THE CLERK OF THE CIRCUIT COURT OF HINDS COUNTY WITHIN THIRTY DAYS OF THE MANDATE OF THIS COURT, AND THEN DISBURSED TO THE APPELLEES. THE CAUSE IS REMANDED FOR ANY FURTHER PROCEEDINGS ON THIS SANCTION AS MAY BE NECESSARY.

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

BRIDGES, P.J., NOT PARTICIPATING.