

IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-R -99027 SCT

IN RE: MISSISSIPPI RULES OF APPELLATE PROCEDURE

ORDER

This matter has come before the Court en banc upon petitions of the Mississippi Supreme Court Rules Advisory Committee for amendment to Rule 4 of the Mississippi Rules of Appellate Procedure and the accompanying comment, and for the adoption of certain historical notes to the Mississippi Rules of Appellate Procedure. Having considered the petitions, the Courts finds that the proposed amendments and the adoption of the proposed historical notes will promote the fair and efficient administration of justice and that the petitions should be granted.

IT IS THEREFORE ORDERED that Rule 4 of the Mississippi Rules of Appellate Procedure and the accompanying comment be and the same are hereby amended as set forth in Appendix A hereto.

IT IS FURTHER ORDERED that those historical notes set forth in Appendix B hereto be and the same are hereby adopted.

IT IS FURTHER ORDERED that such amendments shall be effective on July 1, 1998.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forthwith forward a true certified copy hereof to West Publishing Company for publication as soon as practical in the advance sheets of *Southern Reporter, Second Series (Mississippi Edition)* and in the next edition of *Mississippi Rules of Court*.

SO ORDERED, this, the _____ day of April, 1998.

FRED L. BANKS, JR., JUSTICE,

FOR THE COURT

PITTMAN, P.J. NOT PARTICIPATING.

APPENDIX A

Rule 4. Appeal as of Right -- When Taken

(a) Appeal and Cross-Appeals in Civil and Criminal Cases. Except as provided in Rules 4(d) and 4(e), ~~In~~ a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. If a notice of appeal is mistakenly filed in the Supreme Court, the clerk of the Supreme Court shall note on it the date on which it was received and transmit it to the clerk of the trial court and it shall be deemed filed in the trial court on the date so noted.

(b) Notice Before Entry of Judgment. ~~Except as provided in Rules 4(d) and 4(e),~~ a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day of the entry.

(c) Notice by Another Party. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

(d) Post-trial Motions in Civil Cases. If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Mississippi Rules of Civil Procedure is filed in the trial court by any party: (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of granting the motion would alter the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial; or (5) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment. ,the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

(e) Post-trial Motions in Criminal Cases. If a defendant makes a timely motion under the Uniform Criminal Rules of Circuit Court Practice is filed in the trial court by the defendant: (1) for judgment of acquittal notwithstanding the verdict of the jury, or (2) for a new trial under Rule 5.16, the time for appeal for all parties shall run from the entry of the order denying such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. Notwithstanding anything in this rule to the contrary, in criminal cases the 30 day

period shall run from the date of the denial of any motion contemplated by this subparagraph, or from the date of imposition of sentence, whichever occurs later. A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

(The remainder of the Rule remains unchanged.)

Comment

Rule 4 applies to appeals and cross appeals in all civil and criminal cases. The date of entry of judgment is the date the judgment is entered in the general docket of the clerk of court. Miss.R.Civ.P. 58.

The notice of appeal requirement applies to all forms of appeal including cross appeals. Rule 4(c) requires that a notice of appeal for a cross appeal be filed within 14 days after the date on which the first notice of appeal was filed, unless a longer period is prescribed by another provision of Rule 4.

Previously, Rule 4(d) specified certain post trial motions that ~~must~~ had to await disposition before a valid notice of appeal ~~may~~ could be filed. Any notice of appeal filed before such disposition ~~will have had no force and or effect.~~ Rule 4(e) hasd the same provisions for specified post trial motions in criminal cases. Those provisions of Rules 4(d) and 4(e), however, created a trap for an unsuspecting litigant who filed a notice of appeal before a post trial motion, or while a post trial motion was pending. Because the Rules required a party to file a new notice of appeal after the motion's disposition, unless a new notice was filed the Supreme Court lacked jurisdiction to hear the appeal. See *In re Kimbrough*, 680 So. 2d 799 (Miss. 1996). Many litigants, especially *pro se* litigants, failed to file the second notice of appeal, and the Court expressed dissatisfaction with the rule. See *id.* (Banks, J., dissenting) and (McRae, J., dissenting).

Rules 4(d) and 4(e) now provide that a notice of appeal filed before the disposition of a specified post trial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before its disposition is, in effect, suspended until the motion's disposition, whereupon the previously filed notice effectively places jurisdiction in the Supreme Court. Still, Ordinarily the filing of a notice of appeal should come after the disposition of these motions. An appeal should not be noticed and docketed in the Supreme Court while it is still possible that the appealing party may obtain relief in the trial court.

Because a notice of appeal will ripen into an effective appeal upon disposition of a post trial motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a post trial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient

notice of the appellant's intentions, an additional notice of appeal is unnecessary.

While Rule 4 is patterned after its Federal counterpart, Rule 4(d) departs from Federal practice by providing that a valid notice of appeal is effective to appeal from an order disposing of a post trial tolling motion. Under Fed. R. App. P. 4(a)(4), if a party wishes to appeal from the disposition of a post trial tolling motion, the party must amend the notice to so indicate. However, requiring amendment of the notice of appeal would create a new, albeit less severe, trap for unsuspecting litigants, without serving a substantial purpose.

Rule 4(d) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is filed within 10 days after entry of judgment. This eliminates the difficulty of determining whether a post trial motion made within 10 days after entry of a judgment is a Rule 59 motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. See *Michael v. Michael*, 650 So.2d 469 (Miss. 1995).

Rule 4(f) continues to recognize an extension for parties under a legal disability. See *Parks v. Knight*, 491 So.2d 217 (Miss.1986).

* * * * *

(The remainder of the Comment remains unchanged.)

APPENDIX B

ADVISORY COMMITTEE HISTORICAL NOTE [RULE 2]

Effective July 1, 1997, the Comment to Rule 2 was amended to reflect the promulgation of new Rule 4(h). 689-692 So.2d LXVI (West Miss. Cases 1997).

ADVISORY COMMITTEE HISTORICAL NOTE [RULE 3]

Effective June 21, 1996, Rule 3(d) was amended to require the clerk of the trial court to transmit the Civil Case Filing Form or the Notice of Criminal Disposition Form to the clerk of the Supreme Court. 673-678 So.2d XXXVII (West Miss. Cases 1996).

ADVISORY COMMITTEE HISTORICAL NOTE [RULE 4]

Effective July 1, 1997, a new Rule 4(h) was added to provide for reopening of time for appeal in the

event that a notice of entry of judgment is not received. The former Rule 4(h) was redesignated 4(i). 689-692 So.2d LXII (West Miss. Cases 1997).

ADVISORY COMMITTEE HISTORICAL NOTE [RULE 15]

Effective June 14, 1996, Rules 15(a) and (c) were amended to provide that failure to timely file an application for a writ of mandamus will not result in dismissal when the failure is caused by excusable neglect and dismissal will result in manifest injustice. 673-678 So.2d XXXV (West Miss. Cases 1996)

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ADVISORY COMMITTEE HISTORICAL NOTE [RULE 17]

Effective June 21, 1996, Rule 17 (e) was amended to enlarge the period for acting on certiorari petitions from sixty to ninety days. In addition, Rule 17(b) was amended to redesignate rehearing "petitions" as "motions," and Rule 17 (d) was amended to consistently designate certiorari "petitions" as "petitions" and effect another technical change. 673-678 So.2d XXXIX-XL (West Miss. Cases 1996).

ADVISORY COMMITTEE HISTORICAL NOTE [RULE 25]

Effective June 21, 1996, Rule 25(a) was amended to redesignate rehearing "petitions" as "motions." 673-678 So.2d XL (West Miss. Cases 1996).

ADVISORY COMMITTEE HISTORICAL NOTE [RULE 27]

Effective June 21, 1996, following the redesignation of rehearing "petitions" as "motions," the Comment to Rule 27 was amended to provide that motions for rehearing cannot be considered by a single justice. 673-678 So.2d XLI (West Miss. Cases 1996).

Effective January 1, 1995, Miss. R. App. P. 27 replaced Miss. Sup. Ct. R. 27, embracing proceedings in the Court of Appeals. Rule 27 was further amended by adding subsection ~~(d)~~ **(f)** concerning motions pertaining to Rules of Court. 644-647 So.2d LXII-LXIV (West Miss. Cases 1994).

ADVISORY COMMITTEE HISTORICAL NOTE [RULE 35-A]

Effective July 25, 1996, Rule 35-A(c) was deleted and Rules 35-A(d) and (e) were renumbered accordingly. 673-678 So.2d XLIV (West Miss. Cases 1996).

ADVISORY COMMITTEE HISTORICAL NOTE [RULE 35-B]

Effective September 1, 1996, new Rules 35-B(b) and (c) were added. In addition, Rule 35-B(a) was amended to reflect the new Rules, and former Rules 35-B(b) and (c) were renumbered Rules 35-B(d) and (e). 673-678 So.2d XLV (West Miss. Cases 1996).

ADVISORY COMMITTEE HISTORICAL NOTE [RULE 36]

Effective June 21, 1996, Rule 36(d) and the Comment were amended to redesignate rehearing "petitions" as "motions." 673-678 So.2d XLI (West Miss. Cases 1996).

ADVISORY COMMITTEE HISTORICAL NOTE [RULE 40]

Effective June 21, 1996, Rule 40 and the Comment were amended to redesignate rehearing "petitions" as "motions." In addition, the Comment was further amended to provide that "Motions for rehearing are limited to cases on the merits and motions which have been decided by panels of the Court or by the court sitting *en banc*. Motions for rehearing are not entertained upon motions decided by a single justice." 673-678 So.2d XLI-XLII and LXXXVIII (West Miss. Cases 1996).

ADVISORY COMMITTEE HISTORICAL NOTE [RULE 41]

Effective June 21, 1996, Rule 41 was amended to redesignate rehearing "petitions" as "motions." 673-678 So.2d XLIII (West Miss. Cases 1996).

ADVISORY COMMITTEE HISTORICAL NOTE [APPENDIX III]

Effective May 13, 1996, Appendix III, Section II was amended to add subsection (c). 668-672 So.2d XXXIII (West Miss. Cases 1996).

