

IN THE COURT OF APPEALS 02/27/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-00705 COA

MISSISSIPPI POWER & LIGHT COMPANY

APPELLANT

v.

**BARBARA ANN WASHINGTON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE
ESTATE OF RICHARD WASHINGTON, SR.**

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

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

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

NATIE P. CARAWAY AND RICHARD D. GAMBLIN

ATTORNEYS FOR APPELLEE:

FRANK D. STIMLEY AND MARSHALL SANDERS

NATURE OF THE CASE: WRONGFUL DEATH

TRIAL COURT DISPOSITION: JUDGMENT FOR PLAINTIFF

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

SOUTHWICK, J., FOR THE COURT:

Richard Washington, Sr., died as a result of being electrocuted by contact with a power line owned, operated, and maintained by Mississippi Power & Light Company. His widow, Barbara Washington, individually and as administratrix of the estate, brought a wrongful death action against MP&L. This appeal arises after three trials. The first trial concluded with a verdict in favor of MP&L, which was set aside on a motion for new trial. The second trial resulted in a nominal verdict for Washington in the amount of \$10,000. That verdict withstood a motion for new trial, but Washington moved for reconsideration. After months of deliberating, the trial court granted

reconsideration and eventually ordered that the third trial be held only on the issue of damages. That third trial resulted in a \$2,250,000 plaintiff's verdict.

MP&L raises fourteen issues on appeal. Because one issue overrides all others, we only consider whether the trial court had jurisdiction to entertain Mrs. Washington's motion to reconsider the initial denial of her post-trial motions following the second trial. Since we conclude that the trial court was without jurisdiction, we vacate the lower court's judgment and dismiss this appeal.

FACTS AND PROCEDURAL HISTORY

Mr. Washington, a painter, was electrocuted on November 7, 1987, while painting a metal roof of a house in Natchez. The parties stipulated that the electrocution was a result of Mr. Washington's paint roller coming into contact with a power line owned, operated, and maintained by MP& L. Mrs. Washington brought a wrongful death action. She sought compensatory damages of \$1,000,000.00 and punitive damages of \$2,000,000.00. MP&L denied liability and claimed the incident was caused solely by Mr. Washington's negligence. Following seven days of testimony at the first trial, the jury returned a verdict in favor of MP&L on July 28, 1989. Washington responded with a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. On November 16, 1989, the judge denied the request for judgment notwithstanding the verdict, but granted a new trial. He noted that he could not "escape the *feeling* that justice has not been done," even though he conceded in his order that the issues were vigorously contested and that no legal error was made.

The second trial was conducted before a different judge, and it also lasted seven days. Washington again sought compensatory damages of \$1,000,000.00 and punitive damages of

\$2,000,000.00. The jury was instructed on the issue of comparative negligence, and it returned a general verdict for Washington in the amount of \$10,000.00. A verdict was reached in the second trial on April 3, 1991.

After the second verdict, Washington filed a motion for additur or, in the alternative, a new trial on the issue of damages. On July 23, 1991, the motion was denied. In the opinion and order, the judge held he could not find that the amount of damages was inadequate due to jury bias, passion, or prejudice, or that the damages were contrary to the overwhelming weight of the evidence. He also found no sufficient basis for granting a new trial on the issue of damages.

Seven days later Washington filed a motion to reconsider. Over eight months later, on April 6, 1992,

the court held that a new trial should be granted. Washington then moved to amend the opinion and order to grant either an additur or a new trial solely on the issue of damages, with the jury being peremptorily instructed that MP&L had committed negligence that was the sole or a contributing proximate cause of the accident. On June 9, 1992 the judge granted the motion and the case was tried for a third time, but this time with liability no longer being left for a decision by the jury. The court held that liability had been established as a matter of law because of the "amply supported" proposition that electricity sometimes arcs, or leaps, and that Mr. Washington had been electrocuted that way. However, the only time arcing was mentioned was during the cross-examination of an MP&L witness. The testimony was that it was possible Mr. Washington did not touch the power line, but he would have had to come within some undetermined distance less than a half-inch from the line for arcing to have occurred. Even then, the witness was not certain that the electricity would arc in this situation. The parties had stipulated pre-trial that the handle of the paint roller which Mr. Washington was using *came into contact with the power line*. The courts "are bound by stipulations in respect of matters which may validly be made the subject matter of stipulations." *Wilbourn v. Hobson*, 608 So. 2d 1187, 1189 (Miss. 1992) (quoting 83 C.J.S. *Stipulations* § 17 (1953)). Regardless of the binding nature of the stipulation, the court did not state why it felt Washington's potentially being electrocuted without touching -- but coming within a half inch -- of the power line meant MP&L was negligent as a matter of law.

At the third trial, Washington sought total damages of \$3,000,000.00. The jury assessed damages at that amount, and found that the percentage of fault attributable to Mr. Washington was twenty-five percent. Accordingly, a final judgment was entered on April 14, 1993, against MP&L in the amount of \$2,250,000.00. MP&L then moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. That motion was denied.

DISCUSSION

We are presented with alleged errors affecting each of the three trials and the numerous post-trial motions. One error controls over all others, and we will only address it. MP&L alleges that the trial court lacked jurisdiction to entertain Washington's motion to reconsider the denial of her post-trial motion following the second trial. As noted above, the trial judge initially denied Washington's motion for new trial filed after the second trial. However, eight months after Washington filed a motion to reconsider, the judge ruled that a new trial should be granted.

Pursuant to Rule 59(b) of the Mississippi Rules of Civil Procedure, a motion for a new trial must be served within ten days of the entry of the judgment. Washington's Rule 59(b) motion for a new trial following the second trial was timely filed and denied. Our issue is whether a motion to reconsider a denial under Rule 59 is countenanced in the rules.

"When the procedure authorizing a motion for a new trial has been followed and, pursuant to proper notice, the parties have made their representations to the court, and the court has duly considered and made his decision upon that motion, that completes both the duty *and the prerogative* of the court." *Griffin v. State*, 565 So. 2d 545, 550 (Miss. 1990) (emphasis added). In *Griffin*, the lower court sustained two criminal defendants' motion for new trial as to two of the counts, and overruled as to one count. *Id.* at 545. The defendants fled and were captured several years later. *Id.* At that time the State moved to set aside the order granting a new trial. *Id.* The judge sustained the State's motions

because he believed that he had made an error at law in granting a new trial. *Id.* On appeal, the supreme court found that the judge had no authority to revoke his earlier order for a new trial. *Id.* The court relied on other states that had addressed the same question. Among other authorities, the court quoted the California Supreme Court's holding that, "It has long been the rule that 'A final order *granting or denying* [a motion for a new trial], regularly made, *exhausts the court's* jurisdiction, and cannot be set aside or modified by the trial court except to correct clerical error or to give relief from inadvertence'" *Griffin*, 565 So. 2d at 549 (citing *Wenzoski v. Central Banking Sys.*, 736 P.2d 753, 754 (Cal. 1987)). Once a motion for new trial has been ruled upon:

[I]f the party ruled against were permitted to go beyond the rules, make a motion for reconsideration, and persuade the judge to reverse himself, the question arises, why should not the other party who is now ruled against be permitted to make a motion for *re-re-*consideration, asking the court to again reverse himself? . . . This reflection brings one to realize what an unsatisfactory situation would exist if a judge could carry in his mind indefinitely a state of uncertainty as to what the final resolution of the matter should be.

Griffin, 565 So. 2d at 549-50 (citing *Drury v. Lunceford*, 415 P.2d 662, 663-64 (Utah 1966)).

Though *Griffin* is a criminal case, the court's principal authorities for holding it improper to move for reconsideration of a motion for new trial were civil cases under versions of Rule 59. The supreme court's *Griffin* decision is dispositive. We set out below some of the reasoning that has gone into the precedents that explain more fully why this is the result.

In all relevant particulars, Rules 59(b)-(c) and 60 of the Federal Rules of Civil Procedure and Rules 59(b)-(c) and 60 of the Mississippi Rules of Civil Procedure are worded the same. When this is the case, and specifically stating this as to Rule 59, the supreme court said "the federal construction of the counterpart rule will be 'persuasive of what our construction of our similarly worded rule ought to be.'" *Bruce v. Bruce*, 587 So. 2d 898, 903 (Miss. 1991) (citation omitted). Consequently, we look to federal law as additional authority on this issue.

Rulings under Rules 59(b)-(c) of the Federal Rules of Civil Procedure have the effect of reestablishing a final judgment; and a motion to reconsider those rulings, if permitted, would again attack the finality of the judgment. . . . But where the motion to reconsider rulings (b) and (c), which rulings had the effect of reestablishing a final judgment, is served more than ten days after the entry of [the original] judgment, we believe that the Rules do not contemplate nor permit the trial court to entertain the motion for the following reasons. Term time as both a grant and limitation upon the district court's power over its final judgments has been eliminated.[] In lieu thereof and in the interest of judgment finality a short time period, that is not subject to enlargement, has been substituted, within which a party may move for a new trial or to alter or amend the judgment. *When the court has decided such a motion in a way that the finality of the judgment has been restored, then relief, if any, should come by appeal or by a motion under Rule 60(b), which does not affect the finality of the judgment or suspend its operation. It would be destructive of the general aim of the Rules to permit successive attacks upon final judgments on motions to reconsider orders that deny new trial, or that deny or grant an alteration or*

amendment of the judgment.

6A James W. Moore et al., *Moore's Federal Practice*, ¶ 59.13 [1], at 59-278 (2d ed 1993) (emphasis added).

Professors Wright and Miller agree, stating that "a motion to reconsider the district court's denial of one or more of the four specified motions [which includes Rule 59(b)] does not affect the finality of the judgment and hence does not toll the running of the appeal periods; the losing party is entitled to but one suspension." 16 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Jurisdiction* § 3950 (1977) (citing *Marten v. Hess*, 176 F.2d 834, 835 (6th Cir. 1949)); *see also Dockery v. Travelers Co.*, 349 F.2d 1017, 1017 (5th Cir. 1965).

There are two different questions being discussed in these authorities, both of which are answered by stating that no reconsideration of a granted or denied Rule 59 motion is permitted. First, reconsideration does not toll the thirty-day period for appeal. Had the renewed (second) motion been denied, an appeal then taken more than thirty days after the first denial of a new trial, the appeal would have been dismissed. Since the motion for reconsideration was granted, the question becomes whether the trial court had power to enter the order it did, proceed to a new trial, and start the clock again on an appeal. As held in *Griffin*, the answer is "no." *Griffin*, 565 So. 2d at 549.

The effect of Washington's argument is to imply a provision for reconsideration of any denied motion, that somewhere in the spaces between different rules are ephemeral subparts that allow for readdressing failed motions that were filed under the various rules. The rules have never been interpreted that way. The supreme court held that even though form will not control over substance, a specific rule must authorize the substance of a motion filed by a party. *Allen v. Mayer*, 587 So. 2d 255, 261 (Miss. 1991). The question in *Mayer* was finding a procedural rule that would permit the filing of a motion to reconsider a denied summary judgment. The *Mayer* court did not find a right to reconsider implicit in Rule 56, which is what Washington wants us to do as to Rule 59. Instead, the court held the substance of the motion was found in Rules 59 and 60. *Id.* The time requirements and the substantive provisions of those two rules applied not by analogy, but by express effect. The substance of asking a trial court to reconsider summary judgment is to request:

[I]n an action without a jury, the court . . . [to] 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.

M.R.C.P. 59(a). The motion is to be made within ten days of the entry of the judgment, summary or otherwise. *Id.* 59(b). Rule 60 has its separate provisions if the motion is to seek relief on the grounds permitted under that rule.

There is no rule that is the substantive equivalent of asking a judge to reconsider a denied Rule 59 motion for new trial. Washington would have us say that it is Rule 59 itself. If we could do that here,

then the *Mayer* court was wrong to look outside of Rule 56 to find the right to move for reconsideration of a Rule 56 order, but should have said that reconsideration was a right incident to Rule 56 itself. It did not, and we cannot as to Rule 59. Asking a trial judge to reconsider a summary judgment is the substantive equivalent of filing a Rule 59 motion when there has been a bench trial. There is no rule equivalent of asking for a new trial twice.

The relevant motion here is not a Rule 59 motion for new trial, filed within ten days of the entry of judgment. It is a motion to reconsider a denied Rule 59 motion, filed within ten days of the denial of a previous motion. Analogies are useful, but to employ the civil rules by analogy would allow a losing party indefinitely to postpone the finality of a judgment. That is exactly the problem set out in *Griffin*, 565 So. 2d at 549-50. The court can delay ruling for many months, but once that denial is entered, it is final. A contrary interpretation of the rules would mean that even if after three or four denied motions for reconsideration, and a trial judge states he will entertain no further motions, an insistent litigant could move to have that order reconsidered, and the probable resulting contempt order reconsidered, all the while leaving the successful litigant without a final judgment.

Sometimes a Rule 59 motion can be viewed as a Rule 60 motion for relief from judgment. *Mayer* holds that labels will not control over substance. *See Mayer*, 587 So. 2d at 261. It is obvious, however, that *this* motion to reconsider is exactly that--a motion for the trial judge to reconsider whether there was overwhelming evidence against the jury verdict. None of the enumerated grounds of Rule 60 was alleged, but instead Washington reargued the evidence.

Rule 60(b) is not an escape hatch for lawyers and litigants who had procedural opportunities afforded under other rules and who without cause failed to pursue those procedural remedies. Rule 60(b) is designed for the extraordinary, not the commonplace.

Bruce, 587 So. 2d at 904; *see also Mississippi Bureau of Narcotics v. One Chevrolet Nova Auto.*, 573 So. 2d 787, 789-90 (Miss. 1990). The express label given by Washington and the actual effect of her motion were to renew a rejected Rule 59 motion. The court had no jurisdiction to entertain it. This court lacks jurisdiction unless the appeal was filed within thirty days from the never-disturbed final judgment of July 23, 1991. Instead, the appeal was filed two years later.

The April 14, 1993, judgment of the circuit court is vacated, and the appeal is dismissed. The denial of a new trial on July 23, 1991, was a final judgment from which no timely appeal by either party was taken. The second trial's jury verdict of \$10,000 has remained in effect.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF APRIL 14, 1993 IS VACATED AND THE APPEAL IS DISMISSED. THE COSTS OF THIS APPEAL ARE TAXED EQUALLY TO THE PARTIES.

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

KING, J., NOT PARTICIPATING.