

IN THE COURT OF APPEALS 02/27/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01278 COA

JAMES E. MAGEE

APPELLANT

v.

BETTY S. MAGEE

APPELLEE

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

TRIAL JUDGE: HON. W. O. "CHET" DILLARD

COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT (2D DIST)

ATTORNEY FOR APPELLANT:

W. HARVEY BARTON

ATTORNEY FOR APPELLEE:

DAVID SHOEMAKE

NATURE OF THE CASE: EQUITY: INJUNCTION & DIVORCE

TRIAL COURT DISPOSITION: DIVORCE GRANTED TO WIFE AND ALABAMA DIVORCE
GRANTED TO HUSBAND DECLARED NULL AND VOID

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

SOUTHWICK, J., FOR THE COURT:

Betty Magee was granted a divorce from James Magee in Mississippi on May 8, 1990. Nearly three years later, James filed a motion for relief from the judgment pursuant to Mississippi Rule of Civil

Procedure 60. The motion was denied. On appeal, James contends that the chancellor abused his discretion in denying the motion. We affirm.

STATEMENT OF FACTS

The procedural history of this dispute extends to 1984, when James Magee and his wife Betty Magee were denied a divorce in Mississippi. Mr. Magee then acquired a residence in Mobile County, Alabama, waited the minimum statutory time, and filed for divorce in that state. Betty Magee filed in Jackson County, Mississippi for an injunction to block the Alabama proceedings. Four days before the scheduled hearing on the injunction in Jackson County, Mr. Magee obtained a default divorce in Alabama. The Alabama divorce decree provided for Mr. Magee to pay \$800 per month in alimony, which he paid into the registry of the Alabama court until \$24,000 had accumulated. Betty Magee then sought to have the Alabama divorce declared void, but in the meantime James Magee married another woman.

The case was transferred to Hinds County Chancery Court on Betty Magee's motion. She now sought a divorce, based on adultery, desertion, and other grounds. Trial was conducted on March 6, 1990. The chancellor granted a divorce, found Betty Magee to be entitled to her costs and attorney's fees, and directed Betty Magee's attorney to prepare a judgment. The attorney was to submit a copy of the judgment for review as to form to James Magee, whose attorney had withdrawn from the case prior to trial. In later proceedings James Magee asserted he never received a copy of the judgment prior to its entry, and did not know for over two and a half years that a final judgment existed. The judgment of June 29, 1990, granted a divorce, ordered James Magee to pay over \$14,000 in attorneys fees, ordered an accounting from James Magee, and declared the \$24,000 in alimony that had accumulated in Alabama to be a gift to Betty Magee.

On February 4, 1993 James Magee filed a Rule 60(b) motion for Relief from Judgment, arguing that the judgment did not reflect the orally stated decision of the chancellor after the trial, and that fraud had prevented James Magee from earlier learning of the judgment. The chancellor denied all relief, found the motion to violate Civil Rule 11 that requires good faith pleading, and ultimately awarded \$1200 more in attorneys fees.

DISCUSSION

The appellate record does not contain transcripts or pleadings from this suit prior to the 1993 Rule 60 motion filed by James Magee. We are therefore not in a position to judge the validity of the arguments made by James Magee regarding possible errors committed at that time. The absence of these proceedings is a proper reflection that we are not reviewing the legitimacy of what occurred in 1990 and before. Our role is solely to determine whether the Rule 60(b) motion for Relief from Judgment was properly denied. *Overbey v. Murray*, 569 So. 2d 303, 305 (Miss. 1990).

Rule 60(b) is for exceptional problems, not for oversights under other procedural rules:

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 v. Bruce, 587 So. 2d 898, 904 (Miss. 1991). Gross negligence or ignorance of the law is insufficient. *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984). If fraud on the court is alleged that led to the entry of an erroneous judgment, that motion must be brought within six months. M.R.C.P. 60(b)(1). Mr. Magee alleged the following in his motion:

That [he] was never informed that the Judgment had been rendered in this Cause, said Final Judgment Of Divorce being submitted to the Court without his signature even though it was required by the Opinion of the Court, and the Defendant was never forwarded a copy pf the same even after repeated requests.

That [he] was not aware of the Judgment until a title search on . . . [January 20, 1993] . . .

That the Final Judgment Of Divorce entered in this Cause is not consistent with and does not conform to the Opinion Of The Court issued on May 8, 1990. Further, that the Judgment of \$14,330.04 is not consistent with the law and evidence produced in this case and has no basis in fact or law. This Judgment is without supporting affidavits as required by law and its entry under the circumstances is tantamount to fraud.

There is nothing in these allegations that fall within the accident or mistake, newly discovered evidence, or void judgment reasons of Rule 60(b)(2), (3), or (4). Rule 60(b)(5) is for the inapplicable circumstance of a release or satisfaction of the judgment. Thus the only possibilities are Rule 60(b)(1) for fraud, but that has to be brought within six months, or Rule 60(b)(6), for "any other reason justifying relief from judgment."

The most that can be said of Mr. Magee's allegations is that despite knowing that within ten days a judgment was to be prepared and submitted, he was grossly negligent in failing to make inquiries as to why after one month, then six, then twenty-four passed, no judgment had been sent him. Opposing counsel testified that his records reflected a copy being sent to Mr. Magee, though not with a return receipt mechanism. The chancellor did not make specific findings on the fact issues, but only held that the allegations of lack of notice constituted a frivolous pleading.

We conclude that however characterized, either barred as an allegation of fraud that had to be presented within six months, or as gross negligence and ignorance that does not constitute an escape hatch for a litigant who had procedural opportunities afforded under other rules, the Rule 60(b) motion was properly denied.

At the hearing on his motion for reconsideration, James Magee additionally contended that the judgment was void because it imposed attorneys' fees on him without notice and a hearing. Notably, Mr. Magee did not challenge the amount of the award—he simply objected to the process by which it was obtained. In the circumstances of this case, the imposition of attorneys' fees required due process. *See Griffin v. Griffin*, 579 So. 2d 1266, 1267-68 (Miss. 1991). However, what James Magee knew at the end of trial was that a judgment was to be prepared, and it would assess him with costs and attorneys fees. Though the amount was not determined, Mr. Magee was as inexcusably negligent in waiting well past the six months period for seeking Rule 60 relief for this complaint, as he was for any other.

THE JUDGMENT OF THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

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