# IN THE COURT OF APPEALS 12/29/95

# OF THE

# STATE OF MISSISSIPPI

## NO. 94-CA-00092 COA

**ELIZABETH JEANETTE PINKHAM AND JOHN LARRY PINKHAM**

**APPELLANTS**

**v.**

**JAMES REEVES CONTRACTOR, INC.**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. LARRY EUGENE ROBERTS

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

ISAAC K. BYRD, JR. AND PIETER TEEUWISSEN

ATTORNEY FOR APPELLEE:

ARLO TEMPLE

NATURE OF THE CASE: PERSONAL INJURY

TRIAL COURT DISPOSITION: JURY AWARDED PINKHAM $20,000.00 IN DAMAGES

BEFORE THOMAS, P.J., BARBER, AND DIAZ, JJ.

THOMAS, P.J., FOR THE COURT:

Elizabeth Pinkham sued Robert O. Clark and Reeves Contractor, Inc, for personal injuries and

punitive damages arising out of an automobile accident between Pinkham and Reeves employee Clark, wherein Pinkham was hit from the rear end while stopped to make a turn. Clark was voluntarily dismissed before trial. At the conclusion of all the evidence, the trial court granted a peremptory instruction to Pinkham's favor on the issue of liability and granted a directed verdict to Reeves on the issue of punitive damages. The jury returned a verdict awarding Pinkham $20,000.00 in damages. Pinkham appeals, arguing first that the trial court erroneously failed to grant an additur or, alternatively, a new trial on the issue of damages. Secondly, Pinkham asserts that the trial court was in error in failing to submit the issue of punitive damages to the jury. Reeves, in turn, requested that this appeal be dismissed for failure to file within the time prescribed by law.

Finding Reeve's argument regarding the untimeliness of the appeal to have merit, we dismiss this appeal for want of jurisdiction.

FACTS

Elizabeth Pinkham attempted to make a left-hand turn from Highway 45 North in Meridian into her place of employment. Highway 45 is a two lane road. While waiting for traffic to clear from the opposite direction, Pinkham's 1991 Isuzu pick-up was struck from behind by a two and one-half (2 ½) ton construction truck driven by Robert Clark, driving in the course and scope of his employment for Reeves Contractors, Incorporated. The impact caused Pinkham's truck to be knocked across the highway into an embankment.

Pinkham was taken to the local hospital emergency room, where hospital personnel took her x-rays and subsequently released her. Thereafter, Pinkham was seen by numerous physicians and went through numerous diagnostic tests, including x-rays, M.R.I.'s and other such procedures. Other than subjective complaints of pain by Pinkham in other areas of her body, there was a dispute as to whether there were any objective findings of medical problems. Pinkham claimed some $17,900.00 in medical expenses incurred, some of which were documented and some not.

I.

THE APPEAL SHOULD BE DISMISSED FOR FAILURE TO TIMELY FILE NOTICE OF APPEAL

Final judgment in this case was entered on November 15, 1993. Pinkham filed a motion for an additur, or in the alternative, a motion for a new trial on the issue of damages on November 29, 1993; the trial court overruled the motion by an order dated and filed December 21, 1993. Pinkham filed her notice of appeal January 24, 1994 (it was dated January 21, 1994). Reeves filed a motion with our supreme court on February 28, 1994 to dismiss this appeal, which motion was summarily overruled by a three judge panel of our supreme court on June 30, 1994. Reeves then filed on July 8, 1994, a petition to rehear or reconsider its previous motion to dismiss. Another three judge panel of our supreme court on August 4, 1994, denied Reeves' petition to reconsider or rehear the previous motion to dismiss. The Court stated that the reason for the denial was that there was lack of proof as to when the clerk of the trial court entered the last trial order in the general docket or minute book as required by Mississippi Rule of Civil Procedure 79. Thereafter, the trial clerk's record, along with the

court reporter's transcript, and briefs from both parties were filed. The complete records before this court at this time reveal without doubt that Pinkham failed to timely file her appeal.

Mississippi Supreme Court Rule 3(a) provides an appeal may be taken within the time allowed by Rule 4. Miss. Sup. Ct. R. 3(a). Rule 4(a) provides the notice of appeal required by Rule 3 shall be filed within 30 days after the entry of the order or judgment appealed from. Miss. Sup. Ct. R. 4(a). The comment under Rule 3 states in part as follows:

> Subdivision 3(a) departs from prior practice and provides that the only absolutely necessary step in the process is the timely filing of the notice of appeal. . . . If the notice of appeal is not filed within the time specified in Rule 4, the Court, on its own motion or on motion of a party will dismiss it.

Miss. Sup. Ct. R. 3 cmt. Rule 2(a) (1) is as follows:

> Mandatory dismissal. An appeal shall be dismissed if the notice of appeal was not timely filed pursuant to Rules 4 and 5.

Miss. Sup. Ct. R. 2(a)(1).

Our supreme court has consistently held that we have no jurisdiction of an appeal where the required notice is not timely filed. *Bank of Edwards v. Cassity Auto Sales, Inc.*, 599 So. 2d 579 (Miss. 1992); *Duncan v. St. Romain*, 569 So. 2d 687 (Miss. 1990); *Tandy Electronics, Inc. v. Fletcher*, 554 So. 2d 308 (Miss. 1989).

The filing of a notice of appeal in 30 days is jurisdictional. Rule 2(a) (1), makes it mandatory that the appeal be dismissed if the notice of appeal is not timely filed. In this case, the notice of appeal was not filed within 30 days. There is no issue of the timely filing of the notice of appeal. The certified copy of the docket entries now filed as a part of the record before us shows clearly that the notice of appeal was not filed within the 30 day period permitted.

Pinkham argues that this matter has been considered by our supreme court twice and the issue decided adverse to Reeves both times. What in fact was decided is that the motion to dismiss was not proved on the record that was then before the court. If at any time a court determines it does not have jurisdiction it simply has no power to proceed.

Pinkham had from December 22, 1993, to January 20, 1994, within which time to file her notice of appeal with the trial clerk. Pinkham failed to file her notice within the time proscribed by rule, and we are compelled to dismiss her appeal.

We have reviewed Pinkham's two assignments of error; both involve discretionary rulings by the trial court subject to review by us only under an abuse of discretion standard. Were we to reach the merits of Pinkham's appeal, she still would not prevail. We need not elaborate in view of our holding on the

timeliness of the appeal.

**PINKHAM'S APPEAL IS DISMISSED FOR LACK OF JURISDICTION. COSTS ARE TAXED TO THE APPELLANTS.**

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