

IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00176 COA

TOWN OF GLENDORA, MISSISSIPPI, BY AND THROUGH ITS BOARD OF DIRECTORS OR ALDERMEN, PETE WILLIAMS, GROVER GENE BROWN, AND CHARLES WHITE, AND JOHNNY B. THOMAS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS VICE-MAYOR OF GLENDORA

APPELLANTS

v.

ROB HILSON

APPELLEE

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

TRIAL JUDGE: HON. GEORGE C. CARLSON, JR.

COURT FROM WHICH APPEALED: TALLAHATCHIE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

AZKI SHAH

ATTORNEY FOR APPELLEE:

DANA J. SWAN

NATURE OF THE CASE: MOTION TO SET ASIDE JUDGMENT AND DECLARE NEW TRIAL

TRIAL COURT DISPOSITION: MOTION DENIED

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

DIAZ, J., FOR THE COURT:

A jury verdict was rendered against the Town of Glendora, et al. (Town of Glendora), for \$3,000 in compensatory damages, and \$250,000 in punitive damages. The Town of Glendora appealed the award of punitive damages. This Court reversed and rendered the \$250,000 punitive damages award against the Town of Glendora. *Town of Glendora v. Hilson*, No. 92-CA-00321-COA (Miss. Ct. App. Feb. 7, 1995). The Mississippi Supreme Court denied appellee Rob Hilson's (Hilson) petition of writ of certiorari. The Town of Glendora filed a motion to set aside judgment and to declare a new trial alleging juror misconduct while the case was still pending on appeal to this Court. This motion was dismissed without prejudice by the Circuit Court of Tallahatchie County. The Town of Glendora appeals to this Court asserting the following issue: whether the lower court erred in dismissing their motion to set aside judgment and to declare a new trial. Finding no reversible error, we affirm.

FACTS

The Town of Glendora alleges that one of the jurors in the proceedings below was previously represented in an unrelated action by attorney Ralph Chapman, who is a member of the firm Chapman, Lewis & Swan--the firm currently representing Hilson. Hilson counters by arguing that although Ralph Chapman is a member of the firm, it is only Dana Swan and Richard Lewis, who are representing him in this case.

The record is completely devoid of showing either contention. The Town of Glendora has attached an exhibit to its brief showing Chapman's representation of the juror in the unrelated case. The documents in the exhibit, however, are not in the court records.

DISCUSSION

JURISDICTION

The Town of Glendora's argument is that the lower court should have held an evidentiary hearing on the issue. At the time of the motion, however, this case was on appeal, and it was still pending a disposition from this Court. The trial court dismissed the motion for want of jurisdiction. The Mississippi Rules of Civil Procedure state in pertinent part:

"The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. . . Leave to make the motion need not be obtained from the appellate court *unless the record has been transmitted to the appellate court and the action remains pending therein.*"

M.R.C.P. 60. The Town of Glendora cites the case *Myers v. State* in support of its argument that the trial court had jurisdiction to hear this motion. The *Myers* case was about the defendant selling liquor in a dry county. The trial court dismissed a juror after a deputy sheriff told the prosecutor that he recognized the juror. Apparently, her husband was on probation for a liquor related offense. She failed to disclose this fact on voir dire. The supreme court stated that a trial court must grant a new trial when a party shows that a juror withheld substantial information or misrepresented material facts

and where a full and complete response would have provided a valid basis for challenge for cause. *Myers v. State*, 565 So. 2d 554, 558 (Miss. 1990). That case is clearly distinguishable from the case at bar. In *Myers*, the trial court was not asked to review a motion while the cause was pending in the Supreme Court. In this case, the Town of Glendora argues that the trial court should have heard their motion; however, Rule 60 of the Mississippi Rules of Civil Procedure clearly governs. The trial court was correct in dismissing the motion for lack of jurisdiction. Furthermore, the appellants were not timely in filing their Rule 60(b)(1) motion. The rule clearly sets out the time frame of six months for the motion to be filed. The appellants filed the motion four years after the judgment was entered.

RECORD ON APPEAL

Despite the fact we think the trial court correctly dismissed the case, even if we were to review the motion on its merits, we would be unable to because the record does not provide any evidence in support or in opposition to the allegation of juror misconduct. If the Town of Glendora is going to raise this issue on appeal, it is incumbent upon it to include the necessary information in the record. *American Fire Protection, Inc. v. Lewis*, 653 So. 2d 1387, 1390 (Miss. 1995). The supreme court has held that it may not act upon or consider issues that do not appear in the record. *Lewis*, 653 So. 2d at 1387. We must confine ourselves to what actually does appear in the record. *Id.* Therefore, we cannot hold the trial court to be in error based on the information presented. The burden is on the Town of Glendora to make sure that there is a complete record that supports all of its arguments. *Id.* (citing *Ross v. State*, 603 So. 2d 857, 861 (Miss. 1992)). "As a matter of fact, it is the appellants duty to justify his arguments of error with a proper record, which does not include mere assertions in his brief, or the trial court will be considered correct." *Id.* (citing *Smith v. State*, 572 So. 2d 847, 849 (Miss. 1990)).

Although we do not take the issue of juror misconduct lightly, we affirm the decision of the trial court based on the reasons state herein.

THE ORDER OF THE TALLAHATCHIE COUNTY CIRCUIT COURT DISMISSING THE MOTION TO SET ASIDE JUDGMENT AND TO DECLARE A NEW TRIAL IS AFFIRMED. ALL COSTS ARE TAXED TO THE APPELLANT.

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