

**IN THE COURT OF APPEALS 06/04/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-01116 COA**

**PAYNE HARAWAY, INC.**

**APPELLANT**

**v.**

**CITY OF OLIVE BRANCH**

**APPELLEE**

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

TRIAL JUDGE: HON. MILLS BARBEE

COURT FROM WHICH APPEALED: DESOTO COUNTY COURT OF EMINENT DOMAIN

ATTORNEYS FOR APPELLANT:

MICHAEL WALL AND E. FARISH PERCY

ATTORNEYS FOR APPELLEE: JAMES WOODS AND JANET ARNOLD

NATURE OF PROCEEDINGS: CONDEMNATION ACTION

TRIAL COURT DISPOSITION: JURY AWARD OF \$3,256.25 FOR VALUE OF CONDEMNED  
PROPERTY

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

BRIDGES, P.J., FOR THE COURT:

This case comes to this Court upon appeal from a condemnation action. The jury in the lower court awarded the Appellants, Payne-Haraway, \$3,256.25 for a parcel of property owned by Payne-Haraway and taken by the City of Olive Branch through eminent domain proceedings. Payne-

Haraway appeals to this Court raising numerous issues. We find, however, that we cannot address the issues assigned by the Appellants because this Court lacks jurisdiction on the grounds that Appellant's post-trial motion and notice of appeal were not timely filed. Therefore, the trial court's judgment for the Defendants, who are the Appellees in this Court, shall remain undisturbed and binding on the litigants in this case.

## FACTS

Since we are not addressing the merits of this action, we will recite only those portions of the facts which relate to the procedural question.

On October 26, 1992, the City of Olive Branch, Mississippi, applied for a special court of eminent domain regarding the condemnation of private property owned by Payne-Haraway. Payne-Haraway answered the application on December 9, 1992. The property was appraised, and the case proceeded to trial. After a jury viewed the property, the jury returned a verdict finding that the property was worth \$3,256.25. The final judgment was entered on July 29, 1994. Contrary to Mississippi Rule of Civil Procedure 77(d), the trial court's clerk gave no notice to Plaintiff's counsel that this order had been entered.

Payne-Haraway served its post-trial motion for additur, or in the alternative, a new trial on August 15, 1994. This motion was served seventeen days after entry of the final judgment. The motion was filed on August 16, 1994, which was eighteen days after entry of the final judgment.

The City of Olive Branch opposed Payne-Haraway's post-trial motion for a number of reasons, one of which was that the motion was not timely filed. The trial court denied the motion on September 27, 1994, but did not address whether the court lacked jurisdiction to hear the motion because of an untimely filing. Once again, the court clerk did not give notice to counsel of the order denying the motion for a new trial.

Payne-Haraway filed its notice of appeal on October 27, 1994, eighty-eight (88) days after entry of the judgment of July 29, 1994.

## LAW

Payne-Haraway argues that the thirty days allotted for filing of notice of appeal did not begin to run until September 27, 1994, the day that the post-trial motion was denied by the lower court. Under this theory, the October 27, 1994, filing of the notice of appeal would render the appeal proper.

In this case, Payne-Haraway filed a motion for a new trial, or in the alternative, an additur under Rule 59 of the Mississippi Rules of Civil Procedure. The motion was filed seventeen days after entry of the jury verdict. Rule 59 of the Mississippi Rules of Civil Procedure clearly states that a motion for a new trial shall not be served later than ten days after entry of the final judgment. M.R.C.P. 59(b). The court correctly denied the motion for a new trial on September 27, 1994, but did not address the issue of the motion's untimely filing.

In addressing this issue, we must first note that the ten-day period within which a Rule 59 motion for a new trial or amendment of judgments may be filed is mandatory and jurisdictional and cannot be extended. *Telford v. Aloway*, 530 So. 2d 179, 181 (Miss. 1988). A post-trial judgment will extend the

time for filing of notice of appeal only if the post-trial motion is timely filed. Miss. Sup. Ct. R. 4(d). Here, the post-trial motion was not timely filed. Therefore, we must consider Payne-Haraway's appeal as an appeal from the original judgment, the judgment of July 29, 1994. In light of the above, the notice of appeal was not filed until eighty-eight (88) days after entry of the final judgment. At the time of the filing of the notice of appeal, this issue would have been governed by Rule 4(a) of what was then the Mississippi Supreme Court Rules. This rule provided:

**Appeal and Cross-Appeals in Civil and Criminal Cases.** 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 this 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.

Miss. Sup. Ct. R. 4(a).

Rule 2(a)(1) of what was then the Mississippi Supreme Court Rules provided:

(1) *Mandatory Dismissal.* An appeal shall be dismissed if the notice of appeal was not timely filed pursuant to Rules 4 or 5.

In *Tandy Electronics, Inc. v. Fletcher*, 554 So. 2d 308, 308 (Miss. 1989), Tandy Electronics filed its notice of appeal one day late. The supreme court dismissed the appeal. The supreme court discussed at length the necessity of enforcing the procedural rules. The court stated, "Strict enforcement has the virtue of treating alike all persons similarly situated." *Id.* at 310. "We regard convergence of declared rule and official conduct a virtue in a legal system." *Id.* The supreme court's refusal to entertain an appeal filed one day late demonstrates the supreme court's desire for strict adherence to the thirty-day requirement.

Payne-Haraway also contends that dismissal of this cause would deny it due process of law. It argues that the faulty timing of its notice of appeal is the direct result of the failure of the court's clerk to perform the duties mandated by the rules, specifically the duty of giving counsel of record notice of the entry of judgment. Based on a plain reading of the procedural rules, we must disagree.

Mississippi Rule of Civil Procedure 77(d) provides:

Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the service. *Lack of notice of the entry by the clerk does not affect the time to appeal, nor relieve, nor authorize the court to relieve, a party for failure to appeal within the time allowed, except as permitted by the Mississippi Supreme Court Rules.*

M. R. C. P. 77(d) (emphasis added).

It is apparent from the record that the court clerk did not serve counsel for Payne-Haraway notice of entry of the order on July 29, 1994, in the manner provided for in Rule 5. But, Rule 77(d) clearly provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal." Therefore, we are not at liberty to unilaterally disregard the obvious and plain wording of this rule. The Appellants in this case failed to timely file its notice of appeal. We have already noted that Payne-Haraway filed its notice of appeal on October 27, 1994, which date was well after thirty days of the July 29, 1994, final judgment. Based on previous rulings and decisions of our supreme court, this Court can only conclude that it lacks jurisdiction to hear Payne-Haraway's appeal. Payne-Haraway did not file its notice of appeal within thirty days of the date of the order which was the final order entered in this case. Without a timely filed notice of appeal, a Mississippi appellate court has no jurisdiction of the case for which the notice of appeal was filed. Thus, we have no jurisdiction of the case *sub judice*. Because we lack jurisdiction of this case, we grant the Appellee's motion to dismiss the Appellant's appeal.

Additionally, this Court would ask that the supreme court of this state further examine situations where the clerk of the trial court has failed to serve counsel of record notice of the entry of judgment. We believe that a requirement that the court clerk serve notice of the entry of a judgment would facilitate the judicial process and diminish the number of appeals based on due process grounds. We respectfully ask that the supreme court examine this issue and make appropriate recommendations.

**APPELLEE'S MOTION TO DISMISS APPEAL IS GRANTED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

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