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IN THE SUPREME COURT OF MISSISSIPPI

JOHN R. HARRISON and
JAMES A. MIMS, JR. APPELLANTS

FILED
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SUPREME COURT
COURT OF APPEALS

versus NO. 2006-CA-01663

BOBBY JOE ROBERTS APPELLEE

APPEAL FROM THE CHANCERY COURT
OF WEBSTER COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS

Oral Argument Requested

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REPLY TO APPELLEE'S ARGUMENT THAT APPELLANTS WAIVED THEIR RIGHT TO ARGUE IN THIS COURT THAT THE LOWER COURT'S DECISION IS MANIFESTLY WRONG

Appellants cite Purvis v. Barnes, 791 So.2d 199, as authority for the proposition that the "trial court will not be found in error on a matter not presented to the trial court for a decision". Of course, this court has held in many cases that in a jury trial the appellant cannot argue that the verdict of the jury was against the great weight of the evidence unless he has presented this argument in a motion for a new trial. See Mississippi Digest, Appeal and Error, Headnote 294. The reason given by the Supreme Court for this rule is that the lower court was never given an opportunity to rule on the verdict of the jury unless it was first presented to him on a motion for a new trial.

The Purvis case cited by the appellee is not applicable to the case at bar for the reason that the appellant in that case did not object to the lower court's award of punitive damages where there was no finding of compensatory damage.

In the case at bar, the appellants fully argued their position before the trial court as did the appellee. The trial court rejected the argument of the appellants and found for the appellee. It is submitted by the appellants that it would be a foolish thing to require the appellants to re-submit their argument to the trial judge before they could argue that the lower court was in error in this Court.

Oddly, the case of McLemore v. State, 669 So.2d 19 (Miss. 1996), cited by the appellee supports this position of the appellants. In the McLemore case, this Court said:

> The State argues that McLemore did not preserve the issue for appeal (objection to evidence) since he did not raise the error in the motion for a new trial, citing Billiot v. State, 454 So.2d 445 (Miss. 1984), and that McLemore did not assign the issue in the post-trial motions, and that there was no objection. The State's argument must fail. In Jackson v. State, 423 So.2d 129 (Miss. 1982), we said that "[m]any attorneys in both criminal and civil cases are unfamiliar with the requirement as to what matters assigned as error must be included in a motion for a new trial." *Id.* at 131. That in order "to take advantage of the alleged error on appeal to this Court, it may be helpful for us to point out that is it not necessary to make a

> motion for a new trial grounded upon errors shown in the official transcript...." *Id.* (quoting Colson v. Sims, 220 So.2d 345, 346 n. 1 (Miss. 1969). In Jackson we enunciated that there are certain errors that parties must bring to the attention of the trial judge in a motion for a new trial. These include, all new matters, motions made upon the ground of inadequate or excessive damages, motions made for new trial where it is contended that the verdict is against the overwhelming weight of the evidence, and the denial of a continuance. McLemore did not argue any of these instances in his motion for a new trial. In the case at hand, McLemore objected and even made a proffer, clearly setting out the purposes for the alleged error. "Having made an objection at trial, the objection was preserved for appellate purposes despite its failure to appear in the appellant's motion for a new trial. Donald v. State, 472 So.2d 370, 373 (Miss. 1985) (citing Jackson 423 So.2d at 131; Colson, 220 So.2d at 346). "The rationale for this rule is based on the policy of giving the trial judge, prior to appellate review, the opportunity to consider the alleged error." Ross v. State, 603 So.2d 857, 861 (Miss. 1992 (citing Howard v. State, 507 So.2d 58, 63 (Miss. 1987); Cooper v. Lawson, 264 So.2d 890, 891 (Miss. 1972). Since McLemore properly preserved the alleged error, the State's argument, that we procedurally bar this issue, is without merit.

Appellants would further refer this court to the case of Kiddy v. Lipscomb, 628 So.2d 1355 at 1359 (Miss. 1993), wherein this court stated:

> In her motion for a new trial, Kiddy argued only that the verdict was against the overwhelming

weight of the evidence; the jury was improperly instructed on the law; and that the Court improperly allowed her to be cross-examined about her activities at the local courthouse, which were irrelevant and prejudicial. Several of the assignments of error now before us, however, were not advanced as reasons for reversing the jury verdict in her motion for new trial. Dr. Lipscomb and the Clinic therefore contend that Kiddy is precluded from raising any issues before this Court not expressly presented in her motion for new trial. We disagree.

Relying on Mississippi State Highway Commission v. Rives, 271 So.2d 725 (Miss. 1973) and Estate of Briscoe v. Briscoe, 255 So.2d 313 (Miss. 1971), *appeal after remand,* 293 So.2d 6 (Miss. 1974), Dr. Lipscomb asserts that Kiddy's appeal must be dismissed because the disputed evidentiary rulings made by the trial court were not included in her motion for new trial. This is contrary to our interpretation of M.R.C.P. 59. It is clearly the better practice to include all potential assignments of error in a motion for new trial. However, this approach is not always practical. Because a trial transcript is rarely available within the time frame for filing post-trial motions, the most prudent attorney cannot be expected to pinpoint every objection raised and ruling made during the course of the trial. Thus, when the assignment of error is based on an issue which has been decided by the trial court and duly recorded in the court reporter's transcript, such as the admission or omission of evidence, we may consider it regardless of whether it was raised in the motion for new trial.

We have stated:

"A *motion for a new trial is only necessary to bring to the attention of the trial court matters not embraced in the rulings during the trial, as taken down by the stenographer.* It being provided, among other things, in section 724, Code of 1930, as follows: 'And in and by means of the court reporter's shorthand notes it shall be competent and effectual for the purposes of appeal and all otherwise, to make of the record every part of the proceedings arising and done during the trial, from the opening until the conclusion thereof, including motions so arising to amend the pleadings, except amendments to indictments, and the ruling of the court thereon and all other motions and steps that may occur in the trial, in addition to the oral testimony. *And in such a trial, provided objections are duly made and noted, no exceptions need to be taken either for the purposes of appeal or otherwise, or if taken shall not be noted, to any ruling or decision of the court and this provision shall include the rulings of a court on objections to testimony. If any ruling or decision of the court as to any matter arising during the trial appear in the copy of the court reporter's notes, it shall not be necessary to take any exceptions or bill of exceptions.*' "

Weyen v. Weyen, 165 Miss. 257, 268-9 (1931) (emphasis added). These principles were reiterated in Colson v. Simms, 220 So.2d 345 (Miss. 1969):

"The appellees contend that even if the items

of medical expense were provable by a local doctor, the appellant in this case could not argue this point on appeal, because, it is said, he did not raise this ground in his motion for a new trial. He cannot now, therefore, put the trial court in error on a point on which it had no opportunity to rule. This argument is not tenable: first–because *the trial court did pass upon the issue and did not permit the introduction of the evidence, and second–it is not necessary to make a motion for a new trial in order to preserve the question for appeal where the error is the failure to permit the introduction of essential evidence. Deposit Guaranty Bank and Trust Co. v. Silver Saver Stores, 166 Miss. 882, 148 So. 367 (1933).*

Id. at 346 (emphasis added). This view is consistent with the interpretation of Federal Rule 59, which is identical to the Mississippi Rule:

"The settled rule in federal courts, contrary to that in many states, is that *a party may assert on appeal any question that has been properly raised in the trial court. He is not required to make a motion for a new trial challenging the supposed errors as a prerequisite to appeal."*

Wright & Miller, Federal Practice and Procedure, Section 2812 (emphasis added).

REPLY TO APPELLEE'S ARGUMENT ON THE MERITS

The appellee apparently concedes that both Harrison and

Roberts thought all the land south of the road only contained 30 acres and that all the land north of the road contained 10 acres. The appellee attempts to distinguish Brimm v. McGee and Webb v. Brown on the ground that "the grantee and grantor in question both thought that the legal description used in the deed was accurate, but, in fact, it was not." Appellants fail to see a distinction. In all three of these cases (including the case at bar), the parties thought they were conveying and buying one piece of real estate, when in fact the description used described a different piece of real estate. The court in the cases cited simply held that the parties conveyed and bought what they intended to convey and buy, not what the erroneous description included. For example, in Webb v. Brown, the grantor did not intend to convey the Ainsworth Building nor did the buyer intend to buy the Ainsworth Building. In the case at bar, Harrison did not intend to convey but 30 acres, nor Roberts intend to buy but 30 acres, and both parties clearly testified that this was their intention.

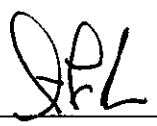
Appellants respectfully submit to the court that equity

dictates that the intention of the parties controls, and that Roberts should only receive 30 acres, which is what he bargained for and paid for.

CERTIFICATE OF SERVICE

I, Arnold F. Gwin, attorney for the appellants, hereby certify that I have this day deposited in the United States mail, postage prepaid, a true and correct copy of the above and foregoing reply brief of appellants to E. Scott Verhine, Post Office Box 173, Vicksburg, Mississippi 39181-0173, attorney for the appellee, and to Judge Robert L. Lancaster, Post Office Box 884, Columbus, Mississippi 39703-0884.

This the 30th day of April, 2007.



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