

**IN THE SUPREME COURT OF MISSISSIPPI**

**Cause No. 2007-CP-01214**

**HOWARD WARD GOBER**

**APPELLANT**

**v.**

**JACK R. LEE and ARTHUR JOHNSTON, in his  
capacity as the Chancery Clerk of Madison County, Mississippi**

**APPELLEES**

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**BRIEF OF JACK R. LEE, APPELLEE**

**(On Appeal from the Chancery Court of Madison County, Mississippi)**

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**ORAL ARGUMENT NOT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case, and makes these representations in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Howard Ward Gober ("Gober"), Appellant
2. Jack R. Lee ("Lee"), Appellee
3. Lara E. Gill and J. Mark Franklin, III, attorneys for Jack R. Lee, Appellee
4. Arthur Johnston, in his capacity as the Chancery Clerk of Madison County, Mississippi ("Chancery Clerk"), Appellee;
5. Edmund L. Brunini, Jr. John A. Brunini and Brian C. Kimball, attorneys for Arthur Johnston, Appellee



Lara E. Gill

*Attorney of Record for Jack R. Lee*

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## **STATEMENT OF THE ISSUES**

This appeal raises the following issues:

1. Is the Appellant entitled to a new trial?
2. Is the Appellant entitled to relief from the judgment entered by the Madison County Chancery Court?

## **STATEMENT OF THE CASE**

A. **Course of Proceedings.** Jack R. Lee (“Lee”) commenced these proceedings by filing his Complaint to Void Tax Deed (“Complaint”) on April 28, 2005, naming as Defendants Howard Ward Gober (“Gober”) and Arthur Johnston<sup>1</sup>, in his capacity as the Chancery Clerk of Madison County, Mississippi (“Chancery Clerk”). [R. 1-5] The Chancery Clerk filed his Answer to the Complaint on September 8, 2005. [R.E. 6; R.49-50] Gober filed his response to the Complaint which he called his “Answer to Summons” on January 3, 2006. [R. 56] On April 10, 2006, Lee filed his Motion for Summary Judgment [R.57-154], and set his Motion for Summary Judgment for hearing before the Madison County Chancery Court for July 26, 2006. [R.155-156] The Chancery Clerk filed his Joinder in Lee’s Motion for Summary Judgment on May 18, 2006. [R.157-159] Gober appeared *pro se* at the hearing on Lee’s Motion for Summary Judgment, along with counsel for Lee and counsel for Arthur Johnston, Chancery Clerk of Madison County, Mississippi. Upon conclusion of the hearing, the Honorable Janace Harvey-Goree, Madison County Chancellor, granted Lee’s Motion for Summary Judgment.

B. **Statement of Facts.** On July 15, 1985, Tower Loan of Mississippi, Inc.

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<sup>1</sup>No damages or other personal liability was sought by Lee against the Chancery Clerk of Madison County, Mississippi. The Chancery Clerk was named as a necessary party as his predecessor in office, Mike Crook, conducted the tax sale of August 27, 2001. Arthur Johnston, as the current Chancery Clerk of Madison County, Mississippi, executed the tax deed to Gober which is the subject of the Complaint.

Profit Sharing Trust, as grantor, executed and delivered its Warranty Deed to Lee, as grantee, selling, conveying and warranting all of its interest in certain real property situated in Madison County, Mississippi, and being more particularly described as follows:

A lot on the North side of West Center Street, City of Canton, being more particularly described as Lot 2 on Northside of Public Square in City of Canton, County of Madison, Mississippi, according to the George and Dunlap map of said City prepared in the year 1898.

Pursuant to the Warranty Deed, fee simple absolute title in and to the subject property vested in Lee. The Warranty Deed was duly filed for record in the office of the Madison County Chancery Clerk on July 16, 1985, and recorded in Book 206, at Page 679.

On August 27, 2001, Madison County sold the subject real property for unpaid 2000 taxes to Gober. On or about October 4, 2004, the Chancery Clerk executed a Tax Deed to "CO or WG," as grantee, pursuant to the tax sale of August 27, 2001. The Tax Deed was filed for record on October 29, 2004, in Book 1847, at Page 672, in the office of the Chancery Clerk.

On August 26, 2002, Madison County sold the subject real property for unpaid 2001 taxes to Trademark Title Services. Thereafter, Gober purchased the interest of Trademark Title Services. A tax deed evidencing the sale of the subject property for unpaid 2001 taxes to Trademark Title Services has not been filed of record in the Office of the Chancery Clerk of Madison County, Mississippi.

Lee never received notice that the subject property was to be sold for 2000 or 2001 taxes, and he never received notice that the sales were due to mature.

#### **1. Procedural history regarding Final Judgment**

As noted above, Lee was successful on his Motion for Summary Judgment before the

Madison County Chancery Court. [R. E. 2; R. 169-170, 163-168] The Final Judgment Voiding Tax Deed and Setting Aside Tax Sales ("First Final Judgment"), was first executed and entered on August 25, 2006. [R.E. 2; R.163-168] As reflected in the Final Judgment, Gober reviewed the Judgment but refused to sign. [R.168] Erroneously believing that the Court's Final Judgment of August 25, 2006 had not been entered, on January 17, 2007, Lee filed his Motion for Entry of Final Judgment, requesting that the Madison County Chancellor enter the proposed final judgment presented on August 25, 2006. [R. 169-173] On February 2, 2007, the Madison County Chancellor signed and entered a second copy of the proposed Final Judgment ("Second Final Judgment"). Except for the date of the Chancellor's signature and the stamp indicating the filing date, the First Final Judgment and Second Final Judgment are identical. [R.E. 3; R. 202-207]

On February 13, 2007, Gober filed his Motion for a New First Trial [R. 208-213], even though the lower court had decided the matter by summary judgment. Lee filed his Response to Gober's Motion for New Trial on February 28, 2007 [R.214-218], and the Chancery Clerk filed his Joinder in Lee's Response to Gober's Motion for New Trial on March 12, 2007. [R. 225-226] In the interim, Gober filed a Motion for Judicial Notice on March 2, 2007 [R. 219-220], and a Reply to Lee's Response to Motion for a New First Trial, on March 8, 2007. [R. 222-224] On March 13, 2007, Lee filed his Response to Gober's Motion for Judicial Notice. [R.227-228]

On April 24, 2007, Gober filed his "Motion for Vacating Hearing 13 April 2007. " [R.233] Lee filed his Response to Motion for Vacating Hearing 13 April 2007 and Motion to Impose Sanctions Under Litigation Accountability Act and Rule 11, Mississippi Rules of Civil Procedure, on May 7, 2007 [R.234-263], because Gober's Motions filed on February 23, 2007, March 2, 2007 and April 20, 2007, were inflammatory and frivolous.



The Madison County Chancery Court agreed, and, on July 6, 2007, entered an order that both imposed sanctions on Gober and denied Gober's pending Motion for Vacating Hearing 13 April 2007. [R.E.4; R.265-267] In that order, the Chancellor found that "[b]y filing at least three Motions regarding this Court's award of judgment as a matter of law, Howard Gober has demonstrated unbridled contempt for the prior final judgment of this Court." [R.E.4; R. 267] The Madison County Chancellor further found that Gober's motions were "knowing and brazen attempts to circumvent the Final Judgment Voiding Tax Deed and Setting Aside Tax Sale." [R.E.4; R.265-267] While there was no monetary sanction imposed on Gober, the Chancellor sanctioned Gober by restricting him "from filing any further pleadings in this cause." [R.E.4; R.265-267]

Gober filed a notice of appeal to this Court on July 13, 2007. [R.272]

## **2. The Chancellor's Ruling**

The Final Judgment first entered on August 25, 2006, and subsequently re-entered on February 2, 2007, correctly concluded the following:

- a. The former Chancery Clerk of Madison County, Mississippi, did not have the Sheriff of the county of Lee's residence effect personal service of the redemption notice on Lee and return proof of service to the Madison County Chancery Clerk's Office;
- b. The former Chancery Clerk of Madison County, Mississippi, did not mail a copy of the redemption notice to Lee's street address;
- c. The former Chancery Clerk of Madison County, Mississippi, did not mail a copy of the redemption notice to Lee's post office address;
- d. The former Chancery Clerk of Madison County, Mississippi, did not exercise reasonable diligence to ascertain the appropriate address for Lee as the record owner to mail the redemption notice;
- e. The former Chancery Clerk of Madison County, Mississippi, did not mail notice to Lee, as owner of the subject property, at the address set forth for

him as grantee on the aforementioned Warranty Deed recorded in Book 206, at Page 679, in the office of the Chancery Clerk; and,

- f. The failure of the former Chancery Clerk of Madison County, Mississippi, to comply with the requirements of Miss. Code Ann. §§ 27-43-1 and 27-43-3 renders the subject tax sales void.

[pp. 163-168, record].

### **SUMMARY OF THE ARGUMENT**

Gober is not entitled to any relief on his appeal. Gober did not file his notice of appeal within the time prescribed by Rule 4 of the Mississippi Rules of Appellate Procedure. Additionally, Gober's request for a new trial in the trial court was untimely, and his request for relief from the Madison County Chancery Court's Final Judgment is not well-founded. Gober's appeal is simply a further improper attempt to relitigate the issues correctly and finally determined by the trial court. Therefore, the judgment of the Madison County Chancery Court should be affirmed and Gober's appeal should be dismissed and denied.

### **STANDARD OF REVIEW**

Rule 4(a) of the Mississippi Rules of Appellate Procedure requires that an appellant's "notice of appeal. . . shall be filed with clerk of the trial court within thirty days after the date of entry of the judgment [appealed from]." On appeal, questions of law are reviewed *de novo* by the Court. *Maldonado v. Kelly*, 768 So. 2d 906, 908 (Miss. 2000). The Mississippi Supreme Court employs a limited standard of review on appeals from chancery court. *Reddell v. Reddell*, 696 So. 2d 287, 288 (Miss. 1997). The appellant must demonstrate "that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard." *Vaughn v. Vaughn*, 798 So. 2d 431, 433-34 (Miss. 2001), *Cummings v. Benderman*, 681 So. 2d 97, 100 (Miss. 1996), quoted

in *Girard Savings Bank v. Worthey*, 761 So. 2d 230, 232 (Miss. App. 2000). This Court will set aside a chancellor's fact findings only upon a determination that such findings are manifestly wrong or are not supported by substantial, credible evidence. *Bredemeier v. Jackson*, 689 So. 2d 770, 775 (Miss. 1997). A trial judge's refusal to grant relief under Rule 60(b) is to be set aside only upon a finding of an abuse of the trial judge's discretion. *Telephone Man, Inc. v. Hinds County*, 791 So. 2d 208, 210 (Miss. 2001).

### **ARGUMENT AND AUTHORITIES**

#### **I. Notice of Appeal time-barred.**

Gober clearly did not timely file his notice of appeal. His appeal was filed nearly ten full months after the thirty-day deadline provided by Rule 4 of the Mississippi Rules of Appellate Procedure had expired. The record clearly reflects that the lower court entered its First Final Judgment on August 25, 2006. Gober's notice of appeal should have been filed no later than September 24, 2006. However, Gober filed his Notice of Appeal with the Madison County Chancery Court almost ten months later, on July 13, 2007. Gober's Notice of Appeal is therefore untimely, and, as stated by this Court, "the thirty-day limit to file notice of appeal to Mississippi's appellate courts is a 'hard-edged, mandatory' rule which this court 'strictly enforces.'" *Arceo v. Tolliver*, 949 So. 2d 691, 696 (Miss. 2006), quoting *Tandy Electronics, Inc. v. Fletcher*, 554 So. 2d 308, 309-312 (Miss. 1989).

As detailed above, the Chancery Court entered a Second Final Judgment, identical to the First Final Judgment, on February 2, 2007. Even if this Court holds that the thirty-day time period stated in M.R.A.P. 4(a) began to run on February 2, 2007, Gober's notice of appeal was still untimely filed, as it was not filed until July 13, 2007. While the running of time under Rule 4(a) of the Rules

of Appellate Procedure is tolled where a party timely files a motion for new trial under Rule 59(a) of the Mississippi Rules of Civil Procedure (within ten days after entry of final judgment), Gober is still time-barred. As addressed in more detail below, Gober's request for a new trial was filed outside the time permitted by the rules. Regardless of which date this Court determines to have commenced the time for Gober to seek relief from or appeal the Chancellor's judgment, Gober's appeal still mandates dismissal. "Our supreme court has made clear that 'Rule 2(a) reflects the long-standing [principle] in this state that the failure to file a timely appeal leaves [the appellate court] without jurisdiction to consider the case.'" *Hodnett v. Anderson*, 913 So. 2d 994, 997 (Miss. App. 2005), quoting *Bank of Edwards v. Cassity Auto Sales, Inc.*, 599 So. 2d 579, 582 (Miss. 1992)(bracketed text in original).

## **II. Request for new trial is time-barred.**

According to Rule 59 of the Mississippi Rules of Civil Procedure, a new trial may be granted on all or part of the issues in an action in which there has been a trial for any reasons for which rehearings are granted in suits in equity in the courts of Mississippi. Miss.R.Civ.P. 59(a). In the case at bar, there was no genuine issue as to any material fact, and, as a result, final judgment was properly entered on Lee's Motion for Summary Judgment.

Because Gober delayed in requesting a new trial, his request is barred as untimely. According to subsection (b) of Rule 59, "a motion for a new trial shall be filed no later than ten days after the entry of judgment." Miss.R.Civ.P. 59(b). *See also Allen v. Mayer*, 587 So. 2d 255, 261 (Miss. 1991)(motion to set aside or reconsider summary judgment order treated as Rule 59 motion). Controlling Mississippi case authority also clearly states that the ten-day limit on service of a motion for a new trial is jurisdictional and mandatory, and contains an inflexible time standard. *Telford v.*

*Aloway*, 530 So. 2d 179, 181 (Miss. 1988)(emphasis added); *see also Netterville v. Weyerhaeuser*, 963 So. 2d 38, 41 (Miss. 2007)(post-judgment time limits pursuant to civil procedure rules are mandatory and jurisdictional).

As reflected in the record before the Court, the Final Judgment Voiding Tax Deed and Setting Aside Tax Sale was originally entered by the Madison County Chancery Clerk on August 25, 2006, without Gober's signature. The Final Judgment was entered again without Gober's signature on February 2, 2007. Gober filed his Motion for First New Trial on February 13, 2007, more than four months after the original entry of Final Judgment by the Court and eleven days after entry of the judgment a second time. Gober's Motion for First New Trial was not filed within the ten-day time period provided by Rule 59 of the Mississippi Rules of Civil Procedure, and the Madison County Chancery Court did not abuse its discretion in denying Gober's request for relief. Gober, despite his *pro se* status, "is bound by the same rules of practice and procedure as an attorney" and must comply with the Mississippi Rules of Civil Procedure. *Bullard v. Morris*, 547 So. 2d 789, 798 (Miss. 1989). This includes compliance with Rule 59 of the Mississippi Rules of Civil Procedure. As a result of Gober's failure to meet the requirements of the Rules, he is barred from receiving a new trial.

### **III. No compelling or extraordinary circumstances exist for relief from judgment.**

A motion for relief from a judgment or order, if filed outside the ten days permitted by Rule 59 of the Mississippi Rules of Civil Procedure, is considered as a Rule 60 Motion. *City of Jackson v. Jackson Oaks Ltd. P'ship*, 792 So. 2d 983, 985 (Miss. 2001). A trial judge's refusal to grant relief under Rule 60(b) is subject to review under an abuse of discretion standard. *Telephone Man, Inc. v. Hinds County*, 791 So. 2d 208, 210 (Miss. 2001). The Mississippi Supreme Court has stated that

“[r]elief under Rule 60(b)(6) is reserved for extraordinary and compelling circumstances,” and further, that the Rule is a “grand reservoir of equitable power to do justice in a particular case.” *M.A.S. v. Mississippi Dept. of Human Services*, 842 So. 2d 527, 530 (Miss. 2003), quoting *Briney v. United States Fid. & Guar. Co.*, 714 So. 2d 962, 966 (Miss. 1998). Gober has submitted no evidence of any extraordinary and compelling circumstances to merit relief from the Final Judgment entered by the Madison County Chancery Court. The record on appeal is devoid of any such proof.

Among the factors a trial judge considers when ruling on a 60(b)(6) motion is (a) whether the movant has had a fair chance to state his claims, (b) whether it would be inequitable to grant the relief sought, and (c) any other factors which are “relevant to the justice of the judgment under attack.” *Briney*, 714 So. 2d at 968. When ruling on a motion for relief from judgment, the Mississippi Supreme Court has directed trial courts to seek a balance “between granting a litigant a hearing on the merits with the need and desire to achieve finality in litigation.” *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984), citing *House v. Secretary of Health and Human Services*, 688 F.2d 7 (2<sup>nd</sup> Cir. 1982).

In the instant matter, Gober is simply trying to reargue his failed opposition to Lee’s Motion for Summary Judgment for a third time. Such arguments are an impermissible basis for relief from the Judgment. The Mississippi Supreme Court has stated that “Rule 60(b) motions should be denied where they are merely an attempt to relitigate the case.” *Stringfellow*, 451 So. 2d at 221. “Rule 60(b) is not an escape hatch for litigants who had procedural opportunities afforded under other rules and who without cause failed to pursue those procedural remedies.” *City of Jackson*, 792 So.2d at 986.

#### **IV. No evidence presented to support assignment of error by trial court.**

Gober failed to present probative evidence demonstrating the existence of a triable issue of

fact in opposition to the Motion for Summary Judgment. Gober's Motion for First New Trial does not establish a single genuine issue of material fact that would prevent an award of judgment as a matter of law to Lee. In fact, Gober's Motion for First New Trial, as well as his Brief filed herein, are incoherent, and his issues and arguments are hard to discern. It does not appear that Gober provides any authority or proof in support of his assignment of error by the Madison County Chancery Court, although he has had ample opportunity to do so.

First, Gober appeared *pro se* at the hearing on Lee's Motion for Summary Judgment, and, as the record demonstrates, the trial court went to great lengths to allow Gober to bring forth whatever proof he might have. However, Gober offered no proof at the hearing. Gober offered neither affidavits nor any other admissible form of evidence setting forth any defense to Lee's Complaint to Void Tax Deed. Similarly, Gober failed to submit any proof or other evidence that would prevent entry of Final Judgment in favor of Lee. It is well established that a party opposing a motion for summary judgment must "be diligent and 'may not rest upon the mere allegations or denials of the pleadings, but instead the response must set forth specific facts showing that there is a genuine issue for trial.'" *Cousin v. Enterprise Leasing Company- South Cent., Inc.*, 948 So. 2d 1287, 1289 (Miss. 2007), quoting *Harrison v. Chandler-Sampson, Ins., Inc.*, 891 So.2d 224, 228 (Miss.2005) and citing *Miller v. Meeks*, 762 So.2d 302, 304 (Miss.2000). Because of his own failure to oppose the Motion for Summary Judgment, Gober cannot now seek relief in this Court.

In contrast, Lee presented to the trial court a chronology of authenticated documents detailing the course of events giving rise to his Complaint and Motion for Summary Judgment, thereby proving the central issue of his case - - that Lee did not receive notice of the tax sales as required by law. Lee's proof included an affidavit from Marie Luckett, Madison County Deputy Clerk [R. 8-

34, 103-129], regarding the notices of tax sales in question, and the Affidavit of Jack R. Lee [R.37-38, 132-133], wherein he states that he did not receive notice of the impending maturity of a tax sale on the Madison County property. In addition to Lee's own proof, the Chancery Clerk of Madison County admitted in his Answer [R.49-52] that proper notice was not provided to Lee and joined in Lee's Motion for Summary Judgment [R.57-140]. The Chancellor correctly decided the case, and, if this Court does not simply dismiss Gober's appeal, it should affirm the Chancellor's judgment.

### **CONCLUSION**

The record before this Court clearly shows that Gober's Notice of Appeal was not timely filed. The record before this Court also clearly shows that Gober's Motion for New First Trial is time-barred pursuant to Rule 59 of the Mississippi Rules of Civil Procedure, and that there are no extraordinary or compelling circumstances to mandate a request for relief from the Final Judgment entered by the Madison County Chancery Court. Therefore, the Chancellor did not abuse her discretion in granting Lee's Motion for Summary Judgment or denying Gober's request for relief from judgment. As a result, there is no basis for Gober's appeal, and the Court should either dismiss the appeal as untimely or affirm the court below.

**RESPECTFULLY SUBMITTED**, this the 30<sup>th</sup> day of June, 2008.

**JACK R. LEE**

By his attorneys  
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**CERTIFICATE OF SERVICE**

I, Lara E. Gill, one of the attorneys for the Appellee, Jack R. Lee, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing **Brief of the Appellee** to the following:

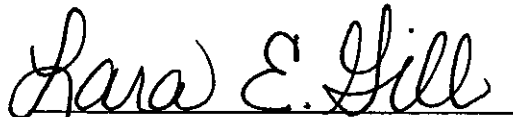
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**DATED** this the 30<sup>th</sup> day of June, 2008.

  
Lara E. Gill