IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI (PERS) — APPELLANT

V. — NO. 2008-CA-00627

ALBERT "BUTCH" LEE — APPELLEE

BRIEF OF THE APPELLEE

MARK C. BAKER, SR. MSB [redacted]
JARROD W. TAYLOR MSB [redacted]
BAKER LAW FIRM, P.C.
306 MAXEY DRIVE, SUITE D
POST OFFICE BOX 947
BRANDON, MISSISSIPPI 39043
TELEPHONE 601.824.7455
FACSIMILE 601.824.7456

ATTORNEYS FOR THE APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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

Hon. Winston Kidd	Circuit Court Judge for the Seventh Circuit Court District
The Board of Trustees of the Public Employees' Retirement System	Appellant
Mr. Albert "Butch" Lee	Appellee
Jim Hood, Esq.	Attorney General
Mary Margaret Bowers, Esq.	Attorney for the Appellant
Mark C. Baker, Esq. Jarrod W. Taylor, Esq.	Attorneys for the Appellee

Mark C. Baker, Sr.
Attorney of record for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISSISSIPPI CASES

FEDERAL CASES

MISSISSIPPI RULES OF CIVIL PROCEDURE

FEDERAL RULES OF CIVIL PROCEDURE

OTHER AUTHORITY

I. STATEMENT OF THE ISSUES

A. THE CIRCUIT COURT DID NOT ERR IN DENYING THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM'S ("PERS") MOTION FOR AN OUT-OF-TIME APPEAL.

B. PERS'S MOTION FOR RECONSIDERATION WAS UNTIMELY FILED AND WAS SUBJECT TO THE STANDARD OF REVIEW OF A MOTION MADE PURSUANT TO M.R.C.P 60(b)

II. STATEMENT OF THE CASE

The Appellant seeks review the Circuit Court's denial of its Motion for an Out-of-Time appeal (a matter within the sound discretion of the trial court) after it filed an untimely Motion for Reconsideration.

III. SUMMARY OF THE ARGUMENT

The Appellant, Mr. Albert "Butch" Lee ("Mr. Lee") appealed from Public Employees' Retirement System's Board of Review ("PERS") to the Circuit Court for the First Judicial District of Hinds County after PERS determined that Mr. Lee was entitled to disability benefits, but that his disability benefits should be categorized as Regular Non-Duty-Related Disability Benefits as opposed to Duty-Related Disability Benefits.

On November 8, 2004, Mr. Lee was preparing for a final scenario for a training class in his job as Instructor/Supervisor with the State Fire Academy by placing a rescue dummy in an underground vault for a rescue team. Mr. Lee was lifting the dummy to turn and drop it in the underground vault when he felt a sharp pain. The trauma that caused this pain eventually required an Anterior Body Fusion and a Posterior Percutaneous Instrumentation at L-4-5. In his final office note regarding Mr. Lee, his treating physician determined that "I do think he has a congenital condition that is usually asymptomatic but do (sic) to the injury in October 2004 became symptomatic."

After appealing to the circuit court, briefs on all the issues were submitted and oral argument was held on April 26, 2007. Thereafter, Mr. Lee's counsel mailed a proposed order to the circuit court, a copy of which was forwarded to PERS's counsel. The trial judge signed Mr. Lee's proposed order on June 29, 2007, and the clerk entered that order on July 2, 2007. On September 5, 2007, PERS filed its motion for leave to file an out-of-time appeal claiming surprise that an order had been entered. On November 21, 2007, the trial court denied PERS's motion for an out-of-time appeal. On December 3, 2007, PERS filed its Motion for Reconsideration, **13** days after the denial of its motion for an out-of-time appeal, and this

motion was denied on January 18, 2007. Not only did PERS's motion for an out-of-time appeal fail to meet the requirements of M.R.A.P. 4(h), its Motion for Reconsideration was filed outside the 10 day time limit of M.R.C.P. 59(e); therefore, both of PERS's motions were properly denied.

PERS was under a duty to investigate the status of the docket, but PERS's brief is devoid of any efforts to investigate the trial court's action with respect to Mr. Lee's proposed order. Therefore, PERS's motion was properly denied.

PERS also attempts to persuade this Court that the trial court abused its discretion because it granted a motion for an out-of-time appeal in another case it had pending before the same trial court. It does not follow that simply because PERS failed to properly monitor its docket in two cases that the lower court abused its discretion.

PERS argues at length that *Brewer v. Williams*, 542 So.2d 1186, (Miss. 1989) states M.R.A.P. 15 has no applicability to trial courts, but PERS omits critical facts of *Brewer* that distinguish it from the case *sub judice*. While it is respectfully submitted that *Brewer* is distinguishable from the present case, if the Court finds that it is not, it is further respectfully submitted that the Court should take this opportunity to establish the rule that either M.R.A.P. 15 either applies to trial courts sitting as appellate courts or, in the alternative, that M.R.A.P. 15 applies when a party appeals from an administrative agency to a trial court sitting as an appellate court.

Finally, to receive relief under M.R.A.P. 4(h), PERS was required to demonstrate that Mr. Lee would suffer no prejudice. Further, PERS's appeal unduly prejudices Mr. Lee as he continues to receive reduced benefits, and PERS continues to deny Mr. Lee finality as the trial

court has heard the merits of his appeal and entered an order doing substantial justice.

IV. ARGUMENT

STANDARDS OF REVIEW

A trial court's denial of a motion made pursuant to Rule 4(h) will be upheld unless the lower court abused its discretion. *Pre-Paid Legal Services v. Anderson*, 873 So.2d 1008 (Miss. 2004) citing *Horowitz v. Parker*, 852 So.2d 686, 689 (Miss.Ct.App.2003) and *Pinkston v. Miss. Dep't of Transp.*, 757 So.2d 1071, 1073 (Miss.Ct.App.2000).

A trial court's denial of a motion made pursuant to Rule 60(b) will be upheld unless the lower court abused its discretion. *In re Marriage of De St. Germain*, 977 So.2d 412 (Miss. App. 2008) citing *Perkins v. Perkins*, 787 So.2d 1256 (Miss. 2001).

STATEMENT OF THE FACTS

A. Background and PERS's Arbitrary Decision

This controversy originated after PERS's Board of Review found that Mr. Lee was permanently disabled and entitled to PERS disability benefits, but that his disability benefits should be categorized as Regular Non-Duty-Related Disability Benefits as opposed to Duty-Related Disability Benefits. R.27; R.E. 19.[1] From this decision, Mr. Lee appealed to the Circuit Court for the First Judicial District of Hinds County.

Mr. Lee was a 48 year-old Supervisor/Instructor for the State Fire Academy, who, at the time of his injury that resulted in termination of his employment, had accumulated 21.75 years of

[1] Based upon Mr. Lee's years of service, the amount of the disability benefit is the same, whether categorized as Regular Non-Duty Related or Duty-Related. However, because of the way such benefits are considered for income tax purposes, the net effect is an overall reduction in the net benefit received by Mr. Lee if the same is categorized as Regular Non-Duty Related as opposed to Duty-Related.

state service. R. 109, 128; R.E. 27, 28. On November 8, 2004, Mr. Lee was preparing for a final scenario for a training class in his job as Instructor/Supervisor with the State Fire Academy. R. 34; R.E. 20. Mr. Lee was moving a rescue dummy, called a victim, and placing it in an underground vault for a rescue team. R. 35; R.E. 21. The rescue dummy was clothed and stuffed, and weighed from 160 to 170 pounds dry and approximately 200 pounds when wet. It had hand holds on the head and chest. *Id.* Mr. Lee had loaded the dummy earlier and carried it out on the back of an Easy-go and was lifting it to turn and drop it in the underground vault when he felt a sharp pain. *Id.*

The pain Mr. Lee felt started in his shoulder blades and went all the way down through his groin into his legs and particularly his left leg and below his knee and back up into his back. *Id.* Initially, Mr. Lee thought that the pain was somehow related to his prostate, which in the past had presented some problems. Because of this, he initially went to see his urologist, Dr. Bob Myers. R. 38-39; R.E. 22-23. Mr. Lee then went to Dr. Belknap at the MEA. R. 39; R.E. 23.

After a period of physical therapy, Dr. Belknap referred Mr. Lee to the Mississippi Spine Clinic where he began treatment with Dr. Bruce Senter. R. 40; R.E. 24. After taking x-rays and ordering an MRI, Dr. Senter advised Mr. Lee that "you got problems here in your back and began to describe, not only a bulging disk or ruptured disk but in essence a dead disk." *Id.* This led to a second opinion from Dr. Collipp which resulted in essentially the same diagnosis. *Id.* Upon review of the MRI report, Dr. Senter was of the opinion that the "MRI shows marked degenerative changes at 4-5 and also 2-3." R. 160; R.E. 29. Dr. Senter and Dr. Collipp considered different courses of action to address the problem. According to Dr. Senter, Dr. Collipp thought that Mr. Lee should consider blocks, and if that did not work then to consider a

posterior spinal fusion. However, Dr. Senter thought that the blocks would not be helpful and that "posterior spinal fusion in somebody with a slip is more surgery with a less mechanically sound fusion". Dr. Senter was of the opinion that "the better surgery would be a small ALIF followed by a percutaneous screw fixation". R. 159; R.E. 30.

On March 10, 2004, Dr. Senter performed an Anterior Body Fusion and a Posterior Percutaneous Instrumentation at L-4-5. R. 175; R.E. 31. In his Surgery Summary, Dr. Senter determined that Mr. Lee "was found to have a spondylitic spondylolisthieses with approximately grade 1 slip of L4-5."[2] *Id.* In his final office note of December 5, 2005, Dr. Senter determined that "I do think he has a congenital condition that is usually asymptomatic but do (sic) to the injury in October 2004 became symptomatic." R. 74; R.E. 26.

As concluded by Commissioner George Dale, "Mr. Lee was injured in the performance of his duties in preparing for a training activity when he was placing a rescue dummy in place for a training session." R. 68; R.E. 25. This assessment is consistent with the First Report of Injury prepared by the State Fire Academy on November 8, 2004. R. 128; R.E. 28. However, contrary to the evidence and Commissioner Dale's opinion, PERS found that Mr. Lee's benefits should be classified as Non-Duty-Related, which gave rise to Mr. Lee's appeal to the Circuit Court for the First Judicial District of Hinds County, Mississippi, the Honorable Winston Kidd presiding.

B. Appeal to the Circuit Court

Briefs on all the issues were submitted by both parties and oral argument was held by the circuit court on April 26, 2007. Thereafter, counsel for the Appellant mailed a proposed order to

---

[2] Spondylolithesis is defined as "Any forward slipping of one vertebrae on the one below it." Taber's Cyclopedic Medical Dictionary,1814 (18th ed. 1997).

the circuit court, a copy of which was forwarded to PERS's counsel. C.P. 18; R.E. 9. The trial judge signed Mr. Lee's proposed order on June 29, 2007 (C.P. 8; R.E. 2), and the clerk entered this order on July 2, 2007. C.P. 5; R.E. 1. On September 5, 2007, PERS filed its motion for leave to file an out-of-time appeal claiming surprise that an order had been entered. C.P. 9-12; R.E. 3-6. On November 21, 2007, the trial court denied PERS's motion for an out-of-time appeal. C.P. 24; R.E. 10. On December 3, 2007, PERS filed its Motion for Reconsideration, **13** days after the denial of its motion for an out-of-time appeal (C.P. 25; R.E. 11-18), and this motion was denied on January 18, 2007. Not only did PERS's motion for an out-of-time appeal fail to meet the requirements of M.R.A.P. 4(h), its Motion for Reconsideration was filed outside the 10 day time limit of M.R.C.P. 59(e); therefore, PERS's motions were properly denied.

V. ISSUES

THE CIRCUIT COURT DID NOT ERR IN DENYING PERS'S MOTION FOR AN OUT-OF-TIME APPEAL

PERS alleges that it was caught by surprise that an order reversing its Board of Review was entered by the court; however, PERS was under a duty to investigate the status of the docket for its own benefit. *Latham v. Wells Fargo Bank, N.A. et al.*, 987 F.2d 1199 (5th Cir. 1993). Any surprise claimed by PERS is not readily understandable as it was aware that Mr. Lee had proposed an order to the court. C.P. 16-18; R.E. 7-9. Further, both PERS's motion to the trial court and its brief to this Court are devoid of any efforts to investigate the trial court's action with respect to Mr. Lee's proposed order. The dearth of detail of PERS's investigation within these filing is not comparable to the level of inquiry exercised by counsel in the cases that give foundation to M.R.A.P. 4(h); therefore, PERS's motion was properly denied.

PERS attempts to persuade this Court that it should reverse trial court's denial of its attempt to file a stale appeal by citing *Williams v. State*, 456 So.2d 1042 (Miss. 1984). *Williams* is a case where the parties who failed to receive notice of the trial court's order were **incarcerated** by the Mississippi Department of Corrections. *Id.* at 1042. PERS's attempts to equate its ability to monitor its docket with that of incarcerated inmates requires a high degree of credulity, and it is respectfully submitted that it should not be well taken.

Further, PERS attempts to persuade this Court that the trial court abused its discretion because it granted a motion for an out-of-time appeal in another case it had pending before the same trial court.[3] It does not follow that simply because PERS failed to properly monitor its docket in two cases that had different results that the trial court abused its discretion, and it is again respectfully submitted that this argument should not be well taken.

A. M.R.A.P. 15

Mississippi Rule of Appellate Procedure 15(a) (with emphasis added), in pertinent part states:

> When a trial judge in a civil case takes under advisement a motion or request for relief which would be dispositive of any substantive issues, and has held such motion or request under advisement for more than sixty (60) days, the plaintiffs and the defendants **shall** each within fourteen (14) days thereafter submit a proposed order or judgment to the trial judge and shall forward to the Administrative Office of Courts, the trial court clerk, and the opposing parties true copies thereof with a statement setting forth the style and number of the case, the names and addresses of the judge and of all the parties and the date on which such motion or request was taken under advisement.

The official comments to M.R.A.P. 4(h) state the rule is modeled after F.R.A.P. (4)(a)(6), and explicitly cites *Nunley v. City of Los Angeles*, 52 F.3d 792 (9th Cir. 1995). Furthermore, the

---

[3] *See* Appellant's Brief at 6.

comments state that "a specific factual denial of receipt of notice rebuts and terminates the presumption that mailed notice was actually received." At first blush, this statement appears to solidify the PERS's position, but a detailed reading of *Nunley* produces the contrary conclusion.

In *Nunley*, a federal district judge entered a judgment against the plaintiff on February 19, 1993,which was met with post trial motions filed on March 5, 1993. *Id.* at 793. The district court denied the plaintiff's post trial motions on April 9, 1993. *Id.* On May 10, 1993, plaintiff's counsel went to the clerk's office to view the case docket, and counsel was able to examine only the case file and found indication that an order had been entered on the post trial motions. *Id.* at 794. On May 20, 1993, the docket was made available to plaintiff's counsel, and upon observing the docket entry of the April 9th order (but still not the actual order), counsel for plaintiff moved for relief under the applicable federal rules. *Id.* After considering many factors, including plaintiff's counsel's diligent search for an entry of an order, the Ninth Circuit granted the extension of for the appeal. *Id.* at 798.[4]

B. AFFIRMATIVE DUTY UNDER M.R.A.P. 15 AND *BREWER V. WILLIAMS*

Counsel for Mr. Lee mailed a proposed order in accordance with M.R.A.P. 15, as the Court had not ruled within 60 days, and PERS did not. PERS argues at length that *Brewer v. Williams*, 542 So.2d 1186, (Miss. 1989) states M.R.A.P. 15 has no applicability to trial courts, but PERS omits critical facts of *Brewer* that distinguish it from the case *sub judice*. In *Brewer*, an appellant appealed from a decision of a county court, where the appellant was afforded all the protections of the Mississippi Rules of Civil Procedure, to a circuit court for review on the

---

[4]*Nunley* does note that contested issues of mailing between counsel and the clerk are questions of fact that a court may determine. *Nunley*, 53 F.3d at 796-97.

record. *See Brewer*, 542 So.2d 1186. As opposed to appealing a trial court judgment rendered in accord with the Mississippi Rules of Civil Procedure, Mr. Lee appealed a decision of an administrative agency, and it is respectfully submitted this fact makes this case distinguishable from *Brewer*.

C. DISTINGUISHING AND/OR REVISITING *BREWER*

While it is respectfully submitted that *Brewer* is distinguishable from the present case, if the Court finds that it is not, it is further respectfully submitted that the Court should take this opportunity to establish the rule that either M.R.A.P. 15 either applies to trial courts sitting as appellate courts or, in the alternative, that M.R.A.P. 15 applies when a party appeals from an administrative agency to a trial court sitting as an appellate court.

It is further respectfully submitted that even the Supreme Court hinted at the inconsistency of *Brewer* when it stated "Whether the rule [now M.R.A.P. 15] should be amended is a question which we do not now address." *Brewer v. Williams*, 542 So.2d at 1188. This case presents an opportunity for the Court to address this situation. The applicable benefits of M.R.A.P. 15 are the same as they were for Rule 47 as stated in *Glenn v. Herring*, 415 So.2d 695, 699 (Miss. 1982):

> First, the rule fixes a definite time within which application for the writ can be made enabling any party in a case to obtain a final decision within the time prescribed.
>
> Second, neither party would be forced to appeal in order to obtain a decision thereby incurring the expense of prepaying the costs for a trial record. . . .
>
> Fourth, parties would be required to apply for a writ of mandamus to save a dismissal of their case, so when a party applies for the writ, they would not thereby incur the displeasure of a trial judge because the trial judge would know that the party was forced to apply for the writ to avoid a dismissal of the case.
>
> Fifth, in cases where a counterclaim or a cross-claim had been filed, the counter-claimant would have the same responsibility as the original party to file an application for a writ of mandamus. This would avoid a waiting game between the

original complaining party and the counterclaiming party because both would be required to file in order to avoid a dismissal of their respective claims.

Sixth, issues of fact would be decided by the trial court instead of this Court acting as a trial court contrary to the provisions of Section 146 of the Constitution.

D. PREJUDICE TO MR. LEE

Finally, to receive relief under M.R.A.P. 4(h), PERS was required to demonstrate that Mr. Lee would suffer no prejudice. However, PERS's groundless continuation of this controversy has caused Mr. Lee to continue to suffer a loss of income from increased taxation as result of his payment designation. This is a palpable injury that Mr. Lee should not be forced suffer because PERS failed to check the status of its docket.

PERS'S MOTION FOR RECONSIDERATION WAS UNTIMELY FILED AND WAS SUBJECT TO THE STANDARD OF REVIEW OF A MOTION MADE PURSUANT TO M.R.C.P 60(b)

A motion under M.R.C.P. 60(b) should only be granted in exceptional circumstances. *Accredited Surety and Casualty, Co., Inc. v. Bolles*, 535 So.2d 56 (Miss. 1988). M.R.C.P. 60 provides that relief from a judgment may be granted by a Court "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . .[b](2) accident or mistake . . . [b](6) any other reason justifying relief from the judgment."

As F.R.C.P. 60 and M.R.C.P. 60 are nearly identical, the Mississippi Supreme Court has adopted the United States District Court's test for considering relief under M.R.C.P. 60(b). In *Briney v. United States Fidelity & Guaranty Company*, 714 So.2d 962 (Miss. 1998), the Mississippi Supreme Court stated the factors to consider were:

> (1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally

> construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) [relevant only to default judgments]; (6) whether---if the judgment was rendered after a trial on the merits---the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Id. at 968 quoting *Batts v. Tow-Motor Forklift, Co.*, 153 F.R.D. 103, 109 (N.D. Miss. 1994).

In the instant case, PERS had no colorable defense to present to the trial court. Further, PERS's appeal unduly prejudices Mr. Lee as he continues to receive reduced benefits, and PERS continues to deny Mr. Lee finality as the trial court has heard the merits of his appeal and entered an order doing substantial justice.

PERS had ample opportunity to monitor its docket and to intervene in this matter instead of doing nothing. Further, PERS was placed on notice by Mr. Lee at every communication with the Court. Finally, PERS's lack of diligence in multiple in cases does not meet the requirements for relief under M.R.C.P. 60 to the detriment and prejudice of Mr. Lee.

VI. CONCLUSION

No matter how PERS's attempts to portray the trial court's denial of its motion for an out-of-time appeal, PERS cannot escape the fact that from the time this case was taken under advisement, PERS did not monitor its docket or correspondence appropriately. As a result, the trial court did not abuse its discretion in denying PERS's motion for an out-of-time appeal or its untimely motion for reconsideration. Therefore, it is respectfully submitted that for these reasons, and all other reasons that trial courts are affirmed, this Court should affirm the order of the trial court and assess all costs of this appeal to PERS.

Respectfully submitted, this the 12th day of August, 2008.

BY: _____
MARK C. BAKER, SR.
ATTORNEY FOR APPELLEE

OF COUNSEL:

MARK C. BAKER, SR., MSB#1717
JARROD W. TAYLOR, MSB#101476
306 MAXEY DRIVE, SUITE D
POST OFFICE BOX 947
BRANDON, MISSISSIPPI 39042
TELEPHONE 601.824.7455
FACSIMILE 601.824.7456
bakerlawfirmpc@yahoo.com

ATTORNEYS FOR THE APPELLEE

CERTIFICATE OF SERVICE

I, Mark C. Baker, Sr., attorney for the Appellee do hereby certify that I have this day delivered via U.S. Mail a true and correct copy of the foregoing to:

Mary Margaret Bowers, Esq.
Office of the Attorney General
429 Mississippi Street
Jackson, Mississippi 39205

Hon. Winston Kidd
Circuit Court Judge for the Seventh Circuit Court District
P.O. Box 327
Jackson, Mississippi 39205

This the 12th day of August, 2008.

_____
MARK C. BAKER, SR.

▶Batts v. Tow-Motor Forklift Co.

N.D.Miss.,1994.

United States District Court,N.D. Mississippi,Delta Division.

Myron BATTS, Plaintiff,

v.

TOW-MOTOR FORKLIFT COMPANY and Caterpillar Industrial, Inc., Defendants.

No. DC 88-71-D-D.

Feb. 8, 1994.

Worker brought products liability suit against forklift manufacturer. After final judgment was affirmed on appeal, 978 F.2d 1386, worker sought relief from judgment. The District Court, Davidson, J., held that apparent misapplication of Mississippi law warranted relief from judgment.

Motion granted.

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

West Headnotes

[1] Products Liability 313A 8

313A Products Liability

313AI Scope in General

313AI(A) Products in General

313Ak8 k. Nature of Product and Existence of Defect or Danger. Most Cited Cases

Under Mississippi law, risk-utility analysis, rather than consumer expectation analysis, is appropriate test in products liability action for determining whether product was sold in defective condition unreasonably dangerous to consumer. Restatement (Second) of Torts § 402A.

[2] Federal Civil Procedure 170A 2655

170A Federal Civil Procedure

170AXVII Judgment

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

170AXVII(G) Relief from Judgment

170Ak2651 Grounds

170Ak2655 k. Further Evidence or Argument. Most Cited Cases

Pronouncement of Mississippi Supreme Court that state products liability law had been misinterpreted and misapplied for five years presented extraordinary circumstances warranting relief from judgment that was based upon incorrect application of Mississippi products liability law. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

***103** Charles M. Merkel, Jr., Clarksdale, MS, for plaintiffs.

John G. Corlew, Jackson, MS, for defendants.

***104** *MEMORANDUM OPINION*

DAVIDSON, District Judge.

This is a six-year-old products liability case which has come before the district court for a second trip. In March of 1991, this case was tried before the undersigned, and the jury returned a verdict in favor of defendants. Post trial motions for judgment notwithstanding the verdict, or alternatively for

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

a new trial, were denied by the undersigned on April 30, 1991. Plaintiff appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed this district court in all respects. The opinion is reported by the Fifth Circuit at *Batts v. Tow-Motor Forklift Company, et al.* 978 F.2d 1386 (5th Cir.1992). The opinion was released on November 25, 1993, and the mandate issued on January 4, 1993. Now, plaintiff has returned to United States District Court under the auspices of Federal Rule of Civil Procedure 60(b)(6), Relief from Judgment, for "any other reason justifying relief from the operation of the judgment." The sum and substance of plaintiff's motion travels on the coattails of the Mississippi Supreme Court's decision in *Sperry-New Holland v. Prestage,* 617 So.2d 248 (Miss.1993). With *Prestage* as his sword, plaintiff asserts that this court incorrectly applied Mississippi products liability law, an error compounded by the Fifth Circuit's affirmance, when it instructed the jury on the open and obvious defense and the "consumer expectation test" consistent with the law of strict liability, Restatement (2d) 402A of the Law of Torts. As explained in this memorandum opinion, the court has now concluded that the jury was improperly instructed on Mississippi products liability law when this case went to trial in March of 1991. Faithful to our *Erie*[FN1] duty to apply state law as expressed by the highest court of this state, this court recognizes the "retroactive rule of *Prestage.*" As such, the motion for relief from judgment will be granted. Prior entry of judgment on April 3, 1991, will be vacated, and the case returned to this court's active

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

docket. Before discussing the merits of the motion as advanced by the plaintiff, the court presents some additional background facts which help complete the picture for the issues that the court addresses today.

FN1. *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); 28 U.S.C. § 1652.

Background

In August of 1984, Myron Batts was employed by Flavorite Laboratories, Inc., where he operated a type of forklift referred to as a "tugger." [FN2] The room where Batts worked was often noisy, and at least one other motorized forklift operated in the same room. The second motorized lift was operated by a seated driver using controls to his front where the forks were located. On the day in question, Charles Johnson was driving the motorized lift in reverse when he backed into Myron Batts, resulting in injury. At the time of the collision, Batts was working with his lift and was either walking beside or backwards with the tugger. Batts brought suit alleging that the forklift should have had a back-up alarm, flashing warning lights, and/or rearview mirrors. According to Batts, the

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

absence of such warning devices entitled him to recover under either strict liability in tort (defective condition unreasonably dangerous), failure to warn, negligent manufacture, or breach of implied and express warranties. Caterpillar's principal defense was that the danger of operating a forklift (the tugger) while not facing in the direction of travel of the operator driven lift was an open and obvious danger. To this end, such open and obvious danger was a complete bar to recovery under Mississippi law.

> FN2. A "tugger" is a motorized lift, but it is not driven by an operator. The operator walks behind the lift and guides it.

The trial of this case was conducted before the undersigned on March 25-29, 1991. The jury was instructed on the "open and obvious" defense, sometimes referred to as the "patent danger" rule. In his brief supporting his Rule 60(b)(6) motion, plaintiff asserts that he argued for a "risk utility" instruction in lieu of the consumer expectation test and the inherent "open and obvious" rule. While the court is not disputing this assertion in the absence of a complete transcript of the ***105** jury instruction conference, the undersigned merely notes that the record which plaintiff has furnished does not reflect a request for the "risk utility" test. In any event, the point is academic. For the record

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

does indicate that Batts entered several objections to the court's instruction on the "open and obvious" defense. In the case *sub judice,* the jury returned a verdict for defendant finding the "open and obvious" defense to be a complete bar to recovery. Post trial motions for j.n.o.v. and new trial predicated upon the court's charge to the jury were denied by the undersigned. Appeal was taken to the United States Court of Appeals for the Fifth Circuit. On appeal, Batts argued that this court committed reversible error when it instructed the jury on the "open and obvious" defense. The Fifth Circuit rejected the argument and affirmed the judgment of this court holding that the undersigned had correctly instructed the jury on Mississippi products liability law. *See* Batts v. Tow-Motor Forklift Co., 978 F.2d 1386 (5th Cir.1992).[FN3] The discussion which follows completes the procedural history of this case which has new life following the Mississippi Supreme Court's decision in Sperry New-Holland v. Prestage, 617 So.2d 248 (Miss.1993).

FN3. A petition for rehearing was denied *en banc* on December 23, 1992.

Discussion

In 1966, Mississippi adopted the doctrine of strict liability in tort. *See* State Stove Manufacturing

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

Co. v. Hodges, 189 So.2d 113, 119 (Miss.1966). With the adoption of strict liability, the Mississippi Supreme Court no longer required "privity of contract" between the manufacturer of a product and the ultimate consumer, and the plaintiff was relieved of the burden of proving negligence. Fault (negligence) is supplied as a matter of law. *Toliver v. General Motors*, 482 So.2d 213, 215 (Miss.1986); *State Stove*, 189 So.2d at 121. With *State Stove,* the court adopted the statement of strict liability as expressed in Section 402A of the American Law Institute's Restatement of Torts (Second). Section 402A provides as follows:

(1) One who sells any product in a *defective condition unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts § 402A (1965). (emphasis added).

Products Liability Standards

A. Consumer Expectation Test

As noted in *Prestage,* the Mississippi court has had numerous opportunities to apply strict liability since its adoption in 1966.[FN4] According to *Prestage,* 402A is "still the law" in Mississippi. However, there is a distinction with a difference with regard to the defining parameters of "defective condition" and "unreasonably dangerous" as expressed in section 402A(1). Comment (i) to Section

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

402A of the Restatement (Second) of Torts describes "unreasonably dangerous" as follows: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Comment g describes "defective condition" as one, "where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." This standard for liability is known as the "consumer expectation test." In order for a plaintiff to recover under the ***106** "consumer expectation test," he or she must prove that injury was caused by a defect in the product which the plaintiff would not know to be unreasonably dangerous. Stated differently, if the plaintiff, in applying the knowledge of an ordinary consumer in the community, sees a danger associated with a product and can appreciate that danger, then there can be no recovery from any injury that resulted from the appreciated danger. *Prestage*, 617 So.2d at 254. "A product that has an open and obvious danger is not more dangerous than contemplated by the consumer, and hence cannot, under the consumer expectation test applied in Mississippi, be unreasonably dangerous." *Toney v. Kawasaki Heavy Industries, Ltd.*, 975 F.2d 162, 165 (5th Cir.1992), quoting *Melton v. Deere & Co.*, 887 F.2d 1241, 1243 (5th Cir.1989). As noted in *Prestage*, the United States District Courts in Mississippi, as well as the Fifth Circuit Court of Appeals, have consistently held that Mississippi employs the "consumer

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

expectation test" with its inherent "open and obvious" standard in products liability cases. By way of illustration, *Prestage*, at 617 So.2d page 254, cites four recent decisions from the Fifth Circuit wherein the "consumer expectation test" was applied to products liability actions. *See* *Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386 (5th Cir.1992); *Toney v. Kawasaki Heavy Industries, Ltd.*, 975 F.2d 162 (5th Cir.1992); *Melton v. Deere & Co.*, 887 F.2d 1241 (5th Cir.1989); *Gray v. Manitowoc Co., Inc.*, 771 F.2d 866 (5th Cir.1985). *Prestage* seems to leave the impression that the federal courts have been all alone in applying the "consumer expectation" test in products liability law. Of course, this impression would be erroneous as reference to the following cases will demonstrate. *See e.g.*, *Kussman v. V & G Welding Supply, Inc.*, 585 So.2d 700 (Miss.1991); *Brown v. Williams*, 504 So.2d 1188 (Miss.1987); *Coca Cola Bottling Co., Inc. of Vicksburg v. Reeves*, 486 So.2d 374 (Miss.1986); *Pargo v. Electric Furnace Co.*, 498 So.2d 833 (Miss.1986); *Fortenberry Drilling Co., Inc. v. Mathis*, 391 So.2d 105 (Miss.1980); *Jones v. Babst*, 323 So.2d 757 (Miss.1975); *Ford Motor Co. v. Matthews*, 291 So.2d 169 (Miss.1974).

FN4.*See* *Sperry New-Holland v. Prestage*, 617 So.2d 248, 253 n. 1 (Miss.1993) (court cites twenty-nine cases where it has applied 402A principles).

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

B. Risk-Utility Test

[1] The alternative definition for "unreasonably dangerous" and "defective condition" is found in the so called "risk-utility" analysis. In *Sperry-New Holland v. Prestage*, 617 So.2d 248, 254 (Miss.1993), the state supreme court described risk-utility as follows:

In a 'risk-utility' analysis, a product is 'unreasonably dangerous' if a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product. Thus, even if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from that danger provided that the utility of the product is outweighed by the danger that the product creates. Under the 'risk-utility' test, either the judge or the jury can balance the utility and danger-in-fact, or risk, of the product. Steven G. Davison, *The Uncertain Search for a Design Defect Standard,* 30 Amer.Univ.L.R. 643, 654 (1981); *See also* John W. Wade, *On the Nature of Strict Tort Liability for Products,*44 Miss.L.J. 825 (1973).

Prestage, 617 So.2d at 254.

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

Prestage was decided by the state supreme court on March 25, 1993. On this date, the Mississippi Supreme Court let the rest of the world in on the best kept secret in Mississippi jurisprudence. In *Prestage,* the court announced that five years earlier, in 1988, Mississippi products liability law had changed from the "consumer expectation" approach to the "risk-utility" test for defining "unreasonably dangerous" and "defective condition" as those terms are utilized in 402A. According to the court, it had adopted new law with its decisions in *Whittley v. City of Meridian,* 530 So.2d 1341 (Miss.1988), and *Hall v. Mississippi Chemical Express, Inc.,* 528 So.2d 796 (Miss.1988).[FN5] The *Prestage* court was careful to note that it was not announcing a new rule of decisional law. Instead, the court proclaimed, presumably with a straight face, ***107** that Mississippi products liability law had changed with *Hall* and *Whittley* five years earlier; and the federal courts had erred in not recognizing the change.

FN5.*Hall* and *Whittley* were both decided in 1988. In *Prestage, Hall* is cited as a 1987 decision, 617 So.2d at 253; and *Whittley* is cited as a 1985decision, 617 So.2d at 255. Apparently, these were errors in proofreading.

This Court has clearly moved away from a 'consumer expectations' analysis and has moved towards

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

'risk-utility.' Consistent with the national trend, the *two most recent decisions* of this Court applied a 'risk-utility' analysis to strict products liability.

Sperry-New Holland v. Prestage, 617 So.2d 248, 256 (Miss.1993). (emphasis in original).[FN6] In addition to the above quoted text, the court apparently sought to remove any speculation or debate by the federal courts that the change in law did not occur with *Prestage,* but rather the change had occurred in 1988. Writing for the court, Justice Prather stated, "recent decisions have turned on an analysis under 'risk-utility.' " *Prestage,* 617 So.2d at 252. "We today apply a 'risk-utility' analysis *as adopted* in *Whittley v. City of Meridian,* 530 So.2d 1341 (Miss.1988) and *Hall v. Mississippi Chemical Exp., Inc.,* 528 So.2d 796 (Miss.1988)...." *Prestage,* 617 So.2d at 253. (emphasis added). Of course, the most significant difference between "consumer expectation" and "risk-utility" is the merger of "open and obvious" into the risk-utility dichotomy. For the case *sub judice,* this is the major distinction which supports plaintiff's Rule 60(b)(6) motion. *Prestage* explains the "open and obvious" role in the "risk-utility" test for unreasonably dangerous products.

FN6. The court's claim that its two most recent decisions had applied "risk-utility" is a misstatement and is simply not accurate. As it will be discussed subsequently, the most recent decision prior to *Prestage* which addressed the issue applied the "consumer

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

expectation" test. *See* Kussman v. V & G Welding Supply, Inc., 585 So.2d 700, 703-04 (Miss.1991). As the citation indicates, *Kussman* was decided in 1991, three years after *Hall* and *Whittley.*

Having here reiterated this Court's adoption of a 'risk-utility' analysis for products liability cases, we hold, necessarily, that the 'patent danger' bar is no longer applicable in Mississippi. Under a 'risk-utility' analysis, the 'patent danger' rule does not apply. In 'risk-utility,' the openness and obviousness of a product's design is simply a factor to consider in determining whether a product is unreasonably dangerous.

Prestage, 617 So.2d at 256 n. 4 (citing Wade, 44 Miss.L.J. 837-838; W. Keeton, D. Dobbs, R. Keeton, and D. Owen, *Prosser and Keeton on the Law of Torts* § 99 at 698-99 (5th ed. 1984)).

Typically, jurisdictions which apply "risk-utility" do so only in defective design cases. Under a "risk-utility" theory, a jury may find a product unreasonably dangerous if its design contains excessive danger which could have been prevented. In other words, a product is unreasonably dangerous if the design's inherent risk of danger outweighs the benefit of the design. 63 Am.Jur.2d *Products Liability* § 546 (1984). Despite the fact that "risk-utility" is usually associated with design

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

defect cases only, *Prestage* makes no such distinction and appears to embrace "risk-utility" in all strict liability situations. In time, perhaps the supreme court will provide further clarification.[FN7]

FN7. *See* Miss. Code Ann. § 11-1-63(a), (b), (f) (Supp. 1993) (Mississippi Products Liability Act enacted by the 1993 Mississippi Legislature incorporates both "consumer expectation" and "risk-utility" language for defective design cases); *see also* § 11-1-63(e) (open and obvious defense retained in failure to warn cases).

Since *Hall* and *Whittley* have now taken on the presence of landmark cases in Mississippi tort law, both merit a second look as the federal court looks for guidance in proceeding with its *Erie* duty to apply state law when hearing federal diversity cases. *Hall v. Mississippi Chemical Express, Inc.*, 528 So.2d 796 (Miss.1988), concerned an appeal from a directed verdict for defendant at the close of plaintiff's case-in-chief. The supreme court affirmed the Lamar County Circuit Court. The primary issue on appeal turned on factual support in the record linking causation of a fire, which injured the plaintiff, to two defendants. In affirming the lower court, the supreme court agreed with the trial court's finding that the defendants' connection with the fire was simply "too tenuous."

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

***108** The case is now down to two possible defendants-the manufacturer and owner/operator of the diesel truck whose 'idling' is said to have ignited the conflagration and caused plaintiff's concededly serious injuries. The facts make clear that factually and legally these defendants' connection with the case is just too tenuous. The Circuit Court directed a verdict at the end of plaintiff worker's case. We affirm.

Hall, 528 So.2d at 797. Both in the lower court and on appeal, *Hall* turned on the element of causation. Nothing in the case at either the trial or appellate level even remotely brought "consumer expectation" versus "risk-utility" approaches to section 402A(1) into issue. In commenting on plaintiff's theory of defective design of a Mack diesel truck engine, Justice Robertson noted that notions of fault and privity are not considered under strict liability theories of recovery. *Hall*, 528 So.2d at 799. Then, the following two paragraphs appear in the opinion.

The proper focus in a strict liability case is upon the utility and safety of the product in view of its intended function rather than on the manufacturer's fault or lack thereof.

Here, Hall has utterly failed to prove that the Mack truck was defective in the sense that it was not reasonably fit for its intended uses. Nor has he shown that without the automatic air shutdown device

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

the truck was rendered unreasonably dangerous. To the contrary, the credible evidence is that the truck is perfectly safe and useful for its intended function without such a device.

Hall, 528 So.2d at 799. Now the *Prestage* court is claiming that with the use of the word, "utility," in the opinion, it took a giant leap and extrapolated a landmark adoption of the "risk-utility" test for products liability law and rejected the "consumer expectation" standard of the past twenty-two (22) years.

In *Whittley v. City of Meridian*, 530 So.2d 1341 (Miss.1988), the trial judge granted a directed verdict in favor of a garbage bin manufacturer after all of the parties had rested. The jury returned a verdict in favor of the City of Meridian. The plaintiff, a small child who sustained severe injuries when a garbage bin fell on her, appealed from the dismissal of the manufacturer and the jury verdict for the city. *Whittley*, 530 So.2d at 1342. Writing for the court, Justice Zuccaro concluded that the trial judge erred in directing a verdict for the manufacturer. Following a discussion of section 402A of the Restatement (Second) of Torts and plaintiff's claim of defective design of the garbage bin, the court stated:

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

In determining whether a product is unreasonably dangerous a reasonable person must conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product. This is a question for the finder of fact.

Whittley, 530 So.2d at 1347. Following this paragraph which also employs the word, "utility," the opinion then launched into a discussion of superseding causes. *Whittley*, 530 So.2d at 1347. Therefore, based upon these comments contained in *Hall,* and in *Whittley,* the Mississippi Supreme Court proclaimed in *Prestage* that "risk-utility" had been forever adopted in Mississippi products liability law.[FN8] *Prestage*, 617 So.2d at 253.[FN9]

FN8.*Hall v. Mississippi Chemical Express, Inc.*, 528 So.2d 796 (Miss.1988), was originally released on May 10, 1988. However, a petition to rehear was filed, which was denied on August 10, 1988. According to Mississippi Supreme Court Rule 41(a), the filing of a petition to rehear will stay the mandate until disposition of the petition. If the petition is denied, as in this case, the mandate will issue seven (7) days after entry of the order denying the petition. *Whittley v. City of Meridian*, 530 So.2d 1341 (Miss.1988) was also released on August 10, 1988, perhaps by coincidence or by design. No petition to rehear was filed in

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

Whittley. Therefore, it appears to the court that the change in Mississippi products liability law occurred on or about August 10, 1988.

FN9.*See* Satcher v. Honda Motor Co., Ltd., 993 F.2d 56 (5th Cir.1993) (Fifth Circuit Order by Judge Jolly granting petition to rehear, vacating court's opinion at 984 F.2d 135, and remanding to Southern District of Mississippi). The order of remand appears to recognize the retroactive application of *Prestage.* Satcher, 993 F.2d at 57.

Despite the "adoption" of "risk-utility" in *Hall* and *Whittley,* the court apparently had a change of heart, although shortlived, when ***109** it decided Kussman v. V & G Welding Supply, Inc., 585 So.2d 700 (Miss.1991). Kussman suffered extensive injuries when he fell from a roof after he was shocked by an electric wrench that had recently been repaired by V & G Welding. Kussman sued V & G Welding for negligent repair of the wrench. The case proceeded to trial, and at the close of all the evidence the court granted a directed verdict in favor of V & G. On appeal, the supreme court reversed and remanded for a new trial finding that the directed verdict was improvidently granted. Kussman, 585 So.2d at 705. Although *Kussman* concerned an action in negligence and not one involving a design defect, the court, nonetheless, entered into a discussion of strict products liability

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

standards for defective conditions. Citing pertinent parts of 402A comments, the *Kussman* court stated:

Restatement (Second) of Torts § 402A, Comment (g), at 351 (1965) states:

The rule stated in this Section applies only where the product is, at the time it leaves the seller's hand, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.

Rest. (2d) Torts § 402A, Comment (i), at 352 (1965) discusses 'unreasonably dangerous' in these terms:

The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

Kussman, 585 So.2d at 703-04, citing *Ford Motor Co. v. Matthews*, 291 So.2d 169, 172 (Miss.1974).

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

Of course, this is the classic statement of the consumer expectation test, "adopted" by the Mississippi court three years following *Hall* and *Whittley.* Interestingly, *Kussman* is neither cited nor mentioned in *Prestage. Kussman* has been swept under a rug and ignored. *Erie* bound, this court is obligated to do the same.

Rule 60(b)(6) Criteria

[2] Batts has moved for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6). The Rule provides as follows:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time....

In the case *sub judice,* the Rule 60(b)(6) motion was filed on or about April 19, 1993. This was less than a month following the court's release of *Prestage,* which gave the first indication that grounds

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

for a 60(b)(6) motion existed. Clearly, the filing was accomplished within a reasonable time. The other factors which are pertinent to a Rule 60(b) motion were discussed in detail in a 1981 Fifth Circuit case, *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir.1981), the most frequently cited opinion for the governing standards for 60(b) relief. The factors for consideration are as follows:

(1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) [relevant only to default judgments]; (6) whether-if the judgment was rendered after a trial on the merits-the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Seven Elves, Inc., 635 F.2d at 402. The *Seven Elves* criteria for Rule 60(b) relief are consistently followed. *See U.S. v. Flores*, 981 F.2d 231, 237 (5th Cir.1993); *Barrs v. Sullivan*, 906 F.2d 120, 121 (5th Cir.1990); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 849 (5th Cir.1990); *Smith v. Alumax Extrusions, Inc.*, 868 F.2d 1469, 1471 (5th Cir.1989); *Bludworth Bond Shipyard, Inc. v.*

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

M/V Caribbean Wind, 841 F.2d 646, 649 (5th Cir.1988).

The court has considered Batts' Motion for Relief from Judgment in light of the *Seven* ***110** *Elves* factors and mindful that Rule 60(b)(6) relief from judgment is reserved for extraordinary circumstances. Obviously, the respect for the finality of judgment must be weighed against the court's principal interest that substantial justice be achieved with each case. To this end, this case falls within that "extraordinary" category-if not bizarre. To say the least, the federal courts, and perhaps a few state courts as well, were surprised to learn in March of 1993 that state law had been misinterpreted and misapplied for the past five years. The court trusts that the basis of this surprise is adequately explained in this memorandum opinion.

Conclusion

For the reasons which are explained in this opinion, Myron Batts' Motion for Relief from Final Judgment pursuant to Rule 60(b)(6), is well taken, and the same will be granted by separate order to issue this day. This court's final judgment in the case *sub judice* entered on or about April 3, 1991, is vacated, and the case is returned to the undersigned's active docket.

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

N.D.Miss.,1994.

Batts v. Tow-Motor Forklift Co.

153 F.R.D. 103

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

HLatham v. Wells Fargo Bank, N.A.

C.A.5 (La.),1993.

United States Court of Appeals,Fifth Circuit.

James A. LATHAM, Plaintiff,

Marian E. Latham, Movant-Appellant,

v.

WELLS FARGO BANK, N.A., et al., Defendants-Appellees.

No. 92-4754

Summary Calendar.

April 13, 1993.

Proposed intervenor in lender-liability action instituted by her husband appealed from denial by the United States District Court for the Western District of Louisiana, Tom Stagg, J., of her motions to have district court set aside its order rejecting her attempted intervention, or to extend period for

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

appealing from denial of motion. The Court of Appeals held that: (1) fact that proposed intervenor's counsel did not receive notice of entry of court's order rejecting her attempted intervention until just before expiration of time to file notice of appeal therefrom did not entitle her to extension of time for filing appeal, where she did not seek any extension until almost a month after receiving notice; (2) motion styled as "motion to set aside order of dismissal" was motion for relief from order under Rule of Civil Procedure 60(b); and (3) denial of that motion was not abuse of discretion for various reasons asserted.

Affirmed.

West Headnotes

[1] Federal Courts 170B 653

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(E) Proceedings for Transfer of Case

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

170Bk652 Time of Taking Proceeding

170Bk653 k. Effect of Delay, and Excuses in General. Most Cited Cases

Implicit in civil rule which clearly states that party must make timely appeal whether or not he receives notice of entry of order is notion that parties have duty to inquire periodically into the status of their litigation. Fed.Rules Civ.Proc.Rule 77(d), 28 U.S.C.A.

[2] Federal Courts 170B 655

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(E) Proceedings for Transfer of Case

170Bk652 Time of Taking Proceeding

170Bk655 k. Extension of Time by Agreement or Court Order. Most Cited Cases

Proposed intervenor's motion to extend time for filing appeal from order rejecting her attempted intervention was properly denied, even if her counsel did not receive notice of that order until just before expiration of time to file notice of appeal therefrom; proposed intervenor did not seek any extension until almost a month after receiving notice and thus also had not demonstrated that her

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

failure to file timely appeal was due to "excusable neglect." F.R.A.P.Rule 4(a)(5, 6), 28 U.S.C.A.

[3] Federal Courts 170B 653

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(E) Proceedings for Transfer of Case

170Bk652 Time of Taking Proceeding

170Bk653 k. Effect of Delay, and Excuses in General. Most Cited Cases

"Excusable neglect" standard is a strict one, and district court's decision to grant or deny relief in form of extension of time for filing of notice of appeal based upon showing of excusable neglect or good cause is reviewed only for abuse of discretion. F.R.A.P.Rule 4(a)(5), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 2641

170A Federal Civil Procedure

170AXVII Judgment

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

170AXVII(G) Relief from Judgment

170Ak2641 k. In General. Most Cited Cases

Federal Courts 170B ⚿829

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk829 k. Amendment, Vacation, or Relief from Judgment. Most Cited Cases

Motion styled as "motion to set aside order of dismissal," attacking district court's denial of motions to have order rejecting attempted intervention set aside or to extend appeals period, was motion for relief from order, the denial of which would be reviewed only for abuse of discretion. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[5] Federal Civil Procedure 170A ⚿2647.1

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(G) Relief from Judgment

170Ak2647 Nature and Form of Remedy

170Ak2647.1 k. In General. Most Cited Cases

(Formerly 170Ak2647)

Motion for relief from judgment or order may not be used as substitute for timely appeal. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[6] Federal Civil Procedure 170A 2655

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(G) Relief from Judgment

170Ak2651 Grounds

170Ak2655 k. Further Evidence or Argument. Most Cited Cases

While party may move for relief from order upon denial of previous posttrial motion, absent truly

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

extraordinary circumstances, the basis for the second motion must be something other than that offered in the first. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[7] Federal Civil Procedure 170A ⚿2656

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(G) Relief from Judgment

170Ak2651 Grounds

170Ak2656 k. Mistake; Inadvertence; Surprise; Excusable Neglect. Most Cited Cases

Opposing party's mailing of their oppositions to proposed intervenor's motions to the wrong address for her counsel did not warrant vacatur of district court order denying those motions, absent explanation by proposed intervenor, either in her memorandum in support of motion for relief from order or in her brief before Court of Appeals, of what she could have said in reply brief to state her case more convincingly than did her original motion and supporting memoranda. Fed.Rules Civ.Proc.Rules 5(a), 60(b), 28 U.S.C.A.

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

*1200 Joseph M. Clark, Sr., Bossier City, for movant-appellant.

Glenn L. Langley, Julia E. Blewer, Cook, Yancey, King & Galloway, Shreveport, La., for Wells Fargo.

Appeal from the United States District Court for the Western District of Louisiana.

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

Movant-appellant Marian E. Latham (Latham) is a would-be intervenor in a suit instituted by her husband against defendants-appellees. Because the suit had already been settled by the parties and dismissed with prejudice, the district court rejected Latham's attempted intervention. Due allegedly to the failure of her counsel to receive notice of the entry of the court's order, Latham failed to make a timely appeal. She thus moved to have the district court set aside its order or to extend the appeals period. It is from the denial of these two motions that Latham now appeals. We affirm.

Facts and Proceedings Below

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

The suit that underlies this appeal is a lender-liability action commenced in 1987 by appellant's husband, James A. Latham (the debtor).[FN1] Following a compromise and ***1201** settlement agreement executed between the debtor's trustee in bankruptcy and appellees Wells Fargo Bank, N.A. and First Security Bank of Utah, N.A. (the banks),[FN2] the district court on July 30, 1990, ordered the dismissal of the suit with prejudice.

FN1. The substance of the lender-liability action is not directly relevant to the disposition of this appeal. For a detailed account of that suit, see *Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979, 980-82 (5th Cir.1990).

FN2. On July 10, 1990, the banks purchased the debtor's claims against them at a judicial auction. On July 19, 1990, the bankruptcy court approved the transaction. On July 25, 1990, the banks and the debtor agreed to a joint stipulation of dismissal.

On August 14, 1990, Latham, who was not a party to original litigation, filed two motions in the district court, one seeking leave to intervene or be substituted as a party in the suit and another

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

couched as a "motion to set aside order of dismissal." The theory of both motions was that Latham's intervention in the litigation was necessary because the cause of action asserted in the lender liability suit, and dismissed in the court's July 30 order, was community property.[FN3] Reasoning that Latham's community property could properly be sold or compromised by the trustee with the bankruptcy court's approval, and that Latham had expressly renounced her right to concur in the sale or encumbrance of her community assets, the court denied her motion to set aside the July 30, 1990, dismissal order. The court also denied Latham's motion to intervene on the ground it was too late to intervene once judgment had been rendered. These motions were denied on December 20, 1991, and the court's order was docketed on December 26, 1991.

FN3. A similar claim was advanced by the debtor in our earlier decision in this case, but we did not reach it. *See Latham, supra,* 896 F.2d at 985 ("We need not consider Latham's argument that if his personal claims were barred, his wife would still be able to press half of them because they are community property under Louisiana law.").

Latham's counsel claims that the denial order was mailed to the wrong address and thus was not received by him until January 24, 1992, just three days before the time for filing a notice of appeal

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

of that order would expire.[FN4] In reaction, Latham, on February 21, 1992, filed two more motions: a "motion to extend time for filing of appeal" and a second "motion to set aside order of dismissal." The district court denied both motions on June 18, 1992, and Latham thereafter timely appealed that order to this Court.

FN4. Latham had thirty days to appeal the court's December 26, 1991, order. *See*Fed.R.App.P. 4(a)(1). Because January 25, 1992, was a Saturday, Latham had until Monday, January 27, 1992, to file her notice of appeal with the clerk of the district court. *See*Fed.R.App.P. 26(a).

Discussion

At the outset, we emphasize that the only matters before this Court are Latham's two motions of February 21 and the district court's denial of them. Latham brought no timely appeal from the December 26, 1991, denial of her August 14, 1990, motions.

I. The Motion to Extend the Time for Filing an Appeal

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

[1][2] Latham argues that, because her counsel did not receive notice of the district court's December 26, 1991, order until just before the expiration of time to file notice of appeal therefrom, it was error for the district court to deny her request, brought under Federal Rules of Appellate Procedure 4(a), to extend the time for filing a notice of appeal. We disagree. It is true that the clerk of the court is required to serve notice of the entry of an order or judgment by mail to the parties immediately upon its entry. *See*Fed.R.Civ.P. 77(d). Nevertheless, Rule 77(d) also provides:

"Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure." Fed.R.Civ.P. 77(d).

Thus, Rule 77(d) clearly states that a party must make a timely appeal whether or not he receives notice of the entry of an order. Implicit in this rule is the notion that parties have a duty to inquire periodically into the status of their litigation. *See, e.g.,* ***1202** *Jones v. Estelle*, 693 F.2d 547, 549 (5th Cir.1982) (per curiam), *cert. denied*, 460 U.S. 1072, 103 S.Ct. 1528, 75 L.Ed.2d 950 (1983). As the text of Federal Rules of Civil Procedure 77(d) indicates, the only exception to its rule is Federal

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

Rules of Appellate Procedure 4(a).

Two provisions of Federal Rules of Appellate Procedure 4(a) are potentially applicable in circumstances such as these. The first, Federal Rules of Appellate Procedure 4(a)(6), as amended effective December 1, 1991, was specifically designed to deal with cases of late notice. It provides:

"The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal." [FN5] Fed.R.App.P. 4(a)(6).

FN5. The current versions of Federal Rules of Appellate Procedure 4(a)(6) and Federal Rules of Civil Procedure 77(d) took effect on December 1, 1991, prior to the court's denial of Latham's August 14 motions and prior to the date on which Latham's counsel claims to have received notice of the order. We deem both rules to be binding in this case. *See In re Jones,*

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

970 F.2d 36, 38 (5th Cir.1992).

Rule 4(a)(6) thus allows a court to extend the filing period for a party that receives notice of an order more than three weeks (but less than six months) after its entry. Assuming that Latham, as she claims, did not receive notice of the court's order until January 24, 1992, she could have sought an extension under Rule 4(a)(6) on that date. However, that Rule requires a party to seek an extension "within 7 days of receipt of such notice." Latham did not seek any extension until February 21, 1992-almost a month after receiving notice. Therefore, Latham is not entitled to relief under Federal Rules of Appellate Procedure 4(a)(6).

[3] Latham's only other potential avenue of relief under Rule 4(a) is Rule 4(a)(5), which provides:

"The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." Fed.R.App.P. 4(a)(5).

We note initially that Latham's application for an extension was within the time permitted by Rule

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

4(a)(5). As noted, *see supra* note 4, the deadline for filing an appeal of the court's December 26, 1991, order was January 27, 1992. Thirty days from that time would be February 26, 1992. Latham's motion was filed on February 21, 1992. Therefore, her application for an extension, while not within the appeals period itself, was within thirty days after its expiration. It thus became necessary for the district court to determine whether Latham had demonstrated that her failure to file a timely appeal was due to excusable neglect.[FN6] Latham, of course, offers as justification her failure to receive prompt notice of entry of the court's order. The district court rejected this argument. We have said both that the excusable neglect standard is a strict one and that a district court's decision to grant or deny relief under Rule 4(a)(5) is reviewed only for abuse of discretion. *See, e.g., Allied Steel v. City of Abilene*, 909 F.2d 139, 142-43 (5th Cir.1990) (per curiam).

FN6.Rule 4(a)(5)'s allowance for extensions in cases of "good cause" (as distinguished from its "excusable neglect" standard) applies only to requests made *before* the expiration of the thirty-day appeals period. *See Allied Steel v. City of Abilene*, 909 F.2d 139, 143 & n. 3 (5th Cir.1990) (per curiam) (citing the Advisory Committee Notes to Rule 4(a)(5)).

We now hold that no such abuse was committed. There is some dispute over whose fault it was that

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

the notice was sent to the wrong address; however, we see no need to resolve it. A sufficient reason for denying Latham's request was offered by the district court: her counsel received the order within the time for filing an appeal yet waited almost a month before requesting*1203 an extension. A related sufficient reason, we think, is that Latham failed to avail herself of Rule 4(a)(6). That rule was designed to handle cases just such as this one. Yet, as we have seen, Latham waited too long to seek relief under that provision. This fact is fatal to her claim of excusable neglect under Rule 4(a)(5). We cannot say that it was an abuse of discretion to deny Latham relief under the general provisions of Rule 4(a)(5) where but for her own delay she could have sought an extension under Rule 4(a)(6).

In sum, we are unable to conclude that the district court erred in denying Latham's motion to extend the time for filing an appeal.

II. The Motion to Set Aside the Court's Order

[4] We now consider Latham's other February 21, 1992, motion, which was styled as a "motion to set aside order of dismissal." This February 21 motion, which attacked the court's denial of Latham's

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

August 14, 1990, motions, is obviously a Rule 60(b) motion for relief from an order (indeed, Latham cited Rule 60(b) in support of that motion). *See Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 669 (5th Cir.) (en banc), *cert. denied*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986).

We review the denial of Latham's February 21, 1992, Rule 60(b) motion only for abuse of discretion. Although the grounds offered in support of that motion are rather murky, one can find in the motion three arguments in favor of setting aside the district court's December 26, 1991, order (which, again, denied Latham's August 14, 1990, motions). First, she reiterates the arguments that she made in support of her August 14, 1990, attack on the dismissal of the lender-liability suit. Second, she cites her failure to receive notice of the court's December 26 order. Third, she complains that she failed to receive the banks' oppositions to her August 14 motions. We will address these arguments *seriatim*.

A.

In large part, Latham's February 21, 1992, Rule 60(b) motion is an attempt to revive her August 14, 1990, motion. Indeed, the first five paragraphs of the February 21 motion repeat verbatim the five

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

paragraphs that constituted the entirety of the August 14 motion. Latham's brief before this Court also restates much of the argument made in support of her August 14 motions.

[5] We begin our analysis with the principle, recognized time and again in our case law, that a Rule 60(b) motion may not be used as a substitute for a timely appeal. *See, e.g., Williams v. New Orleans Public Service, Inc.*, 728 F.2d 730, 736 (5th Cir.1984); *United States v. O'Neil*, 709 F.2d 361, 372 (5th Cir.1983); *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693, 695 (5th Cir.), *cert. denied*, 464 U.S. 826, 104 S.Ct. 98, 78 L.Ed.2d 103 (1983); *Silas v. Sears, Roebuck & Co.*, 586 F.2d 382, 386 (5th Cir.1978); *Edwards v. Joyner*, 566 F.2d 960, 961 (5th Cir.1978) (per curiam). As we said on one occasion, "Rule 60(b) simply may not be used as an end run to effect an appeal outside the specified time limits, otherwise those limits become essentially meaningless." *Pryor v. U.S. Postal Service*, 769 F.2d 281, 288 (5th Cir.1985).[FN7] Thus, we have frequently upheld district court decisions denying Rule 60(b) motions where it appeared that Rule 60(b) was being used as a substitute for a timely appeal. *See, e.g., United States v. O'Neil, supra.* This is particularly appropriate in a case such as this one where a Rule 60(b) motion is itself an attack on the denial of a prior post-judgment motion that asserted virtually identical grounds for relief, and where, as here, it is filed *after* the time for giving notice of appeal from the order denying the earlier motion. *See Pryor*, 769 F.2d at 288.

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

Obviously, if on February 21, 1992, Latham had attempted to bring a ***1204** direct appeal from the December 26, 1991, denial of her August 14, 1990, motion, such an appeal clearly would have been out of time, and this Court would now have no jurisdiction to consider the appeal. In effect, by filing a Rule 60(b) motion following the prior denial of an earlier virtually identical post-trial motion, Latham is using the second motion, which is under Rule 60(b), as an attempt to resurrect the then expired period in which to appeal the denial of the first motion. This procedural ploy cannot be allowed to succeed.

> FN7. We have recognized that this rule may yield "in truly extraordinary cases," *O'Neil*, 709 F.2d at 373, but this is not such a case.

When confronted with an analogous situation in *Burnside v. Eastern Airlines, Inc.*, 519 F.2d 1127 (5th Cir.1975) (per curiam), this Court stated:

"The time for notice of appeal on plaintiff's initial Rule 60(b) motion having run, the filing of another such motion alleging substantially similar grounds for relief does not provide plaintiff with a second opportunity for appellate review." *Id.* at 1128 (citation omitted).

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

See also Ellis v. Richardson, 471 F.2d 720 (5th Cir.1973) (successive Rule 59 motions); *Ratcliff v. State of Texas*, 714 F.2d 24 (5th Cir.1983) (Rule 60(b) motion to attack denial of earlier post-trial motion). *See also* *Eleby v. American Medical Systems*, 795 F.2d 411 (5th Cir.1986). *Cf.* *Hines v. Seaboard Air Line R.R. Co.*, 341 F.2d 229, 231 (2d Cir.1965) ("If plaintiff's [second Rule 60(b) motion] contained only arguments which were made or could have been made on the prior motion, an appeal from the denial of such a motion would not lie, as the second motion would then truly be classified as a reargument.").

[6] This is not to say that a party may never mount a Rule 60(b) attack upon the denial of a previous post-trial motion. However, at least absent truly extraordinary circumstances, not present here, the basis for the second motion must be something other than that offered in the first.[FN8]

FN8. The district court stated that Latham's August 14, 1990, motion to set aside was too late to be considered a Rule 59 motion, and hence had to be considered as one under Rule 60(b), although the court denied it on grounds equally applicable to both rules. Latham does not challenge the district court's determination that her referenced August 14, 1990, motion was

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

filed beyond the ten-day period permitted for Rule 59 motions. The district court's July 30, 1990, order was filed on that date; the docket sheet does not clearly indicate when it was docketed, although notice of entry was not mailed until July 31, 1990. If the order was not entered on the docket until July 31, then the August 14 motion was timely for purposes of Rule 59. Even if that were the case, however, Latham would still be trying to challenge, by her February 21, 1992, Rule 60(b) motion, the denial of her earlier post-judgment motion, raising the same grounds in both motions instead of timely appealing the denial of the first. This is using Rule 60(b) for what an appeal should do; and it is doing so after time for notice of appeal has run and without adequate excuse. Moreover, a Rule 60(b) motion does not extend the time for filing a notice of appeal. *Cf. Eleby* (Rule 59 motion directed to denial of Rule 60(b) relief does delay time for appealing the denial of Rule 60(b) motion).

B.

The second argument advanced by Latham in support of her Rule 60(b) motion is the same one offered in support of her motion to extend the filing period, namely, her failure to receive notice of the entry of the court's order. The law is clear, however, that Rule 60(b) affords no relief under such

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

circumstances. In *Wilson v. Atwood Group*, 725 F.2d 255 (5th Cir.) (en banc), *cert. dismissed*, 468 U.S. 1222, 105 S.Ct. 17, 82 L.Ed.2d 912 (1984), this Court refused to grant Rule 60(b) relief to a party that had failed to receive notice of the entry of a judgment in time to file an appeal. Relying heavily on Federal Rules of Civil Procedure 77(d)'s instruction that lack of notice does not halt the running of the filing period, we held that "to be relieved from the effect of judgment, a party must show more than mere reliance on the clerk to give notice of a judgment." *Id.* at 258. The clear purpose of *Wilson* was to cease the practice of "extending the time for appeal by vacating and re-entering judgments in order to accommodate a party that has not received actual notice of the entry of judgment." *Pryor, supra*, 769 F.2d at 287. Despite the fact that *Wilson* arose amidst what the Court described as "unique circumstances," 725 F.2d at 258, subsequent cases have read *Wilson* as establishing*1205 a clear rule: "failure to receive notice does not justify granting of 60(b) relief to extend [the] time for appeal." *In re Air Crash at Dallas/Fort Worth Airport*, 852 F.2d 842, 844 (5th Cir.1988) (per curiam).[FN9] Even the dissenters in *Wilson* agreed with the proposition that "Rule 77(d) makes one exception to Rule 60(b)(6)'s grant of equitable power-the reason cannot be the clerk's failure to notify." *Wilson*, 725 F.2d at 258 (Clark, C.J., dissenting). Following *Wilson*, we have consistently rejected the use of Rule 60(b) to provide relief for parties complaining of lack of notice. *See, e.g., Prior Products, Inc. v. Southwest Wheel-NCL Co.*, 805 F.2d 543, 545 (5th

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

Cir.1986) (per curiam); *Alamo Chem. Transp. Co. v. M/V Overseas Valdes*, 726 F.2d 1073, 1074 (5th Cir.1984); *Cf. United States v. Awalt*, 728 F.2d 704, 705 (5th Cir.1984) (per curiam) (applying *Wilson* to a Federal Rules of Criminal Procedure 35 motion to correct a sentence).

FN9. Citing the 1991 amendments to Federal Rules of Civil Procedure 77(d) and Federal Rules of Appellate Procedure 4(a)(6), this Court in *In re Jones*, 970 F.2d 36, 39 (5th Cir.1992), stated that "[t]he continuing viability of *Wilson*... is now subject to question." It is unclear to us what is meant by that statement. Perhaps it was intended to be read in context with the statement that amended Fed.R.App.P. 4(a)(6) does not require the district court to grant relief even if its requirements are met, *id.* at 39, and to suggest that though relief was not always required in such instances we would normally expect it to be granted. Or perhaps *Jones* meant that there will be less room for *Wilson* to operate with the 1991 amendments to Rule 77 and 4(a)(6). We will not construe *Jones* to do what it could not, and did not purport to do, namely overrule the *en banc Wilson* decision. The final sentence of Rule 77(d), which states that lack of notice does not excuse an untimely appeal, was *un*changed by the 1991 amendment. The advent of Rule 4(a)(6), if anything, cuts against the idea that *Wilson* is no longer good law in areas where new Rule (4)(6) does not give relief because that new Rule

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

now provides a safety valve for whatever harshness inheres in *Wilson*'s strict interpretation of Rule 77(d).

To be sure, *Wilson* did state that its rule would not reach a party whose counsel "had not relied on the clerk to give notice of the entry of judgment but had been diligent in attempting either to delay its entry or to inquire about the status of the case." *Wilson*, 725 F.2d at 258. Thus, we did not apply *Wilson* in *Tubbs v. Campbell*, 731 F.2d 1214, 1215-16 (5th Cir.1984) (per curiam), where the clerk's office misled appellant into thinking that no judgment had been entered, or *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981, 985-86 (5th Cir.1992), where the clerk's office misled appellants into thinking that an order *had been* entered (and thus caused them to file a premature appeal). But there is nothing in the record to indicate that Latham's counsel made any effort to inquire into the status of her August 14, 1990, motion, even though that motion had been filed seventeen months prior to the time that Latham learned of its denial. Because Latham has failed to "show more than mere reliance on the clerk to give notice," *Wilson*, 725 F.2d at 258, her motion must be denied.

C.

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

[7] Latham's final argument in support of her February 21, 1992, Rule 60(b) motion is that the banks mailed their oppositions to her August 14, 1990, motions to the wrong address. Latham's counsel had supplied his correct address in the August 14 motions. The banks, however, mailed their oppositions to the address listed for Latham's counsel in the *Louisiana Legal Directory,* which touts itself as the official directory of the Louisiana State Bar Association. Latham argues that, if she had received the banks' oppositions, as Federal Rules of Civil Procedure 5(a) requires, she would have been able to file a reply brief. Nevertheless, we cannot agree with Latham that this error warrants the vacation of the district court's December 26 order. The court reasoned that, notwithstanding Latham's failure to file a reply brief, its order "was, in all respects, correct as to fact and law." We need not investigate the merits of that claim to conclude that it was within the court's discretion to deny Latham's motion. Latham does not explain, either in her memorandum in support of her Rule 60(b) motion or in her brief before this Court, what she could have said in a reply brief to state her case more ***1206** convincingly than did her original motion and supporting memoranda.

Conclusion

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

The district court's denial of Latham's February 21, 1992, motions is

AFFIRMED.

C.A.5 (La.),1993.

Latham v. Wells Fargo Bank, N.A.

987 F.2d 1199, 25 Fed.R.Serv.3d 550

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

Nunley v. City of Los Angeles

C.A.9 (Cal.),1995.

United States Court of Appeals,Ninth Circuit.

Michelle La Nette NUNLEY, Plaintiff-Appellant,

v.

CITY OF LOS ANGELES, et al., Defendants-Appellees.

Nos. 93-56110, 93-56166.

Argued and Submitted Feb. 10, 1995.

Decided April 6, 1995.

Motion for extension of time to file appeal in personal injury action against city was denied by the United States District Court for the Central District of California, William J. Rea, J. Appeal was taken. The Court of Appeals, David Alan Ezra, District Judge, sitting by designation, held that: (1) specific factual denial of receipt of notice of entry of judgment rebuts presumption of receipt; (2)

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

motion to enlarge time for filing notice of appeal may not be denied based upon excusable neglect; and (3) remand was required for factual determination whether moving party received notice of entry of judgment.

Vacated and remanded.

West Headnotes

[1] Federal Courts 170B 813

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk813 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases

Denial of motion for extension of time to file notice of appeal is reviewed on appeal for abuse of

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

discretion. F.R.A.P.Rule 4(a)(5, 6), 28 U.S.C.A.

[2] Federal Courts 170B 655

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(E) Proceedings for Transfer of Case

170Bk652 Time of Taking Proceeding

170Bk655 k. Extension of Time by Agreement or Court Order. Most Cited Cases

Notice is required for motion to enlarge time to file an appeal, on ground that would-be appellant did not receive notice of entry of judgment and that no other party would be prejudiced by extension. F.R.A.P.Rule 4(a)(6), 28 U.S.C.A.

[3] Federal Courts 170B 655

170B Federal Courts

170BVIII Courts of Appeals

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

170BVIII(E) Proceedings for Transfer of Case

170Bk652 Time of Taking Proceeding

170Bk655 k. Extension of Time by Agreement or Court Order. Most Cited Cases

Failure to file noticed motion for extension of time to appeal, upon showing that would-be appellant did not receive notice of entry of judgment and that no other party be prejudiced by extension, was not basis for barring appeal, even though procedure did not follow local rules, given that no objection was made to filing of ex parte application, trial judge did not address violation, and proposed appellee was informed of filing of ex parte application and responded to application. F.R.A.P.Rule 4(a)(6), 28 U.S.C.A.

[4] Federal Courts 170B 655

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(E) Proceedings for Transfer of Case

170Bk652 Time of Taking Proceeding

170Bk655 k. Extension of Time by Agreement or Court Order. Most Cited Cases

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

Specific factual denial of receipt of notice of entry of judgment rebuts presumption of receipt for purposes of motion seeking extension of time for appeal by would-be appellant. F.R.A.P.Rule 4(a)(6), 28 U.S.C.A.

[5] Federal Courts 170B 655

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(E) Proceedings for Transfer of Case

170Bk652 Time of Taking Proceeding

170Bk655 k. Extension of Time by Agreement or Court Order. Most Cited Cases

Denial of motion for extension of time to appeal may not be based upon concept of excusable neglect; district judge retains some discretion to decide motion when nonreceipt has been proven and no other party would be prejudiced, but cannot deny relief based on failure of party to learn independently of entry of judgment during 30-day period for filing notices of appeal. F.R.A.P.Rule 4(a)(6), 28 U.S.C.A.

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

[6] Federal Courts 170B ⚿937.1

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(L) Determination and Disposition of Cause

170Bk937 Necessity for New Trial or Further Proceedings Below

170Bk937.1 k. In General. Most Cited Cases

Remand was required, for determination of whether moving party received notice of entry of judgment, before deciding motion for extension of time to appeal on ground that would-be appellant did not receive notice and that no other party would be prejudiced by extension. F.R.A.P.Rule 4(a)(6), 28 U.S.C.A.

***793** Robert Mann and Donald W. Cook, Los Angeles, CA, for plaintiff-appellant.

James K. Hahn, City Atty., Thomas C. Hokinson, Sr. Asst. City Atty., and Katherine J. Hamilton, Deputy City Atty., Los Angeles, CA, for defendants-appellees.

Appeals from the United States District Court for the Central District of California.

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

Before: BEEZER and NOONAN, Circuit Judges, and EZRA, District Judge. [FN*]

FN* Honorable David Alan Ezra, United States District Judge for the District of Hawaii, sitting by designation.

DAVID ALAN EZRA, District Judge:

This appeal from a district judge's denial of an extension of time to file notice of appeal raises questions of first impression concerning the interpretation of Federal Rule of Appellate Procedure 4(a)(6). Rule 4(a)(6) provides for an extension of time upon a showing that the would-be appellant did not receive notice of the entry of judgment and that no other party would be prejudiced by the extension. We hold that a specific factual denial of receipt of notice rebuts the presumption of receipt, which is to be given no further weight. We also hold that Rule 4(a)(6) motions may not be denied based upon the concept of "excusable neglect." Therefore, we vacate the decision of the district judge and remand for a determination of receipt of notice.

I. Background

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

On February 19, 1993, the district court entered judgment against Michelle La Nette Nunley ("Nunley") after a jury returned a verdict in favor of the City of Los Angeles and individual defendants (collectively "City"). At trial, Nunley had claimed damages for injuries suffered as the result of an attack by a police dog. On March 5, 1993, Nunley timely served a motion for judgment notwithstanding the verdict or for new trial pursuant to Fed.R.Civ.P. 50(b), 59(e), and 60(b).[FN1] On April 9, 1993, the district court entered an order denying Nunley's motion. The face of the entered order bears a stamp stating: "I certify that this document was ***794** served by first class mail, postage prepaid, to all counsel (or parties) at their respective, most recent, address of record, in this action, on this date." The date "4/9/93" and the signature of the deputy clerk appear in blanks below the stamp. Boxes at the bottom of the document labelled "Docketed," "Mld Copy Ptys," and "Mld Notice Ptys" are checked. Regarding the April 9, 1993 entry of the order, the civil docket continuation sheet bears the notation "mld cpys & notc."

FN1. The City contends that Nunley's motion was untimely, but because the judgment was entered on February 19, 1993, Nunley had until March 5, 1993 to serve her motion. *See*Fed.R.Civ.P. 50(b), 59(a) (motions under Rules 50(b) and 59(a) must be served within

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

ten days of the entry of judgment); Fed.R.Civ.P. 6(a) (in computing the ten-day period, intermediate Saturdays, Sundays, and legal holidays are excluded).

Nunley's counsel had received the proposed order drafted by the City on April 2, 1993. Counsel appeared in court at least once prior to May 10, 1993, on April 26, 1993, in response to a motion to retax costs.

On May 10, 1993, Nunley's counsel went to the district court clerk's office and asked to view the docket. Having been told that the docket could not be found, counsel examined the file, which did not contain any indication that an order had been signed. A paralegal conducted a similarly unproductive search for Nunley on May 17, 1993. Finally, on May 20, 1993, the docket became available for inspection and Nunley's counsel observed the April 9, 1993 entry of the order denying her motion for judgment notwithstanding the verdict or for new trial. The file still did not contain the signed order. Opposing counsel had not independently served the judgment on Nunley as permitted by Fed.R.Civ.P. 77(d).

Nunley filed an *ex parte* application for extension of time to file an appeal on May 26, 1993, citing

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

only Fed.R.App.P. 4(a)(5).[FN2] On June 14, 1993, the district judge denied Nunley's application. On July 13, 1993, Nunley appealed the district judge's decision. Appeal no. 93-56110. On June 9, 1993, Nunley filed a motion for an extension of time to file an appeal under Fed.R.App.P. 4(a)(5) and (6). On July 22, 1993, the district judge denied this motion. On August 3, 1993, Nunley also appealed the district judge's July 22, 1993 decision. Appeal No. 93-56166. On September 8, 1993, we dismissed Nunley's appeal no. 93-56110 on the ground that it duplicated appeal no. 93-56166.[FN3]

FN2. On May 24, 1993, Nunley filed a notice of appeal of the district court's February 9, 1993 judgment and April 9, 1993 order. On September 8, 1993, we dismissed Nunley's appeal as untimely. *See Nunley v. City of Los Angeles,* No. 93-55808 (9th Cir. Sept. 8, 1993).

FN3. This dismissal was a technical error. Appeal no. 93-56110 was from the district court's June 14, 1993 order denying Nunley's *ex parte* application to extend time, and appeal no. 93-56166 was from the district court's July 22, 1993 order denying Nunley's motion for an extension of time. Thus, appeal no. 93-56110 does not duplicate appeal no. 93-56166, and we reinstate appeal no. 93-56110 and consolidate it with appeal no. 93-56166. However,

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

because the parties' briefs in appeal no. 93-56166 address both the district judge's denial of Nunley's *ex parte* application and its denial of Nunley's noticed motion, no further briefing or argument is necessary.

Nunley appeals the district judge's denial of her motions under Fed.R.App.P. 4(a)(5) and 4(a)(6) to enlarge time to file a notice of appeal. We vacate the decision of the district judge and remand for further proceedings.

II. Standard of Review

[1] We review for abuse of discretion a district judge's denial of a motion brought under Fed.R.App.P. 4(a)(5) or (6) for an extension of time to file notice of appeal. *National Indus., Inc. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1264 (9th Cir.1982) (Fed.R.App.P. 4(a)(5)).

III. Discussion

A. *Federal Rule of Appellate Procedure 4(a)(6)*

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

Nunley claims to have received actual notice of the district court's April 9, 1993 order on May 20, 1993. Because Nunley admits that she received actual notice on May 20, 1993, the district judge only had authority under Rule 4(a)(6) to consider Nunley's May 26, 1993 *ex parte* application,[FN4] which was filed within 7 days of actual notice, and not her June 9, 1993 motion citing Rule 4(a)(6), which was untimely under that rule. *See*Fed.R.App.P. 4(a)(6); *Vahan v. Shalala*, 30 F.3d 102, 103 (9th Cir.1994) (per curiam) (district ***795** court has no authority to consider a motion which is not filed within Rule 4(a)(6)'s time constraints).

> FN4. While this initial *ex parte* application did not invoke Rule 4(a)(6), we will not rigidly deny her review under the authority of Rule 4(a)(6), given her later citation of the rule and its clear application to the circumstances here.

1. *Ex Parte* Application

[2]Rule 4(a)(6) provides that a district judge may reopen time for appeal "upon motion" and upon a finding "that no party would be prejudiced." Rule 5(a), Fed.R.Civ.P., requires every written

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

motion to be served, except a motion which may be heard *ex parte*. While Fed.R.App.P. 4(a)(5) expressly allows an *ex parte* motion to extend time to file a notice of appeal if the motion is filed within the 30-day time period allowed for filing the notice of appeal, Rule 4(a)(5) also states that notice of any motions for extensions of time filed after this period "shall be given to the other parties in accordance with local rules." The requirement in Rule 4(a)(6) of a motion, not an informal application, and the lack of provision for *ex parte* filing, weigh in favor of requiring noticed motions.

The potential prejudice to the other parties addressed by Rule 4(a)(6) also favors requiring notice. Rule 4(a)(6) mandates an inquiry into the prejudice to other parties caused by any extension of time. The Advisory Committee Note defines prejudice as "some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal ... for example, if the appellee had taken some action in reliance on the expiration of the normal time period...." A response from the appellee provides the most informed method for a district judge to assess the possible prejudice. For these reasons, we hold that notice in accordance with the local rules is required under Rule 4(a)(6), just as it is for motions to extend time filed outside the thirty-day period under Rule 4(a)(5).

[3] However, a district judge has broad discretion to depart from local rules, including the service

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

requirements, "where it makes sense to do so and substantial rights are not at stake." *Professional Programs Group v. Department of Commerce*, 29 F.3d 1349, 1353 (9th Cir.1994). Here, the City did not object to Nunley's filing of the *ex parte* application, and the district judge did not address the violation. Moreover, because Nunley's counsel did inform counsel for the City of the filing of the *ex parte* application and because the City did respond to the application, the *ex parte* nature of the application resulted in no prejudice to the City. For these reasons, we hold that under these circumstances the district judge would not have abused his discretion in departing from the service requirements of the local rules, and therefore Nunley's failure to file a noticed motion under Rule 4(a)(6) should not constitute an independent ground for barring her claim here.

2. Showing Necessary to Satisfy Rule 4(a)(6)

[4]Rule 4(a)(6) provides "a limited opportunity" for relief under specific circumstances. *See*Fed.R.App.P. 4(a)(6), advisory committee's note. Where a party entitled to receive notice of the entry of judgment or an order has not received notice within twenty-one days of its entry, and where no party would be prejudiced, a district judge may order an extension of time to file a notice of appeal. Fed.R.App.P. 4(a)(6). Rule 4(a)(6) was adopted to reduce the risk that the right to appeal will

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

be lost through a failure to receive notice. It is to be read in conjunction with Fed.R.Civ.P. 77(d). Rule 77(d) allows, and the advisory committee note to Rule 4(a)(6) encourages, prevailing parties "to send their own notice [of the entry of final judgment to the opposition] in order to lessen the chance that a [district] judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party." Fed.R.App.P. 4(a)(6) advisory committee's note. The City concedes this was not done here.

While Rule 4(a)(6) puts the burden on the moving party to demonstrate non-receipt, the rule does not mandate a strong presumption of receipt. This is clear from its purpose, which is to provide relief from the risk of non-receipt, and from its relationship to Rule 77(d), whereby a prevailing party can ensure receipt. This conclusion also springs from the language of the comment, which refers to a judge "accept[ing] a claim of non-receipt in the face of evidence that notices were sent by *796 both the clerk and the winning party," and from the protection given by the rule to prejudiced parties. Fed.R.App.P. 4(a)(6) advisory committee's note.

Non-receipt is difficult to prove conclusively. All that a party seeking to demonstrate non-receipt can normally do is to submit affidavits regarding the usual practice of opening mail and actions

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

consistent with non-receipt and an intent to file an appeal. A returned envelope or other indication of failed delivery is of course helpful, although undoubtedly not available in many cases. Similarly, actual receipt is difficult to show without using certified mail. Here, the order itself and the docket show notations that notice was mailed. As no letter was returned by the post office, the clerk was entitled to assume receipt.

Nunley argues that Rule 301 of the Federal Rules of Evidence should govern her showing of non-receipt of notice of entry. She contends that she has put forward sufficient evidence to rebut the presumption of receipt, and that the district judge erred in finding the evidence insufficient to rebut the presumption. Under the common law mailbox rule, proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee.[FN5] *Anderson v. United States*, 966 F.2d 487, 491-92 (9th Cir.1992) (citing *Rosenthal v. Walker*, 111 U.S. 185, 193-94, 4 S.Ct. 382, 386, 28 L.Ed. 395 (1884)). However, where a district judge requires extensive evidence to rebut the presumption or continues to rely upon the presumption after it is rebutted, the district judge effectively erects an irrebuttable and insurmountable barrier to the application of Rule 4(a)(6), as did the district judge here.

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

FN5. Nunley nevertheless argues that no evidence was presented to show that notice was in fact mailed. The district judge, however, could properly find the presumption raised by the docket and the stamp on the order, which showed that notice was sent to Nunley's counsel.

Under the so-called "bursting bubble" approach to presumptions, a presumption disappears where rebuttal evidence is presented. *See, generally, In re Yoder,* 758 F.2d 1114, 1119 (6th Cir.1985) ("Most commentators [and three circuits] have concluded that Rule 301 as enacted embodies the Thayer or 'bursting bubble' approach") (citations omitted). Courts have formulated the presumption so as to hold it rebutted upon a specific factual denial of receipt. *Id.* at 1118 (testimony of non-receipt sufficient to support such finding, following general rule that a presumption is rebutted "upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact") (citing 10 Moore's Federal Practice § 301.04[2] (2d ed.)). These approaches combine to require that a district judge give no further weight to the presumption of receipt upon a specific factual denial of receipt by a movant under Rule 4(a)(6).[FN6]

FN6. "Specific factual denial" describes the evidence necessary to rebut the presumption, and "bursting bubble" describes the absence of the presumption once rebutted.

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

While the Ninth Circuit has not previously adopted either the "bursting bubble" or the "specific factual denial" approaches, the realities of proving non-receipt and the purpose of Rule 4(a)(6) favor adopting the standard here. When a movant specifically denies receipt of notice, a district judge must then weigh the evidence and make a considered factual determination concerning receipt, rather than denying the motion out of hand based upon proof of mailing.

Regardless of the quantum of evidence necessary to rebut the presumption, the movant still bears the burden of proving non-receipt. Fed.R.Evid. 301 ("risk of nonpersuasion ... remains throughout the trial upon the party on whom it was originally cast"). Even after the "bubble" of presumption has "burst," the factual question of receipt remains and may be decided in favor of receipt by a fact finder who may choose to draw inferences of receipt from the evidence of mailing, in spite of contrary evidence. *In re Yoder*, 758 F.2d at 1119 n. 8 ("The facts giving rise to the presumption often give rise to an inference that remains and may still be considered by the factfinder") (citing IV Wigmore on Evidence § 2491 (Chadbourne rev. 1981)). "If the clerk or a party attests to mailing or otherwise serving the notice of ***797** entry, but the potential appellant attests that it was never received, the matter will apparently have to be resolved as a question of fact." David D. Siegel, "Changes in

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

Federal Rules of Civil Procedure,"142 F.R.D. 359, 378 (1992). We note that applying the "bursting bubble" and "specific factual denial" standard will not undermine the finality of judgments, because parties can close the period for filing a notice of appeal by sending actual notice of the judgment to the opposing side, and the 180-day limit of Rule 4(a)(6) provides the outer boundary for such motions.

At the time it made its ruling, the district judge here did not have the benefit of the "bursting bubble" and "specific factual denial" standard as we have applied them to Rule 4(a)(6). In applying this standard we find that the district judge erred in basing its denial of Nunley's motion upon the continuing vitality of the presumption of receipt. Nunley's specific factual denial of receipt had in fact rebutted the presumption. The district judge would not have erred if he had resolved the question of receipt against Nunley by carefully weighing the evidence. Such a resolution of the question would have been a factual determination, reviewed for clear error. *Anderson*, 966 F.2d at 492 (citing *United States v. Vasquez*, 858 F.2d 1387, 1391 (9th Cir.1988), *cert. denied*, 488 U.S. 1034, 109 S.Ct. 847, 102 L.Ed.2d 978 (1989)). However, the district judge made no such determination, relying instead on an expansive view of the deflated presumption.

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

[5] Still, our holding regarding the presumption of receipt does not end our review. The use of the verb "may" in Rule 4(a)(6) may leave a district judge with some discretion to deny the motion to extend time even where the requirements of the rule have been met. While the Ninth Circuit has not yet addressed the question, other circuits have visited the scope of discretion to be afforded a district judge under Rule 4(a)(6), with varying results. *Compare* *Matter of Jones*, 970 F.2d 36, 39 (5th Cir.1992) (discretion to deny) *with* *Avolio v. County of Suffolk*, 29 F.3d 50, 54 (2nd Cir.1994) (discretion cannot incorporate concept of "excusable neglect").

In *Matter of Jones,* the Fifth Circuit held that Rule 4(a)(6) is permissive and does not require a district judge to grant relief even if a movant demonstrates non-receipt of notice and the lack of prejudice to any party from the extension of time. In *Jones,* counsel had not received notice of the order because counsel failed to inform the clerk of a change of address. 970 F.2d at 39. Counsel also checked the docket sheet but failed to notice the entry of the order because it had been noted on the reverse of the first page instead of on a separate page. *Id.* In applying the abuse of discretion standard and upholding the district judge's denial of relief under Rule 4(a)(6), the Fifth Circuit clearly allowed the district judge to hold counsel to more than the literal requirements of 4(a)(6). The Fifth Circuit reasoned that "Rule 4(a)(6) allows the district court to grant relief if the specific

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

requirements are satisfied, but the rule does not require the district court to grant the relief, even if the requirements are met." *Id.*

However, in *Avolio v. County of Suffolk,* the Second Circuit held that "a denial of relief [under Rule 4(a)(6)] may not be based on a concept of inexcusable neglect for not having learned of the entry of judgment." 29 F.3d at 54. The Second Circuit found that the word "may" in Rule 4(a)(6) did not justify the importation of the standard of "excusable neglect" from Rule 4(a)(5) into Rule 4(a)(6). *Id.* at 53. Rule 4(a)(5) provides that a district judge may extend the time for filing a notice of appeal "upon a showing of excusable neglect or good cause." Fed.R.App.P. 4(a)(5). The Second Circuit in *Avolio* reasoned that "[t]he purpose of subdivision (6) was to relieve parties of the rigors of subdivision (5) when the failure to timely appeal was caused by not having received notice of the entry of judgment." *Id.*

In this case, the district court denied an extension both because it found that Nunley had not rebutted the presumption of receipt and because it did not find counsel's actions reasonable under the circumstances. The first ground for the denial foundered upon an erroneous conception of the presumption and the evidence necessary to overcome it. The district judge referenced the second

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

ground *798 in denying relief under Rules 4(a)(5) and (6). Therefore, if we interpreted Rule 4(a)(6) as allowing for an inquiry into the "excusable neglect" mandated by Rule 4(a)(5), the district judge's rejection of the motion on that ground might stand.

However, we concur with the reasoning of the Second Circuit and hold that the concept of excusable neglect has no place in the application of Rule 4(a)(6). To hold otherwise would negate the addition of Rule 4(a)(6), which provides an avenue of relief separate and apart from Rule 4(a)(5). As the Second Circuit noted in *Avolio:*

Were we to accept the district court's interpretation, we would subvert the central purpose of subdivision (6). As noted by the civil rules advisory committee in recommending a companion amendment to Fed.R.Civ.P. 77(d), "The purpose of the revisions is to permit district courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment."

29 F.3d at 53 (citation omitted). Any burden that this interpretation places upon other parties is mitigated by the inquiry into prejudice mandated by Rule 4(a)(6) and the running of the period for

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

extensions within seven days of actual notice by a party or the clerk under Rule 77(d). *See id.* (citing Siegel, "Changes to Federal Rules of Civil Procedure," 142 F.R.D. at 378). Given the considerations of prejudice and finality incorporated into the structure of Rule 4(a)(6), we see no reason here to favor a technical denial of the opportunity to appeal over a decision on the merits of that appeal.

Still, this interpretation does not result in the automatic application of Rule 4(a)(6) upon findings of no receipt and no prejudice to other parties. The word "may" allows for discretion. To base that discretion, however, upon "excusable neglect" would unduly undercut the rule. We need not reach the exact scope of district court discretion here. It is enough to state that district judges have some discretion, but that where non-receipt has been proven and no other party would be prejudiced, the denial of relief cannot rest on a party's failure to learn independently of the entry of judgment during the thirty-day period for filing notices of appeal.

[6] Here, the district judge did not expressly question the relevant circumstances alleged by Nunley's counsel. Nunley introduced facts tending to demonstrate non-receipt of the notice, namely the office practice of opening mail. In addition, prior to the running of the thirty-day period for appeal, Nunley's counsel went to the district court clerk's office and asked to view the docket. Informed that

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

the docket could not be found, counsel examined the file, which lacked any indication that an order had been signed. Finally, after a paralegal conducted a similarly unproductive file search, the docket became available for inspection and Nunley's counsel observed the April 9, 1993 entry of the order denying her motion for judgment notwithstanding the verdict and for new trial. The file still did not contain the signed order.

In the absence of a factual determination of the question of actual receipt based upon the evidence, the denial under these circumstances of an extension under Rule 4(a)(6) would constitute an abuse of discretion. Because he lacked the approaches to the presumption of receipt we have discussed and adopted, the district judge erroneously found that Nunley had not rebutted the presumption and did not evaluate the evidence tending to prove receipt and weigh it against the evidence of non-receipt. Therefore, we vacate the district court's order and remand to the district judge for this determination.

B. *Fed.R.App.P. 4(a)(5)*

Nunley asks us to apply the Supreme Court's recent holding in *Pioneer Inv. Serv. Co. v. Brunswick Assoc.*, 507 U.S. 380, ----, 113 S.Ct. 1489, 1498, 123 L.Ed.2d 74 (1993) (5-4 decision), to

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.

Fed.R.App.P. 4(a)(5). In *Pioneer,* the Supreme Court interpreted the term "excusable neglect" in connection with Bankr.R. 9006(b)(1), which extends the time to file a proof of claim, and applied a flexible standard, holding that inadvertence or negligence may constitute excusable neglect. *Id.* at ----,113 S.Ct. at 1496. Because we remand to the district court for an application of the "bursting bubble" and "specific ***799** factual denial" standard under Rule 4(a)(6), and because Rule 4(a)(6) is the preferable route for relief where a party alleges non-receipt of notice of entry, we need not reach the issue of the correct formulation of excusable neglect in the context of Fed.R.App.P. 4(a)(5).

For these reasons, we VACATE the decision of the district court and REMAND for further proceedings.

C.A.9 (Cal.),1995.

Nunley v. City of Los Angeles

52 F.3d 792, 31 Fed.R.Serv.3d 1029

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.