IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WOODKREST CUSTOM HOMES INC.,
NATIONWIDE CUSTOM CONSTRUCTION, LLC
and ROBERT KRESS, SR. individually — APPELLANTS

VS. — CAUSE NO.: 2008-TS-00846

JAMES COOPER and SANDRA COOPER — APPELLEES

BRIEF FOR APPELLANT

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CERTIFICATES OF INTERESTED PERSONS

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 this Court may evaluate possible disqualification or recusal.

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TABLE OF CASES AND OTHER AUTHORITIES

Rule 4 (c) (5) of the Mississippi Rules of Civil Procedure

Rule 60 (b)(1) (2) and (3)

Rule 60 (b) (6)

Bailey v. Beard, 813 So. 2d 682, 686/87 (Miss. 2002)

Bryant, Inc. v. Walters, 493 So. 2d 933, 939 (Miss. 1986)

Burkett v. Burkett, 537 So.2d 443

Capitol One Services, Inc. v. Rawls, 904 So.2d 1010, 1018 (Miss. 2004)

Chassaniol v. Bank of Kilmichael, 626 So.2d 127, 135 (Miss. 1993)

Greater Canton Ford Mercury, Inc. V. Pearl Lee Lane, 2008-MS-1017.540

Journey v. Long, 585 So.2d 1268, 1272 (Miss. 1991)

McCain v. Dauzat, 791 So.2d 839 (Miss. 1997)

Rich ex rel. Brown v. Nevels, 578 So. 2d 609, 617 (Miss. 1991)

Southwestern Sur. Ins. Co., 113 Miss. at 199, So. at 146

STATEMENT OF THE CASE

On or about the sixth day of March, 2006 the Appellees filed suit against the various Appellants. Process was supposedly served on the individual and corporate defendants and a default judgment was sought on April 28, 2006, after no answers were filed. The default judgment was signed by the Circuit Court of Itawamba County on the 9th day of May, 2006.

The Appellees retained Tennessee counsel and filed suit in the Circuit Court of Shelby County, Tennessee to sue on the judgment. Upon the Appellants being served with summons there they immediately contacted an attorney and the Motion To Set Aside Default Judgment was filed. After two requests for a hearing the Court denied on both occasions the motion to set aside the default judgment, with a final Order being signed on the 3rd day of April, 2008. Due to the Court's failure to grant a hearing in the trial court on the issue of setting aside the default judgment Appellant's have appealed to this Court.

ARGUMENT

I

THE APPELLANTS WERE NOT PROPERLY SERVED WITH SUMMONS AND WERE NOT ALLOWED THIRTY DAYS TO FILE AN ANSWER.

A

The Appellants would show this Court that the complaint in this case was filed on March 6, 2006. (Tr 4-8) Summons was issued to Robert Kress, Sr. c/o Eric Clark, Mississippi Secretary of State, P.O. Box 136 Jackson, Mississippi 39205-0136 on March 7, 2006. (Tr 10). Summons was issued to Nationwide Custom Contruction, LLC, c/o Eric Clark, Mississippi Secretary of State, P.O. Box 136 Jackson, Mississippi 39205-0136 on March 7, 2006. (Tr 11). Summons was issued to Woodkrest Custom Homes, Inc., c/o Eric Clark, Mississippi Secretary of State, P.O. Box 136 Jackson, Mississippi 39205-0136 on March 7, 2006. (Tr 12). Said summons to Nationwide was marked filed in the Circuit Clerk's office of Itawamba County on the 23rd day of March, 2006. (Tr 13) Summons was returned and marked filed on March 23, 2006, to Woodcrest Homes, Inc. (Tr 14) Woodkrest Custom Homes, Inc. marked filed March 23, 2006, (Tr 15) with alleged dates of service on all three of March 20, 2006. The article addressed to Woodkrest Custom Homes, Inc., was filed March 31, 2006, and signed for by Bob Kress with no date of delivery issued. (Tr 16) Again Nationwide Custom Construction, LLC was signed for by certified mail by Bob Kress but with no date listed but was filed with the Circuit Clerk of Itawamba County on March 31, 2006.(Tr 18)

B

Further, summons to Robert Kress, Sr. individually, was filed with the Circuit Clerk's Office on March 7, 2006, (Tr 19). Proof of Service showing service by Certified Mail was filed on April 4, 2006, (Tr 20) but was signed for by Teresa Kress with a date of delivery of February 10, 2006. Further summons to Nationwide Custom Construction, LLC was filed March 7, 2006 (Tr 22) allegedly served on the Secretary of State on March 20, 2006, and filed in the office of the Circuit Clerk on April 4, 2006 (Tr 23), but signed for by Robert Kress, Sr., with no listed date of delivery (Tr 24) and filed with the Circuit Clerk on April 4, 2006. Summons was issued to Woodkrest

Custom Homes, Inc. on March 7, 2006 (Tr 25) served on the Secretary of State on March 20, 2006, filed back in the Circuit Clerk's Office on April 4, 2006 (Tr 26) and again Robert Kress, Sr., signed the return receipt which is undated but was filed with the Circuit Clerk's Office on April 4, 2006.

C

A Notice Of Hearing was filed indicating that there would be an ex parte hearing on the matter of damages on Thursday May 4, 2006 at 9:00 a.m. in the Circuit Court of Itawamba County, Fulton, Mississippi 38843 which was signed on the 27th day of April, 2006 and filed on the 28th day of April, 2006. In addition an Application For Entry of Default And Supporting Affidavit was filed on April 28, 2006, and a Default was granted on April 28, 2006. (Tr 32)

The Appellant would show that according to the Appellees' affidavit that:

> The Defendant, Robert Kress, Sr., Individually, was duly served with a copy of the Summons, together with a copy of the Plaintiffs' Complaint in accordance with the Mississippi Rules of Civil Procedure by certified mail on the 10th day of February, 2006. (Tr 30)

The Appellant would indicate that such cannot be since the suit was filed on the 6th day of March, 2006, and it is impossible that he could have been served with summons nearly one month before suit was filed. That the Appellant's wife Teresa Kress signed said Domestic Return Receipt dated February 10, 2006. (Tr 21)

That the Appellees allege that the Appellant was served on March 20, 2006, by and through the Secretary of State in accordance with the long arm statute, but the certified mail Domestic Return Receipts were undated and were filed in the office of the Circuit Clerk of Itawamba County either on March 31, 2006 or on April 4, 2006.

It is very clear on the face of the record that the Appellants did not have thirty days on some,

if not all, of the summons issued against him and the various corporate defendants and that the Entry Of Defaults were offered for filing on the 28th day of April, 2006 on the face of the record. One summons is completely void since it was allegedly served on a day nearly one month prior to the filing of the suit. On the default judgment the errors were repeated when it states in part:

> . . . the Court finds that the Defendants were served with a copy of the Complaint and Summons in this cause on February 10, 2006 (the individual Defendant) and March 20, 2006 (the corporate Defendants), and that more than thirty days have elapsed since the Defendants were severally served with the Complaint and Summons in this cause . . .
>
> The Default Judgment continues:
>
> The Court further finds that the Defendants nor any of them appeared at a hearing in this matter scheduled on March 4, 2006, and that a Default had been previously entered against the Defendants on April 28, 2006. (Tr 41)

The Appellants would show that a hearing could not have been scheduled on March 4, 2006, since this was two days prior to the filing of the Complaint and if a default was entered on April 28, 2006, this was certainly less than thirty days from the date of service from an impossible date of February 10, 2006. Such indicates that the individual Defendant was never properly before this Court. Consequently the Default Judgment should be set aside and the Appellants, both individually and corporately should be allowed to defend their lawsuit.

The Appellants would show this Court that they filed a Motion To Set Aside Default Judgment on November 29, 2006. That in the response to the Motion To Set Aside Default Judgment the Plaintiffs allege that the Defendant was served with process on March 10, 2006, individually and March 20, 2006 corporately. As previously stated the Appellees were completely in error about this since they had earlier alleged that the Appellant Robert Kress, Sr. was personally served by certified mail on February 10, 2006, which was several weeks prior to suit being filed and only in their Response To Motion To Set Aside Default Judgment did they change their dates. Again

February 10, 2006 was an impossible date and could not be cured by new contradictory affidavits. (Tr 50-51)

Based upon such numerous errors in the Appellees' allegations within their pleadings, an Order of April 10, 2007, was filed denying the Defendant's Motion To Set Aside Default Judgment (Tr 54). The Appellant then filed his Motion Requesting Re-Hearing And In The Alternative Motion Requesting Findings Of Fact and Rulings Of Law (Tr 55). The trial court signed an Order On Defendant's Requesting Re-Hearing Or In The Alternative Findings Of Fact and Rulings Of Law on the 3rd day of April, 2008. (Tr 58-61) In said motion the error continues wherein the Court indicates that Robert Kress, Sr., was served with process on March 10, 2006, when in earlier pleadings as well as the signed Certificate of Service, sent by certified mail dated February 10, 2006, this was an error. That the Appellants would submit that no summons was properly served within the thirty day period, especially on individual Robert Kress, Sr. That such is void on its face not only due to the Domestic Return Receipt signed by Teresa Kress on February 10, 2006, but also by the very acknowledgment by the Appellees in numerous of their pleadings. They then apparently attempted to correct this error by alleging that summons was served on Robert Kress, Sr., on March 10, 2006. There is absolutely no evidence in the record to support said service on that date, but abundant allegations of the February date.

II

APPELLEES CHOSE TO SERVE THE DEFENDANT ROBERT KRESS, SR. WITH SERVICE BY CERTIFIED MAIL AND IMPROPERLY SERVED HIM

Appellees chose to serve the individual Defendant Robert Kress, Sr. with service by Certified Mail under Rule 4 (c) (5) of the Mississippi Rules of Civil Procedure which provides as follows:

> . . . . a summons may be served on a person outside this state by sending a copy of the summons and of the complaint to the person to be served by certified mail, return receipt requested. Where the Defendant is a natural person, the envelope containing the summons and complaint shall be marked "restricted delivery." Service by this

method shall be deemed complete as of the date of delivery as evidenced by the return receipt or by the returned envelope marked "Refused."

Whether or not the Appellees marked the envelope "restricted delivery" is not known, but it is clear by at least one of these summons that it was signed for by Teresa Kress on the 10th day of February 2008, nearly four weeks before the original summons was filed. Not only was the application for default judgment in error against the individual Defendant Mr. Kress, but was void since summons could not have been served minus twenty four days before the filing of the original complaint.

III

THE CIRCUIT COURT ERRED IN REFUSING TO SET ASIDE THE DEFAULT JUDGMENT AFTER REQUEST HAVING BEEN MADE TO DO SO

The Appellants would show this Court that the Circuit Court of Itawamba erred in its twice refusal to even allow the Appellants a hearing on their Motion To Set Aside Default Judgment. A discussion of these issues is clearly set forth in *Burkett v. Burkett,* 537 So.2d 443, which is cited and referenced in part:

> . . . Earl Burkett made his application for relief seven months and eight days following entry of the judgment against him. Rule 60 (b)(6) authorizes relief from judgment on grounds of "any other reason justifying relief" upon motion "made within a reasonable time."

The Court specifically found that this was not a motion required to be filed within six months as under Rule 60 (b)(1) (2) and (3) but under Rule 60 (b) (6):"any other reason justifying relief" upon motion "made within a reasonable time."

> This rule is designed for cases of extreme hardship not covered under any of the other sub sections . . ." We have referred to this catch all as a " grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the

preceding clauses, or when it is uncertain that one or more of the proceeding clauses affords relief." *Bryant, Inc. v. Walters,* 493 So. 2d 933, 939 (Miss. 1986)

Continuing, the Court indicated their adoption of a balancing test approach:

> Specifically, the Circuit Court is directed to consider (1) the nature and legitimacy of defendant's reasons for his default, i.e., whether the defendant has good cause for default, (2) whether the defendant in fact has a colorable defense to the merits of the claim, and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default judgment is set aside.

Under part one of the Court's balancing test approach "(1) the nature and legitimacy of defendant's reasons for his default, i.e., whether the defendant has good cause for default" one must view the affidavit of Teresa Kress, Vice President of Woodkrest Custom Homes who stated in part:

> Although we never came to any clear settlement of the matter I strongly stated we did want to settle the matter and did not want to go to court and we had people in place to complete the project to their satisfaction. They refused to allow us to do so but at no time did Mr. Wicker ever indicate that suit had been filed against us . . .
>
> We did not know that we had been sued until we were notified in the State of Tennessee about being sued on a default judgment and we contacted our Mississippi attorney Joe Morgan Wilson . . .
>
> We do not owe this money that was awarded in the default judgment and we need the opportunity to have it set aside so that we can defend ourselves and will happily pay anything that we properly and honorably owe the Coopers.
>
> (Tr 46)

A further affidavit of Appellant Robert Kress, Sr., stated in part:

> My wife spoke with him on several occasions and at no time were either of us informed that suit had been filed against us. We did not understand that suit had been filed and did not know that they were attempting to sue us for actual damages

> or punitive damages until we heard that a hearing that was set for May 4, 2006 had been cancelled. At that time we knew nothing of the hearing but the recording from Tom Wicker's office indicated that we would be notified of another hearing date and we received no further notification of any kind.
>
> We next heard that there were legal proceedings filed against us in Tennessee when we were served a summons that they were attempting to sue on a Default Judgment from Mississippi in the Circuit Court of Tennessee . . .
>
> We have had no opportunity to defend ourselves on this matter and have a meritorious defense and certainly do not owe Mr and Mrs Cooper but a few thousand dollars. We need the opportunity to have this default judgment set aside and to fully defend ourselves.
>
> (Tr 48-49)

Both the Appellant and his wife indicated that they did not owe the amount listed in the default judgment nor were either of them aware that they had been sued until they received notification from the Tennessee Courts.

Under part two of the Court's balancing test approach :(2) whether the defendant in fact has a colorable defense to the merits of the claim. The contents of the affidavits of both Teresa Kress and Robert Kress, Sr., allege that it is clear that they do have a colorable defense which they wish to put forth.

In part three of the Court's balancing test approach: (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default judgment is set aside. In none of the pleadings has the Appellee thus far set forth any reason that they would be prejudiced by giving the Appellants their day in court.

Any prejudice would have been more apparent if the Circuit Court had allowed a hearing on the merits of the matter, but the Court refused to even allow any hearing whatsoever. Quite strangely the entire record is devoid of one sentence of sworn testimony throughout the entire case.

This Court has held numerous times:

> Default judgements are not favored and relief should only be granted when proper grounds are shown. The determination whether to vacate such a judgment is addressed to the discretion of the trial court. While the trial court has considerable discretion, this discretion is neither 'unfettered' nor is it 'boundless'"
>
> *Chassaniol v. Bank of Kilmichael*, 626 So.2d 127, 135 (Miss. 1993)
> *McCain v. Dauzat*, 791 So.2d 839 (Miss. 1997)

Further *McCain* cites a much older Mississippi case as follows:

> . . . where there is reasonable doubt as to whether or not a default judgment should be vacated, the doubt should be resolved in favor of opening the judgment and hearing the case on its merits.
>
> *Southwestern Sur. Ins. Co.*, 113 Miss. at 199, So. at 146

In its Order of April 10, 2007, the Court simply said:

> On Motion of the Defendants to Set Aside Default Judgment, the Court being fully advised in the premises, and having reviewed the pleadings herein, finds that the Motion is not well taken and should be denied . . . (Tr 54)

The Court revealed no guidance to an appellate court in its very brief order that it had considered the three factors cited above by this Court to determine whether or not it was appropriate to set aside the default judgment. Consequently the Appellant's filed a motion requesting rehearing, and in the alternative a motion requesting findings of fact and rulings of law.

(Tr 56)

It is clear that the Court in its Findings of Facts and Rulings of Law touched upon in part portions one and two of the three prong test as set forth by this Court but at no time and in no way did they indicate any harm or prejudice which would be suffered by the Appellees if the default was set aside. The facts clearly show that the Appellees are a medical doctor and his wife who likely

would not be financially harmed or burdened by giving the Defendants an opportunity to defend themselves. The Court said in part:

> Aside from the lack of any evidence of good cause or even excusable neglect for the Defendant's failure to take action so as to protect their rights, the Court is aware that the Appellate Courts of this jurisdiction give great weight to whether or not a colorable defense has been presented. In this case, the Affidavits submitted by the Defendants simply do not address the very specific factual allegations contained in the Affidavit of James Cooper, nor do they set forth a colorable defense to the claims as set forth in the Complaint. The Defendants failed to provide this Court with a draft of any Answer and Defenses to the claims set forth in the Complaint, but simply requested another thirty (30) days within which to do so. (Tr 60)

The Appellants fail to find anywhere in the Supreme Court opinions that it is necessary for them to file an answer to a default judgment without leave of the Court to do so. The Court not only did not give them a hearing but after requesting a rehearing denied it, and they could have clearly testified to a colorable defense if they had been allowed to speak. Since no hearing was allowed after two requests the Appellants were without remedy but to proceed to this Court.

IV

IF DEFAULT JUDGMENT WAS PROPERLY NOT SET ASIDE THE CIRCUIT COURT ERRED IN FAILING TO GIVE A HEARING ON THE ISSUE OF DAMAGES

The Appellants would assume solely for the purposes of argument that the trial court was proper in refusing to set aside the default judgment. In the case of *Greater Canton Ford Mercury, Inc. V. Pearl Lee Lane*, 2008-MS-1017.540, decided on October 16, 2008, stated:

The Appellate Court must review the damages award by looking to the "facts of each case."

> Pursuant to Rule 55 (b) of the Mississippi Rules of Civil Procedure, the trial court may hold a hearing "to determine the amount of damages" to award in a default judgment . . . If the damages are unliquidated, the Court must hold a hearing on the

record. *Capitol One Services, Inc. v. Rawls, 904 So.2d 1010, 1018 (Miss. 2004)*

Journey v. Long, 585 So.2d 1268, 1272 (Miss. 1991) shows:

(holding the trial court must conduct a hearing on the record where the trial court held a hearing that was not on the record.) This Court has previously warned plaintiffs in **default-judgment** cases "that damages awards *must* be supported by evidence, and such evidence *must* be reflected in the record if it is to be affirmed on appeal.

Rich ex rel. Brown v. Nevels, 578 So. 2d 609, 617 (Miss. 1991) showed:

(holding the trial court must conduct a hearing on the record where the trial court held a hearing that was not on the record). In the context of default-judgment cases, this Court has held that the record must also "reflect how [the] damages are calculated.

Bailey v. Beard, 813 So. 2d 682, 686/87 (Miss. 2002):

(remanding for a "proper damages hearing" so the record would reflect how the trial court calculated actual and punitive damages).

The Appellee in that case:

also argues that *Greater Canton* failed to show the trial court that she was not entitled to the awarded damages. The Court does not find merit in Lane's argument, since *Greater Canton* was not present at the damages hearing to submit evidence of damages. Furthermore, the burden of proof was upon Lane to show the trial court she was entitled to a certain amount of damages.

Further this Court stated:

The language in the default judgment verifies that a hearing was, in fact, held to determine the amount of unliquidated damages. However, no record exists of the hearing, and the default judgment is devoid of any explanation concerning the damages.

This Court finally held:

> Because this Court has no evidence before it to judge whether the awarded damages are reasonable and supported by the evidence, we vacate the judgment as to damages and remand for a damages hearing on the record.

The facts in *Greater Canton* are quite similar to this in that there was no hearing held on the issue of damages before the Circuit Court of Itawamba County, Mississippi wherefore this case must be, if on no other grounds, remanded for a hearing on the issue of damages. Fortunately, or unfortunately as the case may be, the attorney who successfully argued this matter in *Greater Canton* is representing the other side of the issue in the case before the Court. Appellants believe that he will find it very difficult to argue against himself in a matter that has been decided by this Court such a short time ago that the ink is barely dry upon its written opinion.

CONCLUSION

First of all the Appellees failed in their attempt to secure proper process upon the Appellants, or at least some of them and applied for a default judgment either before the thirty days had passed or without proper legal process at all. Secondly, even assuming that they were not in error in that regard, the default judgment should have been set aside due to the Appellees' failure to overcome the three prong test as earlier set forth by this Court in numerous decisions.

Finally, even if the Appellees were able to successfully overcome all other arguments, as a matter of law the case must be reversed and remanded to the trial courts on the issue of damages as clearly set forth in the October 16, 2008, decision of *Greater Canton Ford Mercury, Inc. V. Pearl Lee Lane.* This judgment should either be set aside and be re-filed, since proper process was not secured within 120 days as provided under Rule 4 or the Appellants be allowed to file an answer and defend the suit, or lastly must be granted a hearing on the record on the issue of damages.

Respectfully submitted this the 11th day of November, 2008.

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CERTIFICATE OF MAILING

I, Joe Morgan Wilson, Attorney for Appellant Robert Kress, Sr., certify that I have this day mailed by United States Mail, postage pre paid, the original and three copies of the forgoing attached brief for Appellant to the following:

Hon. Betty Sephton
Supreme Court Clerk
P. O. Box 117
Jackson, MS 39205

This the 11th day of November, 2008.

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CERTIFICATE OF SERVICE

I, Joe Morgan Wilson, attorney for Appellant, Robert Kress, Sr., certify that I have this day mailed by first class mail, postage prepaid, a true and correct copy of the foregoing and attached Brief For Appellant.

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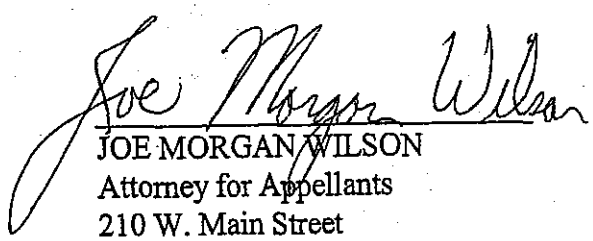
This the 11th day of November, 2008.



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