

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2009-CP-00492**

**NATIONWIDE RECOVERY SERVICE, INC.**

**APPELLEE-PLAINTIFF**

**VS.**

**JOSEPH DAVIS, JR.**

**APPELLANT- DEFENDANT**

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**Appeal from the Circuit Court of Harrison County Mississippi, Second Judicial District  
Honorable Lisa P. Dodson**

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**CERTIFICATE OF INTERESTED PERSONS**

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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

1. Nationwide Recovery Service, Inc., Appellee-Plaintiff
2. Jason Graeber, Attorney for Appellee-Plaintiff
3. Joseph Davis, Jr., Pro Se Appellant



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**JASON GRAEBER**  
Counsel of Record for Appellee

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**STATEMENT REGARDING ORAL ARGUMENT**

Appellee, Nationwide Recovery Services, Inc., ("Nationwide"), respectfully suggests that oral arguments will not be of assistance to the Court in resolving the issue presented. Appellant, Joseph Davis, Jr., ("Davis") was unable to articulate the issues in his brief, and given the opportunity for oral argument, would most likely not be able to limit his comments to the issue before the Court.

**STATEMENT OF THE ISSUES**

- I. Is Davis entitled to relief from judgment pursuant to the Mississippi Rules of Civil Procedure, Rule 60(b)?

**STATEMENT OF THE CASE**

Appellee, Nationwide filed suit against Appellant, Davis in the County Court of Harrison County, Mississippi, Second Judicial District, to collect a past due balance on a visa credit card with Bank of America. R.12 The account was assigned to Nationwide. R.12 A judgment was entered against Davis on February 24, 1997, and no appeal was taken. R.12

On September 5, 1997, Davis filed a Rule 60 motion for relief from the judgment. R.13

The County Court denied the Rule 60 motion and Davis appealed to the Circuit Court of Harrison County, Mississippi, Second Judicial District. R.13 Nationwide moved to dismiss Davis' appeal as untimely filed and the Circuit Court granted the motion on December 9, 1999. R.13 Davis then appealed to the Mississippi Supreme Court. R.13 On March 29, 2001, the Mississippi Supreme Court reversed the Circuit Court's decision and enabled Davis to pursue his appeal of the County Court's denial of his Rule 60 motion. R.14 On March 3, 2009, the Circuit Court affirmed the Order filed on February 8, 1999, denying the Rule 60(b) Motion of Davis. R. 228.

### **SUMMARY OF THE ARGUMENT**

A. Davis is not entitled to relief under the Mississippi Rules of Civil Procedure, Rule 60(b) as he is merely attempting to relitigate the 1997 County Court judgment.

### **ARGUMENT**

#### **Standard of Review**

When reviewing a grant or denial of a Rule 60(b) motion, this Court will only reverse the ruling upon the finding of abuse of discretion. *Briney v. U.S. Fid. & Guar. Co.*, 714 So. 2d 962, 966 (Miss. 1998); *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984). "Generally, consideration of a Rule 60(b) motion requires that a 'balance . . . be struck between granting a litigant a hearing on the merits with the need and desire to achieve finality.'" *Id.* at 221. *See also Pointer v. Huffman*, 509 So. 2d 870, 876 (Miss. 1987); *Guaranty Nat. Ins. Co. v. Pittman*, 501 So. 2d 377, 388 (Miss. 1987). Rule 60(b) motions should be denied where they are merely an attempt to relitigate the case. *Id.* (citing *Mastini v. Am. Tel. & Tel. Co.*, 369 F.2d 378 (2d Cir. 1966)).

#### **Issue No. 1:**

**Is the Davis entitled to relief from judgment pursuant to the Mississippi Rules of**

### **Civil Procedure, Rule 60(b)?**

On September 5, 1997, Davis filed motions with the County Court in Harrison County for relief from judgment under Rule 60(a) and Rule 60(b). R. 13 The County Court denied both motions and Davis appealed. R. 13 The matter eventually made its way to the Mississippi Supreme Court and the Mississippi Supreme Court held that the Rule 60(a) motion was never ruled upon, but the merits of the Rule 60(a) motion were incorporated into the Rule 60(b) motion. R. 12 The Mississippi Supreme Court focused its remand to the issues raised in Davis' motion, specifically Rule 60(b). R. 13 On March 3, 2009, the Circuit Court affirmed the Order filed on February 8, 1999, denying the Rule 60(b) Motion of Davis. R. 228. Davis filed an appellate brief on or about January 23, 2010. Davis' argument for reversing the Circuit Courts Order is as follows:

"The Attorney for the Plaintiff, R. Scott Wells, commingled the two- (2) files – D2402-96-00336 and D2402-94-00570 to intentionally confuse the Court, cause hardship on the Appellant and to reenter the Appellant's case on the judgment rolls. The Appellant's Case was not on the rolls due to the time frame having passed from the Court Hearing on February 24, 1995 and the Court Hearing on February 24, 1997 (which ironically is not on the Court Docket). This is in error and grounds for Dismissal." *Appellant's Brief, Exhibit "D" Tab 6, page 13.*

"The Debt has been satisfied (TR 260). An investigation was completed by Bank of America, on August 11, 1997 (TR 70) Resulting in the Removal of the Judgment from Equifax." *Appellant's Brief, Exhibit "D", Tab 6, page 13.*

Davis' assertions that Nationwide's former attorney commingled two files to confuse the Court and cause hardship on Davis are completely unsupported and without merit. As Judge Dodson makes clear in her opinion, Davis' multiple allegations of perceived errors, problems and misdeeds have nothing to do with the appeal of the ruling on his Rule 60 Motion. R. 219, 221.

In addition to bald assertions that have nothing to do with the appeal of the ruling on his Rule 60 Motion, Davis' brief does not propose the issues to be presented and does not cite any

authority for his arguments; therefore, his arguments should be disregarded and/or waived. *Varvaris v. Perreault*, 813 So. 2d 750, 753 (Miss App. 2001) (citing *Hoops v. State*, 681 So. 2d 521, 535 (Miss. 1996) (citing *Pate v. State*, 419 So. 2d 1324, 1325-26 (Miss. 1982))). Mississippi Rules of Appellate Procedure 28(a)(1)-(6) gives the requirements for the argument in an appellate brief:

The argument shall contain the contentions of appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on.

The Rule 60 motion filed by Davis on September 5, 1997 invokes paragraphs 1, 2, 3, 4, 5 and 6 of Rule 60(b). However, the only justification for relief stated with particularity, as required by Rule 7(b)(1) of the Mississippi Rules of Civil Procedure, seems to be Rule 60(b)(5). Davis' drafting style, in addition to being in conflict with the Mississippi Rules of Civil Procedure, has made it difficult if not impossible for Nationwide to glean the fundamentals of Davis' appeal. (see Judge Dodson opinion R. 221). However, on the face of his motion, Davis prayed for relief based on his belief that the judgment was satisfied, which seemingly invokes Rule 60(b)(5).

Rules 60(b)(5) of the Mississippi Rules of Civil Procedure states:

(b) On 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:

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

Davis states in his brief filed on or about November 4, 1999 that "The Debt has been satisfied. I, Joseph Davis, Jr. did pay to Coldata \$860.02." *Appellant's Brief, Exhibit "D" Tab 6, page 10*. Davis raised this exact issue before the County Court in 1997.

In the County Court trial Davis claimed that he paid Coldata \$860, but was unable to produce any evidence that (1) Coldata was an agent for the creditor (2) the alleged settlement was authorized by the creditor or (3) the \$860.02 was actually paid by Davis. *Opinion by Judge Gaston H. Hewes, Jr* R. 167. *Also see R. 218.* Davis was given every opportunity to prove he satisfied the Nationwide debt at the County Court level. Davis was unable to prove the Nationwide debt was satisfied, and therefore, the County Court held that Davis owed the debt and a judgment was entered against him. Davis' Rule 60(b) motion is merely an attempt to relitigate the issue of whether Davis satisfied the debt with Nationwide. Judge Hewes' opinion clearly demonstrates that this issue was raised at trial. Judge Dodson properly affirmed the denial of Davis' Rule 60(b) Motion. Rule 60(b) is not an escape hatch for litigants who had procedural opportunities afforded under other rules and who without cause failed to pursue those procedural remedies. *King v. King*, 556 So. 2d 716, 722 (Miss. 1990) (Robertson, J., concurring). "Rule 60(b) is designed for the extraordinary, not the common place." *Id.* *One (1) Chevrolet Nova Auto.*, 573 So. 2d 787, 790 (Miss. 1990). Rule 60(b) motions should be denied when they are merely an attempt to relitigate a case. *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984).

### CONCLUSION

Davis is not entitled to relief under Rule 60(b) of the Mississippi Rules of Civil Procedure, as he is merely attempting to relitigate the County Court judgment. At trial, Davis could not prove the debt with Nationwide was satisfied; and therefore, a judgment was entered against him. Rule 60(b) motions should be denied when they are an attempt to relitigate a case. Further, Davis' brief does not present the issues to be considered and does not cite any authority for his arguments; and therefore, his arguments should be disregarded and/or waived. The Circuit Court did not abuse its discretion and the Order dated March 3, 2009 should be affirmed.

RESPECTFULLY SUBMITTED, this the 17<sup>th</sup> day of February, 2010.

SHEEHAN LAW FIRM  
429 Porter Avenue  
Ocean Springs, MS 39564  
Telephone: (228) 875-0572  
Facsimile: (228) 875-0895

By: \_\_\_\_\_

JASON GRAEBER

Mississippi Bar No.: [REDACTED]

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have mailed a true and correct copy of the above and foregoing appellee brief via United States Mail Service, postage prepaid, to the following:

Joseph Davis, Jr., Pro Se  
346 Franks Drive  
Biloxi, MS 39531

Honorable Lisa P. Dodson  
Circuit Court Judge  
P.O. Box 1461  
Gulfport, MS 39502

SO CERTIFIED, this the 17<sup>th</sup> day of February, 2010.

  
\_\_\_\_\_  
JASON GRAEBER