

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2010-CA-01760

SHIRLEY ALSTON, et al.

APPELLANTS

VS.

JUSTIN P. POPE and
T.K. STANLEY, INC.

APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF WAYNE COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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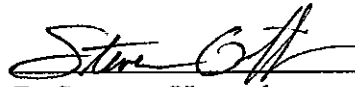
APPELLEE

CERTIFICATE 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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Shirley Alston – Appellant/Plaintiff.
2. Robert Alston – Appellant/Plaintiff.
3. Stephen J. Maggio, Esq. – Attorney for Appellants/Plaintiffs.
4. Justin P. Pope – Appellee/Defendant.
5. T.K. Stanley, Inc. – Appellee/Defendant.
6. B. Stevens Hazard, Esq., and Steven J. Griffin, Esq., of Daniel Coker Horton & Bell, P.A. – Attorneys for Appellees/Defendants.
7. Honorable Robert W. Bailey – Wayne County Circuit Court Judge.

Respectfully submitted, this the 20th day of May, 2011.

A handwritten signature in black ink, appearing to read "Steven J. Griffin", is written over a horizontal line.

B. Stevens Hazard
Steven J. Griffin
Attorneys of Record for Appellees
Justin Pope and T.K. Stanley, Inc.

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STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that oral argument is unnecessary because the facts and legal arguments are adequately presented in the Appellees' brief and the Appellate Record. Accordingly, this Court's decisional process will not be aided by oral argument. However, should this Court so require, Appellee is available for oral argument.

I. STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion when it denied Plaintiffs' motion for relief from judgment by finding that the motion was untimely under Rule 60(b) and that, regardless of the motion's timeliness, the court's judgment was valid.

II. STATEMENT OF THE CASE

A. Nature of the Case

This is a personal injury action based on common law negligence. (R. 4-8.)¹ Defendants-Appellees, Justin P. Pope and T.K. Stanley, Inc., moved to dismiss on the basis of *forum non conveniens*, (R. 55-57) and the trial court entered an Order and Final Judgment dismissing the matter. (R. 82-85). Nearly two years later, Plaintiffs-Appellants, Shirley and Robert Alston, filed a motion seeking relief from the aforementioned judgment, which the trial court denied. (R. 86-88). Plaintiffs-Appellants now appeal.

B. Course of Proceedings and Disposition in the Court Below

Plaintiffs-Appellants, Shirley and Robert Alston (hereinafter referred to as "Plaintiffs"), filed their Complaint against Defendants-Appellees, Justin P. Pope and T.K. Stanley, Inc. (hereinafter referred to as "Defendants"), in the Circuit Court of Wayne County, Mississippi, on November 27, 2007. (R. 4-8). Plaintiffs charged Defendants with negligence in the operation of a motor vehicle and causing a collision that occurred in Northport, Alabama, on December 12, 2005. Defendants filed their motion to dismiss

¹ Citations to "R." refer to page numbers in the Appellate Record.

based on the doctrine of *forum non conveniens* on January 25, 2008, (R. 55-57) and Plaintiffs filed their response on October 13, 2008. (R. 76-81). The Circuit Court of Wayne County, Mississippi, granted Defendants' motion to dismiss and entered its Order and Final Judgment on October 28, 2008. (R. 82-85). Plaintiffs filed their motion for relief from judgment on May 12, 2010. (R. 86-88). Defendants filed their response to Plaintiff's motion on May 24, 2010. (R. 91-96). The trial court denied Plaintiffs' motion and entered its Judgment Denying Plaintiffs' Motion for Relief from Judgment on September 30, 2010. (R. 98-120). Plaintiffs then filed their notice of appeal on October 29, 2010. (R. 135-36).

C. Summary of the Facts

This cause of action arises out of a motor vehicle accident that occurred on or about December 12, 2005, in Northport, Tuscaloosa County, Alabama. Plaintiffs filed suit in Wayne County, Mississippi, where Defendants resided, on November 27, 2007. (R. 4-8). Although the case was filed in Mississippi, Alabama has a two-year statute of limitations for personal injuries. Under MISSISSIPPI CODE ANNOTATED § 15-1-65, when a cause of action accrues in another state and the laws of the state in which the accident occurs would prohibit the suit as time barred, the action would be time barred in Mississippi, as well. Thus, Plaintiffs filed their Complaint in Wayne County Circuit Court just fifteen days prior to the running of the applicable statute of limitations.

Defendants on January 25, 2008, filed a motion to dismiss on the basis of *forum non conveniens* because the accident occurred in Alabama, Plaintiffs were resident citizens of

Alabama, the Complaint itself and recovery sought was based on the application of Alabama law, and virtually all of the witnesses to the accident were located in Alabama, including the other individuals in the Alston vehicle, members of the responding law enforcement agency, and independent witnesses. (R. 55-57). On October 28, 2008, the trial court granted Defendants' motion to dismiss, finding that every element of the test for such a dismissal, as outlined in case law and by statute, favored Defendants. (R. 82-85).

Approximately one year after the case had been dismissed in Mississippi, the Plaintiffs, on October 15, 2009, re-filed their Complaint in the Circuit Court of Tuscaloosa County, Alabama. Then, after Defendants asserted the statute of limitations defense and moved for summary judgment in the Alabama case,² Plaintiffs on May 12, 2010, filed their Motion for Relief from Judgment with the Circuit Court of Wayne County, Mississippi. (R. 86-89). The trial court denied Plaintiffs' motion for relief from judgment, finding that Plaintiffs' motion was untimely. (R. 98-103). The trial court further held that, even assuming the motion was timely, the trial court's judgment of dismissal on the basis of *forum non conveniens* was not void as a matter of law. (R. 103-120)

² The Circuit Court of Tuscaloosa County, Alabama, granted Defendants' motion for summary judgment on Plaintiffs' negligence claims on July 12, 2010, due to the running of that state's two-year statute of limitations.

III. SUMMARY OF THE ARGUMENT

The Circuit Court of Wayne County on October 28, 2008, entered its Order and Final Judgment dismissing Plaintiffs' negligence claims under the doctrine of *forum non conveniens*. As shown in the exhibits to the Court's order, Defendants submitted a copy of the proposed final judgment to Plaintiffs for review prior to the entry of the same by the court. Plaintiffs did not object to the same or ever respond. (R. 116-117). Plaintiffs did not challenge or raise any objections with the court's judgment until nearly two years later when they filed their motion for relief from judgment, claiming the judgment was void because it failed to properly follow statutory requirements for dismissal on such grounds. The Plaintiffs presented no excuse for the delay in filing their Rule 60(b) motion, and this unnecessary delay has unfairly prejudiced Defendants.

Rule 60(b) of the Mississippi Rules of Civil Procedure provides that such motions must be filed "within a reasonable time." The trial court, acting fully within its discretion, properly found that Plaintiffs' Rule 60(b) motion was untimely and that the Plaintiffs' delay was unnecessary. Plaintiffs did not address the trial court's ruling on this issue in their appellate brief, even though that was the primary basis on which the motion was denied. Accordingly, the ruling of the trial court dismissing Plaintiffs' motion for relief from judgment on the grounds of untimeliness should be affirmed.

Further, regardless of whether the Plaintiffs' Rule 60(b) motion was timely filed, the trial court properly found that its prior Order and Final Judgment was not void. The Mississippi statute providing for dismissal of claims based on *forum non conveniens*

provides that a condition of such dismissal is that the defendant agrees to waive the assertion of the statute of limitations defense upon the plaintiff's refile in the more convenient jurisdiction, subject to the tolling provisions of the statute. *See* MISS. CODE ANN. § 11-11-3(4). That provision tolls the statute of limitations from the time the suit was filed in Mississippi until the time the suit is dismissed. The purpose of the provision is to protect plaintiffs who timely file in one jurisdiction, but by the time the case is dismissed, the statute of limitations has run in the more convenient jurisdiction.

In this case, the subject accident occurred in Alabama on December 12, 2005, and suit was filed in Mississippi on November 27, 2007. Although Mississippi has a three-year statute of limitations for negligence claims, Alabama has a two-year statute of limitations for negligence claims arising out of automobile accidents. Thus, when Plaintiffs filed suit, they had approximately fifteen days until the running of the two-year statute of limitations under Alabama law. When the suit was dismissed on October 28, 2008, Plaintiffs, according to the tolling provision of § 11-11-3(4)(b) had fifteen days to re-file suit in Alabama before the statute of limitations would have run. They instead waited approximately one year to re-file. When Defendants later raised the statute of limitations defense in the Alabama action, Plaintiffs filed their motion for relief from judgment with the Wayne County Circuit Court, claiming the court's Order and Final Judgment was void.

The Order and Final Judgment, drafted and submitted to the Court by counsel for the Defendants, explicitly stated that Defendants waived the right to assert a statute of

limitations defense upon the refiling of the action in Alabama, pursuant to and as defined by MISS. CODE ANN. § 11-11-3(4)(b). Defendants clearly stipulated to the waiver of the aforementioned defense. However, as mentioned above, Plaintiffs did not re-file their action within the fifteen-day window before the statute of limitations ran, and, therefore, did not utilize the protection offered by the Defendants' stipulation and the provisions of § 11-11-3(4)(b). The trial court clearly did not abuse its discretion in finding that its order dismissing the Mississippi case under the doctrine of *forum non conveniens* was valid, and its decision regarding the same should be affirmed.

IV. THE ARGUMENT

A. Standard of Review

An order denying a motion for relief from judgment pursuant to Rule 60(b) is reviewed under an abuse-of-discretion standard. *Thomas v. Warden*, 999 So. 2d 842, 848 (Miss. 2008); *Montgomery v. Montgomery*, 759 So. 2d 1238, 1240 (Miss. 2000); *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984).

B. Trial Court Properly Denied Plaintiffs' Motion for Relief from Judgment Due to the Motion's Untimeliness

The trial court denied Plaintiffs' motion for relief from judgment due to the motion's untimeliness. Plaintiffs' failed to address this finding on the trial court on appeal, and it is assumed that Plaintiffs find no error in that regard. As such, the trial court's denial of Plaintiffs' motion for relief from judgment should be affirmed. However, out of an abundance of caution, Defendants will address why the trial court's ruling on this

issue was proper.

Rule 60(b) of the Mississippi Rules of Civil Procedure provides parties with a means to seek relief from a judgment or order:

(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc.

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:

...

(4) the judgment is void;

...

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this sub-division does not affect the finality of a judgment or suspend its operation. ... The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

MISS. R. CIV. P. 60(b) (Emphasis added). Plaintiffs alleged in their motion for relief from judgment that the trial court's Order and Final Judgment entered on October 28, 2008, was void because Defendants failed to stipulate to a waiver of the statute of limitations defense in compliance with Mississippi's statutory requirements for dismissal on the grounds of *forum non conveniens*, and because the judgment stated that the action should be re-filed in a specific forum in another state. (R. 86-89).

Pursuant to Rule 60(b), motions for relief based upon fraud, misrepresentation, misconduct, accident or mistake, or newly discovered evidence must be made within six

months after the judgment in question was entered. Motions relying on all other grounds provided by the Rule, including motions based upon Rule 60(b)(4), must be made “within a reasonable time.” *Gambrell v. Gambrell*, 644 So. 2d 435, 439 (Miss. 1994) (finding that a challenge under Rule 60(b)(4) to a divorce decree seven months later was not within a reasonable time). What constitutes a reasonable time period is determined on a case-by-case basis. *Jenkins v. Jenkins*, 757 So. 2d 339, 344 (Miss. Ct. App. 2000). The circuit court must consider whether the opposing party has been prejudiced by the delay in seeking relief and whether there is good reason for the defaulting party’s failure to take appropriate actions sooner. *Id.* The Mississippi Supreme Court has held that a Rule 60(b) motion filed approximately two years after the final judgment was not “within a reasonable time,” and, therefore, untimely. *See Hinds County Bd. of Supervisors v. Common Cause of Mississippi*, 551 So. 2d 107, 119 (Miss. 1989) (finding a motion seeking to vacate an allegedly void judgment under Rule 60(b) was untimely where the party had waited more than two years before seeking such relief).

In the case *sub judice* the Plaintiffs did not file their Rule 60(b) motion until May 12, 2010, nearly two years after the trial court entered the Order and Final Judgment. (R. 86-89). That unnecessary passage of time unfairly prejudiced the Defendants’ ability to present reliable witness testimony to defend against Plaintiffs’ claims. The accident occurred on December 12, 2005 – now approximately five and a half years ago. The Mississippi Supreme Court has opined that “it requires no great insight to know that a year’s postponement of a trial which will turn on witnesses’ memories regarding a split

second event – a motor vehicle accident – will often substantially prejudice one or both of the parties in terms of the common human phenomenon of loss of memory of specific events over time.” *Guaranty Nat’l Ins. Co. v. Pittman*, 501 So. 2d 377, 388 (Miss. 1987). The unnecessary passage of time also will make it much harder for Defendants to locate all necessary witnesses and pertinent documents in order to effectively present their case.

The trial court properly found that Plaintiffs failed to present any evidence of good cause for their delay in filing their Rule 60(b) motion. As previously mentioned, the proposed order was presented to Plaintiffs prior to entry by the court. However, Plaintiffs did not respond. (R. 116-117). Plaintiffs had other remedies available following the issuance of the trial court’s 2008 order dismissing the case, including a motion for reconsideration or filing an appeal. Instead, Plaintiffs waited nearly two years to file their motion for relief from judgment. As noted by the Mississippi Supreme Court, Rule 60(b) is an extraordinary remedy and “is not an escape hatch for lawyers and litigants who had procedural opportunities afforded under other rules and who without cause failed to pursue those procedural remedies.” *Kirk v. Pope*, 973 So. 2d 981, 987 (Miss. 2007), citing *Bruce v. Bruce*, 587 So. 2d 898, 904 (Miss. 1991).

The trial court was clearly within its discretion by finding that Plaintiffs’ motion for relief from judgment was untimely because it was not filed “within a reasonable time” after the entry of the trial court’s 2008 order dismissing the case under the doctrine of *forum non conveniens*. The trial court explicitly found that Plaintiffs presented no evidence of good cause for waiting nearly two years to file their 60(b) motion. It is quite

telling that the trial court denied Plaintiffs' motion primarily on the basis of untimeliness, yet Plaintiffs do not even address that issue in their appellate brief.

The trial court's denial of the Plaintiffs' motion for relief from judgment on the basis that it was untimely was clearly not an abuse of discretion, and the decision of the trial court should be affirmed.

C. Regardless of Timeliness, Trial Court's Order and Final Judgment is Valid

Plaintiffs contend that the trial court erred by denying its motion for relief from judgment because Defendants never filed a stipulation waiving their right to assert the statute of limitations defense pursuant to state statutory law, and, thus, the trial court's Order and Final Judgment is void. This is totally without merit.

The applicable state statutory provision, MISS. CODE ANN. § 11-11-3(4)(b), provides:

A court may not dismiss a claim under this subsection until the defendant files with the court or with the clerk of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff, all the defendants waive the right to assert a statute of limitations defense in all other states of the United States in which the claim was not barred by limitations at the time the claim was filed in this state as necessary to effect a tolling of the limitations periods in those states beginning on the date the claim was filed in this state and ending on the date the claim is dismissed.

(Emphasis added).

In defining a "void" judgment under Rule 60(b), the Mississippi Supreme Court has repeated the federal rule, which states, "a judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner

inconsistent with due process of law.” *Overby v. Murray*, 569 So. 2d 303, 306 (Miss. 1990), citing *Bryant, Inc. v. Walters*, 493 So. 2d 933, 938 (Miss. 1986). Any failure by a court in literally complying with the technical requirements of a statute in issuing a judgment must be “so defective as to render the judgment which was rendered an absolute nullity,” and such findings are “extremely rare.” *Walters*, 493 So. 2d 933, 938-39 (finding that the plaintiff’s failure to attach a complete itemized account with the complaint as required under law did not render the court’s default judgment void).

The circumstances of the instant case fit none of the instances where a court could find a prior judgment void. It is undisputed that the trial court had proper subject matter and personal jurisdiction over the instant action. There is also no evidence that the trial court acted in a manner inconsistent with due process of law.

The Plaintiffs’ main contention is that the Defendants did not file a stipulation waiving their right to assert a statute of limitations defense upon the subsequent refiling of the action in the more convenient forum in Alabama. Despite Plaintiffs’ assertion that Defendants never stipulated to waiving the statute of limitations defense upon refiling in the more convenient forum, the trial court’s Order and Final Judgment dismissing the complaint – which was drafted and presented to the trial court by counsel for Defendants – explicitly states, in pertinent part:

Further, the Court finds that since plaintiffs’ complaint was filed in this Court on November 27, 2007, before the expiration of the applicable Alabama two year statute of limitations, **defendants waive the right to assert a statute of limitations defense upon the refiling of the action in the Circuit Court of Tuscaloosa County, Alabama,**

pursuant to and as defined by Miss. Code Ann. § 11-11-3(4)(b).

(R. 84) (Emphasis added). The written judgment of the trial court clearly required Defendants to waive the statute of limitations defense according to the applicable statute. Plaintiffs' assertion that the judgment of the trial court is void because Defendants did not file a separate written stipulation is totally without merit.³

Further, the required stipulation only serves to waive the statute of limitations defense for the time remaining before the statute ran when the suit was initially filed. Under § 11-11-3(4)(b), the limitations period is tolled beginning on the date the claim was originally filed in the inconvenient forum, and it ends on the date the claim is dismissed. Because the subject accident occurred on December 12, 2005, Plaintiffs had just fifteen days before the two-year limitations period ran under Alabama law when they filed their suit on November 27, 2007, against Defendants in Wayne County Circuit Court. Pursuant to § 11-11-3(4)(b), the limitations period was thus tolled beginning on the date the action was filed in Mississippi until it was dismissed by the Order and Final Judgment of the trial court on October 28, 2008. Under the statute, the Plaintiffs therefore had fifteen days from the date of dismissal to re-file their action in the more convenient forum. However,

³ Plaintiffs cite the Georgia case of *Hewitt v. Raytheon Aircraft Co.*, 614 S.E. 2d 875 (Ga. App. 2005), which states that the requirement that a defendant's written stipulation waiving the statute of limitations defense in accordance with the *forum non conveniens* statute is mandatory. In that case, the Georgia trial court's order dismissing the case made no mention of such a waiver and there was no other indication the Defendants had so stipulated. In the case *sub judice*, it is undisputed that the trial court's order – prepared and presented to the court by Defendants – specifically stated that Defendants waived their right to assert the statute of limitations defense pursuant to and as defined by Miss. Code Ann. § 11-11-3(4)(b).

Plaintiffs did not re-file their suit in Alabama until October 15, 2009, nearly one year later.

The statutory requirement that the party moving for dismissal on the basis of *forum non conveniens* stipulate to a waiver of the statute of limitations defense exists merely as a safeguard for plaintiffs who timely filed their original complaint in one jurisdiction but would otherwise be barred from subsequently filing in the more convenient jurisdiction due to the running of the statute of limitations. Because the Plaintiffs failed to re-file the action in Alabama within the fifteen-day limitations window ending on approximately November 12, 2008, the Defendants never had an opportunity to raise such a defense. Had the Plaintiffs timely re-filed their complaint in the more convenient forum, Defendants would have been prevented from raising the statute of limitations defense. However, Plaintiffs did not timely re-file the action within the fifteen-day period following the tolling of the statute, and the safeguard provided to the Plaintiffs by § 11-11-3(4)(b) was never utilized. Therefore, the Order and Final Judgment in fact did not deny Plaintiffs in any way the due process of law. As such, the judgment is not void as a matter of law and the trial court did not abuse its discretion in denying Plaintiffs' motion seeking relief from the same.

Plaintiffs also take issue with the language of the Order and Final Judgment which directed them to re-file their complaint in Tuscaloosa County Circuit Court. As required by § 11-11-3(4)(a), Defendant was required to show that in the interest of justice and for the convenience of the parties and witnesses that this action would be more properly heard in a forum outside this state in order to succeed on its motion to dismiss for *forum non conveniens*. Defendants argued and the trial court agreed that Tuscaloosa County Circuit

Court would be the most convenient forum. At the hearing on Defendants' motion to dismiss, Plaintiffs' counsel essentially agreed that Alabama would be a more convenient forum and had no objections to refileing the action there provided Defendants waive the statute of limitations defense and accept service of process. (R. 131).

Counsel for Defendants then sent Plaintiffs' counsel a copy of the proposed order dismissing the case for approval before presenting it to the trial court. (R. 116-117). Plaintiffs' counsel having raised no objections whatsoever, Defendants presented the order of dismissal to the trial court for execution and filing. (R. 119). Plaintiffs did not challenge or raise any objections to the language of the order until nearly two years later when they filed their motion for relief from judgment. As mentioned earlier, Plaintiffs could have filed a motion for reconsideration, an appeal, or any other available method to timely challenge the order, but they chose not to do so until nearly two years later. Plaintiffs' assertion that the trial court's specific reference to the Tuscaloosa County Circuit Court renders the 2008 Order and Final Judgment void is, accordingly, totally without merit.

V. CONCLUSION

The trial court did not abuse its discretion when it denied Plaintiffs' motion for relief from judgment due to untimeliness. Further, the trial court properly found that, regardless of timeliness, the Order and Final Judgment entered in 2008 was not void as a matter of law. As such, the decision of the trial court denying Plaintiffs' motion for relief from judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I, Steven J. Griffin, of counsel for Justin P. Pope and T.K. Stanley, Inc., do hereby certify that I have this day served by United States mail a true and correct copy of the above and foregoing pleading to:

Hon. Robert W. Bailey
Circuit Court Judge
Post Office Box 1167
Meridian, MS 39302
Trial Court Judge

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THIS, the 20th day of May, 2011.



STEVEN J. GRIFFIN