IN THE SUPREME COURT OF MISSISSIPPI

SHIRLEY ALSTON, et al. — APPELLANT

v. — CAUSE NO. 2010 CA 01760

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

BRIEF OF APPELLANTS
SHIRLEY and ROBERT ALSTON

APPEAL FROM JUDGMENT ENTERED ON SEPTEMBER 30, 2010
BY THE CIRCUIT COURT OF WAYNE COUNTY, MISSISSIPPI

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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 this Court may evaluate possible disqualification or recusal.

1. Shirley Alston- Plaintiff below and Appellant herein.

2. Robert Alston- Plaintiff below and Appellant herein.

3. Stephen J. Maggio,- Attorney for Shirley and Robert Alston.

4. Justin P. Pope - Defendant below and Appellee herein.

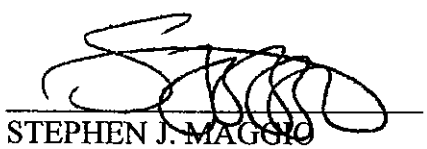
5. T. K. Stanley, Inc.- Defendant below and Appellee herein.

6. M. Garner Berry- Attorney for defendants

7. B. Stevens Hazard- Attorney for defendants.

8. Daniel Cocker Horton and Bell, PA- Firm representing defendants.

Dated: April 22, 2011.



STEPHEN J. MAGGIO
MSB NO. [redacted]

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STATEMENT OF ISSUES

Whether the Circuit of Wayne County exceeded its authority and improperly dismissed the Plaintiffs' complaint for *forum non conveniens* when the defendants had failed to comply with the prerequisites of Miss. Code Ann. § 11-11-3(4)(b) (1972) and whether the order of dismissal was void as it ordered the Plaintiff's matter to be filed in Tuscaloosa County, Alabama?

STATEMENT OF CASE

On November 27, 2007, Shirley Alston and her husband, Robert Alston, brought suit against a Mississippi resident, Justin P. Pope and his employer, T.K. Stanley, Inc., for injuries suffered by Shirley in automobile accident which had occurred Tuscaloosa County, Alabama on December 12, 2005. (CP 4-8, RE 4-8). After service, both defendants answered and asserted the defense of *forum non conveniens*. (CP 37, RE 9). The Plaintiffs responded to request for dismissal claiming that dismissal was procedurally barred due to the defendants non-compliance with Miss. Code Ann. § 11-11-3(4)(b) (1972). (CP 76-81, RE 10-15). On October 28, 2008 the Circuit Court of Wayne County, over objection, granted the defendants' motion and dismissed the case and ordered the case to be re-filed in Tuscaloosa County, Alabama. (CP 82-85, RE 16-19). Suit was re-filed on October 15, 2009 in Tuscaloosa County, Alabama. These same defendants moved to dismiss the Alabama compliant raising statute of limitations. Prior to ruling on the motion in Alabama, on May 12, 2010, the Plaintiffs moved the Circuit Court of Wayne County for relief from the October 28, 2008 judgment. (CP 86-89, RE 20-22). This was denied on September 30, 2010. (CP 98-106, RE 23-31). The Plaintiffs filed their Notice of Appeal to this Court on October 29, 2010. (CP 135-136, RE 32-33).

STANDARD OF REVIEW

"Our standard of review when evaluating the denial of a Miss. R. Civ. P. 60 motion is abuse of discretion." *In re Dissolution of Marriage of De St. Germain*, 977 So. 2d 412, 416 (Miss. App. 2008) quoting *Perkins v. Perkins*, 787 So.2d 1256, 1260 (Miss.2001).

SUMMARY OF ARGUMENT

Suit in this matter was timely filed against two Mississippi residents in their resident county. Justin Pope, the individual defendant, resides in Wayne County, and TK Stanley, Inc., the corporate defendant and Pope's employer, has its principal place of business in Wayne County. The accident occurred in Tuscaloosa County, Alabama while Pope was in the course and scope as an employee of TK Stanley.

The Defendants below moved for dismissal based on *forum non conveniens*. However, neither defendant failed to file any written stipulation as required by Miss. Code Ann. § 11-11-3(4)(b). Despite this failure, the Circuit Court allowed the hearing on the motion to proceed with the representation that the defendants would, that day, file the required stipulations. The stipulations were and never have been filed. Notwithstanding such failure, the Court granted dismissal and then directed the Plaintiffs to re-file their action in the Circuit of Tuscaloosa County, Mississippi. The Wayne County Circuit Court also ruled that the Defendants would be required to waive service of process.

The Plaintiffs did re-file their action in Tuscaloosa County, Alabama. The same Defendants then moved to dismiss on the grounds of statute of limitations. Prior to a ruling on the Defendants motion, the Plaintiffs sought relief from the Mississippi judgment asserting two errors on the part of the Wayne County Circuit Court; first, that it had acted outside the scope of its authority and jurisdiction by granting dismissal without having first received the statutorily required stipulations from the Defendants, and, second because it had exceeded its jurisdiction in directing the matter to be filed in Tuscaloosa County, Alabama. The Plaintiffs assert the judgment was void in that the

court lacked authority to enter it and had no authority to direct transfer of a matter to another county in a specific state.

ARGUMENT

The Plaintiffs timely filed suit in Wayne County, Mississippi against Justin Pope and TK Stanley, Inc. Both of these Defendants below are Mississippi residents. Pope's residence is in Wayne County and TK Stanley's principal place of business is in Wayne County. Thus jurisdiction and venue were proper.

The Defendants moved to dismiss on the grounds of *forum non conveniens*. Prior to any hearing on the request for dismissal, the Plaintiffs responded and brought to the lower court's attention that the Defendants had failed to comply with the requirements of Miss. Code Ann. § 11-11-3(4)(b) (1972). (CP 76-82, RE 10-15). This was also specifically argued by Plaintiffs' counsel at the hearing on September 15, 2008. (Tr 10, RE 36). Plaintiffs argued that dismissal was improper as a result of the Defendants failure to file their stipulations. Miss. Code Ann. § 11-11-3(4)(b) (1972) provides as follows:

> *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 .....

Id. [Emphasis added].

In this case, the statute of limitations in Alabama had not expired when suit was filed in Mississippi, but had expired in the interim and prior to September 30, 2008, as such Tuscaloosa County, Alabama was no longer a viable alternative forum.

In response, defense counsel at the hearing stated:

> In regards to the statute requiring stipulation .... I admit, your Honor, that was an oversight of not having done that beforehand .... But we ... certainly are willing to

> abide by the statute. ... *[W]e'll certainly file the necessary stipulation as soon as I leave here today.*

(Tr 12, RE 38). [Emphasis added].

Although there has been no case interpreting whether the filing of a stipulation is a prerequisite to dismissal, there is one reported decision in Georgia based on a statute word almost identical to Miss. Code Ann. § 11-11-3(4)(b) (1972). In *Hewitt v. Raytheon Aircraft Co.*, 614 S.E.2d 875 (Ga. App. 2005) the Georgia Court of Appeals held:

> Because the issue will recur on remand, we also address whether, pursuant to OCGA § 9-10-31.1(b), the defendants must file a written stipulation stating that "with respect to a new action on the claim commenced by the plaintiff," they will waive the statute of limitations defense "in all other states of the United States," before the trial court may dismiss the case on the ground of forum non conveniens. In light of the plain language of OCGA § 9-10-31.1(b), we conclude that such a written stipulation "fil[ed] with the court or with the clerk of court" is a mandatory condition precedent to the dismissal of a case under the doctrine of forum non conveniens.

Hewitt., 614 S.E.2d at 881(Ga. App. 2005).

Additionally, the cases in this State are legion that plaintiffs will be denied relief if they fail to provide pre-suit notice or fail to attach certain certifications to their complaints when filing an action. *See e.g., South Cent. Regional Medical Center v. Guffy* 930 So. 2d 1252 (Miss. 2006) holding that plaintiff must comply with all seven categories of the tort claim act notice. As was held in *Guffy, supra*, non-compliance is not the same. In this case there has been no compliance with Miss. Code Ann. § 11-11-3(4)(b) (1972). No such stipulations were filed shortly after the hearing on their motion to dismiss. No such stipulations were filed at the time the Rule 60 motion was filed and none were filed at the time the Rule 60 motion was heard. In fact, no such stipulations have ever been filed. As such, the Circuit Court lacked authority to grant the motion. Miss. Code Ann. § 11-

11-3(4)(b) (1972).

Although the statute uses the term "may" as opposed to "shall", in the context of the statute it is apparent that the use of the term "may" in the first sentence of Miss. Code Ann. § 11-11-3(4)(b) is mandatory and not permissive. As stated in the dissent in *Slay v. Lowery*, 152 Miss. 356, 119 So. 819, 822 (1928), "The term 'may,' when used in a statute prescribing duties for officials, is generally used in a mandatory sense ...."[1]. This Court has provided guidance as to when the term "may" is more properly mandatory.

> In construing statutes the word "may" may be construed as mandatory in application, while "shall" may be construed as permissive rather than mandatory; although in ordinary usage "may" is used in a permissive sense, and "shall" is mandatory and excludes discretion-though not always. In Black on Interpretation of Laws, 2d Ed., at page 529, under the heading Permissive and Mandatory Terms," it is said: "Such terms and phrases are as susceptible of being read in either a mandatory or a directory sense are presumed to have been used in their natural and primary signification, and should not be interpreted otherwise, unless it is necessary to carry out the purpose of the legislature, effect justice, secure public or private rights, or avoid absurdity. But words in a statute importing permission or authorization may be read as mandatory, and words importing a command may be read as permissive or enabling, whenever, in either case, such a construction is rendered necessary by the evident intention of the legislature or the rights of the public or of private persons under the statute."

State ex rel. Attorney General v. School Board of Quitman County, 181 Miss. 818, 181 So. 313, 315 (Miss. 1938).

As such, there is little argument that the term "may" as used in Miss. Code Ann. § 11-11-3(4)(b) (1972) is mandatory as it acts to grant permission and seeks to limit authority. Given this interpretation of the statute and the failure of the defendants to file any stipulation, it appears as

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[1] The Plaintiffs do not take exception with the majority opinion in *Slay, supra*, but they do submit that the dissent was correct that in the right context may can be mandatory.

though the Circuit Court exceeded its authority. If so, then it had no power to act on the motion and its judgment would be void. Although the lower court correctly held that a judgment entered without jurisdiction was void, it erred in determining this was the only time a judgment would be void. "[A] judgment is void ... if the court ... lacked jurisdiction ... or if it acted in a manner inconsistent with due process of law." *Overbey v. Murray,* 569 So.2d 303, 306 (Miss. 1990) quoting *Bryant, Inc. v. Walters,* 493 So. 2d 933, 938 (Miss.1986). Our Rule 60(b)(4) is exactly the same as its federal counterpart. As noted in *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 364, note 1, (Miss. 1983), when our state rule and federal rule are identical, then federal authority is persuasive in interpreting our own rule. Authorities on federal civil procedure have stated

> For purposes of a Fed. R. Civ. P. 60(b)(4) motion for relief from a judgment, judgments are void ... if the court lacked jurisdiction ... if the judgment was entered in violation of due process ... or, as is sometimes stated, if the court's action in rendering judgment beyond its scope of authority ....

21A Fed. Proc., L. Ed. § 51:151(B)(2)(d).

Beyond the fact that the Circuit Court exceeded its authority in entering a dismissal in the face of the Defendants' failure to file the proper stipulation, the order also exceeds the Legislature's authority to the Circuit Court to grant the motion in another crucial aspect. In its judgment of dismissal the Circuit Court ordered the Plaintiffs to re-file their suit in Tuscaloosa County, Alabama. It does not allow any other option. Again this exceeds the requirements of the statute. The stipulation required by Miss. Code Ann. § 11-11-3(4)(b) requires that, "[A]ll the defendants ... [shall by written stipulation] ... 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* ..." *Id.* [Emphasis added]. In the case at bar at the time suit was filed there were at least four other

jurisdictions, two federal districts and two states, available to the Plaintiffs other than Tuscaloosa County, Alabama and it was only the Defendants that argued for Tuscaloosa County, Alabama. Although the lower court on the motion for relief seemed to take the position that it was could not grant relief because there had been no argument as to any other jurisdiction other than Tuscaloosa County, Alabama, this would not affect the ability to grant Rule 60 relief. First, while it was necessary for the defendant to make an argument that another jurisdiction was more appropriate, it is not for the trial courts of this State to decide that the trial court of a particular county and state are going to have to accept the filing. The error still was an error and exceeded the statute's grant of authority to dismiss the case. The lower court admitted it had committed error in executing the order and limiting the Plaintiffs to only one jurisdiction. At the hearing on the motion for relief, the Court stated, " ... [A]bout the Court using that restrictive language. It was in there, I guess, *in error* ....." *Id.* [Emphasis added]. (Tr 20, RE 42). Now, not too be overly harsh on the lower court, but it appears to the Plaintiffs that if there was an admitted error which exceeded the authority granted by the Legislature, then the judgment of dismissal was void and due to be set aside. "In considering whether a judgment should be set aside because it is a nullity, there is no discretion in the trial court. If a judgment is void it must be vacated." *Bryant, Inc. v. Walters*, 493 So. 2d 933, 937 (Miss. 1986).

Lastly, the judgment was void in that a Circuit Court in Mississippi has no authority whatsoever to order a matter to be transferred to a county in another state. "Nowhere is a Mississippi state court empowered to require a filing in a court in a sister state, or to affect the sister state's procedural requirements for validating an action." *McCain Builders, Inc. v. Rescue Rooter, LLC*, 797 So. 2d 952, 956 (Miss. 2001).

CONCLUSION

It is for the reasons as set forth above that the Plaintiffs submit that the lower court exceeded its statutory authority by granting the motion without requiring the filing of the required stipulations, that its judgment was void as a result and that its judgment was void in that it also violated the requirements of the statute and limited the Plaintiffs to only one of the other possible jurisdictions available to them and lastly because it exceeded the court's jurisdiction in ordering the matter filed in the court of a sister state. For these reasons the judgment was void and must have been set aside. The refusal to do so was an absolute abuse of discretion. The ruling of the lower should be reversed and rendered.

Respectfully submitted, this the 22nd day of April, 2011.

STEPHEN J. MAGGIO

CERTIFICATE OF SERVICE

I, the undersigned, counsel of record for the Appellant certify that I have served a copy of the foregoing Brief, upon the following:

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Dated: April 22, 2011.

STEPHEN J. MAGGIO