

ARKANSAS COURT OF APPEALS

No. CA09-70

R & G MASONRY CONTRACTORS,
INC.,
APPELLANT

V.

SAFECO INSURANCE COMPANY OF
AMERICA,
APPELLEE

Opinion Delivered March 18, 2009

APPEAL FROM THE CRAIGHEAD
COUNTY CIRCUIT COURT,
[NO. CIV 2007-793]

HONORABLE JOHN FOGLEMAN,
JUDGE,

MOTIONS GRANTED; REMANDED
TO TRIAL COURT

PER CURIAM

The appellant, R&G Masonry Contractors, Inc., by motion, is asking this court (1) to direct the trial court to conduct a hearing on its Rule 60(c)(1) motion for new trial, and (2) to direct the Clerk of this court to accept and file the proceedings of such a hearing with the original record filed in this appeal. Appellee, Safeco Insurance Company of America, resists this motion, and has filed its own request to supplement the record on appeal with its response to appellant's motion for new trial; R&G has no objection to Safeco's response being made a part of the appellate record.

The trial court granted Safeco's motion for summary judgment in the present case on October 13, 2008. R&G timely filed its notice of appeal on October 30, 2008. The transcript in this matter was completed on January 6, 2009. R&G filed its Rule 60(c)(1) motion for new trial on the basis of newly discovered evidence on January 20, 2009. R&G

lodged the record with this court on January 26, 2009. Safeco filed its response to R&G's motion for new trial on February 3, 2009.

Rule 5(a) of the Arkansas Rules of Appellate Procedure -Civil provides that the record on appeal "shall be filed with the clerk of the Arkansas Supreme Court and docketed therein within 90 days from the filing of the first notice of appeal, unless the time is extended by order of the circuit court as hereinafter provided." Therefore, the record was required to be filed by January 28, 2009.

The trial court has discretion to grant a new trial pursuant to Rule 60(c)(1) for up to one year after discovery of the grounds or one year after a judgment is filed with the clerk of the court, whichever is earlier. Ark. R. Civ. P. 60(c)(1); *Belcher v. Belcher*, 80 Ark. App. 86, 91 S.W.3d 108 (2002). "The trial court retains the ability to modify, set aside or vacate its judgment to allow a new trial even after the case has been appealed to the supreme court or court of appeals and affirmed." *Belcher*, 80 Ark. App. at 86-87, 91 S.W.3d at 109.

In *Belcher*, the appellant moved this court for leave to file a motion for new trial; this court agreed that "the trial court should be given the opportunity to act on the motion for new trial prior to submission of the case" and remanded the case to the trial court for decision on the motion for new trial. 80 Ark. App. at 87, 91 S.W.3d at 109. Unlike *Belcher*, but of no significance, here the motion for new trial was filed prior to the record being lodged in this court, but the motion was filed only six days before the record was lodged, and Safeco's response to the motion was not included in the record on appeal. In both cases, no briefs were filed or are filed at the time of consideration of the motion. While we do not order the trial

court to hold a hearing on R&G's motion for new trial, we do hold that the trial court should be given the opportunity to entertain the motion for new trial, and we direct the Clerk of this court to accept and file the proceedings of such a hearing, if one is held, with the original record filed in this appeal. We further grant Safeco's motion to supplement the record on appeal with its response to the motion for new trial.

MARSHALL, J., not participating.