

LAWRENCE BROTHERS, INC. v. R.J. "BOB" JONES
EXCAVATING CONTRACTOR, INC.

94-805

884 S.W.2d 620

Supreme Court of Arkansas
Opinion delivered October 17, 1994

1. APPEAL & ERROR — NOTICE OF APPEAL — WHEN FILED — POST-CONVICTION MOTIONS. — Under Ark. R. App. P. 4(c), the time for filing a notice of appeal is modified in the event a post-trial motion is filed; a notice of appeal filed prior to the disposition of a post-trial motion has no effect, and a new notice of appeal must be filed within the prescribed time dated from the entry of the order dealing with the post-trial motion or from the expiration of the thirty days allowed in the absence of a ruling.
2. APPEAL & ERROR — NOTICE OF APPEAL UNTIMELY AND INEFFECTIVE. — Where appellant filed its notice of appeal on the morning the order denying the J.N.O.V. was entered, and an amended notice of appeal was filed ten minutes before the order, appellant's filing of its notice of appeal was untimely and ineffective.

Appeal from Pulaski Circuit Court, Sixth Division; *David Bogard*, Judge; Motion to Dismiss Appeal, granted.

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., by:
Carrold E. Ray, for appellant.

Stanley D. Rauls, for appellant.

PER CURIAM. The appellee, R.J. "Bob" Jones Excavating Contractor, Inc. ("Jones"), moves to dismiss the appeal of the appellant, Lawrence Brothers, Inc. ("Lawrence Brothers"), the defendant below. Jones contends that Lawrence Brothers failed to file a timely notice of appeal and that, as a result, this court lacks jurisdiction to entertain the matter. We agree and therefore grant the motion to dismiss.

This case entailed a breach of contract action in which a jury awarded Jones \$110,115.50 in compensatory damages. Judgment was entered on March 29, 1994. On April 6, 1994, Lawrence Brothers filed a motion for judgment n.o.v. and, alternatively, for a new trial on damages, requesting that the trial court enter judgment for \$65,317.18.

[1] A hearing was held on the post-trial motions on April 11, 1994, at which time the court verbally denied them, directing the attorney for Jones to "give me just a short order, just denying the motions on this." On April 13, 1994, before the trial court entered its order of record on the post-trial motions, Lawrence Brothers filed a notice of appeal, followed, on the same day, by an amended notice of appeal. Ten minutes later, once again on the same day, the trial court entered its order denying the j.n.o.v. motion. The following is a breakdown of the relevant filing dates and times:

(1) March 29, 1994 — judgment entered in favor of Jones.

(2) April 6, 1994 — j.n.o.v. motion filed by Lawrence Brothers.

(3) April 11, 1994 — hearing on post-trial motions and verbal denial of post-trial motions.

(4) April 13, 1994, 9:07 a.m. — notice of appeal filed by Lawrence Brothers.

(5) April 13, 1994, 4:11 p.m. — amended notice of appeal filed by Lawrence Brothers.

per curiam and ruling, we merely reaffirm its decision." 313 Ark. at 373-74, 853 S.W.2d at 890.

[2] The *Kimble* decision is dispositive of the present matter. Measuring as we must, under Ark. R. App. P. 4(c), from the time of the trial court's entry of its order, we hold that Lawrence Brothers' filing of its notice of appeal on the afternoon of April 13 was untimely and ineffective.

The motion to dismiss the appeal is granted.

BROWN, J., dissents.

CORBIN, J., not participating.

ROBERT L. BROWN, Justice, dissenting. I would deny the motion to dismiss. This is the second time this precise issue has been presented to the court in fairly short order. *See Cason v. House, et al.*, motion for rule on the clerk denied (94-759 October 3, 1994) (3 justices dissenting) (1 justice not participating). In *Cason*, the issue also was whether a notice of appeal filed in timely fashion with regard to the judgment, but after a post-judgment motion, was effective to appeal that judgment. The Supreme Court Clerk had refused to lodge the appeal because the notice of appeal was filed after a post-judgment motion, though within 30 days of the judgment. The notice of appeal referred only to the judgment. The motion for rule on the clerk failed for lack of a fourth vote. I joined the dissent.

In the case before us now, the Supreme Court Clerk has permitted the record in the appeal to be lodged. The additional facts are these. On March 29, 1994, judgment for damages was entered against the appellee, R.J. "Bob" Jones Excavating Contractor, Inc., and against appellant Lawrence Brothers, Inc. On April 6, 1994, Lawrence Brothers filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial on damages. On April 11, 1994, the trial judge had a hearing on the motion, rejected Lawrence Brothers' arguments, denied the motion, and directed Jones's attorney to prepare the order. On April 13, 1994, at 9:07 a.m. Lawrence Brothers filed a notice of appeal expressly directed only to the March 29 judgment. On that same date at 4:11 p.m., Lawrence Brothers filed an amended notice of appeal directed to the March 29 judgment

expiration of the 30-day period. No additional fees shall be required for such filing.

The clear policy behind Rules 4(b) and (c) is to extend the period in which a notice of appeal may be filed when a motion for a new trial, or a motion for JNOV, or a motion for additional findings of fact is filed. An additional policy expressed in Rule 4(c) is to lend finality to the appeal time for such motions by establishing a "deemed denied" date when the trial court does not rule within 30 days of a timely motion.

Here, though, the issue is different. Lawrence Brothers knew its post-judgment motion had been denied. The judge told it so at the hearing and directed Jones to prepare the order. Lawrence Brothers then sought to appeal from the original judgment and filed its first notice of appeal which was within 30 days of that judgment. That is what Ark. R. App. P. 4(a) contemplates. It then filed an amended notice of appeal that same date which also referred to the original judgment and which also was timely.

The post-judgment motions included in Rule 4 permit the trial court to reevaluate the verdict of the jury. But when the trial court has disposed of the motion, even without entry of a formal order, I do not read Rule 4(c) as foreclosing an appeal from the original judgment. To be sure, Rule 4(c) does require entry of an order granting or denying the motion in order for the appeal time to be extended for that denial. Otherwise, the motion is deemed denied on the 30th day from filing the motion, and the notice of appeal must be filed within 30 days of that date. A premature filing of the notice of appeal before entry of an order or the deemed denied date is ineffective *with respect to the filed motion*. But that is not what we have here.

The majority relies in large part on *Kimble v. Gray*, 40 Ark. App. 196, 842 S.W.2d 473 (1992) (per curiam), *aff'd* 313 Ark. 373, 853 S.W.2d 890 (1993). But that reliance is misplaced. In *Kimble*, we said that the appellant had filed the notice of appeal one day too early with regard to the motion for a new trial and, thus, the notice had no effect. We did not reach the issue of whether the notice was filed within 30 days of the original order, but a reading of the case shows that the notice was filed on the

31st day from the order appealed from. Thus, it would have been untimely with respect to that order also. *But see Fuller v. State*, 316 Ark. 341, 872 S.W.2d 54 (1994) (dictum); *Banning v. State*, 43 Ark. App. 106, 861 S.W.2d 119 (1993).¹

This court has not addressed the precise issue now raised in its prior decisions. There is no question, however, that both notices of appeal were timely and effective for an appeal from the original judgment. The notices were filed within 30 days of that judgment, and both notices referred to that original judgment. Our rules of appellate procedure have developed a thorny complexity over the years. We make a serious mistake when we interpret them so as to foreclose a legitimate appeal. For these reasons, I would deny the motion to dismiss.

HAYS, J., joins in this dissent.
