IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CA-01010-COA

ILLINOIS CENTRAL RAILROAD COMPANY **APPELLANT**

v.

EDWIN L. BROUSSARD **APPELLEE**

DATE OF JUDGMENT:	05/28/2007
TRIAL JUDGE:	HON. FRANK G. VOLLOR
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	GLENN F. BECKHAM HARRIS FREDERICK POWERS
ATTORNEYS FOR APPELLEE:	WILLIAM S. GUY C.E. SOREY
NATURE OF THE CASE:	CIVIL - TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE
TRIAL COURT DISPOSITION:	TRIAL COURT GRANTED DEFENDANT'S MOTION TO DISMISS AND DENIED DEFENDANT'S MOTION FOR ATTORNEYS' FEES
DISPOSITION:	AFFIRMED - 09/30/2008
MOTION FOR REHEARING FILED:	10/28/08- GRANTED; AFFIRMED - 10/20/2009
MANDATE ISSUED:	

EN BANC.

LEE, P.J., FOR THE COURT:

MODIFIED OPINION ON MOTION FOR REHEARING

¶1. The motion for rehearing is granted. The original opinion is withdrawn, and this opinion is substituted in its place.

¶2. This appeal arises from the dismissal of the plaintiff's personal-injury lawsuit. The case was dismissed after the circuit court was notified that the plaintiff was deceased at the time the lawsuit was filed by the plaintiff's attorneys. Illinois Central Railroad Company ("Illinois Central"), the defendant in the case, now appeals the circuit court's denial of its request for attorneys' fees. We find no error and affirm.

FACTS

¶3. On April 12, 2006, a complaint was filed in the Warren County Circuit Court on behalf of Edwin L. Broussard. The complaint alleged claims for personal injuries as a result of Broussard's exposure to asbestos while he was an employee of Illinois Central. In response, Illinois Central filed an answer, along with its requests for discovery. Illinois Central later filed a motion to compel after its requests for discovery went unanswered.

¶4. After conducting an independent investigation, Illinois Central discovered that Broussard was deceased at the time the lawsuit was filed. Broussard died on August 3, 2004, which was approximately one year and eight months before the complaint was filed on April 12, 2006.

¶5. On April 27, 2007, Illinois Central filed a motion to dismiss and a motion for attorneys' fees and expenses under Rule 11 of the Mississippi Rules of Civil Procedure and the Litigation Accountability Act of 1988 ("the Act"), Mississippi Code Annotated section 11-55-1 to -15 (Rev. 2002). On May 2, 2007, Broussard's attorneys filed a motion to withdraw as counsel and cited Broussard's failure to respond to mail correspondence and to phone calls as the grounds for the motion.

¶6. The circuit court granted Illinois Central's motion to dismiss; however, Illinois

Central's request for attorneys' fees was denied because the circuit court determined that the plaintiff's attorneys were not guilty of "the type of egregious conduct required by the Act and Rule 11 so as to warrant the assessment of attorney[s'] fees and expenses." It is from that denial of attorneys' fees that Illinois Central now appeals.

¶7. Illinois Central argues on appeal that: (1) the filing of a lawsuit in the name of a plaintiff who had died a year and eight months before the filing of the lawsuit was in error and requires the assessment of sanctions under Rule 11 and the Act; (2) the circuit court failed to apply the proper standard required when considering an award of attorneys' fees; and (3) the circuit court erred in finding facts based on insufficient evidence to deny the motion for attorneys' fees and expenses. Finding no error, we affirm.

STANDARD OF REVIEW

¶8. Illinois Central contends that whether to impose sanctions under the Act and Rule 11 is a question of law that should be reviewed under a de novo standard of review, citing *In re Estate of Ladner v. Ladner*, 909 So. 2d 1051, 1055 (¶15) (Miss. 2004) as authority. However, we find that the supreme court has clearly stated that the proper standard of review for this issue is an abuse-of-discretion standard. Rule 11 states, and the Act has been interpreted to state, that the decision to award sanctions is within the discretion of the trial court. Miss. Code Ann. § 11-55-5 (Rev. 2002); M.R.C.P. 11(b); *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis and Dove*, 965 So. 2d 1041, 1045 n.6 (Miss. 2007). In *Choctaw, Inc.*, the supreme court held that "[a]n extensive number of cases state that the proper standard of review regarding the imposition of sanctions is abuse of discretion." *Choctaw, Inc.*, 965 So. 2d at 1045 n.6. The supreme court further stated: "When reviewing

a decision regarding the imposition of sanctions pursuant to the Litigation Accountability Act, this Court is limited to a consideration of whether the trial court abused its discretion." *Id.* Accordingly, we conclude that abuse of discretion is the appropriate standard of review.

DISCUSSION

¶9. Illinois Central argues that the circuit court erred in denying its request for sanctions against counsel for Broussard because the filing of a claim on behalf of a deceased person is frivolous.

¶10. Both Rule 11 and the Litigation Accountability Act authorize an award of attorneys' fees and expenses as a sanction for certain filings. According to Rule 11(b), the court may order expenses or attorneys' fees "[i]f any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay . . . ." M.R.C.P. 11(b). Similarly, the Act states in part:

> in any civil action commenced or appealed in any court of record in this state, the court shall award . . . reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action . . . that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment . . . .

Miss. Code Ann. § 11-55-5(1).

¶11. The Act defines a claim brought "without substantial justification" to be one that is "frivolous, groundless in fact or in law, or vexatious, as determined by the court." Miss. Code Ann. § 11-55-3(a) (Rev. 2002). This Court uses the same test to determine whether a filing is frivolous under both Rule 11 and the Act. *Leaf River Forest Prods., Inc. v. Deakle*, 661 So. 2d 188, 197 (Miss. 1995). A claim is frivolous when "objectively speaking, the

pleader or movant has no hope of success." *Id.* at 195 (citation omitted).

¶12. In ruling on the issue of attorneys' fees, the circuit court gave the following explanation:

> I'm going to dismiss the action, but I'm not going to hold them accountable under 11-55-5 and assess attorney[s'] fees because this action was an action arising – it's not like they just were contacted by Mr. Broussard and didn't do anything. This action was originally filed while he was alive in Hinds County. It was one of those mass lawsuits, and then it was at some point dismissed, and they had to re-file within a certain time limit and re-file in all the appropriate jurisdictions 175 cases. And re-filing it and then him dying in the interim between all of this going on, the Court does not see the type of egregious conduct that would be warranted under – particularly under Section [11-55-7] (i), the extent to which reasonable effort was made. I think their efforts were reasonable in trying to get this matter – because if they waited too long to search all this out, then they'd run into a statute of limitations problem. And then they did contact – I believe in some of the pleadings you say they contacted you last November [to say] that they could not reach him. They filed it in April and then contacted you, saying, we can't find the fella. So they filed the lawsuit and tried to follow up on it, and I don't see the type of egregious conduct that would warrant sanctions under 11-55-5 in this particular action. He was alive when it was originally filed. The Court dismissed it and told them – gave them a year to re-file 175 cases. And then during all of that they filed it to protect him and then tried to find the – tried to find him and couldn't find him after it was filed and notified you they couldn't find him then, so – and you found out he was dead. . . .

¶13. We agree that the filing of a claim for a deceased person is frivolous because the claim has no hope of success. However, Rule 11 states, and the Act has been interpreted to state, that the decision to award sanctions is within the discretion of the trial court. M.R.C.P. 11(b); *Choctaw, Inc.*, 965 So. 2d at 1045 n.6. We find that the trial court was within its discretion to deny sanctions. As the circuit court judge stated in his order, "[Broussard's counsel] filed the lawsuit and tried to follow up on it, and I don't see the type of egregious conduct that would warrant sanctions under 11-55-5 in this particular action. He was alive

when it was originally filed." Further, no assertion has been made that counsel for Broussard filed this action without substantial justification or for delay or harassment, which would warrant sanctions under the Act. Broussard's counsel, unable to contact Broussard, pursued the lawsuit on Broussard's behalf in order to avoid being barred by the statute of limitations. Therefore, we find that the circuit court did not abuse its discretion by denying an award of attorneys' fees and expenses. This issue is without merit.

¶14. **THE JUDGMENT OF THE CIRCUIT COURT OF WARREN COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

KING, C.J., MYERS, P.J., IRVING, GRIFFIS, BARNES, ISHEE AND CARLTON, JJ., CONCUR. ROBERTS, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY GRIFFIS AND CARLTON, JJ. MAXWELL, J., NOT PARTICIPATING.

ROBERTS, J., CONCURRING:

¶15. I concur with the majority that the grant of rehearing is appropriate and that the judgment of the trial court should be affirmed. The majority has given a suitable account of the facts in the instant case, so they will not be reiterated here. Since I joined the majority in our original opinion to reverse, I write separately to explain briefly why I have now concluded that the trial judge was correct when he considered whether Edwin Broussard's counsel's actions were egregious and when he denied Illinois Central Railroad Company's motion seeking attorneys' fees.

¶16. In our prior decision, the majority focused solely on the frivolity of Broussard's suit because it was discovered that Broussard died one year and eight months before the complaint was filed. At first blush, filing a personal injury suit for a plaintiff who died

twenty months earlier appears to be sanctionable. Undoubtedly, the suit was frivolous in the sense that the plaintiff's counsel had no hope of success, but after further consideration and research of both Mississippi state and federal case law, I do not believe that the intent, knowledge, diligence, or lack of diligence of a party or his counsel can be dissociated from other factual circumstances when determining whether sanctions are appropriate.

¶17. In *Thomas v. Capital Security Services, Inc*., 836 F.2d 866, 876-81 (5th Cir. 1988), the United States Fifth Circuit Court of Appeals rendered a thorough opinion discussing the purposes of the 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure, the appropriate standard of review for violations, a trial judge's duty when violations are found, and under what type of circumstances are sanctions appropriate.[1] *Thomas* clearly states that the purpose of Rule 11 sanctions are to thwart frivolous litigation[2] and check abuses in the signing of pleadings. *Id.* at 870, 874. The pivotal point in time to assess a party's or attorney's actions is the instant when the signature is placed upon the document. *Id.* at 874. And, compliance under Rule 11 is an objective, not subjective, standard of reasonableness under the circumstances. *Id.* at 873 (citation omitted). Additionally, Rule 11 imposes affirmative duties, which an attorney or litigant certifies he has complied with, when he or

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[1] The supreme court routinely looks to federal case law for guidance in construing the Mississippi Rules of Civil Procedure because they were patterned after the Federal Rules of Civil Procedure. *MS Comp Choice, SIF v. Clark, Scott & Streetman*, 981 So. 2d 955, 959 (¶13) (Miss. 2008) (citations omitted).

[2] Many courts have recognized that the purpose of Rule 11 sanctions is to streamline the litigation process by discouraging the use of dilatory or abusive tactics, such as the filing of frivolous claims or defenses or the use of pleadings to harass or delay. *See* Kathleen M. Dorr, Annotation, *Comment Note – General Principles Regarding Imposition of Sanctions Under Rule 11, Federal Rules of Civil Procedure*, 95 A.L.R. Fed. 107 (1989); *Thomas*, 836 F.2d at 870, 874; *Davis v. Veslan Enterprises*, 765 F.2d 494, 500 (5th Cir. 1985).

she signs a pleading, motion, or document. *Id.* at 873-74. These duties are: (1) the attorney has conducted reasonable inquiry into the facts supporting the claim; (2) the attorney has conducted reasonable research into the law, so that the legal document embodies existing legal principles or a good-faith argument for the pleading or motion; and (3) that the motion is not made for the purposes of delay, harassment, or increasing the costs of litigation. *Id.* at 874. Along with the objective standard of reasonableness and the affirmative duties imposed upon an attorney, the *Thomas* court recognized that the court considering sanctions "should consider the state of mind of the attorney when the pleading or other paper was signed" when determining the severity of sanctions. *Id.* at 875 (citation and internal quotation omitted). In other words, it is improper to consider the merit of the document in isolation of the intent or diligence of the pleader.

¶18. In the recent case of *Jowers v. BOC Group, Inc*., 608 F. Supp. 2d 724 (S.D. Miss. 2009), the United States District Court for the Southern District of Mississippi thoroughly analyzed Mississippi case law pertaining to an award of attorney's fees. In *Jowers*, the district court stated that "it appears the rule in Mississippi is that the proof necessary to justify a fee award is tantamount to and coextensive with the proof necessary to obtain punitive damages." *Id.* at 780. It is well-settled law that "[p]unitive damages are only appropriate in the most egregious cases so as to discourage similar conduct and should only be awarded in cases where the actions are extreme." *Warren v. Derivaux*, 996 So. 2d 729, 738 (¶28) (Miss. 2008) (citation omitted). In light of these authorities, it is clear that a mere mistake, *based upon an objectively reasonable belief*, is insufficient to warrant sanctions even when that mistake inadvertently results in a frivolous pleading.

¶19. The Mississippi Supreme Court case *Bean v. Broussard*, 587 So. 2d 908 (Miss. 1991) is analogous to the instant case. In *Bean*, a Mississippi attorney was contacted by an attorney from Louisiana who told him that he had been retained several months earlier to file a medical malpractice suit. *Id.* at 910. The Louisiana attorney assured Bean, the Mississippi attorney, that he had investigated the facts of the case, and he also assured Bean that the case was meritorious. *Id.* The statute of limitations was set to expire the next day, so in order to avoid the claim being procedurally barred, Bean filed suit based upon the Louisiana attorney's representations without any independent investigation. *Id.* After depositions were conducted, Bean realized the case was without merit, and he sought to withdraw as counsel. *Id.* at 910-11. The defendant requested that the court impose Rule 11 sanctions upon Bean arguing that he signed a frivolous complaint for the purpose of delay. *Id.* at 911. The trial court granted a monetary sanction. *Id.* However, the supreme court reversed and remanded, stating that: "While it [was] true that the complaint was filed when it was filed in an effort to toll the statute of limitations[,] mere 'delay' was not the objective. The objective was to preserve or[,] more accurately[,] to assert what could be objectively viewed as a viable cause of action." *Id.* at 913. In *Bean*, the supreme court did not look solely at the frivolity of the complaint, but it considered Bean's rationale and objective belief in bringing the claim, as well as Bean's desire to preserve his client's cause of action. The instant case involves the same type of situation.

¶20. I do not suggest that a plaintiff or his or her attorney is given a free pass to be dilatory in his or her efforts to confirm that the pleadings he or she files have merit just because his or her subjective intent is to bring a meritorious claim or to survive a statute of limitations.

After all, they have the affirmative duty of reasonable inquiry into the facts and law of the case. However, that fact does not vitiate the plaintiff's or their attorney's objectively reasonable belief at the time of the filing. It is apparent, Broussard's attorney was faced with a dilemma or a "Morton's Fork" situation.[3] As stated by the majority, Broussard's attorney was faced with refiling a voluminous amount of claims within one year, due to changes in the law. Just as in *Bean*, Broussard's attorney had the duty to ensure that his client's claim was not lost due to the expiration of the statute of limitations, as well as making sure that the claims were meritorious. Broussard's attorney risked legal malpractice, if he allowed the statute of limitations to run, or risked sanctions if he later found that circumstances had arisen which would render the pleading frivolous. Indeed, either possibility was an unfavorable choice.

¶21. Given that it is undisputed that the claim had merit when it was originally filed, it was objectively reasonable for Broussard's attorney to think that the claim was still viable at the subsequent filing less than a year later. Although the record is rather scant, it appears that Broussard's attorney was diligent in trying to locate Broussard. Both parties agree that it was *after* Broussard's attorney sought to withdraw, due to his inability to contact his client to respond to pending discovery, that it was discovered that Broussard was deceased. Certainly,

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[3] The expression, "Morton's Fork" originates from a policy of tax collection devised by John Morton, Lord Chancellor of England in 1487, under the rule of Henry VII. His approach was that if a subject lived a life of luxury, then clearly he spent a lot of money and, therefore, had sufficient income to spare for the king. However, if the subject lived frugally, and did not display signs of wealth, then apparently he had substantial savings and could then afford to give it to the king. These arguments were the two prongs of the fork and regardless of whether the subject was rich or poor, he did not have a favorable choice. http://www.britannica.com/EBchecked/topic/393253/Mortons-Fork.

it would have been better if Broussard's attorney, rather than Illinois Central's attorney, had thought to contact the Mississippi Department of Health and Vital Statistics to verify whether Broussard had died, but I agree with the trial judge and cannot find that decision, or the lack thereof, to be negligent to the extent of establishing egregious behavior. Even Illinois Central's attorney acknowledged that he did not research and discover that Broussard had died until Broussard's attorney asked him to agree to a dismissal of the action.

¶22. At the motions hearing, Illinois Central's attorney stated that he was not accusing Broussard's counsel of "doing anything intentional." However, he stated that his client had unnecessarily incurred attorney's fees, and he thought that his client was entitled to its money back. Incurring fees alone is insufficient to warrant Rule 11 sanctions. Whether sanctions are viewed as a cost-shifting mechanism or compensation for opposing parties injured by frivolous or vexatious litigation, *it is important to remember that the imposition of sanctions pursuant to Rule 11 is meant to deter an attorney from violating the rule*. *Thomas*, 836 F.2d at 877 (citing *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987)). "Sanctions should also be educational and rehabilitative in character and, as such, tailored to the particular wrong." *Id.* Though I admit this is a close case, after further review of the case law, record, unique facts in the instant case, and upon mature reflection, I must conclude that the trial judge did not abuse his discretion in determining that sanctions were unnecessary to deter Broussard's attorney from violating Rule 11 or Mississippi Code Annotated section 11-55-5 (Rev. 2002), nor did he err in finding that sanctions were inappropriate because Broussard's attorney lacked egregious behavior.

GRIFFIS AND CARLTON, JJ., JOIN THIS OPINION.