

Serial: **94061**

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99027-SCT

RE: MISSISSIPPI RULES OF APPELLATE PROCEDURE

ORDER

This matter has come before the Court en banc on the Court's own motion for consideration of a proposed amendment to Rule 35B of the Rules of the Appellate Procedure and its Comment. Having considered the proposal, the Court finds that the amendment of such rule and its Comment as set out herein, will promote the fair and efficient administration of justice and should be adopted.

IT IS THEREFORE ORDERED that Rule 35B of the Rules of Appellate Procedure and the associated Comment be and are hereby amended as shown in Exhibit "A" hereto.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forward a true certified copy hereof to West Publishing Company for publication in the next edition of the *Mississippi Rules of Court* and in the *Southern Reporter, Second Series, (Mississippi Edition)*.

SO ORDERED, this the 1st day of March, 2002.

/s/ William L. Waller, Jr.

WILLIAM L. WALLER, JR., JUSTICE,

FOR THE COURT

EXHIBIT "A" TO ORDER

ENTRY OF JUDGMENT IN THE COURT OF APPEALS

(a) Written Opinions in the Court of Appeals. The Court of Appeals may write opinions on all cases heard by that court and shall publish all such written opinions. In cases where the judgment of the trial court is affirmed, an opinion will be written in all cases where the Court of Appeals assesses damages for a frivolous appeal and in other cases if a majority of the judges deciding the case determine that a written opinion will add to the value of the jurisprudence of this state or be useful to the parties or to the trial court.

(b) Citation of unpublished opinions. Opinions in cases ~~decided prior to the effective date of this rule~~

which have not been designated for publication shall not be cited, quoted or referred to by any court or in any argument, brief or other materials presented to any court except in continuing or related litigation upon an issue such as res judicata, collateral estoppel or law of the case.

(c) Publication of Court of Appeals Opinions. An opinion may be published only after it is final. An opinion of the Court of Appeals is final where: (i) no motion for rehearing is filed pursuant to Rule 40 or, (ii) where a motion for rehearing is timely filed and the motion for rehearing is denied; (ii) ~~no petition for writ of certiorari is filed pursuant to Rule 17;~~ (iii) ~~a petition for writ of certiorari is filed and automatically rejected through the failure of the Supreme Court to issue such a writ within 90 days;~~ (iv) ~~a petition for writ of certiorari is filed and denied by order of the Supreme Court;~~ or (v) ~~a petition for writ of certiorari is filed and granted by the Supreme Court but ultimately dismissed as improvidently granted. Where further review is otherwise granted by the Supreme Court, that court shall decide whether the Court of Appeals' opinion shall be published. The filing of a petition for writ of certiorari in the Supreme Court shall not, for the purpose of this subsection, prevent or delay finality of the Court of Appeals opinion for publication.~~

(d) Per Curiam Affirmance. The Court of Appeals, with the concurrence of all judges participating in the case, may affirm the action of the trial court without rendering a formal opinion when an opinion would have no precedential value and one or more of the following circumstances exist and are dispositive of the appeal:

- (1) the Court concurs in the facts as found or as found by necessary implication by the trial court;
- (2) there is material evidence to support the verdict of the jury;
- (3) no reversible error of law appears.

(e) Entry of Judgment. The notation of a judgment in the minute book of the Court of Appeals constitutes entry of the judgment. The clerk of the Supreme Court shall enter the judgment following receipt of the opinion and judgment of the court. If a judgment is rendered without an opinion, the clerk shall enter the judgment following instructions from the court.

[Amended effective September 1, 1996; amended effective November 1, 1998; amended effective March 7, 2002.]

Advisory Committee Historical Note

.....

Comment to Rules 35-A and 35-B

The portions of Rule 35 dealing with written opinions are based upon former rules of the Supreme Court. The appellate courts' practice is to write opinions when it reverses or remands a trial court or administrative agency, and Rule 35-A(c) and Rule 35-B(d) therefore address those circumstances in which judgment is affirmed and no opinion is written. Rule 45(c) governs furnishing of copies of the courts' opinions and judgments by the clerk.

While it is the policy of the appellate courts to publish all opinions, there are opinions which have been issued prior to, November 1, 1998, the date of the adoption of that policy, which have been designated

"Not for Publication." Rules 35-A(b) and 35-B(b) restrict the citation of those unpublished opinions. Prior to March 7, 2002, by further amendment to Rule 35-B(c), opinions of the Court of Appeals were not defined as final opinions where they were subject to petitions for writ of certiorari in the Supreme Court until the Supreme Court had denied certiorari or had granted certiorari but later dismissed as improvidently granted. On that date, Rule 35-B(c) was amended to allow publication of Court of Appeals opinions when no motion for rehearing is filed, or where rehearing is denied, even though review on petition for writ of certiorari is sought in the Supreme Court. There remain opinions which were issued prior to each of these amendments which remain designated "Not for Publication," and are not to be cited due to the prohibition of Rule 35-B(b). Although the filing of a petition for writ of certiorari does not delay publication of a Court of Appeals opinion, the filing of such a petition does defer the mandate in the case as provided for in Rule 41(b).

[Amended effective November 1, 1998; amended effective, March 7, 2002.]