

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED

January 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

SHARON TRALECE J A' ANI NI)

Plaintiff - Appellee)

v.)

MICHAEL ZAKARIA J A' ANI NI)

Defendant - Appellant)

HAMILTON COUNTY
03A01-9509-CV-00320

DISSIDENTING OPINION

Franks, J.

I dissent but concur in result.

The motion filed on March 17th was not filed within 30 days of judgment and could not be treated as a Rule 59 motion. Flynn v. Shoney's, Inc., 850 S.W2d 458 (Tenn. App. 1992). All such motions must be filed within 30 days of judgment. T.R.A.P. 59.04.

While the trial court "could" have allowed an amendment to the original motion he did not and dismissed it more than 30 days before he acted on the second motion, which effectively placed the court in the position of not having jurisdiction other than Rule 60 jurisdiction.

I am at a loss to fathom why the majority insists on treating the motion as one filed under Rule 59 when it was intended to be filed as a Rule 60 T. R. C. P. motion.

It would appear that relief is merited under Rule 60.02(5). Clearly the basis for the relief granted would be justified.

The order entered pursuant to the Rule 60 motion recites that the "cause came on to be heard on the 20th day of March, 1995." No record of that hearing is before us, but it can be presumed that the judge was presented with evidence as he made a finding of fact. We may further conclusively presume that the evidence supports his decision as we have been furnished no transcript.

I would affirm the trial judge for the foregoing reasons.

Herschel P. Franks, J.