IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7717
Conference Calendar

OCTAVIO CANTU,

Plaintiff-Appellant,

versus

DONNA E. SHALALA, Secretary of
the Department of Health
and Human Services,

Defendant-Appellee.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. B-83-CV-258
- - - - - - - - - - -
(January 26, 1995)

Before POLITZ, Chief Judge, and HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:*

The threshold issue is whether the district court had the authority to re-enter an order of dismissal to allow an extension of time in which to appeal. In Wilson v. Atwood Group, 725 F.2d 255, 256 (5th Cir.) (en banc), cert. dismissed, 468 U.S. 1222 (1984), the clerk of a federal district court failed to give notice to the appellants that judgment had been entered. After the time for filing a valid notice of appeal had run, the

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

appellants learned of the entry of judgment and successfully moved for relief under Fed. R. Civ. P. 60(b) in the district court. Id. at 256-57. This Court, en banc, vacated that ruling because "to be relieved from the effect of a judgment, a party must show more than mere reliance on the clerk to give notice of a judgment." Id. at 258.

Cantu seeks to avoid dismissal by challenging whether Wilson is still good law. He points out that in In the Matter of Jones, 970 F.2d 36, 39 (5th Cir. 1992), cert. denied, 114 S. Ct. 391 (1993), this Court questioned "[t]he continuing viability of Wilson" in light of the 1991 Amendments to Fed. R. Civ. P. 77(d) and Fed. R. App. P. 4(a)(6). Id. The 1991 Amendments to Rule 77 and Rule 4(a)(6) permit a district court to enlarge the time for appeal if 1) a party fails to receive notice from the clerk or any party within twenty-one days of entry of judgment or order; 2) no party is prejudiced; and 3) a motion is filed within 180 days of entry or seven days of receipt of notice, whichever is earlier. (Emphasis added). Cantu, however, is not entitled to relief under these rules. He concedes that he did not receive notice of the court's March 31, 1993, order until November 8, 1993, more than 180 days after its entry.

Moreover, in Latham v. Wells Fargo Bank, N.A., 987 F.2d 1199, 1205 n.9 (5th Cir. 1993), this Court stated that:

> [w]e will not construe Jones to do what it could not, and did not purport to do, namely overrule the en banc Wilson decision. The final sentence of Rule 77(d), which states that lack of notice does not excuse an untimely appeal, was unchanged by the 1991 amendment. The advent of Rule (4)(6), if

> anything, cuts against the idea that Wilson is no longer good law in areas where new Rule (4)(6) does not give relief because that new Rule now provides a safety valve for whatever harshness inheres in Wilson's strict interpretation of Rule 77(d).

Cantu attempts to distinguish this case from Wilson on the ground that the district court's February 11, 1994, order stated in part that "upon reconsideration of the merits of this case, the Court having adopted the Report and Recommendation of the Magistrate Judge . . . , is of the opinion that the Secretary of Health and Human Service's final decision be affirmed[.]"** However, Cantu's motion sought an enlargement of time in which to file a notice of appeal based on the failure of the district court clerk to notify him of the entry of the March 31, 1993, order. The motion specifically requested "relief from the Judgment of this Court (more specifically, relief from the date of the Order of Dismissal)." (Emphasis in original). Under these circumstances, language contained in the order referring to the court's reconsideration of the merits does not take this case beyond the purview of Wilson.

Alternatively, Cantu argues that this case presents an exception recognized in Wilson as a basis for Rule 60(b) relief. Wilson states that its rule would not reach a party whose counsel "had not relied on the clerk to give notice of the entry of judgment but had been diligent in attempting either to delay its entry or to inquire about the status of the case." Wilson, 725 F.2d at 258. The record reflects that Cantu's counsel did not

** The order was apparently drafted by Cantu's counsel.

inquire about the status of this case until November 8, 1993. Thus, Cantu has failed to "show more than mere reliance on the clerk to give notice[.]" Id.

Wilson establishes that "failure to receive notice does not justify granting of 60(b) relief to extend [the] time for appeal." Latham, 987 F.2d at 1205 (internal quotations and citation omitted).

The grant of Rule 60(b) relief in the February 11, 1994, order is VACATED. It appearing that there is no timely notice of appeal from the March 31, 1993, judgment, the appeal on the merits is DISMISSED.