

IN THE SUPREME COURT OF MISSISSIPPI

BILLY J. FIELDS

APPELLANT

VERSUS

CAUSE NO. 2008-CA-00316

CITY OF CLARKSDALE, MISSISSIPPI

APPELLEE

APPEALED FROM THE CIRCUIT COURT OF COAHOMA COUNTY
CAUSE NO. 14-CI-07-0105

**APPELLEE'S BRIEF
CITY OF CLARKSDALE**

ATTORNEY FOR THE CITY OF CLARKSDALE, MISSISSIPPI

CURTIS D. BOSCHERT, MSB/ [REDACTED]

121 SUNFLOWER AVENUE

POST OFFICE BOX 940

CLARKSDALE, MISSISSIPPI 38614

TELEPHONE NO. (662) 621-8137

FACSIMILE NO. (662) 621-8197

EMAIL: cityattorney@cityofclarksdale.org

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APPELLEE

APPELLEE'S BRIEF

COMES NOW the Appellee, City of Clarksdale, Mississippi ("Clarksdale" or "City") and files this its Brief in response to the Brief of Appellant Billy J. Fields ("Fields") and would show unto this Court as set forth below, that the Order of Coahoma County Circuit Court Judge Kenneth L. Thomas (the "Circuit Court") dated January 22, 2008 in Billy Fields v. City of Clarksdale should be affirmed.

STATEMENT OF THE ISSUES

Whether the Circuit Court Judge's decision to dismiss Fields' appeal pursuant to Uniform Circuit and County Court Rule 5.05 constituted an abuse of discretion.

STATEMENT OF THE CASE

This case involves the failure of a former Clarksdale firefighter to timely seek the assistance of the Court on the compilation of the record after he discovered that there was a question over who was responsible for paying the cost for preparing the transcript.

PROCEDURAL HISTORY AND RELEVANT FACTS

On March 26, 2007, the Board of Mayor and Commissioners of the City of Clarksdale (the "City Board") conducted a predisciplinary hearing regarding the allegations that Fields was insubordinate to the Fire Chief by disobeying several direct orders. The City Board found that Fields was insubordinate and voted to terminate him that same day. (R 10-13) Fields timely appealed the

City Board's decision to the Clarksdale Civil Service Commission (the "CSC"). The CSC conducted an investigation and held a hearing on May 3, 2007 and July 12, 2007, pursuant to MISS. CODE ANN. § 21-31-71 (Rev. 2007), and on August 9, 2007 entered an order affirming the City Board's decision in its entirety. (R 10-13) The CSC also found that Fields' termination was for cause under the City Board's Personnel Manual, the CSC's Rules and Regulations and pursuant to MISS. CODE ANN. § 21-31-69 (Rev. 2001). (R 12-13)

On September 7, 2007, Fields filed a Notice of Appeal with the Coahoma County Circuit Court, but paid no costs. On September 26, 2007, the attorney for the CSC wrote a letter to Fields' attorney advising him that the estimated cost from the court reporter to the transcript of the proceedings before the CSC was \$1,000 and that, "[g]enerally, the Appellant (Fields) is responsible for the cost of the transcript of the proceeding being appealed". (R 25) Subsequently, on October 18, 2007, Fields filed a "Motion for City to Pay Cost of Transcript" (the "Motion") in which he requested that the Court direct City or the CSC to pay the cost of the transcript (R 14-15). The City of Clarksdale ("Clarksdale") responded to Fields' Motion on October 25, 2007, and stated *inter alia*, that it was separate from the CSC by law and as it relates to the CSC's duties pursuant to MISS. CODE ANN. § 21-31-71 (Rev. 2007) and under the Uniform Circuit and County Court Rules ("UCCCR"); that pursuant to UCCCR Rule 5.09 an appellant shall pay all court costs; and that pursuant to UCCCR Rule 5.04 Fields failed to properly perfect his appeal by not paying costs with his notice of appeal; and that "Fields' appeal should also be dismissed pursuant to UCCCR Rule 5.05 since Fields failed 'to request the assistance of the court in compelling the same (filing of the record) within thirty (30) days fo the filing of the written notice of appeal may be deemed as abandonment of the appeal and the court may dismiss the same with costs to the appeal party or parties'". (R 20-23)

On January 17, 2008, the Circuit Court held a hearing on the Motion and Clarksdale's response, and on January 22, 2008, the Circuit Court Judge signed an order dismissing Fields' appeal. The Court found, *inter alia*, that the CSC, as an administrative body was responsible for the appeal costs; that UCCCR Rule 5.05 "is controlling"; that Fields waited 23 days after knowing that the CSC's attorney's position was that Fields had to pay for the transcript, before seeking the Court's assistance; and that Fields' failure to timely seek assistance constituted an abandonment of his appeal. (R 38-39)

SUMMARY OF THE ARGUMENT

The Circuit Court of Coahoma County properly exercised its discretion when it dismissed Fields' appeal pursuant to UCCCR Rule 5.05.

ARGUMENT

I.

STANDARD OF REVIEW

This Court's standard of review of a Circuit Court's granting of a motion to dismiss is clear.

The power to dismiss for failure to prosecute is inherent in any court of law or equity, being a means necessary to the orderly expedition of justice and the court's control of its own docket. That this Court will not disturb a trial judge's finding on appeal unless it is manifestly wrong is a doctrine too well known to require citation.

Stuart v. Public Employees' Retirement System of Mississippi, 799 So. 2d 886, 888 (Miss. App. 2001) citing *Walker v. Parnell*, 566 So. 2d 1213, 1216 (Miss. 1990). In reviewing the lower court's decision, this Court must "examine the procedures set forth in the statutes and rules of court that guide an appeal." *Stuart*, 799 So. 2d 886, at 888.

The CSC exists pursuant to MISS. CODE ANN. § 21-31-51 (Rev. 2007) et seq.. Appeals from the decisions of the CSC are governed by the UCCCR and MISS. CODE ANN. § 21-31-71 (Rev. 2007)

which provides that “[t]he Commission shall within thirty (30) days after the filing of such notice, make, certify and file such transcript with such court”. The statute is silent as to who is responsible for paying the cost of the transcript. By letter dated September 26, 2007, the attorney for the CSC took the position that it was the responsibility of Fields to pay the cost of the transcript. (R 25) Fields subsequently asked the Circuit Court to direct the City to pay the cost of the transcript, which the City opposed. (R 14-26) Generally, an “agency’s interpretation of its own enabling statute is to be given deference.” *Wheeler v. Mississippi Department of Environmental Quality Permit Board*, 856 So. 2d 700, 704 (¶ 11) (Miss. 2003) citing *Gill v. Mississippi Department of Wildlife Conservation*, 574 So. 2d 586, 593 (Miss. 1990). The Circuit Court found that the CSC “is an administrative body and as such, appeal cost are part of the process and should be borne by the administrative body, but in this case, Fields failed to timely bring this matter before this Court and by doing so, waived his right to do so.” (R 39)

In making this determination, the Circuit Court relied on UCCCR Rule 5.05 which is as follows:

In appeals in which the appeal is solely on the record, the record from the lower court or lower authority must be filed with the court clerk within thirty (30) days of filing of the notice of appeal. Provided, however, in cases involving a transcript, the court reporter or lower authority may request an extension of time. The court, on its own motion or on application of any party, may compel the compilation and transmission of the record of proceedings. Failure to file the record with the court clerk or to request the assistance of the court in compelling the same within thirty (30) days of the filing of the written notice of appeal may be deemed an abandonment of the appeal and the court may dismiss the same with costs to the appealing party or parties.

Clearly, UCCCR Rule 5.05 provides the Circuit Court with the authority to dismiss the case and the Court chose to do so. Fields knew that there was a genuine issue as to who should pay for

the transcript, but was slow and outside the required 30 days in seeking the assistance of the Circuit Court.

This Court has found that UCCCR Rule 5.05 “places a duty on the Appellant (Fields) to see that the record is filed with the proper court within thirty days of filing the notice of appeal”. *Zurich American Insurance Company of Illinois v. Beasley Contracting Company, Inc.*, 779 So. 2d 1132, 1135 (Miss. App. 2001). In *Zurich*, the failure on behalf of the appellant to ensure that the record was filed with the court resulted in dismissal of the case and in a finding that the lower court did not abuse its discretion. *Zurich*, 779 So. 2d 1132, at 1136.

In *Stuart v. PERS*, the Court applied UCCCR 5.05 and upheld the dismissal of the case. In *Stuart*, the Court found that the appellant had “the burden of timely filing the record”. *Stuart*, 799 So. 2d 886, at 889. The Court found that the appellant failed to seek the assistance of the Court in having the record filed within 30 days, and that the dismissal was not an abuse of discretion. *Stuart*, 799 So. 2d 886, at 889-890.

II.

FIELDS’ ISSUES

A.

In his brief, Fields argues a denial of due process, abuse of discretion and failure to provide notification by the Circuit Court. At the center of these issues is Fields’ argument that the Circuit Court failed to follow the Mississippi Rules of Appellate Procedure (M.R.A.P.) Rule 2(a)(2) and give Fields 14 days to correct any deficiencies in the appeal. The Court should not consider this argument of Fields. The law is well established that an issue raised for the first time on appeal, including M.R.A.P. 2, is procedurally barred. *Zurich*, 779 So. 2d 1132, at 1134. The “[f]ailure to raise the issue in the trial court bars it from being raised for the first time on appeal”. *Zurich*, 779

So. 2d 1132, at 1134 citing *Riggs v. State*, 744 So. 2d 365 (¶ 26) (Miss. App. 1999). See also *Shaw v. Shaw*, 603 So. 2d 287 (Miss. 1992). There is no mention in the record by Fields of the applicability of M.R.A.P. (2)(a)(2) to this case, accordingly, this Court is barred from considering Fields' arguments based upon M.R.A.P. 2(a)(2).

B.

Fields argues that the Circuit Court treated his reliance in dismissing the case on UCCCR Rule 5.05 as mandatory not as permissive. This argument is clearly without merit. The germ of Fields' argument is that since the Circuit Court dismissed his case based on UCCCR 5.05, the Circuit Court must have treated the rule as requiring a mandatory dismissal, not as the Circuit Court exercising its discretion. The conclusion of this type of logic by Fields would never allow a circuit court to make any discretionary ruling without having it called mandatory. The Circuit Court exercised the discretion provided by Rule 5.05 and dismissed Fields' appeal. There is no evidence that the Circuit Court viewed the rule as mandatory.

C.

Fields next argues that the City unjustly received an advantage by violating state law. Throughout his brief, Fields interchangeably uses the CSC and the City where it is to his perceived advantage. The Circuit Court found that it was the responsibility of the CSC to prepare and bear the expense of the appeal pursuant to MISS. CODE ANN. § 21-31-71 (Rev. 2007), not the City (R39).¹ Fields ignores the fact that the CSC is an independent administrative body created by statute and is independent of the City, with the authority to overrule decisions made by the City. Fields' arguments that the City has unclean hands is misplaced.

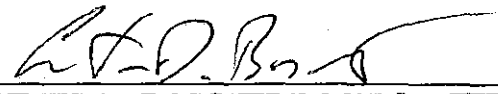

¹ The City did not cross appeal this decision and may be barred from questioning it in this appeal, but there is no prior case law upholding the Circuit Court's decision.

Fields argues that the City, by way of the CSC, ignored the law by not paying for the preparation of the hearing transcript. Appeals from administrative agencies are only consistent on one point and that is that there has to be a final order. See *Encyclopedia of Mississippi Law*, Jackson and Miller editors, Chapter 2. Administrative Law, part V., *Judicial Review of Agency Rules, Orders and Other Acts*, § 2:79, by the Honorable Leslie Southwick, who cites *Stuart* and *Zurich*. Fields even wrote to the Circuit Court that “[a]s a matter of fact, neither party knew who should pay costs or took a formal position prior to Mr. Gresham’s (attorney for the CSC) letter (that Fields should pay the costs of the transcript).” (R 28). Fields’ assertions on appeal that the wording of the statute was clear as to who was responsible for paying the cost of the transcript is not consistent with his stance before the Circuit Court. Clarksdale did not willfully violate a state law to obtain an unfair legal advantage.

CONCLUSION

The Circuit Court properly exercised its discretion in dismissing Fields’ appeal and this Court should affirm that decision based upon the preceding facts and relevant law.

RESPECTFULLY SUBMITTED, on this, the 28th day of July, 2009.

BY: 
CURTIS D. BOSCHERT, MSB 
121 Sunflower Avenue
Post Office Box 940
Clarksdale, Mississippi 38614
Telephone No. (662) 621-8137
Facsimile No. (662) 621-8197
Attorney for the Appellee,
City of Clarksdale, Mississippi

CERTIFICATE OF SERVICE

I, CURTIS D. BOSCHERT, attorney for Appellee, the CITY OF CLARKSDALE, MISSISSIPPI, do hereby certify that I have this day by mailed, by United States mail, postage prepaid, true and correct copies of the above and foregoing APPELLEE'S BRIEF to the following:

Derek D. Hopson, Esquire
Hopson Law Firm
Post Office Box 266
Clarksdale, Mississippi 38614
Attorney for the Appellant, Billy J. Fields

David Neil McCarty, Esquire
David Neil McCarty Law Firm, PLLC
1635 Lelia Drive, Suite 102
Jackson, Mississippi 39216
Attorney for the Appellant, Billy J. Fields

Drew M. Martin, Esquire
Martin Law Firm, PLLC
1635 Lelia Drive, Suite 102
Jackson, Mississippi 39216
Attorney for the Appellant, Billy J. Fields

William H. Gresham, Jr., Esquire
Gresham Law Firm
Post Office Drawer 760
Clarksdale, Mississippi 38614
Attorney for the Clarksdale Civil Service Commission

THIS, the 28th day of July, 2009.


CURTIS D. BOSCHERT