IN THE SUPREME COURT OF MISSISSIPPI

BILLY J. FIELDS — **APPELLANT**

v. — **No. 2008-CA-00316**

CITY OF CLARKSDALE, MISSISSIPPI — **APPELLEE**

REPLY BRIEF OF APPELLANT BILLY J. FIELDS

On Appeal from the
Circuit Court of Coahoma County
No. 14-CI-07-0105

ORAL ARGUMENT REQUESTED

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For the reasons set out in this Reply Brief, this Honorable Court should reverse the decision of the trial court that Mr. Fields abandoned his appeal from city commission to circuit court and remand for a full hearing of Mr. Fields' appeal. To address the arguments of the City on appeal, we emphasize that the Mississippi Rules of Appellate Procedure apply in all appeals, including from a city commission to a circuit court, and mandate a notice of deficiency and time to cure any alleged flaws on appeal. Second, Mr. Fields did not waive this issue, but instead raised it in the trial court both in his brief and at the hearing. Even if not raised, the issue was preserved, as it affects the substantial right of due process possessed by every citizen. There is no precedent which would support a finding that Mr. Fields abandoned his appeal.

I. The Circuit Court Abused Its Discretion When It Failed to Apply the Rules of Appellate Procedure.

As covered amply in Mr. Fields' principal brief, the Rules of Appellate Procedure govern ***all*** appeals. *See, e.g., American Investors, Inc. v. King*, 733 So. 2d 830, 832 (Miss. 1999) (MRAP governs appeals from county court to civil court); *Van Meter v. Alford*, 774 So. 2d 430, 432 (Miss. 2000) (applying *King* and noting that it "specifically held that MRAP 2(a)(2) applies to appeals from county court to circuit court"); *Adams v. Mississippi State Oil & Gas Bd.*, 854 So. 2d 7, 10 (Miss. Ct. App. 2003) (state Supreme Court has issued a clear "directive to the circuit and chancery courts, when sitting as appellate courts, to look to the Mississippi Rules of Appellate Procedure for direction").

Those Rules mandate that when an appeal is timely filed, a party has 14 days in which to cure any related defects after being provided notice by the clerk or the court. MRAP 2(a)(2). Indeed, within the past five months this Court has again confronted this precise issue, when an appeal from county court to circuit court was dismissed for a matter of form—not because it was

untimely filed. *See Adams v. A & C Entertainment*, 6 So. 3d 1082, 1084-85 (Miss. 2009).[1] Finding the dismissal improper, the Court remanded the case to the circuit court for further proceedings and directed the circuit court to first issue a deficiency notice pursuant to Mississippi Rule of Appellate Procedure 2(a)(2) to the plaintiff, "giving him specific notice of the deficiencies of his appeal and allowing him fourteen days from the date of the notice to cure said deficiencies." *Id.* at 1085. That is the exact relief Mr. Fields requests in the case at hand.

The facts and procedural history of this case are wholly conceded. The City framed the issue in this case as "[w]hether 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." City Brief at 1. The appeal was dismissed as allegedly "abandoned" because Captain Fields did not immediately bring the City's obstruction to the trial court's attention. Under the clear precedent cited at length in Mr. Fields' principal brief, the answer to the City's question is a resounding yes, it is an abuse of discretion. It is an abuse of discretion for one simple reason: the trial court should have followed the precedent of *Van Meter*, *King*, and *Adams*, and used the Mississippi Rules of Appellate Procedure to guide the overall process.

MRAP 3 provides the needed guidance when there is a conflict between the Rules of Appellate Procedure and another set of rules, i.e. the Uniform Rules of Circuit and County Court MRAP 3 clearly states that "[a]ll statutes, ***other sets of rules***, decisions or orders in conflict with [the Mississippi Rules of Appellate Procedure] shall be of no further force or effect." (emphasis added). As the Comment to Rule 3 notes, Rule 3 "departs from prior practice and provides that the only absolutely necessary step in the process is the timely filing of the notice of appeal." All parties concede that the appeal was timely filed, *see* T. at 24, and the trial judge found that the

[1] *Adams* was relied upon in Appellant's principal brief, but was at that time unreported.

appeal was timely filed. R. at 28. Accordingly, under the plain language of the Rule, the only "absolutely necessary" step has already been taken.

Similarly, the *Order Adopting the Mississippi Rules of Appellate Procedure*, which prefaces the MRAP, notes that the Rules are to "govern[] all proceedings in the Mississippi Supreme Court and the Courts of Appeals of the state of Mississippi, and the trial courts of this State to the extent provided in the Rules."

Further, the only alleged flaw was that Captain Fields' appeal was deficient because he had not produced a transcript of the Commission hearing. An action that the circuit court found that under state statute was the responsibility of the Commission. R. at 39. Under MRAP 2(a)(2), Mr. Fields must have been given notice of this deficiency by the circuit clerk, before his appeal could be dismissed. Mr. Fields was therefore penalized because his adversary failed to take an action required of it by statute, provide a transcript, within thirty (30) days. Mr. Fields has been placed in the wretched position of being vindicated in his argument, but still harshly penalized for actions beyond his control and fully within the control of his adversary. Such punishment is clearly an abuse of discretion and contrary to law. This case should be reversed and remanded so that Mr. Fields may pursue his appeal in the circuit court.

II. The Applicability of the Rules of Appellate Procedure Was Not Waived.

Captain Fields' properly raised that it was improper to dismiss his appeal in the trial cour below without giving him notice of the deficiency and opportunity to curt that deficiency, and so the argument is not waived. The City argues that such an argument was not raised in the trial court and thus should be procedurally barred. City Brief at 5-6. Yet as noted above, MRAP 3 clearly states that *only the Rules of Appellate Procedure* apply. Whether raised by any party or not, the Rules are the Rules are the Rules—they always apply. Further, the application of MRAP

was raised in the court below, and even if it had not been, the issue is one affecting a substantiv right, and therefore cannot be waived.

A. Mr. Fields Raised the Application of MRAP to the Appeals Process in His Brief and at the Hearing Before the Circuit Court.

Importantly, the issue was raised in the trial court, both in brief and during the hearing o the issue. The critical thrust of Mr. Fields' argument is that his appeal was mandatorily dismissed, and that he was not given time in which to correct any alleged deficiencies in his appeal to circuit court.[2] This argument was raised before the trial court. In Captain Fields' *Repl to City's Response to Appellant's Motion for City to Pay Costs*, he argued that under UCCCR 5.05, the circuit court could deem the failure to seek assistance with thirty (30) days of the Notice of Appeal as abandonment; however such a dismissal would be discretionary, not mandatory. R. at 28. As presented in Mr. Fields' principal brief, the only situation under the plain face of MRAP 2 requiring mandatory dismissal is "if the notice of appeal was not timely filed pursuant to Rules 4 or 5." MRAP 2(a)(2). As Judge Southwick, writing for a unanimous Court of Appeals, held: "[u]nder the appellate rules of procedure, the *only* mandatory dismissal is for failing to timely file notice of appeal." *Wheeler v. MDEQ Permit Bd.*, 856 So. 2d 700, 704 (Miss. Ct. App. 2003) (emphasis added). "*All other* failings are reviewed as potential discretionary dismissals." *Id.* (emphasis added).

In the hearing before the Circuit Court, specific invocation to the MRAP 2(a)(2) deficiency process was made by counsel for Mr. Fields. When speaking about the process of notice by the clerk; he referenced the application of MRAP to the trial court proceedings:

> . . . Now, the clerk can examine, at that point, and I think under any, I'm getting outside the, *but they apply here as well*, and here in Mississippi in, *in the appellate rules* or under the statute, the clerk can examine and say, wait a minute,

[2] As noted at length in Appellant's principal brief, we do not concede there were any deficiencies caused by Mr. Fields or his counsel at the time of dismissal, as the Circuit Court found that the Commission was required to pay for the costs of the transcript.

> this is the filing fee be we need a cost bond or we need a transcript fee, which we consider as part of costs. Or they can separate that out and say, listen, we need you to designate or we need somebody to tell us.

T. at 21 (emphases added).[3]

Therefore Counsel for Captain Fields—caught off-guard by the court's statement just minutes before that "I would rule for your client here today, but I won't," T. at 17, and wranglir with the sudden issue of timeliness, strongly alludes both to the applicability of MRAP and that the clerk should first provide some notice and time in which to cure any allege deficiency.

As the issues on appeal were raised in the circuit court in both brief and hearing, they ar not barred.

B. Issues Regarding Fundamental Rights Are Not Procedurally Barred.

Even if Mr. Fields had not raised the applicability of MRAP to the appeals process in the court below, this issue would not be procedurally barred because it affects a fundamental right. When an appeal involves "a fundamental right, we will not apply a procedural bar and will address the merits of [a] claim." *Graves v. State*, 969 So. 2d 845, 846-47 (Miss. 2007); *see also Fuselier v. State*, 654 So. 2d 519, 522 (Miss. 1995) ("errors affecting fundamental constitutional rights may be excepted from procedural bars which would otherwise prohibit their consideration") (internal citations, quotations, and alteration omitted).

A litigant has a property right in their lawsuit. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"). "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* at 429. Quoting *Zimmerman*, this Court has also recognized that "[i]t is without question that 'a cause of action is

[3] The extraneous "be" in the sentence ". . . filing fee be we need . . ." appears in the original.

a species of property protected by the Fourteenth Amendment's Due Process Clause' of the federal constitution." *Albert v. Allied Glove Corp.*, 944 So. 2d 1, 6 (Miss. 2006). Our state Bill of Rights echoes the protections of the Fourteenth Amendment found in the United States Constitution, as "[n]o person shall be deprived of life, liberty, or property except by due process of law." Miss. Const. of 1890, art. 3, sec. 14. This right is therefore a fundamental and substantive right.

MRAP 2(a)(2) is a key requirement in providing due process to appellants and safeguarding their property right in their case. *See King*, 733 So. 2d at 832 (trial court denied appellant "due process" when failing to use MRAP); *Johnson v. Brooks*, 915 So. 2d 536, 538 (Miss. Ct. App. 2005) (appellant "deprived of due process rights" when "the circuit clerk di not give [him] the required notice of deficiency"). Most recently in *Van Meter*, this Court has made clear that a party is "deprived of due process when his appeal [is] dismissed because he was not given an official notice of deficiencies in his appeal by the circuit clerk." 774 So. 2d at 432.

Because the dismissal of a case deprives a litigant their property right in a case, it must b safeguarded by the Rules. Even if the Court finds that the issue is raised for the first time on appeal, arguments based on this fundamental right cannot be procedurally barred.

III. The City's Interpretation of the Statute is Null and Void.

At page 4-5 of its Brief, the City argues a fresh interpretation of the underlying statute which requires it to pay costs. The trial court ruled against the City on this issue, R. at 39, and the City has not filed a cross-appeal on the issue. The trial court encouraged the City to appeal if it so wished. T. at 31. The City declined. Accordingly, as the City did not appeal this issue, it is not before this Court, and cannot be argued on appeal. Additionally, the deference the City requests for the Commission's interpretation of the statute is not appropriate, as "where the

agency's interpretation is contrary to the statute's language, we grant no such deference." *Wheeler*, 856 So. 2d at 704 (*citing Gill v. Mississippi Dept. of Wildlife Conservation*, 574 So. 2c 586, 593 (Miss. 1990)).

IV. The Trial Court's Mandatory Dismissal Was an Abuse of Discretion.

The City argues only two cases for its argument that UCCCR 5.05 supersedes the MRAI and that this case should be mandatorily dismissed. Neither are applicable. In one case, the Court of Appeals upheld a dismissal for abandonment when an attorney "failed to take any action for approximately eight months after the notice of appeal was filed," and never applied to the circuit court for assistance in obtaining the transcript. *Stuart v. PERS of Miss.*, 799 So. 2d 886, 890 (Miss. Ct. App. 2001).[4] The eight months' delay in *Stuart* is distinguishable from the three weeks in the instant case, as is the active work by Captain Fields' trial attorney. Further, while it appears that in *Stuart* no Rule 2(a)(2) notice of deficiency was sent by the circuit court, this issue was not raised by that appellant.

The other case cited by the City involved a host of errors, including that the record was filed in the wrong county, and the appellant failed to file a brief. *Zurich Am. Ins. Co. of Illinois v Beasley Contracting Co., Inc.*, 779 So. 2d 1132, 1135-36 (Miss. Ct. App. 2000). Critically different from the instant case, in *Zurich* the parties actually *had* a record—it was just filed in the wrong county after the Appellant filed its notice of appeal in the wrong county, and "unlike an original transcript from a trial court to the supreme court, the record from the administrative law

[4] In Appellant's principal brief, *Stuart* was examined as "the only reported case applying UCCCR 5.05." Brief at 10, n. 3. This is not precise; there are actually four Mississippi cases examining the Rule (including one dissent). More correctly, *Stuart* seems to be the one case applying the Rule where there was not some other operative failure, such as failure to file briefs, and where the trial court did not have a transcript of some sort. The other two reported cases are *Johnson Land Co. v. C.E. Frazier Const. Co., Inc.*, 925 So.2d 80, 85 (Miss. 2006), which mentioned Rule 5.05 only in passing, and a dissent to *Van Meter*, which argued that an opponent's "motion to dismiss the appeal diligently informs [a party] of the reasons his appeal should be dismissed," including failure to comply with Rule 5.05. 774 So.2d 430, 433 (Smith, J., dissenting).

judge was already transcribed for the appeal to the Commission, and all parties were familiar with its contents." *Id.*

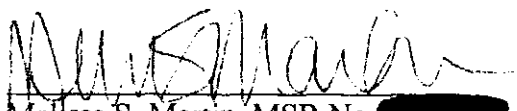
In the case at hand, the City and the Commission prevented Captain Fields from obtaining a record and therefore his appeal. While state statute clearly required them to pay for transcript, they refused, in turn gaining the benefit of their unclean hands by succeeding in having Captain Fields' case dismissed with prejudice for the City's own failure to act. The transcript was not filed in the wrong county; there was no failure to file briefs, and unlike the facts in *Zurich*, the failure was not on the part of the Appellant. *Id. Zurich* is inapplicable.

CONCLUSION

For the reasons above, the Appellant Captain Billy J. Fields prays that this Honorable Court reverse the decision of the Coahoma County Circuit Court to strike his appeal as abandoned, and remand this case for a full appeal on the merits.

Respectfully Submitted,

Appellant Billy J. Fields



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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have served by United States mail, postage prepaid, or via hand delivery, a true and correct copy of the above and foregoing document, to the following persons at these addresses:

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THIS, the 14 day of August, 2009.

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