

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CASE NO. 2008-WC-01091-COA**

WILLIE L. BROWN

APPELLANT

VERSUS

**ROBINSON PROPERTY GROUP, LIMITED PARTNERSHIP
D/B/A HORSEHOE CASINO AND HOTEL**

APPELLEE

AND

ZURICH AMERICAN INSURANCE COMPANY

APPELLEE

**ON APPEAL FROM THE
MISSISSIPPI WORKERS' COMPENSATION COMMISSION**

REPLY BRIEF OF THE APPELLANT

**LAWRENCE J. HAKIM, ESQ.
MS BAR NO. [REDACTED]**

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the persons listed below may have an interest in the outcome of this case. These representations are made in order that the members of this Court may evaluate possible disqualification or recusal.

1. Willie L. Brown, Appellant;
2. Robinson Property Group, Limited Partnership
d/b/a Horseshoe Casino and Hotel, Appellee;
3. Zurich American Insurance Company, Appellee;
4. Lawrence J. Hakim, Esq., Attorney for Appellant;
5. George Dent, Esq., Attorney for Appellees;

This the 17th day of February, 2009.


**LAWRENCE J. HAKIM, ESQ.
MS BAR NO. [REDACTED]
CHARLIE BAGLAN & ASSOCIATES
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TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
ARGUMENT AND RESPONSE TO APPELLEES MOTION TO DISMISS	1
a. Appellees <i>abandoned</i> their Motion to Dismiss in the Tunica County Circuit Court and therefore are barred from raising it before the Court of Appeals	1
b. Appellant corrected any alleged deficiency before Appellees filed their Motion to Dismiss, and therefore, said Motion is moot	2
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

CASES

Page

<u>Anderson v. McRae's, Inc.</u> , 931 So. 2d 674 (Miss. App. Ct. 2006)	2
<u>Burcham v. Burcham's Estate</u> , 303 So. 2d 476 (Miss. 1974)	1
<u>Cossitt v. Alfa Ins. Corp.</u> , 726 So. 2d 132 (Miss. 1998)	2
<u>Harrison v. B.F. Goodrich Co.</u> , 881 So. 2d 288, 290, 294 (Miss. Ct. App. 2004)	2, 4
<u>Medical Assur. Co. of Mississippi v. Myers</u> , 956 So. 2d 213, 215 (Miss. 2007)	2
<u>Tims v. City of Jackson</u> , 823 So. 2d 602 9Miss. Ct. App. 2002)	5
<u>Thomas v. Five County Child Dev. Program, Inc.</u> , 958 So. 2d 247, 250-251 (Miss. Ct. App. 2007)	2, 4
<u>Van Meter v. Alford</u> , 774 So. 2d 430, 432 (Miss. 2006)	2, 4

OTHER AUTHORITIES

Page

Uniform Rules of Circuit and County Court Practice, Rule 2.04	1
Uniform Rules of Circuit and County Court Practice, Rule 4.03	1
Mississippi Rules of Appellate Procedure, Rule 2(a)(2)	3

ARGUMENT AND RESPONSE TO APPELLEES MOTION TO DISMISS

a. Appellees abandoned their Motion to Dismiss in the Tunica County Circuit Court and therefore are barred from raising it before the Court of Appeals.

Appellees filed their "Motion to Dismiss Appeal" on or about February 21, 2008, after Brown filed his Designation of Record. *At no point thereafter did the Appellees seek to have their Motion heard, forward a proposed Order to the Circuit Court Judge, or otherwise pursue or prosecute said Motion.* Rule 2.04 of the Uniform Circuit and County Court Rules states:

It is the duty of the movant, when a motion or other pleading is filed, including motions for a new trial, to pursue said motion to hearing and decision by the court. Failure to pursue a pre-trial motion to hearing and decision before trial is deemed an abandonment of that motion; however, said motion may be heard after the commencement of trial and the discretion of the court.

Rule 4.03 of the Uniform Circuit and County Court Rules states:

All dispositive motions shall be deemed abandoned unless heard at least ten days prior to trial.

In the instant case, Appellees simply filed a Motion to Dismiss, but let it lie dormant, without ever noticing it for hearing, seeking an Order from the Circuit Court or following up in any way, shape or form with the Circuit Court regarding the status of said Motion. Therefore, Appellees are deemed to have abandoned their motion before the Tunica County Circuit Court.

Mississippi Law is unequivocally clear on this point: a movant may not allow his motion to lie dormant, but must bring it to the attention of the trial court and seek a hearing on same. Burcham v. Burcham's Estate, 303 So. 2d 476 (Miss. 1974). This is an affirmative duty and it is the movant's responsibility to obtain a ruling from the court on

the motions he has filed and failure to do so constitutes a waiver of same. Anderson v. McRae's, Inc., 931 So. 2d 674 (Miss. App. Ct. 2006). Moreover, a motion that is not ruled upon is presumed abandoned. Cossitt v. Alfa Ins. Corp., 726 So. 2d 132 (Miss. 1998).

It is hornbook law, that a motion that has been abandoned *cannot* be raised on appeal. Harrison v. B. F. Goodrich Co., 881 So. 2d 288, 290, 294 (Miss. Ct. App. 2004); Medical Assur. Co. of Mississippi v. Myers, 956 So. 2d 213, 215 (Miss. 2007)

As noted above, the Appellees filed their motion on or about February 21, 2008, (after Brown filed his Designation of Record). However, Appellees failed to take any further action or pursue notice for hearing or attempt to bring to hearing their Motion to Dismiss or seek an order granting same. Accordingly, under even the most lenient interpretation of the facts, the Appellees must be deemed to have abandoned their Motion to Dismiss. Having abandoned their Motion, it is axiomatic law that the Appellees can not now raise it before the Court of Appeals.

b. Appellant corrected any alleged deficiency before Appellees filed their Motion to Dismiss, and therefore, said Motion is moot.

Under Mississippi Law, Brown was entitled to official notice from the Circuit Clerk, of any deficiencies in his appeal. Thomas v. Five County Child Dev. Program, Inc., 958 So. 2d 247, 250-251 (Miss. Ct. App. 2007); Van Meter v. Alford, 774 So. 2d 430, 432 (Miss. 2006).

Rule 2(a)(2) of the Mississippi Rules of Appellate Procedure unambiguously states:

An appeal may be dismissed upon motion of a party or on motion of the appropriate appellate court (i), when the court determines that there is an obvious failure to prosecute an appeal; or (ii), when a party fails to comply substantially with these rules. When either court, on its own motion or on motion of a party, determines that dismissal may be warranted under this Rule 2(a)(2), the clerk of the Supreme Court shall give written notice to the party in default apprising the party of the nature of the deficiency. If the party in default fails to correct the deficiency within fourteen days after the notification, the appeal shall be dismissed by the clerk of the Supreme Court.

In the instant case, it is undisputed the Circuit Court did not provide Brown with notice of any alleged deficiency in his Appeal before Appellees filed their Motion to Dismiss. Nevertheless, Brown took steps to correct same by filing his Designation of Record and awaiting the clerk's estimate of costs. It is important to note that the Designation of Record was filed *before* the Appellees filed their Motion to Dismiss.

As the foregoing argument, as well as the Tunica County Circuit Court's docket entries demonstrate, Brown filed his Designation of Record, February 13, 2008. It should be noted that it wasn't until after the Designation of Record was filed that Appellees filed their Motion to Dismiss. The Appellees claim that the court costs and Certificate of Compliance were not filed until July 9, 2008. **However, the clerk's costs were not submitted to Brown until on or about July 9, 2008, which were then promptly paid and Certificate of Compliance filed.**

On page 14 of their Brief the Appellees state:

"Appellee, Horseshoe, filed its Motion to Dismiss Appeal on February 21, 2008, and Brown timely filed a written response. Horseshoe's Motion clearly advised Brown of the deficiencies in his Appeal. However, Brown's cure of these deficiencies did not occur until over 4½ months later, on July 10, 2008."

Such an argument is misleading on two grounds: A.) the deficiency was cured by the filing of the Designation of Record, and the Appeal Costs were not received by Brown *until* July, 2008, at which time Brown promptly tendered payment for same and served his Certificate of Compliance; B.) Appellees “Motion to Dismiss can not be substituted for an official Notice of deficiencies *from the Court Clerk.*” Van Meter v. Alford, 958 So. 2d at 432. (emphasis added).

The Appellees further state on page 14 of their Brief:

“The Circuit Court made no ruling on Horseshoe’s Motion to Dismiss Appeal. On or before June 25, 2008, the Clerk of the Mississippi Supreme Court received the Circuit Court record in this matter. Because there was no ruling by the circuit Court on Horseshoe’s Motion to Dismiss Appeal, it is proper for this Court to consider the Motion.”

The Appellees circular argument is erroneous and again in conflict with Mississippi Law: By virtue of their own inaction with regard to their Motion to Dismiss, Appellees must be deemed to have abandoned their Motion. Therefore, it is fully reasonable “the Circuit Court made no ruling” on said Motion because Appellees failed to bring their own Motion forward. Conversely, the Circuit Court’s denial of Appellees’ Motion to Dismiss can be *implied* by either a.) the Circuit Court not rendering an Order granting said Motion, or, b.) by the Circuit Court’s subsequent action forwarding Brown’s appeal and the Record to the Mississippi Supreme Court. Harrison v. B.F. Goodrich Co., 818 So. 2d at 293.¹

¹ It is not unreasonable to assume that the Circuit Judge refused to rule for Appellees due to the fact, a.) the prior filing of Brown’s Designation of Record automatically made Appellees Motion to Dismiss moot at the time said Motion was filed; or, b.) the proper procedure under Rule 2(a)(2) of the Rules of Appellate Procedure absolutely requires official notice of the deficiencies and the opportunity to correct same before any further action may be taken. However, the Circuit Clerk never provided the requisite notice.

Assuming, *arguendo*, the Circuit Judge implicitly denied Appellees' Motion to Dismiss, Appellees Motion before this Court is still without merit. The decision to grant or deny a motion to dismiss is in the discretion of the trial court and will not be reversed unless the discretion is abused. Thomas v. Five County Child Dev. Program, Inc., 958 So. 2d at 249; Tims v. City of Jackson, 823 So. 2d 602 (Miss. Ct. App. 2002).

Finally, the Appellees have not demonstrated any abuse of discretion by the Circuit Judge, nor have they ever alleged same. Accordingly, Appellees Motion to Dismiss Appeal should be fully denied.

RESPECTFULLY submitted this the 13th day of February, 2009.

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BY:

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CERTIFICATE OF SERVICE

I, **LAWRENCE J. HAKIM**, of counsel for the Appellant herein, do hereby certify that I have this day mailed, proper postage prepaid, a true and correct copy of the above and foregoing **Reply Brief of the Appellant** to:

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Honorable George Dent
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THIS, the 13th day of February, 2009.


LAWRENCE J. HAKIM