

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIAM SMITH

APPELLANTS

VS.

NO. 2009-CA-01003

CITY OF SALTILLO, MISSISSIPPI

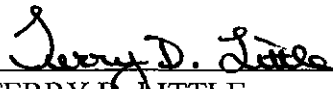
APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal:

1. William Smith – Plaintiff/Appellant.
2. Eugene Barton, Esq. – Counsel for Plaintiff/Appellant.
3. City of Saltillo, Mississippi – Defendant/Appellee.
4. Terry D. Little, Esq., Daniel Coker Horton & Bell, P.A., 265 North Lamar Boulevard, Suite R, Post Office Box 1396, Oxford, Mississippi, 38655 – Counsel for Defendant/Appellee City of Saltillo

THIS the 26th day of January, 2010.


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I. STATEMENT OF THE ISSUES

- A. THIS COURT LACKS JURISDICTION TO HEAR THIS APPEAL.
- B. THE CIRCUIT COURT PROPERLY DISMISSED APPELLANT'S APPEAL FROM COUNTY COURT FOR LACK OF JURISDICTION WHEN HE FAILED TO PROPERLY PERFECT HIS APPEAL.
- C. EVEN IF THIS COURT HAS JURISDICTION TO HEAR THE APPEAL DIRECTLY FROM COUNTY COURT, THE COUNTY COURT CORRECTLY APPLIED THE JUDICIAL IMMUNITY FOUND AT MISS. CODE ANN. §11-46-11(1)(A) TO DETERMINE THE CITY WAS IMMUNE FROM SUIT

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

Plaintiff/Appellant Smith (hereinafter "Smith" and/or "plaintiff") filed suit in the County Court of Lee County, Mississippi, against the City of Saltillo, Mississippi (hereinafter "Saltillo" and/or "defendant").

In his Complaint, Smith alleged that "the City of Saltillo wrongfully convicted, as reflected by the report of a conviction, the plaintiff, William Smith of D.U.I., in municipal court in 2006 and reported that he was convicted of a D.U.I. in 2006 when, in fact, he was not convicted of a D.U.I. in 2006." R.E. 1, R. 00019. Smith alleged that his "entire D.U.I. [c]ase was mishandled by the municipal court clerk in charge at the time." R.E. 1, R. 00019. He also alleged that as a result of the municipal court clerk's negligence in handling and processing his D.U.I. case, he sustained damages in the amount of \$70,000.00. R.E. 1, R. 00020. On June 19, 2008, Saltillo filed a Motion to Dismiss and/or Motion for Summary Judgment asserting various immunities available to it under the Mississippi Tort Claims Act with regard to the subject claim as well as defenses with regard to the sufficiency of the required Notice of Claim under Miss. Code Ann. §11-46-11(2). After the exchange of written briefs on the matter the county court heard Saltillo's Motion to Dismiss and/or Motion for Summary Judgment on October 13, 2008. Following the hearing on the matter, the county court entered a Final Judgment and Order granting the motion on the basis that Saltillo was immune pursuant to Miss. Code Ann. §11-46-9(1)(a) and dismissed Smith's claims against Saltillo with prejudice. R.E. 2, R. 00077-78. The county court found the remaining issues set forth in the defendant's Motion to Dismiss and/or Motion for Summary Judgment to be moot. Final Judgment was entered on October 31, 2008. R.E. 2, R. 00077-78.

On November 10, 2008, Smith filed a purported Petition for Appeal with the Circuit Court

of Lee County. R.E. 3, R. 00002-5. Despite the fact that defendant's counsel appeared on the certificate, Saltillo and its counsel did not receive any notice that a Petition for Appeal had been filed until March 30, 2009, when defendant's counsel received a briefing schedule from the circuit court dated November 10, 2008, signed by the Honorable Thomas J. Gardner, III. R.E. 4, R. 00006. Upon receipt of the briefing schedule, counsel for the defendant contacted the clerk for the county court of Lee County to inquire as to whether a notice of appeal had ever been provided to the county court as required by Uniform Circuit and County Court Rule 5.04. Smith's certificate for the notice of appeal did not indicate that the county court was served with a copy of the notice of appeal and the county court advised defense counsel that it had never received a copy of any notice of appeal. R.E. 3, R. 00004.

Counsel for the defendant then contacted the circuit court of Lee County, Mississippi, to request a complete copy of the appeal file and received a faxed copy on March 30, 2009, and a certified copy by mail on the following day. On or about March 31, 2009, Smith filed a Motion for Additional Time to File his appeal brief. On April 8, 2009, the circuit court entered an Order giving the plaintiff additional time to file his brief. On April 17, 2009, Saltillo filed a Motion to Vacate the Order Giving Additional Time to File Brief and Motion to Dismiss Appeal. On April 21, 2009, Smith filed his response to the Motion to Vacate Order and Motion to Dismiss Appeal. On May 7, 2009, Saltillo filed its Reply in Further Support of Defendant's Motion to Vacate Order and Motion to Dismiss Appeal. On May 15, 2009, the circuit court heard the defendant's Motion to Vacate Order and Motion to Dismiss Appeal and on May 22, 2009, the court entered its Order granting Saltillo's Motion to Vacate Order and Motion to Dismiss Appeal.

Following the dismissal of Smith's appeal from county court to circuit court, the plaintiff filed a Notice of Appeal and Designation of the Record on June 12, 2009. Also on that date, Smith

filed a Notice of Appellant to Supreme Court Order of James Roberts dated May 19, 2009, and issues on appeal. On June 17, 2009, the plaintiff filed a Notification of Appeal and a Certificate of Compliance with the circuit court. Smith has now appealed the ruling of the circuit court and has attempted to include as an issue before this Court whether the county court improperly dismissed plaintiff's claims based on the immunity provided by Miss. Code Ann. §11-46-9(1)(a).

B. STATEMENT OF FACTS

In addition to the facts described in the Nature of the Case and Course of the Proceedings, supra, which is incorporated herewith to the extent that this Court has jurisdiction to determine whether the circuit court erred in dismissing the plaintiff's appeal from county court, Saltillo also sets forth the following facts to the extent that this Court has jurisdiction to hear the issues involving immunity as decided by the county court.

Smith asserts that Saltillo wrongfully convicted him of a D.U.I. in municipal court in 2006 as reflected by a report of conviction.¹ R.E. 1, R. 00019-20. Plaintiff's D.U.I. case is evidenced by an abstract of court record, where Smith appeared as a defendant in Saltillo Municipal Court on May 26, 2004, and pled guilty to a D.U.I. First Offense after registering a .261 blood alcohol content following a stop on March 27, 2004. R.E. 5, R. 00045. At the hearing, the defendant in that case was fined \$250.00 along with \$195.00 in costs and paid the fine off in installments. R.E. 5, R. 00045. After the final payment was made, Mary Buchannan, who took over as Municipal Court Clerk, discovered that the court abstract had not been sent to the Mississippi Department of Public Safety and forwarded same to the agency on or about May of 2006. R.E. 5, R. 00045; R.E. 6, R. 00052. The Abstract of Court Record, which contained Smith's correct date of conviction as May

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Interestingly, there is no definitive date set forth in either the Complaint or Notice of Claim regarding the date of the wrongful conviction.

26, 2004, was subsequently received by the Mississippi Department of Public Safety who proceeded to suspend Smith's driver's licence pursuant to Miss. Code Ann. §63-11-30(2)(a). R.E. 5, R. 00045; R.E. 6, R. 00052.

Smith asserts that the City of Saltillo wrongfully convicted him of a D.U.I. in municipal court in 2006. R.E. 1, R. 00019. He further alleges that his entire D.U.I. case was mishandled by the Municipal Court Clerk in charge at the time. R.E. 1, R. 00019.

III. SUMMARY OF THE ARGUMENT

Smith failed to perfect his appeal from the county court to the circuit court. Accordingly, the circuit court did not err when it dismissed his appeal for lack of jurisdiction. Since the circuit court lacked jurisdiction, plaintiff's appeal from the Judgment of the Lee County Circuit Court is improper as this Court has no jurisdiction to hear the appeal.

Alternatively, to the extent this Court has jurisdiction, the circuit court did not err in dismissing the plaintiff's appeal for lack of jurisdiction for failure to timely perfect his appeal. However, should this Court determine that the circuit court erred in dismissing the appeal, the proper procedure would be to remand the appeal to the circuit court for consideration of the appeal on the record from the county court.

Alternatively, in the event this Court finds that it has jurisdiction and that the plaintiff's appeal from the county court is properly before it, Saltillo would show that the county court did not err in dismissing the plaintiff's Complaint pursuant to the immunity found at Miss. Code Ann. §11-46-9(1)(a). Miss. Code Ann. §11-46-9(1)(a) provides that a governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim "[a]rising out of the legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature."

The plaintiff's Complaint clearly alleges that his claim arises out of the Municipal Clerk's negligence in the handling and processing of his D.U.I. case. The Mississippi Supreme Court addressed judicial or administrative actions or inactions with regards to a Justice Court Clerk and Judge in *Collins v. Tallahatchie County*, 876 So. 2d 284 (Miss. 2004). In *Collins*, the Court found that even if there were a "difference in the issuance of a warrant and the delivery of a warrant to a police or sheriff's department, the type of conduct complained of would be an administrative act of a judicial nature, at the very least." *Collins*, 876 So. 2d at 288 (Miss. 2004). Such conduct "falls squarely within §11-46-9(1)(a)." *Id.* As in *Collins*, the alleged negligence of the Municipal Clerk in the handling and processing of the plaintiff's D.U.I. case falls clearly within §11-46-9(1)(a). Furthermore, the defendant is immune because the action of the Municipal Clerk in handling and processing the plaintiff's D.U.I. case arises out of judicial action. *Blake v. Wilson*, 962 So. 2d 705, 712 (Miss. Ct. App. 2007)(§11-46-9(1)(a) does not premise immunity on the employee's actual employment as a member of the judiciary, instead, the statute grants immunity to governmental employees whose conduct arises out of a judicial action).

IV. ARGUMENT

A. STANDARD OF REVIEW

The Mississippi Supreme Court has held that when a circuit court did not acquire jurisdiction to hear an appeal from county court, there is no valid judgment from which to appeal to the Supreme Court. *Williams v. Michael*, 319 So. 2d 226, 227 (Miss. 1975).

Alternatively, should this Court determine that it has jurisdiction to hear the appeal of the Order of the circuit court, this Court must determine whether the circuit court erred in denying the appeal for lack of jurisdiction where the plaintiff failed to properly perfect his appeal from county court to circuit court. *Graham v. Murray*, 359 So. 2d 1370 (Miss. 1978); *Fowler Butane Gas Co.*

v. Parish, 181 So. 2d 157 (Miss. 1965).

B. SUPREME COURT LACKS JURISDICTION TO HEAR THIS APPEAL

As stated above, plaintiff has filed a separate Motion to Dismiss Appeal for Lack of Standing. To the extent the issue of jurisdiction is more properly argued in the Appellee's Brief rather than by motion, the pertinent authority in support of Appellee's Motion to Dismiss Appeal for Lack of Jurisdiction is repeated below.

Smith improperly seeks to have the merits of the County Court's substantive decision to dismiss the case reviewed by this Court. In *Graham v. Murray*, 359 So.2d 1370 (Miss. 1978), the Mississippi Supreme Court set forth its scope of review when a circuit court dismisses an appeal from county court when the assigned errors were not considered by the circuit court in affirming the judgment of the county court:

We are of the opinion that when no assignment of errors is timely filed in, and is not considered by the appellate court (here circuit court), then no such assignment of errors will be considered by this Court.

In *Fowler Butane Gas Company v. Parish*, 254 Miss. 585, 181 So.2d 157 (1965), this Court held as follows:

Under the posture of this case, the Court is not concerned with the merits of the appeal, but only with whether the circuit court was in error in denying the writ of certiorari and in dismissing the appeal.

This Court considered the same question in *Mississippi State Highway Comm'n v. Cook*, 270 So.2d 695 (Miss. 1972). In that case, we disposed of the issue by holding as follows:

There was no assignment of error filed in the circuit court when the case was appealed there from the county court. Under several cases heretofore decided by this Court, we cannot consider any nonjurisdictional questions not presented by an assignment of error in circuit court.

In considering the practical as well as the legal aspects of this procedural issue, we are of the opinion that the only question properly before this Court is whether the circuit court properly affirmed the judgment of the county court on the ground that the circuit court rules were not complied with by the appellant. To hold otherwise and go into the merits of the assignment of errors charged to the county court, which assignment was not filed in the circuit court until after the circuit court affirmed the judgment of the county court, would, in effect, allow a party to circumvent the intermediate appellate process.

Smith now seeks to circumvent the appellate process by having this Court determine the sufficiency of the county court's decision to grant summary judgment. As set forth above, the plaintiff failed to perfect his appeal by paying the required costs and wholly failed to comply with the rules governing appeals to the circuit court. The plaintiff's failure to timely perfect his appeal before the circuit court requires this Court to dismiss the appeal from circuit court for lack of jurisdiction.

C. CIRCUIT COURT PROPERLY DISMISSED APPELLANT'S APPEAL FROM COUNTY COURT FOR LACK OF JURISDICTION FOLLOWING APPELLANT'S FAILURE TO PERFECT HIS APPEAL.

Alternatively, should this Court determine that it has jurisdiction to hear the plaintiff's appeal from the order of the Circuit Court, the decision of the circuit court in dismissing the appeal for lack of jurisdiction should be affirmed. Smith's Petition for Appeal contained a number of jurisdictional deficiencies requiring dismissal of the appeal. Miss. Code Ann. §11-51-79 provides that "[a]ppeals from the County Court shall be taken and bond given within thirty (30) days from the date of the entry of the Final Judgment or Decree on the minutes of the Court." The Mississippi Supreme Court has long held that the statute governing appeals from the county court to circuit court "is mandatory and jurisdictional." *W. P. Johnson and L. D. Johnson d/b/a P & L Homes in Meridian v. Silvester Evans and Rows Discount Mobile Homes, Inc.*, 517 So. 2d 570 (Miss. 1987); *Williams v. Michael*,

319 So. 2d 226, 227 (Miss. 1975); *Flowers v. Trotlos*, 160 So. 581, 582 (Miss. 1935)(applying same standard to predecessor statute). The Court has also held that since the time for perfecting appeals is jurisdictional, neither the Supreme Court nor the trial court can extend the time for perfecting appeals. *Mississippi State Highway Comm'n v. First Methodist Church of Biloxi, Mississippi, Inc.*, 323 So. 2d 92, 95 (Miss. 1975). Therefore, where a party fails to perfect an appeal within the time allowed by the statute, it is the duty of the Supreme Court to dismiss the appeal either on its own motion or on motion of the Appellee. *Id.*

In addition, the Uniform Circuit and County Court Rule 5.04 governs the Notice of Appeal from a county court to a circuit court and provides:

the party desiring to appeal a decision from a lower court must file a written notice of appeal with the circuit court clerk. A copy of that notice must be provided to all parties or their attorneys of record and the lower court or lower authority whose order or judgment is being appealed. A certificate of service must accompany the written notice of appeal The written notice of appeal must specify the party or parties taking the appeal; must designate the judgment or order from which the appeal is taken; must state if it is on the record or on appeal *de novo* and must be addressed to the appropriate court.

Smith failed to comply with the requirement that the Notice be provided to all parties or their attorneys of record and the lower court. R.E. 3, R. 00002-3. Further, the plaintiff failed to comply with U.R.C.C.C. 5.01 as he requested "that this case be remanded to the Circuit Court for a jury trial on all issues." R.E. 3, R. 00003. U.R.C.C.C. 5.01 provides that all cases appealed to Circuit Court, except for direct appeals from Justice Court or Municipal Court, "shall be on the record and not a trial *de novo*." Accordingly, Smith failed to comply with U.R.C.C.C. 5.01 and 5.04 which requires the plaintiff to state in his Petition that the appeal is on the record.

Smith also failed to comply with U.R.C.C.C. 5.05 and M.R.A.P. 11(a) which governs the filing of the record and appeals on the record. To the extent that Smith's appeal is based on the

record, he failed to file the Record from the lower court with the circuit clerk within thirty (30) days of filing of the Notice of Appeal as required by U.R.C.C.C. 5.05 and M.R.A.P. 11(a). Rule 5.05 provides that the “[f]ailure to file the record with the court clerk or to request 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.” M.R.A.P. 11(a) provides that the Appellant shall designate the record pursuant to M.R.A.P. 10 and take any other action necessary to enable the clerk to assemble and transmit the record. As Smith failed to even notify the county court clerk that the court’s order was being appealed, he failed to comply with M.R.A.P. 10 and 11. Not only did Smith fail to notify the county court of the appeal, he also failed to take any action to secure transmission of the record to the circuit court for over four (4) months after the Petition for Appeal was filed with the circuit clerk on November 10, 2008, as required by U.R.C.C.C. 5.05.

Smith also failed to provide a cost bond as required by U.R.C.C.C. 5.09 which provides: “[i]n all appeals, unless the court allows an appeal *in forma pauperis*, the appellant or appellants shall pay all court costs incurred below and likely to be incurred on appeal as estimated by the circuit court clerk.” The plaintiff failed to perfect his appeal by failing to provide any cost bonds as required by the Rules. R.E. 7, R. 00001; R.E. 8, R. 00018.

U.R.C.C.C. 5.04 provides that “[t]he timely filing of this written notice and payment of costs will perfect the appeal.” Since Smith did not pay the costs incurred in the lower court, his appeal was not perfected and the time for him to file the appeal expired. Since the appeal was not perfected, the time to appeal could not be extended except by M.R.A.P. 4(g), which provides:

the trial court may extend the time for filing a notice of appeal upon motion filed not later than thirty (30) days after the expiration of the time otherwise prescribed by this rule. Any such motion which is

filed before expiration of the prescribed time may be granted for good cause and may be ex parte unless the Court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given other parties, and the motion shall be granted only upon a showing of excusable neglect. No such extension shall exceed thirty (30) days past such prescribed time or ten (10) days from the dates of entry of the order granting the motion, which ever occurs later. (Emphasis added).

Furthermore, Smith failed to comply with Miss. Code Ann. §11-51-29(2009) which required the prepayment of costs in civil cases on appeal. Specifically, Miss. Code Ann. §11-51-29 provides:

on appeals from decrees overruling demurers or other interlocutory orders or decrees, or where the appeal is granted to settle the principals of the case, or on appeals from final judgments of a circuit court in civil cases, or from final decrees of a chancery court including cases where the circuit court or chancery court has acted as an appellate court, the appellant shall prepay all of the costs in the lower court including the cost of the preparation of the record of the proceedings in the trial court, and fee prescribed in §25-7-3, to the clerk of the court from which the appeal is taken. (Emphasis added).

Lastly, Smith failed to comply with M.R.A.P. 11(b) by failing to estimate the cost of preparation of the record on appeal and depositing the sum with the county court clerk. Based upon the numerous jurisdictional deficiencies set forth above, the circuit court properly dismissed the appeal.

D. COUNTY COURT CORRECTLY APPLIED THE JUDICIAL IMMUNITY FOUND AT MISS. CODE ANN. §11-46-9(1)(a) TO DETERMINE THE CITY WAS IMMUNE FROM SUIT

Even if this Court determines that it has jurisdiction to hear the issues related to the county court's grant of summary judgment, the county court correctly applied the judicial immunity provided by Miss. Code Ann. §11-46-9(1)(a) to determine that the city was immune.

Miss. Code Ann. § 11-46-9(1)(a) provides that a governmental entity and its employees acting within the course and scope of their employment or duty shall not be liable for any claim

“[a]rising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature”.

The plaintiff's complaint clearly alleges that his claim arises out of the Municipal Clerk's negligence in the handling and processing of his D.U.I. case. The Supreme Court addressed judicial or administrative actions or inactions with regard to a justice court clerk and judge in *Collins v. Tallahatchie County*. In *Collins*, the Court found that even if there were a “difference between the issuance of a warrant and the delivery of a warrant to a police or sheriff's department, the type of conduct complained of would be an administrative act of a judicial nature, at the very least.” *Collins v. Tallahatchie County*, 876 So.2d 284, 288 (Miss. 2004). As in *Collins*, the alleged negligence of the Municipal Clerk in the handling and processing the plaintiff's D.U.I. case fell clearly within § 11-46-9(1)(a). Furthermore, the defendant was immune because the action of the Municipal Clerk in handling and processing the plaintiff's D.U.I. case arose out of judicial action. *Blake v. Wilson*, 962 So.2d 705, 712 (Miss. Ct. App. 2007)(§ 11-46-9(1)(a) does not premise immunity on the employee's actual employment as a member of the judiciary, instead, the statute grants immunity to governmental employees whose conduct arises out of a judicial action). Accordingly, county court was correct in determining that the defendant was immune and dismissing the plaintiff's complaint with prejudice.

The plaintiff's argument that there is an exception to Miss. Code Ann. §11-46-9(1)(a) premised on reckless disregard is completely without legal precedent. Reckless disregard is a standard applied to “the performance or execution of duties or activities relating to police or fire protection” under the MTCA. Miss. Code Ann. §11-46-9(1)(c). There is no reckless disregard standard applied to Miss. Code Ann. §11-46-9(1)(a).

Furthermore, the other various cases cited by the appellant that purportedly discuss the

negligent activities of clerks are distinguishable as they deal with federal claims or the claims are proscribed by the statute of limitation and those cases do not implicate the immunities Mississippi has enacted for state law claims. As the plaintiff's claims clearly relate to the inactions of an administrative action of a judicial nature, the lower court was correct in dismissing his claims pursuant to the immunity provided by Miss. Code Ann. §11-46-9(1)(a).

V. CONCLUSION

The circuit court did not err when it dismissed plaintiff's appeal for failure to timely perfect his appeal from the county court to circuit court. Since the circuit court dismissed the appeal for lack of jurisdiction, this Court has no jurisdiction to hear the appeal.

Alternatively, to the extent this Court has jurisdiction to determine the sufficiency of the circuit court's dismissal, the circuit court did not err in dismissing the plaintiff's appeal for lack of jurisdiction for failure to timely perfect his appeal. However, should this Court determine that the circuit court erred in dismissing the appeal, the proper procedure would be to remand the appeal to the circuit court for consideration of the appeal on the merits.

Alternatively, in the event this Court finds that it has jurisdiction and that the appeal from the county court is properly before it, the county court did not err in dismissing the plaintiff's complaint pursuant to the immunity found at Miss. Code Ann. §11-46-9(1)(a) as the plaintiff's claim arises out of judicial action or inaction or administrative action or inaction of a judicial nature.

For the foregoing reasons, the plaintiff's appeal should be dismissed or the circuit court's order dismissing the appeal should be affirmed.

Respectfully submitted,

CITY OF SALTILLO, MISSISSIPPI

BY: Terry D. Little
OF COUNSEL

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VI. CERTIFICATE OF SERVICE

I, Terry D. Little, of counsel for Appellee, the City of Saltillo, Mississippi, pursuant to M.R.A.P. 25, do hereby certify that I have this day sent, via Federal Express, the original and three (3) copies of the above Appellees' Brief, to the Clerk of the Mississippi Supreme Court and have mailed a true and correct copy of the same to the following:

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Attorney for Plaintiffs

Honorable James Roberts
Lee County Circuit Court
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Judge for Appeal from County Court

Honorable Charles R. Brett
Lee County Court Judge
P. O. Box 736
Tupelo, MS 38802-0736
Judge for Case against Saltillo Municipal Court Clerk

THIS, the 26th day of January, 2010


TERRY D. LITTLE