2009-CA-1003

TR

REBUTTAL BRIEF

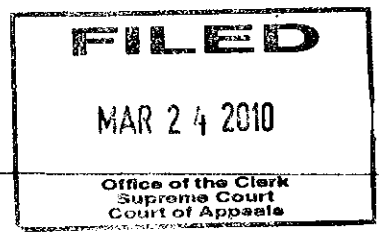

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE COURT OF APPEALS IN THE STATE OF MISSISSIPPI

WILLIAM SMITH — APPELLANT

VS. — CASE NO. 2009-CA-01003

CITY OF SALTILLO, MISSISSIPPI — APPELLEE

REBUTTAL BRIEF

THE APPELLANT in this case would state in this case that the reply brief filed by the appellee is in error for two reasons.

1. The appellee is in error in its position that the circuit court was correct in dismissing the appeal on jurisdictional grounds. This position is more clearly spelled out in the appellant's response to the appellee's motion to dismiss appeal. Specifically, the details of the case of *Van Meter v. Alford* 774 So.2nd 430, clearly covered the facts and details of this situation and is quoted below:

3. "Van Meter contends, that after Alford filed the motion to dismiss for failure to comply with the rules, he was not given (14) days to correct the appeal's deficiency as required under Mississippi Rules of Appellant Procedure 2(a)(2) and that this case must therefore be reversed and remanded." Alford claims Mississippi Rules of Appellant Procedure 2(a)(2) does not apply to appeals from county court to circuit court. The court has previously addressed this issue in American Investors v. King 733 So.2nd 830, 832 (Miss. 1999) ("An appeal from county court to circuit is controlled by the Mississippi Rules of Appellant procedure...,the URCCC and the M.R.A.P") We specifically held that M.R.A.P. 2(a)(2) applies to appeals from county court to circuit court. Id. Rule 2(a)(2) mandates that after a motion to dismiss had been filed, the court clerk (the circuit clerk in this instance) officially notifies an appellant of deficiencies in his appeal and that the appellant be given fourteen (14) days therefrom to correct any deficiencies.

4. "Van Meter was therefore deprived of due process when his appeal was dismissed because he

was not given and official notice of deficiencies in his appeal by the circuit clerk. Alford's motion to dismiss cannot be substituted for an official notice of deficiencies from the court clerk. Even where a party has moved to dismiss, the plain language of the rule requires a notice from the clerk of the deficiency and a fourteen day opportunity to cure the deficiency.

5. This case will be remanded to the Leflore County Circuit Court with instructions that the appropriate notice be issued to Van Meter, informing him of the specific deficiencies in the appeal and giving him 14 days to cure said deficiencies.

6. Van Meter was delinquent in filing a designation of record, an estimation of costs, and a Rule 11(b)(1) certificate of compliance. Appellants are instructed to file a designation of record and an estimate of costs within (7) days after the notice of appeal is filed. See M.R.A.P. 10(b)(1). Appellants are further instructed to file simultaneously a Rule 11(b)(1) certificate of compliance when the estimate of costs is filed.." ALSO SEE Garrett v. Nix, 431 So.2d 137, 139-40 (Miss. 1983) and Moran v. Necaise, 437 So.2d 1222 (Miss. 1983).

There is nothing in the record and the record is clear that the circuit clerk never gave the fourteen (14) days written notice to the appellant. There is no record that the appellant received such notice and in fact there are questions of fact as to whether or not even that the appellant, after the written motion was filed, attempted to correct the deficiencies and was not allowed to do so after various phone calls to employees of the clerk's staff and also to employees of the judge's staff. These are questions of fact but the fact remains that the Meter case required a written notice from the circuit court and such notice was never received and therefore the circuit court was in error to dismiss the appeal on those grounds. The Meter case is very clear and this case, therefore must be reversed and at the very least remanded for a decision on the merits of the judicial immunity issue.

2. The other issue in this case deals with the DUI conviction. The appellant was found

was unemployed some two years later never sent in a DUI abstract and the appellant alleges he was told his license was suspended. Subsequently, some time later a new municipal court clerk is appointed and approximately two years later she sends in a new abstract and appellant get his driver's license suspended for a second time. Appellee in this case contends that as a matter of law, such actions are of a judicial function. However, there is a distinction between judicial functions and ministerial functions. A secretary or any employee in the office could actually be the one sending in these forms. It does not require the actions of the official court clerk. There is a great deal of uncertainty concerning the law as to when a court clerk becomes personally liable for their inactions, negligence, or intentional misconduct, or gross misconduct. Gross misconduct, intentional misconduct and willful misconduct and gross negligence do not come under the terms and phrases of judicial immunity and therefore the circuit judge should not dismiss this case for these reasons simply on a 12b motion, but instead such facts and circumstances must be heard and fully explored by a jury with the testimony of witnesses before a determination is made as to whether or not the doctrine of immunity under the Mississippi Tort Claims Act applies. It is imperative and it is most important that this court of appeals make some clarification as to what circumstances a circuit clerk or municipal court clerk is and can and may be liable for their actions for the benefit of all the court clerks and circuit clerks of this state so that this issue is not left up in the air.

WHEREFORE PREMISES considered, the Appellant, William Smith asks that the decision of the Honorable Circuit Court Judge and the Circuit Court of Lee County Mississippi be reversed and that this case be remanded back to the county court at this time for a trial on the merits in this case. If there are still any jurisdictional deficiencies concerning the appeal, they will immediately be corrected once a written notice is given and would have been corrected a long

time ago if specifically a written notice was given earlier in these proceedings and then at that point the Court could have gotten to the merits of the case and not spent all of its time dealing with these jurisdictional issues and gotten to the meat of the case.

Therefore, again, Appellant, William Smith asks that the circuit court of Lee County Mississippi be reversed and that the case be remanded back for trial on the merits.

Gene Barton
Attorney for William Smith
P. O. Box 147
Okolona, MS [redacted]
Phone: 662-447-2522
Fax: 662-447-2526
gbartonatty@bellsouth.net
MSB [redacted]

CERTIFICATE OF SERVICE

I, Gene Barton, attorney for the Appellant William Smith so hereby certify that I have this day mailed a true and correct copy of the above and foregoing pleading to:

Honorable Terry D. Little
Attorney at Law
P.O. Box 1396
Oxford, MS 38655-1396
Attorney for Appellee

Honorable James L. Roberts
Lee County Circuit Court
P.O. Box 1100
Tupelo, MS 38802-1100
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 9 day of March, 2010.

Gene Barton
Attorney for William Smith
P. O. Box 147
Okolona, MS 38860
Phone: 662-447-2522
Fax: 662-447-2526
gbartonatty@bellsouth.net
MSB#[redacted]

774 So.2d 430
Van Meter v. Alford

430

Wallace VAN METER v. Bobby ALFORD d/b/a Alford Decorating Center.

[Cite as Van Meter v. Alford, 774 So.2d 430]

No. 1998-CA-01591-SCT.

Supreme Court of Mississippi.

December 21, 2000.

431

Richard Benz, Jr., Greenwood, Attorney for Appellant.

James W. Burgoon, Jr., Greenwood, Attorney for Appellee.

EN BANC.

WALLER, Justice, for the Court:

INTRODUCTION

¶1. This case is an appeal from an order issued by the Circuit Court of Leflore County, Mississippi, granting Appellee Bobby Alford's motion to dismiss Appellant Wallace Van Meter's appeal from the County Court to the Circuit Court. Because we find that appeals from county courts to circuit courts are controlled by the Mississippi Rules of Appellate Procedure, we reverse and remand to the Leflore County Circuit Court so that the clerk of the court may issue an appropriate notice to Van Meter and so that the circuit court may consider less severe sanctions.

¶2. This case originated in the County Court of Leflore County and was tried before a jury, resulting in a verdict in favor of Alford. The judgment was dated June 23, 1998. Van Meter filed a notice of appeal with the county court and paid the clerk's filing fee of $100.00 on July 23. Alford filed a motion to dismiss the appeal on September 2, because Van Meter had failed to comply with appellate procedure in several ways. On September 4, Van Meter filed a designation of the record, a request for an estimate of costs and a response to the motion to dismiss. On September 23, the circuit court dismissed Van Meter's appeal.

432

ANALYSIS

I. DID THE CIRCUIT PROPERLY DISMISS VAN METER'S APPEAL FROM COUNTY COURT FOR FAILURE TO COMPLY WITH THE UNIFORM CIRCUIT AND COUNTY COURT RULES AS WELL AS THE RULES OF APPELLATE PROCEDURE?

¶3. Van Meter contends that, after Alford filed the motion to dismiss for failure to comply with the rules, he was not given fourteen days to correct the appeal's deficiencies, as required under M.R.A.P. 2(a)(2), and that this case must therefore be reversed and remanded. Alford claims that M.R.A.P. 2(a)(2) does not apply to appeals from county court to circuit court. The Court has previously addressed this issue in *American Investors, Inc. v. King,* 733 So.2d 830, 832 (Miss.1999) ("An appeal from county court to circuit court is controlled by the Mississippi Rules of Civil Procedure . . ., the URCCC, and the M.R.A.P."). We specifically held that M.R.A.P. 2(a)(2) applies to appeals from county court to circuit court. *Id.* Rule 2(a)(2) mandates that, after a motion to dismiss has been filed, the court clerk (the circuit clerk in this instance) officially notify an appellant of deficiencies in his appeal and that the appellant be given fourteen (14) days therefrom to correct any deficiencies.

¶4. Van Meter was therefore deprived of due process when his appeal was dismissed because he was not given an official notice of deficiencies in his appeal by the circuit clerk. Alford's motion to dismiss cannot

be substituted for an official notice of deficiencies from the court clerk. Even where a party has moved to dismiss, the plain language of the rule requires a notice from the clerk of the deficiency and a fourteen day opportunity to cure the deficiency.

¶5. This case will be remanded to the Leflore County Circuit Court with instructions that the appropriate notice be issued to Van Meter, informing him of the specific deficiencies in the appeal and giving him 14 days to cure said deficiencies.

II. WAS THE DISMISSAL OF VAN METER'S APPEAL AN APPROPRIATE SANCTION?

¶6. Van Meter was delinquent in filing a designation of record, an estimation of costs, and a Rule 11(b)(1) certificate of compliance. Appellants are instructed to file a designation of record and an estimate of costs within seven (7) days after the notice of appeal is filed. *See* M.R.A.P. 10(b)(1) & 11(b)(1). Appellants are further instructed to file simultaneously a Rule 11(b)(1) certificate of compliance when the estimate of costs is filed.

¶7. However, these deficiencies do not necessarily mandate a dismissal. M.R.A.P. 3(a) states that the "[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the perfection of the appeal, but is ground only for such action as the [appellate court] deems appropriate, which **may** include dismissal of the appeal." (emphasis added). Van Meter timely filed his notice of appeal; therefore his appeal **was perfected** to the circuit court. Because M.R.A.P. 3(a) is permissive as to the imposition of sanctions for appellate deficiencies, the appellate court should consider the full panoply of sanctions before imposing the most harsh sanction of dismissal. *See also* M.R.A.P. 11 cmt. ("Even though Rule 3(a) no longer makes prepayment of costs an absolute criterion for perfecting an appeal, the [appellate court] can respond under Rule 2(a)(2) to such failure with an appropriate sanction, including dismissal.").

¶8. However, the consideration of imposition of sanctions is appropriate. Even though Van Meter did not receive **actual** notice from the court clerk, Alford's motion to dismiss provided **constructive** notice that his appeal was subject to dismissal. The administration of justice was hindered when Van Meter, who was under

a duty to insure that proper appellate procedure was complied with, sat back and waited for the court to give him actual notice of something of which he already had constructive notice and something he had a duty to know. Alford has a right to a speedy disposition of this case.

¶9. The Court finds that the dismissal of Van Meter's appeal was too harsh a sanction. *See, e.g., Glover v. Jackson State Univ.,* 755 So.2d 395, 404 (Miss.2000) (interpreting M.R.C.P. 41 and quoting *Wallace v. Jones,* 572 So.2d 371, 375-76 (Miss.1990) ("[D]ismissal . . . is appropriate only where there is a clear record of delay or contumacious conduct and lesser sanctions would not serve the best interests of justice. This is so because dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases.")). However, these concerns must be balanced with any prejudice further delay may impose upon the appellee: "The predominant reason for creating time limitations in appellate procedure is to bring an expeditious termination to the dispute and a final resolution to the matter as quickly as possible." *Garrett v. Nix,* 431 So.2d 137, 139-40 (Miss.1983), *overruled on other grounds, Moran v. Necaise,* 437 So.2d 1222 (Miss.1983).

¶10. There is no evidence in the record that the deficiencies in Van Meter's appeal were the result of clear delay or contumacious conduct. The Court is therefore of the opinion that lesser sanctions may be appropriate in this case.

CONCLUSION

¶11. The judgment of the Circuit Court of Leflore County is reversed, and this case is remanded to that court with instructions that it issue a Rule 2(a)(2) notice to Van Meter, giving him specific notice of the deficiencies of his appeal and allowing him fourteen (14) days from the date of the notice to cure said deficiencies, and with instructions to the circuit court to consider lesser sanctions.

¶12. **REVERSED AND REMANDED.**

PRATHER, C.J., BANKS, P.J., McRAE, MILLS, COBB and DIAZ, JJ., concur. SMITH, J., Dissents with separate

written Opinion joined by PITTMAN, P.J.

SMITH, Justice, dissenting:

¶13. Van Meter claims that he was not given proper notice. Alford's motion to dismiss the appeal diligently informs Van Meter of the reasons his appeal should be dismissed, clearly listing violations of URCCC 5.04, 5.05 & 5.09, M.R.A.P. 10(b)(1), 11(a) & 11(b); and Miss.Code Ann. § 11-51-29. Van Meter filed a response to the motion to dismiss the appeal recognizing that he had yet to conform to the rules: "*Although the appeal has not been perfected until these rules are conformed with,* failure to follow these rules is not fatal to the appeal." (emphasis added). Van Meter is correct in recognizing that he failed to conform to the rules, but he is wrong in asserting that failure to conform to the rules cannot affect his appeal.

¶14. Van Meter argues that he was entitled to the type of notice provided for in M.R.A.P. 2(a)(2):

> [w]hen either Court, on its motion or 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, apprizing the party of the nature of the deficiency.

Van Meter claims that notice "should have been given by the Clerk of the Circuit Court." Van Meter cites no authority for this proposition, and I do not interpret Rule 2(a)(2) as mandating written notice by a circuit court clerk. M.R.A.P. 1 provides that the Mississippi Rules of Appellate Procedure "govern procedure in appeals to the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi. ..." Further, the Comment to

the Rule states that its purpose is "to facilitate the just and efficient disposition of causes brought before the *Supreme Court* and the *Court of Appeals.*" M.R.A.P. 2(a)(2) (emphasis added).

¶15. Procedural due process demands that an appeal should not be dismissed without giving notice to a defaulting party in order to afford the defaulting party an opportunity to cure any deficiencies in his appeal. *American Investors, Inc. v. King,* 733 So.2d 830, 831-32 (Miss.1999). In *King,* the circuit court dismissed the plaintiff's appeal on its own motion, without prior notice to either party. *Id.* at 831. Van Meter's appeal, however, was not dismissed until after Alford filed a motion to dismiss informing Van Meter of his deficiencies. Where a motion to dismiss adequately gives notice of the deficiencies of an appeal and an opportunity is given to cure the default, procedural due process is satisfied, and the trial judge may properly dismiss the appeal where the appellant has not timely cured the deficient appeal. *Russell v. Mitchell-Putnam Signs,* 754 So.2d 1256, 1258 (Miss.Ct.App.1999) (citing *American Investors,* 733 So.2d at 831).

¶16. In the instant case, not only did Alford's motion to dismiss the appeal provide adequate notice, but Van Meter filed a response to the motion which noted that he had yet to conform to the rules necessary to perfect an appeal. Van Meter was clearly on notice of the deficiencies of his appeal, and the circuit court allowed more than fourteen days to cure said deficiencies before granting Alford's motion to dismiss the appeal. By filing a response to the motion to dismiss and acknowledging his failure to conform to the rules necessary to perfect an appeal, Van Meter waived his right to object to lack of notice from the clerk.

¶17. I respectfully dissent.

PITTMAN, P.J., joins this Opinion.

MS

So.2d