IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2009-CA-01431

WAYNE SCARBOROUGH

V.

CITY OF PETAL

APPEAL FROM THE CIRCUIT COURT
OF FORREST COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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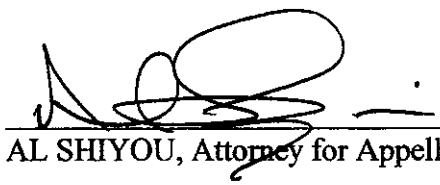
CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for the Appellant, FRANK LEWIS, certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal:

1. WAYNE SCARBOROUGH, Appellant
2. CITY OF PETAL, MISSISSIPPI, Appelles
3. BOB HELFRICH, Circuit Court Judge of Forrest County, Mississippi
4. TOM TYNER, Attorney for Appellees
5. PERCY SCARBOROUGH, Co-Owner of Property Involved



AL SHIYOU, Attorney for Appellant

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STATEMENT OF THE ISSUES

I. **Whether the Circuit Court erred in its ruling that Plaintiff's suit is time barred under 11-51-75.**

II. **Whether the Circuit Court erred in its ruling that the City of Petal did not have to give actual notice to the Plaintiff, Appellant herein.**

STATEMENT OF THE CASE

WAYNE SCARBOROUGH and his father own some land inside the City of Petal. The City of Petal, pursuant to the provisions of Mississippi Code Section 21-19-11 issued a notice to the Plaintiff's father (RE.-8) that he was in violation of the law and the City planned to tear down his building. However, the City of Petal never notified the Plaintiff of their planned actions or of a violation of their ordinances.

In June, 2007, the City of Petal tore down the building which belonged, in part, to the Plaintiff.

After demand was placed on the City of Petal, the City denied the demand.

On August 31, 2007, the Plaintiff herein, WAYNE SCARBOROUGH, filed a complaint in the Circuit Court of Forrest County, Mississippi (RE.-3) seeking damages to the building he co-owned with his father in Petal, Forrest County, Mississippi.

The City of Petal filed a Motion for Summary Judgement, (RE.-6) which over sixteen months later, the Circuit Court of Forrest County, Mississippi granted. (RE.-12)

WAYNE SCARBOROUGH, appeals from the Judgement entered in the Circuit Court of Forrest County, Mississippi.

COURSE OF THE PROCEEDINGS
AND DISPOSITION OF THE CASE IN THE COURT BELOW

On August 31, 2007, the Plaintiff herein, WAYNE SCARBOROUGH, filed a complaint in the Circuit Court of Forrest County, Mississippi seeking damages to a building he co-owned with his father in Petal, Forrest County, Mississippi.

The City of Petal timely filed its Answer herein.

On December 20, 2007 the City of Petal filed a Motion for Summary Judgement. The Plaintiff responded thereto on January 8, 2008. A hearing was held on the Motion before the Forrest County Circuit Court on February 29, 2008. The Circuit Court ruled on the Motion on July 29, 2009. In its ruling, the lower Court dismissed the case.

Being aggrieved, WAYNE SCARBOROUGH, filed his appeal of the lower Court's ruling.

STATEMENT OF THE FACTS

Plaintiff, WAYNE SCARBOROUGH, and his father, Percy Scarborough are co-owners of municipal 415 W. Central Avenue, Petal, Mississippi, and referred to herein as the "subject property." As stated in Defendant's supporting Memorandum, Percy Scarborough, not Plaintiff, was provided notice in 2000 and 2005 of alleged violations of city ordinances as regards the subject property. On or about January 17 or 18, 2006, the third notice regarding the subject property was hand delivered to Percy Scarborough, with the fourth and final notice served on Percy Scarborough on March 23, 2006. All of the foregoing notices were either served on, or delivered via United States mail to Percy Scarborough at his address of 220 Arkwood Lane, Petal, Mississippi 39465. **None of the foregoing notices bear Plaintiff's name or address**

noted anywhere therein, nor were any of them ever delivered by mail or personally to the Plaintiff, WAYNE SCARBOROUGH.

Plaintiff, WAYNE SCARBOROUGH, currently and at the time of the events herein, resides at 320 Garden Lane, Petal, Mississippi 39465, and avers that he has resided at said address during the years 2005 and 2006, during the time of the events as referenced in the subject matter, including the time when the notices were given by Defendant to Percy Scarborough.

On April 18, 2006, the Defendant, CITY OF PETAL, MISSISSIPPI, adopted a resolution adjudicating the subject property to be a "menace to the public health and safety of the community" giving the "owner" of the property "PERCY SCARBOROUGH" forty-five days to remove the structure of bring the structure up to compliance. (Exhibit "K" of Defendant's Memorandum, (RE.-8)) Again, Plaintiff's name is not mentioned anywhere on the resolution, but only "Percy Scarborough" as co-owner. On June 7, 2006, the Defendant, by and through its employees, tore the building down without proper notice to the Plaintiff, under auspices of Mississippi Code Annotated §21-19-11.

On August 31, 2007, the Plaintiff, WAYNE SCARBOROUGH, filed suit in the Circuit Court of Forrest County, Mississippi (RE.-3) against the Defendant, City of Petal.

On December 20, 2007 the City of Petal filed a Motion for Summary Judgement. (RE.-6) The Plaintiff responded thereto on January 8, 2008. (RE.-9, 10 &11) A hearing was held on the Motion before the Forrest County Circuit Court on February 29, 2008. The Circuit Court ruled on the Motion on July 29, 2009. (RE.-12) The Plaintiff timely filed its Notice of Appeal. (RE.-13)

ARGUMENT

I. Whether the Circuit Court erred in its ruling that Plaintiff's suit is time barred under 11-51-75.

The Plaintiff, WAYNE SCARBOROUGH, submits that since Plaintiff was never properly afforded notice, then it is submitted that his failure to file an appeal within the required deadline is irrelevant and moot. The Constitution of the United States, the Constitution of the State of Mississippi, the laws of the State of Mississippi, and the Mississippi Rules of Civil Procedure **requires** the issuance of a notice to put into effect, the due process protection afforded citizens of the State of Mississippi. In the case at hand, **no notice was ever served, by mail or personally, upon the Plaintiff, WAYNE SCARBOROUGH, the Appellant.** Therefore, the Plaintiff, WAYNE SCARBOROUGH, was never a party to the action of the City of Petal and thus had no standing to appeal the decision of the City of Petal.

The case before the Circuit Court should, at the least, be considered a mandamus action under Miss.Code Ann. § 11-41-1. Therein, the Court articulated a four-part test to determine if a party is entitled to obtain a writ of mandamus. To obtain relief:

> it must affirmatively appear that four essential elements are present: (1) the petition must be brought by the officers or persons authorized to bring the suit; (2) there must appear a clear right in petitioner to the relief sought; (3) there must exist a legal duty on the part of the defendant to do the thing which the petitioner seeks to compel; and (4) there must be an absence of another remedy at law.

The Plaintiff, since he was not a party to the action taken by the City of Petal, had no other remedy at law. He had no standing to file an appeal, thus his remedy was to file suit.

Accordingly, this Court should find that every person should have their opportunity to present their case in court and reverse the ruling of the Circuit Court.

II. Whether the Circuit Court erred in its ruling that the City of Petal did not have to give actual notice to the Plaintiff, Appellant herein.

Mississippi Code Section 21-19-11, requires:

21-19-11. Cleaning private property; notice; lien.

(1) The governing authority of any municipality is authorized, on its own motion, or upon the receipt of a petition requesting the municipal authority to so act signed by a majority of the residents residing within four hundred (400) feet of any property or parcel of land alleged to be in need of cleaning, to give notice to the property owner by United States mail two (2) weeks before the date of a hearing, or by service of notice as provided in this section by a police officer at least two (2) weeks before the date of a hearing, or if the property owner or his address is unknown, then by two (2) weeks' notice in a newspaper having a general circulation in the municipality, of a hearing to determine whether or not the property or land is in such a state of uncleanliness as to be a menace to the public health and safety of the community. If, at such hearing, the governing authority shall, adjudicate the property or land in its then condition to be a menace to the public health and safety of the community, the governing authority shall, if the owner does not do so himself, proceed to clean the land, by the use of municipal employees or by contract, by cutting weeds; filling cisterns; removing rubbish, dilapidated fences, outside toilets, dilapidated buildings and other debris; and draining cesspools and standing water therefrom. Thereafter, the governing authority may, at its next regular meeting, by resolution adjudicate the actual cost of cleaning the property and may also impose a penalty of One Thousand Five Hundred ($1,500.00) or fifty percent (50%) of such actual cost, whichever is more. The cost and any penalty may become a civil debt against the property owner, or, at the option of the governing authority, an assessment against the property. The cost assessed against the property means the cost to the municipality of using its own employees to do the work or the cost to the municipality of any contract executed by the municipality to have the work done. The action herein authorized shall not be undertaken against any one (1) parcel of land more than six (6) times in any one (1) calendar year, and the expense of cleaning of said property shall not exceed an aggregate amount of Twenty Thousand Dollars ($20,000.00) per year, or the fair market value of the property subsequent to cleaning, whichever is less. If it is determined by the governing authority that it is

necessary to clean any property or land more than once within a calendar year, then the municipality may clean it provided notice to the property owner is given by United States mail to the last known address at least ten (10) days before cleaning the property. The governing authority may assess the same penalty for each time the property or land is cleaned as otherwise provided in this section. The penalty provided herein shall not be assessed against the State of Mississippi upon request for reimbursement under Section 29-1-145, nor shall a municipality clean a parcel owned by the State of Mississippi without first giving notice.

(2) In the event the governing authority declares, by resolution, that the cost and any penalty shall be collected as a civil debt, the governing authority may authorize the institution of a suit on open account against the owner of the property in a court of competent jurisdiction in the manner provided by law for the cost and any penalty, plus court costs, reasonable attorney's fees and interest from the date that the property was cleaned.

(3) In the event that the governing authority does not declare that the cost and any penalty shall be collected as a civil debt, then the assessment above provided for shall be a lien against the property and may be enrolled in the office of the circuit clerk of the county as other judgments are enrolled, and the tax collector of the municipality shall, upon order of the board of governing authorities, proceed to sell the land to satisfy the lien as now provided by law for the sale of lands for delinquent municipal taxes.

(4) All decisions rendered under the provisions of this section may be appealed in the same manner as other appeals from municipal boards or courts are taken.

(5) The police officer's return on the notice may be in one (1) of the following forms:

(a) Form of personal notice:

"I have this day delivered the within notice personally, by delivering to the within named property owner, _____ (here state name of party summoned), a true copy of this notice.

"This, the _____ day of _____ 20_____.

_____ (Police Officer)"

(b) Form of notice where copy left at residence:

"I have this day delivered the within notice to _____, within named property owner, by leaving a true copy of the same at his (or her) usual place of abode in my municipality, with _____, his (or her) (here insert wife, husband, son, daughter or some other person, as the case may be), _____ a member of his (or her) family above the age of sixteen (16) years, and willing to receive such copy.

The said property owner is not found in my municipality.

This, the _____ day of _____ 20_____.

_____ (Police Officer)"

(c) Form of return when property owner not found within municipality and is a nonresident thereof:

"I have this day attempted to deliver the within notice to _____, the within named property owner, and after diligent search and inquiry, I failed to find the same property owner within my municipality, nor could I ascertain the location of any residence of the property owner within my municipality.

This, the _____ day of _____ 20_____.

_____ (Police Officer)"

The first mode of notice should be made, if it can be; if not, then the second mode should be made, if it can be; and the return of the second mode of service must negate the officer's ability to make the first. If neither the first nor second mode of service can be made, then the third mode should be made, and the return thereof must negate the officer's ability to make both the first and second. In the event the third mode of service is made, then service shall also be made by publication as provided in subsection (1) of this section.

(6) The officer shall mark on all notices the day of the receipt thereof by him, and he shall return the same on or before the day of the hearing, with a written statement of his proceedings thereon. For failing to note the time of the receipt of notice or for failing to return the same, the officer shall forfeit to the party aggrieved the sum of Twenty-five Dollars ($25.00).

(7) Nothing contained under this section shall prevent any municipality from enacting criminal penalties for failure to maintain property so as not to constitute a menace to public health, safety and welfare.

In this matter, the City of Petal **never** provided **"notice to the property owner by United States mail two (2) weeks before the date of a hearing, or by service of notice as provided in this section by a police officer at least two (2) weeks before the date of a hearing.** The City of Petal asserts that the Plaintiff had knowledge of the action it had taken.

The Plaintiff, WAYNE SCARBOROUGH, and his father, Percy Scarborough are co-owners of

municipal 415 W. Central Avenue, Petal, Mississippi, and referred to herein as the "subject property." As stated in Defendant's supporting Memorandum for Summary Judgement, Percy Scarborough, not the Plaintiff, was provided notice in 2000 and 2005 of alleged violations of city ordinances as regards the subject property. ((RE.-8) Exhibits "A", "B", and "E" of Defendant's Memorandum) On or about January 17 or 18, 2006, the third notice regarding the subject property was hand delivered to Percy Scarborough, with the fourth and final notice served on Percy Scarborough on March 23, 2006. ((RE.-8) Exhibits "G" and "I" of Defendant's Memorandum) All of the foregoing notices were either served on, or delivered via United States mail to Percy Scarborough at his address of 220 Arkwood Lane, Petal, Mississippi 39465. **None of the foregoing notices bear Plaintiff's name or address noted anywhere therein, nor were any of them ever delivered by mail or personally to the Plaintiff.**

Plaintiff, WAYNE SCARBOROUGH, currently resides at 320 Garden Lane, Petal, Mississippi 39465, and avers that he has resided at said address during the years 2005 and 2006, during the time of the events as referenced in the subject matter, including the time when the notices were given by Defendant to Percy Scarborough.

On April 18, 2006, the Defendant, CITY OF PETAL, MISSISSIPPI, adopted a resolution adjudicating the subject property to be a "menace to the public health and safety of the community" giving the "owner" of the property "PERCY SCARBOROUGH" forty-five days to remove the structure of bring the structure up to compliance. ((RE.-8) Exhibit "K" of Defendant's Memorandum) Again, Plaintiff's name is not mentioned anywhere on the resolution, but only "Percy Scarborough" as co-owner. On June 7, 2006, the Defendant, by and through its employees, tore the building down without proper notice to the Plaintiff, under the

auspices of Mississippi Code Annotated §21-19-11.

Municipalities possess statutory authority to demolish, at the owner's expense, private property consisting of "unsafe and unfit buildings" for the protection of the health and safety of the community, only after 'reasonable notice provided for in an ordinance.' *Bray v. City of Meridian*, 723 So. 2d. 1200, 1203 (Miss. 1998), quoting *Bond v. City of Moss Point*, 240 So. 2d 270, 273 (Miss. 1970). The operative ordinance in this case is Mississippi Code Section 21-19-11 which **requires** the governing authority of any municipality "to give notice to the property owner by United States registered mail or certified mail *two (2) weeks before the date of a hearing, or by service of notice as provided in this section by a police officer at least two (2) weeks before the date of a hearing,* ..... of a hearing to determine whether or not any parcel of land is in such a state of uncleanliness as to be a menace to the public health and safety of the community..... " (Emphasis added) Mississippi Code Annot. §21-19-11.

Plaintiff submits that at no time prior to April 18, 2006 did the Defendant in accordance with Mississippi Code §21-19-11, ever notify the Plaintiff of the hearing nor at any time prior to June 7, 2006 did the Defendant ever notify the Plaintiff in accordance with Mississippi Code § 21-19-11, of its intention to tear down and remove the building on his property. Therefore, the April 18, 2006 resolution was invalid as to the Plaintiff and Plaintiff had no responsibility to file any appeal therefrom. Plaintiff's position is that the demolition of his property on June 7, 2006, was therefore unlawful.

Defendant relies on the case of *Bray v. City of Meridian*, 723 So. 2d. 1200(Miss. 1998) as support for its argument that Plaintiff was properly afforded notice of Defendant's intention to demolish his property since one co-owner of the subject property, Percy Scarborough, is alleged

to have possessed "apparent authority" to accept service of process on behalf of Plaintiff, the other co-owner. In *Bray*, service of notice of condemnation hearing by defendant City of Meridian on one co-owner of condemned property, Dorothy Bray, was sufficient to meet the requirements of Mississippi Code §21-19-11since the Court held that Dorothy Bray was 'vested with apparent authority' to accept service of process for the other co-owner, her husband, Samuel Bray. *Bray*, 723 So. 2d at 1203. However, *Bray* is distinguishable from the present matter in the following respects. First, in *Bray*, the co-owners of the property in that case were husband and wife living at the same address. Apparently, service of process of the City of Meridian's condemnation order was addressed and mailed Certified Mail to both Mr. Samuel Bray and Ms. Dorothy Bray, co-owners of the property in that case. Ms. Bray accepted the certified mail for notice addressed to *both* of them. *Id,* at 1201. Here, Plaintiff, Wayne Scarborough, and Percy Scarborough, the co-owners, live at separate addresses, and Defendant sent their certified mail notices at issue to Percy Scarborough at his 220 Arkwood Lane address, apparently only addressed to Percy Scarborough. Defendant has never sent anything to Plaintiff at his 320 Garden Lane address regarding this matter. Further, since no notice was ever issued to Wayne Scarborough, there was no notice for Percy Scarborough to have received on his behalf.

Second, in *Bray*, the Mississippi Supreme Court quotes the case of *Williams v. Kilgore*, 618 So. 2d 51 (Miss. 1992) for support of its holding that Dorothy Bray possessed apparent authority to accept service of process on Samuel Bray. *Id,* at 1203. In *Williams*, a summons and complaint was left with the office manager of a defendant doctor, although the doctor testified that the office manager was not authorized to accept service of process. Nonetheless, the Mississippi Supreme Court held that due to testimony from the sheriff process server that the

office manager had accepted process on behalf of the doctor "on many occasions" , service was deemed to have been proper. *Williams,* 618 So. 2d, at 56. In Williams, the court held that service was proper since it found "acceptance of service of process by an agent such as an office manager, who, by custom and practice, is vested with apparent authority to do so. Relying to his detriment on his past experiences in serving process on physicians in Dr. Kilgore's office as well as upon Cliburn's acceptance of the documents, the Deputy Sheriff appears to have properly served process in accordance with Rule 4(d)(1)(A)." *Id* at 56.

Plaintiff, Wayne Scarborough has never given his father, Percy Scarborough, living at a totally separate address, any authority whatsoever to accept service of process on his behalf. This is as a co-owner of the subject property in matters concerning the property, or any other matters.

Further, Defendant alleges that Plaintiff knew, through "personal conversations with city officials and city meetings" of the "various ordinance violations and the urgent need to comply" therein. Plaintiff admits that he had talked with various city officials over the course of several years concerning the subject property. However, these random 'conversations' do not meet the statutory requirement, that the Plaintiff be afforded proper legal notice in March, 2006 of the upcoming resolution meeting in April, or of the fact that the resolution had been adopted on April 18, 2006.

CONCLUSION

In light of the overwhelming evidence in support of the Plaintiff's contention that he did not receive statutory notice of the proposed action of the City of Petal, this Court should reverse the ruling of the lower court and remand this matter for a trial on the merits.

Respectfully submitted, this the 21st day of January, 2010.

WAYNE SCARBOROUGH,
Appellant
BY: _____
Al Shiyou, His Attorney

CERTIFICATE OF SERVICE

I, AL SHIYOU, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

SO CERTIFIED, this the 21st day of January, 2010.

_____
AL SHIYOU

CERTIFICATE OF MAILING

I, Al Shiyou, do certify that I have this date, mailed via United States mail, postage prepaid, first class, an original and three (3) copies of the Brief of Appellant to the Clerk of the Supreme Court and this Brief of Appellant and copies thereof are being deposited into the United States Mail on this, the 21st day of January, 2010, as required by M.R.A.P. Rule 25 (a) for filing of same to be deemed as of this date.

This the 21st day of January, 2010.

_____
Al Shiyou