Serial: 112777

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99027-SCT

RE: MISSISSIPPI RULES OF APPELLATE PROCEDURE

ORDER

This matter has come before the Court en banc on Motion to Amend the Comment to M.R.A.P. 5 filed by the Supreme Court Advisory Committee on Rules. Having considered the motion, the Court finds that the amendment of the Comment to Rule 5 proposed by the Advisory Committee will promote the fair and efficient administration of justice and should be adopted.

IT IS THEREFORE ORDERED that the Comment to Rule 5 of the Mississippi Rules of Appellate Procedure and the corresponding Advisory Committee Historical Notes are amended as set forth in Exhibit "A" hereto.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forward a true certified copy hereof to West Publishing

Company for publication in the next edition of the *Mississippi Rules of Court* and in the *Southern Reporter, Second Series, (Mississippi Edition)*.

SO ORDERED, this the 12th day of April, 2004.

/s/ William L. Waller, Jr.

WILLIAM L. WALLER, JR., PRESIDING JUSTICE

DIAZ, J., NOT PARTICIPATING.

EXHIBIT "A" TO ORDER

HISTORICAL NOTES AND COMMENT TO RULE 5 OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE, AS AMENDED

Advisory Committee Historical Note

Effective April 15, 2004, the Comment was amended to note that Rule 5 doesn not alter the applicability of Miss. Code Ann. § 99-35-103 (Rev. 2000) regarding appeals by the government in criminal cases.

Effective January 1, 1995, Miss.R.App.P. 5 replaced Miss.Sup.Ct.R. 5, 644-647 So.2d XXX-XXXIII (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 5 was amended to delete a reference to a repealed statute. 632-635 So.2d LI (West Miss.Cases 1994).

Comment

This rule is a composite of Fed. R. App. P. 5, 28 U.S.C. § 1292(b) and American Bar Ass'n. ***Standards Relating to Appellate Courts*** § 3.12 (1977). *See also*, Ala. R. App. P. 5; Comment, 88 Harv. L. Rev. 607 (1975). It provides for interlocutory appeal from either Circuit or Chancery Courts. *See* ***Sonford Products Corp. v. Freels***, 495 So. 2d 468, 471 (Miss. 1986); ***Kilgore v. Barnes***, 490 So. 2d 894, 896 (Miss. 1986); ***Southern Farm Bureau Cas. Ins. v. Holland***, 469 So. 2d 55, 62-64 (Miss. 1985) (Anderson, J., concurring). It applies to both civil and criminal cases. *Cf.* ***State v. Caldwell***, 492 So. 2d 575, 576-577 (Miss. 1986) (remedial writ granted where constitutional rights violated prior to criminal trial).

The rule contemplates that either the trial court will grant an interlocutory appeal subject to appellate review of that decision, ***Atwell Transfer Co. v. Johnson***, 239 Miss. 719, 726-27, 124 So. 2d 861, 864 (1960), or the Supreme Court will grant the appeal itself. The rule is unlike federal practice in which both courts must agree before an interlocutory appeal will be heard under 28 U.S.C. § 1292(b).

The standards for granting interlocutory appeal are based on existing law. Appeal will not be permitted except to resolve a question of law, and this includes the application of law to fact. There must be a substantial basis for a difference of opinion with the trial court. *See* Fed. R. App. P. 5(b); 28 U.S.C. § 1292(b). A question of law need not control the entire case, but must be sufficiently important to the litigation to merit interlocutory

appeal. In this latter respect, the rule departs from the standards set forth in § 1292(b) and adopts the language followed by other state courts. *See, e.g.*, Ill. Sup. Ct. R. 308. Rule 5 does not alter the applicability of Miss. Code Ann. § 99-35-103 (Rev. 2000) regarding appeals by the government in criminal cases. ***State v. Hicks***, 806 So. 2d 261 (Miss. 2002).

Rule 5(a)(1) begins with the federal requirement that interlocutory review will be permitted when such review will "materially advance the termination of the litigation." *See* Fed. R. App. P. 5(b); 28 U.S.C. § 1292(b). It adds the requirement of the now-repealed Miss. Code Ann. § 11-51-7 (Supp. 1986) that the appellant must show that the appeal may avoid expense as well as delay.

Rule 5(a)(2) permits interlocutory appeal where review will protect a party from substantial and irreparable injury. This category would permit interlocutory review of rulings on injunctions and receivership matters allowed as of right under 28 U.S.C. § 1292(a)(1). It would continue present state practice of interlocutory review of chancery orders requiring money to be paid or the possession of property changed, but only if compliance with such an order threatened the opposite party with irreparable injury.

Rule 5(a)(3) provides the Court with flexible authority to grant interlocutory review in situations in which the pertinent interest is the administration of justice. The interest "is that of the proper administration of justice generally--for example, when an order involves a question of procedure that would likely become moot by the time final judgment was entered but should be authoritatively resolved for the purposes of future guidance of courts below." American Bar Ass'n, ***Standards Relating to Appellate Courts*** § 3.12, at 29. *See also* Wisc. Stat. Ann. § 809.50(c) (1986). By permitting review to resolve conflicts among trial courts in such cases, the rule promotes uniformity and fairness to litigants.

Rule 5(c) contemplates that the petition and answer will be treated as motions and so must be supported by a brief. In order to expedite judicial consideration, however, the total length of a petition and brief are limited to 15 pages, and a similar restriction applies to the answer and its supporting brief. This limitation does not include pages in exhibits required to be annexed to the petition.

Rule 5 review is separate from the interlocutory review available by certification under M.R.C.P. 54(b) when a final judgment is entered as to fewer than all parties or claims, and that available under Rule 9 governing release in criminal cases.

[Comment amended effective April 15, 2004.]