IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01350 COA

HARDY CRUNK APPELLANT

v.

THE MAYOR AND CITY COUNCIL OF

COLUMBUS, MISSISSIPPI APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOHN M. MONTGOMERY

COURT FROM WHICH APPEALED: LOWNDES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: WILBER O. COLLUM

ATTORNEYS FOR APPELLEES: DONALD CLARK

DEWITT T. HICKS, JR.

NATURE OF THE CASE: STANDING

TRIAL COURT DISPOSITION: MOTION TO DISMISS GRANTED IN FAVOR OF APPELLEES.

MANDATE ISSUED: 9/30/97

BEFORE THOMAS, P.J., HERRING, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Hardy Crunk appeals the circuit court's issuance of an order dismissing his appeal, raising the following issues as error:

I. WHETHER A LEASE-PURCHASE AGREEMENT CONTAINING LANGUAGE OBLIGATING FUTURE GOVERNMENTS AND PROHIBITING SUBSTITUTION CREATES A MONETARY OBLIGATION ON THE CITY BEYOND SUCH CURRENT AND SPECIFIC APPROPRIATION IN VIOLATION OF MISSISSIPPI CODE ANNOTATED SECTION 31-8-9?

II. DOES A LEASE THAT PLACES ALL THE RISK OF CONSTRUCTION, ABATEMENT, PAYMENTS AND LIABILITY ON THE CITY-LESSEE CONTROLLED BY THE MAYOR AND CITY COUNCIL, BUT DOES NOT CONTEMPLATE ANY RISK OR RESPONSIBILITY ON THE CORPORATE LESSOR CONTROLLED BY THE SAME INDIVIDUALS, CONSTITUTE A BAD FAITH LEASE OR A SUBTERFUGE?

III. WHEN A MUNICIPALITY CREATED A NON-PROFIT CORPORATION WHOSE CHARTER PROVIDES THAT THE DIRECTORS SHALL BE THE MAYOR AND MEMBERS OF THE CITY COUNCIL AND THE PURPOSE OF THE CORPORATION IS TO LEASE BUILDINGS TO THE MUNICIPALITY, DID THE MAYOR AND COUNCIL VIOLATE THE SEPARATION OF POWERS DOCTRINE UNDER ARTICLE 1 AND 2 OF THE MISSISSIPPI CONSTITUTION?

IV. WHEN A MUNICIPALITY CREATES A NON-PROFIT CORPORATION WHOSE DIRECTORS ARE THE MAYOR AND MEMBERS OF THE CITY COUNCIL FOR THE PURPOSES OF LEASING FACILITIES TO THE MUNICIPALITY, DOES SUCH A TRANSACTION VIOLATE SECTION 109 OF THE MISSISSIPPI CONSTITUTION WHICH PROHIBITS PUBLIC OFFICERS FROM HAVING A DIRECT OR INDIRECT INTEREST IN A CONTRACT WITH A BOARD ON WHICH HE IS A MEMBER?

The lower court dismissed Crunk's appeal holding that he lacked standing. Crunk does not submit

any authority in his main brief about his standing to prosecute this appeal, although this was the reason the lower court dismissed his case. He does, however, cite authority in his reply brief. The Mississippi Supreme Court has stated before that "[w]e will not consider issues raised for the first time in an appellant's reply brief." *Sanders v. State*, 678 So. 2d 663, 669-70 (Miss. 1996) (quoting *U.S. v. Anderson,* 5 F.3d 795 (5th Cir.1993)). Nevertheless, as this issue is dispositive, we address it *sua sponte*. Finding no error, we affirm the lower court's decision that Crunk lacked standing to sue.

FACTS

On October 25, 1995, the Mayor and City Council of the City of Columbus, Mississippi voted 5-1 to approve a lease-purchase transaction pursuant to Mississippi Code Annotated Sections 31-8-1 to -15. This lease-purchase transaction was for providing a municipal police/court facility and a gymnasium. On November 6, 1995, Hardy Crunk filed a bill of exceptions, attacking the decision of the City to enter the lease-purchase transaction.

On November 16, 1995, the City filed a response to the bill of exceptions objecting for lack of subject matter jurisdiction stating that the bill of exceptions failed to state a claim upon which relief could be granted and asserted two affirmative defenses: namely, that the bill of exceptions was improper because it was not presented by an aggrieved person and that the bill of exceptions lacked pertinent and important facts. The City also filed a motion to dismiss asserting that the bill of exceptions was fatally defective in that it failed to state any evidentiary basis proving that the action taken by the City was legally defective in any way.

On December 18, 1995, the Circuit Court of Lowndes County, Mississippi issued an order dismissing the appeal stating that Crunk lacked standing to prosecute the appeal, there was no evidence that pertinent statutory provisions were unconstitutional, the City entered into a valid, legal lease-purchase agreement, and there was no violation of any Mississippi constitutional sections.

I.

DOES HARDY CRUNK HAVE STANDING TO PROSECUTE HIS APPEAL?

The circuit court held that Crunk lacked standing to prosecute his bill of exceptions because it contained no allegation or evidence establishing an adverse effect different from that of the general public. "Standing is like any other charge of a party's pleading. [Crunk's] well pleaded allegations, where considered on their face, must be taken as true." *Harrison County v. City of Gulfport*, 557 So. 2d 780, 782 (Miss. 1990) (citations omitted). "On appeal, we would apply the same standards as the court below, *viz.*, if there is no genuine issue of material fact on the questions of interest or effect such that we may say with confidence the . . . [party] lacks a colorable claim, the court should order dismissal . . . ." *Id.* (citations omitted).

The method for appealing a decision by a municipality is governed by Mississippi Code Annotated Section 11-51-75 (1972), which provides:

Any person aggrieved by a judgment or decision of the board of supervisors, or municipal authorities of a city, town, or village, may appeal within ten (10) days from the date of adjournment at which session the board of supervisors or municipal authorities rendered such judgment or decision, and

may embody the facts, judgment and decision in a bill of exceptions which shall be signed by the person acting as president of board of supervisors or of the municipal authorities . . . .

Miss. Code Ann. § 11-51-75 (1972) (emphasis added).

There are many decisions in this state interpreting the words "person aggrieved." In *Belhaven Improvement Ass'n v. City of Jackson*, 507 So. 2d 41, 43 (Miss. 1987), the Court considered an appeal by the Belhaven Improvement Association from the circuit court's order dismissing Belhaven's appeal of a rezoning decision made by the City of Jackson. On February 15, 1984, the First Presbyterian Church of Jackson, Mississippi filed an application seeking to rezone certain property from R-2 to Special Use Religious Institution District. *Id.* A hearing was held by the Zoning Hearing Committee of the City Planning Board in which several Belhaven residents appeared, several exhibits were introduced by the protestors, several petitions signed by Belhaven residents opposing the rezoning, and a separate written statement opposing the rezoning were introduced at the hearing. *Id.* The Zoning Hearing Committee voted 4-2 to recommend the approval of the rezoning. *Id.* Later, at a meeting held by the Jackson City Planning Board, the Board voted 7-3 to recommend denial of rezoning. *Id.* at 44. The Church sought action from the Jackson City Council who took up the consideration of the rezoning. *Id.* The Jackson City Council voted to grant the rezoning. *Id.* Pursuant to Mississippi Code Annotated Section 11-51-75 (1972), Belhaven appealed to the circuit court. *Id.* The Church filed a motion to dismiss, which the court granted, holding that Belhaven did not have standing. *Id.*

The Mississippi Supreme Court held that in order to establish standing "the person(s) aggrieved, . . . should allege an adverse effect different from that of the general public." *Id.* at 47. The Court reversed because they determined that the facts relating to the question of standing had not been fully developed. *Id.*

The Mississippi Supreme Court later stated that "[p]arties may sue or intervene where they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant . . . ." *Harrison County*, 557 So. 2d at 782. *See also State ex rel. Moore v. Molpus*, 578 So. 2d 624, 632 (Miss. 1991); *White Cypress Lakes Dev. Corp. v. Hertz*, 541 So. 2d 1031, 1034-35 (Miss. 1989).

In Crunk's case we have no facts whatsoever on Crunk's extent of interest and adverse effect that would be different from that of the general public. Crunk did not elaborate in his brief nor cite as an issue the basis for assertion of error in dismissing his case based on standing. The issue of standing was not in his main brief, and he failed to designate the record of the hearing below.

Under our standard of review we are to take the well pled facts as true. In Crunk's bill of exceptions he merely stated that he was a citizen and was aggrieved by the City's decision. That is all the facts we have before us on how he was affected by the City's actions. As stated before, for a citizen to have standing they have to show some adverse effect different from that of the general public. *Belhaven*, 507 So. 2d at 47. From the record, or lack thereof, and main brief, Crunk has failed to show us any adverse effect whatsoever. Since the circuit court had the full facts before it on whether Crunk suffered an adverse effect different from the general public, and Crunk failed to cite any authority or facts, we will affirm the circuit court's decision that Crunk lacked standing to prosecute the appeal.

THE JUDGMENT OF THE LOWNDES COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.