IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-01046 COA

MORRIS NICHOLSON AND PAUL BROADHEAD **APPELLANTS**

v.

LAUDERDALE COUNTY BOARD OF EDUCATION AND THE LAUDERDALE COUNTY BOARD OF SUPERVISORS **APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	09/08/95
TRIAL JUDGE:	HON. SARAH P. SPRINGER
COURT FROM WHICH APPEALED:	LAUDERDALE COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANTS:	JOHN F. HAWKINS
	JOHN L. MAXEY
	SAMUEL L. BEGLEY
ATTORNEYS FOR APPELLEES:	ROBERT H. COMPTON
	JOHN G. COMPTON
NATURE OF THE CASE:	CIVIL - OTHER
TRIAL COURT DISPOSITION:	ACTION DISMISSED
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/9/97

BEFORE THOMAS, P.J., COLEMAN, AND KING, JJ.

COLEMAN, J., FOR THE COURT:

This case comes before the Court on appeal from the Lauderdale County Chancery Court's opinion and judgment dated September 8, 1995, which dismissed the appellants' amended complaint without prejudice for failure to state a claim under which relief may be granted under Rule 12(b)(6). We affirm.

I. FACTS AND LITIGATION

The catalyst of this present action was a series of agreements dated March 11, 1993, April 22, 1993,

and October 12, 1993, between the Board of Education of Lauderdale County and Bonito Properties, Inc., Hardy P. Graham, and Ed Johnson to develop certain sixteenth section land in Lauderdale County. On May 15, 1995, Morris Nicholson, an owner of real property in Lauderdale County, filed a complaint for declaratory judgment against the Lauderdale County Board of Education and Board of Supervisors, Bonito Properties, Inc., Hardy P. Graham, and Ed Johnson. In his complaint, Nicholson prayed that the chancery court would adjudicate all three agreements to be void and of no effect and render a declaratory judgment "adjudicating that the Board of Education is required to comply with Miss. Code Ann. § 29-3-65, prior to granting a new lease on the sixteenth section property . . . ."

On June 28, 1995, the same day that the chancellor entered an order granting additional time to the two Lauderdale Boards of Education and Supervisors within which to respond to Nicholson's complaint for declaratory judgment, Morris Nicholson and Paul Broadhead, filed a "notice of dismissal pursuant to Rule 41(a)(1)(i) MRCP" by which Nicholson and Broadhead dismissed without prejudice Bonita Properties, Inc., Hardy P. Graham and Ed Johnson.[(1)] Bonita Properties, Inc., Hardy P. Graham, and Ed Johnson were parties to the agreements which Nicholson and Broadhead sought to have the chancery court cancel. The next day, June 29, Nicholson and Broadhead filed an amended complaint, the purpose of which was to add Broadhead as a plaintiff in this case. On July 11, 1995, the Lauderdale Boards of Supervisors and Education filed their motion to dismiss or, in the alternative, motion for additional time to file answer. In their motion, the two boards affirmatively alleged that on June 12, 1995, they and Bonita Properties, Inc., Hardy P. Graham, and Ed Johnson mutually terminated and released the agreements which were the subject of Nicholson and Broadhead's amended complaint. The two boards moved the court to dismiss the amended complaint with prejudice because the issues which Nicholson and Broadhead had raised in it had become moot.

On August 18, 1995, the chancellor conducted a hearing on the merits of the two boards' motion to dismiss filed on July 11, 1995. Introduced into evidence as exhibits at this hearing were copies of the agreement which was the subject of appellants' amended complaint, the termination and release of the agreements, a commercial lease agreement which the two boards and Bonita Properties, Inc., Hardy P. Graham, and Ed Johnson executed on June 12, the date that they mutually terminated and released their earlier agreement, and a commercial lease contract among the same five parties which they also executed on June 12, 1995. The chancellor advised the parties that she intended to take judicial notice of the documents and pleadings which the court file contained, to which none of the parties objected.

Pursuant to the hearing on the boards' motion to dismiss, the chancellor entered an opinion and judgment on September 8, 1995, in which she found that "the Rule 12(b)(6) motion of Defendants should be granted." The chancellor then ordered the following:

> [T]he above styled cause . . . is dismissed without prejudice, inasmuch as the plaintiffs are entitled to no relief under any set of facts that could be proved in support of their claims, further the plaintiffs released parties that this court deems necessary in order to fully adjudicate the extensive and complex matters involved in the cause before this court. It is the opinion of this court that the defendants' 12(b)(6) Motion to Dismiss should be sustained in that this court had determined that it cannot in equity and good conscience proceed with this action further in the absence of those parties needed for just adjudication of this matter.

Nicholson and Broadhead have appealed from this opinion and judgment.

II. REVIEW, ANALYSIS, AND RESOLUTION OF THE ISSUES

We quote verbatim from their brief Nicholson and Broadhead's two issues:

> **1. The trial court should not have dismissed this civil action based on the contention that all necessary parties had not been joined.**
>
> **2. Alternatively, the trial court should have allowed the Plaintiffs to amend their complaint to name as defendants all persons needed for adjudication pursuant to Rule 19 for the Mississippi Rules of Civil Procedure.**

The Lauderdale County Boards of Education and Supervisors seek to present for our review three issues, which we again quote verbatim from their brief:

> **A. Does the failure of the Appellant to assign as error the Court's findings under Rule 12(b)(6) render their appeal moot?**
>
> **B. Is the judgment of the Chancery Court an appealable order?**
>
> **C. Did the Court abuse its discretion when it dismissed this civil action without prejudice?**

Because the two boards did not cross-appeal, this Court need not review and resolve these issues. ***See Beck Enters, Inc. v. Hester,* 512 So. 2d 672, 678-79 (Miss. 1987)** (holding that "[t]his Court will not consider issues not raised . . . on cross-appeal by an appellee"). However, our ultimate resolution of the appellants' two issues necessitates our consideration of whether the opinion and judgment from which they have appealed is an appealable order.

A. Standard of Review

In the case *sub judice*, we are not concerned with the chancellor's findings of fact. However, we adopt for our standard of review the following quotation from ***Benedict v. City of Hattiesburg*, 693 So. 2d 377, 379 (Miss. 1997):**

> Absent an abuse of discretion, this Court will uphold the decision of the chancellor. This Court will not disturb the factual findings of the chancellor unless said factual findings are manifestly wrong or clearly erroneous. Thus, we must look to the decision of the chancellor to determine if it was manifestly wrong or clearly erroneous. (citations omitted).

B. Nicholson and Broadhead's first issue:

The trial court should not have dismissed this civil action based on the contention that all necessary parties had not been joined.

The chancellor dismissed this case without prejudice because she could not "in equity and good conscience proceed with this action in the absence of those parties [Bonita Properties, Inc., Graham, and Johnson] needed for just adjudication of this matter." As parties to the agreements which Nicholson and Broadhead sought to have the chancery court cancel, Bonita Properties, Inc., Graham, and Johnson were necessary parties to the case *sub judice*. ***See Burger King v. Am. Nat'l Bank & Trust Co.*, 119 F.R.D. 672, 675 (N.D. Ill. 1988)** (quoting *Action Co. v. Bachman Foods, Inc.*, 668 F.2d 76, 81-2 (1st Cir. 1982) (holding that absent party to contract at issue "falls squarely within the terms of Rule 19(a)(2)"); ***Naartex Consulting Corp. v. Watt*, 722 F. 2d 779, 788 (D.C. Cir. 1983)** (holding that "an action seeking recission of a contract must be dismissed unless all parties to the contract . . . can be joined"). Although it was not a contract case, ***Ladner v. Quality Exploration Co.*, 505 So. 2d 288, 289 (Miss. 1987)**, involved the issue of whether the trial court erred when it dismissed the plaintiffs' complaint on the defendant's motion to dismiss made pursuant to Mississippi Rule of Civil Procedure 12(b)(7). The Mississippi Supreme Court affirmed the dismissal of the plaintiffs' complaint in so far as their claim for subsurface damages was concerned because they had not joined all the owners of mineral interests in the property. ***Ladner*, 505 So. 2d at 291.**

However, the agreements to which Bonita Properties, Inc., Graham, and Johnson were parties had been canceled and terminated as of June 12, 1995. Thus, the issue of whether the agreements ought to be canceled by the chancery court had become moot. It is a well established rule that the Mississippi Supreme Court will not hear cases that are moot. ***Sheldon v. Ladner*, 205 Miss. 264, 270, 38 So. 2d 718, 719 (1949).** There is, however, an exception to this rule cases which are "capable of repetition yet evading review." ***Strong v. Bostick*, 420 So. 2d 1356, 1359 (Miss. 1982)** (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

> While it is well established in this state, as well as elsewhere, that as a general rule an appeal will be dismissed when no useful purpose could be accomplished by entertaining it, when so far as concerns any practical ends to be served the decision upon the legal questions involved would be merely academic, it has, on the other hand, been broadly stated that the rule will not be applied when the question or questions involved are matters affecting the public interest. That statement is made more accurate, however, by the further statement that there is an exception to the general rule as respects moot cases, when the question concerns a matter of such a nature that it would be distinctly detrimental to the public interest that there should be a failure by the dismissal to declare and enforce a rule for future conduct.

***Strong*, 420 So.2d at 1359** (quoting *Sartin v. Barlow*, 196 Miss. 159, 169-70, 16 So. 2d 372, 376 (1944)). A case which would normally not be considered upon appeal because of mootness will be heard under the "capable of repetition yet evading review" doctrine where (1) the duration of the action in question was so short as to make it impossible to fully litigate it and (2) the petitioner is likely to suffer this same harm again. ***Strong*, 420 So. 2d at 1359.**

In *Strong*, the Mississippi Supreme Court held that a suit brought to determine whether the Mississippi Department of Wildlife Conservation had the authority to promulgate rules prohibiting the use of hunting dogs during deer season was not moot under this doctrine. 420 So. 2d at 1358-9. The Court opined that the issue was one of public concern which would never reach resolution if it was denied review. ***Id.*** Likewise, in ***Pascagoula Mun. Sep. Sch. Dist. v. Doe,*** **508 So. 2d 1081, 1084 (Miss. 1987),** the Court held that a case evaluating the lawfulness of a school's suspension of a handicapped child was not moot even though the semester had ended before the case was litigated. The Court stated that unless the issue was resolved, the school would never be able to discipline handicapped children. ***Doe,*** **508 So. 2d at 1084.** Consequently, the Court held this case capable of judicial review under the exception. ***Id.***

Nicholson and Broadhead assert that the case *sub judice* falls into the aforementioned category because it is a matter which affects the public interest and could be repeated were it allowed to evade review. This Court need not address their assertion insofar as Bonita Properties, Inc., Graham, and Johnson are concerned because the agreements to which they were parties have been canceled and rescinded. Thus, Nicholson and Broadhead's issue is moot as to them. Joining Bonita Properties, Inc., Graham, and Johnson was hardly necessary because the relief which Nicholson and Broadhead sought against them, *i.e.*, cancellation of the agreements, had already occurred. However, the chancellor did not order that Bonita Properties, Inc., Graham, and Johnson be joined as necessary parties, but instead, she dismissed the amended complaint which Nicholson and Broadhead had filed without prejudice.

C. Chancellor's dismissal without prejudice

The second half of Nicholson and Broadhead's first issue and their entire second issue attack the chancellor's dismissal of their case without prejudice. They argue that even if the chancellor's finding that Bonita Properties, Inc., Graham, and Johnson should have been joined was correct, the chancellor should have ordered that they be made parties rather than dismissing their amended complaint without prejudice. Our resolution of this argument accordingly resolves Nicholson and Broadhead's second issue.

The decision of whether or not to grant a motion to dismiss is within the trial court's discretion. ***Carter v. Clegg,*** **557 So. 2d 1187, 1190 n.2 (Miss. 1990).** On appeal from a sustained motion to dismiss pursuant to Rule 41(b), the Supreme Court will not reverse the chancellor's decision unless it was manifestly erroneous or an abuse of discretion. ***Ainsworth v. Callon Petroleum Co.,*** **521 So. 2d 1272, 1274 (Miss. 1987).** We are aware that the chancellor dismissed this case pursuant to Rule 12(b)(6), but Rule 41(b) controls the effect of a dismissal in that Rule 41(b) states that "a dismissal under this subdivision and any other dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." **M.R.C.P. 41(b); 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2373, at 407 n.38 (2d ed. 1995).** The chancellor dismissed the case *sub judice* because she found that Bonita Properties, Inc., Graham, and Johnson were necessary

parties to the litigation. However, in her opinion and judgment she expressly dismissed this case without prejudice; therefore, we hold that Rule 41(b) provides no basis on which to dispose of this issue. **M.R.C.P. Rule 41(b).**

Because the chancellor dismissed Nicholson and Broadhead's amended complaint without prejudice, they were free to re-file their complaint against the Lauderdale County Boards of Supervisors and Education and Bonita Properties, Inc., Graham, and Johnson. ***See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990)** (holding that a "'dismissal ... without prejudice' is a dismissal that does not 'operat[e] as an adjudication upon the merits,' Rule 41(a)(1), and thus does not have a res judicata effect."*); In Interest of Jason B.*, **500 N.W. 2d 384, 386 (Wis. Ct. App. 1993)** (reciting that "'[d] ismissal without prejudice,' by definition, permits 'the complainant to sue again on the same cause of action.'" (quoting Black's Law Dictionary 469 (6th ed. 1990)).

Since the chancellor's opinion and judgment left Nicholson and Broadhead at liberty to re-file their complaint against whomsoever they pleased, it appears that her opinion and judgment was not a final judgment from which Nicholson and Broadhead might otherwise appeal. An aggrieved party may appeal to the Supreme Court from any final judgment handed down in a civil case by either a circuit or chancery court. **Miss. Code Ann. § 11-51-3 (Supp. 1997);** ***Sanford v. Bd. of Supervisors,* 421 So. 2d 488, 491 (Miss. 1982).** However, an appeal cannot be made until there has been a final judgment deciding the issues of the case. **Miss. Code Ann. § 9-3-9 (Supp. 1997);** ***Grey v. Grey,* 638 So. 2d 488, 492 (Miss. 1994);** ***Sanford,* 421 So. 2d at 491.** ***See e.g., Belhaven Improvement Ass'n, Inc. v. City of Jackson,* 507 So. 2d 41, 45 (Miss. 1987)** (holding that an order overruling a motion to reconsider was appealable as it was a final judgment); ***Hamm v. Hall,* 693 So. 2d 906, 911-2 (Miss. 1997)** (holding that denial of motion to strike was appealable because it was actually, although not expressly, based upon the original custody decree which was a final judgment for the purposes of appeal). The "general rule is that in a traditional civil case on appeal from circuit court, all avenues available to an aggrieved party must be exhausted up to and including a judgment denying a new trial." ***Sanford,* 421 So. 2d at 491.** This rule may not be circumvented even where doing so will reduce the cost of the suit or the delay caused by waiting for a judgment. ***Id.***

According to Rule 54(a), "judgment" is a term of art which encompasses final decrees and any orders which may be appealed. **M.R.C.P. 54(a).** This is evidenced by the distinctions drawn with regard to judgments in the Comment to Rule 54, as follows in part:

> Although it is not specifically described in the rule itself, there are several different stages that lead to the creation of a judgment that is final and appealable. It is important to differentiate the various steps that are part of this process. The first distinction is between the adjudication, either by a decision of the court or a verdict of the jury, and the judgment that is entered thereon. The terms "decision" and "judgment" are not synonymous under these rules. The decision consists of the court's findings of fact and conclusions of law; the rendition of judgment is the pronouncement of that decision and the act that gives it legal effect.

***Banks v. Banks*, 511 So. 2d 933, 935 (Miss. 1987)** (quoting M.R.C.P. 54 (cmt.)). In other words, a final judgment is one which makes a final determination of all the issues as to all of the parties involved. ***Cotton v. Veterans Cab Co.*, 344 So. 2d 730, 731 (Miss. 1977);** ***Sanford,* 421 So. 2d at**

491.

For instance, in ***Sanford,* 421 So. 2d at 489,** the appellant appealed the Board of Supervisors' order appointing two people to a committee for the purpose of determining the appropriate site for a proposed road. The Mississippi Supreme Court stated that there was no final order from which to appeal because there was no order by the board deciding to actually build the road. ***Id.* at 491.** Similarly, in ***Celotex Corp. v. J. B. Womack Constr. Co.,* 455 So. 2d 1314, 1316 (Miss. 1984),** the Court held that an order declaring a nonsuit was not a final order for the purposes of appeal and dismissed the appeal before it without prejudice. ***See also Fluor Corp. v. Cook,* 551 So. 2d 897, 904 (Miss. 1989)** (affirming the rule that a nonsuit order is not an appealable final judgment and its holding in *Celotex*).

Whether an appeal may be made from an involuntary dismissal such as the one with which we deal in the case *sub judice* remains opaque at best. Because the Mississippi Rules of Civil Procedure were modeled after the Federal Rules of Civil Procedure, the Mississippi Supreme Court often considers the opinions of federal courts when it construes the Mississippi Rules of Civil Procedure. ***Stanton & Assocs. v. Bryant Constr. Co.,* 464 So. 2d 499, 505 n.5 (Miss 1985).** ***See e.g., Bourn v. Tomlison Interest, Inc.,* 456 So. 2d 747, 749 (Miss. 1984); *Brown v. Credit Center, Inc.,* 444 So. 2d 358, 364 n.1 (1983).** For example, the Court frequently looks to federal law when interpreting Rule 41(b) as it has decided very few cases based upon this rule. ***Carter,* 557 So. 2d at 1190 n.2.** The United States Courts of Appeal for both the Fifth and the Eleventh circuits have opined that unless specified otherwise, an order of dismissal under Rule 12(b)(6) such as the one in the case *sub judice* is a final order which is appealable. ***Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394, 399 n.3 (1981); *NAACP v. Hunt,* 891 F.2d 1555, 1560 (11th Cir. 1990).**

In 1962, before the Mississippi Rules of Civil Procedure were adopted, the Mississippi Supreme Court stated: "The fact that the case was dismissed without prejudice does not prevent the judgment from being a final judgment." ***First Nat'l Bank of Jackson v. Graham,* 242 Miss. 879, 882, 137 So. 2d 193, 194 (1962).** In fact, the Supreme Court of Mississippi has granted such appeals since it adopted the rules of civil procedure. ***In re City of Ridgeland,* 494 So. 2d 348 (Miss. 1986).** For example, in 1984, the City of Ridgeland attempted to annex an area adjacent to it and located in Madison County. ***Ridgeland,* 494 So. 2d at 349.** The City of Jackson opposed this action and requested that the City of Ridgeland's petition be dismissed upon several different grounds. ***Id.*** Consequently, the trial court dismissed the petition without prejudice on the grounds that the petition for annexation was not signed by two-thirds of the qualified electors. ***Id.*** The Mississippi Supreme Court granted the City of Ridgeland's appeal, but affirmed the trial court's decision in part. ***Id.* at 353.** The Court looked at the fact issues involved in the case but never addressed or mentioned the question we face now - whether a dismissal without prejudice is a final order. ***Id.* at 354.** The Court concluded its decision with the following statement:

> [T]he final judgment dismissing this action must be affirmed. The effect of that affirmance, however, should be made clear. This action has been dismissed without prejudice to the rights of these Plaintiffs or any other persons residing in this or any other unincorporated territory contiguous to the City of Ridgeland to file a new complaint under Section 21-1-45. All that has been adjudicated here is that the present complaint has not been joined by the percentage of qualified electors. The adequacy of any such new complaint must be judged as of the date of its

filing in accordance with the standards and principles articulated above.

***In re City of Ridgeland*, 494 So.2d at 353-4 (citation omitted).**

Yet another reason to entertain this appeal as though it were from a final judgment is the fact that Nicholson and Broadhead have elected to stand on their amended complaint rather than exercising their option of filing anew their complaint against whomsoever they wish. In ***Pittsburgh Elevator Co. v. West Virginia Bd. of Regents*, 310 S.E. 2d 675, 678-9 (W. Va. 1983),** the Supreme Court of West Virginia opined: "Therefore, if the effect of a dismissal of a complaint is to dismiss the action, such that it cannot be saved by amendment of the complaint, or *if a plaintiff declares his intention to stand on his complaint*, an order to dismiss is final and appealable." (emphasis added).

Based on our foregoing review of whether the chancellor ought to have dismissed this case without prejudice because Bonita Properties, Inc, Graham, and Johnson ought to be joined as necessary parties, we elect to resolve this issue as the Mississippi Supreme Court resolved a similar issue in *Ridgeland*. We affirm the chancellor's dismissal without prejudice.

III. SUMMARY

The litigants in the case *sub judice* have presented convoluted issues, the resolution of which this Court has found to be slippery and elusive. Had this Court reversed the opinion and judgment from which Nicholson and Broadhead appealed, it could not have rendered judgment for them. At most, a reversal would have resulted in our finding that Bonita Properties, Inc., Graham, and Johnson were necessary parties and a remand to the chancery court. Our affirming the opinion and judgment has the same consequence -- a remand to that court.

Perhaps this Court had alternative methods of affirming the consequences of the opinion and judgment from which Nicholson and Broadhead appealed, if not affirming it *per se*. One alternative may have been to dismiss the appeal because the issue of whether the agreements ought to have been canceled had become moot since the agreements had been terminated by agreement of the parties to the agreements. Another alternative was to dismiss the appeal because it stemmed from a judgment of dismissal without prejudice, which adjudicated nothing and therefore allowed Nicholson and Broadhead to refile their complaint.

However, the standard of review with which we began this opinion required that an appellate court uphold the decision of the chancellor absent an abuse of her discretion. The chancellor opined that she could not "in equity and good conscience proceed with this action in the absence of those parties [Bonita Properties, Inc., Graham, and Johnson] needed for just adjudication of this matter." Although they did not specifically argue the issue in their brief, Nicholson and Broadhead argued before the chancellor that even if the agreements had been terminated by mutual agreement of all of the parties to them, there remained the issue of whether the Lauderdale County Boards of Education and Supervisors were subject to declaratory judgment on the issue of whether they could again execute such agreements as Nicholson and Broadhead had attacked in their amended complaint. Bonita Properties, Inc., Graham, and Johnson were not necessarily parties to the resolution of that issue, if indeed it was an issue at all, and they may not have been parties who were necessary to the determination of the remaining issue of whether the agreements ought to be judicially canceled since the agreements had already been terminated by mutual agreement of the parties to them.

The chancellor's dismissal of their amended complaint without prejudice allowed Nicholson and Broadhead to pursue anew the issues involved in their claims against such parties as they thought appropriate. She did not abuse her discretion when she dismissed the amended complaint without prejudice, and we therefore affirm the opinion and judgment of the Lauderdale County Chancery Court.

THE JUDGMENT OF THE LAUDERDALE COUNTY CHANCERY COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

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

1. Mississippi Rule of Civil Procedure 41(a)(1)(i) provides:

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 66, or of any statute of the State of Mississippi, and upon the payment of all costs, an action may be dismissed by the plaintiff without order of court:

(i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .