

IN THE COURT OF APPEALS 03/26/96
OF THE STATE OF MISSISSIPPI
NO. 94-CA-00233 COA

CHARLES RAY KATES

APPELLANT

v.

MISSISSIPPI RIVERBOAT AMUSEMENT, LTD. d/b/a BILOXI BELLE CASINO RESORT

APPELLEE

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

TRIAL JUDGE: HON. JERRY OWEN TERRY, SR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

TEMPLETON FOWLKES

ATTORNEY FOR APPELLEE:

WILLIAM P. WESSLER

NATURE OF THE CASE: CONTRACT

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT IN FAVOR OF
DEFENDANT/APPELLEE MISSISSIPPI RIVERBOAT AMUSEMENT, LTD. AND RULING
RESERVED ON ISSUE OF LIBEL AND SLANDER

BEFORE FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

FRAISER, C.J., FOR THE COURT:

Charles Kates, former employee at will for Mississippi Riverboat Amusement, Ltd. d/b/a Biloxi Belle Casino Resort (Biloxi Belle), appeals from a summary judgment dismissing his wrongful discharge

suit against his former employer. While the trial court's order granted summary judgment on the issue of wrongful discharge, the trial judge reserved ruling on the issue of libel and slander. The law is clear that only a final judgment is appealable. *Grey v. Grey*, 638 So. 2d 488, 491 (Miss. 1994). Because the circuit judge did not issue a final order, Kates' appeal is interlocutory. See *Freeman Truck Line, Inc. v. Merchants Truck Line, Inc.*, 604 So. 2d 223, 224 (Miss. 1992) ("An order is interlocutory when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action."), *overruled on other grounds by Wilson v. Mississippi Employment Sec. Comm'n*, 643 So. 2d 538 (Miss. 1994). Kates could have moved for a Rule 54(b) judgment or followed the procedures set out in Mississippi Supreme Court Rules regarding interlocutory appeals. For the following reasons, we dismiss this interlocutory appeal without prejudice.

Kates could have filed his appeal if the order of the trial judge had been a Rule 54(b) judgment. "A Rule 54(b) judgment is not an interlocutory order, but a final judgment specifically provided for by this rule." *Cox v. Howard, Weil, Labouisse, Friedrichs, Inc.*, 512 So. 2d 897, 898 (Miss. 1987). Rule 54(b) of the Mississippi Rules of Civil Procedure states in pertinent part:

When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of judgment.

M.R.C.P. 54(b). The comment to Rule 54(b) explains that "[a]bsent a certification under Rule 54(b), any order in a multiple party or multiple claim action, even if it appears to adjudicate a separate portion of the controversy, is interlocutory." *Id.*, cmt. The rule is particularly helpful in complex litigation with multiple claims and parties because it allows separable claims to be settled before extensive litigation is finally resolved. *Cox*, 512 So. 2d at 900. However, Kates did not receive, nor is it known if he asked for, a Rule 54(b) judgment. In that case, proper appellate procedure dictates following Mississippi Rule of Appellate Procedure 5.

Rule 5 sets out the required procedure for filing an interlocutory appeal. Kates did not petition for permission to file an interlocutory appeal, and the appellee did not contest that omission. However, "it is nevertheless the duty of this Court to raise the question which involves jurisdiction, on its own motion, of whether this appeal from the interlocutory decree will lie." *Donald v. Reeves Transp. Co.*, 538 So. 2d 1191, 1193 (Miss. 1989) (quoting *Slater v. Bishop*, 251 Miss. 306, 308-09, 169 So. 2d 465, 467 (1964)).

The rule in effect at the time of Kates' appeal was Rule 5 of the Mississippi Supreme Court Rules. It provides in part:

An appeal from an interlocutory order may be sought if the order grants or denies certification by the trial court that a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:

(1) Materially advance the termination of a litigation and avoid exceptional expense to the

parties; or

(2) Protect a party from substantial and irreparable injury; or

(3) Resolve an issue of general importance in the administration of justice.

Miss. Sup. Ct. R. 5. "Rule 5 requires that an appeal from an interlocutory order must be sought by filing with the Clerk of this Court a petition for permission to appeal." *Donald*, 538 So. 2d at 1194. The court elaborated on interlocutory appeals after the advent of the new rules and stated, "Nothing in our new Rules places in the hands of the trial court the keys to this Court's front door. . . . This Court retains absolute authority to decide whether an interlocutory appeal should be granted." *Id.* (quoting *American Elec.v. Singarayar*, 530 So. 2d 1319, 1322 (Miss. 1988)).

The comment to Mississippi Supreme Court Rule 5 stated:

The rule contemplates that either the trial court will grant an interlocutory appeal subject to appellate review of that decision, or the Supreme Court will grant the appeal itself.

Miss. Sup. Ct. R. 5 cmt. The comment also states that review under the rule "is separate from the interlocutory review available by certification under Miss .R.Civ. P. 54(b) when a final judgment is entered as to fewer than all parties or claims" In *Mississippi Supreme Court Practice*, Luther T. Munford summarizes the steps to take in order to bring an interlocutory appeal:

The first step in bringing an interlocutory appeal to the Supreme Court is to obtain a ruling from the trial court on the question of law. The next step is to request that the trial court certify its ruling for interlocutory appeal. The request must state proper grounds for certification. This request is a condition precedent to pursuing the appeal, although the trial court's refusal to certify the appeal does not bar Supreme Court review.

Luther T. Munford, *Mississippi Supreme Court Practice*, 4-9 (1993).

The Mississippi Supreme Court has stated that the decision to grant an interlocutory appeal rests solely with the court. *Donald*, 538 So. 2d at 1194. "[A]cceptance of this appeal is not obligatory in any sense, and for pragmatic reasons we deny most petitions for interlocutory appeal." *McDaniel v. Ritter*, 556 So. 2d 303, 306 (Miss. 1989).

This Court has previously decided a case involving the same Appellee and the same counsel involved in Kates' appeal: *Bennis v. Mississippi Riverboat Amusement, Ltd. d/b/a Biloxi Belle Casino Resort*. Our decision in that case, which did not note the interlocutory aspect of the appeal, does not affect or impede our authority, nor reduce our obligation, to dismiss this appeal as interlocutory. Kates did not bring a proper appeal before this Court, and in accordance with the law

and procedures recited above, we dismiss his appeal.

THE APPEAL IS DISMISSED. COSTS OF APPEAL ARE TAXED TO APPELLANT.

BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.