Serial: 119209

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99027-SCT

IN RE: MISSISSIPPI RULES OF APPELLATE PROCEDURE

ORDER

This matter is before the Court en banc on its own motion for consideration of the amendment of Rule 5 (a) and (b) of the Mississippi Rules of Appellate Procedure. Having sought the recommendations of the trial judges of the state and the Supreme Court Rules Advisory Committee, and having published the proposed amendment for public comment, the Court finds that the amendment to Rule 5 (a) and (b) as set forth in Exhibit "A" hereto will promote the fair and effective administration of justice.

IT IS THEREFORE ORDERED that Rule 5 (a) and (b) of the Mississippi Rules of Appellate Procedure and the Comment thereto are amended as set forth in Exhibit "A" hereto. This amendment shall be effective as to trial court orders entered from and after March 1, 2005.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and that a true certified copy be forwarded forthwith to West Publishing Company for publication in *Southern Reporter Second (Mississippi Edition)* and the *Mississippi Rules of Court.*

SO ORDERED, this the 6th day of December, 2004.

Kay B. Cobb

KAY B. COBB, PRESIDING JUSTICE,
FOR THE COURT

DIAZ, EASLEY, AND GRAVES, JJ., NOT PARTICIPATING.

EXHIBIT "A" TO ORDER

MISSISSIPPI RULES OF APPELLATE PROCEDURE

RULE 5. INTERLOCUTORY APPEAL BY PERMISSION

(a) Petition for Permission to Appeal. 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 the 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.

Appeal from such an order may be sought by filing a petition for permission to appeal with the clerk of the Supreme Court within 21 ~~14~~ days after the entry of such order in the trial court with proof of service on the trial judge and all other parties to the action in the trial court. ~~An order may be amended to include the prescribed certification or denial at any time, and permission to appeal may be sought within 14 days after entry of the order as amended.~~

(b) Content of Petition; Answer. The petition shall contain: a statement of the facts necessary to an understanding of the question of law determined by the order of the trial court ~~and~~; a statement of the question itself; ~~and a statement of the reasons why the certification required by Rule 5(a) properly was made or should have been made~~ a statement of the current status of the case; and a statement as to why the petition for interlocutory appeal is timely. The petition shall further identify all other cases or petitions for interlocutory appeal pending before the appellate court and known to the petitioner which are related to the matter for which interlocutory review is sought. The petition shall include or have annexed a copy of the order from which appeal is sought and of any related findings of fact, conclusions of law or opinion. Within 14 days after service of the petition, the trial judge may file a statement informing the appellate court of any reasons why that judge believes that the petition should or should not be granted, and any ~~an~~ adverse party may file an answer in opposition with the clerk of the Supreme Court, with proof of service on the trial judge and all other parties to the action in the trial court. The petition with any statement by the trial judge and answers of all parties responding shall be submitted without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. Four (4) copies of the petition and answer, if any, shall be filed with the original, but the Court may require that additional copies be furnished. The provisions of Rule 27 concerning motions shall govern the filing and

consideration of the petition and answer, except that no petition or answer, including its supporting brief, shall exceed 15 pages in length.

(d) Grant of Permission; Prepayment of Costs; Filing of Record. If permission to appeal is granted by the Supreme Court, the appellant shall pay the docket fee as required by Rule 3(e) within 14 days after entry of the order granting permission to appeal, and the record on appeal shall be transmitted and filed and the appeal docketed in accordance with Rules 10, 11, and 13. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of entry of the order granting permission to appeal. A notice of appeal need not be filed.

(e) Expedited Proceedings. The Court may in its discretion expedite the appeal and give it preference over ordinary civil cases. If the Court determines that the issues presented can be fairly decided on the petition, response and exhibits presented, the Court may decide those issues simultaneously with the granting of the petition, without awaiting preparation of a record or further briefing.

(f) Effect on Trial Court Proceedings. The petition for appeal shall not stay proceedings in the trial court unless the trial judge or the Supreme Court shall so order.

[Amended effective July 29, 2004 to add paragraph (e) regarding expedited proceedings when the petition is granted. Effective December 9, 2004, as to trial court orders entered from and after March 1, 2005, paragraph (a) and (b) are amended to eliminate provision for seeking certification of the issue by the trial judge and provide the trial judge an opportunity to file a statement regarding the issue.]

Advisory Committee Historical Note

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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.~~ Prior to March 1, 2005, Rule 5(a) required the petitioner to seek certification for an interlocutory appeal first from the trial court. Denial of certification did not limit the right of the petitioner to seek interlocutory review, but submitting the matter to the trial judge was a prerequisite to proceeding in the Supreme Court. This requirement has been eliminated by the amendment as to trial court orders entered from and after March 1, 2005. Under the rule prior to the amendment, the 14 day time limit ran from the time of entry of the judge's order ruling on a motion to amend the order which was the subject of the petition. With the elimination of the requirement of trial court certification or denial of certification as to orders entered after March 1, 2005, the petition must be filed within 21 days following the entry of the order which the petitioner submits for interlocutory review. While an interlocutory appeal may be sought at any time, the timeliness of the petition decreases as trial approaches. The practice of seeking belated reconsideration of the trial court's ruling for the purpose or renewing the time allowed for seeking interlocutory review is condemned. 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 March 1, 2005 amendment recognizes that the trial court's views as to whether interlocutory review should be granted are often helpful. The amendment requires that the petition be served on the trial judge and invites that judge's statement as to the reasons why the petition should or should not be granted.

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.

Rule 5(e) was added by amendment effective July29, 2004 in recognition of the need for expedited disposition of interlocutory appeals. On occasions when the Court is presented in the petition with a pure question of law or otherwise has before it sufficient information to do so, the Court may in its discretion address and dispose of the issue presented simultaneously with the grant of permission to file the interlocutory appeal and without further record preparation or briefing.

[Comment amended effective April 15, 2004; amended effective July 29, 2004; amended effective December 9, 2004.]