IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-CA-00395-SCT

MARK GIBSON AND COURT PROPERTIES, INC.

v.

QUENTIN M. BELL AND SHARONDA R. BELL

DATE OF JUDGMENT:	02/21/2019
TRIAL JUDGE:	HON. LAWRENCE PAUL BOURGEOIS, JR.
TRIAL COURT ATTORNEYS:	JEFFREY LOEWER HALL HUGH D. KEATING F. DOUGLAS MONTAGUE, III MARA MICHELE LESIEUR JOFFE TAYLOR ALLISON HECK JASON ENLOE GRAEBER MATTHEW STEPHEN LOTT ADRIENNE B. FAZIO
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT, FIRST JUDICIAL DISTRICT
ATTORNEYS FOR APPELLANTS:	F. DOUGLAS MONTAGUE, III HUGH D. KEATING JEFFREY LOEWER HALL MARA MICHELE LESIEUR JOFFE
ATTORNEYS FOR APPELLEES:	JASON ENLOE GRAEBER TAYLOR ALLISON HECK MATTHEW STEPHEN LOTT
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
DISPOSITION:	AFFIRMED - 10/01/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KING, P.J., MAXWELL AND GRIFFIS, JJ.

GRIFFIS, JUSTICE, FOR THE COURT:

¶1. Mark Gibson and Court Properties, Inc., appeal the circuit court's dismissal for lack of jurisdiction of their county-court appeal. Because Gibson and Court Properties failed to

pay the cost bond within thirty days of the final judgment as required by Mississippi Code Section 11-51-79 (Rev. 2019), the circuit court's dismissal for lack of jurisdiction is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2. In 2009, the Bells acquired a loan from Tower Loan. The Bells' house was collateral for the loan. The Bells later experienced financial hardship. As a result, Tower Loan recommended that the Bells contact Gibson and Court Properties, Gibson's wholly owned corporation, for financial assistance.[1]

¶3. On September 20, 2013, the Bells executed a promissory note, a deed of trust, and an assumption warranty deed with Court Properties. Approximately three months later, on December 10, 2013, Gibson evicted the Bells and, shortly thereafter, sold their house.[2]

¶4. The Bells filed a lawsuit in the County Court of Harrison County against Gibson, Court Properties, and Tower Loan,[3] alleging fraud, breach of fiduciary duty, bad faith, and wrongful foreclosure. A jury trial was held and resulted in a unanimous verdict in favor of the Bells.

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[1] According to the Bells, a Tower Loan representative advised that their loan was in default and that Tower Loan planned to foreclose on their home. The same representative later called and explained that Tower Loan had a relationship with Gibson, who "works with people like the Bells to keep their home and avoid foreclosure."

[2] Gibson alleged that the Bells had defaulted on their loan obligation.

[3] Tower Loan and the Bells settled, and Tower Loan was released from the lawsuit by an agreed order of dismissal.

¶5. The county court entered a final judgment and awarded the Bells $136,508 in compensatory damages and $500,000 in punitive damages.[4] Gibson and Court Properties (collectively, "Gibson") moved for a new trial and for a judgment notwithstanding the verdict. The Bells moved for attorneys' fees and costs.

¶6. On March 14, 2018, the county court denied Gibson's motion for a new trial and for a judgment notwithstanding the verdict and granted the Bells' motion for attorneys' fees and costs. The county court awarded attorneys' fees and costs in the amount of $72,869.30 against Gibson.

¶7. Gibson filed a notice of appeal on March 22, 2018, within thirty days of the county court's denial of his motion for a new trial and a judgment notwithstanding the verdict. But Gibson did not pay the cost bond within thirty days of the final judgment as required by Section 11-51-79. On April 5, 2018, the circuit clerk issued her estimated costs for appeal. The clerk's document noted that the "Estimated cost is due within fourteen (14) days, payable to Connie Ladner, Circuit Clerk." Gibson paid the estimated costs on April 18, 2018, which was one day before the circuit clerk's deadline but five days after the thirty-day statutory deadline required by Section 11-51-79.

¶8. The Bells filed a motion to dismiss Gibson's appeal for lack of jurisdiction because

[4] The $136,508 compensatory-damages award was comprised of $83,508 for conversion, $3,000 for trespass, and $50,000 for fraud. Post-judgment interest of 6 percent was added to each judgment amount that would accrue from the date of entry of the final judgment until paid.

Gibson had failed to pay the cost bond within thirty days of the county court's final order. A hearing was held in the circuit court. At the hearing, the Bells argued that under Section 11-51-79 and ***Belmont Holding, LLC v. Davis Monuments, LLC***, 253 So. 3d 323 (Miss. 2018), statutory cost bonds are jurisdictional and, as a result, Gibson's late payment of the cost bond deprived the circuit court of appellate jurisdiction. But Gibson argued that under Rule 2 of the Mississippi Rules of Appellate Procedure and ***Van Meter v. Alford***, 774 So. 2d 430 (Miss. 2000), his untimely payment of the cost bond was not jurisdictional but was a procedural deficiency that he cured when he paid the cost bond within the fourteen days specified by the circuit clerk's notice. Gibson further argued that under Rule 3 of the Mississippi Rules of Appellate Procedure, the payment of a cost bond was not an "absolute criterion for perfecting an appeal."

¶9. The circuit court, relying on ***Belmont***, found that Gibson's failure to pay the cost bond within the statutorily prescribed thirty days precluded its exercise of jurisdiction and, as a result, dismissed Gibson's appeal. Gibson timely appealed to this Court and raises the following two issues:

> 1. Whether the circuit court order . . . [d]ismissing [a]ppeal (for lack of jurisdiction) deprived [Gibson] of due process by dismissing the appeal for failure to timely post the cost bond after [Gibson] received an apparent Miss. R. App. P. 2(a)(2) deficiency notice and complied with the cost bond payment deadline provided in the circuit clerk's notice.
>
> 2. Whether . . . ***Belmont*** should be given retroactive effect when its ruling is contrary to ***Van Meter***, as well as other established precedent, that would otherwise be inapplicable to appeals

pending at the time of the ***Belmont*** decision.

STANDARD OF REVIEW

¶10. "A *de novo* standard of review is applied to questions of law, legal conclusions, and jurisdictional questions." ***Belmont***, 253 So. 3d at 326 (citing ***Aladdin Constr. Co. v. John Hancock Life Ins. Co.***, 914 So. 2d 169, 174 (Miss. 2005)).

DISCUSSION

I. Whether the circuit court had appellate jurisdiction.

¶11. Gibson first argues that the Mississippi Rules of Appellate Procedure conflict with and therefore supersede the cost-bond requirement of Section 11-51-79 as an absolute condition to perfect his appeal. This Court disagrees.

¶12. The Mississippi Legislature prescribed appellate jurisdiction in Mississippi's circuit courts over appeals from county courts in Section 11-51-79. Section 11-51-79 provides, in pertinent part,

> Appeals from the law side of the county court shall be made to the circuit court, and those from the equity side to the chancery court on application made therefore and bond given according to law, except as hereinafter provided. . . . Appeals from the county court shall be taken and bond given within thirty (30) days from the date of the entry of the final judgment or decree on the minutes of the court.

Miss. Code. Ann. § 11-51-79. Under this statute, "a party seeking to appeal a county court judgment must do so within thirty days of the entry of the judgment. Within that time, the appellant must file notice of the appeal and post a bond." ***T. Jackson Lyons & Assocs., P.A. v. Precious T. Martin, Sr. & Assocs., PLLC***, 87 So. 3d 444, 448 (Miss. 2012) (citations

omitted).

¶13. Gibson asserts that the cost-bond requirement of Section 11-51-79 directly conflicts with Mississippi Rule of Appellate Procedure 3(a), which states that the "[f]ailure of an appellant to take any step *other than the timely filing of a notice of appeal* does not affect the perfection of the appeal[.]" M.R.A.P. 3(a) (emphasis added). But Rule 3(a), a *procedural* rule, does not supersede the *jurisdictional* requirement of Section 11-51-79.

¶14. When there is a conflict between a statute and our rules over an appeal *procedure*, our rules control. ***Brown v. Collections, Inc.***, 188 So. 3d 1171, 1177 (Miss. 2016) (citing ***Stevens v. Lake***, 615 So. 2d 1177, 1183 (Miss. 1993)). But this Court has unequivocally stated,

> [T]he Mississippi Rules of Appellate Procedure do not supersede the *jurisdictional* requirement of Section 11-51-79. Even if they did, the Section 11-51-79 requirement comports with the applicable procedural rule, Uniform Rule of Circuit and County Court Practice 5.04, which requires that, in order to perfect an appeal from county to circuit court, the costs of the appeal be paid within thirty days of the entry of the judgment being appealed.

Belmont, 253 So. 3d at 326 (emphasis added).

¶15. Gibson further asserts that his untimely payment of the cost bond under Section 11-51-79 is not jurisdictional but, instead, a procedural deficiency under Mississippi Rule of Appellate Procedure 2(a)(2). But "[s]tatutory bond requirements are jurisdictional issues." ***T. Jackson Lyons***, 87 So. 3d at 451 (citing ***Miss. State Pers. Bd. v. Armstrong***, 454 So. 2d 912, 915 (Miss. 1984)). "The Court repeatedly has held that statutory [cost] bonds are jurisdictional—that is, they relate to a court's appellate jurisdiction." ***5K Farms, Inc. v.***

Miss. Dep't of Revenue, 94 So. 3d 221, 227 (Miss. 2012).

¶16. In support of his arguments, Gibson relies on ***Van Meter***. In ***Van Meter***, a county-court jury rendered a verdict in favor of Bobby Alford against Wallace Van Meter. ***Van Meter***, 774 So. 2d at 431. Van Meter appealed the final judgment to the circuit court. ***Id.*** Van Meter timely filed a notice of appeal and timely paid the clerk's filing fee. ***Id.*** But Van Meter did not file a designation of record, an estimation of costs, or a Mississippi Rule of Appellate Procedure 11(b)(1) certificate of compliance. ***Id.*** at 432. As a result of Van Meter's failure to comply with appellate procedures, Alford filed a motion to dismiss the appeal for lack of jurisdiction. ***Id.*** at 431. The circuit court granted the motion and dismissed Van Meter's appeal. ***Id.***

¶17. On appeal to this Court, Van Meter argued that he was deprived of due process because he was "not given fourteen days to correct the appeal's deficiencies, as required under M.R.A.P. 2(a)(2)." ***Id.*** at 432. This Court found that Rule 2(a)(2) applies to appeals from county court to circuit court in that Rule 2(a) "mandates that, after a motion to dismiss has been filed, the court clerk (the circuit clerk in this instance) officially notify an appellant of deficiencies in his appeal and that the appellant be given fourteen (14) days therefrom to correct any deficiencies." ***Id.*** As a result, the Court reversed the circuit court's judgment and remanded the case with instructions to "issue a Rule 2(a)(2) notice to Van Meter, giving him specific notice of the deficiencies of his appeal and allowing him fourteen (14) days from the date of the notice to cure said deficiencies." ***Id.***

¶18. Additionally, this Court instructed the circuit court to consider lesser sanctions, stating that Van Meter's deficiencies did not "necessarily mandate a dismissal." ***Id.*** Referencing Rule 3(a), this Court noted that because Van Meter timely filed his notice of appeal, the circuit court should "consider the full panoply of sanctions before imposing the most harsh sanction of dismissal." ***Id.***

¶19. But ***Van Meter*** is distinguishable because it did not specifically address the failure to pay a cost bond within thirty days under Section 11-51-79. In fact, in ***Van Meter***, jurisdiction was not in question and Section 11-51-79 was not addressed. Instead, the motion to dismiss the appeal was based on Van Meter's failure to comply with appellate *procedure*.

¶20. In ***Belmont***, this Court addressed an appellant's failure to timely pay a cost bond as required by Section 11-51-79. ***Belmont***, 253 So. 3d at 326. The county court had denied Belmont's replevin action and entered a final judgment in favor of Jason Davis and Davis Monuments, LLC (collectively, "Davis"). ***Id.*** at 324. Belmont filed a notice of appeal within thirty days of the final judgment, but it did not pay the cost bond within thirty days as required by Section 11-51-79. ***Id.*** As a result, Davis filed a motion to dismiss the appeal for lack of jurisdiction based on Belmont's failure to timely pay the cost bond. ***Id.*** at 325. The circuit court found that Belmont's "failure to post the cost bond within the statutorily mandated thirty days" deprived it of jurisdiction; it therefore dismissed the appeal. ***Id.***

¶21. Belmont filed a motion to reinstate the appeal and argued (1) "it was entitled to a notice of the deficiency of its appeal from the circuit clerk under Mississippi Rule of

Appellate Procedure 2(a)(2)" and (2) "the failure to give it official notice of the delinquency violated its due process rights." ***Id.*** at 325-26. The circuit court found "that the failure to perfect an appeal by paying a cost bond [wa]s not a deficiency as contemplated by Rule 2" and denied the motion. ***Id.*** at 326. Belmont appealed to this Court.

¶22. On appeal, this Court affirmed the circuit court's dismissal of the appeal for a lack of jurisdiction. ***Id.*** at 331. The Court explained,

> we have unequivocally stated that "the cost bond, or payment of the cost of preparing the record, is a statutory requirement of appeal" under Section 11-51-79. "Statutory bond requirements are jurisdictional issues." Indeed, the "Court repeatedly has held that failure to post an appeal bond (being the cost bond required by Mississippi Code Section 11-51-79) within the time permitted by statute results in the circuit court's lack of jurisdiction."

Id. at 329 (citations omitted). The Court concluded that "[b]ecause Belmont failed timely to pay the cost bond, the circuit court did not have appellate jurisdiction." ***Id.*** at 330.

¶23. Additionally, the Court held that Belmont's failure to timely pay the cost bond was not a deficiency under Rule 2(a)(2). ***Id.*** at 331. The Court explained that

> the circuit clerk was under no obligation to notify Belmont of its failure to comply with the statutory jurisdictional requirement of paying the cost bond. Rule 2 simply does not apply to the deficiency at issue here, i.e., lack of jurisdiction. The deficiencies as described in Rule 2(a)(2) occur only "(i) when the court determines that there is an obvious failure to prosecute an appeal" or "(ii) when a party fails to comply substantially with these rules." The circuit court, sitting as an appellate court, did not enter a discretionary dismissal under Rule 2(a)(2) for the failure to comply with "these rules," i.e., the Mississippi Rules of Appellate *Procedure*; rather, the circuit court dismissed the appeal for lack of appellate *jurisdiction*. As explained above, it is the Legislature's prerogative to set appellate jurisdiction of circuit courts. It did so in Section 11-51-79.

Id. The Court emphasized that "Section 11-51-79 requires the appellant to pay the cost bond regardless of what the clerks have done." ***Id.***

¶24. Here, Gibson's arguments mirror those asserted in ***Belmont***. But for the same reasons discussed in ***Belmont***, Gibson's arguments fail.

¶25. Unlike in ***Belmont***, there was no confusion over the cost estimate or how much Gibson was to pay. Moreover, at the time the circuit clerk's cost estimate was issued on April 5, 2018, Gibson still had eight days to timely pay the cost bond. Thus, this is not a deficiency or an inability to timely pay; this is a failure to timely pay as required by Section 11-51-79.[5] Although Gibson complied with the circuit clerk's fourteen-day deadline, he was still required to timely pay the cost bond under Section 11-51-79 "regardless of what the clerk[] ha[d] done." ***Belmont***, 253 So. 3d at 331. Accordingly, because Gibson failed to timely pay the cost bond, his appeal was not perfected, and the circuit court lacked appellate jurisdiction.

II. Whether **Belmont** *should be given retroactive effect.*[6]

¶26. Gibson makes several arguments why this Court's decision in ***Belmont*** should not retroactively apply to his appeal. His central argument is that ***Belmont*** is contrary to ***Van Meter*** "as well as other established precedent that would otherwise be applicable to appeals

[5] The record reflects that despite his notice of appeal and receipt of the clerk's cost estimate, Gibson did not file his certificate of compliance under Mississippi Rule of Appellate Procedure 11(b)(1) until April 20, 2018.

[6] Gibson filed his notice of appeal in March 2018. ***Belmont*** was issued in September 2018, while Gibson's appeal was pending in the circuit court.

pending at the time of the Belmont Holding decision." This Court disagrees. As previously established, jurisdiction was not in question in ***Van Meter***, and the other purportedly related cases Gibson cites are, in fact, unrelated and inapplicable.

¶27. Notably, this Court's decisions "are presumed to have retroactive effect unless otherwise specified." ***Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.***, 753 So. 2d 1077, 1093 (Miss. 2000) (citing ***Morgan v. State***, 703 So. 2d 832, 839 (Miss. 1997)). Generally, "all judicial decisions apply retroactively unless the Court has specifically stated the ruling is prospective." ***Mid-S. Retina, LLC v. Conner***, 72 So. 3d 1048, 1052 (Miss. 2011) (internal quotation marks omitted) (quoting ***Cleveland v. Mann***, 942 So. 2d 108, 113 (Miss. 2006)); *see also* ***Morgan***, 703 So. 2d at 839. This Court's decision in ***Belmont*** did not pronounce a prospective application because no such pronouncement was necessary. ***Belmont*** did not overrule ***Van Meter***.

¶28. Furthermore, "newly enunciated rules of law are applied retroactively to cases that are pending trial or that are on appeal, and not final at the time of the enunciation." ***Thompson v. City of Vicksburg***, 813 So. 2d 717, 721 (Miss. 2002). Traditionally, this Court applies the law as it exists at the time of appellate review. ***Mid-S. Retina***, 72 So. 3d at 1053. Accordingly, ***Belmont*** applies retroactively.

III. The Bells' Motion for Attorneys' Fees on Appeal[7]

[7] The motion for attorneys' fees on appeal appears on the Court's docket as a separate motion. This opinion resolves the motion.

¶29. In their motion for attorneys' fees on appeal, the Bells requested "$52,539.93 for attorneys' fees and expenses incurred in defense of the instant appeal and the defense of the [c]ircuit [c]ourt appeal . . . ." Thus, the Bells seek attorneys' fees and expenses associated with (1) the appeal to the circuit court and (2) the appeal to this Court. In response, Gibson asserts that the Bells did not request attorneys' fees in the circuit court and are therefore not entitled to any fees associated with the circuit-court appeal. Regarding the attorneys' fees associated with the appeal to this Court, Gibson asserts that "any such award should be limited to the work performed relating to the sole issue before the Court . . . ." This Court agrees.

¶30. "When a prevailing party requests attorneys' fees on appeal, '[t]ypically, th[e] Court awards attorney fees on appeal in an amount equal to half the amount awarded at trial.'" ***Latham v. Latham***, 261 So. 3d 1110, 1115 (Miss. 2019) (alterations in original) (quoting ***Huseth v. Huseth***, 135 So. 3d 846, 861 (Miss. 2017)). "Because such an award may not be fair and equitable in all cases," attorneys should "file a motion in th[e] Court, supported by affidavits and time records that establish the actual fees expended on appeal." ***Id.*** (alteration in original) (internal quotation mark omitted) (citing ***Hatfield v. Deer Haven Homeowners Ass'n, Inc.***, 234 So. 3d 1269, 1277 (Miss. 2017)).

¶31. In accordance with Rule 27(a) of the Mississippi Rules of Appellate Procedure, the Bells filed a motion requesting attorneys' fees on appeal and attached affidavits and billing sheets detailing the time spent and expenses incurred by their attorneys in defending both

appeals. After review, this Court finds that the Bells' motion should be granted only as to the attorneys' fees and expenses associated with the appeal to this Court.

¶32. The Bells did not request attorneys' fees in their motion to dismiss Gibson's appeal in the circuit court, and they did not seek attorneys' fees after the circuit court granted their motion and dismissed Gibson's appeal. Although the circuit court dismissed Gibson's appeal for lack of jurisdiction, it still had the authority to consider attorneys' fees. *See* ***Bailey v. Chamblee***, 192 So. 3d 1078, 1083 (Miss. Ct. App. 2016) (alteration in original) ("We conclude that we have jurisdiction to award appellate attorneys' fees even though we lack appellate jurisdiction to review the judgment below. *See* ***Morand v. Stoneburner***, 516 So. 2d 270, 271 (Fla. Dist. Ct. App. 1987) (holding that even if an appeal is dismissed for lack of appellate jurisdiction, the appellate 'court has jurisdiction to determine its [own] jurisdiction' and 'ancillary' jurisdiction to award attorneys' fees)."). Thus, the circuit court could have considered a request for attorneys' fees. But it was not until after the Bells had filed their appellees' brief with this Court that they requested attorneys' fees for both appeals. Because the Bells failed to request attorneys' fees in the circuit court, their motion for attorneys' fees on appeal is denied as to those attorneys' fees and expenses associated with the appeal to the circuit court.

¶33. Regarding the attorneys' fees and expenses associated with the appeal to this Court, this Court has reviewed the affidavits and billing statements and finds that an award of $29,074 is fair and equitable as it represents the fees and expenses incurred by the Bells in

defense of the appeal to this Court.[8] While $29,074 is less than "half the amount awarded at trial,"[9] it is more than half of the $52,539.93 requested by the Bells on appeal. ***Latham***, 261 So. 3d at 1115 (internal quotation mark omitted) (quoting ***Huseth***, 135 So. 3d at 861).

CONCLUSION

¶34. Gibson's failure to pay the cost bond within thirty days of the county court's final judgment as required by Section 11-51-79 deprived the circuit court of appellate jurisdiction. Accordingly, the circuit court's dismissal of Gibson's appeal is affirmed.

¶35. The Bells' motion for attorneys' fees on appeal is granted in part. The Bells are awarded $29,074 in attorneys' fees and expenses associated with the appeal to this Court.

¶36. **AFFIRMED.**

RANDOLPH, C.J., KITCHENS AND KING, P.JJ., COLEMAN, MAXWELL, BEAM, CHAMBERLIN AND ISHEE, JJ., CONCUR.

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[8] This Court considered the attorneys' fees and expenses incurred as well as all payments made on and after February 28, 2019, the date Gibson filed his notice of appeal from the circuit court. All fees, expenses, and payments made or incurred before Gibson's appeal to this Court on February 28, 2019, were not included in the calculation.

[9] $36,434.65 would be half of the $72,869.30 in attorneys' fees awarded at trial by the county court.