

Albert and Ruby MITCHELL  
v. CITY OF MOUNTAIN VIEW

91-9

803 S.W.2d 556

Supreme Court of Arkansas  
Opinion delivered February 18, 1991.

1. APPEAL & ERROR — RECORD ON APPEAL MUST BE FILED WITHIN 90 DAYS FROM FILING THE FIRST NOTICE OF APPEAL OR DISMISSAL WILL FOLLOW. — Where the record on appeal was not filed within 90 days of filing the first notice of appeal and no request for an extension was asked for or granted pursuant to Ark. R. App. P. 5(a), the appellee's motion for dismissal must be granted.
2. APPEAL & ERROR — TRIAL COURT HAD NO POWER TO DISMISS A STALE APPEAL. — The trial court had no power to dismiss an appeal except pursuant to Ark. R. App. P. 3(b), but where the time for appeal had expired, the appellee properly filed a partial record with the clerk and moved for a dismissal, which was granted.
3. APPEAL & ERROR — FURTHER COSTS IN A STALE APPEAL PROPERLY AVOIDED BY SEEKING DISMISSAL BY THE TRIAL COURT. — Where an appellant, after filing notice of appeal, permitted the appeal to become stale, it could have avoided further costs by seeking a dismissal in the trial court pursuant to Ark. R. App. R. 3(b).

Motion to Dismiss Appeal; granted.

*Appellant*, pro se.

*Jeff Dobbins*, for appellee.

PER CURIAM. The City of Mountain View (City) has moved to dismiss the appeal of Albert and Ruby Mitchell because the time for filing the record on appeal has expired. Notice of appeal was filed on September 19, 1990, and the Mitchells have neither

filed the record with the Clerk nor responded to the motion to dismiss the appeal.

[1] Ark. R. App. P. 5(a) provides that, “[t]he record on appeal shall be filed with the clerk of the Arkansas Supreme Court and docketed therein within 90 days from the filing of the first notice of appeal, unless the time is extended by order of the trial court as hereinafter provided. . . .” The Mitchells have not filed a request for an extension in which to file the record and none has been granted. Consequently, the Mitchells are procedurally precluded from pursuing their appeal, and the City’s motion to dismiss the appeal must be granted.

[2] This procedure is unusual in that no appeal is pending in this court and were the Mitchells to attempt to perfect an appeal the record would be refused by the Clerk as untimely. However, since the trial court has no power to dismiss an appeal [except as provided in Ark. R. App. P. 3(b)], *Johnson v. Carpenter*, 290 Ark. 255, 718 S.W.2d 434 (1986), there is some uncertainty as to how a stale appeal may be dismissed. We think the procedure followed by the City in this case is proper, that is, if the time for appeal has expired and the prevailing party prefers to formalize that fact without waiting for seven months to elapse, such party may file with the Clerk a partial record and move for a dismissal. Where the partial record demonstrates that the appeal is barred that motion will be granted.

[3] The City also requests that it be reimbursed for its costs. We grant that motion, pointing out that if a would-be appellant, after filing notice of appeal, permits the appeal to become stale, it can avoid incurring further costs by seeking a dismissal in the trial court pursuant to Ark. R. App. P. Rule 3(b).

Motion for dismissal of appeal and recovery of costs granted.