

IN THE SUPREME COURT OF TEXAS

=====
No. 96-1026
=====

JOHN VERBURGT, INDIVIDUALLY AND A/N/F OF THOMAS VERBURGT, TIMOTHY
VERBURGT AND JOSEPH VERBURGT, PETITIONERS

v.

PATRICIA M. DORNER AND THE METHODIST MISSION HOME, RESPONDENTS

=====
ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS
=====

Argued on April 24, 1997

JUSTICE SPECTOR delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE HECHT, AND JUSTICE OWEN join.

JUSTICE ENOCH, joined by JUSTICE ABBOTT AND JUSTICE HANKINSON, filed a dissenting opinion.

JUSTICE BAKER filed a dissenting opinion.

In this case, we decide whether the court of appeals erred in dismissing an appeal for want of jurisdiction. The appellant, John Verburt, filed a cost bond on the thirty-fourth day after the trial court rendered judgment against him. Verburt mistakenly believed that he had timely complied with Rule 41(a)(1) of the Rules of Appellate Procedure in filing the bond and did not concurrently move to extend the time to file under Rule 41(a)(2).¹ We hold that a motion for extension of time is implied when a party, acting good faith, files a cost bond within the fifteen-day period in which Rule 41(a)(2) permits parties to file a motion to extend. We therefore reverse the judgment of the court of appeals and remand to that court.

Verburt, in his individual capacity and as his children's next friend, sued Constance Clear, Patricia Dorner, and the Methodist Mission Home for intentional infliction of emotional distress and

¹The Texas Rules of Appellate Procedure were renumbered and substantially revised on September 1, 1997. See 60 TEX. B.J. 876 (1997). All references to the Rules of Appellate Procedure in this opinion are to the rules in effect before that date.

negligent interference with familial relationships. After Verburgt nonsuited Clear, the trial court granted summary judgment for the remaining defendants. The judgment was signed on October 10, 1995. Because no motion for new trial was filed, Verburgt's cost bond was due within thirty days, by November 9th. *See* TEX. R. APP. P. 41(a)(1).² Verburgt did not file the bond until November 13th, nor did he file a motion to extend the time to file the bond within fifteen days of the bond's due date. *See* TEX. R. APP. P. 41(a)(2).³

Several weeks later, the court of appeals ordered Verburgt to show cause why it should not dismiss his appeal for lack of jurisdiction. Verburgt's response demonstrated that his counsel had simply miscalculated the date the bond was due. *See* 928 S.W.2d 654, 655. Initially, the court of appeals decided to retain jurisdiction of Verburgt's appeal. But on rehearing *en banc*, the court reversed itself.

The court of appeals in this case recognized the "patent unfairness" of the result it reached:

We are, therefore, confronted with the question of whether the appellate rules condone a result that allows a litigant who knows he is late with his bond to save his appeal, but rejects the appeal of the litigant who erroneously, but in good faith, believes he has timely filed his bond and, thus satisfied, also believes he has no need to file for an extension of time.

Id. Although it acknowledged the arbitrariness of dismissal under these circumstances, the court of appeals nevertheless believed that the interest in finality of judgments outweighed the policy of disposing of appeals on their merits. *Id.* at 656.

²Rule 41(a)(1) provides:

When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.

³Rule 41(a)(2) provides:

An extension of time may be granted by the appellate court for late filing of a cost bond or notice of appeal or making the deposit required by paragraph (a)(1) or for filing the affidavit, if such bond or notice of appeal is filed, deposit is made, or affidavit is filed not later than fifteen days after the last day allowed and, within the same period, a motion is filed in the appellate court reasonably explaining the need for such extension. If a contest to an affidavit in lieu of bond is sustained, the time for filing the bond is extended until ten days after the contest is sustained unless the trial court finds and recites that the affidavit is not filed in good faith.

In dismissing Verburgt's appeal, the appellate court also relied largely upon a decision by the Court of Criminal Appeals, *Olivo v. State*, 918 S.W.2d 519 (Tex. Crim. App. 1996). But the Court of Criminal Appeals itself recognized in *Olivo* that its approach to the perfection of appeals in criminal cases has differed significantly from our more liberal approach. *See id.* at 524-25; compare *Jones v. State*, 796 S.W.2d 183, 186-87 (Tex. Crim. App. 1990) (holding that Rule 83 of the Texas Rules of Appellate Procedure did not entitle appellant who filed defective notice of appeal to amend notice beyond the time allowed by Rule 41(a)(2) when the appellant had not requested an extension of time under Rule 41(b)(2)) with *Grand Prairie Indep. Sch. Dist. v. Southern Parts Imports, Inc.*, 813 S.W.2d 499, 500 (Tex. 1991) (holding that an appellate court may not dismiss an appeal when the appellant filed the wrong instrument required to perfect the appeal without giving the appellant an opportunity to correct the error).

This Court has never wavered from the principle that appellate courts should not dismiss an appeal for a procedural defect whenever any arguable interpretation of the Rules of Appellate Procedure would preserve the appeal. We have repeatedly held that a court of appeals has jurisdiction over any appeal in which the appellant files an instrument in a bona fide attempt to invoke the appellate court's jurisdiction. *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994); *Grand Prairie Indep. Sch. Dist.*, 813 S.W.2d at 500. Our decisions reflect the policy embodied in our appellate rules that disfavors disposing of appeals based upon harmless procedural defects.⁴ *See Grand Prairie Indep. Sch. Dist.*, 813 S.W.2d at 500. Thus, we have instructed the courts of appeals to construe the Rules of Appellate Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule. *See Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993); *see also Crown Life Ins. Co. v. Estate of Gonzalez*, 820 S.W.2d 121, 121-22 (Tex. 1991); *Gay v. City of Hillsboro*, 545 S.W.2d

⁴Under Rule 46(f), on motion to dismiss an appeal for a defect in form or substance in any bond, "the appellate court may allow the filing of a new bond or the making of a new deposit in the trial court on such terms as the appellate court may prescribe." Rule 83 provides that "[a] judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities"

765, 766 (Tex. 1977). As the dissenting justice in the court of appeals pointed out, the result the court of appeals reached was not “absolutely necessary” under these facts. 928 S.W.2d at 657 (Duncan, J., dissenting) (“[T]he issue is not whether the rules *condone* a patently unfair result but whether they *require* it.”) (emphasis in original). Here, the court of appeals acknowledged that Verburgt demonstrated that he had made a bona fide attempt to timely perfect an appeal. *See id.* at 655.

We hold that a motion for extension of time is necessarily implied when an appellant acting in good faith files a bond beyond the time allowed by Rule 41(a)(1), but within the fifteen-day period in which the appellant would be entitled to move to extend the filing deadline under Rule 41(a)(2). Our holding does not indefinitely extend the time in which parties may perfect an appeal, as Justice Enoch implies. Instead, once the period for granting a motion for extension of time under Rule 41(a)(2) has passed, a party can no longer invoke the appellate court’s jurisdiction. It also does not alter the time for perfecting an appeal beyond the period authorized by Rule 41(a). Nor does our holding undermine finality of judgments, as the court of appeals believed. *See* 928 S.W.2d at 656. Parties who prevail in the trial court will still know within the time specified in Rule 41(a)(2) whether their opponents will seek to perfect an appeal. We decline to elevate form over substance, as the dissenters would.

Accordingly, we reverse the judgment of the court of appeals and remand to that court to allow it to determine whether Verburgt offered a reasonable explanation for his failure to timely file his bond. *See* TEX. R. APP. 41(a)(2).⁵

⁵The Texas Supreme Court cases cited by the dissenters are distinguishable from this case. In *Davis v. Massey*, the appellant mailed his cost bond a day before it was due, but the bond was received eight days late. 561 S.W.2d 799, 800 (Tex. 1978). We held that the appellant timely perfected his appeal under Rule 5 of the Texas Rules of Civil Procedure. *Id.* at 801. It presents no inconsistency with this case. *Glidden Company v. Aetna Casualty & Surety Company* was a 1956 case in which the Court held that the court of appeals should have dismissed an appeal in which the appellant filed its bond one day late. 291 S.W.2d 315, 317 (Tex. 1956). At the time we decided *Glidden*, the rules allowed for no extension of time to file a cost bond, regardless of good cause. *See id.* at 318 (“It is well settled, that the requirement that the bond be filed within thirty days is mandatory and jurisdictional, and that the time prescribed cannot be dispensed with or enlarged by the court for any reason.”). We disapprove of *Miller v. Miller*, 848 S.W.2d 344 (Tex. App.--Texarkana 1993, no writ), *El Paso Sharky’s Billiard Parlor, Inc. v. Amparan*, 831 S.W.2d 3 (Tex. App.--El Paso 1992, writ denied), and any other authorities in which the court of appeals has dismissed an appeal when the appellant has made a bona fide attempt to invoke the appellate court’s jurisdiction by filing a bond within the fifteen days of the date the bond was due.

Rose Spector
Justice

OPINION DELIVERED: December 4, 1997