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In response to the brief filed by the Appellant the Appellees have advanced their arguments that they have (1) standing to proceed with an action in court to seek a writ of mandamus and (2) that Section 21-8-23(2) of the Mississippi Code of 1972 requires a re-elected mayor to resubmit his department directors for confirmation during a successive term even if they are hold-overs from his previous term.

1. Have the Appellees satisfied the requirement of standing to proceed with seeking a writ of mandamus?

The Appellees argue that they have satisfied the requirement of standing and therefore pass every aspect of the four-part test as set forth in *Board of Education of Forrest County v. Sigler*, 208 So.2d 809 (Miss. 1968). The Appellant contends that the Appellees have failed to satisfy the first and second part of the four-part test.

The first part of the test requires that the petition for writ of mandamus be by petition brought by the officers or persons authorized to bring the suit. Authority to bring the suit must flow from some source. The source in this matter is Section 11-41-1 of the Mississippi Code, Annotated 1972 as amended.

Section 11-41-1 of the Code is very clear and specific regarding who has authority to seek the remedy of mandamus. If it is a matter that affects the public interest, it must be brought (1) on the complaint of the state and (2) by its Attorney General or a district attorney. The Appellees cannot satisfy either of these criteria of the statute. However, they argue that they have a right as public officials to seek the writ of mandamus because of the Supreme Court holding in *Dye v. State*, 507 So.2d 332 (Miss. 1987). In the case of *Dye, supra* the court in making its

finding that the Senators “as public officials” had the authority to bring the action the court specifically stated,

“We refuse to relegate to the Attorney General either the exclusive authority to bring a suit such as this or discretion whether and how that authority should be exercised.” *id.* at 338

The Attorney General in *Dye, supra*, made an election to represent the Lieutenant Governor, *id.* at 337. The court by its holding in *Dye supra*, made a decision that the rights of the Senators, as it relates to standing to seek the assistance of the court, would not be thwarted by relegating to the Attorney General exclusive authority and discretion in a matter regarding a constitutional question of the right to exercise power between the executive and legislative branch of government.

Further, in the *Dye* case, *supra*, a writ of mandamus was not sought and no statute was involved that conferred upon any particular entity the right to seek the specific relief sought by the Senators. However, as between these parties, Section 11-41-1 grant specific authority regarding who may bring a suit for a writ of mandamus when it is a matter affecting the public interest. The Appellees therefore argue they also have the authority to seek a writ of mandamus pursuant to the authority granted in Section 11-41-1 of the Code as private persons. The Appellees rely upon the language in *Van Slyke v. Board of Trustees of State Institutions of Higher Learning*, 613 So.2d 872 at 875 (Miss. 1993) that the State of Mississippi was more permissive in granting standing to parties that sought review of governmental action. The court in *Van Slyke supra*, found that a constitutional question had been raised and that Van Slyke should as a private citizen have the right to challenge the constitutionality of the Board’s composition. There is no constitutional question raised in this matter as the parties seek an interpretation of the language contained in Section 21-8-23(2) of the Mississippi Code. The

Appellees have attempted to make this a constitutional issue by arguing that it involves a separation of power question. However, Article 1, Section 1 of the Mississippi Constitution of 1890 sets up and establishes the government of the State of Mississippi and Article 1, Section 2 prohibits one branch of State government from exercising the power granted to another branch of State government. Title 21, Chapter 1 of the Mississippi Code of 1972 set forth the laws of the State of Mississippi that grants the classification, creation, abolition, and expansion of municipalities in the State. The division of power for each branch of municipal government is defined by the statutes, which creates the form of government and said division of power, as in this case, is not always clear. There is no constitutional question involved in this case. Therefore, under the rationale in *Van Slyke supra*, the Appellees do not have standing as private citizens because of the absence of a constitutional question.

The Appellees argue that they have standing because they qualify as private person who are interested as provided for in Section 11-41-1 of the Code and that their interest is separate from and in far excess of that of the general public because of their interpretation of Section 21-8-23(2) of the Mississippi Code. Appellees refer to *Fondren v. State Tax Commission*, 350 So.2d 1329 (Miss. 1977) as support for this position. *Fondren supra* involves a private citizen bringing an action for equalization of the tax rolls because of the negative impact that unequal tax rolls have upon him personally. Clearly in *Fondren supra*, there is a private right because of the specific authority granted in Section 11-13-11 of the Mississippi Code of 1972. The fallacy with the Appellees argument here is you cannot be a public official and claim that you have a duty arising out of your elected position that entitles you to act as a private individual or gives you a private right by virtue of your elected office. If you have a duty as a result of your elected

position and it affects a matter of public interest, then Section 11-41-1 requires that a petition for a writ of mandamus be brought on complaint by the state.

2. Does Section 21-8-23(2) of the Mississippi Code require a re-elected mayor to resubmit his department directors to the city council for reconfirmation as department directors?

The second argument made by the Appellees relies upon the wording of Section 21-8-23(2) wherein the Appellees argue that the language of 21-8-23(2) which states that each director shall serve during the term of office of the mayor appointing him requires at the beginning of each term of office, the Mayor shall re-nominate his department directors and said directors are subject to being confirmed once again by the council or being rejected and therefore terminated. No force or effect is given to the last clause of the sentence of said Section, which states in essence that each director will continue to serve in office "until the appointment and qualification of his successor." The question is what does this language means? The Circuit Court of Forrest County did not interpret this clause. What is the impact of this clause upon the retention of directors that have been previously voted upon and approved? The language "each director shall serve during the term of office of the mayor appointing him" appears to be clear in its meaning that if a new mayor is elected, the directors appoint by the previous mayor do not have a claim for their continued employment and it is not necessary for the new mayor to ask for their resignation or to take any steps to terminate said directors because they are terminated by operation of law (now perhaps the importance of the last clause), "upon the appointment and qualification of his successor." The last clause, which is referred to as the "holdover clause", does not create a "due process" right of continued employment in a department director but it certainly appears to create the opportunity for continued employment for directors under a re-

elected mayor by stating that said director will serve "until the appointment and qualification of his successor." The Appellees argument boils down to we have the right to deny the opportunity of continued employment to a department director by voting upon whether or not he/she should be re-appointed to the position they presently hold.

CONCLUSION

In conclusion the Appellees lack standing to file a complaint for the writ of mandamus because they did not meet each of the necessary criteria of the four-prong test to establish standing and the language of the last clause of Section 21-8-23(2) of the Mississippi Code eliminates the necessity of a re-elected mayor re-nominating his department directors and the decision of the Circuit Court of Forrest County should be reversed and the writ of mandamus issued by said court should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

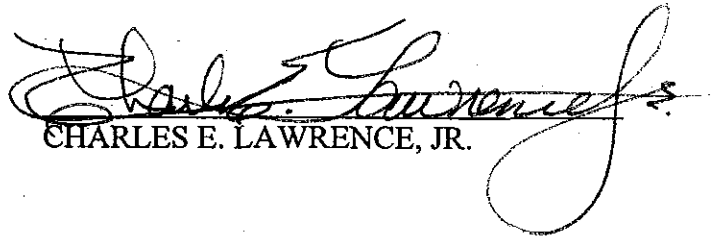
I, CHARLES E. LAWRENCE, JR., Attorney for Appellant, do hereby certify that I have this day mailed by U.S. mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Reply Brief to the following:

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