

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 20026-EC-02096

JUDY SUMNER

APPELLANT

VS.

**CITY OF COMO
DEMOCRATIC EXECUTIVE COMMITTEE
AND MAYOR AZRIA LEWERS**

APPELLEES
Reply Brief

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

1. Mayor Azria Lewers, Appellee;
2. Sanford Knott, Attorney for Appellee;
3. Hon. Ellis Turnage; Attorney for Appellee;
4. Steven W. Pittman, Attorney for the Appellant;
5. Gerald W. Chatman, Sr., Attorney for Appellant;
6. Judy Sumner, Appellant; and
7. Honorable Sharion Aycock, Circuit Court Judge, Trial Judge.

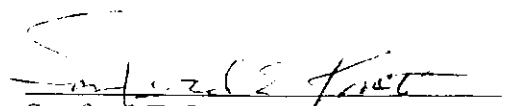

Sanford E. Knott, MSB #8477
Attorney for Appellee

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF AUTHORITIES.....	iii
CERTIFICATE OF COMPLIANCE.....	iv
STATEMENT OF ISSUE.....	1
STATEMENT OF THE CASE	1-2
SUMMARY OF THE ARGUMENT	2-3
ARGUMENT	3-7
CONCLUSION	7
CERTIFICATE OF SERVICE	7-8

TABLE OF AUTHORITIES

CASES:

<i>Cook v. Brown</i> , 909 So.2d 1075,1080-81 (Miss. 2005)	7
<i>Esco v. Scott</i> , 735 So.2d 1002, 1006 (Miss. 1999)	6
<i>Jefferson v. Mississippi State Highway Commission</i> , 254 So.2d 181(Miss.1971)	5
<i>Harry v. Harry</i> , 856 So.2d 748 (Miss App. 2003)	6
<i>Matter of Adoption of R.M.P.C.</i> , 512 So.2d 702, 706 (Miss. 1987)	6
<i>Pearson v. Jordan</i> , 192 So.39 (1939)	4
<i>Pittman v. Forbes</i> , 191 So. 490 (1939)	5
<i>Turner v. Henry</i> , 193 So.2nd 631 (Miss. 1940)	7
<i>Waters v.Gnemi</i> , 907 So.2d 307,322 (Miss.2005)	4,5

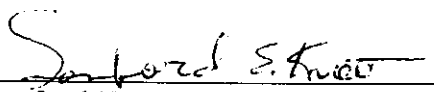
STATUTES:

M.C.A. 11-3-5	5
M.C.A. 11-51-97	5
Miss. Code Ann. §9-1-195(1972)	2
Miss. Code Ann. §23-15-927(1972)	2-7
Miss. Code Ann §23-15-951(1972)	2
Miss. Code Ann. §2766 (1942)	5

CERTIFICATE OF COMPLIANCE

COMES NOW, Sanford E. Knott, attorney of record for Appellee and certifies that this brief contains 2508 words as determined by the word count on the word processing system.

SO CERTIFIED, this the 21st day of May, 2007.


Sanford E. Knott
Attorney for Appellee

ISSUES PRESENTED

- ISSUE 1: WHETHER THE COURT ERRED IN FINDING THE COST BOND REQUIREMENT WAS JURISDICTIONAL AND NOT AMENDABLE.
- ISSUE 2: WHETHER APPELLEES' FAILURE TO RAISE THE ISSUE OF JURISDICTION WAS WAIVED.
- ISSUE 3: WHETHER APPELLANT FILED HER PETITION FOR JUDICIAL REVIEW "FORTHWITH" PURSUANT MISS. CODE ANN. §23-15-927.

STATEMENT OF THE CASE

The City of Como is a small town in north Mississippi located in Panola County, Mississippi. Its mayor is Appellee Azria Lewers. On May 3, 2005, Mayor Lewers, the then incumbent, ran for re-election in the democratic primary. His challenger was Judy Sumner, the Appellant herein.¹ Appellant Sumner and Mayor Lewers participated in a run-off election on May 17, 2005. On May 24, 2005, Appellee Democratic Municipal Executive Committee (hereinafter "DMEC") canvassed the returns and certified Appellee Lewers as the winner. (R.6) By letter dated June 2, 2005, Appellant Sumner served notice to contest the election. (R.4) The DMEC, by letter dated June 6, 2005, denied Appellant relief after reviewing the matter. (R.6) On June 23, 2005, Appellant filed her petition for judicial review, but only against the DMEC. (R.7). Approximately six (6) months later, Appellant

¹ The record is silent as to others who also ran for the position.

filed an amended petition for judicial review causing Appellee Lewers to be a party defendant. (R.14) The Honorable Sharion Aycock was specially appointed by this Court to preside and conduct proceedings pursuant to and by authority of Miss. Code Ann. §23-15-951 and 9-1-105. The matter came on for hearing on November 2, 2006 in Sardis, Panola County, Mississippi and on November 3, 2006, Judge Aycock dismissed Appellant's petition citing deficiencies in the cost bond, particularly with respect to a lack of sufficient sureties as required by Miss. Code Ann. §23-15-927. (R.23)

The matter is now before the Court by way of appeal of the decision of the trial court.

SUMMARY OF THE ARGUMENT

Despite Appellant's argument otherwise, the trial court's ruling that filing a cost bond was jurisdictional and a prerequisite to filing a petition for judicial review were consistent with this Court's prior ruling. The trial court did not err on said ruling.

Additionally, the trial court ruled that submitting two sufficient sureties with the cost bond was also jurisdictional. That, too, was a correct pronouncement of the law given that the statute, arguably, requires that at a minimum cost bond of \$300.00 be posted. However, the sureties are necessary as they must obligate themselves to pay all costs if the petition is dismissed. Thus, the amount of the bond is reviewable by the trial court at any stage of the litigation.

Lastly, Appellant did not file the petition for judicial review timely against Appellee Lewers in that it was six (6) months later before the Mayor was brought into this action. It is in the best interest of the public and orderly government that election matters are resolved

expeditiously. Appellant now seeks to oust Mayor Lewers although Lewers has been in office now two (2) years. It was, therefore, error for the trial court not to have dismissed Appellee Lewers from this action.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE FILING OF THE COST BOND WAS JURISDICTIONAL.

Because a petition for judicial review may not be filed without, *inter alia*, a cost bond with sufficient sureties, not doing so prevents the Court from having subject matter jurisdiction over this election contest. Miss Code Ann. §23-15-927 provides as follows:

“ When and after any contest has been filed with the county executive committee, or complaint with the State Executive Committee, having met shall fail or unreasonably delay to fully act upon the contest or complaint, or shall fail to give with reasonable promptness the full relief required by the facts and the law, the contestant shall have the right forthwith to file in the circuit court of the county wherein the irregularities are charged to have occurred, . . . a sworn copy of his said protest or complaint, together with a sworn petition, setting forth with particularity wherein the executive committee has wrongfully failed to act or to fully and promptly investigate or has wrongfully denied the relief prayed by said contest, with a prayer for a judicial review thereof. But such petition for a judicial review shall not be filed unless it bear the certificate of two (2) practicing attorneys that they and each of them have fully made an independent investigation into the matters of fact and of law upon which the protest and petition are based and that after such investigation they verily believe that the said protest and petition should be sustained and that the relief therein prayed should be granted, and the petitioner shall give a cost bond in the sum of Three Hundred Dollars (\$300.00), with two (2) or more sufficient sureties conditioned to pay all costs in case his petition be dismissed, and an additional bond may be required, by the judge or chancellor, if necessary, at any subsequent stage of the proceedings....”

As emphasized above, a petition for judicial review can not be filed unless the following

occur: (1) the petition must bear the certificate of two (2) practicing attorneys who, *inter alia*, have rendered an opinion that the complainant is entitled to relief; and (2) that complainant shall post a cost bond in the amount of \$300.00 with two (2) more sufficient sureties condition to pay all costs in the event the petition is dismissed. Miss. Code Ann. §23-15-927.

In the recent election case of *Waters v. Gnemi*, 907 So.2d 307,322 (Miss. 2005), this Court acknowledged that it had ruled previously that having two (2) attorney certificates on the petition for judicial review is jurisdictional. *Id.* (citing *Pearson v. Jordan*, 192 So.39 (1939) and *Pittman v. Forbes*, 191 So. 490 (1939).) By the same token, it should be clear that the filing of the cost bond, too, is jurisdictional given that this provision is contained in the same statute and, without question, is a condition precedent to filing the petition for judicial review.

Appellant's position, however, is that the filing of the cost bond is not jurisdictional and argues in support thereof, *Jefferson v. Mississippi State Highway Commission*, 254 So.2d 181 (Miss.1971). This case involved an appeal of an eminent domain decision wherein this Court interpreted Miss. Code Ann. §2766 (1942), which stated that every party had the right to appeal to the Circuit Court by "executing a bond with sufficient sureties, payable to his adversary, in a penalty of Three Hundred Dollars (\$300.00) conditioned to pay all costs that may be adjudged against him." *Id.*

Jefferson, is distinguishable from the case *sub judice* in that it is not an election case. Furthermore, Jefferson involved the posting of a bond to **appeal** an adverse decision where

the cost, arguably, could be reasonably estimated. That is not the case *sub judice*. Therefore, neither *Jefferson* nor M.C.A. 11-3-5 and 11-51-97, the statutes cited by Appellant, are applicable. This Court should follow its holding in *Waters* that the prerequisites of the statute are mandatory and, therefore, must be strictly construed. *Waters*, at 324. Consequently, the trial court did not err in finding that filing the cost bond was jurisdictional.

However, simply filing a timely cost bond alone is not enough to evoke the jurisdiction of this Court. While the trial court ruled that Appellant timely filed a cost bond by posting cash with the circuit clerk in the amount of \$300.00, the court also ruled that Appellant failed to perfect the appeal by not submitting two (2) sufficient sureties. (R.23) Appellant's argument is that posting a cash bond of \$300.00 in lieu of a cost bond is essentially all that is required. See *Appellant's Brief*, p.5. Appellee Lewers disagrees. While this Court has not directly addressed whether having sufficient sureties is mandatory, posting a \$300.00 cost bond should be interpreted to be the minimum anticipated costs, not the maximum. This would be the proper interpretation given that §23-15-927 requires that at least two (2) sureties assure the circuit clerk that they will pay **all costs** in the event the petition for judicial review is dismissed. This Court may take judicial notice that litigation costs, in any given case, could actually amount to thousands of dollars beyond \$300.00, the statutory minimum.² As a safeguard, the trial court may require, at any subsequent stage of the proceeding, an additional bond. *Id.* Appellee Lewers believes that this interpretation of §23-15-927 evinces the intent of the Legislature given the realities of litigation costs at trial.

²This is altogether different from appeal costs which can be reasonably estimated by the clerk of the court together with the court reporter who prepares the transcripts. Cite Omitted.

In the case *sub judice*, Appellant, without question, did not supply the clerk with any sureties to guarantee the costs of litigation. By not doing so, Appellant deprived herself of her right to file her petition for judicial review. This Court is asked to so hold.

**THE TRIAL COURT DID NOT ERR IN ALLOWING
APPELLEES TO RAISE THE ISSUE OF JURISDICTION**

The issue of subject matter jurisdiction can be asserted at any time. *Harry v. Harry*, 856 So.2d 748 (Miss App. 2003). Subject matter jurisdiction involves the power and authority of a court to consider a case. *Esco v. Scott*, 735 So.2d 1002, 1006 (Miss. 1999) (citing *Matter of Adoption of R.M.P.C.*, 512 So.2d 702, 706 (Miss. 1987) . Thus, subject matter jurisdiction may not be waived and may be asserted at any stage of the proceeding or even collaterally. *Id.*, at 1006. Because Appellant's position states otherwise, her argument concerning this issue clearly has no merit. Thus, Appellee Lewers will not take any more time to address this issue.

**THE PETITION FOR JUDICIAL REVIEW
WAS NOT TIMELY FILED**

Appellant filed her amended petition for judicial review against Mayor Lewers on January 23, 2006, six (6) months after filing its original petition on June 23, 2006, against the DMEC. (R.7,14) In its answer, Lewers raised the untimeliness as an affirmative defense and subsequently, filed a motion to dismiss. (R.17-19. 20-22) While said motion was denied due to the timing of its filing by Lewers, this Court is, nevertheless, asked to review and clarify the matter given that he is now two (2) years into his term of office.

In his motion to dismiss, Appellee stated that Appellant Sumner's attempt to bring him in this action violated the dictates of Miss. Code Ann. §23-15-927, which essentially requires that the petition be filed *forthwith*. (R.20) Even this Court ruled in Cook v. Brown, 909 So.2d 1075, 1080-81 (Miss. 2005), that a petition for judicial review filed forty (40) days afterwards did not comply with statutory requirements to file it "forthwith." The same was true in Turner v. Henry, 193 So.2d 631 (Miss. 1940) (wherein petition for judicial review was filed less than thirty (30) days afterwards). In the case *sub judice*, the run-off elections have come and gone and Mayor Lewers has been in office every since. Petitioner failed to timely and diligently pursue judicial intervention and, therefore, must not be able to do so now. In the interest of justice, this Court is asked to exercise its discretion to take up this issue for resolution.

CONCLUSION

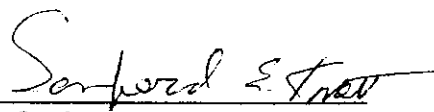
FOR THE FOREGOING REASONS, this election contest can not go further. Mayor Lewers has been in office for two (2) years. The delay in bringing this matter ahead has nothing to do with Mayor Lewers, but wholly rests with the Appellant. It was the Appellant that waited some six (6) months to bring Lewers into this election contest. It was Appellant that did not file sufficient sureties as required by law. Therefore, Appellant Lewers prays that the Court will dismiss this appeal "forthwith." The citizens of Como, Mississippi deserve a stabilized government with its head being solidly in place.

CERTIFICATE OF SERVICE

I, Sanford E. Knott, Attorney for Appellee, do hereby certify that I have this day

hand-delivered, to the Supreme Court of Mississippi, Carroll Gartin Justice Building, 450 High Street, Jackson, Mississippi 39201 and have caused to be mailed, via U.S. mail, postage pre-paid to: Steven W. Pittman, 291 Losher Street, Hernando, Mississippi 38632, Honorable Ellis Turnage, P.O. Box 216, Cleveland, Mississippi 38732, and Honorable Sharion Aycock, Circuit Court Judge, District 01, P.A. Drawer 1100, Tupelo, Mississippi 38802-1100, a true and correct copy along with electronic disk to the Court of the above the forgoing Appellee's Reply Brief.

SO CERTIFIED, this the 21st day of May, 2007.


Sanford E. Knott
Attorney for Appellee
Mayor Azria Lewers