

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-EC-02096

JUDY SUMNER

APPELLANT

Brief

V.

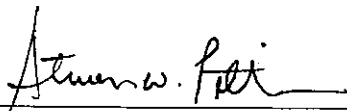
CITY OF COMO
DEMOCRATIC EXECUTIVE COMMITTEE
AND MAYOR AZRIA LEWERS

APPELLEES

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



Steven W. Pittman
Attorney for Appellant

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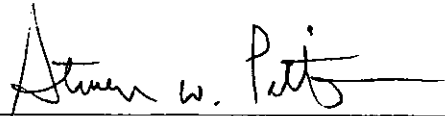
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CERTIFICATE OF COMPLIANCE

COMES NOW, Steven W. Pittman, attorney of record for Appellant and certifies that this brief contains 4,026 words as determined by the word count of the word processing system.

SO CERTIFIED this the 4th day of April, 2007.



Steven W. Pittman
Attorney for Appellant

STATEMENT OF ISSUES

Issue 1: The Court erred in finding that the issue of Appellant's bond was jurisdictional and not amendable pursuant to M.C.A. 23-15-927 when Appellant had in fact paid the full amount of the bond in cash.

Issue 2: The Appellees failed to raise the issue of jurisdiction in a timely fashion and have thus waived this affirmative defense.

STATEMENT OF THE CASE

Appellant, Judy Sumner, filed her Petition for Judicial Review of Primary Run off Election in the Circuit Court of Panola County, Mississippi on June 23, 2005. The petition alleged that certain illegal votes and other irregularities had occurred in the election for Mayor of Como, Mississippi. The Appellant named the City of Como Democratic Executive Committee as Defendant in her petition. The Appellant's petition contained the certificate of two practicing attorneys as required by M.C.A. 23-15-927. The Appellant also paid a Cost Bond in the amount of \$300.00 to the Circuit Clerk of Panola County, Mississippi and received a receipt for the "\$300.00 Cost Bond", however, the Appellant did not provide the signature of two sureties pursuant to M.C.A. 23-15-927. On January 23, 2006 the Appellant filed an amended petition adding Mayor Azria Lewers as a defendant in the proceedings. The Appellee, City of Como Democratic Executive Committee, filed an Answer and Affirmative Defenses on July 29, 2005, however, this Appellee did not include the sufficiency of the bond issue as an affirmative defense. The Appellee, City of Como Democratic Executive Committee, also failed to raise the issue of the bond in its answer to the Amended Petition which was filed on February 23, 2006.

Appellee, Azria Lewers, has never raised any defense, either written or oral, with regard to jurisdiction or sufficiency of the bond pursuant to M.C.A. 11-51-97.

The Appellant's Petition for Review of the election results came on for trial before Judge Sharion Aycock on November 2, 2006 in Sardis, Panola County, Mississippi. At this time, counsel for Appellee, City of Como Democratic Executive Committee, made a motion ore tenus to dismiss by raising the affirmative defense of jurisdiction with respect to the sufficiency of the bond for the first time. Appellee, Azria Lewers did not make the same motion. Counsel for Appellant then pointed out that the \$300.00 cash bond had been paid and further offered to amend the bond by providing two sufficient sureties (p. 32 Trial transcript). On November 3, 2006 Judge Aycock granted the Motion to Dismiss citing that the Appellant's had failed to post an adequate bond pursuant to M.C.A. 23-15-927 and further that the bond that had been paid of \$300.00 could not be cured by amendment. The Order of Dismissal was to both defendants.

SUMMARY OF THE ARGUMENT

Counsel for the Appellant argued that they should be allowed to cure the defective bond by providing two sufficient sureties pursuant to M.C. A. 23-15-927. In support of their position, Counsel for Appellant relied upon Jefferson v. Mississippi State Highway Commission, 254 So. 2nd 181 (Miss. 1971) as well as M.C. A. 11-51-97 and M.C. A. 11-3-5 (formerly 1942 M.C.A. Section 1959 and Section 1208).

Counsel for the Appellee argued that the bond was jurisdictional and that Appellant therefore should not be allowed to amend and cure her bond. The Appellee principally relied upon the case of Waters v. Gnemi, 907 So. 2nd 307 (Miss. 2005).

Further, the Appellant argues that the Appellees either failed to raise the issue of jurisdiction in a timely fashion or failed to raise the defense completely and have thus waived this affirmative defense.

ARGUMENT

ISSUE ONE: The Court erred in finding that the issue of Appellant's bond was jurisdictional and not amendable pursuant to M.C.A. 23-15-927 when Appellant had in fact paid the full amount of the bond in cash. Counsel for the Appellant would submit to this Court that the Jefferson v. Mississippi State Highway Commission, 254 So. 2nd 181 (Miss. 1971) is most analogous to the case at issue today. Although, Jefferson dealt with an appeal of an eminent domain issue pursuant to M.C.A. 1942 annotated Section 2766, the bond requirements were essentially the same. The bond requirements in Jefferson were that the appealing party was required to execute a bond with sufficient sureties payable to the adversary in a penalty of \$300.00 conditioned to pay all costs that may be judged against him. In Jefferson, the appealing party posted the \$300.00 cash bond but failed to attach sufficient sureties pursuant to the statute. This Court's decision in Jefferson affirmatively overruled the earlier case of Watkins v. Guess, 196 Miss. 438, 17 So. 2nd 795 (Miss. 1944). The Court in Watkins had previously held that the deposit of cash in lieu of a bond is a nullity and may not be cured under Miss. Code 1942 Annotated Section 1208. In essence, Watkins held that the requirements as to bond are mandatory and jurisdictional and can not be cured. With the following language, the Court in Jefferson overturned the Watkins decision and gave a good summary of the history and trend towards allowing such defects in bond to be cured:

"Since the Watkins case, there has been a trend to view in a somewhat different light attempts to appeal by depositing cash in lieu of a bond. Both this Court and the legislature have

been liberal in providing that appeals will not be dismissed because of defects in a bond. Two statutes allowing the appealing party to amend and cure defects in appeal bond are Mississippi Code 1942 Annotated section 1959, concerning appeals to the Supreme Court, and section 1208, applicable to all appeals. These two statutes, although somewhat different, serve the same purpose and the principles involved are the same. Williams v. Johnson, 175 Miss. 419, 167 So. 639 (1936).

“There is a line of cases dealing with sections 1959 and 1208 holding that certain defects in an appeal bond can be cured by amendment. The Court has allowed amendment in order to follow the statute where there was only one surety when the statute actually required two. Carter v. Carter, 221 So. 2d 87 (Miss. 1969); Lipson v. Lipson, 183 So. 2d 900 (Miss. 1966). Under the provisions of Mississippi Code 1942 Annotated section 1162, which authorizes a deposit of cash in lieu of bond where costs are prepaid, a bond was allowed to be perfected by amendment when an insufficient amount was paid to prepay the costs. Walters v. Fine, 232 Miss. 494, 95 So. 2d 229 (1957). In Snipes v. Commercial & Industrial Bank, 225 Miss. 345, 82 So. 2d 895 (Miss. 1955), the bond was fixed at \$1,000.00 and the appellant filed a petition for appeal and deposited \$1,000.00 cash with the clerk. Although the appellant failed to pay the cost of the transcript, the Court nevertheless allowed the appeal to be perfected by filing a proper bond.

“We are of the opinion that the efforts in this case to file a bond should not be deemed a nullity. The justice of the peace who presided over the special court of eminent domain had before him a petition for an appeal to the circuit court and accepted \$300.00 cash, the correct amount of the cost bond, and issued a receipt reciting that it was received as an appeal bond. The only reason for giving a bond and having sureties thereon is to secure the payment of the costs. The deposit of cash unquestionably satisfied that purpose. In view of the recent cases construing Code sections 1208

and 1959, we hold that the appellants may cure the defect in the bond by filing the statutory bond with two sureties. Watkins v. Guess, supra, is hereby overruled to the extent that it conflicts with this decision.”

Counsel for Appellant respectfully submits that the logic expressed in this Court’s opinions remains sound today and the fact that Appellants deposited \$300.00 cash, and the Circuit Court Clerk of Panola County accepted said cash bond, as in Jefferson, satisfies the purpose of the bond to begin with; the payment of costs. Further, Counsel would state that the 1972 re-codification did not change in any way the legislature’s intent to allow such bonds to be cured by amendment. The pertinent 1942 code sections, as re-codified in 1972, are as follows:

M.C.A. Section 11-3-5. Appeal not to fail for certain irregularities.

An appeal to the Supreme Court shall not be dismissed for want of jurisdiction because of a defect in the application for appeal, or in the bond, or because an insufficient amount was paid to prepay the costs or because of any failure by an officer to comply with the requirements of law in reference to appeals; but all defects and irregularities may be cured by amendment so as to perfect the appeal and obtain the judgment of the Supreme Court in the case; but the Court may dismiss an appeal for a failure of the appellant to do, within a reasonable time, what may be necessary to perfect his appeal.

11-51-97 New appeal bond

In all appeals and in proceedings of certiorari to the circuit court, the said court, on motion of the appellee or obligee, may inquire into the sufficiency of the amount of the bond, and of the security thereon, and may at any time require a new bond, or additional security, on pain of dismissal; and if any bond be defective, the principal therein may give a new one, which shall have the same effect as if given originally.

Counsel for Appellant further submits that the Trial Court’s reliance upon the Waters v. Gnemi, 907 So. 2d 307 (Miss. 2005) and dismissal of the Appellant’s Petition is error. The following is taken from Judge Aycock’s ruling on November 2, 2007 pp. 18-22:

“I have reviewed the case of Waters versus Gnemi. This is a June 2005 case and in this case there were several challenges to the requirements alleging that the petitioner had failed to meet the statutory requirements in filing the judicial review of the run off.

“In this case, it is alleged that because the petitioner failed to comply with the statute that the Court lacked subject matter jurisdiction. In this particular case, the Court went on to find that the bond was sufficient and it is important to note in that case that a bond was filed and it became an issue about whether or not the piece-meal manner in which the bond had been filed and the faxed copies that had been sent to the Clerk’s office and the lack of the Clerk’s signature on the bond, if those matters were sufficient to render the bond insufficient as required by the statute. And based on the facts of this case, the Court ultimately determined that it was a sufficient bond but it does give us some guidance in a couple respects. One is that this case does acknowledge that these matters are jurisdictional.

“That case also dealt with the petition and whether or not the petition had to be sworn or whether it was sufficient to be an unsworn petition. And, again, that was suggested that it was a procedural defect because it was unsworn. The premise of the case is essentially that it is jurisdictional and it is the intent for these statutes to be strictly complied with when it is set forth in the statute that there will be certain requirements prior to the filing that they are to be complied with.

“I have reviewed some other cases, ESCO E-S-C-O versus Scott was a March, 1999 decision and there was a question there in an election contest as to whether or not the case should be dismissed because of the disqualification of the certifying attorney. Again, contending that it was an issue dealing with subject matter jurisdiction. That case indicates that subject matter jurisdiction

issues can be raised at any time and that it deals - - the jurisdictional issue deals with the power and the authority of the Court to even consider the case.

“In that particular case, the unsuccessful candidate was not entitled or given an opportunity to amend his petition so as to provide an affidavit by another attorney. In other words, the Court finding that it was jurisdictional and not allowing an amendment to cure the defect.

“In Fisher versus Crowe, the Court stated that, “ Even though election commissioners perfected the appeal from a judgment which voided the general election for Board of Alderman and ordered the holding of a new election where successful candidates failed to perfect appeal from such judgment, no issue remained for the resolution of the Court.” Again, a defect in filing.

“The Court has also considered some other cases that are not election cases in trying to look at the issue as to whether or not posing a bond is a jurisdictional issue that robs the Court of is jurisdiction to hear the case. In Johnson versus Sylvester Evans, this is a 1987 case, this dealt with an appeal from County Court to Circuit Court which is like election contests, those appeals are governed by statute. That statute dealing with Justice — with County Court appeals states that a bond must be given within ten days of the entry of the final judgment. That Court found, and this was a Supreme Court decision, “ The failure to give notice of appeal to the Court Reporter is not jurisdictional, but the failure to post the bond is jurisdictional.”

“In Kennedy v. Kennedy, a 1977 case, the case stated, “The appeal must be dismissed for lack of jurisdiction.” This was a - - dealt with a statute that required perfecting the appeal within 45 days. “We have held that the failure to post bond within the time allowed by the statute deprives the Court of jurisdiction.” And the Kennedy case actually cites the Fisher versus Crowe case, “Lack of jurisdiction, of course, may be raised at any time.”

“Spencer v. State of Mississippi is a 2004 case, a Supreme Court case. This was a case dealing with a Justice Court appeal case and this was actually Judge Ann Lamar’s case where it is cited that she dismissed a case because of lack of a bond posted, and , therefore, finding that the appeal had not been perfected and the Court affirmed that decision finding that it was jurisdictional and that the statute required the bond in that in absence of the bond that it merited dismissal of the case. That case indicated that we know of no case which permits the filing of the bonds past the 30 - day appeal time which I think does speak to petitioner’s suggestion that they be permitted to cure the defect this morning by posting the bond”.

In response, Counsel for Appellant points out that none of the cases cited by the trial court touch on a fact scenario, as in Jefferson and the present case, wherein the appeal bond was in fact timely paid and paid in full.

Issue 2: The Appellees either failed to raise the issue of jurisdiction in a timely fashion or failed to raise the defense completely and have thus waived this affirmative defense.

The Appellee, City of Como Democratic Executive Committee, filed an Answer and Affirmative Defenses on July 29, 2005, however, this Appellee did not include jurisdiction and the sufficiency of the bond issue as an affirmative defense. The Appellee, City of Como Democratic Executive Committee, also failed to raise jurisdiction or the issue of the bond in its answer to the Amended Petition which was filed on February 23, 2006.

Appellee, Azria Lewers, has never raised any defense, either written or oral, with regard to jurisdiction or sufficiency of the bond pursuant to M.C.A. 11-51-97.

Counsel for the City of Como Democratic Executive Committee first raised the issue of subject matter jurisdiction in an oral motion at the commencement of trial on November 2, 2006 (p.

12 Trial transcript). It should be further noted that Appellee, Azria Lewers, was not present on November 2, 2006 and has never raised the issue of subject matter jurisdiction either by written or oral motion. Rather, Counsel for Mayor Lewers faxed a Motion to Dismiss to the Clerk on November 2, 2006 which touched on the issues of timeliness (Attorney Knott's Motion To Dismiss). This Motion was dismissed by the Court on November 2, 2006 for not being timely filed (p.7 Trial Transcript).

In response to the oral Motion to Dismiss for lack of subject matter jurisdiction made on behalf of City of Como Democratic Executive Committee, Counsel of Appellant argued that this defense should have been raised at an earlier time, however, the trial court granted the Appellee's Motion to Dismiss over this objection (p. 15 Trial transcript).

Counsel for Appellant again raises the issue for this Court on Appeal and would cite the case of Ms Credit Center, Inc. V. Horton, 926 So. 2d. 167 (Miss. 2006). The premise of Horton is that a failure to timely and reasonably raise any affirmative defense which might terminate or stay the action, coupled with participation in the case, may serve as a waiver of such defense, (Horton, *supra* 181). While Counsel acknowledges that Horton dealt with an arbitration agreement, Counsel points out that this Court emphasized that such waiver of affirmative defense by unreasonable delay is not limited to arbitration.

Counsel also points to the East Mississippi State Hospital v. Adams, 947 So. 2d. 887 (2007). The Adams decision states as follows:

"As set forth *supra*, defendants participated fully in the litigation of the merits for over two years without actively contesting jurisdiction in any way. They participated fully in discovery, filed and opposed various motions. While the defendants may have literally complied with Rule 12(h),

they did not comply with the spirit of the rule. On this record we conclude that the defendants waived the defenses of insufficiency of process and insufficiency of service of process. The trial court's exceptionally well reasoned and written Memorandum Opinion and Judgment denying defendants' motion to dismiss or in the alternative for summary judgment is affirmed."

CONCLUSION

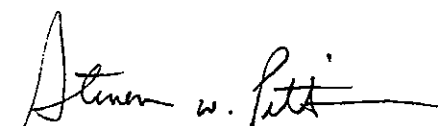
Counsel for Appellant would point out that since Watkins v. Guess, *supra*, was overturned by Jefferson v. Mississippi State Highway Commission, *supra*, this Court has never denied an Appellant the ability to amend and cure a bond where the Appellant initially paid the full amount of the bond to begin with. No of the cases cited by the trial court above deal with a fact scenario wherein the full amount of the bond was paid in cash. Counsel would respectfully submit that this Court has distinguished, via Jefferson, cases wherein the Appellant in fact pays to the clerk the full amount of the bond in cash. In essence, Jefferson, establishes the principal that when a party has in fact paid the full amount of the bond, the Court has then obtained jurisdiction over the subject matter of the case. In the present case, there is no disagreement that the Appellant in fact paid the full amount of the bond. The facts in the present case are essentially identical to that of Jefferson. The Appellant would submit that the Court's reasoning as announced in Jefferson, is rational, reasonable and applicable to the question at hand. Quoting the Jefferson decision again, "The only reason for giving a bond and having sureties thereon is to secure the payment of the costs. The deposit of cash unquestionably satisfied that purpose. In view of the recent cases construing Code sections 1208 and 1959, we hold that the appellants may cure the defect in the bond by filing the statutory bond with two sureties", Jefferson *supra*, 182.

In the event that this Court finds that failure to file the bond sureties is jurisdictional then the Appellant would argue that the Appellee, Azria Lewers, has never raised the affirmative defense of subject matter jurisdiction and therefore should not be allowed to avoid trial on the merits of the case. Also, that the Appellee, City of Como Democratic Executive Committee, has effectively waived the defense of subject matter jurisdiction. This Appellee did not raise the defense of jurisdiction until the day of trial all the while participating in litigation by filing an Answer to the original Complaint, filing and arguing a Motion to Dismiss on grounds other than jurisdiction, by filing and Answer to the Amended Complaint, by filing a Motion for Leave to File First Amended Answer, by participating in a telephone conference between the judge and all counsel, and by consenting to having the matter set for trial as indicated in the Order of October 3, 2006.

Respectfully Submitted,

JUDY SUMNER

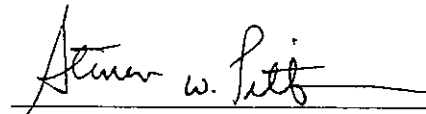
By:


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CERTIFICATE OF SERVICE

I, **Steven W. Pittman**, Attorney for Appellant, do hereby certify that I have this day mailed, via Federal Express Overnight Mail to the Supreme Court of Mississippi, Carroll Gartin Justice Building, 450 High Street, Jackson, Mississippi 39201 and via First Class Mail, postage pre-paid to: Honorable Ellis Turnage, 108 N. Pearman Ave., P.O. Box 216, Cleveland, MS 38732-0216, Sanford Earl Knott, 425 S. State Street, P.O. Box 1208, Jackson, MS 39215-1208; and Honorable Sharion Richardson Aycock, Circuit Court Judge, District 01, P.O. Drawer 1100, Tupelo, MS 38802-1100 a true and correct copy along with electronic disk to the Court of the above and foregoing **APPELLANT'S BRIEF**.

SO CERTIFIED this the 4th day of April, 2007.



Steven W. Pittman
Attorney for Appellant