IN THE SUPREME COURT OF MISSISSIPPI

NO: 2009-CA-00243

WENDY RYALS AND RONALD PERRY

Appellants

VERSUS

BOARD OF SUPERVISORS OF PIKE COUNTY, MISSISSIPPI

Appellee

APPEAL FROM THE CIRCUIT COURT OF PIKE COUNTY

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

Alfred Lee Felder
Attorney at Law
P. O. Box 1261
McComb, MS 39649-1261
Tel: (601) 684-3362
Fax: (601) 684-3508
Mississippi Bar No. [redacted]

Attorney for Appellants

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VS.

BOARD OF SUPERVISORS OF PIKE COUNTY, MISSISSIPPI APPELLEE

ORAL ARGUMENT REQUESTED

Appellants respectfully request oral argument in this case under Rule 34, Rules of Appellant Procedure and pursuant to Rule 34 (b). Appellants set forth the reasons that oral argument will be helpful to the court.

In order for the Pike County Board of Supervisors to enact the ordinance they did banning alcohol on the Bogue Chitto River and Topisaw Creek in Pike County, Mississippi, it was necessary for the Board of Supervisors to borrow code section 67-3-65 from the Beer Statute and transfer it or import it to the Liquor Statute, §67-1-1 et seq. The court appears to have done this on one occasion, without realizing that the court had done so. This writer can find no holding in which our court has said such transfer of a statute was appropriate.

Secondly, oral argument would assist this court in understanding the parties' position on the assignment of error by appellate that the ordinance adopted by the Board of Supervisors was arbitrary and capricious.

Appellant respectfully request that oral argument be granted.

RESPONSE TO STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

The county makes antidotal unsupported claimed facts in its attempt to justify the ban of alcohol on the Bogue Chitto River. A striking example is in the last paragraph of page 2 of the county's brief. The statement is "there have been numerous automobile accidents involving drunken drivers who, after leaving the Bogue Chitto and Topisaw Creek, involved driving intoxicated, have caused fatalities and other serious injuries. R. @ 88." The rest of the story is found in R.@ 89. Line 4 "Q: Did he enter a plea at some point? A: He did. He entered a plea of guilty to leaving the scene of an accident with death or injury."

On cross-examination there was no credible evidence of the driver being drunk, how much he had drunk, when he had drunk any intoxicating beverage or the like. Taken from the record p. 89, L. 27-29 to p. 90, L. 1-14:

Q Now you say that the person in the white pickup truck admitted to having been drinking earlier that day?

A Correct.

Q He did not admit to being drunk?

A No, sir.

Q And he was coming from the Bogue Chitto Water Park, is that what you said?

A Yes.

Q Can you tell me or this court or anybody else how much beer was consumed by him while he was in the river and how much was consumed while he was in the park or either after he left the park?

A No, sir, I cannot.

Q So you don't' know if the beer was consumed on a float or consumed after he got off of the float and was sitting in the Bogue Chitto River Park?

A I have no idea.

Again, there is no credible evidence to support the antidotal claim of the county as to the facts.

Again on page 2 in the first paragraph, drownings and serious accidents are claimed to be attributed to drunkenness and excessive use and consumption of beer, wine, and other alcoholic beverages. On the second paragraph of page 2 private land owners have been subjected to trespass, indecent behavior, disturbance of the peace, littering and unauthorized use of their private property by intoxicated persons, including minors.

Be it remembered that Wildlife and Fisheries officer Lane Ball provided Defendant's Exhibit No. 8 which was a summary of the offenses for which citations were issued on the river from the year 2000 to 2005. (Plaintiff Record Excerpts, p. 14) There was 1,381 total citations. Public drunk accounted for only 21 of those citations.

At one point during the cross-examination of Lane Ball he was confronted about law

enforcement blanket statements that wanted to blame everything on alcohol that occurred at the river. From the record page 70, L.2-24:

Q I know you want to blame everything on alcohol, but all of these other things could occur without alcohol being on the river, couldn't it?

A Yes, sir. First of all, I'm not here to blame anybody with anything. Okay? I'm here to report on our agency's enforcement efforts on the river. I can say that if you take the two charges that you took, the public drunk and possession of beer by minors, and divide those into the total, you come up with 11%. It seems correct to me. What I'm saying is, the large majority of these other charges were alcohol-related, as you said.

Q In that a lot of people floated down the river and they were taking alcohol with them; alcohol-related in that context, not in the context that they were observably publicly drunk, point-eight -percent or greater. Is that correct?

A That is correct. Now, I say it in the aspect that of the 103 people charged with trespassing, the majority of that, jumping off that bank, the vast majority of those people were drinking, okay? The people in possession of marijuana, of the 151, I can say that 99% of those were drinking alcohol also. Same thing with controlled substance, possession of beer, I mean, possession of glass on the river. That's the aspect that I'm saying alcohol-related. Those people were consuming alcohol.

Of course a minor in possession of alcohol did not mean a drunk minor. It simply meant they were under age. On page 72 of the record, line 9-14:

Q Now there were twenty-one public drunk and 143 possession of beer by a minor. And just because a minor was arrested for possession of beer, that does not mean that that minor was intoxicated, does it?

A That is correct. That just means that they were in possession of alcohol.

When the antidotal claims by the law enforcement officers are broken down versus actual arrests, (not even considering actual convictions) the credible evidence does not support the antidotal claims of the law enforcement community.

The county has not remotely successfully attacked the brief of appellants in which appellants argues that the ordinance passed by the Board of Supervisors is arbitrary and capricious.

I. RESPONSE TO ARGUMENT POINT NO. I

On Page 4 and 5 of the county's brief the county argues that the beer statute further provides at Mississippi Code Annotated §67-3-65 that the Board of Supervisors may:

> "fix zones and territories, enforce such proper rules and regulations, and for such other measures as will promote public health, morals and safety" regarding the possession and consumption of alcoholic beverages in Pike County, Mississippi."

Section 67-3-65 does not support that statement by the county. §67-3-65 is clear, in

its totality, when the last line of that section is read. §67-3-65 refers only to "light wines and beer shall not be sold or consumed". The county's claim that it concerns "the possession and consumption of alcoholic beverages in Pike County, Mississippi" (Appellee Brief p. 5) is not supported.

This writer can tell you that he spent untold hours attempting to find any case in Mississippi jurisprudence in which our Court held that it had the right to borrow a statute from some other chapter of the code to support a finding that could only be made with a borrowed code section from another chapter. This writer could find no case in which our Supreme Court held that it had authority to do such, or that it knowingly did such.

On page 5 of its brief, the county claims that under §67-3-65, municipalities and Board of Supervisors have been permitted to enforce rules and regulations for fixing zones and territories for sale and consumption of certain alcoholic beverages in the following cases. The county then cites seven cases.

(1) *Maynard v. City of Tupelo,* 691 So.2d 285 (Miss. 1997).

(2) *Miller v. Board of Supervisors of Forrest County*, 230 Miss. 849, 94 So.2d 604 (Miss., 1957).

(3) *Board of Supervisors of Clay County v. McCormick*, 207 Miss. 216, 42 So.2d 177 (Miss., 1949).

(4) *Hebert v. Board of Supervisors of Carroll County, Mississippi*, 241 Miss. 223, 130 So.2d 250 (Miss., 1961).

(5) *Collins v. City of Hazlehurst*, 709 So.2d 408 (Miss., 1997).

(6) *Steverson v. City of Vicksburg, Mississippi*, 900 F. Supp. 1 (S.D. Miss., 1994).

(7) *Alexander v. Graves*, 178 Miss. 583, 173 So.2d 417 (Miss., 1937).

For the time being we will exclude *Maynard v. City of Tupelo*, supra., from our discussion of those cases.

Otherwise, all of those cases concern the sale of beer and light wine. In number (2) *Miller v. Board of Supervisors of Forrest County*, the county uses the phrase "prohibiting the sale of alcoholic beverages in a limited area of the Petal and Harvey communities of Forrest County". That is incorrect. The ordinance did not concern itself with alcoholic beverages. The ordinance concerned itself with beer and light wines. Quoting from the introduction of that opinion by Justice Etheridge: "This is an appeal by bill of exceptions from an Order of the Board of Supervisors of Forrest County of September 27, 1956, denying a Petition to set aside an Order prohibiting the sale of beer and light wines in a limited area of the Petal and Harvey communities of Forrest County, in which appellant *Miller* operates a restaurant." *Miller v. Board of Supervisors of Forrest County*, 94 So.2d 604 @ 605.

The county in its brief correctly notes that cases in (3) thru (7) above concern the sale of beer and light wine. For example, *Board of Supervisors of Clay County v. McCormick*, supra., "during which beer and wine should not be sold"; in *Hebert v. Board of Supervisors of Carroll County, Mississippi*, supra., "zoning out the sale of beer and wine in a strip of land"; in *Collins v. City of Hazlehurst*, supra., "Ordinance of City of Hazlehurst prohibiting

on-premises beer permit holders to sell to persons under the age of twenty-one (21) or to permit minors to enter their establishment where beer is consumed"; *Steverson v. City of Vicksburg, Mississippi*, supra., in which Vicksburg enacted an ordinance "banning sale and/or consumption of beer and light wine on adult entertainment premises"; and *Alexander v. Graves*, supra., in which the Board of Supervisors of Hinds County created a zone which "prohibited the sale of beer and wine within the said zoned territory." [emphasis added]

Contrary to the claim of the county, all of those cases concern beer and light wines, or the Beer Statute. The ordinances did not concern "alcoholic beverages," or the Liquor Statute.[1]

There is one troubling case cited by the county in that series of cases. It is the first case. *Maynard v. City of Tupelo*, supra. In that case the city of Tupelo passed a "brown bag" ordinance prohibiting all commercial establishments from allowing the consumption of alcoholic beverages on their premises between midnight and 7:00 a.m. The county is correct in its claim in its brief that §67-3-65 was used by our Supreme Court to uphold that ordinance. In an en banc decision authored by Justice Prather, the court stated in *Maynard v. City of Tupelo*, supra., @ 388:

> This Court further notes that the Legislature has granted municipalities the authority to impose regulations relating to alcohol in important areas. Miss. Code Ann. §67-3-65, for example, provides that municipalities may "enforce such proper rules and regulations for fixing zones and territories, prescribing

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[1] Appellants like the Appellee's use of Beer Statute and Liquor Statute (Appellee's Brief p. 5) and will use that term to identify the different code chapters, Liquor Statute, §67-1-1 et seq.; Beer Statute §67-3-1 et seq.

> hours of opening and of closing, and for such other measures as will promote public health, morals, and safety, as they may by ordinance provide." This Court concludes that Western is incorrect in asserting that the entire area relating to the regulation of alcohol is preempted by the extensive regulation of this area by the Legislature. The Legislature appears to understand the importance of granting local governments the power to regulate the impact of alcoholic beverages within their communities.

This writer earlier mentioned that he could not find a case where this court had knowingly borrowed a code section from one chapter of the code and imported it to another chapter of the code to support a decision. In this opinion authored by Justice Prather, one code section from the Beer Statute was imported to the Whiskey Statute to support an ordinance in Tupelo which prohibited "brown bag clubs" (i.e., establishments which did not sell alcoholic beverages, but which permitted the consumption thereof on their premises) operating from midnight until 7:00 a.m. It does not appear to be knowingly done. It was done, but this writer cannot find any Holding from any decision of this court finding such "borrowing" to be affirmed as a holding in a case.

With all due respect to our Supreme Court, it does not appear that the court realized in *Maynard* that it was importing a section of the Beer Chapter to support the ban of both beer (Beer Statute) and alcoholic beverages (Liquor Statute) in brown bag clubs. At no place in its decision was there a holding by the court that the Beer Statute could also be used to ban Liquor Statute beverages. With all due respect, it seems to have slipped into the opinion without being challenged or considered in any way concerning whether or not a Beer Statute was being used to also control Liquor Statute beverages.

It is hoped that this court will recognized that such was inadvertently done in *Maynard v. City of Tupelo*, supra. Certainly, there is no holding by the Supreme Court in that case that the court has authority to mix and match sections from anywhere in the code that it wishes to help the court reach a decision. As stated previously by this writer, much time was spent by this writer attempting to find any holding by this court in which this court said that it had the authority to or could import sections from one chapter to another in order to support its decision. It appears to be bad law, bad public policy, and legislation, certainly when the Legislature saw no fit to place a like or similar statute in another chapter.[2]

Neither the cases or the facts support the county's argument. The county has been unable to seriously dispute that the actions of the Board of Supervisors of Pike County, Mississippi were arbitrary and capricious.

II AND III. RESPONSE TO ARGUMENT POINT NO. II AND POINT NO. III

The county argues that the Legislature has conferred broad powers upon the Board of Supervisors of Pike County, Mississippi, by the provisions of §19-3-40, Miss. Code Ann. The county then cites the code section on page 9 of Appellee's brief. Appellants note that the county may make laws "for which no specific provision has been made by general law and which are not inconsistent with the Mississippi Constitution, the Mississippi Code of 1972, or any other statute or law of the State of Mississippi."

The city of Tupelo just recently expanded beer and liquor sales in its city. Perhaps the *Maynard* decision is now moot by Tupelo's new policy on alcoholic beverages which took effect for beer in mid-October 2009, and Liquor in December 2009 - January, 2010.

The argument made by the Appellants in their brief was that the Board of Supervisors should not be allowed to use a foreign code section to ban alcoholic (Liquor Statute) beverages as well as beer and light wines (Beer Statute), which the foreign code section did authorize. The second point in Appellants' brief was that the ordinance passed by the Board of Supervisors was arbitrary and capricious.

The Home Rule Statute does not help the county. Both issues raised by Appellants fall into the category of the power of the county to adopt ordinances or resolutions concerning county affairs "for which no specific provision has been made by general law and which are not inconsistent with the Mississippi Constitution, the Mississippi Code of 1972, or any other statute or law of the State of Mississippi."

It is clear that a code section foreign to the Liquor Statute was used to ban alcoholic beverages. It is also clear that the decision of the Board of Supervisors was arbitrary and capricious when everything that happened at the Bogue Chitto River was blamed on alcohol, when over a span of six years there were 1,381 citations issued on the Bogue Chitto River, and only 21 of those citations were for public drunk. Only 1.5% of all arrests on the Bogue Chitto River during that six year period were for public drunk. The county law enforcement officers wanted to blame everything on public intoxication, but such a clam is not supported by the facts. Indeed, it is against the overwhelming weight of the evidence. The county acted arbitrarily and capriciously when it banned all alcoholic beverages on the river based upon the conduct of 1.5 % of the arrests on the river.

IV. RESPONSE TO ARGUMENT POINT NO. IV THAT THE ORDINANCE PASSED BY THE BOARD OF SUPERVISORS IS NOT ARBITRARY AND CAPRICIOUS

In its argument on Point IV that the ordinance by the Board of Supervisors is not arbitrary and capricious, the county again recites the antidotal claims of various law enforcement officers. The antidotal claims of law enforcement officers are clearly disputed by Exhibit No. 8, (p. 14 of Appellants Record Excerpts.) To reiterate an argument made earlier by Appellants, the county and law enforcement wish to blame everything that occurred on the Bogue Chitto River on excessive use of alcohol. The facts did not support those claims. The testimony in this case is contained in 182 pages. In reading almost any page in this record concerning law enforcement officers testimony, one can see the attempt to lay all arrests made at the river on excessive use of alcohol. However, when the various claims are put under cross-examination and are compared with the arrest chart, (p. 14 of Appellants Excerpts), the claims of law enforcement are not supported. If the claims of law enforcement are not supported, then of course the claims of the county are not supported.

Law enforcement and the county saw problems with the Bogue Chitto Water Park. How sad. How good it could have been, and hopefully will be, when the county and law enforcement sees opportunity with the Bogue Chitto Water Park.

During the summer months between mid-May and early September there was a huge amount of activity on the Bogue Chitto River and Topisaw Creek as they flowed into the Bogue Chitto Water Park. Tube rentals would exceed four or five thousand some weekends

where you had holidays like Fourth of July, Memorial Day, and Labor Day. Other weekends were 2,000 plus tube rental weekends. During the week it was pretty good. The activities on the Bogue Chitto River, Topisaw Creek, and Bogue Chitto Water Park were bringing a flood of tourist to Pike County. Tourist need gasoline, food, beverages, ice, t-shirts, tubes, and all manner of things that generate sales tax for Pike County. The Bogue Chitto Water Park allows people from all over Mississippi, Louisiana, and other states to enjoy the great outdoors on an untamed and wild river in which tubing, canoeing, swimming, and just plain enjoying life can be done. Sadly, the Board of Supervisors and law enforcement saw this as a problem.

This writer is reminded of the famous "Soggy Sweat" "Whiskey Speech". In the first part of this speech, Soggy Sweat recites the ills of whiskey. He winds up by saying "then certainly I am against it". He then proceeds with the speech:

"But...

> If when you say whisky you mean the oil of conversation, the philosophic wine, the ale that is consumed when good fellows get together, that puts a song in their hearts and laughter on their lips, and the warm glow of contentment in their eyes; if you mean Christmas cheer; if you mean the stimulating drink that puts the spring into the old gentleman's step on a frosty, crispy morning; if you mean the drink which enables a man to magnify his joy and his happiness, and to forget, if only for a little while, life's great tragedies, and heartaches and sorrows; if you mean that drink, the sale of which pours into our treasuries untold millions of dollars, which are used to provide tender care for our little crippled children, our blind, our deaf, our dumb, our pitiful aged and infirm; to build highways and hospitals and schools, then certainly I am for it.
>
> "This if my stand. I will not retreat from it. I will not compromise."

(This speech is now a copyrighted and is attributed to N.S. Sweat, Jr. a/k/a Soggy Sweat.)

A simple attitude adjustment of law enforcement in Pike County would have and could even now rectify almost all problems on the Bogue Chitto River. Almost every tube and canoe that is put in the Bogue Chitto River comes out at the Bogue Chitto Water Park. The park receives a fee for each canoe and each tube that comes through the water park. One Dollar and Seventy-Five Cents ($1.75) for each tube coming through adds considerable revenue to the water park, especially when you consider four and five thousand tubes come through the water park during a summer holiday weekend, and probably in excess of two thousand on any ordinary week or weekend during the summer. If law enforcement would simply station one or two people in the river at a couple of locations between the 98 bridge and the upper end of the water park, and remind the tubers to have a good time, don't drink too much, and that if they drink too much they will be arrested when they take out at the lower end of the water park, most problems would be eliminated. As one of the officers admitted during cross-examination during the trial, all canoes and tubers float from upstream to downstream and almost one hundred percent take out at the lower end of the water park.

Rather than using many officers to try to slip up and see a river floater doing something wrong and trying to make an arrest, how much easier it would be for law enforcement to simply "keep the peace" by keeping an eye on the tubers and canoers, reminding them to have a good time, but to do it safely and without excessive alcohol. Law enforcement looked at the ills of beer and whiskey as Soggy Sweat so famously outlined

them in his speech. But, they had the opportunity to look at the positive as he also outlined in his speech, but law enforcement and the county failed to do this.

CONCLUSION

It is respectfully submitted that the decision of this court should overturn the lower court and void the Pike County Supervisor's ordinance on both grounds assigned in Appellants' Brief.

The borrowing or importing of a statute from the Beer Statutes - - §67-3-65 - - to ban beer under the Beer Statute, and other alcoholic beverages under the Liquor Statute exceeded the authority of the Board of Supervisors.

Also, the decision of the Board of Supervisors in adopting this ordinance were arbitrary and capricious. It is arbitrary and capricious to blame everything that law enforcement did not like about the water park on a bunch of drunks when its own records indicated that only 1.5% of the arrests at the Bogue Chitto Water Park concerned excessive use of alcohol. Twenty-one out of 1,381 arrests.

The Appellants respectfully request that this court find that the Board of Supervisors of Pike County acted beyond their authority on both the grounds of acting arbitrary and capriciously and on the grounds that the Board of Supervisors are not authorized to use a beer statute to ban both beer and alcohol on the Bogue Chittor River and Topisaw Creek as was

done with the ordinance that was adopted.

RESPECTFULLY SUBMITTED,

WENDY RYALS AND RONALD PERRY

BY: _____
OF COUNSEL

Counsel for Appellants
Alfred Lee Felder
Felder Law Firm
P. O. Box 1261
McComb, MS 39649-1261
601-684-3362
Mississippi Bar #[redacted]

CERTIFICATE OF SERVICE

I, Alfred Lee Felder, do hereby certify that I have this day served by United States mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellants to:

Wayne Dowdy, Esq.
Dowdy & Cockerham
Post Office Box 30
Magnolia, MS 39652

Hon. David Strong, Judge
Post Office Box 1387
McComb, MS 39649

This the 29th day of December, 2009.

_____
ALFRED LEE FELDER

CERTIFICATE OF MAILING

The undersigned certifies that the undersigned has this day mailed by U.S. postal service, postage prepaid, the Reply Brief of Appellants, the original and four copies, and the Reply Brief will be mailed on December 29, 2009, and will be deposited in the United States Mail addressed to the clerk of the Supreme Court:

Kathy Gillis, Clerk
Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Post Office Box 249
Jackson, MS 39205-0249

Witness my signature this the 29th day of December, 2009.

ALFRED LEE FELDER