

In the Supreme Court of Mississippi

No. 2009-CA-00684

Richard A. Prewitt

v.

City of Oxford, Mississippi, Oxford Municipal Court, & Lawrence L. Little

Appeal from the Lafayette County Circuit Court

Brief for Appellant

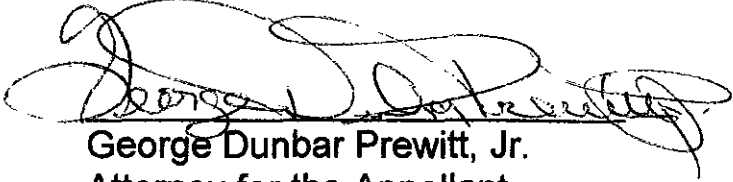
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Oral Argument is not requested

## Certificate of Interested Persons.

1. Richard A. Prewitt
2. City of Oxford, Mississippi, Oxford Municipal Court, Lawrence L. Little.
3. George Dunbar Prewitt, Jr.
4. The attorneys, i.e., Mayo Mallette, PLLC, representing the appellees.

The undersigned counsel of record certifies that the above listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.



George Dunbar Prewitt, Jr.  
Attorney for the Appellant

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## Statement of the Issues

1. Whether a Mississippi Municipal Court has (a) subject matter jurisdiction over crimes involving a person who was a minor at the time the crime was allegedly committed, (b) subject matter jurisdiction over an appellant who was an adult at the time of the appellant's conviction, (c) subject matter jurisdiction over a minor who did not possess alcoholic beverages in a public place, and (d) subject matter jurisdiction over a citation/affidavit which did not allege the essential facts of the alleged violation?
2. Whether a Mississippi Municipal Court has personal jurisdiction where a post-arrest citation, requiring the appellant's appearance in court, was issued by one of the arresting officers who could not be deemed a neutral and detached magistrate?
3. Whether a Mississippi Municipal Court has personal jurisdiction over a minor in the absence of formal process being issued to the minor and to the parents of the minor as required by In re Edwards, 298 So. 2d 703, 704 (Miss. 1974)?
4. Whether the venue statute, MCA 11-45-25, which requires that all litigation against a municipality be brought and heard in the county where that municipality is located, is exclusive and jurisdictional?

5. Whether Circuit Court Judge Albert Smith III (a) erred in granting the appellee's 12(b)(6) motion to dismiss, and (b) whether Judge Smith's dismissal of the case, following a Bolivar County hearing of a case filed against the City of Oxford, Mississippi and City of Oxford officials in the Lafayette County Circuit Court, is void for lack of proper venue?
6. Whether the appellant properly relied on Duvall v. Duvall, 224 Miss. 546, 80 So.2d 752 (1955), in filing the collateral lawsuit which alleged a void judgment by the Oxford Municipal Court?
7. Whether Judge Smith erred in imposing \$7,763.15 in sanctions for what Judge Smith termed a "frivolous" lawsuit?
8. Whether the attorneys for the appellees were lawfully hired pursuant to MCA 25-1-47?
9. Whether (a) a Budweiser Beer is an alcoholic beverage in Mississippi and (b) whether the rear floor of a vehicle is a public place within the meaning of MCA 67-1-81(2)?
10. Whether MCA 43-21-159 violates Section 159(d) of the Mississippi Constitution?

## Statement of the Case

The underlying case began at 11 p.m. on May 6, 2008 when the appellant, Richard A. Prewitt, was charged with violating MCA 67-1-81(2). The official narrative of the Oxford Police Department's Michelle Thompson reads as follows;

"On above date and time, I, Officer Michelle Thompson was dispatched to Campus Walk Building E for a complaint of a vehicle with loud music. Upon arrival, there were 2 females and a male subject standing in the parking lot beside a car. When I approached, the male subject, Anthony Prewitt, was holding a Budweiser in his hand. I asked Prewitt how old he was and he said he was 20 years old. I wrote Prewitt a Post Arrest Citation for possession of alcohol by a minor. There was also another Budweiser in the backseat floor of Prewitt's vehicle. The beer was placed in evidence. Court date was set for May 28, 2008 at 1000 am. Nothing further."

Although Officer Thompson's official report, and the post-arrest citation, clearly charged the appellant, then a minor, with a violation of MCA 67-1-81(2), the appellant was subsequently convicted, as an adult, and unlawfully sentenced to a fine of \$619.50, two years probation, 30 days of community service with 25 suspended, and to complete a BASICS alcohol program on the Ole Miss campus. Specifically, MCA 67-1-81(2) provides, in part, that;

"Any person under the age of twenty-one (21) years who purchases, receives, or has in his or her possession in any public place, any alcoholic beverages, shall be guilty of a misdemeanor and shall be punished by a



fine of not less than Two Hundred Dollars (\$200.00) nor more than Five Hundred Dollars (\$500.00).”

An illegal sentence in Mississippi violates fundamental rights, and an adult cannot be convicted of an offense than can only be committed by a minor.

The appellant filed a collateral lawsuit alleging that the municipal court lacked subject matter jurisdiction (1) over minors, and (2) over a defendant where there was no proof that the defendant possessed alcoholic beverages in a public place, lacked personal jurisdiction because no formal process was issued to the minor and his parents, and had acted in a manner inconsistent with due process because the municipal court permitted the prosecutors to dispense with Miranda rights, illegally sentenced the defendant, permitted the post-arrest citation to be issued by Lt. Bobby Kelly, one of the arresting officers, and permitted Officer Michelle Thompson, in one of the many discovery violations, to omit Kelly’s name from her official report in an effort to conceal that Oxford Municipal Court Deputy Clerk Bobby Kelly was one of the arresting officers.

Bolivar County Circuit Court Judge Albert Smith III was appointed by the Mississippi Supreme Court to preside over the collateral lawsuit. Judge Smith held a hearing in the Bolivar County Circuit Court, an improper venue, and granted a 12(b)(6) motion to dismiss. Judge Smith also

imposed \$7763.15 in sanctions on the appellant's attorney for filing what Smith claims was a frivolous, collateral lawsuit designed to circumvent the direct appellate route.

### Summary of the Argument

1. The appellee Oxford Municipal Court and appellee Lawrence L. Little, in rendering the November 19, 2008 judgment against the appellant, lacked subject matter jurisdiction, personal jurisdiction, and acted in a manner inconsistent with due process. Therefore, the November 19, 2008 decision, of the appellees Oxford Municipal Court and Lawrence L. Little, is void, not voidable.
2. The appellee City of Oxford failed to hire attorneys for appellee Lawrence L. Little pursuant to the statutory procedure established in MCA 25-1-47. Therefore, the legal appearances and legal documents filed on behalf of the appellees, by the persons claiming to be attorneys for the appellees, are void because the procedure in 25-1-47 must be undertaken prior to hiring of the attorneys, and not subsequent to the hiring of the attorneys.
3. Bolivar County Circuit Court Judge Albert Smith III erred in granting the appellees' 12(b)(6) motion to dismiss. If Judge Smith had presumed the

complaint's allegations to be true, as required by Mississippi law in deciding 12(b)(6) motions, then (a) the appellant did not violate MCA 67-1-81(2), (b) Mississippi municipal courts lack jurisdiction over a minor charged with a violation of MCA 67-1-81(2), (c) Mississippi courts are required to serve the parents and the minor to secure personal jurisdiction, (d) Lawrence L. Little imposed an illegal sentence for the ostensible violation of MCA 67-1-81(2), (e) Lawrence L. Little permitted actions incompatible with due process, i.e., the failure to provide the appellant with Miranda warnings, discovery violations, Lt. Bobby Kelly acting as both arresting officer and prosecutor, (e) Duvall v. Duvall, 224 Miss. 546, 552, 80 So. 2d 752, 754 (1955), authorizes collateral actions against void judgments in addition to direct appeals, and Judge Smith should not have granted the 12(b)(6) motion because a claim was stated upon which relief should have been granted.

4. Judge Smith committed a jurisdictional error in changing the venue of the Lafayette County Circuit Court case, by holding a hearing in Bolivar County, Mississippi, because the venue statute for municipalities is exclusive and jurisdictional. Thus, Judge Smith's decisions in this case are void because of the failure to comply with the exclusive and

jurisdictional venue statute for municipalities.

5. Judge Smith erred in imposing sanctions of \$7763.15 against the attorney for the appellant because the case was not frivolous, was not imposed for delay and harassment, and because Judge Smith did not employ the factors in McKee v. McKee, 418 So. 2d 764, 767 (Miss. 1982), i.e., the factors in Rule 1.5 of the Mississippi Rules of Professional Conduct, before imposing the sanctions.

#### Argument

I. Bolivar County Circuit Court Judge Albert Smith III erred in granting the appellees' 12(b)(6) motion to dismiss.

Judge Smith, who was appointed by the Mississippi Supreme Court to preside over the case below, made the following legal errors; (1) Judge Smith, over the appellant's objection, held a hearing in Bolivar County on a case that was filed against the City of Oxford and its officials in the Lafayette County Circuit Court; that derogation of the exclusive and jurisdictional venue mandated by MCA 11-45-25 for cases against municipalities renders Smith's decisions void, (2) Judge Smith failed to follow the 12(b)(6) motion procedure that was recently repeated by the Mississippi Supreme Court in Wilbourn v. Equitable Life Assurance Society of the United States, 998 So. 2d 430, (¶12, ¶13) (Miss. 2008), (3) Judge

Smith failed to note the Mississippi Supreme Court's use of a mandamus writ to vacate a void decision in In re Moore, 722 So. 2d 465 (Miss. 1998) and failed to note that collateral proceedings to vacate a void judgment was outlined in Duvall v. Duvall, 224 Miss. 546, 552, 80 So. 2d 752, 754 (1955), and (4) Judge Smith failed to note that the complaint sought injunctive and declaratory relief as well as mandamus relief.

The Mississippi Supreme Court has written, in Clark v. Luvel Dairy Prods., Inc., 731 So. 2d 1098 (¶24, ¶25, ¶27) (Miss. 1998) that "[v]enue is a function of statute, that Rule 82(b) of the Mississippi Rules of Civil Procedure provides that "Except as provided by this rule, venue of all actions shall be as provided by statute", and that under the common law and statutory law in Mississippi, "no municipality has been sued outside the county of its domicile." In City of Durant v. Laws Constr. Co., 721 So. 2d 598, ¶26, (Miss. 1998), the Mississippi Supreme Court wrote, in response to an assertion that a circuit court's decision was void because a hearing was held in an improper venue, that the movant should have objected to venue not later than the first hearing. In this case, the lawsuit, against a municipality and its officials, was filed in the Lafayette County Circuit Court pursuant to MCA § 11-45-25 which provides, in part, that;

"A municipality may sue and be sued by its corporate name. Suits against any municipality shall be instituted in the county in which such municipality is situated, where such actions are brought in the circuit or chancery or county courts, and where such municipality is wholly situated in one (1) county."

In spite of the above, Judge Smith scheduled a hearing in this case for the Bolivar County Courthouse where he granted the appellees' motion to dismiss for failure to state a claim upon which relief could be granted. The appellant objected to the venue, and sought a stay of the Bolivar County hearing from the Mississippi Supreme Court in No. 2009-M-00374. The appellant's request was denied by the Mississippi Supreme Court on March 10, 2009, and the March 11, 2009 Bolivar County hearing proceeded even though the appellant objected to the venue at the outset of that hearing.

Judge Smith noted the appellant's objection to the venue change, in item 6 of Smith's March 25, 2009 order granting the motion to dismiss, but wrote, in the March 25, 2009 Order of Dismissal, that the "Plaintiff consented to the hearing by his presence" and that "the Court was not required to hold any hearing on Defendants' Motion." Because the appellant timely objected to the change in the venue of the March 11, 2009 hearing, the appellant has not waived this issue. Additionally, because of

the common law requirement, as codified in MCA § 11-45-25, that all actions against municipalities must be decided in the county of their domicile, MCA § 11-45-25 appears to be an exclusive, jurisdictional statute, i.e., a statute where venue cannot be waived because it is jurisdictional. See generally Nat'l Heritage Realty, Inc. v. Estate of Boles, 947 So. 2d 238, (¶36) (Miss. 2006), Price v. Price, 202 Miss. 268, 274, 32 So. 2d 124, 126 (1947). Thus, Judge Smith's March 25, 2009 Order of Dismissal is void because it was the result of a venue violation in the March 11, 2009 hearing in Bolivar County where Judge Smith initially announced his decision to dismiss the Lafayette County Circuit Court lawsuit.

Judge Smith also failed to follow the (12(b)(6) motion procedure recently outlined by the Mississippi Supreme Court in Wilbourn v. Equitable Life Assurance Society of the United States, 998 So. 2d 430, (¶12, ¶13) (Miss. 2008). In Wilbourn, the Mississippi Supreme Court wrote that "The allegations in the complaint must be taken as true, there must be no set of facts that would allow the plaintiff to prevail. . . . This Court must find that there is no set of facts that would entitle a defendant to relief under the law in order to affirm an order granting the dismissal of a claim on a Rule

12(b)(6) motion. ... [I]n order to survive a Rule 12(b)(6) motion, the complaint need only state a set of facts that will allow the plaintiff some relief in court.” (emphasis added). The Wilbourn Court wrote that “Mississippi Rule of Civil Procedure 12(b) further states that: [i]f, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. ... Furthermore, this Court has stated that “[w]here a Rule 12(b)(6) motion is converted into one for summary judgment, . . . the trial court must give ten days’ notice for such a hearing . . . .” Jones, 798 So. 2d at 476 (emphasis added). See Miss. R. Civ. P. 56(c) (“[t]he motion shall be served at least ten days before the time fixed for the hearing.”). “The requirements of Rule 56(c), far from being a mere extension of our liberal procedure exalting substance over form, represents a procedural safeguard to prevent the unjust deprivation of a litigant’s constitutional right to a jury trial.” (emphasis added). And in footnote 9 of the Wilbourn decision, the Court noted that documents which were attached to the



Motion to Dismiss were not part of the complaint, for purposes of the Motion to Dismiss, and that a judge must stay within the confines of the complaint, as noted above, in deciding a motion to dismiss.

Judge Smith also went outside of the complaint in this case by citing the appellant's "Mot. for Hearing and Inj. Relief, at 3-4" and the appellant's "Resp. to Mot. to Dismiss and for sanctions, at 3-4", in item 3 of Smith's March 25, 2009 Order of Dismissal. In item 3 and item 11 of Smith's March 25, 2009 Order of Dismissal, Judge Smith claimed, in improper and unlawful reliance on the appellant's motion for hearing and injunctive relief in addition to the appellant's response to motion to dismiss and for sanctions, that the appellant and his attorney "filed this lawsuit in order to circumvent" the direct appeal route. Not only is Smith's claim false, for the appellant filed a timely notice of direct appeal of the November 19, 2008 municipal court decision, but Smith is legally precluded, in adjudicating a motion to dismiss, from taking judicial notice of what Smith claims were admissions by the appellant and his attorney in various motions aside from the complaint. Judge Smith, by straying from the allegations in the complaint and by failing to give notice to the parties that he was converting the motion to dismiss into a summary judgment motion, also violated the

Wilbourn requirement that 10 days notice of a summary judgment hearing must be provided in such an instance.

Apart from the above errors, Judge Smith also erred in his view that a void judgment, by a lower court, cannot be corrected by a collateral action. Although the appellant's complaint sought, in paragraph 20 of the complaint, declaratory and injunctive relief in addition to the mandamus relief sought in paragraph 1 and in paragraph 19, Judge Smith focused exclusively on the mandamus relief sought and wrote that the appellant had an adequate remedy at law and that mandamus relief could be denied, in the public interest, even assuming a legal right had been violated. Judge Smith, apparently, is unfamiliar with In re Moore, 722 So. 2d 465 (Miss. 1998), where the Mississippi Supreme Court used the mandamus writ to vacate a void judgment.

In this case, the complaint also alleged that the decision in question was void, not that the appellant had suffered an unredressed legal right. In paragraphs 16, 17 and 18, the complaint alleged that the November 19, 2008 Oxford Municipal Court decision was void due to a lack of subject matter jurisdiction, that no arrest warrant was ever properly issued for the appellant, and that a number of due process violations had occurred. In

short, as alleged in paragraph 15 of the complaint, a judgment is void if the rendering court lacked subject matter jurisdiction, jurisdiction over the parties, or acted in a manner inconsistent with due process. The complaint, in paragraph 11, pointed out why the November 19, 2008 decision was void by alleging that only three Mississippi courts have ever had jurisdiction over minors; the chancery courts, the former family courts, and the youth courts. Paragraph 12 of the complaint alleged that to the extent that MCA 43-21-159 delegates jurisdiction over minors to courts which are entirely independent of the chancery courts, 43-21-159 is unconstitutional as violative of Article 6, 159(d) of the Mississippi Constitution which states that "The chancery court shall have full jurisdiction" in "Minor's business."

As pointed out in Duvall, supra, "the test of jurisdiction is whether the court has the right to enter on the inquiry, and not whether its methods were regular, its findings right, or its conclusions according to law." Thus, the complaint was calling Smith's attention to the claim that the Oxford Municipal Court lacked the constitutional power to adjudicate a criminal case involving a minor, and not merely, as Smith apparently believed, that some constitutional or statutory right of the appellant was infringed which

could be corrected on direct appeal. "The test of jurisdiction is the power to act, not the correctness of its decision." Duvall, supra. Thus, Judge Smith's Order of Dismissal indicated a fundamental misunderstanding of the dichotomy between a court's power to act, and the exercise of that power to act, when Smith wrote that the appellant can "raise all of his objections as affirmative defenses at his trial de novo." As alleged in paragraph 18 of the complaint, Mississippi law holds that if a lower court lacks jurisdiction, a Mississippi circuit court also lacks jurisdiction over an appeal from that lower court. Standard Fin. Corp. v. Breland, 163 So. 2d 232, 236, (Miss. 1964). In short, if the Oxford Municipal Court lacked jurisdiction over the appellant, no appellate court can acquire jurisdiction.

That is why a direct appeal is not an adequate remedy in this case, and why Duvall held that "It is equally well settled that a judgment rendered by a court having no jurisdiction of the subject matter is void, not merely voidable, and may be attacked directly or collaterally, anywhere, and at any time." In a direct contradiction of the foregoing statement in Duvall, Smith wrote that "judicial efficiency and economy will be hindered if Plaintiff is allowed to challenge his conviction in this parallel civil proceeding...."

Thus, if Judge Smith had only considered the allegations of the

complaint as being true, as required in a motion to dismiss, Smith would have been legally unable to grant the 12(b)(6) motion to dismiss for the appellant's collateral claim, against a void judgment, is certainly viable under Duvall, supra.

II. The appellee Oxford Municipal Court and appellee Lawrence L. Little, in rendering the November 19, 2008 judgment against the appellant, lacked subject matter jurisdiction, personal jurisdiction, and acted in a manner inconsistent with due process.

In the foregoing section, the appellant indicated that the Oxford Municipal Court lacked subject matter jurisdiction over a minor. Additionally, the Oxford Municipal Court lacked subject matter jurisdiction because (a) the affidavit/post-arrest citation failed to allege the essential elements of the offense charged, (b) the affidavit/post-arrest citation was invalid because it bore the signature of one of the arresting officers, in his capacity as a municipal court deputy clerk, who notarized the affidavit of the other arresting officer in apparent violation of the neutral and detached magistrate requirement in McCommon v. State, 467 So. 2d 940, 942 (Miss. 1985), and (c) a Budweiser beer is not an alcoholic beverage under MCA 67-1-5 and the interior of the appellant's vehicle is not a public place in Mississippi.

MCA 21-23-7(1) requires, in part, that;

"Except as otherwise provided by law, criminal proceedings shall be brought by sworn complaint filed in the municipal court. Such complaint shall state the essential elements of the offense charged and the statute or ordinance relied upon.

The affidavit/post-arrest citation charged the appellant with a violation of MCA 67-1-81 as a "minor in possession of alcohol". However, MCA 67-1-81(2) provides, in part, that;

"Any person under the age of twenty-one (21) years who purchases, receives, or has in his or her possession in any public place, any alcoholic beverages, shall be guilty of a misdemeanor and shall be punished by a fine of not less than Two Hundred Dollars (\$200.00) nor more than Five Hundred Dollars (\$500.00)."

Thus, the essential elements were possession of any alcoholic beverages by a minor in a public place. With respect to alcoholic beverages, MCA 67-1-5(a) defines alcoholic beverage as;

"any alcoholic liquid, including wines of more than five percent (5%) of alcohol by weight, capable of being consumed as a beverage by a human being, but shall not include wine containing five percent (5%) or less of alcohol by weight and shall not include beer containing not more than five percent (5%) of alcohol by weight, as provided for in Section 67-3-5, Mississippi Code of 1972, but shall include native wines."

As noted above, Officer Michelle Thompson's police report recited that she saw the appellant holding a Budweiser beer bottle in his hand, but the complaint alleges, in paragraph 2(d) that Thompson was unsure if the beer bottle in the appellant's hand was empty or not. The only evidence of

Budweiser beer introduced at trial was an unopened Budweiser that Officer Thompson claimed, as alleged in paragraph 2 (f) of the complaint, that she saw, in plain view, on the back seat floor of the appellant's darkened vehicle at 11 pm.

As most beer connoisseurs know, a Budweiser beer is approximately 5 percent alcohol-by-volume (abv) which is equivalent to 3.9668 percent alcohol-by-weight (abw) because alcohol's density is slightly less than 80 percent of water's density, i.e., 0.79336 to be precise. Thus, to convert abv into abw, one must multiply the abv by 0.79336; conversely, changing abw into abv requires the multiplication of the abw by 1.25. Therefore, MCA 67-1-5(a)'s standard for determination of whether a beer is an alcoholic beverage, i.e., more than 5 percent by weight, would require a beer with more than 6.25 abv. Because a Budweiser beer has an abv of approximately 5 percent, and an abw of 3.9668, a Budweiser beer is not an alcoholic beverage in Mississippi. Hence, the appellant could not violate MCA 67-1-81(2)'s requirement, i.e., that he possess an alcoholic beverage, by holding a Budweiser beer bottle or by a Budweiser beet bottle being found in his vehicle.

With respect to the definition of a public place, MCA 67-1-81(2) is silent on

what constitutes a public place. However, the Mississippi Supreme Court, in Richmond v. City of Corinth, 816 So. 2d 373 (¶19) (Miss. 2002), cited Nelson v. City of Natchez, 197 Miss. 26, 19 So. 2d 747 (1944), and wrote that the definition of a public place, "as applied to an enclosure, room or building, must be considered as one wherein, by general invitation, members of the public attend for reasons of business, entertainment, instruction or the like, and are welcome so long as they conform to what is customarily there done." Since the only evidence introduced at the November 19, 2009 trial of the appellant was the unopened Budweiser beer found in the appellant's vehicle, It is clear, under Richmond, supra, that the appellant's vehicle was not a public place, and that the appellant could not be guilty of possession of an alcoholic beverage in a public place. As a matter of Mississippi law, therefore, the appellant did not violate 67-1-81(2).

The Oxford Municipal Court also lacked personal jurisdiction over the appellant because the appellant was not given notice of the essential elements of the charge against him, and the parents of the minor appellant were not notified as required by In re Edwards, 298 So. 2d 703, 704 (Miss. 1974). The Oxford Municipal Court also tacitly approved the failure of the arresting officers to provide the minor appellant with Miranda rights as required by Berkemer v. McCarty, 468



U.S. 420 (1984), and violated a fundamental right of the appellant by imposing an illegal sentence, for the alleged violation of 67-1-81(2), of a fine of \$619.50, two years probation, 30 days of community service with 25 suspended, and to attend a BASICS alcohol course at Ole Miss when the maximum sentence for a violation of 67-1-81(2) is a \$500.00 fine. The right to be sentenced in accordance with the applicable statute is a fundamental right. Luckett v. State, 582 So. 2d 428, 430 (Miss. 1991). As noted above, the Oxford Municipal Court permitted Officer Thompson so omit the name of the other arresting officer, Lt. Bobby Kelly, from Thompson's official report in an apparent effort to conceal the fact that Kelly had unlawfully participated, as a deputy court clerk, in the issuance of the affidavit/post-arrest citation. Thus, in addition to the absence of subject matter jurisdiction, and a lack of personal jurisdiction, the Oxford Municipal Court also acted in a manner inconsistent with due process. The absence of jurisdiction, and the due process violations render the November 19, 2008 judgment void.

Bryant, Inc. v. Walter, 493 So.2d 933, 938 (Miss. 1986).

III. Judge Smith erred in imposing sanctions of \$7763.15 against the attorney for the appellant because the case was not frivolous, was not imposed for delay and harassment, and Judge Smith merely issued a "blanket endorsement" of the attorneys' fees requested.

A lawsuit is only frivolous when "objectively speaking, the pleader or movant has no hope of success." Leaf River Forest Prods., Inc. v. Deakle, 661 So. 2d

188, 196-197 (Miss. 1995). That is clearly not the case in this instance, given the law and facts outlined above. With respect to Judge Smith's claim that this lawsuit sought to harass the appellees, the Leaf River case also wrote that "The second standard, a claim interposed for harassment or delay, generally cannot be met 'where a plaintiff has a viable claim.'"

The claim in this collateral case centers around whether or not the November 19, 2008 judgment of the Oxford Municipal Court is void because of a lack of subject matter jurisdiction, a lack of personal jurisdiction, and because of actions taken which are inconsistent with due process. Judge Smith never bothered to make a legal inquiry into that primary claim, and instead held, in item 11 of his Order of Dismissal, that a "parallel civil proceeding" hinders "judicial economy and efficiency". Smith's belief, that a "parallel civil proceeding" is unlawful in Mississippi, directly contravenes Duvall, supra, which held that a void judgment "may be attacked directly or collaterally, anywhere, and at any time." It is noteworthy that Judge Smith admitted, at the March 11, 2009 hearing in Bolivar County, that he had not read the Duvall case.

And, in imposing the sanctions, Smith replicated the "blanket endorsement" error made by the circuit judge in BellSouth v. Board of Supervisors, 912 So. 2d 436, (¶¶31, ¶¶36, ¶¶37) (Miss. 2005). The Smith April 20, 2009 order of sanctions

only contained 5 sentences, and the following sentence indicates that Judge Smith never employed the factors in Rule 1.5 of the Mississippi Rules of Professional Conduct;

“THIS Cause having come on pursuant to the Defendants’ Motion for Sanctions, filed by and through their attorney, Paul B. Watkins, Jr., and the Court having read and considered said Motion, submitted Affidavits and itemized Billing Statement filed in support of the motion and the response by Plaintiff, does find that pursuant to the Litigation Accountability Act of 1998, Miss. Code Ann. § 11-55-7 and Miss. R. Civ. P. 11(b) the grounds set forth in said Motion are well taken and hereby grants same.”

The Bellsouth case outlawed a “blanket endorsement” of the submitted fees by a circuit judge “without making any kind of reasonableness determination.”

Bellsouth held that “[t]he reasonableness of an attorney’s fee award is determined by reference to the factors set forth in Rule 1.5 of the Mississippi Rules of Professional Conduct.” Those reasonableness factors are “(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience,

reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.”

IV. The appellee City of Oxford, and its officials, failed to hire attorneys for appellee Oxford Municipal Court Judge Lawrence L. Little pursuant to the statutory procedure established in MCA 25-1-47.

The appellee City of Oxford, and its officials, failed to follow the procedure in MCA 25-1-47 for the hiring of attorneys to represent Oxford Municipal Court judge Lawrence L. Little. MCA 25-1-47 provides, in part, that;

(1) Any municipality of the State of Mississippi is hereby authorized and empowered, within the discretion of its governing authorities, to investigate and provide legal counsel for the defense of any claim, demand, or action, whether civil or criminal, made or brought against any state, county, school district, or municipal officer, agent, servant, employee, or appointee as a result of his actions while acting in the capacity of such officer, agent, servant, employee, or appointee; and such municipality is hereby authorized to pay for all costs and expenses incident to such investigation and defense.”

There is simply nothing in the City of Oxford Minutes, that the appellant has uncovered, which indicates that the City of Oxford officials investigated this lawsuit, and its basis, and made a determination to provide legal counsel to defend Lawrence L. Little prior to hiring the firm of Mayo Mallette. Thus, because the firm of Mayo Mallette was not hired in accordance with MCA 25-1-47, this Court cannot take legal notice of any documents filed by the Mayo Mallette law firm on behalf of the appellees in this case. See generally, Madison County v. Hopkins, 857 So. 2d 43, (¶17-¶24) (Miss. 2003). In addition, the

attorneys' fees awarded to the appellees must be vacated because of the failure to comply with MCA 25-1-47.

#### Conclusion

The appellant asks (1) that the March 25, 2009 and April 20, 2009 decisions of Judge Smith be reversed and rendered, (2) that the November 19, 2008 conviction of the appellant be vacated, and (3) that the appellant be awarded attorney's fees.

A handwritten signature in cursive script, appearing to read "George Dunbar Prewitt, Jr.", is written over a horizontal line.

George Dunbar Prewitt, Jr.  
Attorney for Richard A. Prewitt  
P.O. Box 1226  
Greenville, MS 38702-1226  
Bar : [REDACTED]

### Certificate of Service

I certify that I have served a copy of the foregoing appellant's brief on Mayo Mallette, PLLC, at their address of P.O. Box 1456, Oxford, MS 38655 by first class mail, postage prepaid on July 25, 2009.

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George Dunbar Prewitt, Jr.

### Certificate of Filing

I certify that I will serve an original and three (3) copies of the appellant's brief, and four (4) copies of the appellant's record excerpts on the Clerk, Mississippi Supreme Court, P.O. Box 249, Jackson, MS 39205 by first class mail, postage prepaid on July 25, 2009.

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George Dunbar Prewitt, Jr.