


CERTIFICATE OF INTERESTED PARTIES

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 Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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I. STATEMENT OF THE ISSUES

- I. WHETHER A TIMELY FILED PETITION IN CHANCERY COURT CONFERS JURISDICTION FOR AN APPEAL OF AN ORDER ENTERED BY THE MISSISSIPPI TAX COMMISSION.

- II. WHETHER AN INDIGENT PARTY MAY PROCEED *IN FORMA PAUPERIS* IN AN ACTION FILED IN CHANCERY COURT APPEALING AN ADMINISTRATIVE PROCEEDING WHERE THE GOVERNING STATUTE PROVIDES THE APPEALING PARTY A FULL EVIDENTIARY TRIAL DE NOVO IN THE CHANCERY COURT.

If this Court determines Miss. Code Ann. §§ 27-77-7(4) and 27-77-7 require posting a bond or full payment of an assessed tax in order to maintain an action in Chancery Court:

- I. WHETHER THE LEGISLATURE'S IMPOSITION OF A BOND OR PREPAYMENT OF A CONTESTED TAX ASSESSMENT VIOLATES FEDERAL OR STATE DUE PROCESS RIGHTS OF INDIGENT PARTIES UNABLE TO BRING A CIVIL ACTION BECAUSE OF THEIR INABILITY TO PAY.

- II. WHETHER A PARTY MAY CURE A DEFECT IN THE FORM OF A TIMELY FILED PETITION FOR APPEAL OF AN ADMINISTRATIVE PROCEEDING.

II. STATEMENT OF THE CASE

2.1 This case involves a disputed tax assessment resulting from cleanup efforts by 5K Farms ("5K") in the aftermath of Hurricane Katrina. (R.E. 4).¹ 5K's timely appeal of the assessment from the Mississippi State Tax Commission (the "Commission") to the trial court was dismissed due to a form defect. (R.E. 2). The substantive merits of this dispute have yet to be considered by the trial court; accordingly, this appeal is procedural in nature. At the heart of this matter is Mississippi's longstanding policy determination that, where possible, disputes should be decided on their merits. Despite its timely notice of appeal, 5K was never afforded an opportunity to present the merits of this case to the trial court.

2.2 5K is a newly formed farming operation that produces blueberry crops. (R.E. 5). Last year (2009) was the first year 5K produced a crop saleable on the blueberry market. (R.E. 5). After Hurricane Katrina, 5K obtained authority from the Mississippi Department of Environmental Quality on an emergency basis to accept vegetative debris generated as a result of the hurricane. (R.E. 4 at ¶8).

2.3 In 2008, the Commission determined that during the Hurricane Katrina cleanup efforts, 5K operated as a commercial disposal site. (R.E. 4 at ¶11). The Commission assessed against 5K a solid waste fee in the amount of \$133,133.00. (R.E. 4 at ¶12). Pursuant to Miss. Code Ann. 27-77-1, *et seq.*, 5K appealed the assessment to the Board of Review for the Commission. (R.E. 4 at ¶13). By Order dated October 15, 2008, the Board of Review denied 5K's appeal. (R.E. 4 at ¶13). 5K then appealed the Board of Review's Order denying 5K's appeal to the full Commission. (R.E. 4 at ¶13). The Commission entered its Order denying 5K's appeal on March 17, 2009. (R.E. 4 at ¶13).

¹ Citations to the Record will be labeled (R.at ____). Citations to the Record Excerpts will be labeled (R.E. ____)

2.4 Aggrieved, 5K filed this action in the Chancery Court of Hinds County, First Judicial District, on April 16, 2009, seeking a full evidentiary trial concerning the Commission's Order. (R.E. 4). 5K simultaneously filed a Motion for Supersedeas requesting the trial court to enter an order of supersedeas preventing any collection proceedings against 5K Farms during the pendency of this case. (R.E. 5). In support of its Motion for Supersedeas, 5K attached a pauper's affidavit establishing 5K could not afford to purchase a supersedeas bond or property to collateralize such a bond. (R.E. 5). In response, the Commission objected to 5K's Motion for Supersedeas but did not challenge the veracity of its affidavit. (R. at 26). In addition to its Objection to 5K's Motion for Supersedeas, the Commission also filed a Motion to Dismiss for lack of subject matter jurisdiction premised on 5K's failure to pay the amount assessed by the Commission or, in the alternative, post a bond. (R. at 21).

2.5 On July 27, 2009, the chancery clerk entered the trial court's order granting the Commission's Motion to Dismiss. (R.E. 2). In the order, the trial court determined that Miss. Code Ann. § 11-53-17 did not allow 5K to proceed as an indigent party because the chancery court was sitting as an appellate court rather than as a court of original jurisdiction. (R.E. 2). Further, because 5K could not proceed as an indigent party, the court determined that 5K was subject to the bond requirement set forth in Miss. Code Ann. § 27-77-7(3). (R.E. 2). Despite the fact that 5K had timely filed its notice of appeal, the court found that 5K's failure to post a bond was fatal. (R.E. 2). Said differently, the trial court decided the bond requirement was a threshold matter, without which jurisdiction did not vest with the court. The court therefore granted the Commission's 12b(1) Motion to Dismiss for lack of subject matter jurisdiction, and, even though 5K requested a chance to cure any procedural defect, the trial court refused to allow any such opportunity.

2.6 5K subsequently filed a Motion for Reconsideration requesting the court to reexamine dismissal for two reasons. (R. at 61). First, 5K reasserted its contention that the lower court, while technically sitting as an appeals court for matters appealed from the Commission, actually acts as a trial court for parties yet to be afforded a trial on the merits outside an administrative proceeding. (R. at 61). 5K argued, therefore, that the trial court possesses discretion to allow the pauper's affidavit in lieu of the bond requirement. (R. at 61). Second, in the alternative, 5K again requested the court allow reasonable opportunity for 5K to cure any form defects in its appeal, if any, because 5K timely filed its notice of appeal in this matter. (R. at 61). The court denied 5K's Motion and refused to allow 5K the opportunity to cure its appeal. 5K now appeals the trial court's procedural dismissal to this Court. (R.E. 3).

III. SUMMARY OF THE ARGUMENT

3.1 Appellant/Plaintiff 5K Farms, Inc. is a newly formed farming operation whose primary crop is blueberries. 5K filed this action in the Chancery Court of Hinds County, Mississippi, First Judicial District, seeking a full evidentiary trial concerning an assessment made by the Mississippi State Tax Commission. At the time this action was filed in the chancery court, 5K was anticipating its first blueberry crop saleable at market. As a newly established farming operation, 5K had limited funds and assets.

3.2 At issue in this matter is the Mississippi State Tax Commission's assessment of a \$133,133.00 tax against 5K in the form of solid waste disposal fees arising after 5K accepted vegetation debris generated from Hurricane Katrina. Ultimately, 5K, dissatisfied with the assessment made by the Commission, filed the Complaint in this matter, along with a Motion for Supersedeas, appealing the assessment by the Commission. The chancery court erroneously dismissed the Complaint in this case on the basis that the chancery court did not have jurisdiction to hear the case because 5K did not (1) pay the full assessment by the Tax Commission, or (2)

post a bond with the chancery clerk in the sum double the amount of the assessment (Miss. Code Ann. § 27-77-7).

3.3 It is undisputed that 5K timely filed a petition for appeal in this case; accordingly, the trial court possessed jurisdiction to hear this matter and allow 5K's petition *in form pauperis*. This Court therefore should reverse the trial court's dismissal and remand this case for a trial on the merits.

3.4 Under Mississippi law, 5K's timely filing of a petition for appeal conferred jurisdiction on the trial court. The tax code sections at issue in this case, Miss. Code Ann. §§ 27-77-5(1) and 27-77-7(1), unlike other provisions in Chapter 77 of the Mississippi Code, do not provide for dismissal of a taxpayer's timely filed petition due to defects of form. Further, the trial court possessed the authority to allow 5K's petition *in forma pauperis* because denial of access to any and all courts of law solely because of inability to pay violates federal and state due process.

3.5 Even if this Court determines that 5K's petition for appeal was defective, reversal is appropriate because dismissal is unwarranted under Mississippi law. The Legislature and this Court alike have spoken with an unequivocal voice: Errors in matters of form do not terminate a court's ability to consider an appeal. Further, the Mississippi Court of Appeals specifically has determined that Mississippi Rule of Appellate Procedure 2(a) applies to appeals from administrative decisions to chancery court. Thus 5K should be allowed an opportunity to cure any defects in its timely filed petition for appeal.

IV. ARGUMENT

4.1 This Court reviews jurisdictional dismissals by the trial court using a *de novo* standard. It is undisputed that 5K timely filed a petition for appeal in this case; accordingly, the trial court possessed jurisdiction to hear this matter and allow 5K's petition *in form pauperis*.

This Court therefore should reverse the trial court's dismissal and remand this case for a trial on the merits. Indeed, even if this Court determines that 5K's petition for appeal was defective, reversal is nevertheless appropriate because 5K should be allowed an opportunity to cure any defects in its timely petition for appeal pursuant to the well-settled law of this State that errors in matters of form will not terminate a court's ability to consider an appeal.

A. Standard on Appeal

4.2 "Jurisdiction and statutory interpretation are matters of law and, therefore, [the Mississippi Supreme Court] review[s] de novo a trial court's rulings on such matters." Ameristar Casino Vicksburg, Inc. v. Duckworth, 990 So. 2d 758, 759 (Miss. 2008) (citing Grand Casino Tunica v. Shindler, 772 So. 2d 1036, 1038 (Miss. 2000); Wright v. White, 693 So. 2d 898, 900 (Miss. 1997)).

B. The Trial Court Possessed Jurisdiction to Hear this Matter and to Allow 5K's Petition in Forma Pauperis

4.3 Mississippi statutory law provides the right to a full evidentiary judicial hearing for appeals from the Mississippi State Tax Commission. As such, 5K's timely filing of a petition for appeal conferred jurisdiction on the trial court. Specifically, Miss. Code Ann. §§ 27-77-5(7) and 27-77-7(1), unlike other provisions in Chapter 77 of the Mississippi Code, do not provide for dismissal of a taxpayer's timely filed petition due to defects of form. Further, the trial court possessed the authority to allow 5K's petition *in forma pauperis*.

1. Mississippi Statutory Law Provides the Right to a Full Evidentiary Judicial Hearing for Appeals from the Mississippi State Tax Commission

4.4 Miss Code Ann. § 27-77-7(4) unequivocally establishes an aggrieved party's right to a full evidentiary judicial hearing in civil actions appealing final decisions by the Commission to recover taxes and/or assessments: "At trial of any action brought under this section, the chancery court shall give deference to the decision and interpretation of law and regulations by

the commission as it does with the decisions and interpretation of any administrative agency, but it shall try the case de novo and conduct a full evidentiary judicial hearing on the issues raised.” Miss Code Ann. § 27-77-7(4); see also Tenneco, Inc. v. Barr, 224 So. 2d 208, 211 (Miss. 1969) (“[T]he Legislature has made it the public policy of this state to provide a full evidentiary judicial hearing in cases of the character now under consideration.”). Accordingly, upon timely filing its petition for appeal, 5K has the right to have this appeal heard in the lower court by trial de novo with a full evidentiary hearing.

2. 5K’s Timely Filing of a Petition for Appeal Conferred Jurisdiction on the Trial Court

4.5 It is undisputed that 5K’s petition for appeal was timely filed; thus, at the time of filing, jurisdiction over this case vested with the trial court. The Commission argues, and the trial court agreed, that the filing of a petition, alone, does not confer jurisdiction. Rather, the Commission argues that either payment under protest of the assessment or the posting of a bond to secure the same was necessary in order for jurisdiction to vest with the trial court. The fulcrum on which this dispute turns is the statutory interpretation of Miss. Code Ann. § 27-77-1, *et seq.*, which together are entitled “Appellate Review for Taxpayers Aggrieved by Certain Actions of the State Tax Commission.” Section 27-77-5 and Section 27-77-7 are the primary statutes at issue in this matter.

4.6 Miss. Code Ann. § 27-77-5, entitled “Tax Appeals Procedure,” provides the following instruction for aggrieved taxpayers:

If in its order the commission orders a taxpayer to pay a tax assessment, the taxpayer shall, within thirty (30) days from the date of the order, pay the amount ordered to be paid or properly appeal said order of the commission to chancery court as provided in Section 27-77-7. After the thirty-day period, if the tax determined by the commission to be due is not paid and an appeal from the commission order has not been properly filed, the agency shall proceed to collect the tax assessment as affirmed by the commission. . . .

Miss. Code Ann. § 27-77-5(7). Nowhere in Section 27-77-5(7) does the Legislature instruct the chancery court to dismiss with prejudice an appeal where a taxpayer has failed to pay the disputed assessment or post a security bond for the same.

Similarly, Section 27-77-7 provides for no such dismissal by the chancery court:

The findings and order of the commission entered under Section 27-77-5 shall be final unless the taxpayer shall, within thirty (30) days from the date of the order, file a petition in the chancery court appealing the order and pay the tax or post the bond as required in this chapter.

Miss. Code Ann. § 27-77-7(1). Sections 27-77-5(7) and 27-77-7(1) do not provide for the extraordinary measure of dismissal with prejudice of an aggrieved taxpayer's appeal upon the failure to post a bond. Instead, Section 27-77-5(7) merely allows the Commission to proceed with collection unless the bond requirement, which would serve to stay collection, has been satisfied. While Section 27-77-7(1) provides that the findings and order become "final," nothing in this Section specifically terminates any right of a taxpayer to challenge the Commission's final decision by filing a petition in chancery court. In other words, when a taxpayer elects to proceed in chancery court without securing the disputed assessment, Section 27-77-7(1) instructs the Commission to secure through collection the State's interests in taxes the Commission has determined are outstanding. The Commission is instructed to deem the decision final and proceed with collection of the assessment rather than staying its final decision.

3. Miss. Code Ann. §§ 27-77-5(7) and 27-77-7(1), Unlike Other Provisions in Chapter 77 of the Mississippi Code, Do Not Provide for Dismissal of a Taxpayer's Timely Filed Petition

4.7 Further demonstration of the legislative intent behind Sections 27-77-5(7) and 27-77-7(1) can be gleaned from reviewing the remaining provisions of Chapter 77. For instance, Section 27-77-5(4) governs appeals from the Commission's review board to the full Commission. Section 27-77-5(4), unlike the subsection at issue in this case, specifically mandates that a taxpayer's right of appeal is terminated and the decision of the Commission's

review board is not subject to further review upon the failure to timely file a written appeal with the commission secretary:

Failure to timely file a written appeal with the commission secretary within the thirty-day period shall make the order of the board of review final **and not subject to further review** by the commission or a court, other than as to the issue of whether a written appeal from the order of the board of review was timely filed with the commission secretary.

Miss. Code Ann. § 27-77-5(4) (emphasis added). Similarly, Section 27-77-13, entitled “Judicial review of agency actions regarding privileges, permits, tags, etc.,” instructs that

[t]he chancery court shall dismiss with prejudice any petition filed where it is shown that the petitioner failed to pay prior to filing the petition the estimated cost for preparation of the record of the commission or failed to pay any deficiency in the estimate within thirty (30) days of a notice of deficiency.

Miss. Code Ann. § 27-77-13 (emphasis added). In stark contrast, neither Section 27-77-5(7) nor Section 27-77-7 contain similar language. This distinction is important because the Legislature, and not the Commission, was in the position to determine when a taxpayer’s right to bring an action in chancery court is terminated, and the Legislature chose not to include such language in Sections 27-77-5(7) or 27-77-7. As a precept of statutory interpretation, this Court has instructed that “the omission of language from a similar provision on a similar subject indicates that the legislature had a different intent in enacting the provisions, which it manifested by the omission of the language.” Natchez v. Sullivan, 612 So. 2d 1087, 1089 (Miss. 1992). Instead of dismissal, the Legislature provided that the decision of the Commission shall become “final” upon a taxpayer’s election not to file a bond and that a taxpayer who elects not to file such a bond is subject to collection efforts by the Commission during the pendency of this case in Chancery Court.

4. The Trial Court Possessed the Authority to Hear 5K’s Appeal in Forma Pauperis

4.8 The rationale behind the Legislature's intent not to require payment of a disputed assessment or a bond securing the same is obvious: Such a requirement would result in a violation of due process under the Federal Constitution as well as Miss. Const. Art. 3 § 14. A person may not be denied access to the court solely because of inability to pay. For example, the United States Supreme Court invalidated, as applied to indigent plaintiffs, a state requirement that filing and service of process fees be paid as a condition precedent to the maintenance of a divorce action. Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Here, the Commission requests the Court deny 5K access to a remedy in a court of law, not by virtue of adjudication in a competent court of law, but because the appellant is poor.

4.9 Out of an abundance of caution, 5K filed a Motion for Supersedeas with the chancery court, along with a pauper's affidavit. These documents were filed simultaneously with the Complaint. Miss Code Ann § 11-53-17 permits an indigent party to commence *any* civil action without providing security:

A citizen may commence *any* civil action, or answer a rule for security for costs in any court without being required to prepay fees or give security for costs, before or after commencing suit, by taking and subscribing the following affidavit:

"I, _____, do solemnly swear that I am a citizen of the State of Mississippi, and because of my poverty I am not able to pay the costs or give security for the same in the civil action (describing it) which I am about to commence (or which I have begun, as the case may be) and that, to the best of my belief, I am entitled to the redress which I seek by such suit."

Miss. Code Ann. § 11-53-17 (emphasis added). See also Attorney General Op. No. 1999-0109, 1999 WL 269181 (March 31, 1999). Accordingly, Section 11-53-17 allows 5K to commence this civil action without being required to prepay fees or give security by taking and subscribing an affidavit swearing that because of poverty, 5K is unable to pay the costs for the action. Neither the Commission nor the trial court challenged the veracity of 5K's affidavit. Indeed, in the Order dismissing this case, the trial court revealed that it was concerned by 5K's plight:

“[T]his Court is sympathetic to the situation encountered by 5K[.]” The trial court nonetheless determined that (1) the court sat as an appellate court for purposes of 5K’s petition, (2) the right to appeal in forma pauperis was unavailable for appeals, and (3) the bond requirement in Miss. Code Ann. § 27-77-7(1) was jurisdictional and without which the court lacked subject matter jurisdiction to hear 5K’s Appeal.

4.10 First, 5K respectfully requests this Court to determine, under the specific facts of this matter, that the trial court had authority to hear 5K’s appeal *in forma pauperis*. While it is true that the law in Mississippi is well-settled that a party maintains no right of appeal to the Mississippi Supreme Court pursuant to Mississippi Code Annotated § 11-53-17, such a right is distinguishable from the redress sought by 5K Farms, which was an appeal to the chancery court. See Attorney General’s Opinion, 1988 WL 249981 (Miss. A.G.) (citing Mississippi Code Annotated § 11-53-17 and Nelson v. Bank of Mississippi, 498 So. 2d 365 (Miss. 1988)) (instructing that an indigent party’s right to proceed in forma pauperis can only be maintained in courts of original jurisdiction).

4.11 Section 11-53-17 and Miss. R. Civ. P. 3(c) provide discretion to allow 5K to proceed in forma pauperis since, though sitting as an appeals court for purposes of administrative appeals, the trial court actually is a court of original jurisdiction. As an example of this fact, Uniform Circuit and County Court Rule 5.02 plainly sets forth a basis for a party to “proceed in forma pauperis upon written approval of the court acting as the appellate court.” See also Uniform Circuit and County Court Rule 12.02(A)(1) (directing that a party can appeal in forma pauperis upon the court’s discretion). This distinction between an appeal to the Mississippi Supreme Court (or Court of Appeals) and an appeal to the circuit court is recognized in several instances by the Attorney General’s Office. See e.g. Attorney General’s Opinion, 2003 WL 21962287 (Miss. A.G.); Attorney General’s Opinion, 2006 WL 2789810 (Miss. A.G.).

Accordingly, though the Uniform Chancery Court Rules do not address this issue, if the circuit courts of this state have the authority to allow an indigent party to seek redress from municipal and county courts, it certainly should follow that this State's courts of equity can do the same.

4.12 This Court should apprise the trial court that subject matter jurisdiction did indeed vest upon 5K's timely filing its petition so that the trial court may confidently hear 5K's appeal. In addition, this Court also should provide guidance that *in forma pauperis* appeals to chancery court may be had at the trial court's discretion. As stated above, the Commission's remedy upon a taxpayer's election to proceed in chancery court without posting a surety bond is to proceed to collect the assessment by the Commission. 5K filed a Motion for Supersedeas along with its Petition in this case, requesting the Court delay any collection action by the Commission due to its poverty. It was well within the trial court's general equity power and consistent with Miss. R. Civ. P. 62 (b) and (d) to order such a stay.

C. In the Alternative, 5K Should Be Allowed an Opportunity to Remedy Any Defects in its Timely Petition for Appeal Pursuant to this State's Well-Settled Law that Errors in Matters of Form Will Not Terminate a Court's Ability to Consider an Appeal

4.13 In the alternative, even if this Court determines 5K's petition for appeal is defective, dismissal is nevertheless unwarranted. The Legislature and this Court alike have spoken with an unequivocal voice: Errors in matters of form do not terminate a court's ability to consider an appeal.

1. This Court Allows Parties to Cure Form Defects in Timely Filed Appeals

4.14 This Court has determined that a failure to meet the statutory requirements of filing a bond in appeal cases may be excused and/or corrected. See Sabougla Drainage Dist. No. 2 of Calhoun and Webster Counties v. People's Bank & Trust Co. of Tupelo, 1 So. 2d 219, 221 (Miss. 1941) (allowing appellant 10 days to correct deficiencies in appeal by filing bond where a good faith effort was made to perfect appeal, no prejudice to appellee existed, and appellant

mistakenly concluded that appeal bond was not required); Carter v. Carter, 221 So. 2d 87, 87 (Miss. 1969) (granting appellant 30 days to file a bond where appellant mistakenly filed an inadequate bond). 5K made a good faith effort to properly file its appeal to the chancery court by timely filing its petition along with a Motion for Supersedeas requesting the Court to allow the case to proceed with a stay of collection without a bond. Also, out of an abundance of caution, 5K filed a pauper's affidavit swearing to its poverty.

2. The Mississippi Court of Appeals Has Determined that Mississippi Rule of Appellate Procedure 2(a) Applies to Appeals of Administrative Decisions to the Circuit and Chancery Courts of this State

4.15 In addition, concerning deficient appeals from administrative agencies to circuit and chancery courts, the Mississippi Court of Appeals has made clear that dismissal is unwarranted on at least two occasions. In Bowling v. Madison County Board of Supervisors, the court decided that the principle set forth for appeals to the Mississippi Supreme Court that parties must have the opportunity to cure defective yet timely appeals also should apply to administrative appeals to circuit court. 724 So. 2d 431 (Miss. Ct. App. 1998). Building on the holding in Bowling, the court in Wheeler v. Mississippi Department of Environmental Quality Permit Board, appropriately recognized the immateriality of whether such appeals were had in circuit or chancery court and that, specifically, Mississippi Rule of Appellate Procedure 2(a) applies to such appeals. 856 So. 2d 700 (Miss. Ct. App. 2003). This Court, through the promulgation of the Mississippi Rules of Appellate Procedure, decided that parties must be given an opportunity to cure a timely filed yet defective appeal. In Wimley v. Reid, this Court aptly noted that

The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts.... [Inasmuch as the judiciary] is conversant with the law through years of legal study, observation and actual trials, [judges rather than] well-intentioned, but overburdened, legislators [are better suited to know

what procedural changes are] needed to meet the needs of a particular era and to maintain the judiciary's constitutional purpose.

991 So. 2d 135, 138 (Miss. 2008) (quoting Newell v. State, 308 So. 2d 71 (Miss. 1975)). At a minimum, 5K should be allowed an opportunity to cure any deficiencies in its appeal if this Court concludes any indeed exist. Accordingly, dismissal by the trial court was improper.

(a) *Bowling v. Madison County Board of Supervisors*

4.16 In Bowling, the Mississippi Court of Appeals reviewed a jurisdictional issue on all fours with the one at bar. 724 So. 2d 431. There, the appellant (“Bowling”) sought reversal of a circuit court’s dismissal of his appeal from a decision rendered by the Madison County Board of Supervisors. Id. at 432. According to the enabling statute at issue in Bowling, notices of appeal from the Board of Supervisors to the circuit court were to be accompanied by a bill of exceptions. Id. at 433. “The circuit court found that Bowling failed to comply with the requirements of [the statute] for appealing a decision of the Board to the court. Consequently, the court concluded that it lacked jurisdiction to entertain the appeal and dismissed the complaint.” Id. at 432.

4.17 Similar to the instant case, in Bowling, the allegations at issue before the trial court were “the kind that can be brought on a direct appeal from an agency’s final judgment.” Id. at 436. In the instant case, according to Miss. Code Ann. § 27-77-7, 5K’s appeal is from a final judgment by the Commission. Moreover, the instant case is also akin to Bowling because in Bowling, “[t]he controlling issue [was] jurisdictional. The trial court held that no jurisdiction existed since Bowling failed within 10 days of each disputed action by the Board to take an appeal and file a bill of exceptions.” Id. at 433. (emphasis added).

4.18 In determining whether dismissal was the appropriate remedy for timely yet defective appeal, the Court of Appeals examined Miss. Code Ann. §§ 15-1-69 and 11-3-5, both of which, although differing contextually, permit matters of form to be cured as long as an

original petition has been timely filed. The Bowling court noted that these “two statutes . . . indicate that the legislative branch does not wish that matters of form will terminate a court’s ability to consider the rights of parties.” Id. at 442. The court further explained that “[t]he appellate and civil trial rules indicate that the supreme court follows the same principle.” Id. Noting that inconsistency in caselaw on the issue previously existed, the Bowling court resolved the dilemma:

Weaving the two lines of cases together, joining strands from other precedents regarding the power of the courts to establish rules of procedure, and finally giving color to the legal fabric with the policy expressed in statutes and appellate rules that matters of form should be amendable, we reverse the circuit court’s dismissal of the appeal.

Id. (internal citations omitted). The court determined that Bowling should be allowed 10 days to cure the defect in his appeal. Id.

(b) *Wheeler v. Mississippi Department of Environmental Quality Permit Board*

4.19 Whereas Bowling involved an appeal from a final administrative determination to circuit court, the Mississippi Court of Appeals applied the same analysis five years later in an appeal from an administrative agency to chancery court and formally declared that Mississippi Rule of Appellate Procedure 2(a) governs procedural disputes in appeals to circuit and chancery courts of this State. In Wheeler, the Mississippi Department of Environmental Quality Permit Board (the “Board”) granted six permits for various environmentally involved projects. 856 So. 2d 700, 702 (Miss. Ct. App. 2003). Five of these permits were issued to Lone Oak Energy Center (“Lone Oak”), a corporation, and one to the City of Columbus, Light and Water Department (the “City”). Id. Wheeler, who was a private citizen, timely appealed all six permits to chancery court by filing a notice and one cashier’s check for \$100. Id. The pertinent appeals statute in Wheeler called for a cost bond of \$100 for an appeal, and both Lone Oak and the City argued that a separate bond was necessary for each of the appealed permits. Id. The chancellor

agreed, dismissing the appeal of the City's permit and four of the five permits issued to Lone Oak "for failure to timely file the required cost bond." Id. at 702-03. The trial court also found that Wheeler's cashier's check did not comply with the pertinent statute's requirement of a "bond," but the court permitted the check despite the deficiency and allowed Wheeler's appeal as to the first permit listed on his notice of appeal. Id. at 203.

4.20 The Wheeler court noted that "[a]ppeals from state agency decisions are first had to either chancery or circuit court, depending upon the enabling statute. The supreme court has previously held that, at least with respect to matters of mandatory or discretionary dismissals, the Mississippi Rules of Appellate procedure apply to appeals from county to circuit court. Id. at 704 (citing Van Meter v. Alford, 774 So. 2d 430, 432 (Miss. 2000)). Citing Bowling, the court also noted that it had "found the same applicable in appeals from agency decisions to circuit court." Wheeler, 856 So. 2d at 704 (citing Bowling, 724 So. 2d at 442). Accordingly, the Wheeler court wisely extended this same rule to administrative appeals to chancery court:

After a thorough review of the various statutes and rules applicable to situations such as this and the supreme court's interpretation thereof, we found the purpose of imposing some appellate rules on trial courts acting as appellate courts carried out the legislative intent that **errors in matters of form will not terminate a court's ability to consider a claim.** We can find no logical basis for refusing to apply the same policy to appeals from agencies to chancery courts, as well. Application of certain appellate rules to trial courts under these circumstances is particularly apt, not only to carry out legislative intent, but for lack of any other rule to guide chancery courts.

Wheeler, 856 So. 2d at 704. The court correctly explained that "[u]nder the appellate rules of procedure, the only mandatory dismissal is for failing to timely file notice of appeal. Miss. R. App. P. 2(a)(1). All other failings are reviewed as potential discretionary dismissals. Miss. R. App. P. 2(a)(2)" Id. Accordingly, the Wheeler court found that

[t]he chancellor dismissed the appeals by finding the court lacked jurisdiction to hear the matter for failing to properly post bond. Mississippi Rule of Appellate Procedure 2(a)(2) requires the clerk of the court to give written notice to the party in default notifying him of the nature of the default and fourteen days in which to

correct the deficiency before granting the dismissal. Consistent with this rule and its application here to chancery courts, we find that Wheeler should be given an opportunity to amend his appeal to conform with the remainder of this opinion as necessary.

Id.

4.21 The case sub judice, for all material purposes, assuming that the posting of a bond is required under Miss. Code Ann. § 27-77-7, is identical to Wheeler. Just as Wheeler was given an opportunity to cure the defects of form in his appeal, 5K, at the least, must be given an opportunity in which to correct any deficiencies as well.

V. CONCLUSION

5.1 For the foregoing reasons, 5K requests this Court reverse the trial court's dismissal and remand this matter with instructions for the trial court to "try the case de novo and conduct a full evidentiary judicial hearing on the issues raised." Miss Code Ann. § 27-77-7(4). Further, 5K requests this Court to direct the trial court to enter an Order staying any collections on the part of the Commission during the pendency of this matter. In the alternative, if this Court finds that 5K's timely petition for appeal defective, 5K requests this Court to reverse the trial court's dismissal and remand this matter to the trial court with instructions to allow 5K an opportunity to cure the defect pursuant to Miss. R. App. P. 2(a).

Respectfully submitted,

5K FARMS, INC.

By: 

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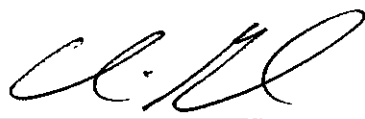
CERTIFICATE OF SERVICE

I, Christopher T. Graham, do hereby certify that I have this day caused to be served, via
U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

Stephanie Jones, Esq.
Stephanie V. Rogers, Esq.
Gary W. Stringer, Esq.
MISSISSIPPI STATE TAX COMMISSION
P.O. Box 1033
Jackson, Mississippi 39215

Honorable William H. Singletary
CHANCERY COURT JUDGE
316 S. President Street
Jackson, MS 39201

This the 9th day of April, 2010.



Christopher T. Graham

CERTIFICATE OF FILING

I certify that I have deposited the original and three (3) copies of the Appellant's Brief in the United States Mail, postage prepaid, addressed to the Clerk of the Mississippi Supreme Court on the 9th day of April, 2010.

A handwritten signature in black ink, appearing to read 'C. T. Graham', is written over a horizontal line.

Christopher T. Graham