

ATTORNEY FOR APPELLEE,

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(a)(1) of the Mississippi Rules of Civil Procedure, 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 disqualifications or recusal.

1. Tim Rogers, Appellant
2. Rodney P. Faver, Esquire
Ward, Rogers & Faver, PLLC
P. O. Box 80286
Starkville, MS 39759
Attorney for Appellee
3. Tom Jones, Esquire
Hugh Gibson, P.A.
P. O. Drawer G
Eupora, MS 39744
Attorney for Appellee
4. Richard Cain, Appellee
Ackerman, MS
5. Town of Ackerman and the Election Commission, Appellee

This the 22nd day of May, 2009.

By: 
RODNEY P. FAVER, Attorney for

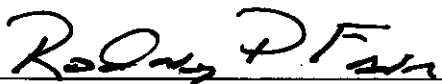

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Ward, Rogers & Faver, PLLC
P. O. Box 80286
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Eupora, MS 39744
Attorney for Appellee
4. Richard Cain, Appellee
Ackerman, MS
5. Town of Ackerman and the Election Commission, Appellee

This the 22nd day of May, 2009.

By: 
RODNEY P. FAVER, Attorney for
Town of Ackerman, MS and the
Election Commission of the Town of
Ackerman, MS
MSB 

By: Thomas Jones
THOMAS JONES, Attorney for
Richard Cain
MSB

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TABLE OF AUTHORITIES

CASES:

GOURLAY V. WEEMS, 874 So.2d 987 (Miss. 2004).....

MOORE v. SANDERS, 569 So.2d 1148 (Miss. 1990).....

O'HARA v. MISSISSIPPI OFFICE OF SECRETARY OF STATE, 2007WL2071796 (S.D. Miss.).....

PRISOCK v. PERKINS, 735 So.2d 440 (Miss. 1999).....

STATUTES:

MISSISSIPPI CODE ANNOTATED 23-15-359.....

MISSISSIPPI CODE ANNOTATED 23-15-361.....

MISSISSIPPI CODE ANNOTATED 23-15-963.....

STATEMENT OF THE ISSUES

Issue 1: Whether or not the Circuit Court has jurisdiction.

Issue 2: Whether or not the Appellant has a complete and adequate remedy at law to contest the qualifications of the Appellee, Cain.

STATEMENT OF THE CASE

A. Nature of the case:

The Appellee, Richard Cain, submitted a qualifying statement of intent on January 24, 2009, to have his name placed on the ballot as an Independent Candidate for the office of the Mayor of the Town of Ackerman, Mississippi in the Mayoral Election to be held on June 2, 2009.

On March 31st and April 6th of 2009, James Mayo, the attorney for the Appellant, Tim Rogers, notified the Election Commission for the Town of Ackerman, Mississippi that he was challenging the Petition of Richard Cain for Mayor of the Town of Ackerman, Mississippi.

The Election Commission set a hearing date for April 16, 2009 at 10:00 o'clock a.m. in the Town of Ackerman Boardroom. The hearing was not held on April 16th due to the unavailability of counsel for the Appellant at the time. The hearing was held on April 21, 2009 and the Election Commission found that the Appellee, Cain's, Petition was signed by more than 50 qualified voters as required by Section 23-15-361 of the MCA 1972.

The Appellant filed his Petition for judicial review under the provisions of Section 23-15-963 of the MCA 1972 on April 30, 2009.

The sitting Circuit Court Judges both recused themselves, Judge Edward Prisock was appointed as Special Judge to hear the case on May 7, 2009.

Judge Prisock then filed a scheduling order on May 14th setting the matter for hearing on May 15th at 9:00 o'clock a.m. in the Choctaw County Circuit Court.

The Appellees filed their Motions for Judgment on the Pleadings and/or Dismiss on May 14th, by noon as ordered by Judge Prisock.

Judge Prisock then granted the Judgment on Motions to Dismiss on May 15, 2009.

Judge Prisock granted the Motion to Dismiss based on construction and application of Section 23-15-963.

SUMMARY OF THE ARGUMENT

The Appellant contends in the document entitled Notice of Appeal that was filed with the Supreme Court, that there is no statutory scheme for appeal in this case. However, the Appellant filed that Appeal in the Circuit Court using Section 23-15-963 of the MCA 1972.

The Appellant did not file their Appeal in the Chancery Court as they now say is the sole Court that has jurisdiction over this matter, instead they availed themselves of the remedies available in Section 23-15-963, now they say that it does not apply that it only applies to those persons who are qualified under the provisions of Section 23-15-359 of the MCA 1972.

The Circuit Court of Choctaw County, by Special Judge Edward Prisock, correctly found that Section 23-15-963(4) did apply to the contest in question and that there was no jurisdiction because the Appeal should have been filed within 15 days after the Petition was originally filed. The Appellants further availed themselves of the remedies available in Section 23-15-963(6), by filing the \$300.00 costs bond and the Bill of Exceptions as required by the said Statute. Simply, the Appellant wants to have it both ways, they want to avail themselves of the remedies available in Section 23-15-963, but now that the Circuit Court has determined there is no jurisdiction to hear the matter, now they want to make the argument that there is no remedy available for them at law and that 23-15-963 does not apply and this matter should be sent to the Chancery Court of Choctaw County, Mississippi.

ARGUMENT

I. **Whether or not the Circuit Court has jurisdiction.**

Attached are Appellee's Motion To Dismiss and Motion For Judgment on the Pleadings and/or Motion To Dismiss. Attached to these Motions are the Appellant's letters to the Election Commission setting forth the challenge to the qualifications of Richard Cain.

In its judgment on the Motion to Dismiss, the Court found that Section 15-23-963(4) was applicable in this case and because the Petition by the Appellant was not timely filed within 15 days after April 6th, that, pursuant to the case of MOORE V. SANDERS 569 So.2nd 1148 (1990) that it did not have jurisdiction to hear the Appellant's Petition. The Court further relied on the case of TURNER V. SIMMONS 99 Miss. 28,54 So. 658 (1911) as further support that it did not have any jurisdiction to hear the matter.

The Appellant has submitted the argument that there is no Statute for contesting the qualifications of an Independent Candidate in a Municipal Election. The Appellees based their argument on the fact that Section 23-15-963, the Statute from which they base their Appeal on, specifically only pertains to persons qualifying under Section 23-15-359. As stated before, the Appellants have tried to avail themselves of the remedies available under this Statute, but on the other hand say it does not apply as to candidates who qualify under Section 23-15-361 of the MCA 1972.

Upon a plain reading of the Statute, as put forth by the Circuit Court, paragraph number 1 specifically does point towards those procedures that deal with a person who

has qualified under Section 23-15-359, which specifically excludes Municipal Elections. However, subparagraph 4 specifically has different language and says any party aggrieved by the action or inaction of the appropriate Election Officials, not specifically referring to the Election Officials as referred to in paragraph 1, may file a Petition for judicial review to the Circuit Court of the County in which the Elected Officials whose decision is being reviewed sits. Such Petition must be filed no later than 15 days after the date the Petition was originally filed with the appropriate Election Official. If Paragraph 1 was to cover any contest, why is there different deadlines for specifically enumerated candidates who have qualified under Section 23-15-359 and yet there is a different deadline for those under Paragraph 4. Further, paragraph 7 as argued by the Appellant specifically says that the procedure as set forth above is the only manner for those seeking office who have qualified pursuant to 23-15-359. The Appellants cite the case of PRISOCK V. PERKINS 735 So.2nd 440 (Miss. 1990) as support for the proposition when an "injured party does not have a full, plain and adequate remedy at law the Chancery Court has jurisdiction for judicial review of the board or agency decision." In that case, there was no Statutory scheme for appealing a school board's decision awarding a hunting and fishing lease. The Court in that matter held that the Chancery Court would have original jurisdiction because there was no other basis for appealing the decision. Such is not the case in our situation, Section 23-15-963(4) specifically spells out the avenue for appeal for the actions of election officials. In Paragraph (4), it does not specifically exclude Municipal Officials as argued by the Appellant, it just says the appropriate Election Officials. In the case of O'HARA V. MISSISSIPPI OFFICE OF SECRETARY OF STATE 2007 WL2071796 (S.D. Miss.) The Federal Court, specifically recognized that Section 23-15-963(4) was the proper avenue

for appeal of a decision by the State Board of Election Commissioners. The theory as argued by the Appellants in this case would be that either the parties in the O'HARA case would have to follow Paragraph 1 of 23-15-963 or they would not be able to appeal the decision at all.

It is clear, that the Circuit Court was correct in finding that it does not have jurisdiction in this matter, due to the Appellants failure to meet the 15 day deadline as required by Paragraph 4 of the MCA 1972 23-15-963.

In GOURLAY V. WILLIAMS, 874 So2d, 987 (Miss. 2004) the Mississippi Supreme Court held that MCA §23-15-963 was the proper statute to follow for challenging the qualifications of an independent candidate prior to a general election. The Court compared and contrasted MCA §23-15-961 and 23-15-963 and further held that the time lines within those statutes were mandatory and jurisdictional.

II. Whether or not the Appellant has a full, plain, complete and adequate remedy at law.

The Appellant in this case, as stated before, has tried to avail himself of the remedies under Section 23-15-963, and attempted to follow all of its guidelines. However, when it was determined that he did not follow the guidelines pursuant to Paragraph 4, and the Court made the finding that it did not have jurisdiction to hear the case, the Appellants now put forth the argument that they have no remedy at law and that the Chancery Court has jurisdiction. As support for this proposition, they cite the PRISOCK case, which had to do with the lease of Sixteenth Section land by the Louisville School District.

The Court in that case, found that because there was no legislative provision for review of School Board decisions for specific review of hunting and fishing licenses, that

the Chancery Court would have jurisdiction. However, that case is not applicable to the case at bar, because as stated before the Appellants availed themselves of Section 23-15-963(4). The Appellants have followed the procedures set forth in that section up until now. If the Appellants, felt that, that section was not applicable and they had no "full, plain, complete and adequate remedy at law," they should have filed their Petition to contest the qualifications of the Appellee, Cain, in the Chancery Court as put forth by the PRISOCK case.

However, it is clear that even they did not believe that, that was the appropriate remedy to contest Appellee, Cain's Petition and now are trying to argue this as their last ditch effort because, they realize they had not followed the dictates of Section 23-15-963.

The Appellant even in the Notice of Appeal that was filed, cites Section 23-15-963(6) as the code section that it is basing its entire appeal on. It is inexplicable, that at this point the Appellant is still citing the code section that they claim does not apply to the original contest.

III. CONCLUSION


The present matter is an appeal from the decision of the Choctaw County Circuit court pursuant to MCA 1972 Section 23-15-963. It is clear, that the Appellants have an adequate remedy at law under that section and they have failed to follow its jurisdictional requirements as stated by the Circuit Court in its opinion. The Appellants now, even though they filed their appeal under that section, now bring forth the argument that they do not have an adequate remedy at law. However, they did not file their original action in the Choctaw County Chancery Court as required by the PICKENS case that they even cite. It is clear, that the legislature specifically did not refer to

section 1 under 23-15-963 in sub-paragraph 4 and the body as referred to in that section. It is clear, that section 4 was specifically, not specific about which election officials it was referring to when it said "appropriate election officials". If it wanted to specifically, limit it to those persons under section 23-15-359 then they would have specifically said "the same body with whom the candidate in question qualified pursuant to section 23-15-359". Even if the legislature did not allow an appeal in Municipal Elections, the Appellant did not file its Appeal in Chancery Court. The reason is, because the Appellants knew just like they know now that the section that was applicable was the one that they have continued to file a Notice of Appeal under Section 23-15-963.

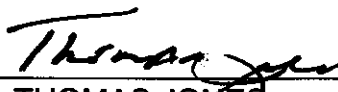
Therefore, the decision of the Choctaw County Circuit Court was correct in that it did not have any jurisdiction to hear this matter and therefore there is no viable issue for reversal by this Court.

Respectfully submitted,

THE TOWN OF ACKERMAN, MISSISSIPPI
and THE ELECTION COMMISSION OF THE
TOWN OF ACKERMAN, MISSISSIPPI

By: 

RODNEY P. FAVER, Esq.
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121 North Jackson Street
P.O. Box 80286
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(662) 323-1912
MSB# 10452



THOMAS JONES
HUGH GIBSON, P.A.

Attorney for Appellee, Richard Cain

112 North Dunn Street
Eupora, MS 39744
(662) 258-7855
MSB# 3193

IN THE CIRCUIT COURT OF CHOCTAW COUNTY, MISSISSIPPI

TIM ROGERS

PETITIONER

VS.

CAUSE NO. 2009-0034-CV

RICHARD CAIN, THE TOWN OF ACKERMAN,
MISSISSIPPI, and THE ELECTION COMMISSION
OF THE TOWN OF ACKERMAN, MISSISSIPPI

RESPONDENTS

MOTION TO DISMISS

Comes now, Richard Cain (hereinafter Cain) through counsel, and files this his Motion To Dismiss and as grounds would show the following:

1. MCA §23-15-963 sets forth the exclusion procedure to be followed when any person desires to contest the qualifications of another person who has qualified as a candidate for any office elected at a general election.
2. MCA §23-15-963(1) states that a person so desiring to contest the qualifications of another shall file a petition specifically setting forth the grounds of a challenge not later than thirty-one (31) days after the date of the first primary election with the same body with whom the candidate in question qualified.
3. Petitioner Tim Rogers notified the Election Commission of the Town of Ackerman on March 31, 2009 that he was challenging the qualifying Petition of Cain on grounds that Cain's qualifying Petition did not contain 50 signatures as required by law. (Exhibit A - March 31, 2009 letter to Election Commission)
4. MCA §23-15-963(2) provides that within ten (10) days of receipt of the Petition to challenge the appropriate elected officials shall meet and rule upon the Petition.

5. MCA §23-15-953(3) provides that if the appropriate election officials fail to rule upon the challenging Petition within the time required (10 days) such inaction shall be interpreted as a denial of the request for relief contained in the challenging Petition.

6. Counsel for Cain would show that there was no ruling on the challenging Petition within 10 days of the Election Commission's receipt of the challenging Petition. Since there was not ruling within the 10 day time frame all parties were on statutory notice that the failure to rule on the Petition was to be interpreted as a denial for the request for relief contained therein.

7. MCA §23-15-963(4) provides that any party aggrieved by the action or inaction of the appropriate election officials may file a Petition For Judicial Review to the Circuit Court of the county in which the election officials whose decision is being reviewed sits. Such Petition must be filed no later than fifteen (15) days after the date the challenging Petition was originally filed with the appropriate election officials. Counsel for Cain would show that Petitioner Tim Rogers' Petition For Judicial Review to the Circuit Court was filed on April 30, 2009 which is well beyond 15 days from the date the challenging Petition was originally filed with the appropriate election officials, i.e. March 31, 2009.

8. Accordingly, Petitioner Rogers' Petition For Judicial Review to this Circuit Court and his March 31, 2009 original challenging Petition to the Election Commission should be dismissed and all costs should be assessed against Petitioner Rogers.

Dated this the 14th day of May, 2009.

RICHARD CAIN, Respondent

Thomas Jones
THOMAS JONES, Attorney for Respondent
MS Bar #3193

OF COUNSEL:

Hugh Gibson, P.A.
P. O. Drawer G
Eupora, MS 39744
(662) 258-7855

CERTIFICATE OF SERVICE

I, Thomas Jones, attorney for the respondent, Richard Cain, do hereby certify that I have this day mailed by United States Mail, first class postage prepaid, a true and correct copy of the above and foregoing Motion To Dismiss to Peggy Reid Miller, Choctaw County Circuit Clerk, P. O. Box 34, Ackerman, MS 39735, Paul B. Watkins, Jr., Esq., Mayo, Mallette, PLLC, P. O. Box 1456, Oxford, MS 38655 and to James C. Mayo, Esq., Fair and Mayo, P. O. Box 509, Louisville, MS 39339.

This the 14th day of May, 2009.

Thomas Jones
THOMAS JONES

IN THE CIRCUIT COURT OF CHOCTAW COUNTY, MISSISSIPPI

TIM ROGERS

PETITIONER

VS.

CAUSE NO. 2009-0034-CV-L

**RICHARD CAIN, THE TOWN OF ACKERMAN,
MISSISSIPPI, and THE ELECTION COMMISSION
OF THE TOWN OF ACKERMAN, MISSISSIPPI**

RESPONDENTS

**MOTION FOR JUDGMENT ON THE PLEADINGS
AND/OR DISMISS**

COMES NOW, THE TOWN OF ACKERMAN, MISSISSIPPI and ELECTION COMMISSION OF THE TOWN OF ACKERMAN, MISSISSIPPI, by and through the undersigned counsel and files this, their Motion For Judgment on the Pleadings and/or Dismiss, and as grounds would show the following, to-wit:

1. The statute for any person desiring to contest the qualifications of a candidate in a general election is found in section 23-15-963 of the Mississippi Code Annotated. Sub-section 1 of that section requires the candidate to file the challenge no later than thirty-one days after the date of the first primary election with the same body whom the candidate in question qualified.
2. The first notice that THE TOWN OF ACKERMAN and THE ELECTION COMMISSION OF THE TOWN OF ACKERMAN received was a letter from counsel for the Petitioner dated March 31, 2009 (see Exhibit "A", which is attached hereto, incorporated herein by reference and made a part of this Motion). The second correspondence received was the Petition requesting a formal hearing, which was

dated April 6, 2009 (see Exhibit "B", which is attached hereto, incorporated herein by reference and made a part of this Motion).

3. THE TOWN OF ACKERMAN, MISSISSIPPI and it's ELECTION COMMISSION notified the Petitioner, the Respondents and the various attorneys that the hearing would be set for April 16, 2009, which was within ten days of the second Petition filed by the Petitioner (see Exhibit "C", which is attached hereto, incorporated herein by reference and made a part of this Motion).
4. However, at the request of the Petitioner and his attorneys, the hearing was rescheduled for April 21, 2009, due to their unavailability. A hearing was held on April 21, 2009, in which the Petition was denied.
5. On April 30, 2009, the Petitioner filed his Petition in Circuit Court that is the subject of the instant lawsuit.
6. Section 23-15-963 of the Mississippi Code Annotated sub-section 2 requires the election officials to meet and rule upon a Petition. The ELECTION COMMISSION attempted to do that and schedule it within the time as prescribed by Section 23-15-963, but was changed at the Petitioner's request due to their unavailability.
7. Section 4 of Section 23-15-963 requires any party who is aggrieved by the action or inaction of the appropriate election officials to file a petition no later than 15 days after the date the Petition was originally filed with the appropriate election officials. The Petition in this case was either filed on March 31st and/or April 6, 2009. The Petition filed in Circuit Court was not filed until April 30, 2009, which is either almost 30 days or 24 days after the Petition was originally filed. In either case, it is outside the 15 days as prescribed by the statute.

WHEREFORE, PREMISES CONSIDERED, the Respondents respectfully request that this honorable Court dismiss the Petition to Disqualify Candidate For Municipal Election that is before it and assess all costs against the Petitioner.

RESPECTFULLY SUBMITTED, this the 14 day of May, 2009.

THE TOWN OF ACKERMAN, MISSISSIPPI and
THE ELECTION COMMISSION OF THE TOWN
OF ACKERMAN, MISSISSIPPI,

RESPONDENTS

By: 

RODNEY P. FAVER, Attorney for
Respondents, MSB: 

WARD, ROGERS & FAVER, PLLC
121 N. JACKSON ST.
STARKVILLE, MS 39759
(662) 323-1912

CERTIFICATE OF SERVICE

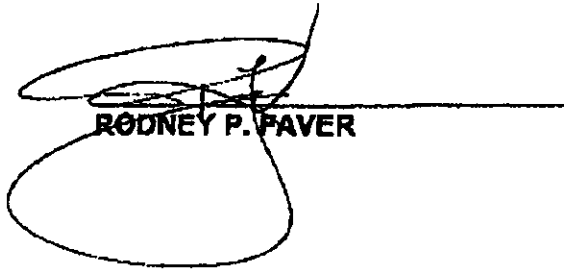
I, Rodney P. Faver, Attorney for Respondents, The Town of Ackerman, Mississippi and The Election Commission of The Town of Ackerman, Mississippi, do hereby certify that I have this day mailed, postage fully prepaid by first class mail a true and correct copy of the, **MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR DISMISS**, to the following:

MS PEGGY REID MILLER
CHOCTAW COUNTY CIRCUIT CLERK
P O BOX 34
ACKERMAN MS 39735

PAUL B WATKINS JR ESQ
MAYO MALLETTE PLLC
P O BOX 1456
OXFORD MS 38655

JAMES C MAYO ESQ
FAIR AND MAYO ATTORNEYS
P O BOX 509
LOUISVILLE MS 39339

This the 14 day of May, 2009.


RODNEY P. FAVER

FAIR & MAYO

Attorneys at Law
110 South Columbus Avenue
Post Office Box 509
Louisville, MS 39339

Charles D. Fair (1915-1988)
James C. Mayo

Telephone 662.773.3455
Facsimile 662.773.7661
Email jcmayor1@bellsouth.net

March 31, 2009

Ms. Ann Hand
664 Sides Ave.
Ackerman, MS 39735

Mr. Jimmy Irving
866 Sides Ave.
Ackerman, MS 39735

Mr. Grady Ervin
72 Irvin St.
Ackerman, MS 39735

IN RE: Challenge to Qualifying Petition of Richard L. (Dick) Cain

Dear Ms. Hand, Mr. Irving and Mr. Ervin:

You are put on notice that it is the intention of Tim Rogers to legally challenge the attached qualifying petition of Richard L. (Dick) Cain and asserts the petition does not meet requirements of Section 23-15-361, Miss. Code 1972. The petition does not contain fifty (50) signatures as required by law.

Therefore, my client, Tim Rogers, requests that Mr. Cain's name not be placed on the June 2009 General Election Ballot.

Respectfully submitted,

FAIR & MAYO, ATTORNEYS

BY: *James Mayo*
JCM/sjm
encls.

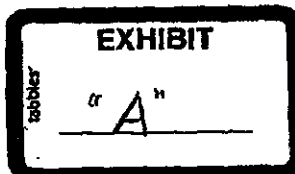
cc: Mr. Joe Griffin
Town Clerk, Ma. Debbie Cagle Boley

FILED

MAY 14 2009

PEGGY R. MILLER, CIRCUIT CLERK
BY *MBM* D.C.

11:25 a.m.



CERTIFICATE OF MAILING

I, RODNEY P. FAVER AND THOMAS JONES, Attorneys for Appellees, do hereby certify that we have this day caused to be hand delivered nine copies of the above and foregoing **APPELLEE'S BRIEF** to:

MS. BETTY W. SEPHTON, CLERK
MISSISSIPPI SUPREME COURT
P.O. BOX 249
JACKSON, MS 39205-0249

and further certify that this day a true and correct copy of the above and foregoing APPELLEES' BRIEF was mailed, via U.S. Mail postage prepaid, to:

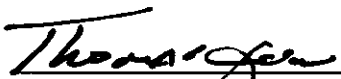
HONORABLE EDWARD PRISOCK
201 SOUTH JONES AVE.
LOUISVILLE, MS 39339

TIM ROGERS, APPELLANT
194 COMMERCE STREET
ACKERMAN, MS 39735

SO CERTIFIED on this the 22nd day of May, 2009.



RODNEY P. FAVER, MSB# [REDACTED]



THOMAS JONES, MSB# [REDACTED]