
IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**TOWN OF TERRY, MISSISSIPPI TEMPORARY
MUNICIPAL DEMOCRATIC EXECUTIVE
COMMITTEE; AND CEDRIC ABSTON**

APPELLANTS

VERSUS

CAUSE NO. 2009-EC-01109

**MARY SMITH, INDIVIDUALLY, AND IN HER
OFFICIAL CAPACITY AS CITY CLERK FOR
THE TOWN OF TERRY, MISSISSIPPI; AND
ELECTION COMMISSION OF THE TOWN
OF TERRY, MISSISSIPPI**

APPELLEES

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI**

BRIEF OF APPELLEES

Oral argument is not requested.

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CERTIFICATE OF INTERESTED PERSONS

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

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- II. Cedric Abston, Appellant;
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VIII. Honorable Swan Yerger, Circuit Court Judge

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STATEMENT OF THE ISSUES

- I. Whether the lower court erred in finding that the Town of Terry, Mississippi Temporary Democratic Executive Committee and Cedric Abston had notice of the Election Commission's decision and/or judgment on March 23, 2009.
- II. Whether the lower court erred in failing to apply Miss. Code Ann. § 11-51-93 to the proceedings below.

SUMMARY OF THE ARGUMENT

The trial court properly dismissed the plaintiff's Amended Complaint pursuant to the defendant's Motion to Dismiss because the plaintiff stated in their Complaint that they received notice of Abston's disqualification and attended the meeting with the Terry Election Commission on the March 23, 2009. Also, in their Amended Complaint the plaintiffs asserted that their sole relief was pursuant to Miss. Code Ann. § 11-51-75. This statute requires that a Bill of Exceptions be filed within ten (10) days of the decision that is to be appealed. No filings of any kind were made until forty six (46) days later and the Bill of Exceptions was not filed until sixty (60) days later. Therefore, the ruling of the trial court to sustain the defendants' Motion to Dismiss should be affirmed.

The Plaintiffs, for the first time on appeal, have asserted Miss. Code Ann. § 11-51-93 is the correct statute that should have been applied in the lower court. The plaintiffs' argument should be procedurally barred because it was not before the trial court. Therefore, the plaintiffs argument that the lower court should have applied Miss. Code Ann. § 11-51-93 is waived on appeal and the decision of the lower court to dismiss the plaintiff's Complaint should be affirmed.

ARGUMENT

I. Whether the lower court erred in finding that the Town of Terry, Mississippi Temporary Democratic Executive Committee and Cedric Abston had notice of the Election Commission's decision and/or judgment on March 23, 2009.

When there is no jury the trial judge sits as the trier of fact and is accorded the same deference in regard to his findings as that of a chancellor, and the reviewing court must consider the entire record and is obligated to affirm where there is substantial evidence in the record to support the trial court's findings. *City Of Newton v. Lofton*, 840 So.2d 833, 835-36 (Miss.Ct.App.2003). "The findings of the trial judge will not be disturbed unless the judge abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Id.*

Because the plaintiffs' counsel asserted that their remedy at law is provided for under Miss. Code Ann. § 11-51-75(Tr. 130) and the circuit judge agreed, the plaintiffs filed an Amended Complaint on May 22, 2009 alleging that they were entitled to judicial review solely by Miss. Code Ann. § 11-51-75. The Amended Complaint did not request relief from any other statutes.

Subsequently on May 26, 2009, the defendants filed a Motion to Dismiss, asserting among other issues, that the plaintiffs had not filed any pleadings or Bill of Exceptions within ten days from the March 23, 2009 meeting wherein the Election Commission disqualified Cedric Abston. Miss. Code Ann. § 11-51-75 states as

follows:

Any person aggrieved by a judgment or decision of the board of supervisors, or municipal authorities of a city, town, or village, may appeal within ten (10) days from the date of adjournment at which session the board of supervisors or municipal authorities rendered such judgment or decision, and may embody the facts, judgment and decision in a bill of exceptions which shall be signed by the person acting as president of the board of supervisors or of the municipal authorities. The clerk thereof shall transmit the bill of exceptions to the circuit court at once, and the court shall either in term time or in vacation hear and determine the same on the case as presented by the bill of exceptions as an appellate court, and shall affirm or reverse the judgment. If the judgment be reversed, the circuit court shall render such judgment as the board or municipal authorities ought to have rendered, and certify the same to the board of supervisors or municipal authorities. Costs shall be awarded as in other cases. The board of supervisors or municipal authorities may employ counsel to defend such appeals, to be paid out of the county or municipal treasury. Any such appeal may be heard and determined in vacation in the discretion of the court on motion of either party and written notice for ten (10) days to the other party or parties or the attorney of record, and the hearing of same shall be held in the county where the suit is pending unless the judge in his order shall otherwise direct.

Provided, however, that no appeal to the circuit court shall be taken from any order of the board of supervisors or municipal authorities which authorizes the issuance or sale of bonds, but all objections to any matters relating to the issuance and sale of bonds shall be adjudicated and determined by the chancery court, in accordance with the provisions of sections 31-13-5 to 31-13-11, both inclusive, of the Mississippi Code of 1972. And all rights of the parties shall be preserved and not foreclosed, for the hearing before the chancery court, or the chancellor in vacation. Provided, further, nothing in this section shall affect pending litigation.

The Plaintiffs claim that there is no evidence that supports the Court's finding that they attended the Election Commission meeting on March 23, 2009. The plaintiffs

further claim that there is no evidence regarding what date they received notice that Mr. Abston was disqualified as a candidate for Mayor. However, the plaintiffs' Amended Complaint, filed on May 22, 2009, clearly stated that the plaintiff, Mr. Cedric Abston, and his attorney, Mr. Hal Dockins, attended the meeting with the Election Commission on March 23, 2009. (R. 34-36) Furthermore, the plaintiffs' own complaint stated that they attended the March 23, 2009 meeting to dispute the disqualification of Abston's candidacy and they were told at the March 23, 2009 meeting the reasons why he was disqualified. (R. 34-36)

The Plaintiffs effectively plead themselves out of relief when they filed their Amended Complaint on May 22, 2009 (amending their original complaint filed on May 8, 2009) stating they received notice that the Election Commission disqualified Cedric Abston on March 23, 2009, and that they requested relief exclusively under Miss. Code Ann. § 11-51-75, which states that a Bill of Exceptions must be filed within ten days of the adjournment of the meeting wherein the decision was made in order to appeal that decision.

Liberally construing the statute in favor of the plaintiffs, they unequivocally had notice of Abston's disqualification at the March 23, 2009 meeting as it is stated in their Amended Complaint. Therefore, the March 23, 2009 meeting is the starting point from which to apply the ten (10) day time limit and, in order to comply with the statute, the

Bill of Exceptions had to be filed on or before April 2, 2009. However, the Bill of Exceptions was not filed until May 22, 2009, sixty (60) days after the March 23, 2009 meeting. Even if this Court determines that the original complaint qualifies as the Bill of Exceptions, the plaintiffs still failed to comply with Miss. Code Ann. § 11-51-75 as the complaint was filed on May 8, 2009, which is still forty six (46) days after the March 23, 2009 meeting and thirty six (36) days outside the ten (10) day time limit provided for under the statute.

The plaintiffs were noticed of Abston's disqualification of the plaintiff on March 23, 2009 and failed to initiate their appeal within ten days of that disqualification, pursuant to the statute. Therefore, the plaintiffs failed to timely file their appeal within the ten day time limit required in Miss. Code Ann. §11-51-75. Accordingly, this cause was properly dismissed, and the trial court's decision should be affirmed.

Motions to dismiss under either Mississippi Rule of Civil Procedure 12 or Rule 56 raise questions of law and are reviewed de novo. *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So.2d 1206, 1209-10 (Miss.2001). Rule 12(b)(6) tests the legal sufficiency of a complaint, and provides that dismissal shall be granted to the moving party where the plaintiff has failed to state a claim upon which relief can be granted. *Children's Med. Group, P.A. v. Phillips*, 940 So.2d 931, 934 (Miss.2006). "[I]n applying this rule 'a motion to dismiss should not be granted unless it appears beyond a

reasonable doubt that the plaintiff will be unable to prove any set of facts in support of the claim.’ ” *Id.* (quoting *Missala Marine Servs. v. Odom*, 861 So.2d 290, 294 (Miss.2003)).

Motions to dismiss under Rule 12(b)(6) are considered on the face of the pleadings alone. *Hartford*, 826 So.2d at 1211. “Quite differently, Rule 56 tests the notion of well-pled facts and requires a party to present probative evidence demonstrating triable issues of fact.” *Phillips*, 940 So.2d at 934 (quoting *Stuckey v. Provident Bank*, 912 So.2d 859, 865-66 (Miss.2005)). Accordingly, Rule 56(c) provides that summary judgment shall be rendered for the moving party “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” M.R.C.P. 56

Our Supreme Court has well established that “[u]nder certain conditions, motions for summary judgment and for judgment on the pleadings are interchangeable.” *Hartford*, 826 So.2d at 1213 (citing M.R.C.P. 12(c), and M.R.C.P. 56 cmt.) (permitting a motion for summary judgment to be converted into a judgment on the pleadings pursuant to Rule 12(c), finding that the circuit court did not consider matters beyond the pleadings); *Lawrence v. Evans*, 573 So.2d 695, 697 (Miss.1990) (citing M.R.C.P. 12(b)(6)); *Millican v. Turner*, 503 So.2d 289, 292 (Miss.1987);

Walton v. Bourgeois, 512 So.2d 698, 699-700 (Miss.1987); *Educ. Placement Serv. v. Wilson*, 487 So.2d 1316, 1320 (Miss.1986); *Kountouris v. Varvaris*, 476 So.2d 599, 602 n. 3 (Miss.1985). Under Rule 12(b)(6), where “matters outside the pleading are presented to *and not excluded by the court*,” a motion to dismiss must be treated as one for summary judgment. *Rosen v. Gulf Shores, Inc.*, 610 So.2d 366, 368 (Miss.1992) (quoting M.R.C.P. 12(b)(6)) (emphasis added). Conversely, where matters outside the pleadings *have been excluded by the trial court*, review may proceed pursuant to Rule 12(b)(6). *Favre Prop. Mgmt., LLC v. Cinque Bambini*, 863 So.2d 1037, 1044 (Miss.Ct.App.2004)

In *Koestler v. Mississippi College* 749 So.2d 1122 (Miss.App.,1999), the court found that the language of Rule 12 granting a respondent to a motion to dismiss, subsequently converted to a summary judgment motion, an opportunity to present further material is not self-executing. A litigant desiring to avail herself of the right to present more evidentiary material has an affirmative duty to timely raise the issue with the trial court or be deemed to have waived objection to the court proceeding on the motion. *MST, Inc. v. Miss. Chemical Corp.*, 610 So.2d 299, 305 (Miss.1992). In *MST, Inc.*, the Mississippi Supreme Court pointed out that Rule 56(f) provides that a party opposing a summary judgment motion who “cannot for reasons stated present by affidavit facts essential to justify his opposition ...” must file an affidavit to that effect

in order to claim her right to a continuance to obtain such affidavits or to pursue further discovery. *Id.*

Even though the trial court admitted the minutes of the Terry Election Commission into evidence (Tr. 219), which corroborates the assertion in the Plaintiffs' Complaint that Cedric Abston and his attorney were present at the Election Commission meeting when Abston was disqualified, the trial judge could just as easily made that determination from reading the plaintiffs' Complaint. In the Judge's ruling on the record, he did not indicate whether he had considered any outside evidence in making his determination to sustain the defendants' Motion to Dismiss because the appeal exceeded the ten day time limit.

In conclusion, the trial court relied on the assertion of the plaintiffs in finding that the plaintiffs were given notice of Abston's disqualification on March 23, 2009. Despite the plaintiffs assertions in their brief to this Court that there was nothing to support such a finding, it is clear that the trial court's finding was based upon the pleading that the plaintiffs themselves filed. Therefore, the ruling of the lower court dismissing the plaintiffs' complaint should be affirmed.

II. Whether the lower court erred in failing to apply Miss. Code Ann. § 11-51-93 to the proceedings below.

In the Plaintiffs' original Complaint, they sought relief under Miss. Code Ann.

§ 23-15-961 and other applicable statutes. In response, the defendants filed a motion to dismiss because that statute does not apply to the facts at hand. The trial court agreed and the plaintiffs then asserted to the court that the appropriate statute is Miss. Code Ann. § 11-51-75. (Tr.130) The Judge agreed and allowed the plaintiffs to file an amended complaint on May 22, 2009. Also, the Judge advised the plaintiffs that there is a required Bill of Exceptions that must be filed pursuant to Miss. Code Ann. § 11-51-75. Subsequently, the defendants filed a new Motion to Dismiss stating that the plaintiffs did not have a claim because the ten day time limit had expired. The Judge agreed and the case was finally dismissed.

At no point in the pleadings, the record, or any exhibits or evidence did the plaintiffs assert Miss. Code Ann. § 11-51-93 as the correct statute for the action. The first time this argument has been offered is now, on appeal and it should be procedurally barred. Any argument that Miss. Code Ann. § 11-51-93 is the correct statute has been waived, because it was not presented at the lower court.

The Court in *Crowder v. State*, 850 So.2d 199, 200 (Miss. App. 2003) stated that “a litigant cannot, as a general rule, raise issues for the first time on appeal. Rather, an appellate court's proper function is to detect and deal with errors committed by the trial court in the conduct of the proceeding in that court. *Robinson v. State*, 758 So.2d 480, 490 (Miss.Ct.App.2000). In the situation where the trial court had no opportunity to

deal with an issue, there can be no resulting error to be dealt with at the appellate level.

Even if this Court determines that the plaintiffs have not waived their opportunity to travel under Miss. Code Ann. § 11-51-93, this statute does not apply to the facts at hand. Miss. Code Ann. § 11-51-93 states as follows:

All cases decided by a justice of the peace, whether exercising general or special jurisdiction, may, within six months thereafter, on good cause shown by petition, supported by affidavit, be removed to the circuit court of the county, by writ of certiorari, which shall operate as a supersedeas, the party, in all cases, giving bond, with security, to be approved by the judge or clerk of the circuit court, as in cases of appeal from justices of the peace; and in any cause so removed by certiorari, the court shall be confined to the examination of questions of law arising or appearing on the face of the record and proceedings. In case of an affirmance of the judgment of the justice, the same judgment shall be given as on appeals. In case of a reversal, the circuit court shall enter up such judgment as the justice ought to have entered, if the same be apparent, or may then try the cause anew on its merits, and may in proper cases enter judgment on the certiorari or appeal bond, and shall, when justice requires it, award restitution. The clerk of the circuit court, on the issuance of a certiorari, shall issue a summons for the party to be affected thereby; and, in case of nonresidents, he may make publication for them as in other cases.

This statute applies to all decisions from justice courts. The plaintiffs are aggrieved by the decision of the Town of Terry Election Commission.

In conclusion, the plaintiffs argument that Miss. Code Ann. § 11-51-93 should have been applied at the lower court is patently invalid because it was never raised at the lower court. The plaintiffs asserted to the trial judge that Miss. Code Ann. § 11-51-75 was the correct statute for relief. The plaintiffs filed their amended complaint citing

only Miss. Code Ann. § 11-51-75 as authority for the relief sought. And now, for the first time, the plaintiffs are asserting Miss. Code Ann. § 11-51-93 is the correct statute that should have been applied. The plaintiffs' argument should be procedurally barred because it was not before the trial court. Therefore, the plaintiffs argument that the lower court should have applied Miss. Code Ann. § 11-51-93 is waived on appeal and the decision of the lower court to dismiss the plaintiff's complaint should be affirmed.


CONCLUSION

For the foregoing reasons, Appellee's request this honorable Court to affirm the decision of the lower court in dismissing the plaintiff's complaint.

Respectfully submitted,

MARY SMITH, INDIVIDUALLY, AND IN HER OFFICIAL CAPACITY AS
CITY CLERK FOR THE TOWN OF TERRY, MISSISSIPPI; AND ELECTION
COMMISSION OF THE TOWN OF TERRY, MISSISSIPPI

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CERTIFICATE OF SERVICE

I, J. Kurt Guthrie attorney for Appellees, do hereby certify that I have this date mailed in the United States Mail, postage fully prepaid, a true and correct copy of the foregoing to:

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This the 23rd day of April, 2010.



J. Kurt Guthrie