

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Town of Terry, Mississippi Temporary  
Municipal Democratic Executive  
Committee; and, Cedric Abston,  
Individually

Appellants

Vs.

Cause No.: 2009-EC-01109

R+

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

**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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- VI. Election Commission of the Town of Terry, Mississippi,  
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- VIII. Honorable Swan Yerger  
Hinds County Circuit Court Judge  
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**TABLE OF CASES AND AUTHORITIES**

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## **STATEMENT OF THE ISSUES**

The issues that this Court should resolve on appeal are:

1. Whether the lower court erred in finding that the Town of Terry Temporary Municipal Democratic Executive Committee and Cedric Abston had legally sufficient notice of the Election Commission's meeting or decision rendered on March 23, 2009 sufficient to invoke the statute of limitations against them.
2. 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, by Order of May 22, 2009, *directed* the Plaintiffs to file their Amended Complaint pursuant to Miss. Code Ann. § 11-51-75. R. at 82, 83. The naming of this particular statute was not at the insistence of the Plaintiffs, who in their original Complaint, and at all times during the proceedings, used the words “and all other applicable statutes” in all of their pleadings. Miss. Code Ann. § 11-51-75 was placed before the Court as dispositive of the proceedings pursuant to the Court’s specific Order. Further, Appellees erroneously assert in their Brief that “in their Amended Complaint the plaintiffs asserted that their sole relief was pursuant to Miss. Code Ann. § 11-51-75.” Appellees’ Brief page 2. This language *does not appear in the Plaintiffs’ Amended Complaint*. R. at 29, 30.

Appellees also misconstrue the facts surrounding the March 23, 2009 meeting with the Terry Municipal Election Commission. Terry Johnson, the Chairperson of the Terry Democratic Party, was not present at the March 23, 2009 meeting.

At the March 23, 2009 meeting, after argument by his counsel, Mr. Abston was advised that his earlier residency disqualification was withdrawn. Mary Smith stood up in the meeting and declared that: “ok, he is a Terry resident, so we are not saying that he is disqualified anymore; we’re just saying the Democratic Party wasn’t formed right.” T.T. at 161. There were no written notices given to Abston, at or following the March 23, 2009 meeting, from which to take exception or file a Bill of Exceptions. The meeting minutes of the Town of Terry Election Commission were given to Mr. Abston and the TTMDEC *for the first and only time at the proceedings below*. (T.T. at 161)

Further, Appellee's application of *Crowder v. State* 850 So.2d 199 (Miss. App. 2003) is misapplied. *Crowder* stands for the proposition that, as a general rule a litigant cannot raise issues for the first time on appeal. *Id.* Appellants are not raising a new issue, but raised the same issue as raised in their initial pleadings and at the trial court. Appellants plead in their initial pleadings and argued at the trial court that Appellees, without authority of law, disqualified the TTMDEC and Cedric Abston. (R. at 36). Appellants reference to the proper statute is not raising a new issue for appeal. Further, Mississippi is a notice pleading state. *Bedford Health Properties, LLC v. Estate of Williams*, ex. Rel., 946 So.2d 335, 350. All that is required is that the pleadings provide sufficient notice to the defendant of the claims and grounds upon which relief is sought. *Id.* Appellants initial pleading and arguments at the lower court provided sufficient notice to Appellees of the claims and grounds upon which relief is sought. Pursuant to *Bedford* and *Crowder*, Appellants reference to the proper statute in its brief does not bar Appellants from asserting it on appeal, as this is not a new issue merely a citation to the correct statute.

Moreover, the circuit court erred in finding that TTMDEC and Abston had notice of the Election Commission's "decision" of March 23, 2009. There is no evidence placed in the record with respect to when the TTMDEC or Abston received notice of the Election Commission's decision to disqualify the TTMDEC, therefore disqualifying Abston. Rather, the only evidence placed in the record was an **undated letter** to Terry Johnson, stating that the TTMDEC was disqualified, and therefore Abston was disqualified as its candidate. R. at 15-16.

The circuit court further erred when it held that the Appellants must travel under Miss. Code Ann. § 11-51-75 in order to obtain relief from the court. Appellants filed their Petition for Judicial Review under Miss. Code Ann. § 23-15-961, and other applicable statutes. R. at 1. The Mississippi Supreme Court in *Crider v. Howard*, 295 So.2d 776 (Miss.1974) held that where a petition for judicial review of election did not comply with the statute requiring bill of exceptions to be filed, but did set out facts which raised question of law as to the validity of the election, the trial court should have treated the petition as an application for writ of certiorari under Miss. Code Ann. §11-51-93. If all other essentials for an appeal by certiorari were met within the time required by law pursuant to *Crider*, the trial court should have granted a hearing on questions of law shown by the record. *Crider v. Howard*, 295 So.2d 776 (Miss.1974). Accordingly, the lower court should have applied Miss. Code Ann. §11-51-93.

### **STANDARD OF REVIEW**

The lower court heard this matter without a jury. Therefore, a circuit judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor, and his findings are safe on appeal when they are supported by substantial, credible, and reasonable evidence. *City of Jackson v. Perry*, 764 So.2d 373, 376 (Miss.2000). The circuit judge's findings will not be disturbed unless they are manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Id.* The appellate court reviews errors of law *de novo*, including the proper application of statutes. *City of Jackson v. Brister*, 838 So.2d 274, 278 (Miss.2003). As such, an appellate court reviews the trial judge's application of Miss. Code Ann. §§ 23-15-961 and 11-51-75 *de novo*.



## ARGUMENT

### I. **Whether the lower court erred in finding that TTMDEC and Abston had notice of the Election Commission's decision and/or judgment on March 23, 2009.**

Miss. Code Ann. § 11-51-75 provides that 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 of municipal authorities rendered such judgment or decision.

Miss. Code Ann. § 11-51-75. The circuit court committed error when it ruled that Appellants were noticed of the Town of Terry Election Commission's decision to disqualify both TTMDEC and Abston on March 23, 2009. Therefore Appellants Petition for Judicial Review was barred by the ten days as referenced in Miss. Code Ann. § 11-57-75.

Not only are the trial judge's findings in the case at bar not supported by substantial, credible, and reasonable evidence; the trial judge's findings are not supported by *any evidence* in the record and/or trial transcript. Likewise, the only evidence in the record and/or trial transcript is an **undated letter** from the City Clerk and the Election Commission, purportedly copied to Abston, that allegedly disqualifies the TTMDEC as well as its candidate, Cedric Abston. R. at 15-16.

The lower court made the ruling without hearing any evidence from Cedric Abston or TTMDEC with respect to when they received notice of their alleged disqualification. The only purported evidence placed in the record with respect to when Appellants received notice, was counsel for Appellees' statement in the record that the alleged meeting of the Town of Terry Election Commission was adjourned on March 23, 2009. T.T. at 159. There was no evidence in the record that the TTMDEC was even at

the March 23, 2009 meeting. Certainly, an undated letter is not sufficient evidence when notice was provided to the TTMDEC or Abston.

Therefore the trial judge's finding that TTMDEC and Abston received notice on March 23, 2009 is manifestly wrong and clearly erroneous. Pursuant to Mississippi case law, the lower court committed error, as there is no evidence in the record that supports its finding.

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

This matter is an appeal from a disqualification of an elector, namely Cedric Abston, who became aware of his disqualification officially only when he learned his name was not being placed on the June 2, 2009 ballot as a candidate of the TTMDEC.<sup>1</sup> Abston filed his Petition for Judicial Review shortly thereafter, on May 8, 2009.

In its Final Judgment, the trial court incorrectly applied Miss. Code Ann. §11-51-75 (Appeals from judgments or decisions by municipal authorities), to the proceedings below. Miss. Code Ann. §11-51-75 is not applicable to appeals from municipal election commission decisions, but rather to appeals from other municipal authorities and bodies. After incorrectly applying §11-51-75 to the proceedings, the court then applied §11-51-75's statute of limitations. Miss Code Ann. §11-51-75 statute of limitations is ten (10), rather than *six (6) months*, as mandated by the applicable statute, Miss. Code Ann. §11-51-93. In applying the incorrect statute of limitations, the trial court then found that Abston's appeal to the circuit court by bill of exceptions was untimely. This however, is

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<sup>1</sup> Abston officially received notice sometimes shortly thereafter by undated letter approximately two weeks before the final election.

contradictory as the lower court ordered that Appellants file a bill of exceptions by May 22, 2009.

As decided in *Crider v. Howard*, 295 So.2d 776 (Miss.1974), Miss. Code Ann. §11-51-93 specifically refers to appeals from adverse municipal election commissions. In *Crider*, the Supreme Court stated as follows:

“....the petition does set out facts which raise a question of law as to the validity of the challenged election, and was n fact a good faith effort to appeal to the circuit court. The trial court should have treated the petition as an application for a writ of certiorari, and, if all other essentials for an appeal by certiorari were met with in the time required by law [Mississippi Code Annotated §11-51-93 (1972)]. The trial court should have granted a hearing on questions of law shown by the record ordered to be brought up by certiorari. If the record brought up to the circuit court revealed errors of law, the court then could have permitted such amendments as it deemed necessary to bring the legal issues fairly before the court determination.”

The facts in *Crider* are almost identical to the facts of the case at bar. The Mississippi Supreme Court in *Crider* held that where a petition for judicial review of election did not comply with the statute requiring bill of exceptions to be filed; but did set out facts which raised question of law as to the validity of the election, the trial court should have treated the petition as an application for writ of certiorari. *Crider*, 295 So.2d 776. As held in *Crider*, if all other essentials for an appeal by certiorari were met within the time required by law, the trial court should have granted a hearing on questions of law shown by the record. *Crider*, 295 So.2d 776.

Accordingly, the trial court erred in applying Miss. Code Ann. § 11-51-75 and rather should have applied Miss. Code Ann. § 11-51-93 to the case at bar.

## CONCLUSION

Appellee's application of *Crowder v. State* is misapplied. *Crowder* stands for the proposition that, as a general rule a litigant cannot raise issues for the first time on appeal. *Id.* Appellants are not raising a new issue, but raised the same issue as raised in their initial pleadings and at the trial court. Further, Mississippi is a notice pleading state. *Bedford Health Properties, LLC v. Estate of Williams*, ex. Rel., 946 So.2d 335, 350. Appellants initial pleading and arguments at the lower court provided sufficient notice to Appellees of the claims and grounds upon which relief is sought. Pursuant to *Bedford* and *Crowder*, Appellants reference to the proper statute in its brief does not bar Appellants from asserting it on appeal, as this is not a new issue merely a citation to the applicable statute.

For the above reasons, Appellants request that this Court reverse the lower court's ruling and render a judgment in favor of Appellants. Specifically, Appellants respectfully submit that this Court should reverse and remand, so that the lower court must make a finding as to notice given to TTMDEC and Abston. In addition this Court should reverse and render the lower court's decision, specifically finding that the lower court apply the appropriate statute, Miss. Code Ann. §11-51-93. Finally, Appellants respectfully request that this Court:

- 1) void the June 2, 2009 mayorial election;
- 2) order a new election for mayor of the Town of Terry to include the candidates (specifically Cedric Abston and the current mayor) party affiliations as they so qualified;
- 3) that the new mayorial election be limited to Cedric Abston and the independent candidate for mayor; and

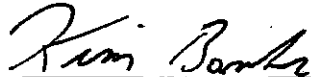
- 4) declare that Cedric Abston is the sole democratic party nominee for mayor of the Town of Terry Mississippi, as he was unopposed in what should have been the general election.

**RESPECTFULLY SUBMITTED**, this the 1<sup>st</sup> day of June, 2010

Town of Terry, Mississippi Temporary  
Municipal Democratic Executive Committee  
and Cedric Abston, Individually



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**ACKNOWLEDGEMENT OF RECEIPT**

The undersigned Capitol Security Police certifies that he/she received the original and three copies of Appellant's Brief on this the 1<sup>st</sup> day of June, 2010.

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CAPITOL SECURITY POLICE

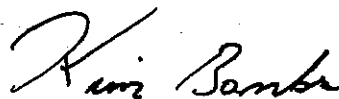
**CERTIFICATE OF SERVICE**

I, Halbert E. Dockins Jr. and Kimberly C. Banks, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Appellants Reply Brief on the following:

James Kurt Guthrie, Esq.  
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This the 1<sup>st</sup> day of June, 2010.

  
\_\_\_\_\_  
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