

2015-CA-01645-SCT

IN THE SUPREME COURT OF MISSISSIPPI

**TUNICA COUNTY BOARD OF
SUPERVISORS**

APPELLANT

VERSUS

HWCC-TUNICA, LLC

APPELLEE

**APPEAL FROM THE
CIRCUIT COURT OF TUNICA COUNTY, MISSISSIPPI**

**SUPPLEMENTAL BRIEF OF APPELLANT TUNICA COUNTY BOARD
OF SUPERVISORS**

ORAL ARGUMENT REQUESTED

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COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

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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:

1. Tunica County Board of Supervisors, appellant.
2. Julian D. Miller, Butler Snow LLP, counsel for appellant.
3. Melvin D. Miller, II, counsel for appellant.
4. HWCC-Tunica, LLC, appellee.
5. A. Thomas Tucker, III, counsel for appellee.
6. The Honorable Charles E. Webster, Tunica County Circuit Court Judge.
7. The Honorable Jim Hood, State of Mississippi Attorney General

THIS 19th day of May, 2017.

/s/ Julian D. Miller

Julian D. Miller
Counsel of Record

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INTRODUCTION

This Court has requested supplemental briefs addressing whether the signature requirement of the board president for the bill of exceptions of Miss. Code Ann. § 11-51-75 is jurisdictional or procedural, and if it is found to be procedural, whether or not it violates the separation of powers doctrine of the Mississippi Constitution. Based on long-standing and well-settled Mississippi law, the requirement is jurisdictional and constitutional.

Furthermore, while the constitutionality of this statute under the separation of powers doctrine was not raised by the parties in the trial court, this Court still has jurisdiction to review this issue based on its requirement of supplemental briefs by the parties through an order of the Court. *See Wimley v. Reid*, 991 So.2d 135, 138–39 (Miss. 2008) Therefore, pursuant to Mississippi Rule of Appellate Procedure 44(c), this Court, by requiring supplemental briefing from the parties as well as the Attorney General, can proceed with the consideration and ultimate resolution of this constitutional issue.

SUMMARY OF THE ARGUMENT

As a general matter, most courts in Mississippi have concluded the requirement under Miss. Code Ann. § 11-51-75 that the bill of exceptions be signed by the President of the Board of Supervisors is a jurisdictional prerequisite that cannot be omitted. *See Wilkinson Cnty. Bd. of Supervisors v. Quality Farms Inc.*, 767 So.2d 1007, 1011 (¶11) (Miss.2000); *Yandell v. Madison County*, 79 Miss. 212, 30 So. 606 (Miss. 1901); *see also City of Jackson v. Varia, Inc.*, 133 So.2d 16 (Miss. 1961).

But even if the Court now determines the requirement to be a procedural device, the requirement still does not infringe on the Court's inherent authority to promulgate procedural rules. In *Newell v. State*, 308 So.2d 71, 78 (Miss.1975), following a well-established line of precedent, the Supreme Court of Mississippi reiterated that "as long as rules of judicial procedure enacted by the legislature coincide with fair and efficient administration of justice, the Court will consider them in a cooperative spirit to further the state's best interest[...]." The signature requirement of the bill of exceptions in no way conflicts with the Mississippi Rules of Civil or Appellate Procedure.

Most importantly, because the court ultimately interprets and applies the statutory jurisdictional requirements, there is no way this Court could render a finding that the signature requirement of the bill of exceptions violates the

separation of powers doctrine of the Mississippi Constitution. The overlap of the judicial and legislative branches is both inevitable and legally permissible. And the Court, understanding the necessity of that overlap to the administration of justice, errs on the side of avoiding the finding of most statutory requirements to be an unconstitutional encroachment on the court's rule-making authority. Such a finding is warranted in this case regarding the signature requirement of the bill of exceptions.

ARGUMENT

I. Standard of Review

In considering the constitutionality of a legislative enactment, this Court recognizes that duly enacted statutes and laws have a strong presumption of constitutionality, and that the party challenging the constitutionality of a law must prove beyond a reasonable doubt that the law is in “palpable conflict with some plain provision of the constitution.” *Hemba v. Mississippi Dep't of Corr.*, 998 So. 2d 1003, 1005 (Miss. 2009) (citing *Oxford Asset Partners, LLC v. City of Oxford*, 970 So.2d 116, 120 (Miss.2007) (citing *In Interest of T.L.C.*, 566 So.2d 691, 696 (Miss.1990)). This Court will invalidate a statute on constitutional grounds only “where it appears beyond all reasonable doubt that such statute violates the constitution.” *Id.* (citing *Richmond v. City of Corinth*, 816 So.2d 373, 375 (Miss.2002)).

“In determining whether an action of the Legislature violates the Constitution, the courts are without the right to substitute their judgment for that of the Legislature as to the wisdom and policy of the act and must enforce it, unless it appears beyond all reasonable doubt to violate the Constitution.” *State v. Bd. of Levee Comm’rs*, 932 So. 2d 12, 19 (Miss. 2006). “[O]ne who assails a legislative enactment must overcome the strong presumption of validity and such assailant must prove his conclusions affirmatively, and clearly establish it beyond a reasonable doubt. All doubts must be resolved in favor of validity of a statute.” *Id.* at 19-20 (quoting *Cities of Oxford, Carthage, Starkville and Tupelo v. Northeast Elec. Power Ass’n*, 704 So. 2d 59, 65 (Miss. 1997).

II. The constitution gives the legislature the authority to prescribe the appellate jurisdiction of the circuit court.

The Mississippi Constitution of 1890 gives the legislature authority over court jurisdiction. Under Section 146, this Court shall exercise “no jurisdiction on matters other than those specifically provided by this Constitution or by general law.” And with respect to Circuit Court jurisdiction, Section 156 it says:

The circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by the Constitution in some other court, *and such appellate jurisdiction as shall be prescribed by law.*

This direct delegation in the Constitution to the legislature of the authority to specify appellate jurisdiction of the circuit courts necessarily carries with it the

authority to determine how that jurisdiction shall be exercised. There is no separation of power issue presented by its exercise of that authority.

III. The signature requirement of Miss. Code Ann. § 11-51-75 is jurisdictional, not procedural.

The bill of exceptions statutory requirements, specifically the requirement that bill of exception be signed by the President of the county Board of Supervisors or municipal Board of Aldermen, are fundamentally jurisdictional. Failure to meet those requirements could preclude the circuit court from having jurisdiction to hear the appeal. Mississippi Code Annotated Section 11-51-75 is a jurisdictional statute. It gives the circuit court jurisdiction over appeals from boards of supervisors and specifies how the appeal is to be taken. It provides:

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.

(emphasis added)

It is well-settled law in Mississippi that “[a] proper bill of exceptions on appeal is necessary to confer jurisdiction on the appellate court.” *Carthan v. Patterson*, 134 So. 3d 374, 377 (¶9) (Miss. Ct. App. 2014) (quoting *Wilkinson Cnty. Bd. of Supervisors v. Quality Farms Inc.*, 767 So.2d 1007, 1011 (¶11) (Miss.2000)); see also *McKee v. City of Starkville*, 97 So.3d 97, 100 (¶9) (Miss. Ct. App. 2012); *Pruitt v. Zoning Bd. of City of Laurel*, 5 So.3d 464, 469 (¶16) (Miss. Ct. App. 2008). Specifically, a bill of exceptions not signed by the county board of supervisor’s board president is incomplete and fatally defective, and therefore, the circuit court lacks jurisdiction to hear the matter. *Wilkinson, supra*, at 1012 (¶14); see also *City of Jackson v. Varia, Inc.*, 241 Miss. 705, 133 So. 2d 16 (Miss. 1961) (circuit court lacked jurisdiction to reverse action of city council denying permit to maintain house trailer on premises when bill of exceptions was signed by one of

applicant's attorneys instead of by mayor and when it was not approved by mayor or commissioners); *Cox v. Board of Sup'rs of Madison County*, 290 So. 2d 629, 630 (Miss. 1974) (petition for appeal from order of board of supervisors of county was lacking a bill of exceptions, circuit court had no jurisdiction to reverse action of board). “Non-compliance with section 11–51–75 is not a [‘]procedural issue[’] that may be ignored. Instead, compliance is [‘]mandatory and jurisdictional.[’]” *Howell v. Board of Supervisors of Jefferson Davis County*, 70 So.3d 1148, 1153 (¶ 13) (Miss. Ct. App. 2011) (citing *Newell v. Jones County*, 731 So. 2d 580, 582 (¶ 10) (Miss. 1999)); *see also Stewart v. City of Pascagoula*, 206 So.2d 325, 328 (Miss. 1968) (establishing “[a] proper bill of exceptions on appeal is necessary to confer jurisdiction on the appellate court”).

It is clear from the law that the bill of exceptions signature requirement of Section 11-51-75 is a jurisdictional requirement. Section 11-51-75 is a jurisdictional statute governing appeals from a decision of a governmental body to the trial court, sitting as an appellate court. Mississippi law is clear that it is the “[l]egislature [that] has the constitutional power to determine our appellate jurisdiction....” *Jones v. City of Ridgeland*, 48 So.3d 530, 536 (¶10) (Miss. 2010) (citing Miss. Const. art. 6, §§ 144, 146). A party has no right to appeal an administrative agency's decision except where the Legislature has expressly conferred such a right. *5K Farms, Inc. v. Mississippi Dep't of Revenue*, 94 So. 3d

221, 227 (¶22) (Miss. 2012) (citing *Gill v. Miss. Dep't of Wildlife Conservation*, 574 So.2d 586, 590 (Miss.1990)).

Furthermore, as Justice Dickinson aptly noted in his dissenting opinion, “[w]ith only a few very limited exceptions, the only reason the circuit court may hear appeals from inferior courts—and the only reason this Court may hear civil-damages appeals and criminal appeals—is because the Legislature confers the jurisdiction to do so.” *Jackson v. Bell*, 123 So. 3d 436, 444 (¶33) (Miss. 2013); *see also Casino Magic Corp. v. Ladner*, 666 So.2d 452, 456 (Miss.1995) (“A right of appeal is statutory.”) (quoting *Bickham v. Dep't of Mental Health*, 592 So.2d 96, 97 (Miss.1991)); *Miller Transporters Ltd. v. Johnson*, 252 Miss. 244, 249, 172 So.2d 542 (1965) (“The right to appeal is a statutory privilege, granted and defined by the legislature.”); *McMahon v. Milam Mfg. Co.*, 237 Miss. 676, 115 So.2d 328, 330 (Miss.1959) (“Appeals are regulated by statute, and only lie in cases provided by statute.”) (citing *State ex rel. Brown v. Poplarville Co.*, 119 Miss. 432, 81 So. 124 (1919); *Jones v. Cashin*, 133 Miss. 585, 98 So. 98 (1923); *Craig v. Barber Bros. Contracting Co.*, 190 Miss. 182, 199 So. 270 (1940)); *Jackson v. Gordon*, 194 Miss. 268, 11 So.2d 901 (1943) (“Appeals are matters of right, and are allowable only in cases provided by statute.”).

The bill of exceptions signature requirement is necessary for the circuit court to have appellate jurisdiction over an appeal of the decision by a county board of

supervisors as mandated by the legislature. *Alias v. City of Oxford*, 70 So.3d 1114, 1117 (¶ 12) (Miss. Ct. App. 2010) (“when a circuit court sits as an appellate court, and not as a court of general jurisdiction, the jurisdiction provided by section 11–51–75 is akin to subject-matter jurisdiction and cannot be waived”). Like appellate bonds for statutory appeals of decisions of the Department of Revenue to the chancery court in *5k Farms*, this Court should find that the bill of exceptions signature requirement is likewise jurisdictional. *5K Farms, supra*, at 228-29 (¶27).

Further, this case is distinguishable from previous cases where this Court found statutory requirements for filing lawsuits to be procedural as opposed to jurisdictional. In *Wimley v. Reid*, 991 So.2d 135, 138–39 (Miss. 2008), this Court held that Section 11-51-58, which requires plaintiffs bringing a medical malpractice claim to attach to the complaint a certificate from their attorney verifying consultation with a medical expert is procedural, since it required the dismissal of lawsuits that were in full compliance with the Mississippi Rules of Civil Procedure.

Wimley is distinguishable from the case at bar, as this case involves an appeal from a county board decision to the trial court, an appeal the constitution gives the legislature the right to regulate. And the statutory requirements for appeal do not conflict with any court rule. As this Court has held, the rules of civil procedure do not apply to appeals from governmental bodies. *City of Jackson v.*

United Water Services, Inc., 47 So.3d 1160, 1162 (Miss. 2010). Rule 5.04 of the Uniform Rules of Circuit and County Court only applies to appeals from a “lower court,” not to appeals from a “lower authority.” See U.R.C.C.C. 5.02 (distinguishing “lower court” from “lower authority”). And the Mississippi Rules of Appellate Procedure also do not apply by their terms to appeals to from lower authorities to trial courts, Miss. R. App. P. 1, except as they may have been adopted, U.R.C.C.C. 5.06. Likewise, in *Jones v. Ridgeland*, 48 So. 3d 530, 537 (Miss. 2010), this Court found Section 11-51-81, the so-called “three-court rule” which precluded parties from appealing decisions from justice and municipal courts to the county, circuit and supreme courts, to be procedural. This statute, however, is distinguishable from the case at bar. The bill of exceptions statute limits the circuit court’s jurisdiction regarding judicial review of municipal authorities within the executive branch as well as of a county board of supervisors.

This Court should apply its long-standing precedent that appellate jurisdiction is in the purview of the Legislature, statutory requirements to perfect a circuit court appeal are jurisdictional, and hold that the signature requirement of the bill of exceptions statute in this case is likewise jurisdictional.

IV. Even if the Court found the signature requirement of the bill of exceptions statute to be procedural, it would still be constitutional.

The signature requirement of the bill of exceptions of Section 11-51-75 is fundamentally jurisdictional, as it relates to the appellate jurisdiction of the circuit

court to provide judicial review of a decision by a county board of supervisors.

However, even if this Court finds the signature requirement to be procedural, it still would not violate the separation of powers doctrine of the Mississippi Constitution.

The Mississippi State Constitution provides, “[t]he powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive another.” MS Const. Art. 1, § 1. This Court has held that the Mississippi Constitution vests in this Court the “inherent power ... to promulgate procedural rules....” *Newell v. State*, 308 So.2d 71, 76 (Miss.1975) (citations omitted). This holding rests on the “fundamental constitutional concept of the separation of powers” defined in Article 1, Sections 1 and 2, and Article 6, Section 144. *Id.* at 77.

This Court’s holding in *Newell*, however, came with the caveat that “as long as rules of judicial procedure enacted by the legislature coincide with fair and efficient administration of justice, the Court will consider them in a cooperative spirit to further the state's best interest.” *Newell*, 308 So.2d at 78. In other words, *Newell* acknowledged that, because the Legislature is constitutionally charged with

enacting the laws of this state¹ and that the court system is charged with administering those laws, there will be inherent overlap between the two branches of government. And such overlap would be legally permissible.

This Court has long recognized that the separation of powers doctrine by no means establishes that the Legislature is precluded from all matters involving Mississippi's court system. In *Matthews v. State*, 288 So.2d 714, 715 (Miss. 1974), one year before the *Newell* decision, when faced with the question of whether the legislature could impose a requirement upon the court to hear no more than ten days after an appeal from a dismissal of a petition for writ of error *coram nobis*, this Court held, “[t]he Supreme Court is in the best position to determine what particular cases should be advanced over other cases on the docket, but legislative suggestions concerning procedural rules will be followed unless they are unreasonable or impracticable.”

Similarly, in *Alexander v. State ex rel. Allain*, 441 So. 2d 1329, 1336 (Miss. 1983) (overruled on other grounds), the Mississippi Supreme Court acknowledged that complete separation of legislative and judicial authority would not always be possible, stating “there will be areas in which the functions of the separate bodies will clash with the idealistic concept of separation of powers.”

¹ As the law-making body of the State of Mississippi, the Legislature has authority to create substantive law, and the Court has long recognized that the Legislature has "all political powers not withheld in [Mississippi's] Constitution, or in conflict with the Constitution of the United States." *Hinton v. Perry Co.*, 84 Miss. 536, 547, 36 So. 565, 567 (1904).

Even Justice Dickinson, writing for the Court in *Long v. McKinney*, 897 So. 2d. 160, 163-64 (Miss. 2004), reiterated that procedural statutes are to be upheld unless to do so would impede justice or impinge upon the constitution. “This Court is loathe to declare unconstitutional any statutory provision enacted by the legislature. To do so requires a careful and diligent review, and a conclusion that no constitutional alternative exists.” *Id* at 163.

Based on this well-settled precedent, the signature requirement of the bill of exceptions of Section 11-51-75, even if procedural, does not violate the separations of powers doctrine, and is therefore, constitutional. In declining to follow the precedent in *Wimley* for an identical statutory requirement, the Texas Court of Appeals found that such procedural requirements could not violate the separation of powers doctrine, because the courts ultimately “retain the judicial power to determine” the applicability of pre-suit statutory requirements and render a decision as to the effect of those requirements, accordingly. *Hebert v. Hopkins*, 395 S.W. 3d 884, 900 (Tex. App. 2013).

And even if this Court were to believe that the bill of exceptions statute should be superseded by court rule, the customary way to do that is to consult the appropriate rules committee, give notice to the public, adopt the rule and then, and only then, repeal the conflicting statute. That is what was done when the Mississippi Rules of Civil Procedure were adopted. Given the extensive statutory

scheme for appeals from lower authorities, it would only make sense to follow that course here, and to apply the statutes in this case as they are written.

Here, this Court has used its power to interpret a statute as being consistent with due process to interpret the statute to allow for limited exceptions to the jurisdictional requirements of the bill of exceptions statute. *See City of Jackson v. Jordan*, 202 So.3d 199, 204 (¶15) (Miss. 2016) (this Court refused to apply the ten-day limit in 11-51-75 to the complainant because the city did not provide him with proper statutory notice of the city's decision to demolish the complainant's home); *see also Bowen v. DeSoto County Board of Supervisors*, 852 So. 2d 21 (Miss. 2003) (holding the filing of a notice of appeal can be sufficient to vest jurisdiction in a circuit court even if the aggrieved party did not file a bill of exceptions); *see also McKee v. City of Starkville*, 97 So. 3d 97 (¶10) (Miss. Ct. App. 2012) (determining the failure to obtain a signature was not fatal because the bill of exceptions contained "the pertinent and important facts and documents" in which the court could "intelligently act" upon); *see also Bowling v. Madison County Board of Supervisors*, 724 So. 2d 431 (Miss. Ct. App. 1998) (Court has stated that the failure to file a bill of exceptions within ten days is not wholly determinative of whether a circuit court has jurisdiction to hear the case if delay was caused by board president).

But here there is no question of notice, no action within 10 days, no adequate record, and no request at all to the board president or attempt to mandamus him.

The statutory, signature requirement for the bill of exceptions of Section 11-51-75 could in no way infringe upon the rule-making powers of the court, when the court ultimately determines how Section 11-51-75 is applied and whether or not the court has jurisdiction to adjudicate the appeal of the county board decision. Therefore, even if the court finds the signature requirement to be procedural, it does not in any way violate the separation of powers doctrine of the Mississippi Constitution.

CONCLUSION

The requirement to file a proper bill of exceptions before a circuit court can hear an appeal from a board decision is jurisdictional. While the Court has, in limited circumstances, allowed parties to proceed with an appeal from a board decision without filing a proper bill of exceptions, the vast majority of existing case law tends to suggest that whether a party has filed a proper bill of exceptions is dispositive to whether a circuit court has jurisdiction to hear the appeal in most cases. And it is well-settled law that appellate jurisdiction is in the purview of the Legislature.

In the event the Court decides the requirement is procedural, the fact that the courts ultimately retain the power to interpret the jurisdictional requirements of the bill of exceptions statute to determine jurisdiction, along with the inevitable, but legally permissible overlap of the rules of the judicial and legislative branches, the signature requirement of Section 11-51-75 still would not violate the separation of powers. The signature requirement is not “unreasonable or impracticable” and does not infringe upon any rules of civil or appellate procedure established by the court.

For the foregoing reasons, including the legal arguments in the briefs already submitted to this Court, Appellant, Tunica County Board of Supervisors , respectfully prays that this honorable Court find the signature requirement of Mississippi Code Annotated Section 11-51-75 to be jurisdictional and constitutional. Appellant prays that this Court ultimately reverses the circuit court’s order and hold that the tax levy appeal should be dismissed for lack of subject matter jurisdiction. In the alternative only, this Court should find that the tax levy was valid, despite the failure to meet the statutory notice requirements, because the statutory remedy allowed for the notice to be corrected as opposed to the taxes to be voided.

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CERTIFICATE OF SERVICE

I, Julian D. Miller, one of the attorneys for Tunica County Board of Supervisors, hereby certify that on this date I electronically filed the Supplemental Brief of Appellant Tunica County Board of Supervisors to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participant:

The Honorable Charles E. Webster
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