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Rules Committee on Civil Practice
and Procedure
Mississippi Supreme Court
Post Office Box 117
Jackson, Mississippi 39205

Re: Need for Rule Governing Appeals from Boards of Supervisors and Municipal Authorities

Gentlemen:

The most recent weekly electronic newsletter published by the Mississippi Bar stated that you were conducting a comprehensive review of the Mississippi Rules of Civil Procedure and that you are requesting members of the Bar to submit proposed revisions.

I respectfully wish to bring to your attention a matter which I believe to be a significant problem in Mississippi jurisprudence. That matter involves Section 11-51-75 of the Mississippi Code of 1972, as amended, the antiquated statute governing appeals from decisions of Boards of Supervisors and municipal authorities. That statute requires that appeals be taken by way of a Bill of Exceptions within ten days from the date of adjournment at which session the Board of Supervisors or municipal authorities rendered the decision being appealed. The Bill of Exceptions must be signed by the President of the Board of Supervisors or by the President of the municipal authority.

The current statute has its genesis in a pre-Civil War statute. See Hutchinson's Code of 1848, Chapter 51, Article 5 (45, 46), dealing with appeals from decisions of the Board of Police of a county. The statute was carried forward through subsequent codes and basically took its current form in Hemingway's Code of 1917, Section 60.

I have been practicing law for 45 years, since 1970, and I devote a substantial percentage of my practice to representing clients in matters coming before local governing authorities. I particularly represent clients in zoning matters, and I have been involved in many appeals from zoning decisions of local governing authorities, representing both appellants and appellees. I

have had the privilege of representing zoning clients in more than 15 appeals before the Mississippi Supreme Court and the Mississippi Court of Appeals, including such significant cases as Woodland Hills Conservation Association, Inc. v. City of Jackson, 443 So.2d 1173 (Miss. 1983); Bridges v. City of Jackson, 443 So.2d 1187 (Miss. 1983); and Hall v. City of Ridgeland, 37 So.3d 25 (Miss. 2010) (upholding the action of the Mayor and Board of Aldermen of the City of Ridgeland in granting the request of my clients, the developers of Renaissance at Colony Park, for a Special Exception to construct a $60 million office building to a height of 13 stories).

I have served many times on the faculties of continuing legal education seminars focusing upon zoning and land use topics.

Since 2009, I have served as an adjunct faculty member at the Mississippi College School of Law, where I teach the course on Land Use Controls. In that course, I instruct my students on appeals by way of a Bill of Exceptions pursuant to Section 11-51-75 of the Mississippi Code of 1972, as amended.

This statute is poorly worded. It contains gaps. It is subject to conflicting interpretations. It bewilders able attorneys. It confuses distinguished Judges.

Twelve years ago, in Bowen v. DeSoto County Board of Supervisors, 852 So.2d 21 (Miss. 2003), the Mississippi Supreme Court reversed well-established precedent, allowing a zoning appeal to proceed, even though the Bill of Exceptions was not filed within the ten-day period provided by the statute. That ruling overturned the holdings in House v. Honea, 799 So.2d 882 (Miss. 2001); Newell v. Jones County, 731 So.2d 580 (Miss. 1999); Moore v. Sanders, 569 So.2d 1148 (Miss. 1990); and Shannon Chair Co. v. City of Houston, 295 So.2d 753 (Miss. 1974).

Until the Bowen ruling, I had always appealed the decision of a local governing authority simply by filing a Bill of Exceptions and attaching thereto in chronological order, with a Table of Contents, all the documents comprising the administrative record made before the local governing authority. Because the Bowen ruling seemed to endorse the concept of also filing a Notice of Appeal (which is not mentioned in the statute, but which is mentioned in the Mississippi Rules of Appellate Procedure), I now file both a Bill of Exceptions and a Notice of Appeal (with a copy of the Bill of Exceptions attached thereto as an exhibit) within the ten-day period.

In modern zoning cases, it is virtually impossible to compile the complete administrative record within ten days after the ruling of the local zoning authority. State law requires an Ordinance of rezoning to be published in a local newspaper. As a practical matter, such cannot be accomplished in time for the Proof of Publication of a certified copy of the Ordinance of rezoning to be available within ten days.

I have always dealt with this problem by including in the Bill of Exceptions a paragraph stating that there is incorporated by reference all proceedings done and all documents filed in the matter and by then declaring that such will be attached when they are made available by the Chancery Clerk or municipal clerk, by the Zoning Administrator, or by other local officials. I then file the Bill of Exceptions within the ten-day statutory period. Some appellate cases have not recognized that such a procedure is a possibility.

There is also confusion within the Bar about exactly what form a Bill of Exceptions should take. There is no readily available suggested form for lawyers to use as a drafting guide. I have seen lawyers word a Bill of Exceptions as an Assignment of Error, as an argumentative statement of their position, and even as a Brief of Appellant. In my opinion, a Bill of Exceptions should simply state in a non-adversarial fashion what happened before the local governing authority and its advisory bodies (the facts, judgment, and decision), that my client is aggrieved by the decision of the local governing authority, and that my client wishes to appeal that decision by way of a Bill of Exceptions. The Mississippi Supreme Court has always implicitly accepted this interpretation.

I have even seen a City Attorney attempt to prevent the entire administrative record from being included in the Bill of Exceptions. I have seen Mayors refuse to sign a Bill of Exceptions.

Some lawyers have filed a letter stating an intent to file a Bill of Exceptions when they could not meet the ten-day deadline. The appellate courts have not accepted this practice.

In recent years, there have been differing appellate rulings as to what should happen if a party files a Bill of Exceptions which the Board of Supervisors or the municipal governing authority deems to be erroneous or incomplete. Compare Reed v. Adams, 236 Miss. 333, 111 So.2d 222 (1959), saying a Mayor should point out where a Bill of Exceptions needs to be corrected, with Hall v. City of Ridgeland, 37 So.3d 25 (Miss. 2010), and McKee v. City of Starkville, 97 So.3d 97 (Miss. App. 2012), allowing an appeal to be adjudicated where each side filed a separate Bill of Exceptions. I am aware of two zoning appeals from actions of the Jackson City Council currently pending in the Hinds County Circuit Court where the parties have spent enormous amounts of time and money disputing over the form of the Bill of Exceptions and what should be included therein. Adjudicating such disputes takes judicial time that could more profitably be spent elsewhere.

The Mississippi Court of Appeals recently noted that preparation of the Bill of Exceptions often creates a controversy. Gallagher v. City of Waveland, No. 2013-CP-00273-COA, ___ So.3d ___ (Miss. App. May 19, 2015). This type controversy substantially delays a ruling on the merits of an appeal.

While the Mississippi Legislature ought to substantially amend Section 11-51-75 or ought to repeal that statute and replace it with a modern, workable statute, it is my considered opinion that such is unlikely to occur any time soon. Thus, I respectfully suggest that the Mississippi Supreme Court ought to promulgate a rule to deal with the situation. When the Mississippi Supreme Court promulgated the Mississippi Rules of Civil Procedure in 1981, it specified that the Rules would replace any previously adopted statute in conflict therewith.

If a new Rule were to be adopted, one of the problems would be to determine where it should be placed. Should it be placed in the Mississippi Rules of Civil Procedure, the Mississippi Rules of Appellate Procedure, or the Uniform Rules of Circuit and County Court Practice? Sections 5.01-5.09 of the current Uniform Rules of Circuit and County Court Practice do not specifically deal with appeals by way of a Bill of Exceptions.

Perhaps a modern Rule covering appeals from decisions of Board of Supervisors and municipal authorities should be modeled on the format prescribed in the Mississippi Rules of Appellate Procedure, involving a Notice of Appeal and the Designation of Record. It seems to me that, in modern practice, there is no need for the President of the Board of Supervisors or for the presiding officer of the municipal authority to have to sign a Bill of Exceptions or some similar pleading.

I thus respectfully suggest that a modern Rule concerning appeals from Boards of Supervisors and municipal governing authorities needs to be promulgated to replace the Bill of Exceptions statute, Section 11-51-75 of the Mississippi Code of 1972, as amended, which statute is obsolete in many ways, and which statute often impedes the appellate process.

Sincerely yours,

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JAPjr:br