IN THE SUPREME COURT OF MISSISSIPPI

NO. 2012-EC-01506-SCT

D. PHILLIP BRYANT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MISSISSIPPI AND AS A MEMBER OF THE STATE BOARD OF ELECTION COMMISSIONERS; DELBERT HOSEMAN, JR., IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF MISSISSIPPI, AS THE CHIEF ELECTION OFFICER OF THE STATE OF MISSISSIPPI AND AS A MEMBER OF THE STATE BOARD OF ELECTION COMMISSIONERS; JAMES HOOD, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI AND AS A MEMBER OF THE STATE BOARD OF ELECTION COMMISSIONERS; AND THE STATE BOARD OF ELECTION COMMISSIONERS

v.

LATRICE WESTBROOKS

DATE OF JUDGMENT:	09/17/2012
TRIAL JUDGE:	HON. WINSTON L. KIDD
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	OFFICE OF THE ATTORNEY GENERAL BY: DOUGLAS T. MIRACLE HAROLD E. PIZZETTA, III
ATTORNEYS FOR APPELLEE:	DAVID NEIL McCARTY RAMEL L. COTTON PAUL T. "PJ" LEE, JR.
NATURE OF THE CASE:	CIVIL - ELECTION CONTEST
DISPOSITION:	VACATED - 09/25/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

LAMAR, JUSTICE, FOR THE COURT:

¶1. Latrice Westbrooks filed a Qualifying Statement of Intent with the Secretary of State's Office, declaring her intent to be a candidate for the office of Court of Appeals of the State of Mississippi, District 2, Position 2. The State Board of Election Commissioners,[1] in a unanimous vote, determined that Westbrooks did not meet the qualifications to seek election. Westbrooks sought judicial review, and the Circuit Court of Hinds County, First Judicial District, entered an Order Granting Permanent Injunction and Order Granting Declaratory Judgment. The circuit court ordered the Board immediately to add Westbrooks's name to the ballot as a candidate for the office.

¶2. Aggrieved by the circuit court's order, the Board appealed to this Court via a Bill of Exceptions and a Notice of Appeal. By order entered on the same day, this Court expedited the appeal.

FACTS AND PROCEDURAL HISTORY

¶3. On May 11, 2012, Westbrooks filed a Qualifying Statement of Intent to run as a candidate for the office of Court of Appeals of the State of Mississippi, District 2, Position 2. At that time, she did not reside within District 2. On August 30, 2012, the Secretary of State sent a letter to Westbrooks advising her that a candidate for the Court of Appeals must be a resident of the district from which she seeks election. Westbrooks responded and argued that no such residency requirement exists. On September 10, 2012, during its public

[1]The State Board of Election Commissioners consists of the Governor, the Secretary of State, and the Attorney General. Miss. Code Ann. § 23-15-211 (Rev. 2007).

meeting, the Board determined that Westbrooks did not meet the qualifications to seek this elected office because she does not reside in District 2. The next day, Westbrooks executed a Residential Lease Agreement for a residence in Durant, Mississippi, within District 2. On September 13, 2012, Westbrooks sought judicial review of the Board's decision to keep her name off the ballot. On September 14, 2012, Westbrooks filled out an application for electric, water, sewer, and garbage service for the Durant residence.

¶4. On September 17, 2012, the circuit court conducted a hearing during which counsel for each side presented argument. No testimony or evidence was presented to the court. Westbrooks did not testify during the hearing or offer any evidence that she now resides in District 2. The circuit court ruled in Westbrooks's favor, finding that there was no residency requirement to run for a judgeship on the Court of Appeals, and alternatively, if there were, Westbrooks had met that requirement. The circuit court ordered the Board immediately to add Westbrooks's name to the ballot as a candidate for the Court of Appeals office.

¶5. We consider this expedited appeal based on the Board's Bill of Exceptions, Notice of Appeal, the record, and the briefs of the parties.

DISCUSSION

¶6. We have held that "[i]n a candidate qualification challenge, the standard of review for questions of law is de novo." ***Young v. Stevens***, 968 So. 2d 1260, 1262 (Miss. 2007) (citing ***Ladner v. Necaise***, 771 So. 2d 353, 355 (Miss. 2000)); ***Garner v. State Democratic Exec. Comm.***, 956 So. 2d 906, 909 (Miss. 2007); ***Grist v. Farese***, 860 So. 2d 1182, 1185 (Miss. 2003); *see also* ***Cameron v. Miss. Republican Party***, 890 So. 2d 836, 840-41 (Miss. 2004); *but see* ***Rayner v. Barbour***, 47 So. 3d 128, 131 (Miss. 2010) (***Rayner*** addressed a write-in

election and not a challenge to a candidate's qualifications). "[W]e review findings of fact by a trial judge sitting without a jury for manifest error, including whether the findings were the product of prejudice, bias, or fraud, or manifestly against the weight of the credible evidence." ***Young***, 968 So. 2d at 1263 (citations omitted).

¶7. This case presents a question of first impression. Must a candidate for the office of Court of Appeals of the State of Mississippi reside within the district for the office she seeks? Having meticulously reviewed the Mississippi Constitution, statutes, caselaw, the record, and the briefs of the parties, we conclude that a candidate for the office of Court of Appeals must reside within the district for the office she seeks.

¶8. The Mississippi Legislature created the Court of Appeals,[2] and Section 9-4-1 of the Mississippi Code provides that:

> (2) The Court of Appeals *shall be comprised of ten (10) appellate judges, two (2)* ***from*** *each Court of Appeals District*, selected in accordance with Section 9-4-5.

Miss. Code Ann. § 9-4-1 (Rev. 2002) (emphasis added). Section 9-4-5 of the Mississippi Code states, in pertinent part:

> (1) The term of office of judges of the Court of Appeals shall be eight (8) years. An election shall be held on the first Tuesday after the first Monday in November 1994, to *elect* the ten (10) *judges of the Court of Appeals, two (2)* ***from*** *each congressional district*; provided, however, judges of the Court of Appeals who are elected to take office after the first Monday of January 2002,

[2]"The legislature shall, from time to time, establish such other inferior courts as may be necessary, and abolish the same whenever deemed expedient." Miss. Const. art. 6, § 172 (1890).

> shall be elected ***from*** *the Court of Appeals Districts* described in subsection (5) of this section. . . .
>
> (2). . . . (b) The *laws regulating the general elections shall apply to and govern the elections of judges of the Court of Appeals* except as otherwise provided in Sections 23-15-974 through 23-15-985.
>
> (c) In the year prior to the expiration of the term of an incumbent, and likewise each eighth year thereafter, an election shall be held in the manner provided in this section in the *district* ***from*** *which the incumbent Court of Appeals judge was elected* at which there shall be elected a successor to the incumbent. . . .
>
> (3) No person shall be eligible for the office of judge of the Court of Appeals who has not attained the age of thirty (30) years at the time of his election and who has not been a practicing attorney and citizen of the state for five (5) years immediately preceding such election.
> . . . .

Miss. Code Ann. § 9-4-5 (Rev. 2002) (emphasis added). These statutes clearly require that the judge shall be "from each . . . district."

¶9. Furthermore, we find that this language is very similar to the residency requirement for candidates for this Court.[3] In her brief, Westbrooks acknowledges that "a person seeking a seat on the court of appeals must possess the same qualifications as a justice of the supreme court." Article 6, Section 145 of the Mississippi Constitution instructs the Legislature to divide the state into districts, "and there shall be elected one judge for and ***from*** each district. . . ." (Emphasis added.) Article 6, Sections 145A and 145B similarly require that the judges

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[3]Other qualifications for judge of the Supreme Court are found in Article 6, Section 150 of the Mississippi Constitution. That section states: "No person shall be eligible to the office of judge of the Supreme Court who shall not have attained the age of thirty years at the time of his appointment, and who shall not have been a practicing attorney and a citizen of the State for five years immediately preceding such appointment." Miss. Const. art. 6, § 150.

of this Court "shall be selected one for and ***from*** each of the Supreme Court districts. . . ." (Emphasis added.) While this Court has never interpreted this residency requirement, the Fifth Circuit has noted that the Mississippi Constitution "imposes a residency requirement to run for the position of justice" of the Supreme Court. ***Robertson v. C.I.R.***, 190 F. 3d 392, 398 (5th Cir. 1999) (citing Miss. Const. art. 6, § 145).

¶10. The residency requirement for judges of the Court of Appeals also is similar to the residency requirements for chancellors, circuit judges,[4] and county court judges. The qualifications for each of these offices are found in the Mississippi Constitution and in the Mississippi Code. "A chancellor shall be elected for and ***from*** each of the chancery court districts. . . ." Miss. Const. art. 6, § 153; Miss. Code Ann. § 9-5-1 (Rev. 2002) (emphasis added). "A circuit judge shall be elected for and ***from*** each circuit court district. . . ." Miss. Const. art. 6, § 153; Miss. Code Ann. § 9-7-1 (Rev. 2002) (emphasis added). County court judges are to be elected in the same manner as circuit court judges. Miss. Code Ann. § 9-9-1 (Rev. 2002).

¶11. Westbrooks argues that the only qualifications for the office are found in Section 9-4-5(3) of the Mississippi Code.[5] However, this interpretation completely ignores the remaining

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[4]Other qualifications for chancellors and circuit court judges are found in Article 6, Section 154 of the Mississippi Constitution. That section states: " No person shall be eligible to the office of judge of the circuit court or of the chancery court who shall not have been a practicing lawyer for five years and who shall not have attained the age of twenty-six years, and who shall not have been five years a citizen of this State." Miss. Const. art. 6, § 154.

[5]"No person shall be eligible for the office of judge of the Court of Appeals who has not attained the age of thirty (30) years at the time of his election and who has not been a practicing attorney and citizen of the state for five (5) years immediately preceding such election." Miss. Code Ann. § 9-4-5(3) (Rev. 2002).

subsections in Section 9-4-5 and Section 9-4-1. And, like the Court of Appeals statutes, the qualifications for justices of this Court also are found in separate sections of the constitution. Additionally, Article 6, Section 145 of the Mississippi Constitution further provides: "but the removal of a judge to the state capitol during his term of office shall not render him ineligible as his own successor for the districts from which he has removed." Miss. Const. art. 6, § 145. If there were no residency requirement for Supreme Court justices, then this language in the constitution would serve no purpose. Additionally, Westbrooks's interpretation would be inconsistent with other provisions found in "the laws regulating the general elections" of judges of the Court of Appeals. Miss. Code Ann. § 9-4-5(2)(b) (Rev. 2002). For example, Section 23-15-849 of the Mississippi Code governs vacancies in the office of judge of the Court of Appeals. The statute requires the Governor to appoint a qualified person "***from*** the district in which the vacancy exists." Miss. Code Ann. § 23-15-849 (Rev. 2007) (emphasis added).

¶12. We find a candidate for the office of Court of Appeals of the State of Mississippi must reside within the district for the office she seeks.

¶13. Next, we must determine if Westbrooks has proven that she is a resident of District 2. Westbrooks admits that, at the time she filed her Qualifying Statement of Intent, she lived .7 miles outside District 2. At least as late as September 11, 2012, Westbrooks's residency remained outside District 2.[6]

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[6]Both parties mistakenly rely on Section 23-15-359 of the Mississippi Code. By its own terms, that statute does not apply to the election of a judge of the Court of Appeals. Miss. Code Ann. § 23-15-359(6) (Rev. 2007) ("The provisions of this section shall not apply to municipal elections or to the election of the offices of justice of the Supreme Court, judge

¶14. When considering residency in the context of elections, this Court has said:

> In Mississippi, residence and domicile are synonymous for election purposes. ***Hinds County Election Comm'n v. Brinston***, 671 So. 2d 667, 668 (Miss. 1996). A person's domicile in election matters is the place:
>
> where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning. . . . A domicile continues until another is acquired; before a domicile can be considered lost or changed, a new domicile must be acquired by removal to a new locality with intent to remain there, and the old domicile must be abandoned without intent to return thereto.
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> ***Smith v. Deere***, 195 Miss. 502, 505-06, 16 So. 2d 33, 34 (1943) (internal citations omitted).

Young, 968 So. 2d at 1263; ***Garner***, 956 So. 2d at 909. In ***Young***, we also stated:

> The determination of a person's "permanent home and principal establishment" *turns on actual proof of a person's living arrangements*. It is not satisfied with a *simple declaration* that one intends to be a resident of a particular county when the overwhelming proof shows that he actually resides elsewhere. It is not enough that [the candidate] considers himself an official resident of [the district]. He must actually reside there permanently.

Young, 968 So. 2d at 1264 (emphasis added). It is the candidate's burden to prove that she meets the residency requirement. ***Edwards v. Stevens***, 963 So. 2d 1108, 1110 (Miss. 2007); *see also* ***Grist v. Farese***, 860 So. 2d 1182, 1187 (Miss. 2003).

¶15. In Westbrooks's brief before the circuit court, she attached two documents in an effort to prove that she now resides in District 2. She attached a "Residential Lease Agreement" for a residence in Durant, Mississippi, which she executed on September 11, 2012. The terms of the lease state: "This lease shall commence on the 11 day of September, 2012 and *extend*

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of the Court of Appeals, circuit judge, chancellor, county court judge and family court judge.")

until the 11 day of September, 2012. . . ." (Emphasis added.) Westbrooks also attached an "Application for Electric, Water, Sewer and/or Garbage Service," which she signed on September 14, 2012, that lists the address of the Durant residence. These documents were not admitted as evidence at the hearing, although the record reflects that both attorneys and the circuit judge referenced these documents. Further, Westbrooks presented no testimony concerning her residency or her intentions regarding this lease. In fact, no sworn testimony or physical evidence was presented to the circuit court.

¶16. This Court has considered a candidate's evidence to prove residency several times. In ***Young***, evidence was presented regarding real property the candidate owned, his homestead filings, his voter registration, his vehicle registrations, the address on his driver's license, and testimony regarding his actual living arrangements. This Court affirmed the trial court's finding that the candidate had failed to show that he met the residency requirement. ***Young***, 968 So. 2d at 1260. In ***Garner*** and ***Edwards***, this Court considered similar evidence. In both cases, the candidates failed to meet their burden of proof that they met the residency requirements. ***Edwards***, 963 So. 2d at 1110 (trial court ordered candidate's name removed from ballot and this Court affirmed); ***Garner***, 956 So. 2d at 909 (trial court found that candidate was qualified to run for office and this Court reversed).

¶17. While the existence of a residency requirement was a question of law suitable for summary review by a circuit judge, the question of whether a candidate meets that residency requirement clearly involves questions of fact. We have said that "[t]he determination of a person's 'permanent home and principal establishment' turns on *actual proof* of a person's living arrangements." ***Young***, 968 So. 2d at 1264 (emphasis added). This record is

completely devoid of any such proof. Based on the complete lack of evidence presented, we find that the circuit court erred in concluding that "the petitioner does indeed reside within the district," as this finding is clearly "against the weight of the credible evidence." ***Young***, 968 So. 2d at 1263 (citations omitted).

¶18. Justice Chandler's dissent argues that this Court lacks jurisdiction to consider this appeal. Further, he argues that the chancery court, rather than the circuit court, had jurisdiction for judicial review of the Board's decision and concludes that this case should be reversed and the matter remanded with directions to transfer the case to chancery court. Assuming arguendo that jurisdiction for judicial review was properly in the chancery court, Article 6, Section 147 of the Mississippi Constitution provides, in pertinent part:

> No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction; . . .

Miss. Const. art. 6, § 147 (1890). Pursuant to this section we will not reverse a case simply because the wrong court decided the issue. The merits of this appeal are squarely before this Court and we should address them.

¶19. Justice King's dissent argues that Westbrooks has until the day of election to meet the qualifications for the office that she seeks and contends that the Board acted prematurely in finding that Westbrooks was not qualified. This Court previously has reviewed candidate qualification challenges which were brought before the ballots were printed and specifically held that the challenges were not premature. In ***Garner v. State of Mississippi Democratic Executive Committee***, a candidate for district attorney argued that his qualifications should

not be judged until the time of the election. ***Garner***, 956 So. 2d 906, 910 (Miss. 2007). Relying on this Court's previous decision in ***Grist v. Farese***, we again held that the "determination of the residency issue prior to the election is *not premature*." ***Id.*** at 911 (citing ***Grist v. Farese***, 860 So. 2d 1182 (Miss. 2003) (emphasis added). Justice King is correct that "the statutes regarding Court of Appeals candidates are silent as to when candidates must meet the residency requirement." However, we need not decide this issue today, because when given the opportunity to present evidence that she would meet the residency requirement, Westbrooks chose not to do so.

CONCLUSION

¶20. We find that a candidate for the office of Court of Appeals of the State of Mississippi must reside within the district for the office she seeks. We further find that Westbrooks has not met the residency requirement. Therefore, the circuit court erred in finding that Westbrooks was a qualified candidate for the position. The circuit court's Order Granting Permanent Injunction and Order Granting Declaratory Judgment is hereby vacated. The injunction is hereby dissolved.

¶21. Because the ballots have been printed and voting by absentee ballot began on September 22, 2012, under this Court's authority to suspend the rules pursuant to Rule 2(c) of the Mississippi Rules of Appellate Procedure, no motion for rehearing will be allowed and this opinion shall be deemed final in all respects. The mandate in this matter shall issue immediately.

¶22. The Court further finds that the State Board of Election Commissioners' Motion to Expedite Appeal and for Relief from the Trial Court's Judgment is hereby dismissed as moot. All costs of this appeal are assessed to the Appellee, Latrice Westbrooks.

¶23. **VACATED**.

CARLSON AND DICKINSON, P.JJ., RANDOLPH AND PIERCE, JJ., CONCUR. CHANDLER, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, J. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, J.; CHANDLER, J., JOINS IN PART. WALLER, C.J., NOT PARTICIPATING.

CHANDLER, JUSTICE, DISSENTING:

¶24. Because this Court lacks jurisdiction to review the merits of this appeal, I respectfully dissent. The State Board of Election Commissioners removed Westbrooks's name from the ballot upon a finding that she had not met the residency requirements to qualify her as a candidate for the Court of Appeals. Westbrooks appealed to the circuit court from the decision of the State Board of Election Commissioners pursuant to Mississippi Code Section 23-15-963. Section 23-15-963(5) provides:

> The circuit court with whom such a petition for judicial review has been filed shall at the earliest possible date set the matter for hearing. Notice shall be given the interested parties of the time set for hearing by the circuit clerk. The hearing before the circuit court shall be de novo. The matter shall be tried to the circuit judge, without a jury. After hearing the evidence, the circuit judge shall determine whether the candidate whose qualifications have been challenged is legally qualified to have his name placed upon the ballot in question. The circuit judge may, upon disqualification of any such candidate, order that such candidate shall bear the court costs of the proceedings.

Miss. Code Ann. § 23-15-963(5) (Rev. 2007).

¶25. Section 23-15-963 did not provide a right of appeal to Westbrooks. Section 23-15-963(1) states "[a]ny person desiring to contest the qualifications of another person *who has*

qualified pursuant to the provisions of Section 23-15-359, Mississippi Code of 1972, as a candidate for any office elected at a general election, shall file a petition specifically setting forth the grounds of the challenge . . . ." Section 23-15-963(7) states "[t]he procedures set forth above shall be the sole and only manner in which the qualifications of a candidate seeking public office *who qualified pursuant to the provisions of Section 23-15-359*, Mississippi Code of 1972, may be challenged prior to the time of his election." The statute provides a mechanism for challenging the qualifications of only those candidates who qualified pursuant to Section 23-15-359.

¶26. Section 23-15-359 states that it "shall not apply to municipal elections or to the election of the offices of justice of the Supreme Court, *judge of the Court of Appeals*, circuit judge, chancellor, county court judge and family court judge." Miss. Code Ann. § 23-15-359(6) (emphasis added). As a Court of Appeals candidate, Westbrooks did not qualify "pursuant to the provisions of Section 23-15-359." Therefore, her qualifications as a candidate in the general election cannot be challenged according to the procedure promulgated in Section 23-15-963.

¶27. No statutory procedure afforded Westbrooks an appeal. In ***Prisock v. Perkins***, 735 So. 2d 440, 442 (Miss. 1999), Prisock appealed to the circuit court from a school board's order pursuant to a certain statute. This Court determined that the statute did not apply and there was no statutory mechanism that permitted the appeal to circuit court. ***Id.*** at 443. We reversed and remanded for a transfer to chancery court. We held that:

> [W]here there is no statutory scheme for appeal from a decision of a state board or agency and the injured party does not have a full, plain, complete and adequate remedy at law, the chancery court has jurisdiction for judicial review

> of the board or agency decision. Here there is no statutory scheme for appealing the school board's decision awarding a hunting and fishing lease, and Prisock lacks a complete and adequate remedy at law. Therefore, the chancery court would have jurisdiction of an original action for injunction to judicially review the school board's decision. Accordingly, we will not reach the additional issues raised by this appeal. Instead, we reverse and remand this case to the Winston County Circuit Court with instructions to transfer the case to the Winston County Chancery Court pursuant to Miss. Const. Art. 6, § 157.

Id. The standard of review to be applied is whether the action of the Board was "(1) supported by substantial evidence; (2) arbitrary or capricious; (3) beyond the agency's scope or powers; or (4) in violation of some constitutional or statutory rights of the complaining party." ***Tucker v. Prisock***, 791 So. 2d 190, 192 (Miss. 2001).

¶28. In the strikingly similar case of ***Mississippi Transportation Commission v. Engineering Associates***, 39 So. 3d 1, 2 (Miss. 2010), Engineering Associates appealed the decision of the Mississippi Transportation Commission to the circuit court. It was undisputed that there was no statute that allowed an appeal of the decision of the Mississippi Transportation Commission. ***Id.*** Under these circumstances, this Court held that Engineering Associates should have filed an action for an injunction in the chancery court. ***Id.*** at 3. Justice Lamar, writing for the unanimous Court, held that "[w]ithout a statutory right of appeal, any review of MTC's decision could be sought only through an independent action. Based on the foregoing, we find the circuit court lacked jurisdiction over EAI's appeal and accordingly, the decision of the circuit court is reversed and rendered." ***Id.***

¶29. Because no statutory procedure afforded Westbrooks an appeal, Westbrooks should have filed a petition for an injunction in the chancery court. The majority finds that, under Article 6, Section 147 of the Mississippi Constitution, this Court may decide the merits of

this appeal, because a case cannot be reversed on the ground that the wrong court decided the case. Article 6, Section 147 states, in its entirety:

> No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction; *but if the Supreme Court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the Supreme Court may remand it to that court which, in its opinion, can best determine the controversy*.

Miss. Const. art. 6, § 147 (emphasis added). The error in this case extends beyond filing the case in the wrong court. Under Section 23-15-963, the circuit court is to afford the appellant a de novo hearing. Miss. Code Ann. § 23-15-963(5) (Rev. 2007). But on a petition for an injunction, the chancery court may determine only if the Board's decision was supported by substantial evidence, was arbitrary and capricious, was beyond the agency's scope or power, or was in violation of a statutory or constitutional right of a complaining party. ***Tucker***, 791 So. 2d at 192.

¶30. Because Section 23-15-963 did not apply, Westbrooks was not entitled to de novo review of the Board's decision. This Court lacks jurisdiction to review this appeal of the circuit court's decision on the merits. This Court may reverse and remand for a transfer to the appropriate court if there is error in the proceedings other than jurisdiction. Miss. Const. art. 6, § 147. Accordingly, I would reverse the decision of the Circuit Court of Hinds County, First Judicial District, and remand this case with directions for the circuit court to transfer it to the Hinds County Chancery Court, First Judicial District. *See* ***Perkins***, 735 So.

2d at 442. Although this Court lacks jurisdiction over the merits, I believe Justice King's analysis of the pertinent statutes is correct.

KITCHENS, J., JOINS THIS OPINION.

KING, JUSTICE, DISSENTING:

I. Is there a Residency Requirement?

¶31. I agree that there is a residency requirement for candidates for the office of Court of Appeals. Mississippi Code Section 9-4-1 provides, in pertinent part, that "[t]he Court of Appeals shall be comprised of ten (10) appellate judges, two (2) from each Court of Appeals District, selected in accordance with Section 9-4-5." Miss. Code Ann. § 9-4-1(2) (Rev. 2002). Then, Section 9-4-5 provides the same:

> The term of office of judges of the Court of Appeals shall be eight (8) years. An election shall be held on the first Tuesday after the first Monday in November 1994, to elect the ten (10) judges of the Court of Appeals, two (2) from each congressional district; provided, however, judges of the Court of Appeals who are elected to take office after the first Monday of January 2002, shall be elected from the Court of Appeals Districts described in subsection (5) of this section. The judges of the Court of Appeals shall begin service on the first Monday of January 1995.

Miss. Code Ann. § 9-4-5(1) (Rev. 2002).

¶32. Black's Law Dictionary defines "from," in pertinent part:

> As used as a function word, implies a starting point, whether it be of time, place, or condition; and meaning having a starting point of motion, noting the point of departure, origin, withdrawal, etc. . . . One meaning of "from" is "out of."

Black's Law Dictionary 668 (6th ed. 1990). Thus, "from each Court of Appeals District" means the candidate must come "out of" the district or, in other words, be from the district.

The statute is unambiguous and must be applied according to its plain meaning. ***Dialysis Solution, LLC v. Miss. State Dep't of Health***, 31 So. 3d 1204, 1212 (¶26) (Miss. 2010).

¶33. Based on a plain reading of the statute, a candidate for the office of Court of Appeals must reside within the Court of Appeals district for which she seeks office. Thus, I would reverse the trial court's judgment that there is no residency requirement. But I differ from the Majority opinion regarding when Westbrooks must meet the residency requirement.

II. When must a candidate meet the residency requirement?

¶34. No statute states specifically when a candidate for the office of Court of Appeals must meet the residency requirement. The parties rely on Section 23-15-359, which gives candidates who are affiliated with a political party an opportunity to submit proof that all qualifications will be met by the time of the election:

> The appropriate election commission shall determine whether each candidate is a qualified elector of the state, state district, county or county district they seek to serve, and whether each candidate meets all other qualifications to hold the office he is seeking or presents absolute proof that he will, subject to no contingencies, meet all qualifications on or before the date of the general or special election at which he could be elected to office.

Miss. Code Ann. § 23-15-359(8) (Rev. 2007). But the statute also provides that "[t]he provisions of this section shall not apply to municipal elections or to the election of the offices of justice of the Supreme Court, judge of the Court of Appeals, circuit judge, chancellor, county court judge and family court judge." Miss. Code Ann. § 23-15-359(6) (Rev. 2007).

¶35. But in regard to municipal elections, which are exempted from Section 23-15-359, Mississippi Code Section 23-15-361 allows specifically a municipal-election candidate to

"present[] absolute proof that he will, subject to no contingencies, meet all qualifications on or before the date of the general or special election." Miss. Code Ann. § 23-25-361 (Rev. 2007). This is similar to the allowance provided in Section 23-15-359(8). But there is no complementary statute regarding the Supreme Court or Court of Appeals on this point.

¶36. The majority opinion reads a provision – that Westbrooks must meet the residency requirement before her name is placed on the ballot – into the applicable statutes which simply is not there. The statutes regarding Court of Appeals candidates are silent as to when candidates must meet the residency requirement. *See* Miss. Code Ann. §§ 9-4-1 to -17 (Rev. 2002). For instance, must the requirement be met (1) at the date of filing, (2) when the Commission prepares to certify the ballot, or (3) on the date of the election? In contrast, Section 23-25-299 provides specifically when party-affiliated candidates must meet its requirements:

> *Upon receipt of the proper fee and all necessary information*, the proper executive committee shall then determine whether each candidate is a qualified elector of the state, state district, county or county district which they seek to serve, and whether each candidate meets all other qualifications to hold the office he is seeking or presents absolute proof that he will, subject to no contingencies, meet all qualifications on or before the date of the general or special election at which he could be elected to office.

Miss. Code Ann. § 23-15-299(7) (Rev. 2007) (emphasis added); *See* ***Cameron v. Miss. Republican Party***, 890 So. 2d 836, 842 (¶17) (Miss. 2004) (holding that senatorial candidate "failed to show at the time of qualification for office with 'absolute proof' and 'without contingencies' that he would be a resident within the district at the time of the election"). No similar provision exists regarding Court of Appeals candidates. This Court has refused

previously to read provisions into election law which are not specifically in the applicable statutes or constitutional provisions.

¶37. In ***State ex rel. Holmes v Griffin***, a voter challenged an elected chancellor's qualifications. ***State ex rel. Holmes v Griffin***, 667 So. 2d 1319, 1322-23 (Miss. 1995). The issue was whether to be elected chancellor, the candidate had to be a resident of Mississippi for five years total or for five years *immediately preceding* the election. ***Id***. at 1325-27. Although other constitutional provisions relating to elected officials included that "immediately preceding" language, the provisions relating to chancellors did not.[7] ***Id***. at 1325-26. The Court refused to read the language into the statute, reasoning:

> It appears to this Court that after four opportunities to draft such a Section as 154, that the drafters would have included the immediately preceding language if they had intended to do so, as they did for other positions.

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[7] ***Holmes*** lists statutes which include the "immediately preceding" language and those which do not:

> For sections requiring a time period immediately preceding, *See* Miss. Const. Art. 4 § 41 (two-year House of Rep.), Art. 5 § 117 (five-year Governor), Art. 5 § 128 (five-year Lt. Governor), Art. 5 § 133 (five-year Sec. Of State), Art. 5 § 134 (five-year Treasurer), Art. 6 § 150 (five-year Supreme Court judge), Art. 6 § 171 (two-year Justice of the Peace), Art. 8 § 202 (five-year Superintendent of Public Education); For sections which do not require a time period immediately preceding, *See* Miss. Const. Art. 5 § 135 (sheriff, coroner, tax collector, and surveyor), Art. 6 § 174 (district attorney), Art. 6 § 176 (Board of Supervisors), Art. 8 § 204 (county superintendent of public education), Art. 11 § 230 (levee board commissioners).

Holmes, 667 So. 2d 1319 at n.4.

Id. at 1326. Based on the plain language of the Constitution as written, the Court determined "that a candidate for chancellor need not necessarily be a citizen for the immediately preceding five years, but instead need only have been a citizen of the state for five years prior to the election." ***Id***.

¶38. Likewise, the applicable statutes – Sections 9-4-1 and 9-4-5 – are silent as to when Westbrooks must meet the residency requirement for the office of Court of Appeals. *See* Miss. Code Ann. §§ 9-4-1; 9-4-5 (Rev. 2002). The Court should not make up or read a deadline into the statute which is not there. Thus, I opine that the Commission was premature in its decision to remove Westbrooks from the ballot.

¶39. The majority finds the existence of a residency requirement, but refuses to determine what that requirement is. Such an action is totally devoid of logic. The majority gives as a reason for this refusal that Westbrooks allegedly chose not to present evidence that she would meet the residence requirement. That statement is not absolutely accurate. On September 7, 2012, Westbrook wrote that she would meet the residency requirement. Additionally, Westbrooks submitted a signed lease and application for utility services for an apartment in the district.

¶40. On September 4, 2012, Kimberly Turner, Senior Attorney in the Secretary of State's Election Division, sent an email to Westbrooks, which indicated that pursuant to 23-15-359, a candidate could appear on the ballot as long as there was assurance that he/she would be fully qualified by election day:

> Of course, the satisfaction of candidate qualifications must be met at the time of the actual election; however, if candidate qualifications are not satisfied as of the date of the meeting of the State Board of Election Commissioners, the

> candidate must affirm that the unmet qualification will, beyond doubt, be met as of the date of the election.

¶41. On September 7, 2012, Westbrooks responded to that email indicating a disagreement with the State's position on residency, but affirmatively stating that by election day, she would have complied with the State's stated position on residency:

> To the extent that my position as stated above is unsatisfactory to the members of the State Board of Electors, I also certify that I will be a resident of district 2 on or before election day, if so required.

For reasons of its own, and contrary to the September 4, 2012, email, the State declined to accept this representation from Westbrooks, and directed that she appear for a hearing on September 10, 2012. This Court does not have a record, either in the form of a transcript or minutes, of the September 10, 2012 ,hearing. On September 11, 2012, Westbrooks requested in effect, a written ruling from the State as to the specific reasons for refusing to place her name on the November ballot. By letter dated September 12, 2012, the State refused Westbrooks' request.[8]

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[8]The letter stated, in pertinent part, that:

> The SEBC performs its statutory duties during public meetings, as memoralized by the minutes thereof. The SBEC provides no written opinions as to either justify or substantiates those decisions publicly made following discussion, comment and vote.
>
> Given that the SBEC is to reconvene today, September 12, 2012, to conclude its discussion and render a vote as to matters outstanding, the minutes of the Monday meeting have not been reduced to writing. Further, the minutes of the meeting(s) of the SBEC may not be deemed to constitute the office act(s) of said board until approved and adopted during a subsequent, yet to be scheduled meeting of the SBEC. For those reasons, the SBEC is unable to accommodate your request for "any and all minutes."

¶42. In its September 12, 2012, letter, the State indicated that during the September 10, 2012, hearing in response to a question, Westbrooks's attorney stated that Westbrooks had no intention of moving into the district.[9] In its letter, the State relies upon this statement as a reason to eliminate Westbrooks from the November ballot. The State does so notwithstanding that it also previously had received Westbrooks' September 7, 2012, correspondence, in which she certified her intent to meet the state's definition of residence prior to the November election. Accepting for purposes of discussion that this was as accurate reflection of counsel's remark, because Westbrooks had previously indicated to the State her intent to comply with its definition of residence, it would be beneficial to know the circumstances which preceded and surrounded that response.

¶43. It has been the practice of the State, that candidates need be fully qualified only by election day. That practice now seems to have been abandoned in this case. If that is true, then this action would appear to be in conflict with the Voting Rights Act, which requires preclearance before changes in voting practices and procedures in this state may be implemented. *See* 42 U.S.C. §§ 1973–1973 (aa-6). Beyond question, any change in the time at which a candidate must be fully qualified would be a change in the State's voting practices and procedures, which would require preclearance. Just as it did in ***In re McMillin***, this

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> In good faith, however, the SBEC has enclosed herein those documents it held in its possession during the Monday meeting relevant to your qualifications and, upon your request, will provide to you a true and accurate copy of the original tape recording of the relevant portions of said meeting.

[9]The letter provided that: "In answer to a question posed by Secretary Hosemann, your counsel stated you did not intend to move into Congressional District Two, and it was your position that residency in said district was not required so as to maintain your candidacy."

Court has an obligation to be aware of the application of the Voting Rights Act, and its interplay with elections in this state. *See* ***In re McMillin***, 642 So. 2d 1336 (Miss. 1994).

¶44. Because 9-4-1(2) and 9-4-5 both are silent as to when a candidate must fulfill the residency requirement, I would hold that consistent with past state practice, Westbrooks had until the day of election to be a resident of the district. Because the State now seeks to abandon that practice, without having obtained the required preclearance under the Voting Rights Act, I would hold that attempted abandonment of this practice to be ineffective, and that Westbrooks has until the November election to meet the residency requirement.

¶45. In conclusion, I would reverse the trial court's judgment regarding whether there is a residency requirement. If the Court determines that the trial court reached the right result, the Court may affirm the trial court's holding on other grounds. *See* ***Cucos, Inc. v. McDaniel***, 938 So. 2d 238, 247 (¶26) (Miss. 2006). Thus, I would affirm the trial court's judgment to place Westbrooks on the ballot. All candidates' names should be placed on the ballot. If Westbrooks wins the election and there then remains an issue regarding where she resides, any challenge to her residency may be addressed at that time. If she loses, the point is moot.

¶46. The majority also has precluded Westbrooks from filing a motion for rehearing. Its reason is that the ballots have been printed, and absentee balloting has begun. That is not a rational justification to preclude rehearing on an issue of this significance. The majority fails to identify any specific harm that is prevented by not allowing a rehearing in this case. But if this case has been wrongly decided, then there is significant harm to Westbrooks, her supporters, and their right to support a candidate of their choice.

KITCHENS, J., JOINS THIS OPINION; CHANDLER, J., JOINS IN PART.