IN THE SUPREME COURT OF MISSISSIPPI

JAMES ALBERT WIGGINS	APPELLANT/DEFENDANT
VS.	CAUSE NO. 2006-CA-01126
BILLY RAY PERRY	APPELLEE/PLAINTIFF

REPLY BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED

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ARGUMENT.

In his Appellee Brief, Perry makes two basic arguments. First, Perry argues that Wiggins' equitable defenses, as *anticipated* by Perry, established Chancery Court jurisdiction over the subject matter of Perry's claim. Second, Perry argues that, by the mere filing of a motion, he amended his Complaint and thus established subject matter jurisdiction in the Chancery Court. However, both arguments fail.

Anticipated Defenses Do Not Establish Chancery Court Jurisdiction

Perry claims that jurisdiction in the Chancery Court was proper not because of the contents of his Complaint, but instead based on the defenses he *anticipated* Wiggins would raise. It has long been established that subject matter jurisdiction is established by the well pled allegations of the Complaint. See, e.g., *In Re City of Ridgeland*, 494 So.2d 348, 350 (Miss.1986); *Brown v. Brown*, 493 So.2d 961, 963 (Miss.1986); and *American Fidelity Fire Insurance Co. v. Athens Stove Works, Inc.*, 481 So.2d 292, 296 (Miss.1985). Subject matter jurisdiction is decided at the time suit is filed. *City of Ridgeland v. Fowler*, 846 So.2d 210 (¶25)(Miss. 2003). See also, *Euclid-Mississippi v. Western Cas. & Sur. Co.*, 163 So.2d 676, 679 (Miss. 1964).

Even defenses raised in an answer to a complaint are not allowed to be used to establish subject matter jurisdiction, much less defenses that a plaintiff merely *anticipates* that a defendant might raise. Allowing Perry to succeed in establishing subject matter jurisdiction through the defenses he "anticipates" Wiggins would raise would create a very dangerous precedent. Under such a ruling, the only limit on a plaintiff's ability to create subject matter jurisdiction in any given Court would be the limit of the plaintiff's imagination in conjuring up "anticipated" defenses, defenses which may not ever even be contemplated by the defendant, much less raised.

Perry also argues that § 160 of the Mississippi Constitution, which bestows jurisdiction upon the Chancery Courts to hear suits to try title and to cancel deeds, establishes jurisdiction in the Chancery Court in this case. On its face, Perry's Complaint is neither a suit to try title or to cancel deeds. It is an eviction proceeding. Recognizing this jurisdiction defect, Perry again relies on defenses he anticipates Wiggins to make, namely that Perry anticipated that Wiggins would try to cancel the deed transferring title from Wiggins to Perry. However, even the Mississippi Constitution does not allow "anticipated" defenses to be the basis for subject matter jurisdiction. To find jurisdiction, the Court must look only within the four corners of Perry's Complaint, not into Perry's crystal ball of anticipated defenses.

Perry also relies upon *Hudson v. Bank of Edwards*, 469 So.2d 1234 (Miss. 1985), as support for his argument that the Chancery Court possessed subject matter jurisdiction over Perry's claims. However, in *Hudson*, which was an ejectment action as is the present case, the plaintiff followed the correct procedure and filed his ejectment action in circuit court, basing jurisdiction upon the allegations of the complaint, not any anticipated defenses. The Mississippi Supreme Court, after reversing the Circuit Court, remanded the case to Chancery Court instead of Circuit Court, finding that it was the proper forum given the equitable defenses that were actually raised in the trial court.

Perry contends that to follow the procedure used in *Hudson*, i.e., filing an ejectment action in a court of law rather than a court of equity, would be a "total waste of judicial economy" because of the anticipated equitable defenses of Wiggins. Appellee's Brief at p. 8. However, it would only be a waste of judicial economy if and only if equitable defenses are indeed raised, which is never known at the time of the filing of the complaint. Under the *Hudson* procedure, if equitable defenses are raised, the court of law can simply transfer the case to a court of equity, thereby making any

waste of judicial economy minimal. Not following the *Hudson* procedure leads to the filing of an action in a court not appropriate for the type of action, which risks the same waste of judicial economy when equitable defenses are not raised, leading to the transfer of the case from a court of equity to a court of law.

Either approach risks wasting judicial economy. However, Perry's approach bases that risk on unknown facts, i.e. the anticipated defenses, while the established and correct approach used in *Hudson* bases the risk on facts that are known, i.e. the allegations of the complaint. The best approach would have been for Perry to file his action in County Court for Bolivar County, which has both equitable and common law jurisdiction. Such an approach would have eliminated any risk of wasted judicial economy, as the county court has jurisdiction over both Perry's common law claims and Wiggins' equitable defenses, as anticipated by Perry.

Mere Filing of Motion Does Not Amend Complaint

Perry also argues that the filing of his Motion to Dismiss Anticipated Pleadings amended his Complaint pursuant to Rule 15 of the Mississippi Rules of Civil Procedure to include equitable issues sufficient for Chancery Court jurisdiction.

M.R.C.P. 15 contemplates five ways in which a complaint may be amended. First, a "party may amend a pleading as a matter of course at any time before a responsive pleading is served." M.R.C.P. 15(a). Perry did not amend his Complaint before Wiggins answered, so this way to amend a complaint is not applicable.

Second, "if a pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may amend the pleading at any time within thirty days after it is served." M.R.C.P. Rule 15(a). Since a responsive pleading was required, this

approach is also not applicable.

Third, "[o]n sustaining a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), or for judgment on the pleadings, pursuant to Rule 12(c), leave to amend shall be granted when justice so requires upon conditions and within time as determined by the court, provided matters outside the pleadings are not presented at the hearing on the motion." M.R.C.P. Rule 15(a). The Chancery Court did not grant a motion pursuant to Rule 12(b)(6) or Rule 12(c). Further, Perry never sought leave of the Chancery Court to amend his Complaint. Thus, the third way by which to amend the complaint also does not apply to the facts at hand.

Fourth, "a party may amend a pleading by leave of court or upon written consent of the adverse party." M.R.C.P. Rule 15(a). Again, Perry never sought the leave of anyone, either the Chancery Court or Wiggins, to amend his Complaint. Perry's failure to seek and be granted either leave of the Chancery Court or consent by Wiggins eliminates this avenue by which Perry could have amended his Complaint.

Lastly, "when issues not raised by the pleadings *are tried* by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." M.R.C. P. Rule 15(b) (emphasis added). Perry contends that the filings of his Motion to Dismiss Anticipated Pleadings and his Motion for Summary Judgment put Wiggins on notice of his own equitable defenses to Perry's non-equitable claims and thus constituted an amendment of Perry's Complaint to include Wiggins' equitable defenses. Perry's argument does not make logical sense for several reasons.

First, M.R.C.P. Rule 15 does not provide for amendment of a complaint by the mere filing of a motion. If such were the case, no party would ever need to seek leave of the court or consent

of the opposing party to amend its original complaint, thus making a substantial portion of M.R.C.P. Rule 15(a) meaningless. Perry putting Wiggins on notice of issues that *Perry* anticipates *Wiggins* raising is simply not enough to amend *Perry's* Complaint.

Also, for a complaint to be amended by expressed or implied consent, the very language of M.R.C.P. Rule 15(b) requires that the issues not previously raised in the complaint be "*tried* by expressed or implied consent" (emphasis added). There was no trial in the present case, so M.R.C.P. Rule 15(b), by its own language, does not apply.

For the same reason, Wiggins failure to respond to the Motion to Dismiss Anticipated Pleadings does not mean that Wiggins expressly or implied consented to the amendment of Perry's Complaint to include the anticipated equitable defenses of Wiggins. Wiggins' equitable defenses were not "tried" as there was no trial. Since a trial is needed for amendment by either express or implied consent to occur under M.R.C.P. Rule 15(b), no amendment could have occurred.

Finally, to allow Perry to amend his Complaint to include anticipated equitable issues by filing a motion to bar the very same anticipated equitable issues is absurd. In other words, Perry is claiming that the filing of his Motion to Dismiss Anticipated Pleadings in effect immediately amended his Complaint to include the same anticipated issues he sought to prohibit. To allow Perry to seek to exclude the anticipated equitable issues and at the same time claim that his Complaint is amended to include the issues he sought to exclude would simply not make sense.

Perry also argues that an amendment pursuant to M.R.C.P. Rule 15 relates back to the original filing. See Appellee's Brief at p. 10. Perry relies on three cases, *Marr v. Adair,* 841 So.2d 1195 (Miss. App. 2003), *Pearson v. Parsons*, 541 So.2d 447 (Miss. 1989), and *CSX Transportation, Inc. v. Owens,* 533 So.2d 613 (Ct. App. Ala. 1987), as well as federal cases, in support of this

argument. However, it is immaterial whether a properly amended Complaint relates back to the original filing for jurisdictional purposes. This argument is immaterial because there was never a proper amendment of Perry's Complaint and therefore there was nothing to relate back to the original Complaint. Therefore, whether an amended Complaint can be used to cause an original filing to invoke jurisdiction is not relevant to this appeal. The issue is whether the Complaint was ever properly amended. As discussed above, the proof is clear that it was not.

Section 147 of the Mississippi Constitution Does Not Prohibit Reversal

Perry also cites § 147 of the Mississippi Constitution as a basis for avoiding reversal. Section 147 states:

> "No judgment or decree in any chancery or circuit court rendered in a civil case 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..."

The Mississippi Supreme Court has interpreted § 147 as being triggered after "a trial on the merits." See *Burnette v. Hartford Underwriters Insurance Co.*, 770 So.2d 948 (Miss. 2000) ("this Court is prohibited by the Mississippi Constitution from reversing on this issue following *a trial on the merits*") (emphasis added); and *Southern Leisure Homes, Inc. v. Hardin*, 742 So.2d 1088 (Miss. 1999) ("The Mississippi Constitution would prohibit Southern from gaining a reversal on this jurisdiction issue *following a trial on the merits.*") (emphasis added). Since a trial on the merits has not occurred in the present case, § 147 does not preclude reversal on jurisdictional grounds.

Further, even if § 147 is triggered before a trial on the merits, it should still not apply in this case. It has repeatedly been held by the Mississippi Supreme Court that the proper procedure to contest jurisdiction in a situation such as Wiggins' is to seek permission to file an interlocutory

appeal prior to the trial on the merits in the incorrect court. See *Burnette, supra* at 951 and *Southern Leisure Homes, supra* at 1091. Wiggins sought permission to file an interlocutory appeal regarding the jurisdictional issue. However, the Supreme Court denied Wiggins' Petition for Interlocutory Appeal. R. 119. It would thus be inappropriate for this Court to now preclude Wiggins from obtaining a reversal on jurisdictional grounds because the issue was not addressed via interlocutory appeal when the Supreme Court did not allow Wiggins to address it via interlocutory appeal. Wiggins tried to follow the correct procedure to address the jurisdictional issue but was not allowed due to the Supreme Court's denial of his Petition for Interlocutory Appeal. The Court should therefore not allow § 147 to bar a reversal because of any failure to address the issue on interlocutory appeal.

CONCLUSION.

Jurisdiction for actions for eviction are statutorily placed with the County Courts or other inferior courts. As such, the Chancery Court lacked subject matter jurisdiction. The raising of equitable defenses, or in this case the raising of *anticipated* equitable defenses, does not cause a case to come within the jurisdiction of the Chancery Court.

If a court lacks subject matter jurisdiction, it cannot obtain it through default. Nothing that occurs subsequent to the filing of the initial pleading can give a court subject matter jurisdiction, excepting the possibility of filing an amended pleading which sets out the necessary allegations to do so. Such was not done here, as no motion to amend the complaint was ever filed, much less granted, and no equitable issues were ever *tried* via expressed or implied consent. The lower court lacked the jurisdiction to act and as such, the orders entered by the lower court regarding this controversy are void.

CERTIFICATE OF SERVICE

I, CHRISTOPHER E. KITTELL, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

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THIS, the 22nd day of January, 2007.

CHRISTOPHER E. KITTELL, MSB #[redacted]

CEK\Wiggins.James\Appeal\Reply Brief