IN THE SUPREME COURT OF MISSISSIPPI

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

BRIEF OF APPELLANT

CHRISTOPHER E. KITTELL
GRESHAM & KITTELL
P. O. Box 760
144 Sunflower Avenue
Clarksdale, Mississippi 38614
(662) 624-5408
(662) 627-5530 (facsimile)
Attorneys for Appellant JAMES ALBERT WIGGINS

IN THE SUPREME COURT OF MISSISSIPPI

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

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Mr. James Albert Wiggins - Appellant/Defendant below;
2. Mr. Billy Ray Perry - Appellee/Plaintiff below;
3. Christopher E. Kittell, Gresham & Kittell - Attorneys for Appellant/Defendant below;
4. Mr. Lindsey Meador - Attorney for Appellee/Plaintiff below;
5. Honorable William G. Willard, Jr., Chancery Court Judge.

THIS, the 5th day of December, 2006.

CHRISTOPHER E. KITTELL, MSB [redacted]
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

1. Did the Chancery Court err in failing to grant the Motion to Dismiss based upon lack of subject matter jurisdiction?

STATEMENT OF THE CASE

I. Nature of Case and Course of Proceedings in Lower Court

1. This matter originated with a pleading entitled Petition for Damages, Injunctive Relief and Other Relief Regarding Interest in Land (hereinafter the "Petition"). R.3. The Petition was filed by the Appellee (hereinafter "Perry") in the Chancery Court of the Second Judicial District of Bolivar County, Mississippi on October 5, 2004. The Petition alleged that the Appellant (hereinafter "Wiggins,") was a "tenant in a dwelling house" and that Wiggins was in arrears in his rent. The specific relief demanded *via* the Petition was as follows:

1. A mandatory injunction directing that Wiggins "quit the premises" and surrender the premises to Perry;
2. A money judgment in the amount of $2,000 for past due rent;
3. Attorney fees and cost incurred for bringing the action; and, alternatively,
4. A mandatory injunction directing Wiggins to sign a new written lease and an agreement to repay the $2,000 past due rent.

Wiggins was timely served with the Petition.

2. On October 14, 2004, attorney Sarah C. Jubb with North Mississippi Rural Legal Services filed an "Entry of Appearance" in this file on behalf of Wiggins. R.8.

3. On November 17, 2004, Perry filed a Motion to Dismiss Anticipated Pleadings seeking to prohibit Wiggins from raising issues of lack of capacity, undue influence, overreaching for insufficient consideration and/or fraud. R. 19. In his motion, Perry asserted that all such claims were barred by a three year statute of limitations.

4. On July 13, 2005, Perry filed his Motion for Summary Judgment. R.27. The Motion for Summary Judgment was supported by affidavits filed by various persons claiming to have been present when Perry originally obtained the title to the real property and stating that they observed no indications of lack of capacity at the time of signing. No response was filed on behalf of Wiggins.

5. On November 28, 2005, the Chancery Court of the Second Judicial District of Bolivar County, Mississippi, granted Perry's Motion for Summary Judgment. R.38. As part of the Order Granting Summary Judgment, the lower court found, albeit without benefit of hearing, that Wiggins "had the mental capacity and was not unduly influenced, or the victim of fraud or duress at all relevant times concerning the execution of the December 18, 2000, warranty deed to Billy Ray Perry,...". In this Order, the lower court reserved ruling on the issues of back rent, if any, owed by Wiggins to Perry, and the question of cost and fees.

6. On December 13, 2005, Wiggins filed his Motion to Set Aside Order/Motion to Stay Current Order and Motion to Dismiss for Lack of Jurisdiction. R.42. In this motion, Wiggins challenged the lower court's jurisdiction to entertain this action.

7. On February 8, 2006, the lower court denied Wiggin's Motion to Set Aside Order/Motion to Stay Current Order and Motion to Dismiss for Lack of Jurisdiction and entered Judgment confirming its earlier Order granting Summary Judgment.

8. By Final Judgment dated *nunc pro tunc* May 26, 2006, entered May 30, 2006, the lower court awarded Perry a judgment against Wiggins in the amount of $11,900 for back rent and denied any award for attorney fees or punitive damages. R.120.

9. Wiggins filed a timely Notice of Appeal on June 28, 2006. R.123.

II. Statement of Facts Relevant to Issues for Review

Prior to December 15, 2000, Wiggins owned and lived in his residence located at 316 South Leflore, Cleveland, Mississippi. Prior to December 15, 2000, Wiggins borrowed certain funds from Perry. R.23. Perry claims that Wiggins failed to repay these borrowed funds and, as a result thereof and in lieu of foreclosure, on December 15, 2000, during a meeting with Perry, Wiggins deeded Perry his homestead. Thereafter, Perry asserts that Wiggins remained in the home as a tenant pursuant to an oral lease. R.4. However, Perry asserts that Wiggins failed to pay the lease payments. The alleged failure to pay the lease payments prompted Perry to file his original Petition for Damages, Injunctive Relief and Other Relief Regarding Interest in Land seeking to have the Chancery Court remove Wiggins from the property, award a judgment for past due rent, or alternatively, require Wiggins to execute a new lease at a stated monthly rental. R.3-5.

Although disguised as a petition for injunctive relief, the document, *as filed*, is a classic action for eviction. Being an action for eviction, the Chancery Court had no subject matter jurisdiction to entertain the same.

SUMMARY OF THE ARGUMENT.

When James Albert Wiggins transferred title to his residence to Billy Ray Perry, Wiggins did not leave the premises. Rather, *according to Perry*, Wiggins remained in the residence pursuant to an oral lease agreement. Again, according to Perry, Wiggins became delinquent in his rent. Perry desired for Wiggins to vacate the premises. Although jurisdiction for an eviction action is statutorily mandated to the County Court, Perry elected to file his eviction action in Chancery Court. In an effort to make what is a classic eviction action appear to be properly filed in Chancery Court, Perry used terms such as "mandatory injunction" in asking the Chancery Court to remove Wiggins from the property. Perry included an additional claim for a mandatory injunction asking the court to require Wiggins to sign a new written lease agreement and acknowledge his past due rent - a form of relief that is not achievable in any court.

The *primary* relief sought by Perry was the removal of Wiggins from the premises. Thus the pleading filed is actually an eviction action masquerading as a request for injunctive relief. Because subject matter jurisdiction of eviction actions is statutorily and exclusively placed with either county courts or other inferior courts, the Chancery Court below lacked subject matter jurisdiction to hear this matter. This Court should reverse the Chancery Court's Order Granting Summary Judgment and Final Judgment.

ARGUMENT.

Did the Chancery Court Lack Subject Matter Jurisdiction?

Subject matter jurisdiction is decided **at the time suit is filed**. City of Ridgeland v. Fowler, 846 So.2d 210 (¶25)(Miss. 2003) ("...jurisdiction is determined as of the time the suit is filed"). See also, Euclid-Mississippi v. Western Cas. & Sur. Co., 163 So.2d 676, 679 (Miss. 1964). When assessing subject matter jurisdiction, the Court is to look at the well pled allegations of the Complaint. In Re City of Ridgeland, 494 So.2d 348, 350 (Miss.1986); Brown v. Brown, 493 So.2d 961, 963 (Miss.1986); American Fidelity Fire Insurance Co. v. Athens Stove Works, Inc., 481 So.2d 292, 296 (Miss.1985). It is the "nature of the primary claim" that determines whether a particular court has subject matter jurisdiction. "When determining whether a court has subject matter jurisdiction to hear a particular matter, the court should consider the *nature of the primary* claim asserted." Dye v. State ex rel. Hale, 507 So.2d 332, 337 (Miss. 1987)(*emphasis added*).

What must be determined is the *substance* of the Complaint. "Substance is considered over form and label." Medlin v. Hazlehurst Emergency Physicians, 889 So.2d 496, 499 (Miss. 2004); *citing* Arnona v. Smith, 749 So.2d 63, 66 (Miss.1999). Courts must be cautious of pleadings which are couched in terms of equity when they are actually actions at law. Thompson v. First Mississippi Nat. Bank and Mut. Sav. Life Ins. Co., 427 So.2d 973, 976 (Miss. 1983) ("The ... court should be wary of attempts to camouflage as a complicated accounting what is in essence an action at law for breach of contract.") Lastly, subject matter jurisdiction may be attacked anywhere, at any time. A judgment issued by a court lacking subject matter jurisdiction is void. "It is well settled that a judgment rendered by a court having no jurisdiction of the subject matter is void, not merely

voidable, and may be attacked directly or collaterally, anywhere, and at any time. Such a judgment is a usurpation of power and is an absolute nullity." Roberts v. Roberts, 866 So.2d 474, 477 (¶ 8)(Miss. App.,2003). If the lower court lacked subject matter jurisdiction, the Order Granting Summary Judgment entered herein carries no authority. It is therefore void.

To determine if the Chancery Court had subject matter jurisdiction, consistent with the above cited authorities, requires a review and analysis of the initial pleading.

Petition for Damages, Injunctive and Other Relief Regarding Interest in Land

Following the naming of the parties to the action, the Petition for Damages, Injunctive and Other Relief Regarding Interest in Land filed by Perry initiating this litigation related the following allegations:

a. Perry is the owner of 316 South Leflore (Cleveland, MS). Perry obtained the property by virtue of a Warranty Deed from Wiggins dated December 15, 2000. The legal description of the subject real property is Lot 151, Block 6, Williams and Davidson Addition to the City of Cleveland, Mississippi, and the residence situated thereon (R.3) (¶ 2 of Petition);

b. Since January, 2001, Wiggins was a tenant in said house pursuant to a "verbal lease" between Wiggins and Perry with lease payments of $450 per month. As of September 1, 2004, Wiggins was delinquent in such lease payments in the amount of $900. (R. 3- 4) (¶ 3 of Petition)

c. Effective September 1, 2004, the rent was increased from $450 to $550. At the time of the filing of the Petition, Wiggins was delinquent in the total amount of $2,000. Perry offered Wiggins the option of renting the "main structure" under a new written lease for the new rental of $550 per month, or leasing "the property in the rear of the main house" under a new written lease

for the rental of $450 per month. Perry offered Wiggins "different arrangements" to bring current the delinquent rent. Wiggins refused all such offers. (R. 4)(¶ 4 of Petition).

It was on these facts that Perry asked the Chancery Court to remove Wiggins from the subject property *via* a "mandatory injunction" and award Perry a judgment for all back due rent and attorneys fees. (R. 4)(¶ 5 of Petition). Alternatively Perry asked the Chancery Court to enter a "mandatory injunction" directing that Wiggins execute one of the written leases tendered by Perry and enter into an agreement to pay the current rent delinquency. (R. 5)(¶ 5 of Petition). With all due respect to the lower court, it is difficult to see how the original Petition filed by Perry is anything other than an eviction action. Although it is couched in equitable terms such as "mandatory injunction," it is clear that the primary relief sought is the removal of Wiggins from the subject premises and an award of past due rentals. All such actions are governed by Miss. Code Ann. § 89-7-27 which places the *exclusive* jurisdiction of such eviction proceedings with the county court, any justice of the peace of the county, or the mayor or police justice.[1]

The Judgment rendered by the lower court spends a fair amount of time discussing the fact that Wiggins failed to respond to the Motion for Summary Judgment. While such may be true, a

---

[1]**Miss. Code Ann. § 89-7-27:** A tenant or lessee at will or at sufferance, or for part of a year, or for one or more years, of any houses, lands, or tenements, and the assigns, under-tenants, or legal representatives of such tenant or lessee, may be removed from the premises by the judge of the county court, any justice of the peace of the county, or by the mayor or police justice of any city, town, or village where the premises, or some part thereof, are situated, in the following cases, to wit:

First.-Where such tenant shall hold over and continue in possession of the demised premises, or any part thereof, after the expiration of his term, without the permission of the landlord.

Second.-After any default in the payment of the rent pursuant to the agreement under which such premises are held, and when satisfaction of the rent cannot be obtained by distress of goods, and three days' notice, in writing, requiring the payment of such rent or the possession of the premises, shall have been served by the person entitled to the rent on the person owing the same.

court that lacks subject matter jurisdiction cannot obtain such jurisdiction by default. Because the Chancery Court lacked subject matter jurisdiction, no pleadings filed therein could command any response and no failure to respond could bestow subject matter jurisdiction. Simply put, if the lower court lacked subject matter jurisdiction, it did not matter that Wiggins failed to respond to the Motion for Summary Judgment.

Why Chancery Court?

In the lower court, Perry claimed that he filed his Petition in Chancery Court because, prior to filing suit, those speaking on behalf of Wiggins had suggested that the transaction whereby Perry obtained title to the property was voidable on equitable grounds. (R. 50 - 51, ¶ 5). Thus, as Perry's argument must go, chancery court jurisdiction was appropriate not based on the merits or allegations contained in Perry's Petition, but rather on how Perry *anticipated* Wiggins would *respond* to his Petition. This is made clear in the following excerpts from Perry's Memorandum of Law submitted to the lower court in support of his Response to Wiggin's Motion to Set Aside on jurisdictional grounds where he stated:

> There is a reason that Perry brought this action in Chancery. That reason is that Perry knew Wiggins was challenging the validity of the December 15, 2000, deed, where Perry received title, and that these challenges would ultimately cause this matter to be resolved in Chancery.

(R.E. 8 - Perry's Memorandum of Law, p. 1, ¶ 2)

> Perry knew that this was no simple eviction matter. He knew that Wiggins' response *would be* equitable arguments that he had been overreached, that the consideration was inadequate, that he did not have mental capacity, and other possible equitable claims and defenses to the execution of the December 15, 2000, warranty deed.

(R.E. 9-10 - Perry's Memorandum of Law, pp. 2 - 3.) (*Emphasis added*) And lastly, on page 5 of his Memorandum:

> Here, it is clear that Chancery has jurisdiction of the *defenses* stated in open court by Mr. Wiggins and his attorneys, regarding the equitable defenses to the execution of [the] December 15, 2000, deed.

(R.E. 12 - Perry's Memorandum of Law, p. 5.) (*Emphasis added*)

Of course, the rule is that subject matter jurisdiction is decided **at the time suit is filed,** NOT at the time of the filing of the response. ("...jurisdiction is determined as of the time the suit is filed." City of Ridgeland v. Fowler, 846 So.2d 210 (¶25)(Miss. 2003); Euclid-Mississippi v. Western Cas. & Sur. Co., 163 So.2d 676, 679 (Miss. 1964)(Emphasis added). When assessing subject matter jurisdiction, it is the well pled allegations of the Complaint, NOT the Answer, that control. In Re City of Ridgeland, 494 So.2d 348, 350 (Miss.1986); Brown v. Brown, 493 So.2d 961, 963 (Miss.1986); American Fidelity Fire Insurance Co. v. Athens Stove Works, Inc., 481 So.2d 292, 296 (Miss.1985). Under Perry's scenario, Perry would have the Court disregard this rule and look rather to what he, Perry, *thought* the response of the Respondent would be. Imagine the liberties that could be taken with jurisdiction if instead of looking at what *was* filed, we instead look to what a Petitioner *thought* would be filed by a Respondent. The only limit that would be placed on any court's jurisdiction would be the limits of the Petitioner's imagination. It seems inadequate to simply state that such a situation would be untenable. That is why this Court has so wisely determined that when assessing jurisdiction, it is the pleadings of the one initiating the action, i.e. the allegations of the Complaint, that must be considered, not what might be filed in response. The Court should disregard Perry's arguments to the contrary.

Authorities cited by Perry.

Perry next cited two cases which he claimed supported his argument that the Chancery Court had jurisdiction of this matter: Johnson v. Hines (*sic.*) County, 524 So. 2d 947 (Miss. 1988); and Hudson v. Bank of Edwards, 469 So. 2d 1234 (Miss. 1985). (Rec. 49 - 50) As will be shown, each of these cases is distinguishable from the case at bar, as follows:

JOHNSON V. HINES (*SIC.*) COUNTY
524 So. 2d 947 (Miss. 1988)

Ben Johnson, an experienced land developer, purchased a parcel of property in Hinds County, Mississippi, known as "Timberlake." Before purchasing the property, Johnson had a civil engineer draw up plans to subdivide the property but never submitted the plans to the Board of Supervisors for approval as required by statute. *See* Miss.Code Ann. § 17-1-23(2) (1972). Johnson, *supra*, p. 950. Johnson eventually sold all of the lots and homes were ultimately built on the property. A water system was installed by Johnson that was neither submitted to nor approved by the Mississippi Board of Health. Johnson, *supra*, p. 950. In several respects, the Timberlake subdivision failed to conform to the Hinds County Subdivision Ordinances. Johnson, *supra*, p. 950. Johnson openly acknowledged that he did not follow the ordinance because *he felt there was no need to*. Johnson, *supra*, p. 950. Johnson next purchased additional property and again had a civil engineer draw up plans to subdivide the same. Hinds County filed suit in chancery court regarding both properties, seeking a mandatory injunction to require Johnson[2] to cause the Timberlake properties to be brought into code, and a prohibitory injunction seeking to stop Johnson from selling and developing homes in the additional property until it had likewise been brought into compliance with the County Code.

[2]Johnson died during the pendency of the litigation. The action was revived and continued against his Estate.

Finding that both "Timberlake Place and Bolton Heights [were] wholly subject to the Hinds County Subdivision Ordinance," (Johnson, *supra*, p. 952), the chancery court granted both requests.

Johnson described the efforts of the County as an action of "eminent domain" and argued that since only special courts of eminent domain are authorized to hear such causes, the chancery court lacked subject mater jurisdiction to hear the controversy. Citing the case of City of Hattiesburg v. L. & A. Contracting Co., 159 So.2d 74 (Mis. 1963), wherein the Court had previously found that "courts have held that the municipality itself, having adopted a zoning ordinance, may pursue the remedy of obtaining an injunction against a violator of it," (City of Hattiesburg, *supra*, p. 76), the Johnson court determined that Hinds County had authority to seek injunctive relief against Johnson. It was within the above context - a context of on-going violations of County subdivision ordinances and prayers for injunctive relief to prohibit further violations - that the Johnson Court opined, "[c]laims regarding title, possession and use of land are well within the chancery court subject matter jurisdiction." *See* Johnson, *supra*, p. 952.[3] Looking at the on-going violations of the County ordinances, the threatened future violations regarding the recently purchased property, and clear past precedent, the Johnson court found that Hinds County acted properly in seeking injunctive relief against Johnson, and thus chancery court had subject matter jurisdiction. What the Johnson court DID NOT say was that the chancery court had jurisdiction to entertain an action for eviction.

The distinguishing feature of this case is that in Johnson, there was clear precedent that the County could seek injunctive relief to avoid the continuing and future violations of county

[3]Notwithstanding that the two quotes are very similar, the Petitioner's brief cites this, or a similar, quote as "It is well settled that claims regarding title, possession and use of land are within the Chancery Court's subject matter jurisdiction," and likewise ascribes the quote to page 952 of the Johnson opinion. Although repeatedly reading page 952 of the Johnson opinion, undersigned counsel is unable to find this quote.

subdivision ordinances, positive ordinances which the property clearly fell subject to and something which the County had a clear right to do. The *primary* relief sought in the present case is the removal of a non-paying tenant. Although couched in terms of injunctive relief, the substance of the relief sought by Perry is one of eviction - *a matter of law, not equity*. Thus, the facts and holding in Johnson are not applicable to this appeal.

HUDSON V. BANK OF EDWARDS
469 So. 2d 1234 (Miss. 1985)

Hudson, acting as the Flying H. Ranch, purchased 111 acres from the Duffys at a cost of $168,000. Hudson financed $128,000 of the purchase price by way of a loan from the First National Bank. The land was put up as security for the loan. The Crystals were collateral endorsers[4] of the loan to First National Bank. The remaining $40,000 was financed through a note and deed of trust to the Duffys. Subsequent to the purchase, Flying H. Ranch borrowed an additional $38,000 from the Bank of Edwards. This loan was also secured by a deed of trust on the subject property. Thereafter, Flying H. Ranch, by way of an assumption deed, conveyed title to the 111 acres to the Crystals. Flying H. Ranch subsequently filed bankruptcy. In the mean time, the note to First National Bank went into default. Foreclosure proceedings were commenced by First National Bank. In an effort to protect its interest in the 111 acres, Bank of Edwards sought unsuccessfully to enjoin the foreclosure by First National Bank.

The Crystals purchased the property at foreclosure. In a further effort to protect it's interest in the land, the Bank of Edwards purchased the 111 acres from the Crystals. Thereafter, the Bank of Edwards found that Hudson had never vacated the premises. The Bank of Edwards filed an action

[4]The Crystals did not sign the Note to First National Bank. They did provide additional collateral to secure the loan to First National Bank.

of ejectment with the County Court of Hinds County seeking to remove Hudson from the premises. Finding that the amount in controversy exceeded $10,000, the Bank of Edwards moved the Hinds County Court to transfer the matter to the Hinds County *Circuit* Court. Desiring to raise equitable defenses, Hudson asked that the matter be transferred to the Hinds County *Chancery* Court. The County Court Judge transferred the matter to the Circuit Court. The Bank of Edwards then filed a Motion for Summary Judgment. Before the hearing on the Bank's Motion for Summary Judgment, Hudson again requested that the matter be transferred to the Chancery Court of Hinds County. The Motion to Transfer was denied and the Circuit Court, finding that title to the property was vested in the Bank and that the Bank was entitled to possession under Mississippi's ejectment law, (*see* Mississippi Code Annotated § 11-19-1 et seq.), granted the bank's Motion for Summary Judgment.

On appeal, the Supreme Court found that issues of fact existed that prevented the entry of summary judgment and thus reversed the ruling of the Circuit Court. In determining to which lower court the matter should be remanded, the Supreme Court found that Hudson had raised equitable defense to the ejectment action. It was in that context that the Court stated "the Chancery Court of Hinds County, Mississippi, would be the proper forum to try the ejectment and at the same time allow the appellant to enjoy the benefit of raising equitable defenses and receiving such relief as equity may grant." Hudson v. Bank of Edwards, 469 So.2d 1234, 1240 (Miss. 1985). Thus, the Court did not find that the County Court erred when it declined to transfer the matter to Chancery Court, rather because the pleadings embraced issues involving both matters of law and equity, the Supreme Court determined that Chancery Court offered the best forum for addressing both issues. **To the contrary,** the Court positively stated "[c]ircuit courts are competent to hear ejectment actions." Hudson, *supra*, p. 1240.

void. This Court should reverse the lower Court's Final Judgment as void and remand this matter to the County Court of the 2nd Judicial District of Bolivar County, Mississippi. Being a court which shares both law and equity jurisdiction, if equitable claims are actually raised by Wiggins, the County Court has the jurisdiction to deal with them.

Respectfully submitted, this the 5th day of December, 2006.

CHRISTOPHER E. KITTELL, MSB #[redacted]
GRESHAM & KITTELL
144 Sunflower Avenue
Post Office Drawer 760
Clarksdale, Mississippi 38614
Telephone: (662) 624-5408
Facsimile: (662) 627-5530

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:

Lindsey C. Meador, Esquire
Meador & Crump
P. O. Drawer 1319
Cleveland, MS 38732
Attorney for Appellee

Hon. William G. Willard, Jr.
Chancery Court Judge
11th Chancery Court District
P.O. Box 22
Clarksdale, MS 38614

THIS, the 5th day of December, 2006.

CHRISTOPHER E. KITTELL, MSB #[redacted]