IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2009-CA-01601

Deutsche Bank National Trust Company PLAINTIFF/APPELLEE

V.

Angela L. Turner DEFENDANT/APPELLANT

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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ANGELA L. TURNER

IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2009-CP-01601

Deutsche Bank National Trust Company PLAINTIFF/APPELLEE

V.

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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 Justices of this Court may evaluate possible disqualification or recusal:

1. Deutsche Bank National Trust Company, Plaintiff/Appellee;
2. Cynthia L. Cohly, Attorney for Plaintiff/Appellee;
3. Shapiro & Massey, L.L.P.,
4. Chancellor Vicki Roach-Barnes, Chancery Court Judge, Warren County;
5. Chancellor Jane Weathersby, Chancery Court Judge, Sunflower County;
6. Angela L. Turner, Defendant/Appellant and John Richard May, Jr., Attorney for Defendant/Appellant.

RESPECTFULLY SUBMITTED,

ANGELA L. TURNER
BY: John Richard May Jr.
HER ATTORNEY

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STATEMENT OF THE ISSUES

The issues presented to this honorable Court on appeal are as follows:

I. Whether the lower court committed reversible error in granting Deutsche Bank National Trust Company a default judgment.

   A. Whether the Chancery Court had personal jurisdiction over Defendant Turner.

   B. Whether Plaintiff was required to strictly comply with the service by publication rules of civil procedure.

   C. Whether the default judgment is void and all subsequent orders sustaining that order.

II. Whether Plaintiff has unclean hands and is thereby precluded from using the courts further in this matter.

STATEMENT OF THE CASE

PROCEDURAL POSTURE[1]

Before this Court comes Defendant, Angela Turner, to request that the Supreme Court vacate the Warren County Chancery Court's 02/17/2009 denial of Plaintiff's motion to set aside default judgment and its 08/28/2009 denial of Defendant's "Motion to Reconsider the Motion to Set Aside" the Default Judgment, as well as the Default Judgment itself entered on or about 07/24/2008.

On 02/07/2008, Plaintiff Deutsche Bank National Trust Company filed suit against Defendant Turner to Reform Deed of Trust, Confirm Title and Authorize Nonjudicial Foreclosure. On 02/08/2008 the court clerk issued a Summons, commanding the appearance of Defendant Angela Turner, to the Plaintiff's attorney. On 03/14/2008, said Summons was returned to the clerk unexecuted by the Sheriff and marked undeliverable.

On 04/10/2008, Plaintiff caused a Summons to be published in the *Vicksburg Post* based on the Plaintiff not being able to find the defendant. However, Plaintiff failed to file an affidavit of diligent inquiry prior to seeking service by publication upon Defendant Turner. On 05/30/2008, Plaintiff filed with the Warren County Chancery Court Clerk an Application for Entry of Default and Supporting Affidavit. Also filed on that date were a purported 'Default' and a Motion for Default Judgment. On or about 07/17/2008, the court records show that the Plaintiff caused a proof of publication to be filed with the Court. On 07/24/2008, Warren County Chancery Court Judge Vicki Roach-Barnes signed a Default Judgment.

On 09/23/2008, Plaintiff filed a Complaint for Eviction in the Warren County Justice Court. On 10/15/2008, Defendant filed a Motion to Set Aside the Default Judgment entered in the Warren County Chancery Court based on lack of jurisdiction over the person, insufficiency of process, and

[1] Please see docket. [R. at 3].

insufficiency of service of process under ***Miss. R. Civ. P.*** 12(b)(2)(4) and (5). On this same date, Defendant filed a Motion to Dismiss the Eviction action in Warren County Justice Court as premature because the Motion to Set Aside the Default Judgment was still pending in the Warren County Chancery Court. An Eviction hearing was scheduled for 10/16/2008 in the Warren County Justice Court, Judge Woods presiding. However, due to a minor car accident in which counsel for the Plaintiff was involved, the hearing was rescheduled. On 11/06/2008, a hearing was held in the Warren County Justice Court before Judge Williams. At that hearing, a continuance was granted pending the outcome of the Warren County Chancery Court's ruling on the Defendant's Motion to Set Aside the Default Judgment. On 11/12/2008, Plaintiff filed its Answer and Defenses of Deutsche Bank National Trust Company, as Trustee, to Defendant's Motion to Set Aside the Default Judgment.

On 01/14/2009, Judge Barnes recused herself and this matter was assigned to Judge Jane Weathersby, in the Sunflower County Chancery Court. On 02/12/2009, Chancellor Jane Weathersby heard Defendant's Motion to Set Aside the Default Judgment. On 02/17/2009, Chancellor Jane Weathersby executed an ORDER denying Defendant's Motion to Set Aside the Default Judgment. On 02/27/2009, Defendant filed a Notice of Motion and Motion for Reconsideration (Motion for Reconsideration). On 03/16/2009, Plaintiff filed its Answer and Defenses regarding Defendant's Motion for Reconsideration.

On 04/23/2009, a hearing was held in the Warren County Justice Court based on Plaintiff's Motion for Unlawful Entry and Detainer. On that day, Defendant filed a Motion to Dismiss the Motion for Unlawful Entry and Detainer. Warren County Justice Court Judge Woods ruled in favor of Plaintiff and ordered the eviction on 4/23/2009. On 05/04/2009, Defendant appealed the Warren County Justice Court's Judgment to the Warren County, County Court. On 06/08/2009, a hearing was held in the Warren County, County Court where Judge Price denied Defendant's Motion

to Dismiss the Warren County Justice Court's Writ of Eviction and entered Judgment. However, the Writ of Eviction judgment was suspended pending the outcome of Defendant's Motion to Reconsider the Motion to Set Aside the Default Judgment in the Warren County Chancery Court.

A hearing on Defendant's Motion to Reconsider was held on 08/25/2009 in the Sunflower County Chancery Court. Chancellor Jane Weathersby took the matter under advisement. On 08/28/2009, Chancellor Jane Weathersby issued an ORDER denying Defendant's Motion to Set Aside Default Judgment. On 9/21/2009, Defendant filed a Notice of Appeal with the Warren County Chancery Court to appeal to the Mississippi Supreme Court. Therefore, this appeal has been filed within thirty (30) days of the Warren County Court's final order concerning this matter.

SCOPE OF REVIEW

"Whether to set aside a default judgment is committed to the sound discretion of the trial court". ***Lexington Ins. Co. v. Buckley,*** 925 So.2d 859, 864 (Miss. Ct. App. 2005). This does and has never meant that the trial judge can do anything he or she wishes. ***Bell v. City of Bay St. Louis,*** 467 So.2d 657, 661 (Miss. 1985). "Generally, this Court reviews a trial court's decision on whether to set aside a default judgment under an abuse of discretion standard". ***Stanford v. Parker***, 822 So.2d 886, 887-88 (Miss. 2002); ***McCain v. Dauzat***, 791 So.2d 839, 842 (Miss. 2001). Improper service of process, nevertheless, prevents a trial court from entering judgment against a defendant. ***Sanghi v. Sanghi,*** 759 So.2d 1256, 1257 (Miss. Ct. App. 2000).

FACTS

In July 2003, Defendant discussed the purchase of a mobile home with Homes and Land Mobile Home Sales (Homes & Land) with salesperson, Linda Ragan. Defendant applied and became pre-qualified for a mortgage loan through Homes & Land's preferred mortgage lender, Argent Mortgage and their agent, Mississippi Mortgage. Homes and Land then placed the mobile home on

Defendant Turner's 0.5 acres of real property prior to the closing. Mrs. Ragan later submitted a sales package to Defendant Turner concerning the mobile home. Prior to any document being signed, Homes & Land graded the property and added dirt at a cost more than double the amount that was placed in the proposal package.

In November 2003, Homes & Land sent Defendant an invoice with a price vastly different from the amount previously agreed upon orally, $58,000. Homes & Land's revised sales price for the mobile home was $80,000, including $14,900 for land site preparation. Initially, Ms. Turner refused to accept those terms. However, Defendant ultimately went forward with the loan closing under duress because Plaintiff threatened to put a lien on the property for the $14,900 of land site preparation Plaintiff had already completed. Defendant also threatened to sue plaintiff for the value of the site preparation work.

In April 2004, Ms. Turner obtained a copy of the "filed" deed of trust and discovered that her real property had been erroneously or fraudulently encumbered in that a legal description of her property had been added to the "filed" deed of trust after she had already signed that document. [R. at 13]. Under advice of counsel, Ms. Turner (A) conveyed her interest in the real property to a third party and (B) obtained a copy of the HUD-1 closing statement in order to protect her interest in the real property [R. at 33 and 136]. Upon receipt of the HUD-1 closing statement, Ms. Turner learned her signature had been forged.

Hurricane Katrina hit Mississippi in August 2005, and Ameriquest Mortgage, the successor to Argent Mortgage, suspended payment demands on the property and put all such due payments on the back end of the loan. In August 2006, the loan was sold to Citi Residential Mortgage. After several late payments, Citi Residential Mortgage terminated the deferred payment plan and demanded immediate payment of the amount previously deferred: approximately $10,000. Citi Residential

Mortgage refused to accept any partial payment and suggested that Ms. Turner execute a short sale, which Ms. Turner attempted unsuccessfully. Thereafter, Deutsche Bank National Trust Company ("Deutsche Bank"), as the trustee for the benefit of Ameriquest Mortgage and Citi Residential Mortgage, commenced a legal action against Defendant [R. at 41].

Attorneys for Deutsche Bank filed a complaint in the Warren County Chancery Court against Defendant to Reform the Deed of Trust, Confirm Title and Authorize a Nonjudicial Foreclosure [R. at 41]. On February 8, 2008 the court clerk issued a Summons, commanding the appearance of Defendant Angela Turner, to the Plaintiff's attorney [R. at 36]. At some point, the summons was given to the Sheriff of Warren County to be served upon the Defendant. The summons was returned on March 14, 2008 by the Sheriff to the Court stating on the return of service that the Sheriff was unable to serve the summons and Complaint [R. at 39].

Plaintiff thereafter sought to serve Defendant with service of process by publication [R. at 46]. However, Plaintiff failed to file the required 'affidavit of diligent inquiry' which is necessary to cause the summons by publication to be issued. In fact, no such affidavit has ever been filed by Plaintiff. On 5/30/2008, Plaintiff filed an Application to Clerk for Entry of Default and Supporting Affidavit for Default Judgment against Defendant [R. at 48].

A hearing was held on this issue on 07/24/2008 without the presence of the Defendant and a Default Judgment was entered. When Defendant finally became aware of this Default Judgment, Ms. Turner filed a Motion to Set Aside the Default Judgment due to lack of service of process from the Plaintiff [R. at 56].

In February 2009, Chancellor Jane Weathersby heard Defendant's Motion to Set Aside the Default Judgment and on 02/17/2009 denied the motion [R. at 78 and 159].

On 08/25/2009, Judge Weathersby heard Defendant's Motion to Reconsider the Motion to Set

Aside default judgment [R. at 165]. On 08/28/2009, Judge Weathersby denied the Motion to Reconsider after taking it under advisement [R. at 199]. Defendant now appeals this decision to the Supreme Court [R. at 201].

SUMMARY OF THE ARGUMENT

In the case before this Court, Plaintiff sought to effect service of process and ultimately Court jurisdiction over Defendant Angela Turner by "service by publication". In order to do so, Plaintiff was required to first conduct an inquiry concerning the whereabouts of Ms. Turner. Then, Plaintiff was required to file a sworn complaint or petition or filed affidavit confirming this diligent inquiry. Moreover, Plaintiff was required to state in this sworn statement Plaintiff's post office address or the fact that the post office address is unknown.

Plaintiff failed to do either a diligent inquiry or file any sworn statement prior to attempting service by publication as required by ***Miss. R. Civ. P. 4(c)(4)(A).*** In that this Court has held that the service of process rules are strictly construed and demands that such rules be complied with strictly, Plaintiff failed to effectively serve Defendant with service of process. As such, the lower court had no jurisdiction over Ms. Turner, and the default judgment entered by Judge Barnes is void (as well as all further orders upholding that void judgment).

Finally, Plaintiff presented forged and altered documents to Judge Barnes in support of the relief Plaintiff requested in its Complaint and received in the Default Judgment. First, the HUD-1 presented to the Court with Defendant Turner's signature on it was a forgery as attested to by Defendant Turner's handwriting expert. Second, the deed of trust filed by the Plaintiff on April 14, 2004, 127 days after the closing, contained a legal description of Defendant's property added after Defendant had already signed that document. Contrary to the representations made to Judge Barnes concerning the deed of trust, Defendant Turner never pledged her land and the mobile home as

security for purchase of the mobile home. Rather, Ms. Turner only pledged the mobile home. By forging one closing document, adding language to another after it was signed, and presenting both to the court as a basis for its default judgment, Plaintiff's committed fraud not only upon Defendant, but also the Court. With such "unclean hands", Plaintiff should be prohibited from further use of the courthouse to pursue this matter.

ARGUMENT

I. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN GRANTING DEUTSCHE NATION BANK & TRUST A DEFAULT JUDGMENT.

The Chancery Court of Warren County entered default judgment against Defendant Angela Turner, erroneously finding that the court had "full and complete jurisdiction of the parties and the subject matter". [R. at 48]. Although the lower court did in fact have subject matter jurisdiction, it did not have personal jurisdiction over Defendant Angela Turner. This Court has ruled that both are necessary in order for a final judgment to be valid. See ***Rice v. McMullen***, 43 So.2d 195, 201 (Miss. 1949). In ***Lexington Ins. v. Buckley,*** 925 So.2d 859, 864 (Miss. Ct. App. 2005), the Mississippi Court of Appeals, affirmatively stated:

> To enter a valid judgment, a 'court must not only have jurisdiction of the subject matter, but also of the persons of the parties to give validity to its final judgment'.

(Citations Omitted). In ***McCain v. Dauzat***, 791 So.2d 839, 842 (Miss. 2001), this honorable court held: "A court must have jurisdiction, proper service of process, in order to enter a default judgment against a party. Otherwise, the default judgment is void." ***Id.***; see also ***Williams v. Kilgore***, 617 So.2d 51, 56 (Miss. 1992).

A. The Chancery Court Lacked Personal Jurisdiction over Defendant Turner.

Although one of the "boiler plate" recitals in the order for default judgment states that the Warren County Chancery Court had jurisdiction over Defendant Turner, the

record shows otherwise. In fact, other than these "boiler plate" recitals concerning personal jurisdiction, the record evidences no basis for assertion of personal jurisdiction over Defendant Turner by the Chancery Court.

In accordance with Mississippi law, "the concept of personal jurisdiction comprises two distinct components: amenability to jurisdiction and service of process". ***Buckley*** at 865. Undisputedly, Defendant Turner was and is amenable to the lower court's jurisdiction. However, she was never brought under that jurisdiction by proper service of process. "Service of process is the ... means by which [personal] jurisdiction is asserted." ***Id.*** Before a default judgment can be entered, "the court must have jurisdiction over the party against whom the judgment is sought, which also means that [s]he must have been effectively served with process". ***Arnold v. Miller***, 26 Miss. 152 (1853); see also ***Kilgore*** at 56 (holding: "In order to enter default, the Court must have jurisdiction over the party against whom judgment is sought.").

In the case before this Court, Plaintiff attempted and failed to serve Defendant Turner by two (2) means: (1) By Sheriff and (2) By Publication. On February 8, 2008 the Chancery Court Clerk issued a summons for personal service of process on Ms. Turner and delivered it to Plaintiff's attorney. Apparently, Plaintiff's attorney hired the Sheriff of Warren County to serve Defendant Turner with service of process and delivered the summons (and presumably a copy of the complaint) to him. However, the Sheriff was unsuccessful in serving Defendant Turner with the summons and complaint. In fact, on March 14, 2008, the Sheriff of Warren County, Mississippi marked the "SHERIFF'S RETURN" as follows: "I was unable to serve the summons and complaint." [R. at 39]. Therefore, the record clearly reflects that Plaintiff failed to serve Defendant by Sheriff. ***Id.*** Moreover, nothing in the record reflects any other attempts by Plaintiff to personally serve Defendant Turner.

Having failed to personally serve Ms. Turner, Plaintiff impermissibly attempted to serve Defendant Turner by publication. The purpose of the service by publication rule of civil procedure is to allow service of process on nonresidents and absent defendants who cannot be found in this state (presumably nonresidents). See ***Miss. R. Civ. P. 4(c)(4)(A).*** Specifically, Rule 4(c)(4) states in relevant part:

> (4) By Publication.
>
> (A) If the defendant in any proceeding in a chancery court, or in any proceeding in any other court where process by publication is authorized by statute, be shown by sworn complaint or sworn petition, or by a filed affidavit, to be a nonresident of this state or not to be found therein on diligent inquiry and the post office address of such defendant be stated in the complaint, petition, or affidavit, or if it be stated in such sworn complaint or petition that the post office address of the defendant is not known to the plaintiff or petitioner after diligent inquiry, or if the affidavit be made by another for the plaintiff or petitioner, that such post office address is unknown to the affiant after diligent inquiry and he believes it is unknown to the plaintiff or petitioner after diligent inquiry by the plaintiff or petitioner, the clerk, upon filing the complaint or petition, account or other commencement of a proceeding, shall promptly prepare and publish a summons to the defendant to appear and defend the suit. The summons shall be substantially in the form set forth in Form 1-C.

Miss. R. Civ. P. 4(c)(4)(A) (Emphasis Added).

Clearly, service by publication was and is meant to be used in very limited circumstances. Unless otherwise statutorily authorized, service by publication under Rule 4(c)(4)(A) is meant for service of process upon nonresidents, whether actual nonresidents (i.e., the Plaintiff knows the Defendant to be a nonresident) or constructive nonresidents (i.e., the Plaintiff believes the Defendant to be a nonresident after having been unsuccessful in locating the defendant in the state after "diligent inquiry"). See ***Miss. R. Civ. P. 4(c)(4)(A).***

In the case before this court, Defendant Turner was and is neither an "actual" or "constructive" nonresident. Rather, she does and has at all times relevant hereto resided in the State of Mississippi at 1107 Monroe Street, Apt 1, Vicksburg, Mississippi 39183. Moreover,

Plaintiff cannot legally contend that Defendant was or is a "constructive" nonresident in that (a) Plaintiff never conducted a "diligent inquiry" as to Defendant Turner's whereabouts and (b) Plaintiff did not file the required "sworn complaint or sworn petition or ... affidavit" stating that Plaintiff could not find Ms. Turner in the State of Mississippi upon "diligent inquiry." ***Id.*** Consequently, service by publication was unavailable to Plaintiff and Defendant's attempt to serve Ms. Turner by publication was ineffective.

B. Service by Publication Requires Strict Compliance.

Assuming ***argueundo*** that Defendant Turner was and is amenable to service by publication, Plaintiff nevertheless failed to accomplish such service by failing to strictly comply with the rule. ***Birindelli v. Egelston***, 404 So.2d 322, 323-24 (Miss. 1981). Rule (4)(c)(4)(A) of the Mississippi Rules of Civil Procedure dictates that prior to the Clerk's "[publication of] a summons to [D]efendant [Turner] to appear and defend the suit", Plaintiff was required to show "by sworn complaint or sworn petition or by a filed affidavit" that Defendant Turner was either a nonresident or could not be found in the state after "diligent inquiry". See ***Miss. R. Civ. P. 4(c)(4)(A).*** Plaintiff admits, as it must, that Defendant Turner was entitled to proper service of process, but what Plaintiff erroneously represented to the lower court was that Plaintiff had properly served Defendant in accordance with Rule 4(c)(4)(A), stating: "Admittedly that Angela L. Turner was entitled to proper service of process which she received pursuant to Rule 4(c)(4)(A)." [R. at 62].

First, Plaintiff was required to conduct a diligent inquiry concerning the whereabouts of Defendant Turner. Second, upon making such inquiry, Plaintiff was required to file a sworn complaint, sworn petition, or filed affidavit stating that Defendant Turner was either a nonresident or "not to be found [in the state] on diligent inquiry". See ***Miss. R. Civ. P.***

4(c)(4)(A). The sworn complaint or petition or filed affidavit was also required to state Defendant Turner's post office address was unknown (assuming that Plaintiff did not have a post office address for Defendant Turner). Then and only then could Plaintiff properly cause summons for service by publication to issue. ***Id.***; see also ***Caldwell v. Caldwell***, 533 So.2d 413, 415 (Miss. 1988) (Court held that a diligent inquiry must be done prior to execution of the publication affidavit).

No Diligent Inquiry

Contrary to Plaintiff's representation to the lower court that Defendant Angela Turner was properly served, Plaintiff did not make a diligent inquiry as to the whereabouts of Defendant Turner as required by the service by publication rules. Ms. Turner's whereabouts could have easily been found by Plaintiff by simply checking the Warren County Tax Assessor's records. There, Plaintiff would have found that Ms. Turner resides now and resided then at 1107 Monroe Street, Apt. 1, Vicksburg, Mississippi 39183. [R. at 81]. On its part, Plaintiff alleges that "[Plaintiff] called the Sheriff's office to ask them if they knew where [Defendant Turner] was" and that "[Plaintiff] tried everything possible to find out and [that Plaintiff] searched Probe 360". [Court Reporter's Transcript at 16 (lines 7-12) Feb. 11, 2009, Honorable Jane R. Weathersby presiding]; see also [Court Reporter's Transcript at 24 (lines 21-25) (August 25, 2009, Honorable Jane R. Weathersby presiding)]. Still, Plaintiff failed to do the easiest and most obvious search of all: check with the Warren County Tax Assessor's office where Plaintiff filed Plaintiff's complaint. ***Id.***

No Sworn Complaint or Petition and No Affidavit

Since Plaintiff did not conduct a diligent inquiry for the whereabouts of Defendant Turner, Plaintiff did not and could not file any sworn statement asserting that Defendant Turner was a nonresident or that Plaintiff could not find Defendant Turner in the state after diligent

inquiry, all of which are required by the civil procedure, service by publication rules. See ***Miss. R. Civ. P. 4(c)(4)(A).*** Under these rules, the issuance of the summons for Defendant Turner could only be triggered by Plaintiff's filing of this "sworn complaint, sworn petition, or filed affidavit." ***Id.*** Since Plaintiff failed to file such a sworn statement alleging that (a) Plaintiff had conducted a "diligent inquiry" and (b) that Defendant was either a nonresident or could not be found in the state, the summons issued by the Chancery Court Clerk for publication was invalid, and the later publication of said summons was notice of nothing. See ***Id.***

Moreover, since Plaintiff failed to file a sworn statement as dictated by Rule 4(c)(4)(A) of the Mississippi Rules of Civil Procedure, the Chancery Clerk was not provided with Defendant Turner's post office address or any sworn statement, after diligent inquiry, that Defendant Turner's post office address was unknown. ***Id.***; see also ***Williams v. Kilgore***, 617 So.2d 51, 56 (Miss. 1992). These omissions too are fatal to Plaintiff's attempted service by publication on Defendant Turner. See also ***Kolikas v. Kolikas***, 821 So.2d 874, 879 (Miss. Ct. App. 2002); ***Mercantile Acceptance Corporation v. Hedgepeth***, 112 So. 872, 147 Miss. 717, 725 (Miss. 1927).

Service By Publication Rule Strictly Construed

In ***Caldwell v. Caldwell***, 533 So.2d 413, 415 (Miss. 1988), this court stated definitively that the rules for service of process must be strictly complied with:

> Where notice by publication is resorted to as a basis for the jurisdiction of the court, in lieu of personal summons, all the requirements of the [service by publication rules] as to such notice must be strictly complied with, and it being a jurisdictional matter, it cannot be cured by a recital in the decree.

Id. (quoting ***Griffith, Mississippi Chancery Practice, Bobbs-Merrill Company, Inc. § 236 (1925)***); see also ***Young v. Sherrod***, 919 So.2d 145, 148 (Miss. 2005) ("The rules on service of process are to be strictly construed."). Since the rules for service of process have not been

complied with here, "the court is without jurisdiction unless [Defendant Turner appeared] of [her] own volition." ***Fletcher v. Limeco Corp***, 996 So.2d 773 (Miss. 2008). It is undisputed that Ms. Turner did not appear of her own volition. Therefore, the lower court lacked jurisdiction to enter default judgment.

C. SINCE THE ENTRY OF DEFAULT JUDGMENT IS VOID, DEFENDANT'S MOTION TO VACATE AND FOR RECONSIDERATION MUST BE GRANTED.

In that Defendant Turner was not effectively served with process, Judge Barnes had no jurisdiction over her. As such, that entry of default judgment dated July 28, 2008 was and is void. [R. at 48]. The only basis for assertion of jurisdiction was stated in Judge Barnes' order: "the court having considered the Complaint, Application for Default, Default and Motion for Default Judgment, and the affidavit in support thereof and other evidence and finding that it has full and complete jurisdiction of the parties and the subject matter." ***Id.***

Nowhere therein is there any mention of any sworn complaint, sworn petition, or filed affidavit of diligent inquiry. Moreover, there are no assertions in that order that the court found that Plaintiff had conducted a diligent inquiry. Further, none of the documents, which the court acknowledged as having reviewed, evidences that Plaintiff conducted a diligent inquiry. Further, none of the documents presented to the lower court constituted a sworn complaint, sworn petition or filed affidavit of diligent inquiry. Service by publication is not a mere formal or perfunctory matter but rather a jurisdictional matter, and a mere recital of jurisdiction in a decree is insufficient. ***Caldwell v. Caldwell***, 533 So.2d, 413, 415 (Miss. 1988).

As stated earlier, the lower court had no jurisdiction to enter a default judgment against Defendant Turner in that Plaintiff's attempts at service of process failed. As such, the default judgment entered by Judge Barnes is void, and this court has held that under such circumstances "the trial court has no discretion and must set the judgment aside". ***Sartain v. White***, 588 So.2d

process. ***Id.*** In this case, Judge Weathersby found neither actual nor constructive notice to Defendant Turner, but nevertheless upheld the default judgment based on mere recitals in the previous judge's order. Just as it should do with the order of default judgment, this Court should vacate Judge Weathersby's February 17 and August 28, 2009 orders based on the lower court's lack of jurisdiction. "To be sure, default judgments are not favored and trial courts should not be grudging in the granting of orders vacating such judgment where showings within the rules have arguably been made." ***McCain v. Dauzat***, 791 So.2d 839, 842 (Miss. 2001) (quoting ***Bell v. City of Bay St. Louis,*** 467 So.2d 657, 666 (Miss. 1985)).

II. THE LOWER COURT ERRED IN FINDING THAT PLAINTIFF DID NOT HAVE UNCLEAN HANDS.

Plaintiff obtained a default judgment based on forged and altered documents in contravention of Mississippi law and should be precluded from any remedy of or from Defendant. First, Plaintiff or its principal/assignor initially failed to provide Defendant with a HUD-1 closing statement. In fact, Plaintiff did not provide such a statement until Defendant retained a lawyer to look into the mater. Upon receipt of the HUD-1, Defendant discovered that her name had been forged on that document. See [R. at 187-198] (Defendant's expert concluded that the person who signed the HUD-1 probably was not (to a high degree of certainty) the same person that signed the "Signature/Name affidavit" document as Angela Turner).

Defendant Turner also went to the land records and pulled the filed deed of trust on her land and learned that the copy of the deed of trust provided to her by Plaintiff or its principal/assignor was different from the one provided to her at closing. Without Defendant Turner's permission, Plaintiff typed in the legal description for Defendant's real property rather than a description of the mobile home that Defendant had granted Plaintiff a security interest in

as collateral for the loan to purchase the mobile home. Plaintiff made this change after Defendant Turner had already signed the deed of trust, thus changing the parties' agreement from the mobile home only serving as collateral. To make matters worse, Plaintiff then convinced Judge Barnes via Default Judgment to declare that both the land and the mobile home stood as collateral for the purchase of the mobile home. [R. at 48-52]. Thereafter, Plaintiff wrongfully foreclosed on Defendant's land.

Such acts of deception by Plaintiff constitute fraud, not only against Defendant, but also upon the court. As such, this Court should not only vacate Judge Barnes and Judge Weathersbys' orders granting default judgment, but should also bar any further action by Plaintiff against Defendant based on the doctrine of unclean hands as stated in ***Ellzey v. James F/K/A Waller***, 970 So.2d 193, 195 (Miss 2007):

> 'It is one of the oldest maxims of the law that no man shall, in a court of justice, take an advantage which has his own wrong as a foundation for that advantage.' Moreover, one of the maxims of equity is, 'He who comes into equity must come with clean hands.'
>
> The maxim is often stated in the following language, 'he who doeth fraud, may not borrow the hands of the chancellor to draw equity from a source his own hands hath polluted.'

CONCLUSION

Service of process is a jurisdictional matter. Without jurisdiction, no valid judgment can issue from the court. Here, service of process failed, robbing the lower court of jurisdiction. Therefore, the judgment issued by that court based thereon is null and void. This honorable Court should so declare. Moreover, Plaintiff's demonstrated "unclean hands" should cause justice to close the courthouse doors on this Plaintiff and prevent it from doing any further injustice in this matter.

RESPECTFULLY SUBMITTED, this the 2nd day of July 2010.

ANGELA L. TURNER
BY: John Richard May Jr.
HER ATTORNEY

OF COUNSEL:
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CERTIFICATE OF SERVICE

I, John Richard May, Jr., do hereby certify that I have caused a true and correct copy of the foregoing DEFENDANT ANGELA TURNER'S APPELLANT'S BRIEF to be delivered by U.S. Mail, postage prepaid, to the following:

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Chancery Court Judge, Warren County
Post Office Box 351
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Chancellor Jane Weathersby
Chancery Court Judge, Sunflower County
Post Office Box 1380
Indianola, MS 38751

This the 2nd day of July, 2010.

John Richard May Jr.
John Richard May

ADDENDUM

RULES CITED IN BRIEF

Mississippi Rules

Rules Of Civil Procedure

Rule 4. SUMMONS

(a) Summons: Issuance. Upon filing of the complaint, the clerk shall forthwith issue a summons.

(1) At the written election of the plaintiff or the plaintiff's attorney, the clerk shall:

(A) Deliver the summons to the plaintiff or plaintiff's attorney for service under subparagraphs (c)(1) or (c)(3) or (c)(4) or (c)(5) of this rule.

(B) Deliver the summons to the sheriff of the county in which the defendant resides or is found for service under subparagraph (c)(2) of this rule.

(C) Make service by publication under subparagraph (c)(4) of this rule.

(2) The person to whom the summons is delivered shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff, separate or additional summons shall issue against any defendants.

(b) Same: Form. The summons shall be dated and signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed tothe defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. Where there are multiple plaintiffs or multiple defendants, or both, the summons, except where service is made by publication, may contain, in lieu of the names of all parties, the name of the first party on each side and the name and address of the party to be served. Summons served by process server shall substantially conform to Form 1A. Summons served by sheriff shall substantially conform to Form 1AA.

(c) Service:

(1) By Process Server. A summons and complaint shall, except as provided in subparagraphs (2) and (4) of this subdivision, be served by any person who is not a party and is not less than 18 years of age. When a summons and complaint are served by process server, an amount not exceeding that statutorily allowed to the sheriff for service of process may be taxed as recoverable costs in the action.

(2) By Sheriff. A summons and complaint shall, at the written request of a party seeking service or such party's attorney, be served by the sheriff of the county in which the defendant resides or is found, in any manner prescribed by subdivision (d) of this rule. The sheriff shall mark on all summons the date of the receipt by him, and within thirty days of the date of such receipt of the summons the sheriff shall return the same to the clerk of the court from which it was issued.

(3) By Mail.

(A) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (4) of subdivision (d) of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 1-B and a return envelope, postage prepaid, addressed to the sender.

(B) If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint may be made in any other manner permitted by this rule.

(C) Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing the notice and acknowledgment of receipt of summons.

(D) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(4) By Publication.

(A) If the defendant in any proceeding in a chancery court, or in any proceeding in any other court where process by publication is authorized by

statute, be shown by sworn complaint or sworn petition, or by a filed affidavit, to be a nonresident of this state or not to be found therein on diligent inquiry and the post office address of such defendant be stated in the complaint, petition, or affidavit, or if it be stated in such sworn complaint or petition that the post office address of the defendant is not known to the plaintiff or petitioner after diligent inquiry, or if the affidavit be made by another for the plaintiff or petitioner, that such post office address is unknown to the affiant after diligent inquiry and he believes it is unknown to the plaintiff or petitioner after diligent inquiry by the plaintiff or petitioner, the clerk, upon filing the complaint or petition, account or other commencement of a proceeding, shall promptly prepare and publish a summons to the defendant to appear and defend the suit. The summons shall be substantially in the form set forth in Form 1-C.

(B) The publication of said summons shall be made once in each week during three successive weeks in a public newspaper of the county in which the complaint or petition, account, cause or other proceeding is pending if there be such a newspaper, and where there is no newspaper in the county the notice shall be posted at the courthouse door of the county and published as above provided in a public newspaper in an adjoining county or at the seat of government of the state. Upon completion of publication, proof of the prescribed publication shall be filed in the papers in the cause. The defendant shall have thirty (30) days from the date of first publication in which to appear and defend. Where the post office address of a defendant is given, the street address, if any, shall also be stated unless the complaint, petition, or affidavit above mentioned, avers that after diligent search and inquiry said street address cannot be ascertained.

(C) It shall be the duty of the clerk to hand the summons to the plaintiff or petitioner to be published, or, at his request, and at his expense, to hand it to the publisher of the proper newspaper for publication. Where the post office address of the absent defendant is stated, it shall be the duty of the clerk to send by mail (first class mail, postage prepaid) to the address of the defendant, at his post office, a copy of the summons and complaint and to note the fact of issuing the same and mailing the copy, on the general docket, and this shall be the evidence of the summons having been mailed to the defendant.

(D) When unknown heirs are made parties defendant in any proceeding in the chancery court, upon affidavit that the names of such heirs are

unknown, theplaintiff may have publication of summons for them and such proceedings shallbe thereupon in all respects as are authorized in the case of a nonresident defendant. When the parties in interest are unknown, and affidavit of that fact be filed, they may be made parties by publication to them as unknown parties in interest.

(E) Where summons by publication is upon any unmarried infant, mentally incompetent person, or other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate, summons shall also be had upon such other person as shall be required to receive a copy of the summons under paragraph (2) of subdivision (d) of this rule.

(5) Service by Certified Mail on Person Outside State. In addition to service by any other method provided by this rule, a summons may be served on a person outside this state by sending a copy of the summons and of the complaint to the person to be served by certified mail, return receipt requested. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked "restricted delivery." Service by this method shall be deemed complete as of the date of delivery as evidenced by the return receipt or by the returned envelope marked "Refused.

(d) Summons and Complaint: Person to Be Served. The summons and complaint shall be served together. Service by sheriff or process server shall be made as follows:

(1) Upon an individual other than an unmarried infant or a mentally incompetent person,

(A) by delivering a copy of the summons and of the complaint to him personally or to an agent authorized by appointment or by law to receive service of process; or

(B) if service under subparagraph (1)(A) of this subdivision cannot be made with reasonable diligence, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service, and by thereafter mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of

the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.

(2)(A) upon an unmarried infant by delivering a copy of the summons and complaint to any one of the following: the infant's mother, father, legal guardian (of either the person or the estate), or the person having care of such infant or with whom he lives, and if the infant be 12 years of age or older, by delivering a copy of the summons and complaint to both the infant and the appropriate person as designated above.

(B) upon a mentally incompetent person who is not judicially confined to an institution for the mentally ill or mentally deficient or upon any other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate by delivering a copy of the summons and complaint to such person and by delivering copies to his guardian (of either the person or the estate) or conservator (of either the person or the estate) but if such person has no guardian or conservator, then by delivering copies to him and copies to a person with whom he lives or to a person who cares for him.

(C) upon a mentally incompetent person who is judicially confined in an institution for the mentally ill or mentally retarded by delivering a copy of the summons and complaint to the incompetent person and by delivering copies to said incompetent's guardian (of either the person or the estate) if any he has. If the superintendent of said institution or similar official or person shall certify by certificate endorsed on or attached to the summons that said incompetent is mentally incapable of responding to process, service of summons and complaint on such incompetent shall not be required. Where said confined incompetent has neither guardian nor conservator, the court shall appoint a guardian ad litem for said incompetent to whom copies shall be delivered.

(D) where service of a summons is required under (A), (B) and (C) of this subparagraph to be made upon a person other than the infant, incompetent, or incapable defendant and such person is a plaintiff in the action or has an interest therein adverse to that of said defendant, then such person shall be deemed not to exist for the purpose of service and the requirement of service in (A), (B) and (C) of this subparagraph shall not be met by service upon such person.

(E) if none of the persons required to be served in (A) and (B) above exist other than the infant, incompetent or incapable defendant, then the court shall appoint a guardian ad litem for an infant defendant under the age of 12 years and may appoint a guardian ad litem for such other defendant to whom a copy of the summons and complaint shall be delivered. Delivery of a copy of the summons and complaint to such guardian ad litem shall not dispense with delivery of copies to the infant, incompetent or incapable defendant where specifically required in (A), and (B) of this subparagraph.

(3) Upon an individual confined to a penal institution of this state or of a subdivision of this state by delivering a copy of the summons and complaint to the individual, except that when the individual to be served is an unmarried infant or mentally incompetent person the provisions of subparagraph (d)(2) of this rule shall be followed.

(4) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

(5) Upon the State of Mississippi or any one of its departments, officers or institutions, by delivering a copy of the summons and complaint to the Attorney General of the State of Mississippi.

(6) Upon a county by delivering a copy of the summons and complaint to the president or clerk of the board of supervisors.

(7) Upon a municipal corporation by delivering a copy of the summons and complaint to the mayor or municipal clerk of said municipal corporation.

(8) Upon any governmental entity not mentioned above, by delivering a copy of the summons and complaint to the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity. Service upon any person who is a member of the "group" or "body" responsible for the administration of the entity shall be sufficient.

(e) Waiver. Any party defendant who is not an unmarried minor, mentally incompetent, or convict of felony may, without filing any pleading

therein, waive the service of process or enter his or her appearance, either or both, in any action, with the same effect as if he or she had been duly served with process, in the manner required by law on the day of the date thereof. Such waiver of service or entry of appearance shall be in writing dated and signed by the defendant and duly sworn to or acknowledged by him or her, or his or her signature thereto be proven by two (2) subscribing witnesses before some officer authorized to administer oaths. Any guardian or conservator may likewise waive process on himself and/or his ward, and any executor, administrator, or trustee may likewise waive process on himself in his fiduciary capacity. However, such written waiver of service or entry of appearance must be executed after the day on which the action was commenced and be filed among the papers in the cause and noted on the general docket.

(f) Return. The person serving the process shall make proof of service thereof to the court promptly. If service is made by a person other than a sheriff, such person shall make affidavit thereof. If service is made under paragraph (c)(3) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. If service is made under paragraph (c)(5) of this rule, the return shall be made by the sender's filing with the court the return receipt or the returned envelope marked "Refused." Failure to make proof of service does not affect the validity of the service.

(g) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued.

(h) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

History. Amended effective May 1, 1982; March 1, 1985; February 1, 1990; July 1, 1998; January 3, 2002.

Mississippi Rules

Rules Of Civil Procedure

Rule 12. DEFENSES AND OBJECTIONS-WHEN AND HOW PRESENTED-BY PLEADING OR MOTION-MOTION FOR JUDGMENT ON THE PLEADINGS

(a) When Presented. A defendant shall serve his answer within thirty days after the service of the summons and complaint upon him or within such time as is directed pursuant to Rule 4. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within thirty days after the service upon him. The plaintiff shall serve his reply to a counter-claim in the answer within thirty days after service of the answer or, if a reply is ordered by the court, within thirty days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

The times stated under this subparagraph may be extended, once only, for a period not to exceed ten days, upon the written stipulation of counsel filed in the records of the action.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,

(2) Lack of jurisdiction over the person,

(3) Improper venue,

(4) Insufficiency of process,

(5) Insufficiency of service of process,

(6) Failure to state a claim upon which relief can be granted,

(7) Failure to join a party under Rule 19.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15(a).

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15(a).

(d) Preliminary Hearings. The defenses specifically enumerated (1) through (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings (subdivision (c) of this rule), shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15 (a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion that the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action or transfer the action to the court of proper jurisdiction.

Note:

Comment

*The purpose of **Rule 12** is to expedite and simplify the pretrial phase of litigation while promoting the just disposition of cases. The periods of time referred to in **Rule 12(a)** relate to service of process, motions, pleadings or notices, and not to the filing of the instruments. Because of the nature of divorce cases, **Rules 12(a)(1)** and **(2)** do not apply to such proceedings. See alsoM.R.C.P. 81(b). **Rule 12(a)** represents a marked change from the former procedures which linked the return date or response date to a term of court. See Miss. Code Ann. 11-5-17; 11-7-121; and 13-3-13 (1972).*

***Rules 12(b)(6)** and **12(c)** serve the same function, practically, as the general demurrer. See Investors Syndicate of America, Inc. v. City of Indian Rocks Beach, Florida, 434 F.2d 871, 874 (5th Cir. 1970). They are the proper motions for testing the legal sufficiency of the complaint; to grant the motions there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim.*

If the complaint is dismissed with leave to amend and no amendment is received, the dismissal is a final judgment and is appealable unless the dismissal relates to only one of several claims. See Ginsburg v. Stern, 242 F.2d 379 (3rd Cir. 1957).

*A motion pursuant to **Rule 12(c)** may be granted if it is not made so that its disposition would delay the trial; the moving party must be clearly entitled to judgment. See Greenberg v. General Mills Fun Group, Inc., 478 F.2d 254, 256 (5th Cir. 1973).*

*Under **Rule 12(d)**, the decision to defer should be made when the determination will involve the merits of the action, thus making deference generally applicable to motions on **Rules 12(b)(6)** and **(c)**.*

***Rule 12(e)** abolishes the bill of particulars. Miss. Code Ann. 11-7-97 (1972). The motion for a more definite statement requires merely that -- a more definite statement -- and not evidentiary details. The motion will lie*

only when a responsive pleading is required, and is the only remedy for a vague or ambiguous pleading.

Ordinarily, ***Rule 12(f)*** *will require only the objectionable portion of the pleadings to be stricken, and not the entire pleading. Motions going to redundant or immaterial allegations, or allegations of which there is doubt as to relevancy, should be denied, the issue to be decided being whether the allegation is prejudicial to the adverse party. Motions to strike a defense for insufficiency should, if granted, be granted with leave to amend.* ***Rule 12(f)*** *is generally consistent with past Mississippi procedure. See Miss. Code Ann. 11-7-59(3) (1972);Parish v. Lumbermen's Mut. Cas. Co., 242 Miss. 288, 134 So.2d 488 (1961).*

Rule 12(g) *allows the urging of all defenses or objections in one motion with no waiver. There are three important qualifications which permit at least two rounds of motions: (1) the requirement of consolidation applies only to defenses and objections then available to the moving party; (2) the requirement applies only to defenses and objections which this rule permits to be raised by motion; (3) the prohibition against successive motions is subject to the exceptions stated in* ***Rule 12(h)****.*

Rule 12(h)(1) *states that certain specified defenses which may be available to a party when he makes a pre-answer motion, but which he omitted from the motion, are waived. Aparty who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of* ***Rule 12(g)*** *forbidding successive motions. 5 Wright & Miller, Federal Practice and Procedure, Civil 1391 (1969).*

Rule 12(h)(2) *preserves three defenses against waiver during the pleading, motion, discovery, and trial stages of an action; however, such defenses are waived if not presented before the close of trial. 5 Wright & Miller, supra, 1392.*

Under ***Rule 12(h)(3)*** *a question of subject matter jurisdiction may be presented at any time, either by motion or answer. Further, it may be asserted as a motion for relief from a final judgment under M.R.C.P. 60(b)(4) or may be presented for the first time on appeal. Welch v. Bryant, 157 Miss. 559, 128 So. 734 (1930); Brown v. Bank, 31 Miss. 454 (1856).*

This provision preserves the traditional Mississippi practice of transferring actions between the circuit and chancery courts, as provided by Miss. Const. 157 (all causes that may be brought in the circuit court whereof the chancery court has jurisdiction shall be transferred to the chancery court) and 162 (all causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court), but not reversing for a court's improperly exercising its jurisdiction, Miss. Const. 147. Cazeneuve v. Curell, 70 Miss. 521, 13 So. 32 (1893).

[Comment amended effective February 1, 1990.]