

IN THE SUPREME COURT OF MISSISSIPPI

RAS FAMILY PARTNERS, LP  
and RAY A. SIMS

APPELLANTS/DEFENDANTS

VERSUS

CASE NO. 2006-IA-00976-SCT

ONNAM BILOXI, LLC

APPELLEE/PLAINTIFF

CONSOLIDATED WITH

ONNAM BILOXI, LLC

APPELLANT/DEFENDANT

VERSUS

CASE NO. 2006-IA-1414-SCT

RAS FAMILY PARTNERS, LP  
and RAY A. SIMS

APPELLEES/PLAINTIFFS

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BRIEF OF APPELLANTS  
(No. 2006-IA-00976)

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INTERLOCUTORY APPEAL FROM THE  
CHANCERY COURT OF HARRISON COUNTY

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## CERTIFICATE OF INTERESTED PARTIES

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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. RAS Family Partners, LP, a Mississippi limited partnership
2. *Jo Anne Sims, principal owner of RAS Family Partners, a citizen of Hattiesburg, Mississippi*
3. Ray A. Sims, a citizen of Hattiesburg, Mississippi
4. Onnam Biloxi, LLC, a Mississippi limited liability company
5. Onnam Entertainment, LLC, a foreign limited liability company
6. Sandra Manno, a citizen of New Jersey, an owner of Onnam Entertainment, LLC
7. Joel Gold, a citizen of New York, an owner of Onnam Entertainment, LLC
8. Aryeh Lightstone, a citizen of Colorado, an owner of Onnam Entertainment, LLC
9. Alan Jacobs, a citizen of Florida, an owner of Onnam Entertainment, LLC
10. Irving Shwarzbaum, a citizen of New Jersey, an owner of Onnam Entertainment, LLC
11. *Howard Berg, a citizen of New Jersey, an owner of Onnam Entertainment, LLC*
12. Philip Lightstone, a citizen of Colorado, an owner of Onnam Entertainment, LLC
13. Gary Snitow, a citizen of New York, an owner of Onnam Entertainment, LLC
14. Ira Tannenbaum, a citizen of New York, an owner of Onnam Entertainment, LLC
15. Asher Shafran, a citizen of New York, an owner of Onnam Entertainment, LLC
16. Joel Shafran, a citizen of New York, an owner of Onnam Entertainment, LLC

17. Simon Horn, a citizen of New York, an owner of Onnam Entertainment, LLC
18. Alan Rubin, a citizen of New Jersey, an owner of Onnam Entertainment, LLC
19. DNF Financial LLC, a citizen of New Jersey, an owner of Onnam Entertainment, LLC
20. Precious Investments LLC, a citizen of New Jersey, an owner of Onnam Entertainment, LLC



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LAWRENCE C. GUNN, JR.

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## STATEMENT OF ISSUE

The issue on this appeal is whether the chancery court should have transferred this controversy to circuit court where the same controversy between the same parties was already in litigation because (i) the circuit court case was filed nearly a month earlier than this case, and (ii) the controversy is essentially a breach of contract/damage case that should be in circuit court, under the principles announced in *Southern Leisure Homes, Inc. v. Hardin*, 742 So.2d 1088 (Miss. 1999).

## STATEMENT OF THE CASE

### A. Nature of the Case

This is an interlocutory appeal from an order of the chancery court refusing to abate proceedings or to transfer to circuit court. This Court has ordered this appeal consolidated with No. 2006-IA-01414, which involves the same question, whether the circuit court properly retained jurisdiction. The Court has further ordered that a third interlocutory appeal on the merits of the controversy from the circuit court order granting summary judgment will be passed for consideration once the jurisdictional issue is decided. (See Order of October 19, 2006, in No. 2006-M-01614-SCT.)

### B. Course of Proceedings

The instant controversy between these parties actually began in federal court, where Onnam filed a complaint virtually identical to the one in this case. RAS and Mr. Sims promptly moved to dismiss the federal court suit because the contract of the parties, a Lease Agreement (Record Excerpt 6; Clerk's Papers 4-22) and Agreement for Sale and Purchase of Stock (Record Excerpt 7; Clerk's Papers 23-31), contains a forum selection clause whereby the parties had agreed that any litigation must be in state court in Mississippi, not in federal court. The U.S.

District Judge, Honorable Louis Guirola, agreed with RAS and Mr. Sims' positions and dismissed the federal case on January 25, 2006, but he actually verbally announced his ruling the day before, January 24.

In anticipation that the federal case was going to be dismissed, RAS had earlier filed suit in the Circuit Court of Harrison County on December 27, 2005. This circuit court action was later amended to join Mr. Sims, individually. (Record Excerpt 4, pages 10-14; Exhibit 1). The plaintiffs' suit sought damages for Onnam's breach of contract and for slander of title due to its recording a lis pendens notice against RAS' land when it filed the federal action in November. The plaintiffs also sought a declaratory judgment of the circuit court that the Lease Agreement and Agreement for Sale and Purchase of Stock had been terminated by their own terms when Onnam failed to pay the amount due, \$7,200,000, by the extended closing date.

This circuit court action was filed on December 27, 2005, and process was served January 26, 2006, the day after the U.S. District Court order was entered.

In the meantime, the same day the federal judge gave his announcement from the bench that he would dismiss the case, Onnam rushed to the coast and filed the chancery case from which this appeal is taken, and the chancery summons was served January 25, 2006, on RAS and then on January 26, 2006, on Mr. Sims, individually. Process was thus complete in each case on the same day, January 26.

RAS and Mr. Sims moved in this case for the chancery court to transfer the chancery action to circuit court or to abate it, as the circuit court action was filed nearly a month before the chancery case, and the chancellor's denial of that motion prompted this appeal.

Relevant dates reflecting how this particular appeal came to this Court are:

- January 24, 2006, Onnam's complaint was filed in chancery court (Clerk's Papers

1-3);

- February 21, 2006, RAS' and Mr. Sims' motion to abate or to transfer to circuit court was filed (Clerk's Papers 34-41);
- May 22, 2006, the chancery court entered its initial order denying RAS' and Mr. Sims' motion (Clerk's Papers 65-67);
- May 31, 2006, RAS and Mr. Sims moved the Court to reconsider its order (Clerk's Papers 70-75);
- June 2, 2006, the chancery court entered an order correcting a portion of its initial order (Clerk's Papers 76-80);
- June 12, 2006, the petition for interlocutory appeal was filed, ten days after the amended order and well within the time set forth in MRAP 5(a).

Onnam, dreading a jury, later moved the circuit court to transfer that case to chancery court, but the circuit judge, Honorable Stephen Simpson, denied that motion after this Court granted this interlocutory appeal and stayed proceedings in the chancery court. He subsequently granted RAS' and Mr. Sims' motion for summary judgment, declaring that the Lease Agreement and Agreement for Sale and Purchase of Stock which comprise this controversy had properly been terminated and were no longer in effect. RAS' and Mr. Sims' claims for damages for slander of title and for attorneys' fees and other damages remain pending subject to the stay imposed by this Court's order of October 19, 2006, in No. 2006-IA-01614 and the grant of the consolidated interlocutory appeal in No. 2006-IA-01414.

#### **STATEMENT OF THE FACTS**

The merits of the substantive part of this case are fully briefed by the parties in Onnam Biloxi's petition for interlocutory appeal in No. 2006-IA-01614, and in the response to the



petition filed by RAS and Mr. Sims. Those two documents set forth fully the parties' arguments on the ultimate merits of this case, and a lengthy discussion of that aspect of this controversy is unnecessary here, where the issue is whether circuit court or chancery court has proper jurisdiction. It is helpful, however, to have a general understanding of the nature of the controversy to understand why this case is a damage case which ought to be in circuit court rather than chancery court.

This dispute involves a lease agreement (Record Excerpt 6; Clerk's Papers 4-22) and a stock sale agreement (Record Excerpt 7; Clerk's Papers 23-31) which are both part of one transaction. Under these agreements, RAS agreed, for an initial payment of \$1,200,000, to lease ten acres of undeveloped vacant land on back bay in Biloxi to Onnam to operate a casino, and Mr. Sims agreed to sell his 25% interest in the corporation that owns some adjacent land, for \$6,000,000. Neither of those sums has ever been paid or even tendered.

Initially, the "closing" of the lease and stock sale was to have occurred on August 30, 2005, but Hurricane Katrina disrupted this closing date, and RAS and Mr. Sims agreed to extend the closing to September 30, 2005.

Onnam had the right to avoid the lease due to the disruption in licensing, permitting, and other contingencies, some of which might have been contributed to by Hurricane Katrina:

6. Contingencies:

f. In the event any of the contingencies is not fulfilled to Lessee's satisfaction by August 30, 2005, then this Lease Agreement shall, at the option of the Lessee, become null and void and, in such event, the Lessee shall be refunded all deposits, rents and other amounts theretofore paid or made hereunder, except the \$25,000.00 paid by Lessee to Lessor on April 25, 2005. See Lease, Record Excerpt 6, pages 23-24; Clerk's Papers 6-7.

In other words, failure of the various contingencies under the lease, some of which may have been hurricane-related, gave Onnam the right to back out of the transaction. What is clear, however, is that Onnam only had two options: it could either back out of the lease or stay in it. If

it avoided the lease, it owed no money. If it accepted the lease in spite of the unfulfilled contingencies, it owed \$7,200,000. Strangely, Onnam is apparently contending that it can keep the lease in effect and yet indefinitely postpone paying the consideration for the beginning of the lease and purchase of Mr. Sims' stock in the adjoining corporate land, now overdue since September 30, 2005, seventeen months.

At the "closing," Onnam was to have paid RAS \$1,200,000 and Mr. Sims personally \$6,000,000. No amount of this money had been paid. Neither has any offer been made to pay the money. Onnam has given no indication when this payment might be made. Because Onnam failed to pay any of the money when due, RAS and Mr. Sims elected to terminate the transaction.

Onnam's suit, filed first in federal court and later in the chancery court, made two claims against RAS and just one against Mr. Sims, individually.

Against RAS Family Partners, Onnam claimed it was seeking specific performance plus incidental and consequential damages for delay. As to Mr. Sims, Onnam only seeks damages and has not sought specific performance of the stock purchase agreement. (See Complaint, Record Excerpt 3; Clerk's Papers 1-3.)

Before this case was filed in chancery court on January 24, 2006, RAS had filed suit against Onnam in circuit court, anticipating the federal court would grant dismissal due to the forum selection clause, which ultimately did occur. While RAS and Mr. Sims seek a declaration that both the lease and the stock purchase agreement were properly terminated, the principal thrust of RAS Family Partners' suit is for damages for slander of title on account of Onnam's wrongful filing of a lis pendens notice and its deprivation of RAS's ability to market the property during the boom times currently occurring on the Mississippi Gulf Coast in the aftermath of Hurricane Katrina. (See Amended Complaint in circuit court, Record Excerpt 4; Exhibit 1.)

## SUMMARY OF THE ARGUMENT

The chancery court order refusing to abate or transfer the case is reversible under the doctrine of priority jurisdiction set forth in *Copiah Medical Associates v. Mississippi Baptist Health Systems*, 898 So.2d 656 (Miss. 2005) and numerous other cases to the same effect, that the court which first acquires jurisdiction over a controversy should try the case to conclusion.

Putting the dates of filing of the two cases totally aside, however, the chancery court's order is nonetheless erroneous, because the essential nature of this controversy is a breach of contract claim for damages, and the case ought to be tried before a jury in circuit court rather than before a single chancellor. *Southern Leisure Homes, Inc. v. Hardin*, 742 So.2d 1088 (Miss. 1999); *Burnette v. Hartford Underwriters Ins. Co.*, 770 So.2d 948 (Miss. 2000); *ERA Franchise Systems, Inc. v. Mathis*, 931 So.2d 1278 (Miss. 2006); *Tyson Breeders, Inc. v. Harrison*, 940 So.2d 230 (Miss. 2006).

## ARGUMENT

The issue on this appeal is whether the chancery court should have transferred this controversy to circuit court where the same controversy between the same parties was already in litigation because (i) the circuit court case was filed nearly a month earlier than this case, and (ii) the controversy is essentially a breach of contract/damage case that should be in circuit court, under the principles announced in *Southern Leisure Homes, Inc. v. Hardin*, 742 So.2d 1088 (Miss. 1999).

### A. Priority Jurisdiction

The question here is similar to that involved in *Copiah Medical Associates v. Mississippi Baptist Health Systems*, 898 So.2d 656 (Miss. 2005). That decision by this Court reaffirms the doctrine of priority jurisdiction, i.e., that the court which first acquires jurisdiction over a

controversy should try it to conclusion, not the court where an action is filed later, and that the priority jurisdiction rule is not affected by a later amendment of the complaint in the first case, because amendments “relate back” to the date of the original filing.

It is difficult to see how the chancellor’s decision can stand in light of *Copiah Medical Associates*. As this Court stated there:

This Court has repeatedly stated that it is a ‘well-established rule in this jurisdiction that where two suits between the same parties over the same controversy are brought in courts of concurrent jurisdiction, the court which first acquires jurisdiction retains jurisdiction over the whole controversy to the exclusion or abatement of the second suit. (Citations omitted.) 898 So.2d at 663, ¶22

This Court also observed in *Copiah Medical Associates*:

In this state priority of jurisdiction between courts of concurrent jurisdiction is determined by the date the initial pleading is filed, provided process issues in due course. (Citations omitted.) 898 So.2d at 663, ¶22.

The first order entered by the chancery court denying transfer appeared to be based upon a mistaken assumption that RAS had delayed service of process until after the chancery court case was filed. (Clerk’s Papers 65-67) This assumption was not only erroneous, it is irrelevant. It was erroneous because process in the circuit court case was actually served the same day as the second process in this case, January 26, the day after the entry of the order dismissing the federal case Onnam had erroneously filed in U.S. District Court. (See process at Clerk’s Papers 74-75.) The date of service of process is irrelevant in any event because it is the filing of a complaint, not service of a summons, that initiates a civil action. MRCP 3(a) plainly states, “A civil action is commenced by filing a complaint with the court.” Further, MRCP 4(h) gives a party 120 days to serve summons on the opposite party, and RAS’ process was served less than a month after the suit was filed. The date of service of process simply is not a factor to be considered at all, as process issued in the circuit court “in due course,” as required. See *Copiah*, 898 So.2d at 663,

¶22. The circuit court case was filed prior to this case, and that is what is important.

Even after Judge Persons corrected the mistake as to the date of service of process, he nonetheless denied Appellants' motion to dismiss or abate, apparently giving weight to the fact that RAS' circuit court case did not initially include Mr. Sims, individually, as a plaintiff, whereas the chancery action did name Mr. Sims along with RAS as defendants. (Record Excerpt 7; Clerk's Papers 76-80) *Copiah Medical Associates* makes it clear that this distinction does not change the rule. An amended complaint naming Mr. Sims as a plaintiff in the circuit court case was served on February 27, before Onnam had answered RAS' suit in circuit court. (Record Excerpt 4; Exhibit 2) This amended complaint by Mr. Sims relates back under MRCP 15(c) to the initial date of filing of the circuit court action. Thus, in the circuit court action, both the claims by RAS and those by Mr. Sims personally are deemed to have been filed December 27, 2005, almost a month before this suit was filed by Onnam against RAS and Mr. Sims. *Copiah Medical Associates*, at ¶22.

The fact that Mr. Sims was not initially a plaintiff in the circuit case is no factor at all justifying the denial of the defendants' motion to transfer to circuit court.

#### **B. The Nature of the Case as a Contract Suit for Damages**

Onnam's counterclaim filed in the circuit court action is a verbatim recitation of the allegations of the complaint in this case. (Compare Record Excerpt 3, Clerk's Paper 1 to Record Excerpt 5, Exhibit 2.) Onnam's cause of action is a compulsory counterclaim to the circuit court action. And while its complaint does indeed contain a claim for specific performance, it is not really a specific performance case because it makes no offer to pay the \$7,200,000 that it would have to pay to have the Lease Agreement and Stock Purchase Agreement in effect. Onnam's principal claim is for damages, and Onnam's intent is clearly reflected in the letter from its New

York lawyer (Record Excerpt 8) threatening RAS and Mr. Sims that “the concomitant damage claim against Mr. Sims would be extremely large and might even threaten to wipe out his net worth.”<sup>1</sup>

*Southern Leisure Homes, Inc. v. Hardin*, 742 So.2d 1088 (Miss. 1999) is a significant decision of this Court in that it expounded upon earlier cases dealing with the subject of whether a circuit or chancery court should hear cases that might conceivably have been brought in either court. The Court made it clear that Mississippi Constitution, Article 3, Section 31, providing for the right of trial by jury, is the factor which can tip the scales in cases where there is any doubt. Where the right to a jury trial would be infringed if a controversy were heard in chancery court, the matter should be transferred to circuit court. If the question of jurisdiction is debatable, “it is more appropriate for a circuit court to hear equity claims than it is for a chancery court to hear actions at law....” 742 So.2d at 1090, ¶6.

*Southern Leisure* has been followed in at least three other recent decisions of this Court, all of which approved circuit court, not chancery court, as the appropriate jurisdiction: *Burnette v. Hartford Underwriters Ins. Co.*, 770 So.2d 948 (Miss. 2000), a suit which was essentially a bad faith breach of contract insurance law suit, *ERA Franchise Systems, Inc. v. Mathis*, 931 So.2d 1278 (Miss. 2006), a multi-faceted business dispute involving shareholder derivative claims (an equity proceeding) and numerous claims of damages and torts (legal claims), and most recently, *Tyson Breeders, Inc. v. Harrison*, 940 So.2d 230 (Miss. 2006), a case where a chicken farmer sought specific performance and injunctive relief as well as contract damages, and this Court held that the entire matter should have been held in circuit court rather than in

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<sup>1</sup> This letter is omitted from the clerk’s papers and exhibits in this case, but is reproduced in the record in No. 2006-IA-01414 as an attachment to the complaint.

chancery court.

Granted that Onnam included a claim for specific performance against RAS (but not against Mr. Sims). Nonetheless, Onnam also seeks damages, and the most important claim of all is RAS' and Mr. Sims' claims for damages for delay and for the wrongful filing of the *lis pendens* notice in connection with the federal lawsuit. Under the guidance of this Court's four recent decisions beginning with *Southern Leisure* and culminating in *Tyson Breeders*, the Chancellor ought to have transferred this case to circuit court, where the same controversy was already in litigation.

It was error for the chancery court to deny the motion to abate or transfer to circuit court, and RAS and Mr. Sims request this Court to reverse the Chancellor's ruling and to order that this case be dismissed or abated pending final determination of the circuit court case.

### CONCLUSION

RAS Family Partners and Mr. Sims respectfully request this Court to reverse the order of the chancery court and to direct that court either to stay all proceedings or to transfer the matter to circuit court, where it can be consolidated with the case pending there.

RAS and Mr. Sims further ask this Court, once the jurisdictional issue of circuit court versus chancery court has been decided, to then consider the merits of the circuit court's grant of summary judgment that is fully set forth before the Court in No. 2006-IA-01614. No further briefing should be necessary in that case, as the petition itself and RAS' and Mr. Sims' response fully set forth the arguments and positions of the parties; see MRAP 5(e): "[T]he Court may decide those issues simultaneously with the granting of the petition, without awaiting preparation of a record or further briefing."

This the 14 day of February, 2007.

Respectfully submitted,



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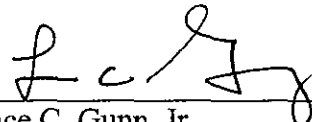
**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that I have this date mailed by United States Mail, postage prepaid, or served by facsimile or electronic mail, a true and correct copy of the above and foregoing document to:

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Honorable James Persons  
Chancery Court of Harrison County  
P. O. Box 457  
Gulfport, MS 39502

THIS 14 day of February, 2007.

  
\_\_\_\_\_  
Lawrence C. Gunn, Jr.