

**IN THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT**

**THE STATE OF MISSISSIPPI, BY AND THROUGH
MICHAEL WATSON IN HIS OFFICIAL CAPACITY
AS SECRETARY OF STATE**

PLAINTIFF

VERSUS

CAUSE NO. 19-515 (2)

**RW DEVELOPMENT LLC and
THE CITY OF BILOXI, MISSISSIPPI**

DEFENDANTS

HARRISON COUNTY, MISSISSIPPI

DEFENDANT INTERVENOR

**ORDER DENYING THE STATE'S MOTION FOR SUMMARY JUDGMENT (DKT. NO.
21) AND GRANTING IN PART AND DENYING IN PART THE DEFENDANTS'
MOTION TO AMEND (DKT. NO. 31)**

THIS CAUSE, having come on to be heard on the Secretary of State's ("Plaintiff") *Motion for Summary Judgment* (Dkt. No. 21), and the City of Biloxi, Harrison County, Mississippi and RW Development LLC's (hereinafter collectively "Defendants") *Motion to Amend* (Dkt. No. 31), and the Court having heard oral argument and considered the filings of the parties, does hereby find, as follows:

Defendants' Motion to Amend

1. Defendants contend that the State of Mississippi is a necessary party to this litigation and the State, not the Secretary of State, is the Trustee of the Public Trust for Tidelands. Accordingly, Defendants argue that the State of Mississippi, separate from the Secretary of State should be a party to Defendants' Counterclaim. The State asserts that the Secretary of State has been authorized by the Legislature to handle all litigation concerning the Public Trust for Tidelands.

2. The Court finds the Defendants' motion to add the State of Mississippi as a

party pursuant *M.R.C.P.* 19 and 20 is moot. The State of Mississippi, by and through the Secretary of State, is a party to this litigation and is properly before the Court. Therefore, the Defendants' Motion to Amend to add the State of Mississippi as a counter-defendant is **DENIED**.

3. The remainder of the Defendants' Motion to Amend is **GRANTED** pursuant to *M.R.C.P.* 15. Upon entry of this Order, Defendants may file an Amended Answer and Counterclaim in conformance with this Order.

Plaintiff's Motion for Summary Judgment

4. The State's underlying Complaint seeks declaratory relief pursuant to *M.R.C.P.* 57. At the hearing and prior to proceeding on the State's Motion for Summary Judgment, the County objected on the basis of "ripeness." The premise of County's objection was that the Court would be giving an "advisory opinion"¹ without an "actual case in controversy" unless the new resolution recently passed by the City was first allowed to be entered into the record through amendment to the Defendants' Answer and Counterclaim pursuant to the Defendants' Motion to Amend. The State took the position that other exhibits to pleadings already gave rise to a substantial controversy between the parties regardless of how many resolutions the City passed touching upon the subject the property. As more fully explained below, the Court **OVERRULED** the County's objection, finding that Rule 57 of the *M.R.C.P.* "is informed by the fact that the Mississippi Constitution does not limit the judicial power and authority to actual 'cases' or

¹ "... judicial power extends to 'matters,' which is broader and more inclusive than cases or controversies. Relatively recent cases confirm that the court long ago lost its virginity when it came to rendering advisory opinions." 3 MS Prac. Encyclopedia MS Law Sec. 19:214 (3d ed.), *citing Miss. Const., Art. VI, §§ 146, 156, 159; Johnson v. Sysco Food Services*, 86 So. 3d 242 (Miss. 2012); *Dialysis Solutions, LLC v. Mississippi State Dept. of Health*, 96 So. 3d 713 (Miss. 2012).

'controversies.'" Jeffrey Jackson, Mary Miller, & Donald Campbell, Encyclopedia of Mississippi Law, Sec. 19:214 (3d. ed. 2020).²

5. Although Mississippi law regarding the justiciability of cases subject to declaratory judgment is more liberal and broader in scope than federal law, the Fifth Circuit's holding in *Frye v. Anadarko Petroleum Corporation*, 953 F.3d 285 (5th Cir. 2019) is nevertheless instructive:

... declaratory judgment plaintiffs need not actually expose themselves to liability before bringing suit." *Id.* "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 549 U.S. at 127, 127 S.Ct. 764 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941)).

The Court finds that a substantial controversy exists between the parties based upon the current state of the pleadings to warrant relief under Rule 57 of the *Mississippi Rules of Civil Procedure*, and, accordingly, issues the following Order regarding the State's Motion for Summary Judgment.

6. This dispute involves the remnants of a City pier located south of the Harrison County Sand Beach and southerly from the end of Veterans Avenue located within the city limits of Biloxi. The pier and littoral rights were transferred to the City of Biloxi upon the dissolution of the Biloxi Port Commission. The City and Harrison County

² MS Prac. Encyclopedia MS Law Sec. 19:214 (3d ed.) Footnote 10 "Mississippi Constitution contains no "cases" or "controversies" clause such as is found in the Constitution of the United States. See City of Picayune v. Southern Regional Corp., 916 So. 2d 510 (Miss. 2005); State v. Quitman County, 807 So. 2d 401 (Miss. 2001); Van Slyke v. Board of Trustees of State Institutions of Higher Learning, 613 So. 2d 872, 81 Ed. Law Rep. 382 (Miss. 1993); compare U.S. Const. Art. III, § 2, cl. 1."

seek to lease portions of Veterans Avenue, the Sand Beach and certain property south of the shoreline to RW Development LLC, to allow RW Development LLC to construct a handicap accessible public pier in the current location of the remnants of the City's former pier.

7. The State requests the Court grant Summary Judgment finding that no genuine issue of fact exists for trial and to thus, to declare preemptively a final judgment pursuant to *M.R.C.P.* 57 and *M.R.C.P.* 54 that the Secretary of State, as Trustee of the Public Trust Tidelands, "has the sole authority to lease the Subject Property" and that any party wishing to develop and/or build upon Public Trust Tidelands "is required to obtain a Public Trust Tidelands Lease ("Tidelands Lease") from the Secretary of State." Dkt. No. 22, pgs. 2 and 5. The instant Motion for Summary Judgment is indeed the essence of the State's entire action, as set forth in its Complaint.

8. The State asserts that the property located at the south end of Veterans Avenue is Public Trust Tidelands and that Section 95 of the Mississippi Constitution provides title to such lands "shall never" be donated, directly or indirectly, to private entities such as RW Development LLC. The Mississippi Supreme Court has recognized that such tidelands are held in trust for the people of the State. See *Parks v. Simpson*, 137 So.2d 136, 138-39 (Miss. 1962). Further, the State asserts under *Miss. Code Ann.* §29-1-107, the sole authority to lease such tidelands is with the Secretary of State. The State also cites to *Secretary of State v. Wiesenbergs*, 633 So. 2d 983 (Miss. 1994), *Cinque Bambini Partnership v. State*, 491 So. 2d 508 (Miss. 1986), *Hosemann v. Harris*, 163 So. 3d 263 (Miss. 2015), and *RW Development, LLC v. Mississippi Gaming Commission*, 307 So. 3d 404 (Miss. 2020) in support of its position, specifically asserting that the State has

the authority to require that the City, County, and/or RW Development enter into a Tidelands Lease unless the Legislature has delegated leasing authority to the City or County. The State argues the Legislature has not delegated such authority to the City or County, including through the statutes or authorities cited by the Defendants, and thus, the City and County have no authority to rent, lease, or otherwise control the Subject Property without first acquiring a Public Trust Tidelands Lease from the Secretary of State.

9. Defendants counter by asserting: (1) the Tidelands Act (*Miss. Code Ann. §29-1-107 et. seq.*) does not grant exclusive authority to the Secretary; (2) in fact, the Tidelands Act [*Miss. Code Ann. §29-1-107(1)*] provides, “The Secretary of State, with the approval of the Governor, shall, as far as practicable, rent or lease all lands belonging to the state, **except as otherwise provided by law . . .**”(emphasis added); (3) *Miss. Code Ann. §29-1-107(4)(c)(i)* recognizes that political subdivisions of the state may lease Public Trust Tidelands; (4) the City and the County are political subdivisions of the State [*Miss. Code Ann. §11-46-1*]; (5) the County has exclusive jurisdiction over the Harrison County Sand Beach and all structures thereon pursuant to *Miss. Code Ann. §65-33-1* and *United States of America v. Harrison County, Mississippi*, and the District Court’s Final Judgment entered therein [Dkt. No. 9-2 herein]; (6) the State has delegated authority to the City of Biloxi through *Miss. Code Ann. §21-37-13*, *§49-15-9*, *§59-1-17(1)*, *§59-7-401 et. seq.*, *§59-15-1*, and *§59-7-405*, to construct a pier at the Veterans Avenue location³; (7) the

³ The State asserts these statutes are limited in their application to acts within ports and harbors. The subject property was once under the control of the Biloxi Port Commission which was dissolved.

above cited statutes are specific statutes and the Tidelands Act is a “general” law⁴, therefore the above statutes control over the general Tidelands Act; (8) these same authorities are sufficiently broad to allow the County and City to enter into a public/private partnership to construct a handicapped pier at Veterans Avenue; (9) *Miss. Code Ann.* §§21-37-13 and 59-7-405(1)(a)(5) allows the construction of such pier outside of a port or harbor; (10) the construction of such a pier falls within the Public Purpose Doctrine; and (11) the Mississippi Supreme Court has recognized a public/private partnership is an appropriate vehicle to develop public trust tidelands in a manner consistent with the Public Purpose Doctrine. See *Treuting v. Bridge & Park Comm'n of City of Biloxi*, 199 So.2d 627 (Miss. 1967).

10. Based upon the briefs and arguments expanding upon the law cited herein, the Court finds the State’s motion is not well taken and should be **DENIED**.

11. The Supreme Court recognized in *Secretary of State v. Wiesenbergs* that once held in trust by the State, land may only be alienated from the State upon the “authority of legislative enactment and then only consistent with the public purposes of the trust.”⁵ These transfers to private parties have been allowed by the Supreme Court when they are incidental to achieving a higher public purpose.⁶ Such public purposes include fishing, bathing, swimming, and other recreational activities.⁷ The Court also noted the higher duty assumed by the Secretary of State and Legislature, namely, “a return to the public of use, environmental protection and advancement and, in the

⁴ *Secretary of State v. Wiesenbergs*, 633 So.2d 983, 995 (Miss. 1995) (“Because the tidelands legislation will be applied to all members of the class of persons whose lands border tidelands, it constitutes general law.”).

⁵ *Id.* at 987.

⁶ *Id.* at 993.

⁷ *Id.* at 988-89.

appropriate areas, a return of economic growth. To stagnantly hold tidelands is not always in the public's best interest, nor is it responsive to the public's trust.”⁸

12. With this in mind, it is not clear that the Public Trust Tidelands Act read as a whole grants *sole* authority and *exclusive* rights to the Secretary of State to act on behalf of the State and other governing authorities to lease all purported Public Trust Tidelands *without exception*. First, the Act begins as a directive to the Secretary of State with the approval of the Governor when “practicable” to “lease all lands belonging to the state, **except as otherwise provided by law....**” Section (2) and the remainder of the Act set the parameters and specifics of such leases regarding Public Trust Tidelands. Statutes cited by the Defendants involving ports, harbors, and piers corroborate this point, as illustrated by the number of piers and other structures along the coast which have required no lease from the Secretary of State, including the destroyed pier on the Subject Property. It is therefore not obvious that the legislature intended to grant such broad and exclusive authority to the Secretary of State and the Governor alone such that certain exceptions have not been carved out.

13. While ownership interests may not be the central issue of this case, the Court has not been presented with sufficient evidence, such as the location of the mean high tide line on the subject property, to conclusively establish the rights of the parties. At present, the State has the sole claim pending before the Court; however, the State has only made conclusory statements regarding the conflicting interests involved in the Subject Property. It is clear from case law and statutory schemes that the State does delegate its authority to regulate and control public trust lands from time to time. It is not

⁸ *Id.* at 994.

clear that it has not done so here. Each party hereto has some claim to control the Subject Property, whether it be the County's control over the sand beach, the City's control over the pier, or the State's control over the bottomlands. Ultimately, this Court must reconcile those competing interests, but it cannot do so based upon the conclusory pronouncements of the State without additional evidence and absent any pending claims by the Defendants.

14. Furthermore, while Rule 57 is broader than "actual cases and controversies" in this State, it is not broad enough for the Court to address the State's authority to lease all Public Trust Tidelands wherever situated, especially when so many other statutes touch upon this very subject. The Court's declaration of rights is hereby limited to the parties hereto and the subject property.

15. Finally, to the extent the Temporary Restraining Order issued April 7, 2021, conflicts with the ten-day expiration required by M.R.C.P. 65, it must be dissolved. At the time of its entry, the parties contemplated final resolution of this matter at the May 5, 2021 summary judgment hearing and any construction taking place prior May 5, 2021 to be a practical impossibility. At the time of the hearing on the State's motion for temporary restraining order, all the parties agreed that permitting by the Department of Marine Resources, for example, as well as other necessary work would take some time, and thus, no objection was made to a *temporary restraining order* restricting construction on the subject property. The State's other requests for injunctive were in fact denied by the Court. May 5, 2021 having come and gone, the parties may comply with the procedures set forth in M.R.C.P. 65 to seek additional injunctive relief. It is therefore

ORDERED AND ADJUDGED that Defendants' Motion to Amend/Correct Answer

to Complaint is GRANTED for the purposes of adding their counterclaim(s) and DENIED as moot as to their request to add a necessary party; It is further

ORDERED AND ADJUDGED that Plaintiff's *Motion for Summary Judgment* is hereby DENIED, leaving for a final determination of rights which entity or entities: the State, the City, and/or the County, have the authority to lease the subject property and whether this authority should be exercised concurrently or exclusively. It is further

ORDERED AND ADJUDGED that the temporary restraining order contained within the April 7, 2021 Order is hereby dissolved.

SO ORDERED AND ADJUDGED this the 28th day of May, 2021.



HONORABLE JENNIFER SCHLOEGEL
CHANCERY COURT JUDGE

cc: R. Mark Alexander, Esq.
Mary Jo Woods, Esq.
Timothy Holleman, Esq.
Michael Whitehead, Esq.
Peter Abide, Esq.
Michael Cavanaugh, Esq.