

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-CA-00129 COA**

**GERALD L. BURGE**

**APPELLANT**

**v.**

**CARL A. LOZIER AND THE STATE OF  
MISSISSIPPI**

**APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,  
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	01/30/96
TRIAL JUDGE:	HON. R. I. PRICHARD III
COURT FROM WHICH APPEALED:	PEARL RIVER COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	EDWARD H. STEVENS GLENN LOUIS WHITE
ATTORNEYS FOR APPELLEES:	WILLIAM L. DUCKER
NATURE OF THE CASE:	CIVIL - OTHER
TRIAL COURT DISPOSITION:	APPELLANT ORDERED TO PAY \$10,000 REFUND OF APPEARANCE BOND PREMIUM
DISPOSITION:	AFFIRMED IN PART AND REVERSED AND RENDERED IN PART- 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

THOMAS, P.J., FOR THE COURT:

The Circuit Court of Pearl River County ordered that Gerald L. Burge d.b.a. Burge Bonding, Inc. refund criminal defendant Carl A. Lozier a premium paid for an appearance bond and also entered other directions to be discussed herein. Aggrieved, Burge appeals assigning four issues as error:

**I. THE CIRCUIT COURT ERRED IN IT'S ORDER OF OCTOBER 7, 1994, WHEREIN THE APPELLANT, GERALD L. BURGE, WAS ORDERED TO PAY TO THE CRIMINAL DEFENDANT, CARL A. LOZIER, THE SUM OF TEN THOUSAND DOLLARS AS A REFUND OF A PREMIUM PAID TO GERALD L. BURGE FOR AN APPEARANCE BOND**

**IN THE SUM OF ONE HUNDRED THOUSAND DOLLARS, BECAUSE GERALD L. BURGE, APPELLANT, WAS NOT A NAMED PARTY TO THE PROCEEDINGS, WAS NOT SERVED WITH PROCESS AND THE CIRCUIT COURT THUS LACKED JURISDICTION. GERALD L. BURGE WAS THEREFORE DENIED DUE PROCESS.**

**II. THE JUDICIAL INTERFERENCE IS A CONSTITUTIONALLY PROHIBITED IMPAIRMENT OF CONTRACT.**

**III. THE APPELLANT, GERALD L. BURGE, IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS FROM THE PRESIDING JUDGE PURSUANT TO THE LITIGATION ACCOUNTABILITY ACT OF 1988.**

**IV. AN ORDER WHICH IS THE EQUIVALENT OF A MONEY JUDGMENT, CIVIL IN NATURE, CANNOT ISSUE FROM A CRIMINAL PROCEEDING.**

Our supreme court by order dated September 11, 1995 dismissed Burge's motion against the State of Mississippi for lack of jurisdiction. The Court also dismissed Burge's motion for an award of attorney's fees and costs pursuant to the Litigation Accountability Act of 1988. Therefore, Issue III need not be discussed.

Finding merit to Burge's first assignment of error, we reverse and render in part. We need only discuss the first assignment of error.

### **FACTS**

Carl A. Lozier was indicted on March 18, 1994, and on that date, his bond was erroneously set on the docket as being \$100,000, instead of what should have been the correct amount of \$200,000. On March 23, 1994, the State, upon learning of the incorrect bond setting, filed a motion to increase the bond, and the court entered an order directing that Lozier's bond be raised to \$200,000 in conformity with the court's original order. The sheriff's office inadvertently listed Lozier's bond as \$100,000. On June 29, 1994, Lozier purchased an appearance bond in the amount of \$100,000 from Gerald L. Burge d.b.a. Burge Bonding, Inc. for a premium to be paid in the sum of \$10,000, and Lozier claimed he also paid a two-percent bond tax in the amount of \$2,000. On September 26, 1994, upon Lozier's appearance in Pearl River County Circuit Court, his bond was revoked because the \$100,000 amount was not the correct bail, and he was surrendered into custody by Burge. Lozier was free on bond for a total of ninety-one days. On October 7, 1994, the circuit court entered an order to return the \$2,000 bond tax and ordered that it be paid to Lozier personally by the Pearl River County Circuit Clerk. The court also ordered that the \$10,000 bond premium paid to Burge be returned to Lozier. We are unable to ascertain how this order came about being entered. There is no motion in the sparse record before us wherein Lozier formally, by either written or oral motion, requested assistance in the matter of his dealings with Burge regarding the bond. The order itself simply states that it is predicated on motion made *ore tenus*. Burge was not given notice nor an opportunity to be heard on the action taken by the trial court on October 7, 1994. Thereafter, Burge filed a motion seeking relief from this order, and a contested hearing was ultimately held before the trial court.

Burge testified at the relief hearing and stated that he took a mortgage on Lozier's restaurant and the

restaurant equipment and also took another mortgage on his home in Louisiana. Burge stated that he posted the two thousand dollar bond tax for Lozier out of his own pocket and then bailed Lozier out of jail. Burge then went to Lozier's house to pick up a big screen television set that went along with the mortgage on the restaurant equipment. Burge testified that approximately two or three weeks later, he went to New Orleans to meet Lozier. He stated that Lozier gave him five thousand dollars in a brown paper bag. Burge stated he wrote Lozier a receipt on a business card for five thousand dollars. The receipt was not dated. Burge wrote a receipt to himself signed by Lozier acknowledging that Lozier gave Burge five thousand dollars. This receipt was also not dated. At the hearing, Lozier produced his receipt from Burge which had the amount of fifteen thousand dollars instead of five thousand dollars. Burge claimed the fifteen versus five thousand listing was a forgery.

Lozier testified that he paid two thousand dollars to Burge for the bond tax. Lozier testified that he paid a part of his bond premium by lump sum of five thousand dollars at one time and also paid another lump sum of four thousand dollars on a later date. Lozier also stated that his father-in-law then paid Burge one thousand dollars. Lozier then testified that he paid an additional five thousand dollars to Burge on a later date towards the second bond premium to cover the added \$100,000 bond. Lozier states that this fifteen thousand dollar amount is reflected in his receipt from Burge. Lozier contends that he put up seventeen thousand dollars total; two thousand for the bond tax, ten thousand for the first bond premium, and five thousand towards the second bond premium. Lozier also testified that a big screen television set, VCR, bracelet, Rolex watch, and a chain were also given to Burge as collateral. Lozier did not get a receipt for any of the property. Burge admitted to taking the television set but denied ever having received any other property from Lozier. Lozier stated that Burge sought to keep the entire fifteen thousand dollars in return for releasing Lozier's mortgaged property in Louisiana.

Based on highly contested and convoluted facts, the trial court found that Lozier had in fact paid a total of ten thousand dollars to Burge. The trial court's total included five thousand dollars in cash and the value of the big screen television set. The trial court ordered that Burge return this ten thousand dollar amount to Lozier. The trial court also ordered that the \$2,000 bond tax be returned to Lozier. Furthermore, the trial court found that Lozier did not put on proof beyond a preponderance of the evidence to show that Burge had the VCR, Rolex watch, gold chain, and bracelet. Therefore, the trial court did not order that these items or their monetary equivalent be returned to Lozier.

## ANALYSIS

### I.

**THE CIRCUIT COURT ERRED IN IT'S ORDER OF OCTOBER 7, 1994, WHEREIN THE APPELLANT, GERALD L. BURGE, WAS ORDERED TO PAY TO THE CRIMINAL DEFENDANT, CARL A. LOZIER, THE SUM OF TEN THOUSAND DOLLARS AS A REFUND OF A PREMIUM PAID TO GERALD L. BURGE FOR AN APPEARANCE BOND IN THE SUM OF ONE HUNDRED THOUSAND DOLLARS, BECAUSE GERALD L. BURGE, APPELLANT, WAS NOT A NAMED PARTY TO THE PROCEEDINGS, WAS NOT SERVED WITH PROCESS AND THE CIRCUIT COURT THUS LACKED JURISDICTION. GERALD L. BURGE WAS THEREFORE DENIED DUE PROCESS.**

Burge contends that the circuit court wrongfully denied him both substantive and procedural due process when it entered an order which was, in effect, a money judgment against him when he was not a party to the criminal litigation and was afforded neither notice nor a hearing. Burge argues that the circuit court lacked jurisdiction over him. Lozier contends that the circuit court had the proper jurisdiction to order the refund based upon Rule 6.02 E of the Uniform Circuit and County Court Rules. Rule 6.02 E states that the circuit judge has the discretion to waive or modify any of the requirements of the bail rule, except for the collection of the fee.

The general law is stated in **8 Am. Jur. 2d Bail and Recognizance § 4 at 581-82 (1980)**:

The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the state of the burden of keeping him, pending the trial, and at the same time to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required. . . .

These purposes are fulfilled by the surrender of the defendant as a condition of exoneration of the surety. *United States v. Arnaiz*, **842 F.2d 217, 220 (9th Cir. 1988)**. "[T]he outcome of the premium dispute will have no effect on the defendant's appearance in court." *Id.*

The Mississippi Constitution grants to the circuit courts "original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court. . . ." **Miss. Const. Art. 6, § 156 (1890)**. Circuit courts are courts of general subject matter jurisdiction. *Barlow v. Weathersby*, **597 So. 2d 1288, 1293 (Miss. 1992)**. In reviewing a subject matter jurisdiction challenge to the Constitution's grant of authority, we must look at the type of case by examining the nature of the controversy and the relief sought. *Singing River Mall Co. v. Mark Fields, Inc.*, **599 So. 2d 938, 942 (Miss. 1992)**. A judgment rendered by a lower court having no jurisdiction over the subject matter is void, not merely voidable. *Duvall v. Duvall*, **224 Miss 546, 552, 80 So. 2d 752, 754 (1955)**. Subject matter jurisdiction may be questioned or challenged at any time, even on appeal. *Crowe v. Smith*, **603 So. 2d 301, 308 (Miss. 1992)**.

The question becomes whether the circuit court, with the ultimate power to grant or deny bail, had the proper authority and jurisdiction by way of the criminal case before it to order Burge to return to Lozier the premium paid on Lozier's bond. This question has not been directly addressed by our supreme court. We have found a Ninth Circuit United States Court of Appeals opinion which provided some much needed guidance to help answer the question.

In *United States v. Arnaiz*, **842 F.2d 217 (9th Cir. 1988)**, the Ninth Circuit dealt with the issue of whether a federal district court had jurisdiction to resolve a dispute between the bondsman and the defendant regarding a bond premium. The Ninth Circuit found that the district court did not have jurisdiction over the matter and reasoned that the premium dispute was not "so closely related to the purposes of the bail provisions (i.e., to secure the presence of the defendant) that denial of jurisdiction would necessarily interfere with the district court's ability to carry out its statutory mandate." *Id.* **at 220**. Disputes between defendants and their sureties over the bond premium involve an inquiry into the contractual obligations of the principal and the surety under the surety agreement. *Id.* **at 221**. The court declined to extend the district court's jurisdiction in this matter. The court did state that Arnaiz was not without remedy; he could bring a separate civil action in order to recover

the premium. *Id.* at 222.

In looking at our state statutes dealing with bondsmen, we find no indication that the legislature intended to extend jurisdiction vested to the circuit court in a specific criminal matter to deal with a contractual dispute between a principal and surety over a bond premium. The Mississippi Supreme Court in adopting the Uniform Circuit and County Court Rules has given the circuit court the authority to govern matters dealing with pretrial bail. However, these rules do not provide that jurisdiction be extended to contractual disputes between the principal and the surety. We, therefore, need to determine if the circuit court on its own had the proper authority, through ancillary jurisdiction, to order the return of the bond premium.

In order for the intruding claim to fall within the parameters of ancillary jurisdiction, the claim "must arise out of the same transaction or occurrence as the principal claim or, as others put it, out of a common nucleus of operative fact." *Hall v. Corbin*, 478 So. 2d 253, 255 (Miss. 1985). "[W]here a circuit court has jurisdiction of an action at law, it may hear and adjudicate in that action all claims, including those with an equitable smell, arising out of the same transaction and occurrence as the principal claim." *Id.* The circuit courts have full jurisdiction to adjudicate all claims in a single action without regard to whether they arise in equity or at law. *McDonald v. Holmes*, 595 So. 2d 434, 437 (Miss. 1992).

In the case *sub judice*, Lozier did not bring an original action in circuit court for the return of the bond premium. From the record before us, we cannot determine what compelled the trial court's order. Apparently, the trial court ordered the return of the money on its own volition by request of Lozier at the conclusion of Lozier's criminal trial. However, we do know that Burge was not a party or participant to Lozier's criminal action, and we also know that the trial court's order to return the money emerged from Lozier's criminal action. Lozier's criminal action was the principal claim; however, Burge was neither a participant nor an intervener to that principal claim. Therefore, we determine that the circuit court was unable to use ancillary jurisdiction to order the return of the bond premium. Our situation is similar to the *Arnaiiz* case. In conclusion, we determine that the circuit court was without jurisdiction to order that Burge return the bond premium to Lozier, and therefore, that order must be set aside. However, like *Arnaiiz*, we note that Lozier is not without remedy; he may bring a separate civil action for the return of the bond premium.

We now turn our attention toward the \$2,000 bond tax. Lozier claimed he paid a two percent bond tax in the amount of \$2,000 to Burge through a girlfriend of Lozier's. Burge stated that he posted the \$2,000 bond tax for Lozier out of his own pocket, and then bailed Lozier out of jail. The circuit court entered an order to return the \$2,000 bond tax and ordered that it be paid to Lozier personally by the Pearl River County Circuit Clerk.

Although our ruling is that the trial court did not have direct or ancillary jurisdiction to entertain Lozier's dispute with Burge over how much if any bond premium had been paid or how much of the same ought to be rightfully returned to Lozier, we nonetheless do believe that the trial court did have jurisdiction to determine who was rightfully due the return of the bond tax. This is so because the circuit clerk, not the bondsman, receives the bond tax on behalf of the State regardless of who pays it. The trial court must become involved when there is a refund due if there is a dispute over who is entitled to the same in order to give the circuit clerk guidance.

**THE JUDGMENT OF THE PEARL RIVER COUNTY CIRCUIT COURT IS AFFIRMED IN PART AND REVERSED AND RENDERED IN PART. COSTS ARE ASSESSED ONE-HALF AGAINST THE APPELLANT AND ONE-HALF AGAINST LOZIER AND PEARL RIVER COUNTY CIRCUIT COURT.**

**BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., CONCURS IN RESULT ONLY.**