IN THE MISSISSIPPI SUPREME COURT

No. 2005-CA-01952

HILDA PATSY SPURGEON AND OTTIS JEROME SPURGEON

Plaintiffs/Appellants

EDWIN G. EGGER

Defendant/Appellee

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

On Appeal from the Circuit Court of Washington County, Mississippi

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UNCONTRADICTED EVIDENCE ESTABLISHED GOOD CAUSE AS TO WHY SERVICE OF PROCESS WAS NOT MADE WITHIN THE 120 DAY PERIOD

The Trial Court made no specific findings in its determination that good cause was not shown as to why service of process was not been made within 120 days of the filing of the complaint. There were two bases for good cause in the record: (1) reasonable reliance on the process server's confirmation of timely and proper service, and on his return of service which shows proper and timely service; (2) Dr. Egger's attorneys' invocation of the stay of the Bankruptcy Act within the 120 day period after the complaint was filed. There was no evidence in the record which challenged either of these bases.

Without challenge or contradiction the Spurgeons established that they relied on their process server's apparently valid return of process which showed proper and timely service on Dr. Egger, and on verbal communication with him regarding the service.

The Supplemental Affidavit of William R. Armstrong, Jr. states:

> A basis for good cause is that service of process which appears sufficient on the face of the return was made by a professional process server within 120 days of the filing of the complaint and no defect in service of process was raised within the 120 day period.
>
> I engaged the services of Dennis Faust to serve process because he was an experienced professional process server in Washington County who was highly recommended. I prepared process and

copies of complaints and forwarded them to Dennis Faust, and thereafter he confirmed that service of process had been accomplished on all of the defendants including Dr. Edwin G. Egger. I had no reason to believe either from the return of process or conversations with Dennis Faust confirming service of process that Dr. Egger had not been properly served.

The return of process by Dennis Faust reflects personal service of process on Edwin G. Egger on August 10, 2004 and it is complete and sufficient on its face with a proper affidavit reflecting a sufficient and timely service of process on Dr. Edwin G. Egger within 120 days of the filing of the complaint.

A lawyer representing Dr. Edwin G. Egger wrote a letter to me on August 13, 2004, within the 120 day period, confirming that he represented Dr. Egger in the claim of Mrs. Spurgeon. A copy of the letter is attached hereto as Exhibit "1". This letter, received when there was still time to serve process before the 120 day period expired, confirmed that the attempted service of process had resulted in notice to Dr. Egger of the lawsuit, Dr. Egger's referral of the lawsuit to an attorney, and notice to me that Dr. Egger was defending the lawsuit. The letter raised no question as to the sufficiency of service and I considered it sufficient to constitute an appearance to the extent that a default could not have been entered against Dr. Egger.

A second lawyer, also representing Dr. Egger, wrote a letter to me on August 23, 2004 informing me "I understand that Dr. Egger was served with process on August 11, 2004, but I also understand that Dr. Egger is in bankruptcy". A copy of the letter is attached hereto as Exhibit "2".

On September 9, 2004 Dr. Egger's attorneys filed a Suggestion of Bankruptcy stating that a Chapter 11 case is pending for Edwin G. Egger, M.D. and Ann M. Egger, bankruptcy case number 99-21448, and that pursuant to the provisions of 11 U.S.C. § 362(a) the case is/must be stayed until further order of the U.S. Bankruptcy Court. A copy of the Suggestion of Bankruptcy is attached hereto as Exhibit "2".

> The delay under the notice of a stay of bankruptcy by Dr. Egger was followed by his attorneys' refusal to permit his deposition to be taken.
>
> Affidavits challenging the sufficiency of the service of process on Dr. Egger by Dennis Faust were not filed and served until on or about June 23, 2005.
>
> Within two weeks after the filing and service of the affidavits by Dr. Egger challenging sufficiency of service of process on Dr. Egger, process was reissued and personal service was completed on Dr. Edwin G. Egger on July 7, 2005. [Emphasis added].
>
> C.P.: 114-116.

While Dr. Egger seems to be asserting that the court filing date of the return of process, which coincided with the Spurgeons' filing of their response to Dr. Egger's Motion to Dismiss, is somehow indicative of when Plaintiffs' attorney actually received the return of process, this challenge was not made at the hearing. Candidly, the Spurgeons' attorney could have refuted that assertion, had it been raised in the hearing. On its face, the filing date of the return is simply the date it was forwarded for filing. At the hearing, Dr. Egger offerred no evidence to challenge the basis for good cause shown in the affidavit for not serving process within 120 days of the filing of the complaint. The Spurgeons' attorney was present at the hearing and could have testified in detail had Dr. Egger challenged the facts in the affidavit or sought to determine how and when the return of process was received by the Spurgeons' attorney.

There is no evidence, substantial or otherwise, challenging the Spurgeons' attorney's affidavit statements that the return of the process server was made within the 120 days of the filing of the complaint, that the process server confirmed that service of process had been accomplished on all of the defendants including Dr. Edwin G. Egger and that from the conversation with the process server he had no reason to believe that Dr. Egger had not been properly served.

Since the Trial Court made no specific findings with regard to the issue of good cause it is unknown why the Trial Court concluded that good cause had not been shown. However, since there is no evidence at all to support Dr. Egger's speculation that the Spurgeons did not rely on their process server and return of process, there can no substantial evidence supporting a finding that they did not. The lack of specific findings where evidence has been adduced on the issue of good cause is a reason to remand the case for further proceedings on that issue. It is also a basis for a finding of a lack of substantial evidence supporting the Trial Court's determination.

The Spurgeons also established without contradiction that Defendant Egger invoked the stay of the Bankruptcy Act within 120 days of the filing of the complaint. Exhibit "1" to the Supplemental Affidavit of William R. Armstrong, Jr. is a letter from Dr. Egger's attorneys. C.P.: 117; R.E.: 10.

The letter, dated August 13, 2004, a date still within the 120 day period following the filing of the complaint, stated:

> Dear Mr. Armstrong:
>
> Clint Guenther and I will be representing Dr. Egger in connection with Ms. Spurgeon's claim.
>
> First, be advised that Dr. Egger is currently involved in a bankruptcy proceeding. Mr. Martin Kilpatrick of Greenville is representing the doctor in that proceeding. As soon as we can contact Mr. Kilpatrick and obtain a copy of the petition, we will file that with the clerk in Washington County invoking the automatic stay.
>
> We are willing, during the time that this case is stayed, to investigate your claim against the doctor, but in order to do so, we will need copies of Ms. Spurgeon's medical records. If you will agree to provide those records, we would appreciate it. [Emphasis added].

C.P.: 117; R.E.: 10.

The letter did not provide the case number of the bankruptcy case, the date it was filed, or the chapter under which it was filed. It stated, not as an opinion or conclusion as Appellee's counsel has argued, that "[a]s soon as we can contact Mr. Kilpatrick and obtain a copy of the petition, we will file that with the clerk in Washington County invoking the automatic stay". C.P.: 117; R.E.: 10.

The Trial Court also made no specific findings with regard to Dr. Egger having filed bankruptcy, whether the stay was in effect, whether Dr. Egger improperly invoked the stay, or whether he is estopped from denying the stay

by his invocation of stay in direct communications with the Spurgeons' counsel and by the unequivocal judicial declarations in the Suggestion of Bankruptcy:

> Defendant, Edwin G. Egger, M.D., hereby provides notice of the filing of a case under Chapter 11 of the United States Bankruptcy Code on the United States Bankruptcy Court for the Northern District of Mississippi for the following debtors: Edwin G. Egger, M.D. and Ann M. Egger, bankruptcy case number 99-21448.
>
> The Chapter 11 case is now pending and, therefore, pursuant to the provisions of 11 U.S.C. §362(a), this case is/must be stayed until further order of the U.S. Bankruptcy Court.
>
> C.P.: 114-116.

The evidence in the record on the subject of Dr. Egger's bankruptcy and the stay he invoked is the letter that was sent to the Spurgeons' counsel invoking the stay [C.P.: 117], the Suggestion of Bankruptcy he filed [CP.: 24-25], the Withdrawal of Suggestion of Bankruptcy he subsequently filed [C.P.: 29-30], and the Spurgeons' attorney's affidavit dated June 16, 2005 which stated:

> "I confirmed through the docket of the U.S. Bankruptcy Court for the Northern District of Mississippi that Edwin G. Egger filed under Chapter 11 of the Bankruptcy Act on March 29, 1999 and that his case (No. 99-21448) was still open on April 20, 2002."
>
> C.P.: 77.

Defendant Egger has not offered evidence justifying his acts of invoking the bankruptcy court's automatic stay and the Trial Court has made no findings with regard to his bankruptcy or the automatic stay.

Dr. Egger acknowledges the existence of the bankruptcy case, the fact of the letters sent to counsel and the invocation of the automatic stay with the Suggestion of Bankruptcy which was filed with the Trial Court. Dr. Egger's argument is that his counsel was simply giving opinions and stating conclusions on which Plaintiffs' counsel was not justified in relying. The letter, however, contained no such reservations or characterizations. It stated: "[a]s soon as we can contact Mr. Kilpatrick and obtain a copy of the petition, we will file that with the clerk in Washington County invoking the automatic stay". C. P. at 117; R.E.: 10. Dr. Egger's counsel argues that the Spurgeons should have known that Dr. Egger's actions invoking the stay were invalid. Yet even now, Dr. Egger has provided no factual evidence whatsoever with regard to the events in his bankruptcy case or to show that the stay was not in effect. The record is devoid of any information from which the status of the automatic stay in Dr. Egger's bankruptcy case can be determined. Dr. Egger's counsel also argues in his brief that the invocation of stay did not follow this Court's suggestions in *Overbey v. Murray*, 569 So. 2d 303, 307 (Miss. 1990). While those procedures were not completely followed, this Court has not said

that perfection was required to give effect to the notice. The intent of the notice which was filed, signed by Dr. Egger's attorneys, subject to Rule 11, as well as the intent of the earlier letter sent, was clearly to invoke the stay.

Dr. Egger's counsel also argues that Plaintiff was not deterred by its actions. In fact, Dr. Egger ignored the stay himself to serve a Motion to Dismiss on September 7, 2004. After receiving the Motion to Dismiss and perceiving that Dr. Egger was himself ignoring the stay, the Spurgeons sent Dr. Egger a notice letter before receiving the Suggestion of Bankruptcy that Dr. Egger's attorney filed on September 10, 2004.

Defendant Egger also argues that the Spurgeons ignored the automatic stay which Dr. Egger invoked by filing a certification of consultation pursuant to Miss. Code Ann. §11-1-58(1)(a). C.P.: 90, 100, 102. The record does not reflect that the certification of consultation was served on Dr. Egger. There were two other defendants in this case and continuation of the litigation against them was not stayed by the automatic stay which Dr. Egger had invoked. Accordingly, because the complaint had been filed against all defendants without having obtained a consultation with an expert, the deadline for filing the certificate of consultation with regard to the other defendants who were not stayed by Dr. Egger's invocation of the automatic stay of his bankruptcy case had to be met. A certificate was filed which stated that at

least three medical experts licensed to practice in Mississippi and specializing in ophthalmology had declined to consult with regard to providing expert testimony regarding Hilda Patsy Spurgeon's case. C.P.: 90. The Spurgeons acted only in response to Dr. Egger having ignored the stay himself by filing a Motion to Dismiss. The Spurgeons respected the stay from the time it was first invoked by Dr. Egger's counsel's letter of August 9, 2004, until service of Dr. Egger's Motion to Dismiss on September 7, 2004. The index of the Clerk's papers in the record of this case reflects that no filings were made by the Spurgeons after the filing of the complaint until after the withdrawal of Suggestion of Bankruptcy in February, 2005. Dr. Egger filed his Suggestion of Bankruptcy on September 10, 2004 and the Spurgeon's continued to abide by the stay until the Suggestion of Bankruptcy was partially withdrawn in February, 2005.[1]

The chronology of the procedure which Dr. Egger's attorneys followed was: to promptly notify Plaintiffs' counsel on August 13, 2004 of their representation of Dr. Egger, that he had filed a bankruptcy and that the stay would be invoked as soon as a copy of the bankruptcy petition was obtained [C.P.: 117; R.E: 10]; to wait until the statute of limitations appears to have expired knowing that process had been improperly served on Dr. Egger's

[1] The Suggestion of Bankruptcy purported to "voluntarily" lift stay only to the extent of any professional liability coverage that may be applicable to the claims against Dr. Egger. C.P.: 29.

receptionist and then on September 7, 2004 to serve a Motion to Dismiss for improper service of process but without affidavits [C.P.: 21-22]; on September 9, 2004 to serve a Suggestion of Bankruptcy to cut off further proceedings [C.P.: 24-25]. Although Dr. Egger's counsel argue and attempt to demonstrate that as a matter of law the stay was not in effect, they have produced no evidence regarding the bankruptcy case or the automatic stay or that they ever notified the Spurgeons or the Trial Court that the Spurgeons' case was not affected by the automatic stay.

Dr. Egger's brief also questions why the Spurgeons did not respond to Dr. Egger's Motion to Dismiss, which was filed September 10, 2004, until June 15, 2005, if they relied on Dr. Egger's Withdrawal of Suggestion of Bankruptcy which was filed February 10, 2005. There are two explanations. The first explanation is that the Mississippi Rules of Civil Procedure do not require a response to a Motion to Dismiss. The second explanation is that Dr. Egger did not file any supporting affidavits to his Motion to Dismiss until June 22, 2005 although the Mississippi Rules of Civil Procedure do require affidavits to be filed with a Motion to Dismiss. Until those affidavits were finally filed, the Spurgeons believed that Dr. Egger's Motion to Dismiss was entirely unfounded and based on an erroneous belief that the service of process was not within 120 days of the filing of complaint (on or before

August 18, 2004), as it stated. C.P.: 21. It was only when Dr. Egger filed affidavits of Dr. Egger and of Dennis Faust, the process server, after the Spurgeons' response was filed, that it was disclosed that the return of service was false because the process server had improperly served Amanda Boozer, Dr. Egger's receptionist.

Dr. Egger's attorneys also argue that the surgery from which this case arose occurred after the filing of Dr. Egger's Chapter 11 bankruptcy case on March 29, 1999 and would not be covered by the automatic stay. They have not shown from the record of this case how the bankruptcy case proceeded. Having been filed as a Chapter 11 case it may have been converted to a Chapter 7 case pursuant to 11 U.S.C. § 1112 which provides:

> (a) The debtor may convert a case under this chapter to a case under chapter 7 of this title unless -
>
> (1) the debtor is not a debtor in possession;
> (2) the case originally was commenced as an involuntary case under this chapter; or
> (3) the case was converted to a case under this chapter other than on the debtor's request.

The conversion of a case from Chapter 11 to Chapter 7 constitutes an order for relief pursuant to 11 U.S.C. §348(a) which provides:

> "(a) conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted . . . ."

All debts which arise after the filing date of the petition in bankruptcy but before the date of conversion are treated as though they arose before the date of the filing of the petition and are dischargeable as though they arose prior to the filing date. 11 U.S.C. §348 [Effect of Conversion] provides:

> "(d) A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1208, or 1307 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition." [Emphasis added].

The point Dr. Egger's attorneys seemed to be making, which is that the stay simply couldn't be applicable despite the fact that they invoked it, can't be made without a detailed review of Dr. Egger's bankruptcy case.

Finally, the Trial court made no specific findings as to whether Dr. Egger is estopped to deny his attorneys' assertion of a bankruptcy stay to the Spurgeons' counsel and his judicial assertions of a stay in the Suggestion of Bankruptcy they filed. The Spurgeons contend that the conduct of Dr. Egger's attorneys meets the requirements for estoppel set forth in *Chapman v. Chapman*, 473 So. 2d 467, 470 (Miss. 1985): "It is sufficient if the acts of the party sought to be estopped, although made without subjective intent to mislead, were, objectively speaking, calculated to mislead, and did mislead". *Id.* Objectively, the action of invoking the stay by letter dated August 13, 2004 were calculated to induce a belief that the stay was in effect, and did

induce that belief: the Spurgeons' were induced by Dr. Egger's attorneys to believe the stay was in effect before the 120 day period for service expired.

No cases have been cited involving the combination of events which the Spurgeons' have offered as the basis for good cause for not having served process within 120 days of the filing of the complaint. The Spurgeons submit that invocation of the bankruptcy stay before the 120 day period for service of process expired is conduct which so obfuscated the proceedings when combined with the circumstances of the Spurgeons' reliance on their process server and the facially valid return of service of process as to constitute good cause as to why process was not served within 120 days of the filing of the complaint.

CONCLUSION

In asking this court to remand this case to the Trial Court with a five (5) day extension of time for the service of process on Dr. Egger, the Spurgeons' are asking for the opportunity they would have had to complete service of process had Defendant Egger not obfuscated the proceedings by invoking the stay of the Bankruptcy Act and had the process server not made a false return of service of process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been mailed, by placing same in the U.S. Mail, with proper postage affixed hereto, to the following individuals:

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Signed this 11th day of April, 2007.

William R. Armstrong, Jr.