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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CASE NO. 2007-CA-00980

THOMAS LUCAS, KATHLEEN LUCAS MUNN, JAMES L. MCNEILL, MICHELLE MCNEILL CIACCIO, AND MATTHEW MCNEILL, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF JANE LUCAS **APPELLANTS**

V.

BAPTIST MEMORIAL HOSPITAL-NORTH MISSISSIPPI, INC. **APPELLEE**

REPLY BRIEF OF APPELLANTS

ARGUMENT

Appellee Baptist Memorial Hospital–North Mississippi, Inc., waived its affirmative defense of ineffective service of process.

Defendant Baptist Memorial Hospital-North Mississippi, Inc., attempts in its Brief to use a "sleight of hand" technique in an attempt to keep this Court's eye off of the waiver ball. On page 7 of its Brief, Defendant states that "[d]efects in the service of process, including the defect of untimely service, are waived *only if* the defendant fails to assert the defense in its Answer or moves to dismiss." Later on that same page, Defendant states that "[i]n short, BMJ-NM preserved the defense of untimely service by raising it in the Answer, and therefore the defense was not waived." By footnotes 11 and 12 respectively, Defendant cites to the case of *Collom v. Senholtz*, 767 So.2d 215, 218 (Miss. App. 2000), to support each of the two sentences quoted above.

One problem with Defendant's argument is that it takes a very narrow principle set forth in the *Collom* case and then attempts to use it to support a much broader proposition. As quoted in footnote 11 of Defendant's Brief, the Court in *Collum* states that "[r]ule 12(b) explicitly states that the insufficiency of process defense is only waived if the answer or affirmative defenses are filed

omitting the defense." *Id.* at 218. The *Collum* holding is restricted the very narrow type of Rule 12(b) waiver which can occur if a party fails to list an affirmative defense in its answer. However, it certainly does not support a broader statement that affirmative defenses "are waived *only if* the defendant fails to assert the defense in its Answer or moves to dismiss." See Def.'s Br. at 7. Affirmative defenses can be waived under subsections other than 12(b) such as 12(h)(1) discussed below. Further, it does not stand for the proposition that Defendant "preserved the defense of untimely service by raising it in the Answer, and therefore the defense was not waived." See Def.'s Br. at 7. In fact, the only relevance that the quoted portion of the *Collum* case has to this case is that Defendant did not waive that defense on the basis of Rule 12(b).

As Defendant well knows, Plaintiffs did not even suggest in their Brief that Defendant had waived its affirmative defense based on Rule 12(b). Plaintiffs only referred to Rule 12(b) in their Brief to illustrate that the defense of insufficiency of process and insufficiency of service of process were available to Defendant under subsections 12(b)(4) and 12(b)(5), respectively. See Pls.' Br. at 8-9. Plaintiffs did not suggest in their Brief that Defendant waived its affirmative defense based on Rule 12(b). Thus, not only did Defendant misapply the holding in the *Collum* case, but Defendant quoted to this Court a portion of the *Collum* case wholly inapplicable to the instant legal analysis.

In the case at hand, Plaintiffs asserted in their Brief and again assert now that Defendant waived its affirmative defenses of insufficiency of process and insufficiency of service of process based on Rule 12(h)(1). See Pls.' Br. at 9. This separate section of Rule 12 allows for other ways wherein a party can waive affirmative defenses. Rule 12(h)(1) waivers are wholly independent and separate from a waiver which can arise from omitting an affirmative defense from an Answer. Rule 12(h)(1) states as follows:

> (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.

Miss. R. Civ. P. 12(h)(1). Under subsection (A), a party can waive these affirmative defenses if they omit them from a motion described in Rule 12(g). Rule 12(g) reads as follows:

> (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.

Miss. R. Civ. P. 12(g). It is a matter of fact that Defendant filed a Motion to Dismiss for Improper Venue or, in the alternative, to Transfer to the Circuit Court of Lafayette County, Mississippi, on or about January 20, 2004. R. at 27. The affirmative defenses of insufficiency of process and insufficiency of service of process could have been asserted by Defendant in this first Motion to Dismiss but were omitted. This scenario is exactly what is contemplated in Rule 12(g) and Rule 12(h)(1). These subsections taken together, in essence, stand for the proposition that if a party files a motion to dismiss based on an affirmative defense found in Rule 12, then that party must join all such defenses available to him in that first motion. If the party omits an affirmative defense then available to it from that first motion, then Rule 12(g) states that "he shall not hereafter make a motion based on the defense or objection so omitted." Rule 12(h)(1) then goes on to specifically and unequivocally state that the defenses of insufficiency of process and insufficiency of service of process are waived "if omitted from a motion in the circumstances described in subdivision (g)." Defendant plainly and clearly waived these defenses and were barred from filing their subsequent

Motion to Dismiss on these grounds. See *L.W. v. C.W.B.*, 762 So.2d 323, 328 (Miss. 2000).[1]

It is significant to note that in its Brief, Defendant does not address at all Plaintiffs' Rule 12(h)(1) and 12(g) argument. At no point does Defendant contradict or challenge this argument. Defendant offers no law to challenge this argument nor does it offer any facts to suggest that this argument is not applicable to this case. Defendant waived its affirmative defenses of insufficiency of process and insufficiency of service of process by filing to join them in its first Motion to Dismiss for Improper Venue or, in the alternative, to Transfer to the Circuit Court of Lafayette County, Mississippi, and Defendant knows it.

Further, Defendant waived its insufficiency of process defense by actively engaging in litigation and waiting over nine months to file its motion requesting dismissal due to insufficiency of process. In its Brief, Defendant blindly alleges that it did not actively participate in litigation but ignores many of the numerous litigation acts in which it engaged. Defendant was served no later than November 7, 2003. R. at 18, 51, 68. Defendant did not file its motion to dismiss for insufficiency of process until August 20, 2003. R. at 67. In the interim, Defendant:

- filed an Acknowledgement of Receipt of Summons and Complaint, R. at 18;
- answered the complaint, R. at 19;
- propounded written discovery to Plaintiffs, R. at 26;[2]
- filed Motion to Dismiss for Improper Venue, R. at 27;

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[1]Plaintiffs specifically made this waiver argument to the trial court in its Motion for Additional Time Until November 24, 2003, During Which to Serve Defendant Baptist Memorial Hospital and For Alternative Relief in Rebuttal and Defendant's Second Motion to Dismiss. R. at 165.

[2]On page 10 of Defendant's Brief, Defendant states that during the period of time following the July 22, 2005, hearing, "there were no interrogatories, no request for production and no depositions." Defendant blatantly ignores the fact that it had already propounded discovery to Plaintiffs.

- filed Reply in further support of its Motion to Dismiss for Improper Venue, R. at 47;
- filed Response to Plaintiffs' Motion to Strike Defenses and Motion for Sanctions, R. at 50;
- issued and served two different Subpoena Duces Tecums to healthcare providers for medical records, R. at 55-64.

Defendant could have filed its Motion to Dismiss on the ground of insufficiency of process even before answering the complaint. How can it be said that Defendant did not actively participate in this litigation before deciding to file its dismissal motion?

Defendant in its Brief seems to be to blame the trial court for part of the delay, because it did not have hearing dates available. See Def.'s Br. at 9. Then, Defendant blames Plaintiffs for filing the case in Pontotoc County. See Def.'s Br. at 11.[3] Everyone is at fault for the delay but Defendant. The problem with Defendant's argument is the facts. Neither the Plaintiffs nor the trial court forced Defendant to move for a change of venue, propound written discovery and issue subpoenas. Defendant litigated this case for some time prior to asking for a dismissal on the subject grounds. This type of litigation activity while waiting to assert a defense is exactly the type of behavior that has justified a finding of waiver by this Court in the past. See e.g. *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 180 (Miss. 2006).

Defendant waived its affirmative defenses as a result of its delay in asserting them and its active participation in litigation in the interim.

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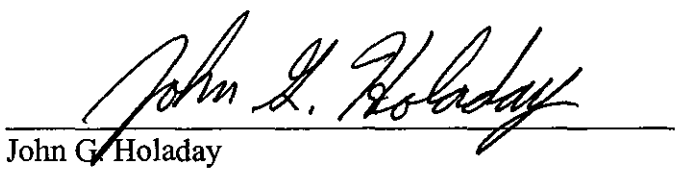
[3]On page 9 of Defendant's Brief, Defendant repeatedly cites alleged facts about the procedural history of this case in support of its position, e.g., 1) first full sentence beginning "[a]lmost beginning . .", 2) second full sentence beginning "There were . .", 3) last full sentence beginning [a]t the hearing's . . .". These and many other procedural facts alleged by Defendant on page 9 and others are not supported by any record cites and should be stricken as a result.

Conclusion

Based on the foregoing, Appellants Thomas Lucas, Kathleen Lucas Munn, James L. McNeill, Individually, and on behalf of Jane Lucas request that the Court reverse the Orders and Judgment of the Lafayette County Circuit Court dismissing Appellee Baptist Memorial Hospital-North Mississippi, Inc.

This the 6th day of March, 2008.



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Certificate of Service

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