IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MONTY FLETCHER — APPELLANT

V. — Case No.: 2007-CA-01247

LIMECO CORPORATION — APPELLEE

Consolidated with

R. W. WHITAKER — APPELLANT

V. — Case No.: 2007-CA-01249

LIMECO CORPORATION AND WILLIAM KIDD — APPELLEE

T-REX 2000, INC. — APPELLANT

V. — Case No.: 2007-CA-01262

BRETT KIDD AND JAMIE KIDD — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

APPELLEES' BRIEF

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BRETT KIDD AND JAMIE KIDD**

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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 the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Monty Fletcher, Appellant.
2. R. W. Whitaker, Appellant.
3. T-Rex 2000, Inc., Appellant.
4. Danny Cash, Plaintiff in related case.
5. Michael N. Watts, Attorney for Appellants.
6. R. Bradley Best, Attorney for Appellants.

7. Julie Murphy Burnstein, Attorney for Appellants.

8. Peter C. Sales, Attorney for Appellants.

9. David Sparks, Former Attorney for Appellants.

10. Limeco Corporation, Appellee.

11. William Kidd, Appellee.

12. Brett Kidd, Appellee.

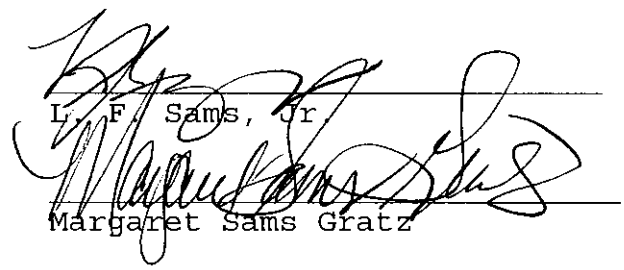
13. Jamie Kidd, Appellee.

14. L. F. Sams, Jr., Attorney for Appellees.

15. Margaret Sams Gratz, Attorney for Appellees.

16. Honorable Paul S. Funderburk, Trial Court Judge.

17. Honorable Sharion Aycock, Trial Court Judge.



L. F. Sams, Jr.

Margaret Sams Gratz

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a)(3) of the Mississippi Rules of Appellate Procedure, Appellees request no oral argument. The facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. Nevertheless, if the Court desires to hear oral argument, Appellees have no objection.

TABLE OF AUTHORITIES

Federal Cases

State Cases

Statutes and Rules

STATEMENT OF THE ISSUES

I. Whether the trial courts were correct in holding that the process was insufficient because it failed to comply with Rule 4 of the Mississippi Rules of Civil Procedure.

II. Whether the trial courts were correct in holding that Defendants did not waive their defenses of insufficient process and insufficient service of process.

STATEMENT OF THE CASE

Presently before the Court are three (3) of four (4) cases[1] that center around negotiations that began in 2001 for the purchase of the T-Rex 2000 hockey team in Tupelo. For numerous reasons, this deal was never consummated. However, the underlying facts related to the negotiations and alleged breach of contract are irrelevant to this appeal. Instead, only the facts related to the procedural history are relevant. Accordingly, the Appellees have limited the statement of the case to these facts.

A. Fletcher Case[2]

On December 11, 2003, Monty Fletcher filed a Complaint against Limeco Corporation. Fletcher R. 3. Also on December 11, 2003, a "Notice to Respondent" (which was apparently the Summons) was issued by the Clerk of the Court. Fletcher R. 73. On January 23, 2004, the Complaint and Notice to Respondent were served on William Kidd,[3] as Managing Director of Limeco Corporation.

The Notice to Respondent that had been served upon Limeco was apparently prepared by Fletcher's attorney, but erroneously

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[1] The fourth case is Danny Cash v. Bill Kidd, Cause No. CV03-1329, presently pending in the County Court of Lee County, Mississippi.

[2] Although the legal issues of these consolidated cases are similar, Appellees have separated the facts of each of the cases to simplify the explanation.

[3] All four of the Complaints in these related cases were delivered to William Kidd in a single manila envelope at his home.

stated, **"You are not required to file an answer or other pleading but you may do so if you desire."** Fletcher R. 73 (emphasis added). This language does not substantially conform to Summons Forms 1A or 1AA as required by Rule 4(b) but, rather, is language contained in Summons Form 1D which should only be used in Rule 81 matters.[4] Fletcher R. 74. Based on this language of the Summons, Limeco did not timely file a response to the Complaint, but mailed and delivered an answer to Plaintiffs' attorney, David Sparks.

Unbeknownst to Limeco, on March 24, 2004, Fletcher filed a Motion for Default Judgment and Affidavit. Fletcher R. 9. On April 1, 2004, a Judgment was entered granting the default judgment, and again, Limeco was given no notice and was therefore unaware of this judgment or its entry. Fletcher R. 12.

It was not until September 8, 2006, when Limeco was served a Notice of Filing of Foreign Judgment (filed in an Alabama state court) that it learned of the default judgment against it. Fletcher R. 84. On September 20, 2006, Limeco served a Motion to Set Aside Default Judgment and for Other Relief asserting that the

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[4] Rule 81 matters include (1) proceedings pertaining to the writ of habeas corpus; (2) proceedings pertaining to the disciplining of an attorney; (3) proceedings pursuant to the Youth Court Law and the Family Court Law; (4) proceedings pertaining to election contests; (5) proceedings pertaining to bond validations; (6) proceedings pertaining to the adjudication, commitment, and release of narcotics and alcohol addicts and persons in need of mental treatment; (7) eminent domain proceedings; (8) Title 91 of the Mississippi Code of 1972; (9) Title 93 of the Mississippi Code of 1972; (10) creation and maintenance of drainage and water management districts; (11) creation of and change in boundaries of municipalities.

default judgment was void because process was insufficient. Fletcher R. 14. On November 6, 2006, an Order was entered in the Alabama matter dismissing the Notice of Filing of Foreign Judgment without prejudice. Fletcher R. 127. On November 9, 2006, an Agreed Order was entered by the trial court in this matter setting aside the default judgment and allowing Limeco thirty days in which to file a responsive pleading. Fletcher R. 55. On December 11, 2006, Limeco served its Answer and Defenses and therein asserted that process was insufficient and that, under Rule 4(h), service was not perfected on Limeco within 120 days of the filing of the Complaint. Fletcher R. 59. On December 15, 2006, Limeco served its motion to dismiss this case under Rule 12(b)(4) for insufficient process and for failure to perfect service on Defendant within 120 days of the filing of the Complaint under Rule 4(h). Thereafter, the briefing was completed and a hearing before the trial court was conducted. On May 8, 2007, the Court entered an Order granting the motion to dismiss without prejudice. Fletcher R. 303. On May 16, 2007, Fletcher filed a Motion to Alter or Amend. Fletcher R. 305. On July 6, 2007, the Court denied Fletcher's motion, and this appeal followed. Fletcher R. 365.

B. Whitaker Case[5]

On December 11, 2003, a Complaint was filed by R. W. Whitaker, Plaintiff, against Limeco Corporation and William Kidd, Defendants. Whitaker R. 3. Also on December 11, 2003, a "Notice to Respondent" (which was apparently the Summons) was issued by the Clerk of the Court to Limeco only. Whitaker R. 45. On January 23, 2004, the Complaint and Notice to Respondent were served on William Kidd, as Managing Director of Limeco Corporation.

The Notice to Respondent that had been served upon Limeco was apparently prepared by Plaintiff's counsel, but erroneously stated, "**You are not required to file an answer or other pleading but you may do so if you desire.**" Whitaker R. 45 (emphasis added). This language does not substantially conform to Summons Forms 1A or 1AA as required by Rule 4(b) but, rather, is language contained in Summons Form 1D which should only be used in Rule 81 matters. Whitaker R. 51. Based on this language of the Summons, Limeco did not timely file a response to the Complaint, but mailed and delivered an answer to Plaintiffs' attorney, David Sparks.

Unbeknownst to these Defendants, on March 24, 2004, Plaintiff's counsel filed a Motion for Default Judgment and

[5] The relevant facts of the Whitaker case are practically identical to the relevant facts of the Fletcher case with the following two exceptions: (1) Whitaker sued both Limeco and William Kidd; and (2) although the Notice to Respondent (or summons) was issued for Limeco, no summons was issued for William Kidd.

Affidavit. Whitaker R. 19. On April 1, 2004, a Judgment was entered granting the default judgment, and again, these Defendants were given no notice and were therefore unaware of this judgment or its entry. Whitaker R. 22.

It was not until September 8, 2006, when these Defendants were served a Notice of Filing of Foreign Judgment (filed in an Alabama state court) that they learned of the default judgment against them. Whitaker R. 61. On September 20, 2006, these Defendants served a Motion to Set Aside Default Judgment and for Other Relief asserting that the default judgment was void because process was insufficient. Whitaker R. 24. On November 6, 2006, an Order was entered in the Alabama matter dismissing the Notice of Filing of Foreign Judgment without prejudice. Whitaker R. 177. On November 9, 2006, an Agreed Order was entered by the trial court in this matter setting aside the default judgment and allowing these Defendants thirty days in which to file their responsive pleadings. Whitaker R. 76. On December 11, 2006, these Defendants served their Separate Answer and Defenses and therein asserted that process was insufficient and that, under Rule 4(h), service was not perfected on Defendants within 120 days of the filing of the Complaint. Whitaker R. 80 & 86. On December 15, 2006, Limeco and Kidd served their motion to dismiss this case under Rule 12(b)(4) for insufficient process and for failure to perfect service on Defendant within 120 days of the filing of the

Complaint under Rule 4(h). Thereafter, the briefing was completed and a hearing before the trial court was conducted. On May 8, 2007, the Court entered an Order granting the motion to dismiss without prejudice. Whitaker R. 395. On May 16, 2007, Whitaker filed a Motion to Alter or Amend. Whitaker R. 397. On July 6, 2007, the Court denied Whitaker's motion, and this appeal followed. Whitaker R. 458.

C. T-Rex 2000 Case

On December 11, 2003, a Complaint was filed by T-Rex 2000, Inc., Plaintiff, against Brett Kidd and Jamie Kidd, Defendants. T-Rex R. 3. Also on December 11, 2003, a "Notice to Respondent" (which was apparently the Summons) was issued by the Clerk of the Court to each Defendant. T-Rex R. 23 & 24. William Kidd, Defendants' father, at no time agreed to accept service on behalf of either Defendant. Nevertheless, on January 23, 2004, the Complaint and Notices to Respondent were delivered to William Kidd at Beech Springs Road, Tupelo, Mississippi, where William Kidd resided with his son, Brett Kidd. Jamie Kidd, William Kidd's daughter, did not reside at this location or even in the United States.

The Notices to Respondent that had been delivered to William Kidd were apparently prepared by Plaintiff's counsel, but erroneously stated, **"You are not required to file an answer or other pleading but you may do so if you desire."** T-Rex R. 23 & 24

(emphasis added). This language does not substantially conform to Summons Forms 1A or 1AA as required by Rule 4(b) but, rather, is language contained in Summons Form 1D which should only be used on Rule 81 matters. T-Rex R. 30. Based on this language of the Summons, Defendants did not timely file a response to the Complaint but mailed and delivered an answer to Plaintiffs' attorney, David Sparks.

Unbeknownst to these Defendants, on March 24, 2004, Plaintiff's counsel filed a Motion for Default Judgment and Affidavit. T-Rex R. 8. On April 1, 2004, a Judgment was entered granting the default judgment, and again, these Defendants were given no notice and were therefore unaware of this judgment or its entry. T-Rex R. 11.

It was not until September 8, 2006, when these Defendants received a Notice of Filing of Foreign Judgment (filed in an Alabama state court) that they learned of the default judgment against them. T-Rex R. 120. On September 20, 2006, these Defendants served a Motion to Set Aside Default Judgment and for Other Relief asserting that the default judgment was void because process was insufficient. T-Rex R. 13. On November 6, 2006, an Order was entered in the Alabama matter dismissing the Notice of Filing of Foreign Judgment without prejudice. T-Rex R. 130. On November 9, 2006, an Agreed Order was entered in this matter setting aside the default judgment and allowing these Defendants

thirty days in which to file their responsive pleadings. T-Rex R. 52. On December 11, 2006, these Defendants served their Separate Answer and Defenses and therein asserted that process was insufficient, that service of process was insufficient and that, under Rule 4(h), service was not perfected on Defendants within 120 days of the filing of the Complaint. T-Rex R. 56 & 60. On December 15, 2006, Brett Kidd and Jamie Kidd served their motion to dismiss this case under Rule 12(b)(4) for insufficient process, Rule 12(b)(5) for insufficient service of process, and for failure to perfect service on Defendant within 120 days of the filing of the Complaint under Rule 4(h). Thereafter, the briefing was completed and a hearing before the trial court was conducted. On April 30, 2007, the Court entered an Order granting the motion to dismiss without prejudice. T-Rex R. 295. On May 10, 2007, T-Rex 2000 filed a Motion to Alter or Amend. T-Rex R. 315. On July 6, 2007, the Court denied T-Rex 2000's motion, and this appeal followed. T-Rex R. 376.

SUMMARY OF THE ARGUMENT

The trial courts correctly granted Defendants' motions to dismiss because, as to all defendants, process was insufficient under Rule 4 because the "Notices to Respondent" served on these Defendants were hybrid Rule 81 Summons, they contained language contrary to a Rule 4 summons, and thus they did not substantially conform to Forms 1A or 1AA as required by Rule 4.[6] These defenses were never waived because, pursuant to Rule 5(d) of the Mississippi Rules of Civil Procedure, the answers that were mailed and delivered to Plaintiffs' attorney, David Sparks, in February 2004 but never filed have no force or effect. Contrary to Plaintiffs' argument, Defendants did not rely on the un-filed answers in seeking to have the default judgments set aside. Rather, Defendants asserted in their motions to set aside default judgment that because process and service of process were insufficient, the default judgments were void. Nevertheless, even if the un-filed answers were effective (which they were not), the Agreed Orders signed by the parties and signed and entered by the trial courts, granted Defendants leave to file their separate answers and defenses that were filed with the trial courts, and those answers assert the defenses of insufficient process and insufficient service of process. The Separate Answers and

[6] In regard to William Kidd (Defendant in the Whitaker case), it is undisputed that process was never issued for him. In regard to Brett Kidd and Jamie Kidd (Defendants in the T-Rex 2000 case), it is undisputed that service of process was never completed on either of them.

Defenses actually filed preserved all defenses asserted. Accordingly, the defenses of insufficient process and insufficient service of process have not been waived, and because process and service of process were insufficient and process was not perfected within 120 days of filing the Complaint, these lawsuits were properly dismissed without prejudice by the trial courts.

ARGUMENT

I. Standard of Review

"This Court employs a *de novo* standard of review of a trial court's grant or denial of a motion to dismiss." Spencer v. State, 880 So. 2d 1044, 1045 (Miss. 2004)

II. Undisputed Issues Related to Process and Service of Process

A. No Process Issued for William Kidd.

Plaintiffs do not dispute that in the Whitaker case, process was never issued to Defendant William Kidd. Whitaker is the only case in this consolidated appeal in which William Kidd is a defendant. Accordingly, William Kidd was neither issued nor served with process in *any* of the cases pending in this appeal.

B. No Service of Process on Brett Kidd or Jamie Kidd.

Plaintiffs do not dispute that in the T-Rex 2000 case, service of process was never completed on either Brett Kidd or Jamie Kidd.[7] T-Rex 2000 is the only case in which Brett or Jamie

[7] William Kidd is the father of Brett and Jamie Kidd. William Kidd was "served" with complaints in four cases on January 23, 2004, (the three cases pending on appeal and a fourth case, Danny Cash v. Bill Kidd, presently pending in the County Court of Lee County, Mississippi). The Complaints and Notices of Respondent in all four of these cases were in a single envelope and were handed to Mr. Kidd at his residence where he lived with Brett Kidd. At the time the envelope was handed to Mr. Kidd, he was unaware of its contents. Moreover, he at no time agreed to accept service on behalf of either Brett Kidd or Jamie Kidd. Accordingly, service on Brett Kidd or Jamie Kidd was not made upon a member of "defendant's family above the age of sixteen years who is willing to receive service" as required under Rule 4(d)(1)(A).

Kidd are defendants. Accordingly, neither Brett Kidd nor Jamie Kidd was ever served with process in any of these cases pending before the Court.

III. Process or Summons Issued Were Hybrid Rule 81 Notices to Respondent And Are Void

Plaintiffs argue that the "Notices to Respondents" substantially conformed to Form 1A despite the fact that these notices followed the Form 1D (Rule 81) format and contained language *contrary* to the Form 1A summons. This argument, as correctly determined by the trial courts, is simply without merit.

Rule 4(b) of the Mississippi Rules of Civil Procedure states what the form of the summons must be and what information it must contain:

> The summons shall . . . state . . . the time within which these rules require the defendant to appear and defend . . . Summons served by process server *shall*

Second, neither the Complaint nor the Notices of Respondent were ever mailed (first-class, postage prepaid) to either Brett Kidd or Jamie Kidd after these documents were left with William Kidd. Service is not "deemed complete" until "the 10th day after such mailing." Miss. R. Civ. P. 4(d)(1)(A). Accordingly, to date, service has not been completed on either of these Defendants. Third, although the Complaint and Notices of Respondent were left with William Kidd at his residence, this was not Jamie Kidd's residence or "usual place of abode." In fact, Jamie Kidd did not even live in the United States. Accordingly, not even the first step of "residence service" --- "leaving a copy of the summons and complaint at the defendant's usual place of abode" --- was ever accomplished for Defendant Jamie Kidd. Accordingly, to date, this Defendant has not been served with process.

substantially conform to Form 1A. Summons served by sheriff *shall substantially conform* to Form 1AA.

Miss. R. Civ. P. 4(b) (emphasis added). The Comment to Rule 4 emphasizes that "[a]ll summons used pursuant to Rule 4 must be in substantial conformity with [Form 1A or Form 1AA]." Miss. R. Civ. P. 4 cmt.

The "summons" in these cases failed to substantially conform to either Form 1A or Form 1AA. Instead, the Notices to Respondent expressly stated, "**You are not required to file an answer or other pleading but you may do so if you desire.**" Fletcher R. 73; Whitaker R. 45; T-Rex R. 23 & 24. (emphasis added). On the contrary, Forms 1A and 1AA expressly state, "**You must also file the original of your response with the Clerk of this Court within a reasonable time after [service].**" Fletcher R. 74; Whitaker R. 51; T-Rex R. 30. Apparently, the language used in Plaintiffs' Notices to Respondent was mistakenly copied from Summons Form 1D which is only to be used in Rule 81 matters, which, as recognized by Rule 1,[8] involves certain limitations and exceptions that fall outside the scope of the of the Mississippi Rules of Civil Procedure.

[8] Scope of the Rules. These rules govern procedure in the circuit courts, chancery courts, and county courts in all suits of a civil nature, whether cognizable as cases at law or in equity, subject to certain limitations enumerated in Rule 81; however, even those enumerated proceedings are still subject to these rules where no statute applicable to the proceedings provides otherwise or sets forth procedures inconsistent with these rules. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action. Miss. R. Civ. P. 1 (emphasis added).

Although there are no cases in which this Court has discussed insufficiency of process when a Rule 81 Summons is served when a Rule 4 Summons should have been served, this Court has addressed insufficiency of process when a Rule 4 Summons was served in a Rule 81 matter. This Court consistently holds that it is imperative that the form of summons be accurate and correct.

In Powell v. Powell, a Rule 4 summons was served on the defendant that stated that a complaint was attached when in fact a motion for modification was attached. 644 So. 2d 269, 271 (Miss. 1994). Additionally, the summons stated that the defendant was "required to mail or hand-deliver a copy of a written response" to the plaintiff's lawyer within 30 days when, in fact, the defendant was not required to send a written response. Id. The summons did not set a date or time for a hearing or other procedure as required in a Rule 81 summons. Id. Plaintiff's counsel represented that a Notice of Hearing was later served on the defendant setting a hearing modifying custody and child support, though the defendant stated that he never received the Notice of Hearing. The modification hearing was held, defendant was not present, and a judgment modifying custody and child support was entered. On appeal, the Mississippi Supreme Court overturned the judgment holding that "when proceeding under matters enumerated in Rule 81, a proper 81 summons *must* be served." Id. at 274 (emphasis added). See also Sanghi v. Sanghi, 759 So. 2d 1250 (Miss. 2000). This Court has further held that the mere fact that a defendant receives the complaint and is aware of the existence of a lawsuit does not operate to remedy the defective process.

See Mansour v. Charmax Industries, Inc., 680 So. 2d 852 (Miss. 1996); See also Collom v. Senholtz, 767 So. 2d 215 (Miss. Ct. App. 2000).

The language of Forms 1A and 1AA mandates that these Defendants be advised to "file the original of [the] response with the Clerk of the Court. . ." Without this language a summons does not substantially conform to Forms 1A or 1AA as required by Rule 4(b). Miss. R. Civ. P. 4(b). Moreover, in the cases *sub judice*, not only was the requisite language omitted, but language that is contrary to Forms 1A and 1AA erroneously instructed these Defendants that they did *not* have to file a response with the Clerk of the Court. Certainly, a summons that contains language *contrary* to the forms provided in the rules does not "substantially conform" to those forms. Accordingly, the "summons" or Notices to Respondent in this matter were erroneous and constituted insufficient process. Consequently, the trial courts' rulings that these cases should be dismissed, pursuant to Rule 12(b)(4), for insufficient process should be upheld.

IV. Defenses Not Waived by an Un-Filed Answer

Plaintiffs desperately assert that Defendants waived the defenses of insufficient process and insufficient service of process when they served answers via U.S. Mail and hand-delivery upon Plaintiffs' counsel in February, 2004. Plaintiffs also argue that Defendants relied on the un-filed answers in seeking to have the default judgments set aside. Plaintiffs' first argument is a

misstatement of the law, and the latter argument is a misstatement of the facts.

A. An "Answer" Served But Never Filed Has No Effect.

Although Rule 12(a) requires a defendant to serve his answer within thirty days after service upon him, Rule 5(d) requires that "[a]ll papers after the complaint required to be served upon a party *shall be filed* with the court either before service or within a reasonable time thereafter . . ." Miss. R. Civ. P. 5(d) (emphasis added). Although no Mississippi case has ever addressed the effect of a pleading that was served but never filed pursuant to Rule 5(d), some federal courts have addressed this issue.[9] In Saulsberry v. Atlantic Richfield Co., Judge Senter addressed the effect of responses to requests for admission that were served on the opposing party but were never filed.[10] 673 F. Supp. 811, 814 (N.D. Miss. 1987). In Saulsberry, Plaintiff asserted a sexual harassment claim against her employer. However, based on admissions that were deemed admitted, Judge Senter granted a motion for partial summary judgment and dismissed Plaintiff's

[9] The Mississippi Supreme Court has stated that "[b]ecause our rules of civil procedure have been patterned after the Federal Rules of Civil Procedure, we look to authoritative constructions of the comparable federal rule for guidance in our consideration of questions presented under our rules." Stanton & Assoc., Inc. v. Bryant Constr. Co., Inc., 464 So. 2d 499, 505 n. 5 (Miss. 1985) (citations omitted).

[10] Saulsberry precedes the December 1, 2000 amendment to Rule 5(d) of the Federal Rules of Civil Procedure which, post-amendment, no longer requires parties to file responses to requests for admission. See also McIntosh v. Victoria Corp. 877 So. 2d 519, (Miss. Ct. 2004) (holding discovery responses need not be filed in Court under 5(d)).

employer. Id. Plaintiff argued that the admissions should not be deemed admitted because the response to admissions had been served on opposing counsel. Id. However, the Court held that Rule 5(d) requires that the documents must be filed: "The plaintiff's attorney did not *file* his response to the request for admissions. The response is, therefore, ineffective." Id. See also McLaurin v. Werner, 909 F. Supp. 447, 453 (S.D. Miss. 1995) (holding response to requests for admission "ineffective" because responses were not filed, although responses had been timely served). Likewise, in Ryan v. Allen, the Court emphasized the importance and effect of filing a pleading pursuant to Rule 5(d):

> The record reflects that the parties previously stipulated to allow plaintiff to file a first amended complaint. Docket No. 9. The docket in this matter, however, does not reflect that a first amended complaint was ever filed. A document not filed with the Court is of no force and effect. *See* Fed. R. Civ. P. 5(d) (requiring filing with court of all papers within a reasonable time after service). . .

Ryan v. Allen, 992 F. Supp. 152, 154 n.1 (N.D.N.Y. 1998).

Clearly, the Courts have consistently held that, pursuant to Rule 5(d), a pleading not filed is a pleading that has no force or effect. To hold otherwise would eliminate any purpose of Rule 5(d). Accordingly, this Court should affirm the trial courts' ruling that the un-filed "answers" of Defendants did not act to waive any defenses.

B. No Waiver By "Appearance" and Passage of Time

Relying on Schustz v. Buccaneer, Inc., 850 So. 2d 209 (Miss. Ct. App. 2003), Plaintiffs argue that the Defendants waived their defenses by "appearing" in this case and then allowing several years to pass before asserting their Rule 12(h) defenses. This assertion is legally and factually untrue. First, there was no "appearance" by the Defendants in these cases until they filed their Motions to Set Aside Default Judgment on September 22, 2006.[11] Second, the two and one-half years of delay between when this action commenced and when Defendants filed their separate answers and defenses was not caused by Defendants "sitting on their rights." Rather, the delay was caused by Plaintiffs failing to give Defendants notice of the hearings on the default judgments in March, 2004, obtaining a default judgment against Defendants in April, 2004, and then waiting two and one-half years before giving Defendants notice of the default judgments in September, 2006.

1. No Schustz Appearance

In Schustz v. Buccaneer, Inc., the defendant's attorney actually filed an Entry of Appearance with the Court over twenty months before it asserted its defenses. 850 So. 2d 209 (Miss. Ct. App. 2003). Nevertheless, in the case *sub judice,* Plaintiffs argue that when the Defendants served, but did not file, their

[11] Once the Agreed Order was entered on November 9, 2006, Defendants thereafter served their separate answers and defenses on December 11, 2006, in which they asserted the defenses of insufficient process and insufficient service of process.

answers in February 2004, this action constituted an "appearance." Plaintiffs rely upon King v. Sigrest, 641 So. 2d 1158 (Miss. 1994), in this assertion but have clearly misapplied the rational for the decision in that case. In King, the plaintiff had requested an entry of default judgment. King v. Sigrest, 641 So. 2d 1158, 1160 (Miss. 1994). In response, the defendant served, but failed to file, a motion to set aside the default judgment and for additional time to file an answer. Id. Thereafter, the plaintiff filed a motion for default judgment and "*[w]ithout notice of a hearing* a default judgment was entered . . ." Id. The Court held that Rule 55(b) requires a hearing on a default judgment and that, when a party has made an appearance, Rule 55(b) requires that the party be given notice three days in advance of the hearing. Id. at 1162. The Court stated, "[f]or these purposes, an appearance, is an act conveying an intent to defend and service of [defendant's] motion . . . was sufficient." Id. (emphasis added) (citing Dynasteel Corporation v. Aztec Industries, Inc., 611 So. 2d 977 (Miss. 1992) (holding that although appearances traditionally require either filing of documents or appearance before a court, "the appearance commanded by Rule 55(b) (default judgments) has been defined broadly and interpreted liberally and is not limited to formal court appearances.")).

Clearly, based on the holdings in Dynasteel and King, the "appearance" as discussed in those cases only applies in the context of determining notice under Rule 55(b) for default judgments. Consequently, although service (without filing) of the Defendants' answers in February 2004 may have constituted an appearance under Rule 55(b) requiring that notice of the hearing on the motion for default judgment be given to them (which was actually argued by the Defendants in their Motion to Set Aside Default Judgment), such action does not constitute a formal appearance as contemplated by the Court in Schustz.

Plaintiffs cite several other cases in support of their argument that the un-filed answers constituted "appearances" and waived the Rule 12(h) defenses. However, two of these cases, New York Life Ins. Co. v. Brown, 84 F.3d 147 (5th Cir. 1996) and Quaker Furniture House, Inc. v. Ball, 228 S.E.2d 475 (N.C. App. 1976), are clearly Rule 55 appearances and are inapplicable to the discussion of appearances for the purpose of waiving Rule 12(h) defenses. In regard to the third case cited by Plaintiffs, Trustees of Central Laborers' Welfare Fund v. Lowery, 924 F.2d 731, 733 (7th Cir. 1991), Plaintiffs quote, "A party need not actually file an answer or motion before a waiver is found." However, Plaintiffs omit reference or discussion of the Fifth Circuit case, Broadcast Music Inc. v. M.T.S. Enterprises, Inc., 811 F.2d 278, 281 (5th Cir. 1987), cited by the Seventh Circuit in

Trustees of Central Laborers'. See Trustees of Central Laborers', 924 F.2d at 733. In Broadcast Music, the Court stated:

> [The Defendants] never filed a pleading in the case prior to the entry of default judgment. Therefore, it cannot be said that they failed to raise the defense, as required by Rule 12(h). However, a party need not necessarily file an answer in federal court to put in an appearance for purposes of Rule 12(h).

811 F.2d at 281. In Broadcast Music, the Court held that because counsel for the corporation appeared before the Court at a pretrial conference on behalf of both corporate and individual defendants, negotiated settlement on behalf of all defendants, moved to withdraw as counsel for all defendants, and was served motions, subpoenas, etc. for all defendants, the individual defendants had waived any defect related to personal jurisdiction. This holding is consistent with Dynasteel, discussed supra, which stated that, except in the context of Rule 55, appearances traditionally require either filing of documents or appearance before a court. In Broadcast Music, the attorney had appeared in court. Thus, the holdings in Broadcast Music and Trustees of Central Laborers' actually refute Plaintiffs' argument and, instead, support Defendants' position that an appearance for purposes of Rule 12(h) requires that a party file a document or appear before a Court.

2. Time Delay Caused by Plaintiffs' Inaction

It is ironic that Plaintiffs argue that the extensive passage of time and inactivity in these cases causes, in effect, the

waiver of the Rule 12(h) defenses for the Defendants when the delay was *caused* by Plaintiffs' dilatory inaction. Without notice to Defendants, Plaintiffs brought on for hearing their motions for default judgment in March, 2004. By April, 2004, Plaintiffs had obtained default judgments against Defendants and then chose to do nothing for two and one-half years. It was not until September, 2006, that Plaintiffs notified Defendants of the default judgments. Thus, the Defendants should not be punished for the delay caused by Plaintiffs. In any event, this Court has held that a defendant's inaction or failure to timely respond to the complaint, as required by Rule 12(a), has no effect on that defendant's defenses or waiver thereof under Rule 12(h). Rockaway Commuter Line, Inc. v. Denham, 897 So. 2d 156, 159 (Miss. 2004).[12]

C. Construction of Rule 12(h)

Plaintiffs attempt to manipulate rules of statutory construction to convince this Court that Rule 12(h) mandates that the defenses of insufficient process and insufficient service of process (and the other defenses listed therein) are waived upon

[12] Still, Plaintiffs will certainly argue the recent opinion of Estate of John Grimes v. Warrington, 2008 WL 451714 (Miss. Feb. 21, 2008) and the cases cited therein to assert that the passage of time in effect waives Defendants' defenses. However, that too would be a misapplication of the rational of this Court. Unlike Warrington, Defendants in these cases did not assert defenses and then participate in litigation without bringing these defenses before the Court. On the contrary, Defendants in the cases *sub judice* asserted their defenses in their separate answers and defenses, served motions asserting these defenses within days of serving their answers, and brought these motions on for hearings before the trial courts at the earliest available hearing dates.

service of a document --- even if that document is never filed with the court. This argument not only ignores proper application of the rules of statutory construction, but also ignores prior holdings of this Court. Most recently, in Burleson v. Lathem, this Court stated,

> Further, Mississippi Rule of Civil Procedure 12(h) requires that a defense of insufficiency of process or insufficiency of service of process made by motion must be filed concurrently with other *initial* motions in a lawsuit or with responsive pleadings. **Once the responsive pleadings have been filed, a party's failure to plead a Rule 4(h) objection by filing a Rule 12(b)(4) or (5) defense constitutes waiver.**

968 So. 2d 930, 934 (Miss. 2007) (citations omitted)(emphasis added).

This Court's recognition in Burleson that a motion or responsive pleading must be filed before it has the effect of waiver of a defense is consistent with rules of statutory construction as applied to the Mississippi Rules of Civil Procedure. Plaintiffs argue that because Rule 12(h) does not expressly state that these defenses are waived at the time of filing, then this Court should assume that the defenses are waived at the time the document is served. However, Rule 12(h) does not expressly state that these defenses are waived at the time of service. Consequently, although the rules of statutory construction state that the specific rule governs over the general rule, the reciprocal of that rule requires that when no specific rule exists --- i.e. when Rule 12(h) does not specify whether

certain defenses are waived upon filing or service of a document -- the general rule, or Rule 5(d) in these cases, should be applied.

Plaintiffs also argue that the Mississippi Rules of Civil Procedure should be construed as a whole. Defendants agree. Rule 4(b), through Form 1A and Form 1AA, requires that a defendant be advised that he must file his responsive pleading with the Court. Form 1D requires that the defendant be advised when and where he must appear in court to defend himself, because he is not required to file a responsive pleading. As discussed supra, filing a paper or actually appearing in court are the methods of appearance whereby a defendant may waive his Rule 12(h) defenses. Additionally, Rule 5(d) requires filing of all papers after the complaint except for discovery papers until those discovery papers are used with respect to any proceeding. Rule 5(e) defines "filing," and "filing" of a paper is not "serving" of a paper. Thus, "filing" as required and defined by Rule 5(d) and (e) is the action that gives a paper or pleading its force or effect. If this were not true, there would be no purpose for Rule 5(d). Additionally, the fact that filing a paper or pleading is what gives it force or effect is indicative of why Form 1A and Form 1AA require that a defendant be advised that he must file his responsive pleading with the court and why Form 1D does not require filing of a responsive pleading. A defendant in a Rule 81

matter (utilizing Form 1D) will appear in court to defend himself, while a defendant in a Rule 4 matter (utilizing Form 1A or Form 1AA) will appear through filing his responsive pleading. Accordingly, construing the Mississippi Rules of Civil Procedure as a whole, a defendant does not waive his Rule 12(h) defenses until he files his responsive pleading without answering such defenses.

D. Defendants Have Never Relied On The Un-filed Answer in Seeking to Set Aside Default Judgment.

Plaintiffs mischaracterize Defendants' position when they assert that Defendants relied on the service of their answers in seeking to have the default judgments set aside. As explained in Defendants' motions to set aside default judgments (which were later agreed upon by counsel), the default judgments should have been set aside because the judgments were void due to the insufficient and erroneous process. Defendants alternatively argued that the default judgments should be set aside for good cause shown because Defendants should have received notice of the hearings on default judgments since they had served Plaintiffs with an answer.

> Clearly, the judgment entered against Defendant is void under Rule 60(b) of the Mississippi Rules of Civil Procedure because the process was insufficient, specifically the Summons instructed Defendant that only the attorney of record should be served and that filing with the Clerk of the Court was not required. Additionally, because Plaintiff's counsel had been served with the Answer, he should have given Defendant notice of the application for judgment. Defendant was

> given no notice of the Motion for Default Judgment. Thus, the Court may also set aside the entry of default for good cause shown.

Fletcher R. 16; Whitaker R. 26; T-Rex R. 15. This argument made by Defendants in support of their motion to set aside default judgment is consistent with Rule 55(b) and the cases requiring notice of the application for judgment at least three days prior to the hearing. See Miss. R. Civ. P. 55(b); See also King v. Sigrest, 641 So. 2d 1158 (Miss. 1994); Segars v. Hagerman, 99 F.R.D. 274 (N.D. Miss. 1983); Dalminter, Inc. v. Jessie Edwards, Inc., 27 F.R.D. 491 (S.D. Tex. 1961).

Defendants have stated that they did not file the answers due to the language of the defective summons. However, Defendants have never argued that the default judgments should be set aside simply because they served, though never filed, an answer. This argument would not hold water under Rule 5(d), as explained supra, because an un-filed answer has no force or effect. In the separate answers and defenses that were served *and filed* in December, 2006, Defendants asserted the defenses of insufficient process and insufficient service of process and raised these defenses as grounds for dismissal in their motions to dismiss. Accordingly, the defenses of insufficient process and insufficient service of process have never been waived by these Defendants.

V. AGREED ORDER ALLOWED FILING OF RESPONSIVE PLEADING

At the trial court level, Plaintiffs argued that "[Defendants] cannot file purported "Separate Answers and Defenses" without seeking leave of Court to amend and raise defenses they failed to raise in the original Answer served" in February 2004. Fletcher R. 167; Whitaker R. 222; T-Rex R. 174. As previously stated, the answers served in February 2004 are of no effect because they were never filed. The trial courts' rulings on Defendants' motions to dismiss did not consider the effect of the agreed orders setting aside default judgments and allowing Defendants to file their responsive pleadings or Rules 12(h) or 15(a) because the Court held that the defenses were never waived to begin with --- because the February 2004 answers were never filed. Nevertheless, Defendants respond to Plaintiffs' arguments on this issue.

Assuming *arguendo* that the un-filed answers were effective to constitute an appearance under Rule 12(h)(which Defendants deny they were), then when Plaintiffs agreed to an order allowing Defendants to file a responsive pleading, pursuant to Miss. R. Civ. P. 15(a), and the trial courts entered an order allowing such filings, then the responsive pleadings that were filed --- the separate answers and defenses filed by each respective defendant --- replaced the original answers that were never filed. Accordingly, the defenses asserted in the separate answers and defenses filed in December 2006 are now in force and in effect.

See Miss. R. Civ. P. 12(h) and 15(a).[13] See also Scaife v. Scaife, 880 So. 2d 1089, 1094 (Miss. Ct. App. 2004) (stating,

> It is correct that [Defendant] *filed* a written answer. However, with leave of court [Defendant] filed an amended answer, which contested jurisdiction. Pursuant to Mississippi Rules of Civil Procedure Rules 12(h)(1) and 15(a), the amended answer, with its contest of jurisdiction, related back to the filing date of the original answer...)(emphasis added).[14]

A. Discussions Related to Agreed Order and Language of Agreed Order

In regard to the parties' agreement to set aside the default judgment, Plaintiffs mischaracterize the record. First, the agreement by counsel was not a "generous agreement," nor was Plaintiffs' counsel granting any favors. It was apparent from Defendants' motions to set aside default judgment that Defendants would be successful on those motions (for the same reasons they were successful on the motions to dismiss --- process and service of process were insufficient, and thus the default judgments were void). There was never an agreement between counsel for these parties that by Plaintiffs' agreeing to set aside the default judgments, Defendants would waive any defenses or that Defendants intended to file the answer that had been served by Defendants in February, 2004. Moreover, it was expressly discussed that by such agreement, Defendants expressly did not waive any defenses nor did

[13] Rule 15(a) states that a party may amend a pleading "by leave of court or upon written consent of the adverse party..."

[14] It should be noted that even the Court's language in Scaife emphasizes that it is the filing of an answer that gives it its effect.

Defendants intend to file the February, 2004 answer. Fletcher R. 235; Whitaker R. 320; T-Rex R. 244.

The records of the trial courts reflect an *Agreed* Order signed by counsel for the parties, submitted to the trial courts for consideration, and signed and entered by the trial courts. The Agreed Orders state:

> By agreement of the parties the judgment rendered on April 1, 2004, is hereby set aside. Defendants shall have thirty days from this date in which to file a responsive pleading.

Fletcher R. 55; Whitaker R. 76; T-Rex R. 52. The Agreed Orders granted Defendants thirty days in which to file their "responsive pleading[s]." The term "responsive pleading" itself indicates the parties' understanding that the Defendants would not be limited to the un-filed answer served in 2004. Moreover, if, by some unknown phenomena, Plaintiffs honestly understood the agreement to be that Defendants would waive all defenses and simply file the answer that had been served in February 2004, the Agreed Order should have stated such. Clearly, there was no agreement that Defendants would waive any defense or that Defendants would or even intended to file the answer served in February 2004.

B. Effect of Agreed Order

Plaintiffs argue that under Rule 15(a), a defendant cannot amend his answer to include a Rule 12(h) defense after thirty days of serving his original responsive pleading. In support of their argument, Plaintiffs cite Ellibee v. Leonard, 226 Fed. Appx. 351

(5th Cir. 2007), but Ellibee is distinguishable from this case because the defendant in Ellibee had filed its responsive pleading and failed therein to assert its Rule 12(b) defense. Nevertheless, Plaintiffs argue that under Rules 12(h) and 15(a), as interpreted by Ellibee v. Leonard, a federal prisoner *pro se* case, and Wright & Miller, a defendant's answer can only be amended to add any of the four defenses listed in Rule 12(h)[15] when said amendment is made within thirty days of the service of the answer, even if that answer was never filed. If Ellibee were consistent with Mississippi case law, it might be persuasive or even authoritative. However, Plaintiffs' argument under Ellibee is simply not consistent with Mississippi law.

In the recent case of Burleson v. Latham (that Plaintiffs attempt to distinguish), this Court stated,

> [Defendant] did not assert deficient service of process as an affirmative defense in the answer filed on October 15, 2002. Based on Rule 15(a), [Defendant] had thirty days from the service of his answer to submit any amendments without leave of court. The comment to Rule 15(a) notes that, unlike the federal rules, the Mississippi rules do not limit the number of times a party may amend as a matter of course. Thus, [Defendant] had the entire thirty days to amend his pleading as often as he deemed necessary; however, [Defendant] chose not to amend at all. **Once this thirty-day time period expired, [Defendant], pursuant to Rule 15(a), needed leave of the court or written consent of opposing counsel in order to amend his answer.**

[15] The defenses listed in Rule 12(h) are lack of jurisdiction over the person, improper venue, insufficiency of process and insufficiency of service of process.

Burleson, 968 So. 2d 930, 936 (Miss. 2007)(empahsis added). Likewise, in Scaife v. Scaife, 880 So. 2d 1089, 1094 (Miss. Ct. App. 2004), the Court of Appeals clearly allowed a defendant to amend its answer, with leave of court and/or agreement of the parties, and to add the defenses listed in Rule 12(h) to the amended answer and said defenses related back to the original filing pursuant to Rule 15(c). In Scaife, the plaintiff filed a complaint in April, 2001. Scaife, 880 So. 2d at 1091. On November 7, 2001, the defendant's attorney filed an entry of appearance, and on November 26, 2001, the defendant filed an answer. Id. On March 26, 2002, (120 days after the filing of the original answer) the defendant moved for leave to amend, and the court granted his motion to amend his answer to add the defense of lack of personal jurisdiction (one of the defenses listed in Rule 12(h)). Id. The Mississippi Court of Appeals upheld this ruling by the lower court and stated,

> It is correct that [defendant] filed a written answer. However, with leave of court [defendant] filed an amended answer, which contested jurisdiction. Pursuant to Mississippi Rules of Civil Procedure Rules 12(h)(1) and 15(a), the amended answer, with its contest of jurisdiction, related back to the filing date of the original answer..." Id. at 1094.

Accordingly, Plaintiff's argument is contrary to Mississippi case law. In any event, this argument was not considered by the trial court because the un-filed answers did not have the effect of waiving any defenses or any other force or effect.

C. Plaintiffs Should Have Moved to Strike "Separate Answers and Defenses"

In the trial courts, Plaintiffs asserted that Defendants could not file the separate answers and defenses that were filed despite the fact that Plaintiffs agreed to Defendants filing a responsive pleading and despite the fact that the Agreed Orders granted Defendants leave to file such pleading. Fletcher R. 162; Whitaker R. 217; T-Rex R. 169. Nevertheless, despite this implausible argument, if Plaintiffs truly believed Defendants did not have authority to file the separate answers and defenses filed in December 2006, and/or the Rule 12(h) defenses, Plaintiffs should have filed motions to strike these pleadings as allowed by Rule 12(f). Rule 12(f) states, "upon motion made by a party within thirty days after the service of the pleading upon him . . ., the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Plaintiffs did not file motions to strike the separate answers and defenses of these Defendants within thirty days of service of that pleading. Accordingly, Plaintiffs waived any argument that the trial courts should not consider the separate answers and defenses that were filed in December 2006. Herrington v. State, 690 So. 2d 1132, 1137 (Miss. 1997).

CONCLUSION

In this consolidated appeal, Plaintiffs argue that this Court should reverse three separate, consistent rulings made by

two separate, experienced trial judges. The record is clear that the applicable Mississippi law was properly applied to the facts of this case and that the learned trial judges were absolutely correct in their rulings. For all the reasons set forth above and in the record, the trial courts' decisions granting the motions to dismiss without prejudice should be affirmed.

CERTIFICATE OF SERVICE

I, Margaret Sams Gratz, one of the attorneys for the Appellees, Limeco Corporation, William Kidd, Brett Kidd and Jamie Kidd, do hereby certify that I have this day served a true and correct copy of the above and foregoing APPELLEES' BRIEF by placing said copy in the United States Mail, postage prepaid, addressed to the following:

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DATED, this the 29th day of February, 2008.

L. F. SAMS, JR.

MARGARET SAMS GRATZ

CERTIFICATE OF FILING

I, Margaret Sams Gratz, do hereby certify that I have served via first-class, United States mail, postage prepaid, the original and three copies of the Brief of Appellee and an electronic diskette containing same on February 29, 2008, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, Post Office Box 249, Jackson, Mississippi 39201.

L. F. SAMS, JR.

MARGARET SAMS GRATZ