IN THE SUPREME COURT OF MISSISSIPPI

MONTY FLETCHER	**APPELLANT**
V.	**Case #2007-CA-01247**
LIMECO CORPORATION	**APPELLEE**
Consolidated with	
R. W. WHITAKER	**APPELLANT**
V.	**Case #2007-CA-01249**
LIMECO CORPORATION AND WILLIAM KIDD	**APPELLEE**
T-REX 2000, INC.	**APPELLANT**
V.	**Case #2007-CA-01262**
BRETT KIDD AND JAMIE KIDD	**APPELLEE**

On Appeal from the Circuit Court of Lee County, Mississippi

BRIEF OF APPELLANTS

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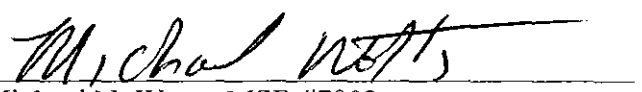
ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following 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. Daniel A. Cash
2. R.W. Whitaker
3. Monty Fletcher
4. T-Rex 2000, Inc.
5. William Kidd
6. Jamie Kidd
7. Brett Kidd
8. Limeco Corporation

Respectfully submitted,



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STATEMENT OF REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 34(b) of the Mississippi Rules of Appellate Procedure, Appellants request to be heard orally. The issues presented in this appeal would be significantly aided by oral argument inasmuch as this appeal involves the interpretation of Mississippi Rules of Civil Procedure. Due to the broad implications this opinion may have, oral argument should be granted in the case *sub judice* in an effort to promote a just and fair adjudication of the issues presented and to allow dialog with regard to the affect this case would have on the practice of law in Mississippi.

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STATEMENT OF ISSUES

1. Did the trial court err in holding that the process issued to the Defendant Limeco Corporation did not substantially comply with Mississippi Rule of Civil Procedure 4(b) where the summons contained the essential elements of a summons established by Rule 4?

2. Did the trial courts err in holding that the Defendants Brett Kidd, Jamie Kidd, William Kidd, and Limeco Corporation did not waive their defenses of insufficient process and insufficient service of process where the Defendants served answers to the Complaints and failed to assert any affirmative defense based on insufficiency of process or insufficiency of service of process?

STATEMENT OF THE CASE

1. Nature of the Case.

This consolidated appeal arises from three cases filed in the Lee County Circuit Court. In each of the three cases, the Defendants served Answers without asserting any defense based on insufficiency of process or insufficiency of service of process. After Default Judgments were entered, the Defendants relied on the served Answers to have the Default Judgments set aside. After the Default Judgments were set aside, almost three years after receiving the Complaints and serving their Answers, the Defendants filed second Answers asserting for the first time defenses based on insufficiency of process and service of process. Each of the three cases was dismissed by the respective trial court finding that process on the Defendants was insufficient, that service of process was insufficient and that process was not perfected within 120 days of the filing of the Complaint. (Fletcher R. 303-304; Whitaker R. 395-396; T-REX R. 295)[1] The trial

[1] Because this appeal consolidates the appeals in T-REX 2000, Inc. v. Brett Kidd and Jamie Kidd, Monty Fletcher v. Limeco Corporation and R.W. Whitaker v. Limeco Corporation, the references to the record are preceded by reference to the appropriate case.

courts also found that the Defendants did not waive their defenses of insufficient process and insufficient service of process. Id. This appeal followed.

2. The course of the proceedings and disposition of the courts below.

This appeal arises from three cases filed in the Lee County Circuit Court. In the first lawsuit, the Plaintiff T-REX 2000, Inc. ("T-REX") filed suit against Brett Kidd and Jamie Kidd (the "T-REX case") on December 11, 2003. (T-REX R. 3) In the T-REX case, the Plaintiff, T-REX alleged that the Defendants Brett Kidd and Jamie Kidd breached a Stock Purchase Agreement. (T-REX R. 3-4) T-REX sought $1,100,000.00 in damages. (T-REX R. 3) In the second lawsuit, also filed on December 11, 2003, R.W. Whitaker ("Mr. Whitaker") filed a complaint against Limeco Corporation ("Limeco") and William Kidd[2] alleging that Limeco and William Kidd failed to pay a $375,000.00 promissory note (the "Whitaker case"). (Whitaker R. 3-6) In the third lawsuit filed on December 11, 2003, Monty Fletcher ("Mr. Fletcher")[3] filed a Complaint against Limeco alleging that Limeco breached another $375,000.00 promissory note (the "Fletcher case"). (Fletcher R. 3-4) The T-REX case was assigned to Lee County Circuit Judge Paul S. Funderburk. (T-REX R. 12) The Whitaker and Fletcher cases were assigned to then Lee County Circuit Judge Sharion R. Aycock. (Fletcher R. 13; Whitaker R. 23)

The Plaintiffs in each of the three cases, represented by their former counsel, attempted to obtain service on the Defendants. In T-REX, the Plaintiffs served William Kidd, the father of Brett Kidd and Jamie Kidd, with two Summonses, issued to Brett Kidd and Jamie Kidd, respectively, and the Complaint. (T-REX R. 15, 23-25) The Whitaker and Fletcher Complaints were served on William Kidd as managing director of Limeco. (Fletcher R. 24, 25 ¶ 3; Whitaker

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[2] Brett Kidd, Jamie Kidd, William Kidd and Limeco are sometimes collectively referred to as the "Defendants."

[3] T-REX, Mr. Fletcher and Mr. Whitaker are sometimes collectively referred to as the "Plaintiffs."

R. 45, 46 ¶ 3) In all three cases, the Summonses were hand delivered to William Kidd on January 23, 2004 at William and Brett Kidd's residence. (Fletcher R. 25 ¶ 3; T-REX 46 ¶ 2; Fletcher R. 46 ¶ 3) The Summonses issued to the Defendants and served on William Kidd stated "[y]ou are not required to file an answer or other pleading but you may do so if you desire."[4] (Fletcher R. 24; T-REX R. 23-24; Whitaker R. 45)

On February 20, 2004, twenty-eight days after the date of service, William Kidd, on behalf of himself, Limeco, Jamie Kidd and Brett Kidd, hand delivered and mailed to the Plaintiffs' former counsel answers to the Complaints filed in all three cases. (Fletcher R. 26 ¶ 5; T-REX R. 26 ¶ 5; Whitaker R. 46 ¶ 5) None of the three served Answers asserted insufficiency of process or service of process as defenses. (Fletcher R. 28-29; T-REX R. 28-29; Whitaker R. 49-50)

On March 24, 2004, the Plaintiffs in all three cases moved for Default Judgment pursuant to Mississippi Rule of Civil Procedure 55. (Fletcher R. 9; T-REX R. 8; Whitaker R. 19) The Plaintiffs' former counsel provided no notice of the Motion for Default Judgment to the Defendants and testified via affidavit that no answer had been filed or served. (Fletcher R. 10, 11 ¶ 4; T-REX R. 8, 9 ¶ 4; Whitaker R. 19, 20 ¶ 4) Default judgments subsequently were entered in each of the three cases. (Fletcher R. 12; T-REX R. 11; Whitaker R. 22)

Inexplicably, for more than two years after entry of the Default Judgments, the Defendants took no action in the case. In the intervening years, the Defendants took no steps to object to process or service of process. On August 31, 2006, new counsel retained by T-REX, Mr. Whitaker and Mr. Fletcher filed Notices to Enroll Foreign Judgments in the Franklin

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[4] This language is contained in Summons Form 1D typically used in Rule 81 matters.

County, Alabama Circuit Court seeking to enforce the Default Judgments. (Fletcher R. 40; T-REX R. 40; Whitaker R. 61)

Upon receipt of the Notice to Enroll Foreign Judgment, Brett Kidd, Jamie Kidd, William Kidd, and Limeco filed Motions to Set Aside the Default Judgments and for other relief on September 20, 2006. (Fletcher R. 14; T-REX R. 13; Whitaker R. 24) In seeking to set aside the Default Judgments, all the Defendants asserted the Default Judgments were improper because the Defendants had served Answers. (Fletcher R. 16; T-REX R. 15; Whitaker R. 26) In recognition that the Default Judgments were entered in error, the Plaintiffs agreed to set aside the Default Judgments. The parties submitted Agreed Orders to the respective trial courts in each of the cases stating that the Default Judgments would be set aside and that the Defendants would file "responsive pleadings" within thirty days of the entry of the orders. (Fletcher R. 55; T-REX R. 52; Whitaker R. 76) The Agreed Order was entered on October 30, 2006 in the Fletcher and Whitaker cases, and on October 31, 2006 in the T-REX case.

The Defendants filed their second Answers to the Complaints in the T-REX, Whitaker and Fletcher cases on December 11, 2006. (Fletcher R. 59; T-REX R. 56, 60; Whitaker R. 80, 86) These second Answers, filed almost three years after the Defendants received the Complaints and served their original Answers, raised insufficiency of process and insufficiency of service of process as defenses for the first time. (Fletcher R. 59; T-REX R. 56, 60; Whitaker R. 80, 86) On December 15, 2006, the Defendants filed Motions to Dismiss for Lack of Service of Process. (Fletcher R. 63; T-REX R. 66; Whitaker R. 93) The Plaintiffs opposed the Motion to Dismiss in each case. (Fletcher R. 161; T-REX R. 167; Whitaker R. 215)

By order dated April 30, 2007, Judge Funderburk dismissed the T-REX case without prejudice finding that process and service of process were insufficient and service had not been accomplished within 120 days of the filing of the Complaint as required by Mississippi Rule of

Civil Procedure 4(h). (T-REX R. 295) Judge Funderburk further found the Defendants had not waived their 12(h) affirmative defenses of insufficiency of process and insufficiency of service of process. (T-REX R. 295) On May 3, 2007, Judge Aycock dismissed the Whitaker and Fletcher cases without prejudice, making the same findings. (Fletcher R. 303; Whitaker R. 395)

The Plaintiffs filed timely Motions to Alter or Amend the Judgment. (Fletcher R. 305; T-REX 315; Whitaker 397) Both Judge Aycock and Judge Funderburk denied the Motions to Alter or Amend the Judgment. (Fletcher R. 365; T-REX R. 376; Whitaker R. 458) The Plaintiffs filed timely notices of appeal in each of the three cases. (Fletcher R. 366; T-REX R. 377; Whitaker R. 459)

STATEMENT OF FACTS

As noted, the Plaintiffs filed Complaints in the T-REX, Whitaker and Fletcher cases in December, 2003. (Fletcher R. 3; T-REX R. 3; Whitaker R. 3) Former counsel for Plaintiffs issued Summonses to the Defendants. The Summonses stated "[y]ou are not required to file an answer or other pleading but you may do so if you desire." (Fletcher R. 24-25; T-REX R. 23-24; Whitaker R. 45) In the T-REX case, T-REX's counsel served the Summonses issued to the Defendants Jamie Kidd and Brett Kidd on their father, William Kidd, at Brett Kidd's usual place of abode. (T-REX R. 23-24, 25 ¶3, 105 ¶ 3) In the Fletcher and Whitaker cases, the Summonses were served on William Kidd as the managing director of Limeco. (Fletcher R. 24, 25 ¶ 3; Whitaker R. 45, 46 ¶ 3)

On February 20, 2004, William Kidd served Answers to the Complaints filed in each of the three cases via mail and hand-delivery to the Plaintiffs' former counsel. (Fletcher R. 26 ¶ 5; T-REX R. 26 ¶ 5; Whitaker R. 47 ¶ 5) Brett Kidd personally read the answer served on his behalf in the T-REX case. (T-REX R. 46 ¶ 4) In fact, William Kidd served the Answers with

Brett Kidd and Jamie Kidd's authorization. (T-REX Plaintiffs' Exh. 1, pp. 48-49, 54) The Answers were not filed in the clerk's office.

The Answer served in the T-REX case was titled "Answer" and contained the denial of each of the factual allegations by paragraph. (T-REX R. 28) The T-REX Answer stated "the Defendants jointly and separately deny the validity and overall substance of Plaintiff's claims and ask for a complete dismissal of this Summons and Complaint." (T-REX R. 29) Brett Kidd and Jamie Kidd signed the T-REX Answer. (T-REX R. 29) Notably, the T-REX Answer did not state that Brett Kidd or Jamie Kidd had any objection to process or service of process. (T-REX R. 28-29) Brett Kidd knew the T-REX case had been filed; had read the Complaint; had read and signed the Answer; and knew that his father had prepared and served an Answer. (T-REX R. 46) In filing the Answer on their behalf, William Kidd believed he had "done everything [he] needed to do to preserve the rights of Brett Kidd and Jamie Kidd." (T-REX R. 26 ¶ 6)

In the Whitaker case, William Kidd served the Answer on behalf of himself and Limeco. (Whitaker R. 49-50) William Kidd served the Answer on former counsel for Mr. Whitaker on February 20, 2004 by hand delivery and by mail. (Whitaker R. 47 ¶ 5) The Answer prepared and served by William Kidd responded by paragraph to the allegations of the Complaint and stated whether the Defendants admitted or denied each of the allegations. (Whitaker R. 49-50) At the conclusion of the Answer, the Defendants stated that they "jointly and separately deny validity and overall substance of Plaintiff's claim and ask for a complete dismissal of the Summons and Complaint." (Whitaker R. 50) Nowhere in the Whitaker Answer did Limeco or William Kidd assert any objection to process or service of process. (Whitaker R. 49-50) William Kidd signed the Answer on behalf of himself and Limeco. (Whitaker R. 50) By preparing, signing, mailing and hand delivering the Answer, William Kidd believed he had

"done everything [he] needed to do to preserve the rights of Limeco Corporation and [himself]." (Whitaker R. 47 ¶ 6)

In response to the Fletcher Complaint, on February 20, 2004, William Kidd drafted, signed and served the Answer on behalf of Limeco. (Fletcher R. 28) William Kidd hand delivered and mailed the Answer to Mr. Fletcher's former counsel. (Fletcher R. 26 ¶ 5) The Answer, captioned "Answer," stated in paragraph form whether the Defendant admitted or denied the allegations of the Complaint. (Fletcher R. 28-29) At the conclusion of the Answer, the Defendant stated that it "jointly and severally den[ied] validity and overall substance of Plaintiff's claim and ask[s] that the Summons and Complaint be dismissed." (Fletcher R. 29) Nowhere in the Answer to the Fletcher Complaint did Limeco assert any objection to process or service of process. (Fletcher R. 28-29) William Kidd signed the Complaint on behalf of himself and as managing director of Limeco. (Fletcher R. 28-29) In serving the Answers, William Kidd "believed that after [he] mailed and hand delivered the Answers to attorney Sparks [he] had done everything [he] needed to do to preserve the rights of Limeco Corporation." (Fletcher R. 26 ¶ 6)

Although William Kidd, Brett Kidd, Jamie Kidd and Limeco served Answers to the Complaints, on February 20, 2004, the Plaintiffs' former counsel moved for Default Judgment. (Fletcher R. 9; T-REX R. 8; Whitaker R. 19) The Motions for Default Judgment were supported by an Affidavit stating that no answer to the Complaint had been filed or served. (Fletcher R. 11 ¶ 4; T-REX R. 9 ¶ 4; Whitaker R. 20 ¶ 4) The respective trial courts entered Default Judgments against the Defendants. (Fletcher R. 12; T-REX R. 11; Whitaker R. 22)

Subsequently, T-REX, Mr. Fletcher and Mr. Whitaker engaged new counsel to pursue the judgment against the Defendants in Alabama. Upon receiving the Notice of the Filing of a Foreign Judgment, William Kidd, Brett Kidd, Jamie Kidd and Limeco moved to set aside the Default Judgments against them. (Fletcher R. 14; T-REX R. 13; Whitaker R. 24) Recognizing

the Default Judgments had been entered erroneously, the parties submitted an Agreed Order stating that the Default Judgments would be set aside and stating the Defendants would file a responsive pleading within thirty days. (Fletcher R. 55; T-REX R. 52; Whitaker R. 76)

Following entry of the Agreed Orders, William Kidd, Brett Kidd, Jamie Kidd and Limeco, in their respective cases, filed second Answers and for the first time asserted insufficiency of process and insufficiency of service of process as affirmative defenses. (Fletcher R. 59; T-REX R. 56-60; Whitaker R. 80, 86) Several days later, the Defendants moved to dismiss each of the cases on the basis of these defenses. (Fletcher R. 63; T-REX R. 64; Whitaker R. 93) The Plaintiffs opposed all three Motions to Dismiss asserting that any objection to process or service of process had been waived through service of the Answers and that process on Limeco in the Fletcher and Whitaker cases was proper. (Fletcher R. 63; T-REX R. 66; Whitaker R. 93) Ultimately, Judge Funderburk dismissed the T-REX case and Judge Aycock dismissed the Fletcher and Whitaker cases without prejudice, in each case finding that process and service of process were improper; that service had not been accomplished within 120 days of the filing of the Complaint as required by Mississippi Rule of Civil Procedure 4(d); and that no waiver of the insufficiency of process and insufficiency of service of process defenses occurred. (Fletcher R. 303; T-REX R. 295; Whitaker R. 395)[5]

SUMMARY OF THE ARGUMENT

The Plaintiffs respectfully submit that the trial courts' orders dismissing the T-REX, Fletcher and Whitaker cases should be reversed. First, in the Whitaker and Fletcher cases, process was proper as to Limeco. Second, in all three cases, the Defendants waived the process

[5] While the trial courts dismissed the three cases without prejudice, the Plaintiffs fully expect the Defendants will argue in any subsequent litigation that the filing of the Complaints without perfection of service of process did not toll the statute of limitations and that the claims are, accordingly, barred by the statute of limitations.

and service of process defenses when the Defendants failed to assert these defenses in their first responsive pleadings, the served Answers. The Defendants' delay of almost three years in asserting any objection to process or service of process waived these defenses.

The plain language of Rule 12(h)(1) demonstrates that a waiver of these defenses occurs when the defendant fails to include the defenses in his responsive pleading. Here, the Defendants failed to assert insufficient process and insufficient service of process when they made a responsive pleading through the service of the Answers. Under Rule 12(h), the Defendants' failure to file the Answers is irrelevant to a determination of whether a waiver occurred.

Even if no waiver occurred through the Defendants' failure to raise the defenses in the served Answers, the Answers themselves evidence an intent to defend the cases and, accordingly, constitute a general appearance. This general appearance, coupled with the passage of time in which the Defendants failed to assert their defenses, constitutes a waiver of the affirmative defenses. Because the Defendants waived any defense based on insufficiency of process or insufficiency of service of process, the trial courts erred in dismissing the Complaints because service was not accomplished within 120 days of the filing of the Complaints.

In short, the Defendants served Answers and relied on service of the Answers in seeking to have the Default Judgments set aside. There is no dispute that the Defendants knew about the three cases and intended to defend the cases on the merits, as evidenced by service of the Answers. The Defendants raised no objection to process or service of process for almost three years. Having served and relied on the Answers in having the Default Judgments set aside, the Defendants then sought to disclaim the waiver of affirmative defenses which occurred when the Defendants failed to include insufficiency of process and service of process as defenses in their first responsive pleadings, the served Answers. The Defendants should not be allowed to enjoy

the benefit accruing from service of the Answers in avoiding the Default Judgment while simultaneously avoiding the waiver arising from the failure to include the affirmative defenses in their served Answers as is required by Rule 12(h)(1).

For all these reasons, as set forth further below, the Plaintiffs request that the Orders dismissing the T-REX, Whitaker and Fletcher Complaints be reversed and that the cases be remanded to the trial courts for disposition on the merits.

ARGUMENT

1. Process and service of process were proper as to Limeco in the *Fletcher* and *Whitaker* cases.

Process on Limeco was proper in the Fletcher and Whitaker cases because the Summonses substantially complied with Mississippi Rule of Civil Procedure 4(b). Rule 4(b) establishes the form of a summons required for service upon a defendant. Specifically, Mississippi Rule of Civil Procedure 4(b) provides as follows:

> The summons shall be dated and signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, list the plaintiff's address and the time within which these rules require the defendant to appear and defend and shall notify him that in case of his failure to do so judgment by default will be rendered against him for relief demanded in the complaint.... Summons served by process server shall substantially conform to Form 1A.

Summons Form 1A states that "[y]ou must also file the original of your response with the Clerk of this Court within a reasonable time afterward." In these cases, because the Plaintiffs' former counsel used language from a Rule 81 Summons, the Summons served stated "[y]ou are not required to file an answer or other pleading but you may do so if you desire." (Fletcher R. 73; T-REX R. 23-24; Whitaker R. 45) This statement represents the only deviation from Summons Form 1A in the Summons served on Limeco in the Fletcher and Whitaker cases. All of the elements required by Rule 4(b) appear in the Summonses used.

In spite of this deviation, however, the Summonses were dated and signed by the clerk. The Summonses were under the seal of court. The Summonses stated the names of the parties. The Summonses stated the Plaintiffs' address. The Summonses stated the time within which the Rules required the defendant to appear and defend. The Summonses stated that in the case of the Defendant's failure to appear and defend judgment by default would be rendered against him. Accordingly, the Summonses substantially complied with Summons Form 1A. The Plaintiffs respectfully submit that the trial court erred in dismissing the Fletcher and Whitaker cases against Limeco for insufficient process.

2. The Defendants waived any objection to process or service of process by serving Answers to the Complaints without asserting these defenses.

As noted above, in each of the three cases, all the Defendants served Answers without objecting to process or service of process. The service of the Answers without asserting the defenses of insufficiency of process or insufficiency of service of process waived these defenses. As a result, the trial courts erred in dismissing each of the three cases because process or service of process was insufficient.

Mississippi Rule of Civil Procedure 12(h) establishes that the defenses of insufficiency of process or insufficiency of service or process are waived unless contained in a motion made under Rule 12, in a responsive pleading or in an amendment to a responsive pleading permitted by Rule 15 to be made as a matter of course. Specifically, the Rule provides as follows:

> 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. Pro. 12(h).

Application of the Mississippi Rules of Civil Procedure demonstrates that the Answers served by the Defendants constitute responsive pleadings which waived the process and service of process defenses. Rule 12(a) provides that a defendant shall serve his answer within thirty (30) days after the service of the summons and complaint upon him or within such time as is directed pursuant to Rule 4. Rule 8 establishes the form of the answer. Specifically, Rule 8 provides that "a party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies ... a denial shall fairly meet the substance of the averments denied...." Further, Rule 8(e)(1) establishes "no technical forms of pleadings or motions are required."

The Answers served by William Kidd, Brett Kidd, Jamie Kidd, and Limeco evidence all the indicia of an answer contemplated by Rule 8. (Fletcher R. 28-29; T-REX R. 28-29; Whitaker R. 49-50) In each of the Answers, which, notably, the Defendants titled "Answer," the Defendants state in short and plain terms their defenses to each of the claims. In fact, the Defendants admitted or denied each of the allegations in the Complaints in paragraph form and stated a general denial. In none of the served Answers, however, did the Defendants assert any defense based on insufficiency of process or insufficiency of service of process.

Because the Defendants did not include a defense of insufficiency of process or insufficiency of service of process in their first responsive pleading, application of Rule 12(h) establishes that a waiver occurred. The Defendants' failure to file the Answers does not change this result. Rule 12(h) establishes the defenses of insufficiency of process and insufficiency of service of process are waived if not included in a responsive pleading. Rule 12(h) does not contemplate that the waiver occurs only when the responsive pleading is filed with the court. Rather, the waiver occurs when the defendant fails to include the defenses in the responsive pleading.

The rules of statutory construction apply to the interpretation of the Mississippi Rules of Civil Procedure. Diogenes Editions, Inc. v. State, 700 So.2d 316 (¶ 23) (Miss. 1997). Accordingly, the Rules should be interpreted according to their plain language. Gannett River States Pub. Co. v. Entergy Mississippi, Inc., 940 So.2d 221 (¶ 11) (Miss. 2006). While Mississippi Rule of Civil Procedure 5(d) contemplates that all papers after the complaint will be filed with the court, the plain language of Rule 12(h) establishes that waiver of the process and service or process defenses occurs upon exclusion of the defenses from the responsive pleading, not upon filing of the pleading. If the drafters of Rule 12 intended for the waiver to occur only upon filing of the pleading, the Rule would so state.

Further, the Mississippi Rules of Civil Procedure should be construed as a whole. Gannett River, 940 So.2d at ¶ 11 ("The primary rule of construction is to ascertain the intent of the legislature from the statute as a whole...."). In drafting the Rules, this Court expressly required a filing under other Rules to accomplish a particular result without imposing such a filing requirement under Rule 12 to accomplish a waiver. For example, Mississippi Rule of Civil Procedure 38 establishes that parties to an action "may waive their rights to a jury trial by filing with the court a specific, written stipulation that the right has been waived...." (emphasis added). Likewise, Mississippi Rule of Civil Procedure 41 contemplates that a plaintiff may voluntarily dismiss his case "by filing a notice of dismissal before service by the adverse party of an answer or by a motion for summary judgment, whichever first occurs...." Mississippi Rule of Civil Procedure 50 establishes that a party may seek a motion for judgment notwithstanding the verdict by filing a motion to have the verdict set aside. Mississippi Rule of Civil Procedure 59(e) provides that a motion to alter or amend the judgment shall be filed not later than ten days after the entry of the judgment.

The drafters imposed no such filing requirement on the waiver provision of Rule 12(h). If the drafters of Rule 12 intended to make waiver of the process and service defenses effective only upon the filing of the responsive pleading with the court, Rule 12 would require such a filing, just as Rule 38 requires a filing to accomplish a waiver of the right to a jury trial. Rule 12 requires no such filing. Because the Defendants made responsive pleadings without asserting insufficiency of process or insufficiency of service of process as defenses, application of the plain language of Rule 12(h) evidences that a waiver occurred.

The law favors disposition of cases on the merits. Sartain v. White, 588 So.2d 204, 208 (Miss. 1991). In recognition that the Default Judgments should not have been sought without notice to the Defendants by the Plaintiffs' former counsel in view of the served Answers and had, in fact, been entered erroneously, the Default Judgments were set aside by agreement. The Defendants plainly and unequivocally relied on the served Answers in seeking to set aside the Default Judgments. Having relied on the service of the Answers, the Defendants should not now be allowed to avoid the waiver of the affirmative defenses that occurred upon service of the Answers in a blatant attempt to avoid resolution of the cases on the merits.

3. The general appearance accomplished through the Answer coupled with the passage of time effected a waiver.

Mississippi law recognizes that where a defendant makes an appearance and fails to contest service or process for a prolonged period of time, a waiver occurs. Schuste v. Buccaneer, Inc., 850 So.2d 209 (¶ 20) (Miss. Ct. App. 2003). In Schuste, the court held that an appearance made by filing of a notice of appearance, combined with the lapse of twelve months before asserting the defense of insufficiency of process, waived the defense. Id. at ¶¶ 13, 20.

In Schuste, the plaintiff attempted to serve process on a corporate defendant but failed to deliver the summons to the proper agent for service of process. Id. at ¶ 8 The defendant filed a notice of appearance, but failed to take any other action, and did not file an answer. Id. at

¶¶ 8, 9. After the plaintiff moved for default, the defendant, more than twenty months after filing the notice of appearance, moved to dismiss asserting that it had not been properly served within 120 days of the filing of the complaint. Id. at ¶ 9.

In Schuste, the Mississippi Court of Appeals held the appearance and lengthy ensuing period of inactivity, acting in conjunction, constituted a waiver of any defects in the form or manner of service. Id. at ¶ 20. Schuste also recognized that a defendant appearing and filing an answer or otherwise proceeding to defend the case on the merits in some way may not subsequently attempt to assert jurisdictional questions based on claims of defects in service of process. Id. at ¶ 15.

This case mirrors Schuste. Here, at a minimum, the service of the Answers by the Defendants on February 20, 2004 constituted an appearance in each case. King v. Sigrest, 641 So.2d 1158, 1162 (Miss. 1994) (recognizing that for purposes of Rule 55 even an unfiled motion constitutes an appearance); Schuste, 850 So.2d at ¶ 15 (recognizing that defending the case on the merits without asserting service defense constitutes a waiver). See also New York Life Ins. Co. v. Brown, 84 F.3d 137, 141 (5th Cir. 1996) (an appearance "is an indication in some way of an intent to pursue a defense"); Quaker Furniture House, Inc. v. Ball, 228 S.E.2d 475, 476 (N.C. App. 1976) (service of answer constitutes appearance for purpose of Rule 55). See also, Trustees of Central Laborers' Welfare Fund v. Lowery, 924 F.2d 731, 733 (7th Cir. 1991) ("A party need not actually file an answer or motion before a waiver is found.").

The service of the Answers evidences an intent to defend the case sufficient to constitute an appearance and conduct sufficient to accomplish the waivers. In serving the Answers, the Defendants believed that they had done everything they needed to do to protect their rights. (Fletcher R. 26 ¶ 6; T-REX R. 26 ¶ 6; Whitaker R. 47 ¶ 6) The Defendants served the Answers as directed by the Summonses. By serving the Answers, the Defendants appeared and evidenced

an intent to defend the cases. More than two years elapsed before the Defendants took any other action and almost three years elapsed before the Defendants bothered to challenge process or service of process. Here, as in Schuste, a period of prolonged inactivity in which the Defendants completely failed to assert their defenses followed the appearance accomplished through service of the Answers. Accordingly, as in Schuste, a waiver occurred.

4. Once waived, the service related defenses were not revived by the Agreed Order.

Although the trial courts ruled in all three cases that no waiver occurred, the Defendants argued that even if the waiver occurred through service of the Answers, the service related defenses were "revived" by entry of the Agreed Order. This argument, not reached by either of the trial courts, defies the law, the facts, and common sense.

First, as noted above, it is undisputed that the Defendants in all three cases served Answers without raising any defense based on insufficiency of process or insufficiency of service of process. Following the filing of the Motion to Set Aside the Default Judgments, counsel for the parties agreed that the Default Judgments would be set aside and the Defendants could file a "responsive pleading" within thirty days of the date of the order. The generous agreement of the Plaintiffs' counsel that the Defendants could file a "responsive pleading" in no way constituted the Plaintiffs' agreement that any defense based on insufficiency of process or insufficiency of service of process could be asserted free from the assertion that a waiver occurred upon service of the Answers.

Second, the Defendants' own proof contravenes such an argument. The Affidavit of the Defendants' counsel, filed in connection with the Defendants' Reply Memorandum in Support of their Motion to Dismiss, states that in connection with the entry of the Agreed Order, the Plaintiffs "agreed that [the Defendants] could file an answer and proceed with each party free to raise any arguments, claims or defenses as they might wish." (Fletcher R. 236 ¶ 5; T-REX R.

321 ¶ 5; Whitaker R. 245 ¶ 5) This testimony from the Defendants' counsel evidences that there was no agreement to "revive" the defenses. As each party retained the right to assert "any argument," the Plaintiffs retained the right to argue that a wavier occurred through service of the Answers. Further, at the hearing on the Motion to Dismiss in the Fletcher and Whitaker cases, the Defendants' counsel conceded that the Agreed Orders were intended to reflect "nobody would waive anything" and that, upon the submission of the Agreed Order, the waiver issue was simply left open to preserve the status quo. (T-REX Plaintiffs' Exh. 2, pp. 27, 33-34) Accordingly, the Defendants' own proof and statements of counsel reflect that, at a minimum, the parties agreed that the Defendants could file a responsive pleading and be subject to an argument by the Plaintiffs that a waiver occurred upon service of the Answers.

Third, once the waiver occurred through the service of the Answers without the assertion of the defenses, the plain language and interrelationship of Rule 15(a) and Rule 12(h) prevents "revival" of the waived service and process defenses. As noted, Rule 12(h) states that a defense of:

> ... 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.

Accordingly, the plain language of Rule 12 establishes that, if not included in the first responsive pleading, the service and process defenses may be asserted only by an amendment permitted by Rule 15(a) to be made as a matter of course. Rule 15(a) provides as follows:

> A party may amend a pleading as a matter of course at any time before a responsive pleading is served, or, if a pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within thirty days after it is served.

(Emphasis added). Accordingly, an answering party may amend its answer as a matter of course at any time within thirty days after the answer is served.

As a result, Rule 12(h) and Rule 15(a), when read together, make clear that an answer, once served, may be amended to assert the service and service of process defenses only if amended as a matter of course within thirty days after the service of the answer. Ellibee v. Leonard, 2007 WL 837092 at *6 (5th Cir. March 15, 2007) (holding that defendant waived his insufficiency of service of process defense by failing to raise it in his pre-answer motion, original answer or an amendment to his answer made as a matter of course within twenty days). See also Lopulsky v. Boruchow, 545 F.Supp. 126, 128 (E.D.N.Y. 1982) (finding it would be an abuse of discretion to permit resurrection of waived defenses by way of an amendment where defenses were not included in original pleading or amendment permitted as a matter of course); White v. Stewman, 932 So.2d 27 (¶ 16) (Miss. 2006) (recognizing that federal practice provides guidance when considering questions arising under the Mississippi Rules of Civil Procedure). Wright & Miller provides further instruction on this issue stating:

> Until 1966 a party might have escaped the consequences of a failure to plead the defenses set forth in Rule 12(B)(2-12)(b)(5) by amending its pleadings. Presently, however, Rule 12(H)(1) severely restricts this practice. The court no longer has the authority to grant leave to amend in order to add one of these four defenses; according to the language of subdivision (H)(1), this may be done only by an amendment to the answer permitted as a matter of course under the first sentence of Rule 15(a) which requires the party to act very quickly.

5 C. Wright & A. Miller, Federal Practice & Procedure Civil § 1391 at 514 (3d ed. 2007).

Here, the Defendants served their Answers on February 20, 2004. No amendment asserting insufficiency of process or service of process was served within the thirty day period following February 20, 2004. Accordingly, the application of Rule 12(h) and Rule 15(a) demonstrate that the Defendants simply could not raise insufficiency of process or service of

process in any pleading submitted after March 22, 2004. Those defenses were waived when not included in a pre-answer motion, the original answer or amendment to the answer allowed as a matter of course within thirty days of February 20, 2004.

Further, the courts recognize that where the applicable Rule 12 defenses are not included in the answer or an amendment allowed as a matter of course, the plaintiff's consent to the amendment is meaningless. Catlin v. Commissariat, 619 P.2d 1066, 1067 (Ariz. Ct. App. 1980). In Catlin, the defendant filed an answer in which he did not object to lack of personal jurisdiction. The plaintiff subsequently agreed that the defendant could file an amended answer. Id. On appeal, the defendant argued that the plaintiff's "stipulation permitting the filing of an amended answer containing that jurisdiction defense ... revived the issue." Id. The court rejected this argument stating:

> ... since the amendment in this case was not an amendment thereof permitted by Rule 15(a) to be made as a matter of course, the fact that it was made with the plaintiff's consent is meaningless. The language of the rule is clear and unambiguous. Had the Supreme Court intended that the issue of lack of personal jurisdiction could be raised and an amendment obtained by the written consent of the adverse party, it could easily have said so....

Id.[6]

Here, the Defendants did not file an amended answer within thirty days of making their original answer. As recognized by the courts and leading commentators, the court lacks the authority to grant leave to amend to add the service or process defenses. Accordingly, the Plaintiffs' agreement that the Defendants could file a "responsive pleading," as in Catlin, could

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[6] The Mississippi Supreme Court's decision in Burleson v. Lathem, 2006-CA-02025 ¶ 17 (Miss. Nov. 15, 2007) does not change this result. In Burleson, the defendant did not seek permission to file an answer after the thirty days in which the defendant could file an amendment as a matter of course had passed. Accordingly, the Court's decision in Burleson does not reach the issue of whether the trial court has the authority to permit an amended pleading asserting insufficiency of process or insufficiency of service of process after the thirty day period in which the defendant can amend as a matter of course has passed.

not revive the otherwise waived defenses. Although not reached by the trial courts, any argument by the Defendants on appeal that the Agreed Order somehow "revived" the waiver defenses should be rejected.

CONCLUSION

In light of the foregoing, the Plaintiffs request that the Orders dismissing the T-REX, Whitaker and Fletcher cases because process and service process were insufficient and the Complaints were not served within 120 days as required by Mississippi Rule of Civil Procedure 4(h), be reversed and that the cases be remanded to the trial courts to proceed on the merits.

Respectfully submitted this 5 day of December, 2007.

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CERTIFICATE OF SERVICE

I, MICHAEL N. WATTS, do hereby certify that I have this day served, via United States mail, postage pre-paid, a true and correct copy of the above and foregoing on the following:

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SO CERTIFIED, this the 5 day of December, 2007.

Michael Watts
MICHAEL N. WATTS

CERTIFICATE OF SERVICE

I, MICHAEL N. WATTS, do hereby certify that I have this day served, via United States mail, postage pre-paid, a true and correct copy of the above and foregoing on the following:

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SO CERTIFIED, this the 6th day of December, 2007.

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