IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NO. 2007-CA-01440

MORRIS E. COURTNEY — PLAINTIFF/APPELLANT

vs.

WALLACE B. McCLUGGAGE — DEFENDANT/APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF GREENE COUNTY, MISSISSIPPI
GREENE COUNTY CIRCUIT COURT NO. 2005-04-041(2)

BRIEF of the APPELLEE WALLACE B. McCLUGGAGE

ORAL ARGUMENT NOT REQUESTED

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MORRIS E. COURTNEY **PLAINTIFF/APPELLANT**

vs.

WALLACE B. McCLUGGAGE **DEFENDANT/APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

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 disqualifications or recusal.

1. Appellant, Morris E. Courtney, by and through counsel of record, Stewart L. Howard, Esq., P.O. Box 1903, Mobile, AL 36633.

2. Appellee, Wallace B. McCluggage, by and through counsel of record, Myles E. Sharp, Esq., Hewitt and Sharp, PLLC, P.O. Box 6669, D'Iberville, MS 39540.

3. The Honorable Kathy King Jackson, Greene County Circuit Court Judge, P.O. Box 998, Pascagoula, MS 39568-0998.

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STATEMENT OF THE CASE

Defendant would agree with the Plaintiffs statement of the case except for the following. Defendant would deny that Plaintiff "made the appropriate amendments to the complaint," as asserted at p. 4 of his brief, since Plaintiff never sought leave to Amend the Complaint nor was it timely served. Additionally, Defendant denies that the Amended Complaint "was properly served on McCluggage on April 11, 2006," as asserted at p. 4 of his brief, for the same reasons.

Additionally, Defendant would dispute Plaintiff's assertion that he requested additional time as asserted on p. 6 of his brief. In fact, not only was this "request" contained within a Reply Brief to the Motion to Dismiss, and not a motion, it was filed the day after the hearing on the Motion to Dismiss, after Plaintiff failed to appear at the hearing. In other words, Plaintiff failed to appear at the hearing on Defendants Motion to Dismiss, and then the day after, filed a responsive pleading.

Finally, Defendant denies that Plaintiff suffered injuries to his knees, mouth and other parts of his body.

SUMMARY OF THE ARGUMENT

After the Default Judgment set aside on the grounds that Defendant was never served, Plaintiff never filed a Motion for an Extension of Time to serve process. Instead, Plaintiff relies upon a bare assertion in his response to Defendant's Motion to Dismiss, that good cause had been demonstrated and for additional time if necessary. Never was a Motion filed with the Court. Compounding Plaintiff's problem is the fact that the Reply Brief upon which he relies was filed one day after the hearing on the Motion to Dismiss, for which he failed to appear. Thus, after failing to appear at the properly noticed hearing on Defendant's Motion to Dismiss, Plaintiff filed a Reply to the Motion to Dismiss the following day, and now seeks to hold the trial court in error for stating in its Order that leave was never sought by the Plaintiff for an extension.

Even if this Court were to find that the Reply Brief was sufficient as a motion for time, Plaintiff still can not meet his burden of showing good cause. Plaintiff's failure to mark the envelope "restricted delivery" is the sole reason service was not completed. There was no evasion or misleading conduct on the part of this Defendant, or anyone else, to cause this failure. Plaintiff's failure made it perfectly permissible for his father to sign for a letter which was only "certified." The requirement of "restricted delivery" is designed for the very reason exemplified in this case. Plaintiff's ignorance of the rule or mistake or inadvertence does not rise to the level of good cause.

Moreover, the only issue for this Court is why service was not completed within the initial 120 days. The simple answer is because Plaintiff failed to mark the envelope "restricted delivery" which ultimately led to Defendant's father signing for the letter. This mistake can be categorized as nothing other than ignorance of the rules, or mistake of counsel; neither of which constitutes good cause. All other arguments regarding what happened **after** the expiration of the initial 120 days are completely irrelevant as to why service was not completed within the time allowed.

Finally, Defendant's collateral attack of a void judgment cannot serve to give the Court retroactive jurisdiction over that Defendant. Defendant coming in to challenge as void the Default Judgment, does not act as a waiver of jurisdiction. The court must have jurisdiction at the time the Order is entered.

Thereafter, once Defendant was served with the Amended Complaint, some 217 days after the original Complaint was filed, he raised insufficiency of process and that process served was insufficient, and that the applicable statute of limitations had expired.

Plaintiff's attempt to reverse the trial court's order setting aside the default judgment is procedurally barred since the time has expired to challenge that order. Since the Order that set aside the Default Judgment effectively dismissed the action since service of process had never been accomplished, Plaintiff had 30 days to appeal same. Instead, Plaintiff amended the Complaint, without leave of court, and attempted to proceed with the litigation.

(1) There is absolutely no dispute that Defendant was not served during the 120 days as required by Rule 4(h), and Plaintiff admits same in his brief.

(2) Plaintiff never filed any Motion for an Extension of Time to effect service of process.

(3) Plaintiff filed no reply to Defendant's Memorandum in Support of Motion to Dismiss, and failed to appear at the hearing thereon. The day after the hearing, Plaintiff finally filed a Reply which was untimely.

(4) Plaintiff cannot, and did not show good cause why service was not accomplished within the initial 120 days, because his failure to mark the envelope "restricted" can only be categorized as ignorance of the rules, or mistake of counsel, which does not suffice as good cause.

(5) Defendant's collateral attack of the default judgment is not a waiver of service, and Plaintiff's appeal of the order setting aside the default judgment are procedurally barred.

ARGUMENT

I. THE PLAINTIFF FAILED TO MOVE FOR AN EXTENSION OF TIME TO SERVE PROCESS, AND THUS FAILED TO SHOW GOOD CAUSE FOR FAILURE TO SERVE PROCESS WITHIN 120 DAYS.

Defendant would show that the authority cited by Plaintiff here offers no assistance to Plaintiff, and only serves to support the arguments advanced by the Defendant.

FACTS AND BACKGROUND

This case arises from an automobile accident on January 7, 2003, between the parties. The Plaintiff filed a Complaint on or about April 25, 2005, for damages alleged to have been sustained.

Service of process was attempted on May 5, 2005, pursuant to Rule 4(c)(5) for service on persons outside the State of Mississippi. However, said service was not proper in that Defendant no longer resided at the address served, and the Plaintiff failed to mark the envelope as "Restricted Delivery," resulting in the mail being signed for by Defendant's father.[1]

Since the entry of this Court's Order that service of process was improper, Plaintiff contends that service was then properly made on April 11, 2006.[2] Plaintiff has not, and did not, re-file the Complaint prior to service, nor has Plaintiff sought leave of this Court to effectuate service outside the 120 days allowed.

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1 In response to Defendant's motion to set aside the default judgment, the trial court entered an Order granting same on February 14, 2006, on the grounds that service was not proper, and the trial court lacked jurisdiction over the Defendant. (R. at 56).

2 Defendant would show that whether the April 11, 2006 service was proper is of no consequence, since same was made without leave of Court, and outside the 120 days allowable by Rule 4(h).

For the convenience of the Court, the following is a time-line of the events in the case at bar:

January 7, 2003	Date of subject accident Statute of Limitations begins to run
May 25, 2005	Complaint Filed Statute of Limitations tolled for 120 days
September 25, 2005	Expiration of 120 days allowed for Service Statute of Limitations begins to run again
February 14, 2006	Order Granting Defendant's Motion to Set Aside Entry of Default
April 6, 2006	Amended Complaint filed (without leave of Court)
April 11, 2006	Service of Process on Defendant (see fn.2 on pg. 4)
May 7, 2006	Statute of Limitations expires
June 7, 2006	Answer filed raising Statute of Limitations and Service of Process defenses
June 7, 2006	Motion to Dismiss (contained in Answer)
February 27, 2007	Memorandum in Support of Motion to Dismiss
March 12, 2007	Hearing on Motion to Dismiss (Plaintiff fails to Appear)
March 13, 2007	Plaintiff's Reply to Memorandum in Support of Motion to Dismiss

ARGUMENT AND LAW

"While the filing of a Complaint tolls the statute of limitations, if service is not made upon the defendant within 120 days as required by M.R.C.P. 4(h), the limitations period resumes running at the end of the 120 days." *Owens v. Mai*, 891 So.2d 220, 223 (Miss. 2005), Citing *Holmes v. Coast Transit Auth.*, 815 So.2d 1183, 1185 (Miss. 2002); *Watters v. Stripling*, 675 So.2d 1242, 1244 (Miss. 1996); *Moore ex rel. Moore v. Boyd*, 799 So.2d 133,137 (Miss. Ct. App. 2001); *Young v. Hooker*,

753 So.2d 456, 460 (Miss. Ct. App. 1999).

"A plaintiff who does not serve the defendant within the 120-day period must either re-file the complaint before the statute of limitations ends or show good cause for failing to serve process on the defendant within that 120-day period; otherwise dismissal is proper." *Holmes v. Coast Transit Auth.*, 815 So.2d 1183, 1185 (Miss. 2002); Citing *Watters v. Stripling*, 675 So.2d 1242, 1244 (Miss. 1996); *Brumfield v. Lowe*, 744 So.2d 383, 387 (Miss. Ct. App. 1999). See also *Triple "C" Transport, Inc. and Henry v. Dickens*, 870 So.2d 1195(Miss. 2004). The Supreme Court has reaffirmed the holdings in Holmes as recently as 2006. See *Heard v. Remy*, 937 So.2d 939 (Miss. 2006).

A. THE PLAINTIFF NEVER SOUGHT LEAVE OF COURT TO SERVE PROCESS OUTSIDE THE 120 DAY LIMIT AS REQUIRED.

Plaintiff takes issue with the trial court's statement in its Order Granting Motion to Dismiss that at "no time was the aid of the Court sought to enable the plaintiff to correctly serve process outside the 120 day limit" by asserting that the statement is "an erroneous review of the record." (R. at 141). Plaintiff's argument here is simply without merit.

A simple review of the record clearly demonstrates the absence of any Motion filed on behalf of the Plaintiff for an extension of time to serve process. Plaintiff filed a Reply to Defendant's Motion to Dismiss, wherein he argued that his counsel should have been given 30 days to consider the trial court's order setting aside the default, before the 120 days started to run again. (R. at 78). Of course, the 120 days had already run, and does not "begin to run again." Moreover, Plaintiff seems to assume that such extensions are granted automatically without the necessity of a motion being filed. Moreover, the only good cause argument he made therein, was in reference to the Order Setting Aside the Default Judgment. (R. at 77). Essentially, instead of addressing the current

Motion to Dismiss, Plaintiff was attempting to re-litigate the Default Judgment which had already been set aside. Nonetheless, all was contained within a reply brief, and not a motion.

In fact, Plaintiff failed to even appear at the hearing on Defendant's Motion to Dismiss which was set for March 12, 2007. (Appellee's Record Excerpts p. 1, and p.3).

Thereafter, on March 13, 2007, the day after the hearing, Plaintiff filed a Reply to Defendant's Memorandum in Support of Motion to Dismiss. (R. at 112). This Reply was untimely filed, as it should have been filed no later than 10 days after the filing of Defendant's Memorandum in Support of Motion to Dismiss which was filed February 27, 2007.[3]

Additionally, Plaintiff urges this Court to accept that his statement in a reply brief that he "requests additional time, if that is found to be necessary," as a motion. Again, not only was it not contained in a motion as required, it was made the day after the hearing on the matter, to which Plaintiff nor his attorney appeared. Plaintiff's assertion that the trial court was in error for finding he never moved for an extension of time is unconscionable.

B. GOOD CAUSE WAS NEVER SHOWN.

Since there can be no dispute that Plaintiff has failed to re-file his Complaint since the expiration of the 120 days, the only avenue of assistance to the Plaintiff is whether he can show good cause for his failure. However, Plaintiff never even filed any Motion with the trial court asserting good cause and seeking an extension of time to perfect service. As such, Plaintiff's attempts to address that issue for the first time on appeal is procedurally barred.

A simple review of the record reveals that Plaintiff never filed any Motion with the trial court. Instead, in responses to motions filed by Defendant, Plaintiff made vague assertions regarding

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3 Defendant subsequently filed a Motion to Strike the Reply as untimely, which the trial court held was moot by virtue of its granting dismissal.

good cause, but steadfastly held on to the notion that there was no requirement for him to file any motion for an extension of time to complete service. One such attempt was made in his Reply Brief which was filed the day after the hearing on Defendant's Motion to Dismiss, for which Plaintiff failed to appear. The Reply Brief was also untimely in that it should have been filed within 10 days of Defendants memorandum pursuant to Uniform Local Rule 4.03. In case this Court does not find this issue procedurally barred, Defendant would show that nonetheless, the failures by the Plaintiff in this case do not rise to the level of good cause necessary.

Plaintiff bears the burden of establishing good cause. (M.R.C.P. 4(h)); *Holmes v. Coast Transit Auth.*, 815 So.2d 1183, 1185 (Miss. 2002). In Holmes, the Court reiterated that "at a minimum, a plaintiff attempting to establish 'good cause' must show 'at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules does not suffice.'" Id. at 1186, citing *Watters v. Stripling*, 675 So.2d at 1243 (quoting *Systems Signs Supplies v. U.S. Dept. of Justice*, 903 F.2d 1011, 1013 (5th Cir. 1990))(emphasis added).

(i) Plaintiff's attempted service on May 5, 2005.

It is important to note that the only issue which is relevant is why service was not properly made during the initial 120 days allowed. As has already been litigated and ruled upon by the trial court, Plaintiff's attempted service of process on May 5, 2005, was improper due to Plaintiff's failure to mark the envelope as "Restricted Delivery" which is expressly required under M.R.C.P. Rule 4(c)(5). Thus, this is squarely an issue of ignorance of the rules, or at the least inadvertence or mistake of counsel, which this Court has held insufficient to meet Plaintiff's burden.

While Plaintiff has argued that he was unaware that Defendant did not reside at the address served, and further that he was unaware that Defendant was in prison, such is not sufficient to show

good cause.

Plaintiff failed to comply with the express requirement under Rule 4(c)(5), in that he did not mark the envelope for "restricted delivery." Had he done so, this letter could have only been signed for by the intended recipient. It should be noted that since his father has no middle name, he knew this letter was in fact intended for his son. (R. at 94). The obvious intent of this requirement was to avoid the very pitfall exemplified in this case. In fact, Plaintiff offers absolutely no explanation in his brief why he failed to comply with this requirement of Rule 4(c)(5).

The error here can only be classified as one of mistake of counsel or ignorance of the rules. As stated above, this is insufficient to show good cause. *Holmes v. Coast Transit Auth.*, 815 So.2d 1183, 1186 (Miss. 2002), citing *Watters v. Stripling*, 675 So.2d at 1243 (quoting *Systems Signs Supplies v. U.S. Dept. of Justice*, 903 F.2d 1011, 1013 (5th Cir. 1990)).

Plaintiff's attempts to place the blame on the father of the Defendant is wholly without merit. In essence, Plaintiff urges this Court to place the burden upon the father of the Defendant to notify Plaintiff's counsel of the whereabouts of Defendant. Additionally, it is misplaced to state that Defendant's father "engaged in misleading conduct." Defendant's father did nothing more than sign for a letter for which he was perfectly permitted to sign, since it was not marked "restricted delivery." He had no obligation under the law, or otherwise, to forward or open the mail as suggested by Plaintiff. Not only was this not "misleading," it is not the type of conduct contemplated by precedent cited by Plaintiff regarding evasion and misleading conduct. Plaintiff's attempts an unreasonable stretch of those grounds for good cause. And, it has no bearing on why Plaintiff did not mark the envelope "restricted" in the first place. The simple fact remains that had Plaintiff marked the envelope as required, it would have been returned to him, thus putting him on notice that service had not occurred. Regardless, Plaintiff simply cannot escape the fact that even after being

put on notice, he failed to move for an extension of time.

(ii) Notice to Plaintiff that service was improper.

Next, Plaintiff has argued that he can not be expected to correct an error until he knows that one exists. Again, Plaintiff's counsel is charged with knowledge of the procedural requirements of Mississippi courts, and should have known to properly serve the Defendant in the first instance. Importantly, had Plaintiff marked the envelope "restricted" as required, it would have been returned to him as undeliverable or incorrect address.

Additionally, even after being put on notice of the deficiency, Plaintiff made absolutely no attempts to correct the error. Defendant was placed on notice of the deficiency at the very least when Defendant filed his Second Supplemental Motion for Relief from Judgment on November 21, 2005, and again when this Court entered its Order regarding same on February 14, 2006. (R. at 40 and R. at 56). At neither time did Plaintiff move this Court for an extension of time to complete service, or re-file his Complaint as required. The trial court succinctly noted in its Order as follows:

> "At the earliest, the plaintiff was aware of the problem with the service of process when the defendant filed his supplemental motion on November 28, 2005. ...At the latest, on February 14, 2006 the Court entered the Order setting aside the default because of the failure of the service of process. At that point the plaintiff was clearly on notice that service of process was not complete, and he still could have sought leave for additional time to serve the defendant."
>
> (R. at 140-141).

Thus, any such argument is without merit.

Moreover, Defendant not only put Plaintiff on notice by and through his Motion to Dismiss and Memorandum in Support, it even gave Plaintiff a clear indication of what he needed to do to correct the deficiency. Defendant urged as early as June 7, 2006, that "Plaintiff never obtained an Order from this Court extending the time for service as required by Rule 4." (R. at 67). Again in

the Memorandum, Defendant asserted "Plaintiff has not, and did not, re-file the Complaint prior to service, nor has Plaintiff sought leave of this Court to effectuate service outside the 120 days allowed." (R. at 99). Additionally, Defendant stated "However, Plaintiff has never even filed any Motion with this Court seeking an extension of time to perfect service." (R. at 100). Finally, after outlining the other instances Plaintiff was put on notice, Defendant stated "At neither time did Plaintiff move this Court for an extension of time to complete service, or re-file his Complaint as required." (R. at 102).

For reasons only known to the Plaintiff, he refused to take the steps necessary to obtain relief, or to cure the deficiency, even if only out of an abundance of caution, and instead remained steadfast that such was not necessary. Interestingly, although not an issue in this appeal, under nearly identical circumstances, Plaintiff did just that. Defendant filed a Motion to Strike Plaintiff's Amended Complaint on the grounds that such was made without leave of Court. (R. at 106). Although Plaintiff disagreed that such was necessary, presumably out of an abundance of caution, Plaintiff thereafter filed a Motion for Leave to File Amended Complaint. (R. at 109).

In short, not only was Plaintiff clearly on notice of the deficiency in service as early as November 21, 2005, he had also been clearly put on notice by the Defendant of what must be done to cure the deficiency. Regardless, Plaintiff completely failed to ever avail himself of the procedural mechanisms to obtain an extension of time, and seeks now to hold the trial court in error, when the trial court was left with no option. Unlike past cases where this Court has remanded cases to the trial court for findings as to good cause, they are distinguishable from this case, because here, the Plaintiff never filed any motion with the trial court. As such, the trial court did not fail to make findings of whether good cause existed, the Plaintiff never requested any relief from the trial court.

II. RULE 4(h) CERTAINLY APPLIES TO THE CASE AT BAR, AND THE SETTING ASIDE OF THE DEFAULT JUDGMENT IS IMMATERIAL.

Defendant is strained to comprehend the arguments raised by Plaintiff in this portion of his brief, but would show that he cites no authority for the arguments raised therein, and therefore this Court need not address same.

However, out of an abundance of caution, it appears as though Plaintiff is asserting, as he did in the trial court, that (1) Defendants are somehow encouraged to commit laches, and (2) that he is under no obligation to correct any alleged deficiencies in process until the trial court rules on those issues. It should be noted that not only does Plaintiff not assert that Defendant has engaged in any such conduct in the instant case, he concedes that no such conduct has occurred. As such, Plaintiff's arguments here are irrelevant to his brief as a whole.

Moreover, it is Plaintiff's responsibility to be diligent and move to correct any deficiencies when alleged, out of an abundance of caution, especially when there are statute of limitations issues. Regardless, even after the trial court did rule that service was insufficient, Plaintiff still refused to move for an extension of time to complete service.

A. RULE 4(h) APPLIES, AND THE COURT DID NOT ERR IN CALCULATING THE 120 DAY PERIOD, AS THERE IS NO TOLLING OF THE 120 DAYS FOR SERVICE.

Again, Defendant is strained to comprehend the arguments raised by Plaintiff in this portion of his brief, and would show that he cites no authority for the arguments raised therein, and therefore this Court need not address same.

Plaintiff urges this Court to adopt the rationale that improper service should toll the 120 day time period for service until such time as the trial court rules that service is insufficient. Plaintiff's argument here either confuses the law with respect to the tolling of the statute of limitations for the

period for service, or is an attempt to have this Court adopt a new rule. Either way, the arguments here are misplaced.

The simple question is whether service was made within the 120 days allowed by Rule 4(h). Either it was, or it was not.

Plaintiff simply cannot escape the well established case law on this point. "While the filing of a Complaint tolls the statute of limitations, if service is not made upon the defendant within 120 days as required by M.R.C.P. 4(h), the limitations period resumes running at the end of the 120 days." *Owens v. Mai*, 891 So.2d 220, 223 (Miss. 2005), Citing *Holmes v. Coast Transit Auth.*, 815 So.2d 1183, 1185 (Miss. 2002); *Watters v. Stripling*, 675 So.2d 1242, 1244 (Miss. 1996); *Moore ex rel. Moore v. Boyd*, 799 So.2d 133,137 (Miss. Ct. App. 2001); *Young v. Hooker*, 753 So.2d 456, 460 (Miss. Ct. App. 1999).

"A plaintiff who does not serve the defendant within the 120-day period must either re-file the complaint before the statute of limitations ends or show good cause for failing to serve process on the defendant within that 120-day period; otherwise dismissal is proper." *Holmes v. Coast Transit Auth.*, 815 So.2d 1183, 1185 (Miss. 2002); Citing *Watters v. Stripling*, 675 So.2d 1242, 1244 (Miss. 1996); *Brumfield v. Lowe*, 744 So.2d 383, 387 (Miss. Ct. App. 1999). See also *Triple "C" Transport, Inc. and Henry v. Dickens*, 870 So.2d 1195(Miss. 2004). The Supreme Court has reaffirmed the holdings in Holmes as recently as 2006. See *Heard v. Remy*, 937 So.2d 939 (Miss. 2006).

There are already in place procedures by which the Plaintiff can correct the deficiencies in service, even after the running the applicable time period; he may move for an extension of time to complete service and/or show good cause. Now however, because Plaintiff completely failed to avail himself of the relief which may have been available, he now seeks the adoption of a new rule

tolling the 120 days after faulty service until an order is entered confirming the service to be faulty. Unfortunately for Plaintiff, even if the Court were to adopt such a rule, it provides the Plaintiff in the instant case no assistance since he failed to move for an extension of time even after the trial court entered its Order declaring service to be insufficient.

III. THIS COURT SHOULD NOT REVERSE THE CIRCUIT COURT'S ORDER SETTING ASIDE THE DEFAULT, AS SAME IS PROCEDURALLY BARRED, AND DEFENDANT CAN NOT WAIVE SERVICE IN A COLLATERAL ATTACK ON A VOID JUDGMENT.

Plaintiff's final argument requests that this Court now reverse the trial court's order setting aside the default judgment, which was set aside because the trial court lacked jurisdiction over the Defendant at the time the Default was entered since he had not been served with process. Thus, the default judgement was void as a matter of law.

The trial court's Order Granting Defendant's Motion to Set Aside Entry of Default was filed on February 14, 2006. (R at 56) Pursuant to Rule 4(a) of the Mississippi Rules of Appellate Procedure, Plaintiff had 30 days from the entry of that Order to file a notice of appeal. As the time for same has long since expired, Plaintiff is procedurally barred from asserting same.

Even assuming, *arguendo*, that Plaintiff is not procedurally barred, the Court's Order was proper, and Plaintiff's arguments must fail. It is axiomatic that in order for a court to enter a valid judgment, a "court must not only have jurisdiction of the subject matter, but also of the persons of the parties to give validity to its final judgment." *James v. McMullen*, 733 So.2d 358 (Miss.Ct. App. 1999)(citing *Rice v. McMullen*, 43 So.2d 195, 201(Miss. 1949)). There is no dispute by Plaintiff that the service attempted was insufficient. However, Plaintiff argues that Defendant's appearance to collaterally attack that judgment after it had been entered, constituted a retroactive waiver.

A collateral attack on a void judgment cannot serve to give the court jurisdiction, where there

otherwise was none. *Bryant v. Lovitt, et al.*, 231 Miss. 736, 745; 97 So.2d 730, 733 (Miss. 1957). A motion filed "after the entry of the judgment complained of could not serve to give validity to the judgment if invalid for the want of proper process. *Home Ins. Co. v. Watts*, 93 So.2d 848, 850 (Miss. 1957).

Unfortunately, the cases cited by Plaintiff in support of his position, fail to offer any support whatsoever. In fact, the *Home Ins. Co.* case supports Defendant's position as outlined above. None of the remaining cases cited by Plaintiff dealt with a collateral attack on a void judgment, but rather stood for the general proposition that Defendant's must timely raise service of process defenses in responding to lawsuits.

As outlined in Plaintiff's own brief, the *Bank of Mississippi* case is clearly distinguishable from the case at bar. See generally, *Bank of Mississippi v. Knight*, 208 F.3d 514 (5th Cir. Miss. 2000). There, after determining its first judgment was void against the defendant, the *Bank* re-filed its suit to renew the prior judgment. The defendant after being properly served with the second lawsuit, failed to respond or raise any defenses.

However, in the instant matter, Defendant filed a collateral attack of the default judgment on the grounds that same was void. Plaintiff's asserts that Defendant's subsequent appearance somehow retroactively makes a void judgment valid. The appearance would have to have happened prior to the entry of the Order. It is boilerplate that the trial court must have jurisdiction at the time the judgment is entered. "There is no doubt that one who is not in court, or of whom the court has no jurisdiction, may, by his appearance in the court, especially asking for affirmative relief, waive venue and lack of personal jurisdiction." *Bryant v. Lovitt, et al.*, 231 Miss. 736, 745; 97 So.2d 730, 733 (Miss. 1957).

CONCLUSION

There is no dispute that Defendant was not served properly served during the 120 days required by Rule 4(h). A simple review of the Record clearly reveals that Plaintiff never filed any motion in the trial court seeking an extension of time to serve process or attempting to show good cause. As such, dismissal was proper.

Importantly, even if Plaintiff had filed a motion, the only issue would be why he failed to complete service of process within the 120 days. Anything that occurred after that time is irrelevant. His failure to mark the envelope for service of the Defendant as "restricted delivery" can only be categorized as ignorance of the rules, or mistake or inadvertence of counsel, which by well established precedent is insufficient to rise to the level of good cause necessary. Despite attempts by the Plaintiff to assign blame to Defendant's father for signing for the certified mail, this in no way explains or offers any justification why it was not marked "restricted delivery."

Finally, Plaintiff's attempt to go back and challenge the order setting aside the default judgment is untimely and procedurally barred. Regardless, Plaintiff's arguments here fail as well since there is no dispute that the trial court lacked jurisdiction to enter the default at the time it was entered. Defendant's appearance to collaterally attack the void judgement cannot serve to retroactively give jurisdiction to the Court.

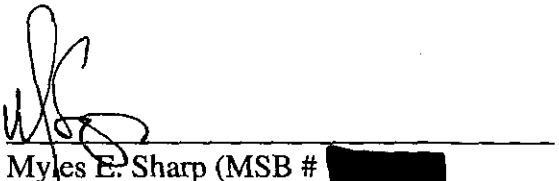
This case represents is a series of missteps by Plaintiff. First, Plaintiff failed to mark the envelope "restricted delivery" as required. Then, Plaintiff failed to either re-file his Complaint after the expiration of the 120 days or to file a motion for an extension of time, despite being given numerous opportunities to do so. Then, Plaintiff failed to timely respond to the Memorandum in Support of the Motion to Dismiss. Then, Plaintiff failed to appear at the hearing on the Motion to Dismiss. Then, the following day, he filed a Reply to the Memorandum. Now, he seeks to hold the

trial court in error which dismissed the matter on the grounds that service was never completed within the 120 days allowed, and that Plaintiff never sought an extension of time. Quite simply, the trial court was left with no option, and its order succinctly states the reasons therefore.

The statute of limitations has expired, and Plaintiff never properly served Defendant within the time prescribed, nor did he ever move for an extension of time to complete same. As such, the trial court's Order Granting Defendant's Motion to Dismiss should be affirmed, and Plaintiff taxed with all costs of this appeal.

Respectfully submitted, this the 28th day of February, 2008.

HEWITT and SHARP, PLLC



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CERTIFICATE OF SERVICE

I, Myles E. Sharp, do hereby certify that I have this date forwarded, via first class mail, a true and correct copy of the Appellee's Brief and Appellee's Record Excerpts to Stewart L. Howard, Esquire, at his usual and regular mailing address of P.O. Box 1903, Mobile, AL 36633, and the Honorable Judge Kathy King Jackson, Circuit Court of Greene County, P.O. Box 998, Pascagoula, MS 39568-0998.

THIS the 28th day of February, 2008.

Myles E. Sharp (MSB#[redacted])

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APPENDIX of the BRIEF of the APPELLEE WALLACE B. McCLUGGAGE

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WALLACE B. McCLUGGAGE

RULE 4. APPEAL AS OF RIGHT - WHEN TAKEN

(a) Appeal and Cross-Appeals in Civil and Criminal Cases. Except as provided in Rules 4(d) and 4(e), in a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. If a notice of appeal is mistakenly filed in the Supreme Court, the clerk of the Supreme Court shall note on it the date on which it was received and transmit it to the clerk of the trial court and it shall be deemed filed in the trial court on the date so noted.

(b) Notice Before Entry of Judgment. A notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day of the entry.

(c) Notice by Another Party. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

(d) Post-trial Motions in Civil Cases. If any party files a timely motion of a type specified immediately below the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Mississippi Rules of Civil Procedure (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of facts, whether or not granting the motion would alter the judgment; (3) under Rule 59 to alter or amend the judgment; (4) under Rule 59 for a new trial; or (5) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

(e) Post-trial Motions in Criminal Cases. If a defendant makes a timely motion under the Uniform Criminal Rules of Circuit Court Practice (1) for judgment of acquittal notwithstanding the verdict of the jury, or (2) for a new trial under Rule 5.16, the time for appeal for all parties shall run from the entry of the order denying such motion. Notwithstanding anything in this rule to the contrary, in criminal cases the 30 day period shall run from the date of the denial of any motion contemplated by this subparagraph, or from the

RULE 4. SUMMONS

(a) Summons: Issuance. Upon filing of the complaint, the clerk shall forthwith issue a summons.

(1) At the written election of the plaintiff or the plaintiff's attorney, the clerk shall:

(A) Deliver the summons to the plaintiff or plaintiff's attorney for service under subparagraphs (c)(1) or (c)(3) or (c)(4) or (c)(5) of this rule.

(B) Deliver the summons to the sheriff of the county in which the defendant resides or is found for service under subparagraph (c)(2) of this rule.

(C) Make service by publication under subparagraph (c)(4) of this rule.

(2) The person to whom the summons is delivered shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff, separate or additional summons shall issue against any defendants.

(b) Same: Form. 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, otherwise 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 the relief demanded in the complaint. Where there are multiple plaintiffs or multiple defendants, or both, the summons, except where service is made by publication, may contain, in lieu of the names of all parties, the name of the first party on each side and the name and address of the party to be served. Summons served by process server shall substantially conform to Form 1A. Summons served by sheriff shall substantially conform to Form 1AA.

(c) Service:

(1) *By Process Server.* A summons and complaint shall, except as provided in subparagraphs (2) and (4) of this subdivision, be served by any person who is not a party and is not less than 18 years of age. When a summons and complaint are served by process server, an amount not exceeding that statutorily allowed to the sheriff for service of process may be taxed as recoverable costs in the action.

(2) *By Sheriff.* A summons and complaint shall, at the written request of a party

seeking service or such party's attorney, be served by the sheriff of the county in which the defendant resides or is found, in any manner prescribed by subdivision (d) of this rule. The sheriff shall mark on all summons the date of the receipt by him, and within thirty days of the date of such receipt of the summons the sheriff shall return the same to the clerk of the court from which it was issued.

(3) *By Mail.*

(A) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (4) of subdivision (d) of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 1-B and a return envelope, postage prepaid, addressed to the sender.

(B) If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint may be made in any other manner permitted by this rule.

(C) Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing the notice and acknowledgment of receipt of summons.

(D) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(4) *By Publication.*

(A) If the defendant in any proceeding in a chancery court, or in any proceeding in any other court where process by publication is authorized by statute, be shown by sworn complaint or sworn petition, or by a filed affidavit, to be a nonresident of this state or not to be found therein on diligent inquiry and the post office address of such defendant be stated in the complaint, petition, or affidavit, or if it be stated in such sworn complaint or petition that the post office address of the defendant is not known to the plaintiff or petitioner after diligent inquiry, or if the affidavit be made by another for the plaintiff or petitioner, that such post office address is unknown to the affiant after diligent inquiry and he believes it is unknown to the plaintiff or petitioner after diligent inquiry by the plaintiff or petitioner, the clerk, upon filing the complaint or petition, account or other

commencement of a proceeding, shall promptly prepare and publish a summons to the defendant to appear and defend the suit. The summons shall be substantially in the form set forth in Form 1-C.

(B) The publication of said summons shall be made once in each week during three successive weeks in a public newspaper of the county in which the complaint or petition, account, cause or other proceeding is pending if there be such a newspaper, and where there is no newspaper in the county the notice shall be posted at the courthouse door of the county and published as above provided in a public newspaper in an adjoining county or at the seat of government of the state. Upon completion of publication, proof of the prescribed publication shall be filed in the papers in the cause. The defendant shall have thirty (30) days from the date of first publication in which to appear and defend. Where the post office address of a defendant is given, the street address, if any, shall also be stated unless the complaint, petition, or affidavit above mentioned, avers that after diligent search and inquiry said street address cannot be ascertained.

(C) It shall be the duty of the clerk to hand the summons to the plaintiff or petitioner to be published, or, at his request, and at his expense, to hand it to the publisher of the proper newspaper for publication. Where the post office address of the absent defendant is stated, it shall be the duty of the clerk to send by mail (first class mail, postage prepaid) to the address of the defendant, at his post office, a copy of the summons and complaint and to note the fact of issuing the same and mailing the copy, on the general docket, and this shall be the evidence of the summons having been mailed to the defendant.

(D) When unknown heirs are made parties defendant in any proceeding in the chancery court, upon affidavit that the names of such heirs are unknown, the plaintiff may have publication of summons for them and such proceedings shall be thereupon in all respects as are authorized in the case of a nonresident defendant. When the parties in interest are unknown, and affidavit of that fact be filed, they may be made parties by publication to them as unknown parties in interest.

(E) Where summons by publication is upon any unmarried infant, mentally incompetent person, or other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate, summons shall also be had upon such other person as shall be required to receive a copy of the summons under paragraph (2) of subdivision (d) of this rule.

(5) *Service by Certified Mail on Person Outside State.* In addition to service by any other method provided by this rule, a summons may be served on a person outside this state by sending a copy of the summons and of the complaint to the person to be served by certified mail, return receipt requested. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked "restricted delivery." Service by this method shall be deemed complete as of the date of delivery as evidenced by the return receipt or by the returned envelope marked "Refused."

(d) *Summons and Complaint: Person to Be Served.* The summons and complaint shall be served together. Service by sheriff or process server shall be made as follows:

(1) Upon an individual other than an unmarried infant or a mentally incompetent person,

(A) by delivering a copy of the summons and of the complaint to him personally or to an agent authorized by appointment or by law to receive service of process; or

(B) if service under subparagraph (1)(A) of this subdivision cannot be made with reasonable diligence, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service, and by thereafter mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.

(2) (A) upon an unmarried infant by delivering a copy of the summons and complaint to any one of the following: the infant's mother, father, legal guardian (of either the person or the estate), or the person having care of such infant or with whom he lives, and if the infant be 12 years of age or older, by delivering a copy of the summons and complaint to both the infant and the appropriate person as designated above.

(B) upon a mentally incompetent person who is not judicially confined to an institution for the mentally ill or mentally deficient or upon any other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate by delivering a copy of the summons and complaint to such person and by delivering copies to his guardian (of either the person or the estate) or conservator (of either the person or the estate) but if such person has

no guardian or conservator, then by delivering copies to him and copies to a person with whom he lives or to a person who cares for him.

(C) upon a mentally incompetent person who is judicially confined in an institution for the mentally ill or mentally retarded by delivering a copy of the summons and complaint to the incompetent person and by delivering copies to said incompetent's guardian (of either the person or the estate) if any he has. If the superintendent of said institution or similar official or person shall certify by certificate endorsed on or attached to the summons that said incompetent is mentally incapable of responding to process, service of summons and complaint on such incompetent shall not be required. Where said confined incompetent has neither guardian nor conservator, the court shall appoint a guardian ad litem for said incompetent to whom copies shall be delivered.

(D) where service of a summons is required under (A), (B) and (C) of this subparagraph to be made upon a person other than the infant, incompetent, or incapable defendant and such person is a plaintiff in the action or has an interest therein adverse to that of said defendant, then such person shall be deemed not to exist for the purpose of service and the requirement of service in (A), (B) and (C) of this subparagraph shall not be met by service upon such person.

(E) if none of the persons required to be served in (A) and (B) above exist other than the infant, incompetent or incapable defendant, then the court shall appoint a guardian ad litem for an infant defendant under the age of 12 years and may appoint a guardian ad litem for such other defendant to whom a copy of the summons and complaint shall be delivered. Delivery of a copy of the summons and complaint to such guardian ad litem shall not dispense with delivery of copies to the infant, incompetent or incapable defendant where specifically required in (A), and (B) of this subparagraph.

(3) Upon an individual confined to a penal institution of this state or of a subdivision of this state by delivering a copy of the summons and complaint to the individual, except that when the individual to be served is an unmarried infant or mentally incompetent person the provisions of subparagraph (d)(2) of this rule shall be followed.

(4) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

(5) Upon the State of Mississippi or any one of its departments, officers or institutions, by delivering a copy of the summons and complaint to the Attorney General of the State of Mississippi.

(6) Upon a county by delivering a copy of the summons and complaint to the president or clerk of the board of supervisors.

(7) Upon a municipal corporation by delivering a copy of the summons and complaint to the mayor or municipal clerk of said municipal corporation.

(8) Upon any governmental entity not mentioned above, by delivering a copy of the summons and complaint to the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity. Service upon any person who is a member of the "group" or "body" responsible for the administration of the entity shall be sufficient.

(e) Waiver. Any party defendant who is not an unmarried minor or mentally incompetent may, without filing any pleading therein, waive the service of process or enter his or her appearance, either or both, in any action, with the same effect as if he or she had been duly served with process, in the manner required by law on the day of the date thereof. Such waiver of service or entry of appearance shall be in writing dated and signed by the defendant and duly sworn to or acknowledged by him or her, or his or her signature thereto be proven by two (2) subscribing witnesses before some officer authorized to administer oaths. Any guardian or conservator may likewise waive process on himself and/or his ward, and any executor, administrator, or trustee may likewise waive process on himself in his fiduciary capacity. However, such written waiver of service or entry of appearance must be executed after the day on which the action was commenced and be filed among the papers in the cause and noted on the general docket.

(f) Return. The person serving the process shall make proof of service thereof to the court promptly. If service is made by a person other than a sheriff, such person shall make affidavit thereof. If service is made under paragraph (c)(3) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. If service is made under paragraph (c)(5) of this rule, the return shall be made by the sender's filing with the court the return receipt or the returned envelope marked "Refused." Failure to make proof of service does not affect the validity of the service.

(g) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against

whom the process is issued.

(h) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

[Amended effective May 1, 1982; March 1, 1985; February 1, 1990; July 1, 1998; January 3, 2002.]

Advisory Committee Historical Note

Effective January 3, 2002, Rule 4(e) was amended to delete a prohibition against waiver of service of process by one convicted of a felony. 802-804 So.2d XVII (West Miss. Cases 2002).

Effective July 1, 1998, Rule 4(f) was amended to state that the person serving process shall promptly make proof of service thereof to the court.

Effective February 1, 1990, Rule 4(c)(4)(B) was amended by striking the word "calendar" following the word and figure "thirty (30)"; Rule 4(c)(4) was amended by adding subsection (E); Rule 4(c)(5) was amended by changing the title to reflect service by certified mail; Rule 4(d)(2)(A) was amended by substituting the word "person" for "individual" in reference to the one having care of the infant. 553-556 So. 2d XXXIII (West Miss. Cas. 1990).

Effective March 1, 1985, a new Rule 4 was adopted. 459-462 So. 2d XVIII (West Miss. Cas. 1985).

Effective May 1, 1982, Rule 4 was amended. 410-416 So. 2d XXI (West Miss. Cas. 1982).

Comment

The original version of Rule 4, effective as of January 1, 1982, was amended by the Mississippi Supreme Court on March 5, 1982. The amending order deleted the entire text of Rule 4 and substituted the prior statutory procedure for service of the summons. On December 28, 1984, the Supreme Court adopted a new Rule 4, effective March 1, 1985. Forms applicable to the new Rule 4 were adopted on May 2, 1985. This comment pertains

will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(b) Preliminary Instruction: Note Taking Permitted

If you would like to do so, you may take notes during the course of the trial. On the other hand, you are not required to take notes if you prefer not to do so. Each of you should make your own decision about this. If you decide to take notes, be careful not to get so involved in note taking that you become distracted from the ongoing proceedings.

Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you take notes or not, each of you must form and express your own opinion as to the facts of this case. An individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors.

You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(c) Use of Notes During Deliberations.

Jury Instruction # ___

Members of the Jury, shortly after you were selected I informed you that you could take notes and I instructed you as to the appropriate use of any notes that you might take. Most importantly, an individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you took notes or not, each of you must form and express your own opinion as to the facts of this case. Be aware that during the course of your deliberations there might be the temptation to allow notes to cause certain portions of the evidence to receive undue emphasis and receive attention out of proportion to the entire evidence. But a juror's memory or impression is entitled to no greater weight just because he or she took notes, and you should not be influenced by the notes of other jurors.

Thus, during your deliberations, do not assume simply because something appears in your notes that it necessarily took place in court.

[Adopted effective April 18, 2002.]

RULE 4.01 SCOPE OF CIVIL RULES

Rule Series 4 and 5 shall apply only in civil proceedings.

[Adopted effective May 1, 1995.]

RULE 4.02 COST DEPOSIT

1. A cost deposit shall be made with the clerk of court at the time of the filing of the complaint in the amount of $75.00.

2. The plaintiff shall make an additional cost deposit of $1,000.00 with the clerk of the court at the time of filing of a complaint pursuant to Miss. Code Ann. § 11-27-81 claiming the right of immediate possession of property sought to be condemned.

[Adopted effective May 1, 1995; amended effective June 29, 1995; amended March 22, 2001, amendment suspended April 12, 2001.]

PUBLISHER'S NOTE

By order of the Supreme Court of Mississippi issued March 22, 2001, Rule 4.02 was amended to require a deposit of one thousand dollars for cases in which a complaint is filed pursuant to West's A.M.C. § 11-27-81. By order of the Supreme Court of Mississippi issued April 12, 2001, the court suspended the March 22, 2001 order amending Rule 4.02 and its effect pending further order of the Court.

RULE 4.03 MOTION PRACTICE

The provisions of this rule shall apply to all written motions in civil actions.

1. The original of each motion, and all affidavits and other supporting evidentiary documents shall be filed with the clerk in the county where the action is docketed. The moving party at the same time shall mail a copy thereof to the judge presiding in the action at the judge's mailing address. A proposed order shall accompany the court's copy of any motion which may be heard ex parte or is to be granted by consent. Responses and supporting evidentiary documents shall be filed in the same manner.

2. In circuit court a memorandum of authorities in support of any motion to dismiss or for summary judgment shall be mailed to the judge presiding over the action at the time that the motion is filed. Respondent shall reply within ten (10) days after service of movant's memorandum. A rebuttal memorandum may be submitted within five (5) days of service of the reply memorandum. Movants for summary judgment shall file with the clerk as a part of the motion an itemization of the facts relied upon and not genuinely disputed and the respondent shall indicate either agreement or specific reasons for disagreement that such facts are undisputed and material. Copies of motions to dismiss or for summary judgment sent to the judge shall also be accompanied by copies of the complaint and, if filed, the answer.

3. Accompanying memoranda or briefs in support of other motions are encouraged but not required. Where movant has served a memorandum or brief, respondent may serve a reply within ten (10) days after service of movant's memorandum or brief. A rebuttal memorandum or brief may be served within five (5) days of service of the reply memorandum.

4. No memorandum or brief required or permitted by this rule shall be filed with the clerk. Memoranda or briefs shall not exceed 25 pages in length. If any memorandum, brief or other paper submitted in support of a legal argument in any case cites or relies upon any authority other than a Mississippi or federal statute, Mississippi or federal Rule of Court, United States Supreme Court case, or a case reported in the Southern or Federal Reporter series, a copy of such authority must accompany the brief or other paper citing it.

5. All dispositive motions shall be deemed abandoned unless heard at least ten days prior to trial.

[Adopted effective May 1, 1995; amended May 23, 2002.]

RULE 4.04 DISCOVERY DEADLINES AND PRACTICE

A. All discovery must be completed within ninety days from service of an answer by the applicable defendant. Additional discovery time may be allowed with leave of court upon written motion setting forth good cause for the extension. Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial.

B. When responding to discovery requests, interrogatories, requests for production, and requests for admission, the responding party shall, as part of the responses, set forth immediately preceding the response the question or request to which such response is given. Responses shall not be deemed to have been served without compliance to this subdivision.

C. No motion to compel shall be heard unless the moving party shall incorporate in the motion a certificate that movant has conferred in good faith with the opposing attorney in an effort to resolve the dispute and has been unable to do so. Motions to compel shall quote verbatim each contested request, the specific objection to the request, the grounds for the objection and the reasons supporting the motion.

[Adopted effective May 1, 1995.]

RULE 4.05 JURY SELECTION PROCESS

A. Peremptory jury challenges shall be exercised as follows:

1. The court shall consider all challenges for cause before the parties are required to exercise peremptory challenges.

2. Next, the plaintiff shall tender to the defendant a full panel of accepted jurors having considered the jury in the order in which they appear, having exercised any peremptory challenges desired.

3. Next, the defendant shall go down the juror list accepted by the plaintiff and exercise any peremptory challenge(s) to that panel.

4. Once the defendant exercises peremptory challenges to the panel tendered, the plaintiff shall then be required to again tender to the defendant a full panel of accepted jurors.

5. The above procedure shall be repeated until a full panel of jurors has been accepted by both sides.

6. Once the jury panel is selected, alternate jurors shall be selected following the procedure set forth above for selecting the jury panel.

B. Constitutional challenges to the use of peremptory challenges shall be made at the time each panel is tendered.

[Adopted effective May 1, 1995; amended April 18, 1995.]

RULE 5.01 APPEALS TO BE ON THE RECORD/EXCEPTIONS

Except for cases appealed directly from justice court or municipal court, all cases appealed to circuit court shall be on the record and not a trial de novo. Direct appeals from justice court and municipal court shall be by trial de novo.

[Adopted effective May 1, 1995.]

RULE 5.02 DUTY TO MAKE RECORD

In appeals on the record it is the duty of the lower court or lower authority (which includes, but is not limited to, state and local administrative agencies and governing authorities of any political subdivision of the state) to make and preserve a record of the proceedings sufficient for the court to review. Such record may be made with or without the assistance of a court reporter. The time and manner for the perfecting of appeals from lower authorities shall be as provided by statute.

[Adopted effective May 1, 1995.]

RULE 5.03 SCOPE OF APPEALS FROM ADMINISTRATIVE AGENCIES

On appeals from administrative agencies the court will only entertain an appeal to determine if the order or judgment of the lower authority:

1. Was supported by substantial evidence; or

2. Was arbitrary or capricious; or

3. Was beyond the power of the lower authority to make; or