IN THE SUPREME COURT OF MISSISSIPPI

MORRIS E. COURTNEY,	*	
Plaintiff/Appellant,	*	
vs.	*	NO. 2007-CA-01440
WALLACE B. MCCLUGGAGE,	*	
Defendant/Appellee.	*	

On Appeal From Green County Circuit Court
Case No. 2005-04-041(2)

BRIEF OF APPELLANT,
Morris E. Courtney

ORAL ARGUMENT NOT REQUESTED

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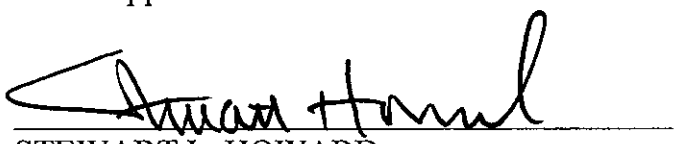
Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representatives 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.

Morris E. Courtney - Plaintiff/Appellant
Wallace B. McCluggage - Defendant/Appellee
Wallace McCluggage - Father of the Defendant/Appellee
Elizabeth McCluggage - Mother of the Defendant/Appellee
Stewart L. Howard - Counsel for Plaintiff/Appellant
Myles E. Sharp - Counsel for Defendant/Appellee



STEWART L. HOWARD
Attorney of record for Morris E. Courtney

Table of Contents

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes: **Page(s)**

STATEMENT OF ISSUES

I. Whether good cause has been demonstrated for failure to serve process within the prescribed 120 day period when the following occurred:

a) The original service occurred within 15 days of the filing of the complaint;

b) A default judgment was set aside due to a family member with a nearly identical name, signing for service of mail he knew was for his son;

c) The plaintiff had to re-serve the defendant after the default judment was set aside; and

d) The plaintiff amended the complaint to correct any service deficiencies, re-filed it, and served the defendant in a jail, located in another state within 56 days of the order setting the default aside.

II. Alternatively, whether the 120 day period to serve the summons and complaint in M.R.C.P. Rule 4(h) applies after a default judgment has been entered and if so, whether the 120 day period tolls after the initial service until the default judgment is set aside.

III. Alternatively, whether the defendant waived insufficiency of process, insufficiency of service, or lack of personal jurisdiction by not asserting these defenses in his initial Motion to Set Aside Default Judgment or Supplemental Motion to Set Aside Default Judgment.

STATEMENT OF THE CASE

A. Procedural History

On April 25, 2005, the Plaintiff/Appellant, Morris E. Courtney ("Courtney") filed a complaint against the Defendant/Appellee, Wallace B. McCluggage ("McCluggage") for a vehicle accident which occurred on January 7, 2003. R. 8-9. Courtney attempted to get service on McCluggage through certified mail, return receipt requested at the address he provided on the accident report. R. 9. Courtney also sent McCluggage's insurance carrier a copy of the complaint, and notified the carrier that Courtney was attempting to get service on McCluggage. R. 38. On May 5, 2005, the certified receipt was signed by a "Wallace McCluggage." R. 20. A timely answer was not filed.

On July 25, 2005, Courtney filed an Application for Default. R. 10. On August 1, 2005, a default judgment was entered. R. 22. On August 10, 2005, a revised default judgment was entered correcting a clerical error. R. 24. On August 25, 2005, 122 days after the complaint was filed, McCluggage filed a Motion for Relief from Judgment. R. 25-28. The motion stated that the default judgment was void as a matter of law because a hearing was not held pursuant to M.R.C.P Rule 55 on the amount of damages and alternatively, because notice was not given to the Defendant, who made an appearance. R. 26. With regard to notice, the motion specifically stated as follows:

> Notice is required for any Defendant who has made an appearance pursuant to Rule 55. The traditional formal requirements for what constitutes an appearance has been broadly defined and liberally interpreted. Journey v. Long, 585 So.2d 1268, 1272 (Miss. 1991), citing Heleasco

> Seventeen, Inc. V. Drake, 102 F.R.D. 909, 912 (1984). "Several cases have held that informal contacts between parties may constitute an appearance." Id. Here, the Plaintiff's attorney had, and was engaging in settlement discussions with Defendant's insurance company, and was well aware they would defend any lawsuit filed.
>
> R. 26-27.

On October 2, 2005, Courtney filed a Reply to Defendant, Wallace B. McCluggage's Motion for Relief from Judgment by which Courtney consented to a hearing on the issue of damages but maintained that the entry of default was due to be upheld. R. 29-31. On October 3, 2005, McCluggage filed a Supplemental Motion for Relief from Judgment which requested that McCluggage be allowed to conduct discovery on the issue of damages. R. 32-34. The Supplemental Motion specifically incorporated each and every argument made in the Motion for Relief from Judgment. R. 32. On October 24, 2005, Courtney filed a Reply to Defendant, Wallace B. McCluggage's Supplemental Motion for Relief from Judgment. R. 37-39.

On November 28, 2005, 217 days after the complaint was filed, and 202 days after service of the Complaint by certified mail, McCluggage filed a Second Supplemental Motion for Relief from Judgment which first raised the defense that service was inadequate. R. 40-45. The motion stated in part that the defendant, "Wallace B. McCluggage," had not signed for the certified mail. R. 41. Rather, "Wallace McCluggage," the defendant's father signed for the certified mail. R. 41. The supplemental motion further stated that the envelope containing the summons and

complaint was not marked "restricted delivery." R. 41. The motion was filed with an Affidavit of the defendant's mother, dated November 18, 2006, which stated that the defendant's father had signed for the package, and was estranged from McCluggage. R. 44. The defendant's mother also stated that she found the certified letter around August 19, 2005, and proceeded to open the letter, read the contents, and take the letter to the insurance agent. R. 44.

On November 29, 2005, Courtney filed a Response to Defendant's Motion to Set Aside Judgment. R. 49-51. On November 30, 2005, a hearing on the Motion to Set Aside the Default Judgment was held. Subsequently, on February 8, 2006, the defendant's father signed an Affidavit which stated that he signed for the certified mail knowing that the mail was intended for his son and then did not open the letter. R. 54-55. The defendant's father stated that his son was incarcerated at the Aiken Detention Center in South Carolina on May 5, 2005. R. 54.

On February 14, 2006, the Court entered an Order Granting Defendant's Motion to Set Aside Entry of Default. R. 56-57. After the order, Courtney determined where McCluggage was incarcerated, determined the address for the Aiken Detention Center, contacted the sheriff's office to determine the appropriate procedures to have McCluggage served in jail, and made the appropriate amendments to the complaint, specifying the correct address. R. 75. On April 6, 2006, Courtney filed an Amended Complaint which was properly served on McCluggage on April 11, 2006. R. 58-59; R. 66. The following is a summary of the timeline of preceding events:

ACTION	DATE
Complaint	April 25, 2005
Certified Mail Receipt	May 10, 2005
Default Judgment	August 10, 2005
Motion for Relief from Judgment (waiver of service defense)	September 8, 2005
Supplemental Motion for Relief from Judgment (waiver of service defense)	October 7, 2005
Second Supplemental Motion for Relief from Judgment (asserting insufficiency of service)	November 28, 2005
Affidavit of Father	February 8, 2006
Order Granting Motion to Set Aside Entry of Default	February 14, 2006
Amended Complaint (clarifying name)	April 6, 2006
Affidavit of Service	April 11, 2006

On April 17, 2006, McCluggage filed a Motion for an Enlargement of Time to Plead, Answer, or Otherwise Move. R. 60-62. The parties entered an agreed order extending the time which was approved by the Court on May 4, 2006. R. 63. On June 5, 2006, McCluggage filed an Answer which incorporated a motion to dismiss. R. 66-73. The motion to dismiss asserted that Courtney never obtained an order from the Court extending time for service. R. 67. McCluggage stated that the filing of the Complaint on May 25, 2005 tolled the statute of limitations for 120 days. However, McCluggage asserted that since he was not properly served within 120 days of the original filing, the statute of limitations began to run at the expiration of the 120 days and expired on May 7,

2006. McCluggage and the Court calculated that the 120 days began to run with the filing of the original Complaint and continued to run, even though McCluggage was served within 15 days from the original filing and it took 280 days to set aside the default.

On June 28, 2006, Courtney filed a Reply to Motion to Dismiss asserting among other things, that the court should look at the "good cause" demonstrated. R. 74-80. On February 27, 2007, McCluggage filed a Motion to Strike Amended Complaint asserting that the Amended Complaint was filed without leave of the trial court. R. 106-108. On March 13, 2007, Courtney filed a Motion for Leave to File Amended Complaint. R. 109.

On March 13, 2007, Courtney also filed a Reply to Defendant's Motion to Strike and Memorandum in Support of Motion to Dismiss. R. 112-123. In addition to other arguments, the reply states that "Plaintiff hereby requests additional time, if that is found to be necessary, pursuant to the good cause exception." R. 114. On April 19, 2007, McCluggage filed a Rebuttal to Plaintiff's Reply to Defendant's Motion to Dismiss. R. 127-133. On April 19, 2007, McCluggage also filed a Response to Plaintiffs Motion to File Amended Complaint. R. 134-138. On July 20, 2007, the Court entered an Order Granting Motion to Dismiss for failure to timely serve process. R. 139-141. The order stated that **"at no time was the aid of the Court sought to enable the plaintiff to correctly serve process outside the 120 day limit,"** and "**no attempt was made to secure additional time to serve process**." R. 141 (emphasis added). Therefore, the Court found that good cause did not exist for the failure to serve process within the 120 day period, apparently since additional time had not been requested [although additional time

clearly had been requested]. R. 141.

B. Statement of Facts

On January 7, 2003, Courtney was involved in a vehicle accident with McCluggage in Greene County Mississippi. R. 08. Courtney suffered injuries to his knees, mouth and other parts of his body. R. 09. On April 25, 2005, Courtney filed a complaint against McCluggage in the Circuit Court of Greene County, Mississippi alleging that McCluggage negligently and/or wantonly pulled out from a stop sign into the path of Courtney causing the collision.

SUMMARY OF THE ARGUMENT

Pursuant to M.R.C.P Rule 4(h), Courtney has shown good cause for failing to serve process within the 120 day period. The failure to serve process was due to the misleading conduct of the defendant's father, and the efforts to get an out-of-state incarcerated, defendant served. Courtney asked for leave of court to serve McCluggage outside of the 120 day period even though such leave is not required and served the defendant with an amended complaint within 56 days of the court's decision that service was originally insufficient. Therefore, good cause was shown, Courtney's service of the amended complaint was timely, and the dismissal is improper.

Alternatively, the 120 day period to serve the original complaint in M.R.C.P. Rule 4(h) does not apply to this situation. In particular, M.R.C.P. Rule 4(h) does not contemplate setting aside a default judgment for inadequate service. Therefore, in the alternative, McCluggage's dismissal based on the failure to serve the defendant within 120 days is improper because M.R.C.P. Rule 4(h) does not contemplate service after a default judgment is set aside.

Alternatively, even if this Court determines that M.R.C.P. Rule 4(h) applies to a situation in which a default judgment is set aside, the trial court miscalculated the 120 day period. Courtney served McCluggage within 15 days of filing the initial complaint and within 56 days of the order setting aside the default judgment. The time for service should have tolled once McCluggage was initially served. The 280 days between the original service and the order setting aside the default should not count against Courtney.

Therefore, in the alternative, the time under M.R.C.P. Rule 4(h) tolled after the initial service and did not begin to run until the default judgment was set aside. Therefore, Courtney served McCluggage within 71 days which is timely under M.R.C.P. Rule 4(h).

Alternatively, under M.R.C.P. Rule 12(b), inadequate service, or lack of personal jurisdiction must be timely asserted or they are waived. By filing a motion and a supplemental motion before raising the defense of inadequate service, and furthermore, by participating in the proceedings by attempting to clarify damages, McCluggage waived any defense to inadequacy of service. Therefore, the order setting aside the default judgment is improper because McCluggage.was served within the 120 days and any insufficiency was waived by not asserting such in the first two motions with the court. Furthermore, the dismissal based on a failure to serve McCluggage within 120 days as prescribed in M.R.C.P. Rule 4(h) is improper.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE TRIAL COURT'S FINDING THAT THE PLAINTIFF FAILED TO SHOW GOOD CAUSE FOR FAILURE TO SERVE PROCESS WITHIN 120 DAYS.

Pursuant to M.R.C.P. Rule 4(h), a failure to serve process within 120 days will only cause a complaint to be dismissed if the plaintiff cannot show good cause for failing to meet the deadline. Holmes v. Coast Transit Authority, 815 So.2d 1183, 1185 (¶ 7)(Miss. Ct. App. 2002). Whether or not the plaintiff can show good cause is a discretionary matter for the trial court and is entitled to deferential review of whether the trial court abused its discretion, and whether there was substantial evidence supporting the determination. In re Estate of Ware, 573 So.2d 773, 775-776 (Miss. 1990). The plaintiff bears the burden to demonstrate the existence of good cause for the failure to timely serve process. Montgomery v. Smithkline Beecham Corp., 910 So.2d 541, 547 (¶ 24) (Miss. 2005). A showing of good cause requires at least as much as would establish excusable neglect, and must be more than "simple inadvertence or mistake of counsel or ignorance of the rules." Watters v. Stripling, 675 So.2d 1242,1243 (Miss. 1996). "A plaintiff must be diligent in serving process within 120 days." Bang v. Pittman, 749 So.2d 47, 52 (¶ 25) (Miss. 1999)(overruled on other grounds).

A. THE PLAINTIFF SOUGHT LEAVE OF COURT TO SERVE PROCESS OUTSIDE THE 120 DAY LIMIT EVEN THOUGH LEAVE IS NOT REQUIRED.

Mississippi Rule of Civil Procedure Rule 4(h) states:

> If a service of the summons and complaint is not made upon 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 such motion.

In the Order Granting Motion to Dismiss, the court states that at "no time was the aid of the Court sought to enable the plaintiff to correctly serve process outside the 120 day limit." This is an erroneous review of the record, and of Mississippi law.

M.R.C.P. Rule 4(h) does not require that leave of court for additional time be sought. Webster v. Webster, 834 So.2d 26, 28 (¶ 10)(Miss. 2002). Rather, the rule provides for notice to the plaintiff before the court dismisses the complaint at which time a motion for additional time to serve would be appropriate. Id. Furthermore, M.R.C.P. rule 4(h) does not require that a motion for additional time for service of process be filed within 120 days of the filing of the complaint. Webster v. Webster, 834 So.2d 26, 28 (¶ 8)(Miss. 2002). Therefore, the request was timely. Quite simply, M.R.C.P. Rule 4(h) mandates that if you wait beyond the 120 days, you must show good cause why the party was not served. Cross Creek Productions v. Scafidi, 911 So.2d 958, 960 (¶ 5) (Miss. 2005).

In the case at bar, Courtney filed a Reply to Motion to Dismiss which stated that the court should "look to the attempts of service and good cause demonstrated." Additionally, in the Plaintiff's Reply to Defendant's Motion to Strike and Memorandum in Support of Motion to Dismiss, Courtney stated that "Plaintiff hereby requests

additional time, if that is found to be necessary, pursuant to the good cause exception." Therefore, the finding that the plaintiff did not seek the aid of the court is erroneous as to the law, and as to the facts of the case at bar.

B. GOOD CAUSE WAS CLEARLY SHOWN.

Good cause may be found when the plaintiff's failure to effect timely service was due to the conduct of a third person, or when the defendant has evaded service of process or has engaged in misleading conduct. Holmes v. Coast Transit Authority, 815 So.2d 1183, 1185 (¶ 12)(Miss. Ct. App. 2002).

In the present case, Courtney has demonstrated good cause for failing to meet the deadline, and was diligent in trying to get McCluggage served. Courtney undertook to serve McCluggage by certified mail at the address McCluggage provided on the accident report. Courtney also attempted to contact McCluggage through his insurance carrier. That company was sent a copy of the Complaint, and notified that service was being attempted on its insured.

On May 10, 2005, 15 days after filing the Complaint, a "return receipt" was signed by "Wallace McCluggage." Courtney was under the impression that service was proper on McCluggage. Relying on the "return receipt" bearing what appeared to be the defendant's signature was more than simple inadvertence, mistake of counsel, or ignorance of the rules. Given the similarity in the names, the reliance was justified. Furthermore, the failure to properly serve McCluggage was due to the misleading conduct of the defendant's father. The defendant's father admitted as much when he indicated that

he knew that the certified letter was intended for his son but he signed for the letter anyway. The defendant's father was fully aware or should have been aware that signing his name for certified mail intended for his estranged son could mislead the sender to rely that the mail had been properly delivered. The fact that the defendant's father engaged in misleading conduct, and then, did not respond, forward or even open the mail for three months should not be used to discount Courtney's diligence.

Furthermore, McCluggage's failure to timely raise the defense of insufficiency of service should not be attributed to Courtney's diligence. The earliest point that Courtney could have been put on notice that the signature was possibly not that of McCluggage was on November 28, 2005, which is 217 days after the complaint was filed. However, even at that point, the insufficiency was a mere allegation. In fact, the Affidavit of the defendant's father stating that he had signed for the package was not signed until February 8, 2006, and the order stating that service was not proper was not entered until February 16, 2006. In total, there were 280 days from the date on which McCluggage was originally served to the date on which the court entered an order that service was insufficient. The 280 day delay is not the fault of Courtney. Rather, it is a result of McCluggage's delay in raising the defense.

Upon a determination that service was insufficient, Courtney made a diligent attempt to get McCluggage served again. Courtney determined where McCluggage was incarcerated, determined the address for the Aiken Detention Center, contacted the sheriff's office to determine the appropriate procedures to have McCluggage served in

jail, and made the appropriate amendments to the complaint to clarify the name and the service directions. On April 11, 2006, 56 days after the court ruled that service was not proper, Courtney was able to properly serve McCluggage at the Aiken Detention Center.

Courtney's failure to mark "restricted delivery" is not the proximate cause of the failure of service. In fact, had McCluggage signed for the package as it appeared, then there would be no issue as to whether Courtney had failed to mark "restricted delivery." Courtney was not aware of the similarity between the names of McCluggage and the defendant's father. Therefore, without notice otherwise, the signature on the return receipt seemed to cure any problems with service.

Therefore, while an excusable mistake on marking "restricted delivery" may have been made, it was furthered by the family of McCluggage, the delay of McCluggage in raising the defense, and the time necessary for the trial court to review and make a determination on the sufficiency of service. As such, the failure to get service in the 120 days is explainable, and good cause has been demonstrated.

II. ALTERNATIVELY THE 120 DAY PERIOD IN M.R.C.P. RULE 4(h) FOR SERVICE OF THE SUMMONS AND COMPLAINT DOES NOT APPLY AFTER A DEFAULT JUDGMENT HAS BEEN ENTERED, BUT IS LATER SET ASIDE.

Mississippi Rule of Civil Procedure Rule 4(h) does not contemplate setting aside a default judgment. Quite simply, M.R.C.P. Rule 4(h) deals with time limits for service of the original summons and complaint. Applying the time limits in M.R.C.P. Rule 4(h) when setting aside a default judgment is problematic, and can yield inequitable consequences. In particular, applying M.R.C.P. Rule 4(h) to an attack on a default

judgment on the basis of an alleged insufficiency of service gives the Defendant an incentive to delay raising a defense of insufficiency of service and delay providing proof of any insufficiency until it is too late for the Plaintiff to correct any errors. Furthermore, it leaves the Plaintiff at the mercy of the Court's timetable for entering an order regarding whether service was sufficient, even though the time limit for service continues to run.

The dissent in Watters v. Stripling, 675 So.2d 1242, 1245 (Miss. 1996), actually raises a similar argument in the context of the statute of limitations. The dissent states:

> This Court is encouraging defendants who have actually been served later than 120 days after the complaint was filed to intentionally delay in moving to dismiss the complaint until expiration of the applicable statute of limitations. This case represents the clear potential for abuse where a defendant who is untimely served may intentionally wait for the statute of limitations to expire before objecting on this basis. More troublesome, however, is that this intentional delay is encouraged at the expense of the injured plaintiff who merely seeks his or her day in court.
>
> Id. at 1244-1245.

The same rationale applies in the context of raising insufficiency of service as a defense. If a party is allowed to sit on the defense and simply set aside a default judgment at any time, there is a clear incentive to delay raising the defense until the applicable time limits under M.R.C.P. Rule 4(h) and possibly the statute of limitations have expired. In fact, it is hard to imagine a scenario in which the defendant would raise the defense of insufficiency of service within the applicable time periods if waiting means that the case will be dismissed and possibly barred by the statute of limitations. There is a clear

potential for abuse when a defendant may intentionally wait for time limits to expire before raising a defense. There is no implication in this case that defense counsel intentionally subverted the rule, but upholding the dismissal in this case, creates an opportunity for just that.

A. IF M.R.C.P. RULE 4(h) DOES APPLY, THE COURT ERRED IN CALCULATING THE 120 DAY PERIOD BY NOT TOLLING THE TIME AFTER THE INITIAL SERVICE.

The principles of equity would suggest in the case where a default judgment is set aside for insufficient service, the time under M.R.C.P. Rule 4(h) should toll upon service. When the default judgment is set aside for insufficient service, the plaintiff should, at a minimum, have the number of days left at the time of the original service.

In the instant case, McCluggage and the trial court count the 120 days continuously from the date on which the Complaint was originally filed. However, Courtney served McCluggage within 15 days of the filing of the Complaint, and subsequently, obtained a default judgment. It was not until 280 days after the default judgment was entered that the Court set aside the default stating that service was insufficient. After the order was entered, Courtney diligently made the appropriate amendments to the complaint and served McCluggage within 56 days. Therefore, it took Courtney 15 days and 56 days, respectively, to serve McCluggage. To allow the time limit for service under M.R.C.P. Rule 4(h) to continue to run for the 280 days from the first date of service to date the default was set aside encourages defendants to delay raising any defense to jurisdiction until the applicable time limits have run, at the expense of the injured plaintiff, who

merely seeks his day in court.

At a minimum, Courtney should have been allowed the 105 days which were remaining after the initial service. If that is the case, the amended complaint was timely served, and the order dismissing this case for not timely serving the defendant should be reversed, and this matter should be remanded for trial.

III. ALTERNATIVELY, THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S ORDER SETTING ASIDE DEFAULT JUDGMENT SINCE THE DEFENDANT WAIVED SERVICE.

As a general matter, subsequent proceedings on a judgment are null and void if the original judgment is void. Bryant v. Lovitt, 97 So.2d 730, 746 (Miss. 1957); See also Home Insurance Company v. Watts, 93 So.2d 848, 850-851 (Miss. 1957). However, this is an oversimplified statement of the law. A void judgment because of insufficiency of process or insufficiency of service of process is a matter that has to be raised as a defense. Pursuant to M.R.C.P. Rule 12(b), any responsive pleadings or motions should assert, insufficiency of process or insufficiency of service of process. A defense of lack of jurisdiction over the person, insufficiency of process or insufficiency of service of process is waived if it is not asserted timely. M.R.C.P. Rule 12(h); See also Manning v. Tanner, 594 So. 2d 1164, 1167 (Miss. 1992) (A defendant cannot raise for the first time on appeal that a decree is void for insufficiency of process and lack of personal jurisdiction); Young v. Huron Smith Oil Company, Inc., 564 So.2d 36, 39 (Miss. 1990). (Objections to personal jurisdiction must be asserted timely or they will be held waived).

The Federal Case of Bank of Mississippi v. Knight, 208 F.3d 514 (5th Cir. Miss.

2000) stated as much. In Bank of Mississippi, a judgment was obtained in 1988 against the respondent. Id. at 515. However, the judgment was void because the respondent had not been served with the complaint. In 1995, the Bank sued the respondent to renew the judgment and properly served the respondent. The respondent did not answer. The respondent cited Bryant v. Lovitt, 97 So.2d 730 (Miss. 1957) for the proposition that subsequent proceedings on a judgment are null and void if the original judgment is void. Bank of Mississippi at 516. The Court specifically rejected this interpretation of Bryant finding that the defendant in Bryant had raised the defense that the judgment was void. The court held that even if a judgment is void, the defendant is still procedurally required to raise that alleged voidness as a defense, or it is waived. Bank of Mississippi at 517.

In the instant case, the issue missed by the court is that while subsequent proceedings may be void if there is insufficient jurisdiction, or insufficient service, the insufficient jurisdiction, or insufficient service must be timely raised, or it is waived. Therefore, the order setting aside the default judgment is improper if service was made within the 120 day period and the insufficiency was not timely raised.

McCluggage filed a Motion for Relief from Judgment on August 25, 2005, stating that the judgment was void because a hearing was not held pursuant to M.R.C.P. Rule 55, not because there was insufficient jurisdiction, or insufficient service. The motion specifically stated that the Defendant had entered an appearance, and was entitled to notice. On October 3, 2005, McCluggage filed a Supplemental Motion for Relief from Judgment which requested that McCluggage be allowed to conduct discovery on the issue

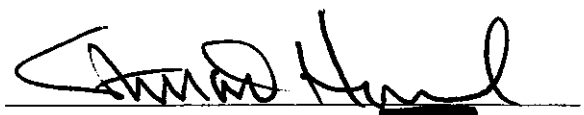
of damages. This motion incorporated the assertions in the original Motion for Relief from Judgment. There was no mention in either motion that service was insufficient. It was not until November 28, 2005, 95 days after the Motion for Relief from Judgment was filed, and 217 days after the Complaint was filed, that McCluggage filed a Second Supplemental Motion for Relief from Judgment asserting that service was inadequate. Like Bank of Mississippi, McCluggage was required to raise the defense of insufficient process, or insufficient service of process in his initial response. By not raising the defense, McCluggage waived personal jurisdiction.

Therefore, the trial court's order setting aside the default judment should be reversed. As such, the order dismissing this case for not timely serving the defendant should also be reversed.

CONCLUSION

Therefore, for the above-stated reasons, the Court should reverse the Circuit Court's ruling that good cause has not been demonstrated by Courtney for the delay in service. Alternatively, the Court should reverse the Circuit Court because the time limits prescribed in M.R.C.P. Rule 4(h) are inapplicable when a default judgment has been entered, and subsequently set aside. Alternatively, the Court should reverse the Circuit Court's ruling that service was inadequate because McCluggage waived the defense of insufficiency of service by failing to timely raise it.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 5 day of December, 2007, served a copy of the foregoing pleading upon the following, by mailing same by United States mail, properly addressed, and first class postage prepaid:

Myles E. Sharp, Esq.
1635_D Popps Ferry Road
D'Iberville, Mississippi 39540

OF COUNSEL

MISSISSIPPI COURT RULES ANNOTATED

*** THIS SECTION IS CURRENT THROUGH APRIL 18, 2007 ***

MISSISSIPPI RULES OF CIVIL PROCEDURE
CHAPTER II. COMMENCEMENT OF ACTION: SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

M.R.C.P. Rule 4 (2007)

Review Court Orders which may amend this Rule

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.

HISTORY: Amended effective May 1, 1982; March 1, 1985; February 1, 1990; July 1, 1998; January 3, 2002

NOTES:
ADVISORY COMMITTEE HISTORICAL NOTE

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 to new Rule 4 and its forms.

After an action is commenced, the clerk is required to issue a separate summons for each defendant except in the case of summons by publication. The plaintiff or his attorney has the right, by written election, to determine whether each summons shall be delivered to the plaintiff or his attorney for service by process server or delivered by the clerk to the sheriff of the county in which the defendant resides or may be found. Where service is by publication, the clerk shall hand the summons to the plaintiff or to his attorney, or, if so requested by either of them, the clerk shall hand it to the publisher of the proper newspaper for publication.

Forms 1A, 1AA, 1B and 1C are provided as suggested forms for the various summons. All summonses used pursuant to Rule 4 must be in substantial conformity with these forms.

Various "Processes" provided for by statute, other than the summons and subpoena (the subpoena is governed by Rule 45), will continue to be governed by statute.

Rule 4(a)(2) requires that a copy of the complaint be served with the summons. Rule 4(b) requires that the summons form notify defendant that his failure to appear will result in a judgment by default against defendant for the relief demanded in the complaint. Although the "judgment by default will be rendered" language may be an overstatement, the language is included in Rule 4 for two reasons. First, the language is part of Federal Rule 4(b), and an effort has been made to maintain procedural conformity between the Mississippi and federal systems where possible. Second, the strong language is deemed more likely to encourage defendants to appear to protect their interests.

Rule 4(b) provides that where there are multiple plaintiffs or defendants, the summons may name just the first party on each side, together with the name and address of the party to be served. However, the complaint, which must accompany the summons, will provide the names of all parties to the action.

Exhibits to the complaint form a part of the complaint and in most cases should be attached to the complaint [See Rule 10(d)]. However, in cases where unusually lengthy exhibits are attached to the complaint, plaintiff may elect not to attach copies of the lengthy exhibits to the copies of the complaint served, but instead may attach a statement to the effect that such exhibits are not attached because of their size and that the exhibits are available for inspection and copying.

Rule 4(c)(1) provides for service by a process server and Rule 4(c)(2) provides for service by a sheriff. There is no limit to the territorial jurisdiction of a process server who may serve the summons anywhere in the world. A sheriff, however, may serve the summons only within his county. However, the mere service of the summons and complaint does not, of itself, resolve all questions as to jurisdiction over the person of the defendant, and any such questions may be raised at appropriate times.

A party using a process server may pay such person any amount that is agreed upon. However, only that amount statutorily allowed to the sheriff under Miss. Code Ann. § 25-7-19 (Supp. 1984) may be taxed as recoverable costs in the action.

Plaintiff is given the option under Rule 4(c)(3) of obtaining service by first-class mail. Defendant's failure to complete and return one copy of the "Notice and Acknowledgment for Service by Mail" may trigger the cost-shifting provisions of Rule 4(c)(3)(B). The provisions for service by first-class mail are modeled upon Federal Rule 4(c)(2)(C)(ii). The completion and return of Form 1B (Notice and Acknowledgment for Service by Mail) does not operate as a waiver of objections to jurisdiction. All jurisdictional objections are preserved whether Form 1B is completed and returned from inside or outside the State.

Rule 4(c)(4) provides for service of summons by publication and generally tracks the previous statutory requirements for summons by publication under Miss. Code Ann. § 13-3-19 et seq. (1972). However, a few major changes should be noted. Under Rule 4(c)(4)(B), "[t]he defendant shall have thirty (30) days from the date of first publication in which to appear and defend." The thirty days from first publication is a shorter time in which one must respond than was previously provided by statute.

Publication under this rule is deemed complete with the third publication in those instances where the time of an event is related to completion of publication. However, it should be noted that this is not deemed to alter the time for response by defendant.

It should be noted that there will be instances under Rule 4(c)(4)(E) where service by publication is appropriate for persons under disability, but service of the summons and complaint upon the "other person" required to be served under Rule 4(d)(2) will not be appropriate by publication because the "other person" may be found within the State of Mississippi.

Rule (4)(c)(4)(C) continues the previous statutory requirement that the clerk send a copy of the summons (and now also of the complaint) by first-class mail to the address of the defendant. The mailing provides further opportunity to give defendant notice of the action. If the defendant's post office address is unknown to plaintiff after diligent inquiry, then the mailing of the summons and complaint is not required.

Rule 4(c)(5) provides for "Service by Certified Mail on Person Outside State" by sending a copy of the summons and complaint to the person to be served by certified mail, return receipt requested. The certified mail procedure is not available to serve a person within the state. It is an alternative form of service because a person outside of the state may also be served under Rule 4(c)(1), 4(c)(3) or 4(c)(4).

The Rule 4(c)(5) procedure supplants the circuitous procedures previously available to obtain in personam jurisdiction against nonresidents. E.g. Miss. Code Ann. § 13-3-63 (1972). However, the criteria for subjecting nonresidents to the jurisdiction of Mississippi courts are those established by the legislature.

Rule 4(d) provides the methods by which the summons and complaint may be served by a sheriff or process server. The basics of service follow generally the previous statutory practice under Miss. Code Ann. § 13-3-33 et seq. (1972). However, there are differences which must be noted. Rule 4(d)(1)(A) tracks previous statutory practice by providing that reasonable diligence be made to deliver a copy of the complaint and summons to the person personally or to his authorized agent.

Where the summons and complaint cannot be delivered to the defendant personally, the copies may be delivered at defendant's usual place of abode by leaving the same with defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service. The corresponding Federal Rule 4(d)(1) has no such requirement. A new procedural safeguard has been added to this mode of "residence service." A copy of the summons and complaint must thereafter be mailed (first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and complaint were left. Such "residence service" of a summons is not deemed complete until the 10th day after such mailing.

Rule 4(2)(A) provides for service upon an unmarried infant and makes several changes from previous practice. The unmarried infant must only be served a copy of the summons and complaint if twelve years of age or older (previously there was no age limitation). The rule now specifies that the guardian served may be the guardian of either the person or of the estate of the unmarried minor, and such service is now permitted upon "the individual having care of such infant or with whom he lives" in addition to the infant's mother, father or legal guardian. This rule is not intended to depart from the basic concepts of traditional Mississippi practice which must still be followed. See: Section 232, Griffith, Mississippi Chancery Practice. The record, exclusive of server's return, should reflect facts sufficient to establish service upon the proper person.

Rule 4(e) provides for waiver of service of the summons and complaint and tracks the provisions of Miss. Code Ann. § 13-3-71(1) (Supp. 1984). The waiver must be dated and signed by the defendant after the day on which the action is commenced. A waiver may be executed without a summons having been issued since for purposes of Rule 4(e) "commencing the action" means merely filing the complaint. Although the Statutory provisions of Miss. Code Ann. § 13-3-71(2) (Supp. 1984) dealing with when causes are triable after waiver by a fiduciary are not mentioned in Rule 4(e), such provisions are not in conflict with Rule 4(e) and continue in effect.

Rule 4(f) provides that the person serving the process shall promptly file a return of service with the court. Prior to revision in 1997, the rule sanctioned making the return at any time before the person served was required to respond. The failure to promptly file a return may precipitate a default or defeat a defendant's right to remove the case. The purpose of the requirement for prompt filing is to avoid these problems that may arise when a defendant is unable to verify the date of service by examining the return of service in the court records.

Rule 4(h) provides that service upon a defendant must be made within 120 days after the filing of the complaint or the cause will be dismissed without prejudice as to that defendant unless good cause can be shown as to why service could not be made.

[Comment adopted effective March 1, 1986; amended effective February 1, 1990; July 1, 1998; April 13, 2000.]

FOCUS - 2 of 3 DOCUMENTS

MISSISSIPPI COURT RULES ANNOTATED

*** THIS SECTION IS CURRENT THROUGH APRIL 18, 2007 ***

MISSISSIPPI RULES OF CIVIL PROCEDURE
CHAPTER III. PLEADINGS AND MOTIONS

M.R.C.P. Rule 12 (2007)

Review Court Orders which may amend this Rule

Rule 12. Defenses and objections -- when and how presented -- by pleading or motion -- motion for judgment on the pleadings.

(a) When presented. A defendant shall serve his answer within thirty days after the service of the summons and complaint upon him or within such time as is directed pursuant to Rule 4. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within thirty days after the service upon him. The plaintiff shall serve his reply to a counter-claim in the answer within thirty days after service of the answer or, if a reply is ordered by the court, within thirty days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

The times stated under this subparagraph may be extended, once only, for a period not to exceed ten days, upon the written stipulation of counsel filed in the records of the action.

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,

(2) Lack of jurisdiction over the person,

(3) Improper venue,

(4) Insufficiency of process,

(5) Insufficiency of service of process,

(6) Failure to state a claim upon which relief can be granted,

(7) Failure to join a party under Rule 19.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15(a).

(c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15 (a).

(d) Preliminary hearings. The defenses specifically enumerated (1) through (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings (subdivision (c) of this rule), shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or preservation of certain defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by a motion under this rule nor included in a

responsive pleading or an amendment thereof permitted by Rule 15 (a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion that the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action or transfer the action to the court of proper jurisdiction.

NOTES:
COMMENT

The purpose of Rule 12 is to expedite and simplify the pretrial phase of litigation while promoting the just disposition of cases. The periods of time referred to in Rule 12(a) relate to service of process, motions, pleadings or notices, and not to the filing of the instruments. Because of the nature of divorce cases, Rules 12(a)(1) and (2) do not apply to such proceedings. See also M.R.C.P. 81(b). Rule 12(a) represents a marked change from the former procedures which linked the return date or response date to a term of court. See Miss. Code Ann. §§ 11-5-17; 11-7-121; and 13-3-13 (1972).

Rules 12(b)(6) and 12(c) serve the same function, practically, as the general demurrer. See Investors Syndicate of America, Inc. v. City of Indian Rocks Beach, Florida, 434 F.2d 871, 874 (5th Cir. 1970). They are the proper motions for testing the legal sufficiency of the complaint; to grant the motions there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim.

If the complaint is dismissed with leave to amend and no amendment is received, the dismissal is a final judgment and is appealable unless the dismissal relates to only one of several claims. See Ginsburg v. Stern, 242 F.2d 379 (3rd Cir. 1957).

A motion pursuant to Rule 12(c) may be granted if it is not made so that its disposition would delay the trial; the moving party must be clearly entitled to judgment. See Greenberg v. General Mills Fun Group, Inc., 478 F.2d 254, 256 (5th Cir. 1973).

Under 12(d), the decision to defer should be made when the determination will involve the merits of the action, thus making deference generally applicable to motions on Rules 12(b)(6) and (c).

Rule 12(e) abolishes the bill of particulars. Miss. Code Ann. § 11-7-97 (1972). The motion for a more definite statement requires merely that -- a more definite statement -- and not evidentiary details. The motion will lie only when a responsive pleading is required, and is the only remedy for a vague or ambiguous pleading.

Ordinarily, Rule 12(f) will require only the objectionable portion of the pleadings to be stricken, and not the entire pleading. Motions going to redundant or immaterial allegations, or allegations of which there is doubt as to relevancy, should be denied, the issue to be decided being whether the allegation is prejudicial to the adverse party. Motions to strike a defense for insufficiency should, if granted, be granted with leave to amend. Rule 12(f) is generally consistent with past Mississippi

procedure. See Miss. Code Ann. § 11-7-59(3) (1972); Parish v. Lumbermen's Mut. Cas. Co., 242 Miss. 288, 134 So.2d 488 (1961).

Rule 12(g) allows the urging of all defenses or objections in one motion with no waiver. There are three important qualifications which permit at least two rounds of motions: (1) the requirement of consolidation applies only to defenses and objections then available to the moving party; (2) the requirement applies only to defenses and objections which this rule permits to be raised by motion; (3) the prohibition against successive motions is subject to the exceptions stated in Rule 12(h).

Rule 12(h)(1) states that certain specified defenses which may be available to a party when he makes a pre-answer motion, but which he omitted from the motion, are waived. A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of Rule 12(g) forbidding successive motions. 5 Wright & Miller, Federal Practice and Procedure, Civil § 1391 (1969).

Rule 12(h)(2) preserves three defenses against waiver during the pleading, motion, discovery, and trial stages of an action; however, such defenses are waived if not presented before the close of trial. 5 Wright & Miller, supra, § 1392.

Under Rule 12(h)(3) a question of subject matter jurisdiction may be presented at any time, either by motion or answer. Further, it may be asserted as a motion for relief from a final judgment under M.R.C.P. 60(b)(4) or may be presented for the first time on appeal. Welch v. Bryant, 157 Miss. 559, 128 So. 734 (1930); Brown v. Bank, 31 Miss. 454 (1856). This provision preserves the traditional Mississippi practice of transferring actions between the circuit and chancery courts, as provided by Miss. Const. § 157 (all causes that may be brought in the circuit court whereof the chancery court has jurisdiction shall be transferred to the chancery court) and § 162 (all causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court), but not reversing for a court's improperly exercising its jurisdiction, Miss. Const. § 147. Cazeneuve v. Curell , 70 Miss. 521, 13 So. 32 (1893).

[Amended effective February 1, 1990.]