

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**NO. 2008-CA-00373**

KENNETH JOHNSON

APPELLANT

V.

JOHN PAUL LEE, et al.

APPELLEES

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**REPLY BRIEF OF APPELLANT**

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*ORAL ARGUMENT NOT REQUESTED*

Mark D. Morrison, MS. [REDACTED]  
ADCOCK & MORRISON, PLLC  
199 Charmant Drive, Suite 1  
Post Office Box 3308  
Ridgeland, Mississippi 39158  
Tel.: (601) 898-9887  
Fax.: (601) 898-9860

**ATTORNEY FOR APPELLANT,  
KENNETH JOHNSON**

II. TABLE OF AUTHORITIES

Miss. Code Ann. §11-1-58 ..... 2

MRCP 4 ..... 5

MRCP 12(b)(6) ..... 1

MRCP 56 ..... 1, 3

Uniform Circuit Court Rule 4.04 ..... 1, 2, 3

### III. REPLY TO BRIEF OF APPELLEE, JOHN PAUL LEE, M.D.

Dr. Lee's initial argument on appeal is that the vehicle by which Johnson's claims and causes of action against him were dismissed was a dispositive motion under MRCP 56, and thus any reference to cases addressing a dismissal under MRCP 12(b)(6) are inapplicable. True enough, Lee's motion (C.P., p. 29) and the trial court's ensuing order (C.P., p. 93) granting the same are literally couched in terms of an MRCP 56 dismissal; however, a closer examination of the underlying basis of each reveals a distinction without a difference. Specifically, Lee filed his dispositive motion on or about December 20, 2007, seeking a dismissal on the pleadings, or lack thereof, based upon the absence of a formal expert designation by Johnson under Uniform Circuit Court Rule 4.04's "60-Day Deadline." It was not until January 3, 2008 that the affidavit of Dr. Tenore was signed and later filed in support of their motion, thereby technically taking the same outside of the pleadings and procedurally converting it to a true MRCP 56 dispositive motion. By this time, Johnson had already prepared and sent for filing his response to the original dispositive motion, addressing the Rule 4.04 argument therein. Perhaps most important is the actual basis of the trial court's ruling, as set forth in the February 4, 2008 order, which clearly states that the dismissal was predicated upon a failure to comply with Rule 4.04, and does not in any way or fashion address the merits of the affidavit submitted by Dr. Tenore. Thus, Dr. Lee requested and received a dismissal based upon the pleadings, or lack thereof, and thus he cannot now be heard to complain of the legal authorities addressing the propriety of such rulings under Mississippi case law addressing MRCP 12(b)(6) dismissals.

It is next argued that although Johnson had sufficient time to pursue discovery in this matter, he failed to do so in a timely manner. Such argument is without merit as discovery was

in fact propounded to Dr. Lee prior to the filing of any dispositive motion on the latter's behalf. Much of Johnson's efforts early on in the subject litigation were focused upon responding to discovery, procuring a judgment by default against Medco, the scheduling of Johnson's deposition and working with the remaining manufacturing defendants towards a resolution of those claims. As set forth in his initial brief, Johnson likewise made a good-faith effort to obtain a continuance of the trial setting so that discovery could in fact be completed in a more timely manner, which fell upon deaf ears as counsel for Dr. Lee was apparently biding their time until the Rule 4.04 60-day deadline ran. In any event, this argument on behalf of Dr. Lee carries no weight and is little more than an attempt to distract this Court from the injustice worked upon Johnson by the trial court's premature dismissal of his claims against this particular party-Defendant below.

As noted above, Dr. Lee and his counsel place great emphasis upon the failure of Johnson to supply an actual affidavit from Dr. Ramsey or some other medical expert in support of their contention that dismissal was proper. Again, the trial court expressly dismissed the instant claims based upon a finding that Rule 4.04 was not met, failing to even mention any affidavit submitted by Dr. Tenore as the basis of the dismissal. On the other hand, and because the instant case was filed after January 1, 2003, it was incumbent upon Johnson and his counsel to obtain a pre-litigation expert consultation and certify that the same had occurred prior to even filing the instant claim against Dr. Lee pursuant to Miss. Code Ann. §11-1-58. While the complaint did not specifically identify Dr. Ramsey as the initial consulting expert, his identity was in fact known to Dr. Lee as of September 24, 2007, and he was specifically designated as an expert for trial as of January 30, 2008, prior to the trial court's granting of Dr. Lee's dispositive motion.

hearing.

#### IV. REPLY TO BRIEF OF APPELLEE, MEDCO

As anticipated, Medco and its counsel have responded by continuing to assert that the complaint in the underlying action was ripe for dismissal as it was not served upon an agent in the State of Mississippi. However, as addressed in Johnson's initial brief, this argument is without merit as such resident agent was not the agent for "Medco Health Solutions of Dublin," an Ohio corporate entity for whom no agent was specifically identified in this state. Service of process was perfected upon the very entity that sent notification to Johnson of the change of his prescription blood pressure medications. This fact, no matter how hard Medco's counsel tries, cannot be disputed as the documentation specifically indicates that such notices were sent from "Medco Health Solutions of Dublin."

Alternatively, Medco argues that service of process, even if upon the proper entity, was procedurally defective as it was not sufficiently restrictive on its face. However, even the most casual reading of the certified mail/return-receipt card (C.P., p. 27) and actual summons (C.P., p. 25) issued shows that the complaint was to be served upon "any officer, director, agent or other person duly authorized to accept service of process..." There has been no showing, factual or legal, that this was in fact insufficient or improper process, and thus the trial court's rulings to that effect are clearly erroneous. It is respectfully submitted that Johnson should not bear the heavy penalty of a dismissal with prejudice of his claims, simply because a Medco employee apparently charged with the responsibility of accepting the company's mail is either illiterate or absent minded, accepting process and then losing the important legal documents enclosed in such

mailing, a mailing that is clearly authorized under MRCP 4.

Finally, the notion that “good cause” was shown for the purported failure to serve the allegedly proper Medco entity within 120 days of the filing of the complaint is weak and disingenuous, at best. Johnson directs this Court’s attention to the undisputed chronology of events in this case: It wasn’t until nearly 5 months after actual service of process was perfected upon Medco, and nearly 3 months after Johnson had begun the process of obtaining a default judgment against the same, that he was informed for the first time that “Medco Health Solutions of Dublin” was allegedly not the proper party, in spite of the fact that it was the very entity with whom he had his sole dealings as it concerned the subject matter of this litigation. How and under what logic could anyone, including the trial court, conclude that Johnson was derelict in his efforts to proceed in a timely manner against the entity responsible for wrongfully changing his prescription blood pressure medication? What reasonable basis is there in the record to conclude that Johnson either knew or reasonably should have known, prior to the expiration of MRCP 4’s 120-day period, that the entity with whom he had his sole dealings was some fictitious shell of an entity, disguising the true culprit? Johnson respectfully submits that ample “good cause” was shown, and thus the trial court’s dismissal of Medco was improper, constituting an abuse of discretion as a matter of law.

## V. CONCLUSION

Based upon the foregoing, Johnson respectfully submits that the trial court abused its discretion when it dismissed Dr. Lee and Medco as party-Defendants to this litigation. No prejudice would have visited upon either defendant had the court simply continued the premature

trial setting and allowed the parties to continue litigating the claims between them on the merits.

By contrast, the court's dismissal of these claims has wholly and irrevocably deprived Johnson of his right to redress against these entities, adding insult to those injuries which prompted this litigation in the first instance.

RESPECTFULLY SUBMITTED,

KENNETH JOHNSON

BY: 

MARK D. MORRISON, MSB   
ATTORNEY FOR APPELLANT

OF COUNSEL:

ADCOCK & MORRISON, PLLC  
199 Charmant Drive, Suite 1  
Post Office Box 3308  
Ridgeland, Mississippi 39158  
Tel.: (601) 898-9887  
Fax.: (601) 898-9860

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199 Charmant Drive, Suite 1  
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Ridgeland, Mississippi 39158  
Tel.: (601) 898-9887  
Fax.: (601) 898-9860



**AMENDED CERTIFICATE OF SERVICE**

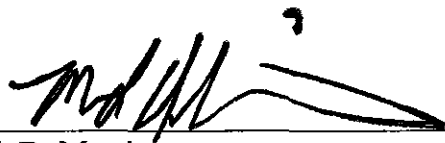
I, Mark D. Morrison, do hereby certify that I have this day delivered by United States mail, properly addressed and postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellant to:

Mildred M. Morris, Esq.  
Timothy L. Sensing, Esq.  
Post Office Box 650  
Jackson, Mississippi 39205

Joseph G. Baladi, Esq.  
J. Collins Wohner, Esq.  
Post Office Box 650  
Jackson, Mississippi 39205

Hon. Marcus D. Gordon  
Circuit Court Judge  
Post Office Box 220  
Decatur, Mississippi 39327

SO CERTIFIED, this the 18th day of December, 2008.

  
\_\_\_\_\_  
Mark D. Morrison

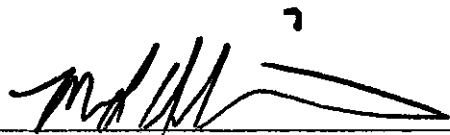
**CERTIFICATE OF SERVICE**

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Post Office Box 650  
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Joseph G. Baladi, Esq.  
J. Collins Wohner, Esq.  
Post Office Box 650  
Jackson, Mississippi 39205

SO CERTIFIED, this the 17th day of December, 2008.

  
\_\_\_\_\_  
Mark D. Morrison

**CERTIFICATE OF FILING**

I, Mark D. Morrison, do hereby certify that I have the day delivered, via United States mail, postage prepaid, the original and three (3) copies of the Reply Brief of Appellant and an electronic diskette containing the same on December 17, 2008, addressed to Ms. Betty W. Sephton, Clerk of the Mississippi Supreme Court, Post Office Box 249, Jackson, Mississippi 39205-0249.

  
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MARK D. MORRISON