IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00373

KENNETH JOHNSON — APPELLANT

V.

JOHN PAUL LEE, et al. — APPELLEES

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

Mark D. Morrison, MSB #[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

I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court Of Appeals may evaluate possible disqualification or recusal:

1. Honorable Marcus D. Gordon - Scott County Circuit Judge;
2. Kenneth Johnson - Plaintiff/Appellant;
3. John Paul Lee, M.D. - Defendant/Appellee;
4. Medco Health Solutions, Inc. - Defendant/Appellee;
5. Mark D. Morrison - Counsel for Plaintiff/Appellant;
6. Mildred M. Morris - Counsel for Defendant/Appellee, John Paul Lee, M.D.;
7. James A. Becker - Counsel for Defendant/Appellee, John Paul Lee, M.D.;
8. Timothy L. Sensing - Counsel for Defendant/Appellee, John Paul Lee, M.D.;
9. Joseph G. Baladi - Counsel for Defendant/Appellee, Medco Health Solutions, Inc.;
10. J. Collins Wohner - Counsel for Defendant/Appellee, Medco Health Solutions, Inc.

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IV. STATEMENT OF ISSUES

(A) Whether the trial court erred in granting Dr. John Paul Lee's Motion for Summary Judgment and denying Johnson's Motion for Continuance of Trial Setting and Entry of Scheduling Order.

(B) Whether the trial court erred in granting Medco's Motion to Set Aside Entry of Default & Dismiss and denying Johnson's Motion for Leave to Amend Complaint.

(C) Whether the trial court erred in denying Johnson's Motion for Reconsideration of the rulings identified in Issues (A) & (B) herein above.

V. STATEMENT OF THE CASE

Appellant, Kenneth Johnson, commenced the subject litigation in the Circuit Court of Scott County, Mississippi on or about July 3, 2007, seeking compensation for injuries arising out of an automobile accident that occurred on July 24, 2005. As set forth in the Complaint (C.P., pp. 3-8), it was and remains Johnson's contention that the improperly changing of his blood pressure medication prescription by Dr. John Paul Lee and Medco Health Solutions of Dublin was the proximate cause of said accident and his resulting injuries. The viability of a claim or cause of action against Dr. Lee was verified through a competent physician prior to the filing the instant suit and the required Certificate of Consultation was attached to the Complaint at the time of filing (C.P., p. 8). On the same date the Complaint was filed, summons were issued for all four (4) of the named party-Defendants, including Medco Health Solutions of Dublin (C.P., pp. 9-15).

Medco Health Solutions of Dublin was the sole entity with whom Johnson had any dealings

or communications regarding his prescription medications (C.P., pp. 63-66). Thus, it was this specific Defendant against whom his claims and causes of action were asserted, resulting in service of process being perfected against this non-resident entity by certified mail on July 31, 2007 (C.P., pp. 14-15). When no Answer or other responsive pleading was forthcoming from Medco, Johnson moved for and eventually obtained a Docket Entry of Default (C.P., p. 219). During the late Summer and early Fall of 2007, the parties engaged in preliminary discovery, including the exchange of written discovery requests, etc. When asked in discovery as to the identity of experts, Johnson responded by stating at that early juncture he might call Dr. Calvin Ramsey, the physician with whom his counsel had consulted prior to filing the Complaint, as well as a treating physician, Dr. Gayle Harrell (C.P., pp. 75-77). On or about November 19, 2007, the trial court peremptorily set this matter for trial on February 6, 2008, without regard to the availability of the parties and in spite of the fact much discovery remained to be completed. Thus, a mere 2 weeks remained under Uniform Circuit Court Rule 4.04's 60 day deadline before trial to designate Johnson's experts.

While attempting to coordinate deposition dates for Johnson and obtain an Agreed Order continuing the case (C.P., pp. 58-59), counsel for Dr. Lee and Medco were preparing and ultimately filed the dispositive motions which led to the Court's February 1, 2008 Orders underlying this appeal (C.P., pp. 93-96). As noted above, a Motion for Reconsideration was filed on behalf of Johnson, but no relief from the trial court's erroneous rulings was obtained (R.E., pp. 21-28). Consequently, Johnson timely appealed the dismissal of his claims against Dr. Lee and Medco to this Court (C.P., p. 235).

VI. SUMMARY OF THE ARGUMENT

The trial court abused its discretion in denying Johnson's Motion for Continuance and for

Entry of Scheduling Order, choosing instead to impose the most draconian sanction of dismissal based upon the determination that no satisfactory designation of Plaintiff's medical expert had occurred at least 60 days prior to trial as required by Uniform Circuit Court Rule 4.04. Johnson's expert was in fact known to defense counsel well more than 60 days prior to trial, and no harm or prejudice would have been visited upon any Defendant had the Court simply continued the trial setting and entered an appropriate scheduling order.

The trial court's dismissal of Medco was predicated upon an alleged violation of MRCP 4(h)'s 120 day time limit in which to perfect service of process. However, as borne out by the record in this matter, the Medco entity with whom Johnson had his direct dealings was not only timely served, but was in default at the time when the trial court allowed a parent or sister-company to enter an appearance and obtain a complete dismissal of Plaintiff's claims (C.P., pp. 46-47). Johnson respectfully submits that serving and obtaining a Docket Entry of the Default, against the very entity with whom he had his sole dealings and communication at the very heart of this litigation, is good cause for extending the time for service when, as apparently was the case, the technically wrong company or subsidiary was sued.

VII. ARGUMENT

(A) Dr. John Paul Lee:

Prior to commencing the instant litigation, counsel fulfilled the obligations of expert consultation mandated by Miss. Code Ann. §11-1-58 by obtaining preliminary oral opinions from Dr. Calvin Ramsey to the effect that Dr. Lee had in fact been guilty of medical malpractice in (1) acquiescing in Medco's decision to change Johnson's blood pressure medication prescription solely for the purpose of saving Medco monies; and (2) failing to provide competent medical advice and

evaluation following Johnson's pre-accident complaints of dizziness and/or fainting (C.P., p. 8). In response to Dr. Lee's first set of written discovery, Dr. Ramsey was identified as not only the initial pre-suit consulting expert, but likewise as a likely expert expected to testify at trial (C.P., pp. 75-77). However, due to the fact that the subject suit had been pending for less than three (3) months at the time Johnson's initial responses to Dr. Lee's discovery requests were due, no final determinations or opinions had been rendered by Dr. Ramsey.

On or about November 19, 2007, the trial court clerk sent out notice to all litigants on Judge Gordon's docket peremptorily setting this and all other active cases for trial. Specifically, and if memory serves correctly, this particular case was set behind approximately 100 other cases for trial during the first few days of February, 2008. While in the process of attempting to procure a Default Judgment against Medco, as well as work with counsel opposite to schedule Johnson's deposition, counsel for Dr. Lee was apparently waiting for the sixty (60) day deadline under Uniform Circuit Court Rule 4.04 to arrive so as to file the dispositive motion at issue in this appeal. Thus, Johnson's efforts to obtain an agreed continuance of the February 6, 2008 peremptory trial setting fell upon deaf ears (C.P., pp. 58-59). Subsequent to filing of Dr. Lee's dispositive motion, and in response to his request for supplemental discovery responses, more definitive preliminary opinions from Dr. Ramsey were in fact provided, only to be met with a Motion to Strike (C.P., pp. 153-156). Ultimately, on February 1, 2008, the trial court granted Dr. Lee's dispositive motion (C.P., pp. 93-94), and Johnson's February 8, 2008 Motion for Reconsideration was later denied by the trial Court (R.E., pp. 21-28), thus necessitating the instant appeal.

As this Court is undoubtedly aware, "it is only in extreme circumstances that a trial court should dismiss a suit for failure to comply with discovery requirements." Payne v. Whitten, 948

So.2d 427, 430 (Miss. 2007)(citing Pierce v. Heritage Props., Inc., 688 So.2d 1385, 1388 (Miss. 1997)); see also, Gilbert v. Ireland, 949 So.2d 784, 788 (Ms. Ct. App. 2006); Allen v. National R.R. Passenger Corp., 934 So.2d 1006, 1009 (Miss. 2006). In the instant case, it bears noting that this litigation had been pending a mere seven (7) months when it was summarily dismissed by the trial court. Further, at the time this matter was peremptorily set for trial, Johnson was afforded a mere span of approximately two (2) weeks in which to fully designate his experts when consideration is given to Uniform Circuit Court Rule 4.04's "60 Day Rule". There was also no effort by Dr. Lee or his counsel to formally compel any more definitive designation of Johnson's expert(s). See, Ford Motor Co. v. Tennin, 960 So.2d 379, 393 (Miss. 2007) (Proper course of action for incomplete discovery responses is to seek order compelling same with request for monetary sanctions).

In any event, established case law provides the following factors to be considered on appeal when determining whether dismissal with prejudice is the appropriate remedy:

> (1) whether the discovery violation resulted from wilfulness or any inability to comply; (2) whether the deterrent value of the discovery sanctions rule could not have been achieved through lesser sanctions; (3) whether the other party's trial preparation has been prejudiced; (4) whether the failure to comply is attributable to the party itself, or their attorney; and (5) whether the failure to comply was a consequence of simply confusion or a misunderstanding of the trial court's order.

Beck v. Sapet, 937 So.2d 945, 948 (Miss. 2006)(citing Pierce, 688 So.2d at 1389). Under these factors, Johnson respectfully submits that the trial court abused its discretion by ordering a dismissal of his claims against Dr. Lee.

First, the failure to fully designate Dr. Ramsey more than 60 days prior to the premature trial setting of February 6, 2008 was not the result of any wilfulness; rather, it was the result of naively assuming that counsel for Dr. Lee would respond to the request for an agreed continuance of a

peremptory trial setting by the trial court, which was clearly without regard to the preparedness of either side for trial, when formal discovery was just beginning.

Second, lesser sanctions, if indeed any at all were warranted, could have been effectuated. As noted previously, a motion to compel supplemental responses could have been filed, and if no satisfactory responses obtained therefrom, a monetary assessment could have been imposed. Further, a continuance could have been granted, with a firm and final trial date assigned by the trial court. In fact, a formal continuance and scheduling order was requested by Johnson, but ignored by the trial court in favor of a complete dismissal (C.P., pp. 53-56).

Third, Dr. Lee and his counsel were not prejudiced in any way, shape or form in their trial preparation as it is doubtful that any meaningful efforts in that regard had occurred in the few short months this matter had been pending. As noted previously, this case was merely one of approximately 100 cases set on the trial court's docket for February 6, 2008, and thus the likelihood that this then four (4) month old case would actually go to trial was "slim to none".

Fourth, the "blame", if any, for failing to fully and definitively designate Dr. Ramsey as a "will call" expert witness at trial a mere 4-5 months after the suit was filed falls not upon Johnson, but upon his counsel, if anyone. Thus, Johnson should not be penalized in his pursuit of justice against Dr. Lee.

Finally, and as noted previously, the absence of a complete and definitive expert designation of Dr. Ramsey was not the result of any confusion; rather, it emanated from the naive belief that all counsel would be agreeable to a continuance of the premature and peremptory trial setting, given the obvious fact that much discovery was needed to frame the issues surrounding liability and damages (C.P., pp. 58-59). The undersigned has practiced in this circuit court district regularly during the past

seventeen (17) years, and never before had difficultly in obtaining voluntary continuances of what are obviously peremptory and often premature trial settings. Dr. Lee and his counsel saw a procedural means by which to utilize Uniform Circuit Court Rule 4.04 to their advantage, and they took it and used it to its fullest extent. Thus, the present circumstances are not the result of misunderstanding any court order, but of being oblivious to counsel opposite's intentions.

Thus, Johnson respectfully submits to this Court that the trial judge in fact abused his discretion in fully and finally dismissing his claims against Dr. Lee, especially under the facts and circumstances set forth immediately above. No prejudice would have been visited upon Dr. Lee or his counsel had the trial court denied their dispositive motion, continued the premature trial date, and entered a scheduling order to ensure that this litigation proceeded to an orderly disposition on the actual merits. Alternatively, the trial court could, and should, have granted Johnson's MRCP 56(f) request for additional time to respond to Dr. Lee's dispositive motion (C.P., pp. 89-90). Special circumstances exist under these facts, and therefore Johnson requests that this Court reverse and remand this case for a resolution on the facts and law. See, Brennan v. Webb, 729 So.2d 244, 246 (Ms. Ct. App. 1998).

(B) Medco Health Solutions of Dublin:

At the very heart of this litigation is Medco and Dr. Lee's decision to change Johnson's blood pressure medication prescription solely for purposes of saving Medco and/or Johnson's General Motors health plan money. On or about July 7, 2005, Medco sent a "Prescription Change Notification" to Johnson, advising him that it and Dr. Lee had made a decision to change his prescription from Avalide to Benicar HCT Tabs (C.P., pp. 63-64). On the face of this critical document, it clearly identifies "Medco Health Solutions of Dublin" as the source of this decision and

notification. Thus, when Johnson suffered certain side effects (i.e., dizziness & fainting), resulting in a serious automobile accident, it was "Medco Health Solutions of Dublin" that was properly named as a party-defendant in the Complaint. Being that this defendant was a non-resident of the State of Mississippi, a summons was issued on the day the complaint was filed and served upon Medco via certified mail in accordance with MRCP 4. On or about July 31, 2007, a "Vincent Smith" signed for the summons and complaint, which was directed to any officer, director or agent of Medco (C.P., pp. 14-15). When Medco failed to answer or otherwise plead in defense of the complaint, a docket entry of default (C.P., p. 45) was entered against it by the Scott County Circuit Clerk, resulting in a Motion for Default Judgment having been filed against Medco on or about October 10, 2007 (C.P., pp. 47-48).

Miraculously, Medco Health Solutions, Inc. apparently learned of the docket entry of default and hired Dr. Lee's law firm to enter a "special appearance," and move to set aside the default and move for a dismissal under MRCP 4(h)'s 120 day rule for service of process. Johnson responded to Medco's motion by offering to voluntarily set aside the docket entry of default, amend his complaint, and proceed against "Medco Health Solutions, Inc." based upon counsel opposite's representations to the trial court that it was the proper entity in spite of the documentary evidence to the contrary (C.P., pp. 60-62). For reasons which may never become apparent to Johnson, the trial court granted Medco's dispositive motion (C.P., pp. 95-96), and when coupled with the erroneous dismissal of Dr. Lee (and prior settlement with the manufacturer defendants), effectively terminating this litigation as to all Defendants.

First and foremost, Mississippi law is clear to the effect that the party upon whom process has allegedly been improperly served is the only party to have standing to seek dismissal under

MRCP 4(h) and/or MRCP 12(b)(4) or (5). Burleson v. Lathem, 968 So.2d 930, 933-34 (Miss. 2007)(citing Rains v. Gardner, 731 So.2d 1192, 1195 (Miss. 1999)). In the present case, "Medco Health Solutions of Dublin" never, ever, appeared (specially or otherwise) for any purpose. Thus, the trial court's decision to allow another, admittedly separate "Medco" entity to move and obtain a dismissal was reversible error, as this latter entity clearly lacked standing under Burleson & Rains.

The very language of MRCP 4(h) provides that:

> 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.

Thus, where "good cause" is shown, alleged defects in service of process may be cured. As this Court is undoubtedly aware, many of the cases in our jurisprudence addressing MRCP 4(h) deal with factual scenarios in which process was either intentionally withheld by plaintiff's counsel, and later served beyond the time limit, or process was issued upon the filing of the complaint, and for a variety of reasons, not perfected until more than 120 days later.

In the instant case, none of these events occurred. Process was issued immediately upon filing of the complaint (C.P., pp. 13), and service was perfected upon the ***VERY ENTITY FROM WHOM JOHNSON RECEIVED HIS PRESCRIPTION CHANGE NOTIFICATION***, all of which occurred within thirty (30) days (C.P., pp. 14-15). Thus, it cannot be said that Johnson or his counsel were dilatory in their efforts to serve Medco. Accepting as true the assertions of Medco's counsel that "Medco Health Solutions, Inc." is the real-party in interest as it pertains to the nature of Johnson's claims, then the proper, equitable and most just solution would have been for the trial

court to have set aside the docket entry of default against "Medco Health Solutions of Dublin" and granted Johnson leave of court to amend his complaint and substitute the purportedly proper Medco-entity as a defendant.

The case law in Mississippi is scant as it concerns the application of MRCP 4(h) to factual scenarios involving the alleged misidentification of a party-defendant. However, Johnson welcomes the Court to compare and contrast the facts and circumstances of Triple "C" Transport, Inc. v. Dickens, 870 So.2d 1195, 1198 (Miss. 2004), with those in the instant case. While "good cause" may have been lacking in Dickens, it is respectfully submitted that the same cannot be said of Johnson's efforts at service of process in this litigation.

Finally, in balancing the equities to meet the ends of justice, Johnson respectfully submits that the trial court abused its discretion because the prejudice visited upon his claim against Medco was great and complete. Simply stated, while MRCP 4(h) mandates such dismissals to be "without prejudice," the net effect of the dismissal in this case, given the applicable two (2) year statute of limitations, was that it was truly "with prejudice." On the other hand, there would have been absolutely no harm visited upon "Medco Health Solutions, Inc." if the trial court had set aside the docket entry of default against its kindred entity, and thereafter, allowed Johnson to amend his complaint and proceed accordingly. A trial court certainly does not abuse its discretion when balancing the equities and giving parties their rightful "day in court." See, e.g., Tunek v. Windham, 897 So.2d 186, 188 (Ms. Ct. App. 2004)(Good cause shown where delay in service was slight).

VIII. CONCLUSION

Based upon the foregoing, Johnson respectfully submits that the trial court wrongfully dismissed his case as to these Defendants, unnecessarily imposing the harshest of sanctions, thereby

abusing its discretion and denying him his rightful day in court. Accordingly, Johnson requests that this Court reverse and remand this case to the Circuit Court of Scott County, Mississippi for a trial on the merits, thereby refusing to countenance the procedural maneuverings that have occurred to date. Johnson prays for such further or additional relief, whether legal or equitable, to which he may be entitled in the premises.

RESPECTFULLY SUBMITTED,

KENNETH JOHNSON

BY: 

MARK D. MORRISON, MSB [redacted]
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

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

SO CERTIFIED, this the 8th day of October, 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 Brief of Appellant and an electronic diskette containing the same on October 8th, 2008, addressed to Ms. Betty W. Sephton, Clerk of the Mississippi Supreme Court, Post Office Box 249, Jackson, Mississippi 39205-0249.

MARK D. MORRISON

AMENDED CERTIFICATE OF SERVICE

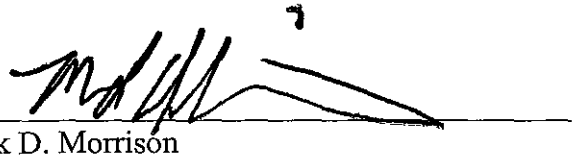
I, Mark D. Morrison, do hereby certify that I have this day delivered by United States mail, properly addressed and postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellant to:

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

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

SO CERTIFIED, this the 13th day of October, 2008.



Mark D. Morrison