IN THE SUPREME COURT OF MISSISSIPPI

DELFENIA RAINEY — APPELLANT

VS. — CAUSE #2009-CA-01577

GRAND CASINOS, INC., CAESARS ENTERTAINMENT, AND HARRAHS OPERATING COMPANY — APPELLEE

APPELLANT'S BRIEF IN CHIEF

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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 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.

Honorable Albert Smith
Tunica Circuit Judge

Thomas U. Reynolds, Esq.
Stewart Guernsey, Esq.
Reynolds' Law Firm

Delfenia Rainey, Plaintiff/Appellant

Robert Moore, Esq.

Dawn Carson, Esq.
Heaton and Moore, P.C.

Grand Casinos, Inc

Caesar's Entertainment, Inc

Harrah's Operating Company

BL Development Corp.

BL Development Corp. d/b/a Grand Casino Tunica

SO CERTIFIED this 19 day of January, 2010.

DELFENIA RAINEY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

1. Case Law

STATEMENT OF ISSUES

1. Did the Tunica Circuit Court err in dismissing the instant case on Summary Judgment for failure of service of process on the proper party, BL Development Corp. or BL Development Corp. d/b/a Grand Casinos?

2. Did the lower court err in denying Plaintiff's Motion to Amend her Complaint?

STATEMENT OF THE CASE

On or about July 30, 2004, Ms. Delfenia Rainey went to engage in gaming and entertainment at the lawful enterprise commonly known as the Grand Casino in Tunica, Ms. Unfortunately, during the course of the visit, Ms. Rainey sustained a "slip and fall injury" and concomitant medical damages.

On July 30, 2007, Ms. Rainey filed a lawsuit against Grand Casinos, Inc. Caesar's Entertainment, Inc., and Harrah's Operating Company for damages occasioned by the negligence of the casino owners and operators. In numbered paragraph 2 of her Complaint, Plaintiff included the following language (TR. 006): "Plaintiff further names as Defendants, any and all such corporation or corporations, at the time of the filing of this Complaint, that are either the owner or holder of such properties where Plaintiff herein was negligently injured."

All Defendants answered, denying that they owned or operated the Grand Casino on the pertinent date or on any date at all. They failed to allege any insufficiency of process and asserted negligence on the part of Plaintiff. Discovery proceeded.

On or about April 1, 2009, Defendants filed their Motion For Summary Judgment based on service of the wrong corporation. Plaintiff answered and the Court heard argument on July 8, 2009. At the conclusion of the argument, the Court requested further briefing.

Defendants timely submitted their brief, as did Plaintiff. Unfortunately, a new secretary (in training) sent Plaintiff's brief to the Tunica Circuit Clerk, (appropriately), but not to the trial judge. Hence, on August 19, 2009, the Court granted Defendants' motion and dismissed the case. Plaintiff responded with a MRCP 59 motion for reconsideration, explaining the mishap. On September 10, 2009, the lower court issued a second order granting dismissal on the

basis that, "if an amended complaint is filed after the statute of limitations has run, regardless of when the motion to amend was made, the statute of limitations bars the suit against the newly named Defendants." (TR.123)

At or near the time of filing Plaintiff's Supplemental Brief, Plaintiff had filed with the Circuit Court her Motion to Amend Complaint, (TR. 106, et seq), as well as a First Amended Complaint. The trial judge erroneously stated in his Supplemental Order that no such motion had been filed. (TR. 123).

From the Court's original Order of August 19, 2009, granting judgment as a matter of law, and from the Supplemental Order of September 10, 2009, affirming the prior summary judgment and denying Plaintiff's Motion to Amend Complaint, this appeal arises.

SUMMARY OF THE ARGUMENT

There is no longer any doubt in this electronic information society, (if there ever were), that computers and the web that links them, are here to stay. Instant information, at least in the field of law, has replaced for better and worse the necessity of counsel digging through corporate records and documents located in various places. This case is a cautionary tale about the risks of relying on such "instant information."

As soon as Plaintiff's counsel received a copy of Defendants' Motion For Summary Judgment, Counsel requested a computer-savvy staff member to research the records of corporate ownership of the Grand Casino. An Attorney Affidavit was attached to Plaintiff's Response, (TR. 61) together with a WIKIPEDIA article purporting to outline the ownership history and corporate documents which appeared to substantiate the article. (TR. 67-72). While the Wikipedia article was updated in June, 2009, it is believed that an earlier version or a similar article was relied on by Plaintiff in naming Defendants. It is crucial to note, however, that Plaintiff's original Complaint contained language referencing MRCP 9 (h) as to "such" corporation or corporations owning or operating the casino. It is also important to note that the Gaming License at the time of Plaintiff's accident was in the name of BL Development Corp. D/B/A Grand Casino Tunica. (Emphasis added, TR. 90).

It cannot be denied that Plaintiff relied to her detriment on the Wikipedia article mentioned above, even in her initial Response to Defendants' Motion For Summary Judgment. Upon receipt of Defendant's Reply (after the July 8 hearing), Plaintiff changed course, seeking refuge in MRCP 15 © to correct the incorrect information on which she replied.

Plaintiff will show in this brief that all elements of MRCP 15 © were met, since Plaintiff

pled against "such" corporations that owned or operated the facility. By reason of interlocking directorates, common counsel, and other reasons to be shown, Defendants had timely knowledge of the lawsuit, and knew, (as the pleadings clearly show), that but for a mistaken name, that BL Development would have been sued.

For all of these reasons and others to be argued herein, Appellant prays that this Court will reverse the ruling of the Tunica Circuit Court dismissing the case with prejudice and enter its Order permitting Plaintiff/Appellant to amend her complaint. Plaintiff prays for general relief.

ARGUMENT

Issue: Did the Tunica Circuit Court err in dismissing the instant case on Summary Judgment for failure of service of process on the proper party, BL Development Corp. or BL Development d/b/a Grand Casino?

Yes, the Circuit Court erred in granting Summary Judgment for incorrect service of process. First, Defendants failed to plead MRCP 12 (b) (2), (4), or (5) in their Answer. MRCP 12 (h) (1) states: "A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process in waived (A) if omitted from a motion in the circumstances described in sub-division (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."

It is important to note that the Defendants were served in July, 2007. Their Answer did not raise any 12 (b) defense. They proceeded with and participated in discovery for nearly two (2) years before bringing their motion.

In East Mississippi State Hosp. V. Adams, 947 So.2d 887 (MS. 2007), the Supreme Court considered a similar fact pattern. The major difference in the facts of Adams and the instant case is that in Adams the Defendants asserted their 12 (b) defenses in their Answer. This is not the situation in the instant case, where no mention of Rule 12 is in the Answer.

Having pointed out this distinction, discussed in ¶ 12, p.891 of Adams, Plaintiff here cites the ruling in Adams that Defendants have waived their MRCP 12 defenses:

¶ 10. The other important question to be answered in this interlocutory appeal is whether the defendants waived the defenses of insufficiency of process and insufficiency of service of process by failing

to pursue them until almost two years after they raised them in their answer while actively participating in the litigation. M.R.C.P. 12(h)(1), which addresses waiver of insufficiency of process if neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof, is not applicable here, as the defendants raised the defenses of insufficient process and insufficient service of process in a responsive pleading (the answer). The Court of Appeals recently adopted the rule that "[o]nce the defense of failure of service of process has been made in the responsive pleading, it is not waived by the mere submission of other pleadings in the case, nor even by participation in a trial on the merits." *Page v. Crawford,* **883 So.2d 609**, 612 (Miss.Ct.App. 2004); *see also Mitchell v. Mitchell,* **767 So.2d 1078**, 1085 (Miss.Ct.App.2000). However, this Court has recently held to the contrary, in *MS Credit Center, Inc. v. Horton,* **926 So.2d 167**, 181 (Miss.2006), which addressed the waiver of affirmative defenses in an arbitration case, but went on to announce:

> Our holding today [in *Horton*] is not limited to assertion of the right to compel arbitration. A defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver.

¶ 11. As set forth supra, defendants participated fully in the litigation of the merits for over two years without actively contesting jurisdiction in any way. They participated fully in discovery, filed and opposed various motions. While the defendants may have literally complied with Rule 12(h), they did not comply with the spirit of the rule. On this record we conclude that the defendants waived the defenses of insufficiency of process and insufficiency of service of process. The trial court's exceptionally well reasoned and written Memorandum Opinion and Judgment denying defendants' motion to dismiss or in the alternative for summary judgment is affirmed.

CONCLUSION

¶ 12. The defendants properly and timely raised the defenses of insufficient process and insufficient service of process in their answer. However, defendants' subsequent participation in this litigation, together with their failure to pursue these defenses for two years after the case began, waived these defenses. Therefore, we affirm the trial court's denial of defendants' motion to dismiss, lift the stay imposed by this Court pending resolution of this interlocutory appeal, and remand this case to the trial court for further proceedings consistent with this opinion.

¶ 13. **AFFIRMED AND REMANDED.**

See also Grimes v. Warrington, 982 So.2d 365, 369-70 (Miss. 2008); MS Credit Ctr. Inc., v. Horton, 926 So.2d 167, 180 (Miss. 2006); Stuart v. UMMC, 2007-CT-00864-SCT, ¶ 9 (Miss. 2009).

Having failed to preserve the defense in their Answer and having engaged in almost two (2) years of litigation, Defendants have waived this affirmative defense. Having waived the defense itself, Summary Judgment may not be based on the waiver.

Hence, the Tunica Circuit Court erred in granting summary judgment. This honorable Court should reverse and remand for trial.

Issue: Did the lower court err in denying Plaintiff's Motion to Amend her Complaint?

Yes, the Court erred in denying Plaintiff's MRCP 15 © Motion to Amend. It is clear that the trial judge did not see the Motion to Amend. (TR. 123). In his Supplemental Order, (id), the judge characterizes Plaintiff's Supplemental Response as an attempt to relate the Amended Complaint back to the date of filing. His Honor then made the point without any analysis of MRCP 15 © , that since the statute of limitations had passed, no "new" parties may be joined. This is simply not the law. This matter should be reversed.

The seminal case of general precedent as to Amendment of parties and party names is Bedford Health Prop. V. Estate of Williams, 946 So.2d 335 (MS 2006), (hereinafter, Bedford). Bedford is currently authoritative, resolving a conflict of interpretation which existed prior to its publication.

The Bedford court distinguished between MRCP 15 (1) and (2) Amendments and MRCP 9 (h) amendments, adding a due diligence requirements to 9(h) amendments. Rule 15

amendments, conversely, relate back under proper circumstances where, (citing Ralph Walker, Inc. V. Gallagher, 926 So.2d 890, 894-95 (Miss.2006)):

> Thus, it is not that one of the requirements of Rule 15(c) is that the amendment change a party; instead, it is that only those amended pleadings which do change a party are the pleadings which have three requirements. To pinpoint the rules it applies to this case, the three requirements of a complaint that changes a named defendant are: (1) the claim in the amended complaint must arise out of the same conduct, transaction, or occurrence as that set forth in the original complaint; (2) the newly-named defendant must have received notice of the action within the 120 days; and, (3) the newly-named defendant must have or should have known that an action would be brought against him within the 120 days unless a mistake existed as to the parties' identities.

The court in Bedford used seven indicia that the originally named Defendants received notice of the filing and knew that, but for a mistake as to identity, the Defendants in the Amended Complaint would have been the true parties. The case at bar is even stronger because Defendants admitted at hearing that they knew a mistake had been made and that the proper party would have been served but for mistake. The Bedford Court factors (not intended, Plaintiff asserts, to be a bright-line "test" or exclusive set of criteria), are found at 349-50:

> ¶ 39. We first will address the four Original/Amended Defendants that were named in both the original complaint and the amended complaint, those being, Bedford Health Properties, L.L.C.; Hattiesburg Medical Park, Inc.; Hattiesburg Medical Park Management Corporation; and Michael E. McElroy, Sr. We find that the facts of this case are unique and merit close review. **First**, as stated above these four defendants were named in the original and amended complaints. **Second,** one of the corporate entities, Bedford Health Properties L.L.C., owned both Conva-Rest of Hattiesburg and Conva-Rest of Northgate. **Third,** Michael E. McElroy, Sr., had 26% ownership interest in Bedford Health Properties, L.L.C., which owned Conva-Rest of Hattiesburg and Conva-Rest-Northgate. **Fourth,** in addition to his ownership interest, Michael E. McElroy, Sr., was served both the original and emended complaint in his capacity as licensee of Conva-Rest of Hattiesburg and administrator of Conva-Rest-Northgate. **Fifth,** Michael E. McElroy, Sr. And Jr., were the registered agents for all the corporate entities served in the original complaint and amended complaint. **Sixth,** defense counsel was the same for all the Original Defendants and the Amended Defendants.

> **Seventh,** the corporate entities all have the same address. **Finally,** while the same corporate counsel may not be a decisive factor, it imparts more weight here because of all the other intertwined relationships in this case.
>
> ¶ 40. Notwithstanding the unique circumstances of this case, the four Original/Amended Defendants knew that there was simply a mistake in the location and corresponding personnel of the Estate's claims. In fact, the defendants pointed out the incorrect location of the nursing home to the Estate in their answers. Furthermore, the injuries alleged to be suffered by Williams were the same, and the same eight claims stated in the amended complaint were stated in the original complaint. No new claim was added to the amended complaint.

In the instant case, Grand Casino is named in both Complaints. BL Development owns the Grand Casino and continues to maintain its reservation of name. Third, BL Development and Grand Casino, Inc., have the same President, Gary W. Loveman, the same Vice-President, John Payne, the same Secretary, Michael D. Cohen, the same Vice President, Treasurer, Director, Jonathan S. Halkyard, and the same Assistant Secretary, Anthony D. McDuffie. Harrah's Operating Company, Inc., has the exact same officers. On information and belief, ownership of the Corporation stock is identical or similar in BL Development Corp., Grand Casino, Inc., and Harrah's Operating, Inc. Fourth, BL Development, Grand Casino, and Harrah's Operating, Inc., all have the same registered agent for service of process, Corporation Service Company. The service of process on the interlocking boards, as admitted by defense counsel, gave notice to BL Development of the mistake in identity. On information and belief, counsel for BL Development also represents Grand Casinos, Inc., and Harrah's Operating Co., Inc. The corporate addresses for BL, Grand and Harrah's Operating Co. are all the same. Plaintiff confesses that Caesars Entertainment was involved, if at all, as a contractor with BL Development.

Since all parties Defendant are corporate, BL Development meets the second and third parts of the Walker case, as they have readily admitted. The Court will see from the proposed Amended Complaint attached to the Motion to Permit Amendment that all claims are exactly the same. Only the names have been changed.

Plaintiff asserts that the Court should permit a Rule 15 © amendment not substituting a party but simply correcting an error reasonably made by counsel in reliance on public information. Plaintiff prays for costs and fees. Plaintiff also prays for general relief.

It should be noted that the seven Bedford indicia of notice of filing and mistaken name are fulfilled substantially in the case at bar. It is of little consequence, though. Since Defendant admitted in open Court that BL Development comprised of the identical directors as Harrah's and Grand Casino, Inc., knew of the lawsuit and the mistake of identity. (TR. 102). Additionally, the proposed Amended Complaint "chang[ed] the party against whom a claim is asserted." See TR. 92, et seq, substituting BL Development for all other parties Defendant.

For all of the above reasons, the trial court erred in denying Plaintiff's MRCP 15 (c) motion. Appellant prays that the Court will reverse and remand this case for trial under the Amended Complaint.

CONCLUSION

After all is said and done, this is a case about MRCP 9 and 15. Plaintiff used the "fictitious" name "such corporation" and, when the true entity was discovered, she sought to substitute the true name for the fictitious one.

Alternatively, all elements of MRCP 15 (c) have been met. The trial court simply erred in denying Plaintiff's Motion to Amend.

Finally, Defendants waived their process issues by not placing them in their Answer or timely filing a Motion to Dismiss before litigating for nearly two (2) years. Therefore, their Motion should have been denied and should now be reversed.

Respectfully Submitted this 19 day of January, 2010.

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CERTIFICATE OF SERVICE

I, STEWART GUERNSEY, attorney for Plaintiff do hereby certify that I have this day mailed, first class mail, postage prepaid, a true and correct of the foregoing Appellant's Brief in Chief to:

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This the 19 day of January, 2010.

Stewart Guernsey
STEWART GUERNSEY