

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI,  
ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND  
JUDICIAL DISTRICT OF BOLIVAR COUNTY, MISSISSIPPI

KIMBALL GLASSCO RESIDENTIAL CENTER, INC.  
and VERA RICHARDSON

APPELLANTS

VS.

CAUSE NO. 2009-M-01617-SCT

TERRANCE SHANKS AS NEXT OF KIN OF LOIS SHANKS

APPELLEE

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**REPLY BRIEF OF APPELLANTS, KIMBALL GLASSCO  
RESIDENTIAL CENTER, INC. and VERA RICHARDSON**

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## **STATEMENT OF THE FACTS**

The Appellants will not restate the facts of this case here but are compelled to clarify one misleading statement made by Shanks in her responsive brief. On page 3 of her responsive brief, Shanks states that “the July 28, 2006 Mississippi Tort Claims Board letter signed by Bruce Donaldson . . . stat[ed] that no MTCA entity was involved with or connected to the April 15, 200[5] collision.” While the subject letter speaks for itself, it is important to note that the letter does not state that “no MTCA entity was involved with or connected to the April 15, 2005 collision.” Rather, the letter informs counsel that the Department of Mental Health has advised the Board that Delta Community Mental Health Services “is not a state agency nor is it a department or division of” the Department of Mental Health and that accordingly, the Board would “be unable to assist [Shanks] any further in this respect.” (R. at 27.) Again, such a statement does not, in any way, suggest that “no MTCA entity was involved with or connected to” the subject accident.

## **STANDARD OF REVIEW**

In her brief, Shanks suggests that the trial court's denial of the Appellants' *Motion to Dismiss* should be reviewed by this Honorable Court only for an abuse of discretion. Shanks argues that the trial court's ruling in this case with regard to waiver and/or estoppel should stand unless this Court determines that the trial court's findings are manifestly wrong or are clearly erroneous. *Rebuild America, Inc. v. Norris*, --- So.3d ----, 2010 WL 3547982 (¶ 7) (Miss.App. 2010) (citing *Morgan v. West*, 812 So.2d 987, 990 (¶ 7) (Miss.2002) (defining "abuse of discretion"). In doing so, Shanks incorrectly assumes that the trial court's ruling with regard to waiver and/or estoppel was based on a finding of fact. In this case, however, the trial court's ruling was based on the application of a legal concept or law. As previously stated by the Appellants in their brief, "[i]n matters that are questions of law, this Court employs a de novo standard of review and will only reverse for an erroneous interpretation or application of the law." *Id.* Again, in the case before this Court, the law with regard to the waiver of an affirmative defense and also with regard to equitable estoppel has been erroneously interpreted and applied by the trial court. Reversal of the trial court's Order denying the Appellants' *Motion to Dismiss* is, therefore, warranted.

## **REPLY ARGUMENT**

The arguments set forth in Shanks's brief can be summarized as follows:

- **Richardson's delay in setting her *Motion to Dismiss* for hearing constitutes a waiver of the defense of the expiration of the statute of limitations.**
- **Kimball Glassco did not file a formal *Motion to Dismiss* and therefore failed to pursue to defense of the expiration of the statute of limitations. Such a failure to pursue the defense constitutes waiver of the same.**

Shanks does not address the issue of Richardson's or Kimball Glassco's entitlement to the protections or immunities of the MTCA. Shanks also does not address whether the correspondence from the MTCB equitably estops Kimball Glassco or Richardson asserting the defense of the expiration of the statute of limitations. Accordingly, it can be assumed that Kimball Glassco and Richardson have prevailed on those issues and the same will not be addressed by the Appellants in any further detail in this reply brief.

**I. Richardson's alleged "delay" in setting her *Motion to Dismiss* for hearing does not constitute a waiver of the defense of the expiration of the statute of limitations.**

Throughout her brief, Shanks points out that Richardson failed to set her motion for hearing until 11 months following the filing of the motion. In fact, that is the only point made by Shanks in support of her argument that Richardson waived the defense of the expiration of the statute of limitations. In her brief, Shanks has cited the correct rule of law in stating that a defendant's failure to timely pursue an affirmative defense coupled with the defendant's active participation in litigation will ordinarily serve as a waiver of the defense. However, Shanks completely fails to address the fact that "**neither delay in pursuing [an affirmative defense] nor participation in the judicial process, standing alone, will constitute a waiver.**" *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 180 (¶¶ 41, 44) (Miss. 2006) (emphasis added). Shanks points to no participation in the litigation on behalf of Richardson which would, coupled with the

delay, constitute a waiver of the affirmative defense of the expiration of the statute of limitations.

As expected, Shanks cited *MS Credit Center, Inc. v. Horton*, 926 So.2d 167 (Miss. 2006); *East Mississippi State Hospital v. Adams*, 947 So.2d 887 (Miss. 2007); and *Grimes v. Warrington*, 982 So.2d 365 (Miss. 2008) in support of her arguments that Richardson waived the statute of limitations defense. However, as discussed in detail in the Appellants' original brief, each of these cases are easily distinguishable from the case at hand in that in each of the cases cited, the defendants actively engaged in the litigation of the merits of each case. In contrast with those cases, Richardson's only participation in the instant litigation includes the filing of her *Motion to Dismiss*. As such, there has been no delay *coupled with* active participation in the litigation of the merits of the case which would constitute a waiver of the defense of the expiration of the statute of limitations on behalf of Richardson. In her response, Shanks has made no argument to the contrary.

**II. Kimball Glassco's alleged "failure to pursue" the defense of the expiration of the statute of limitations does not constitute a waiver the same.**

In her responsive brief, Shanks takes issue with the fact that Kimball Glassco never filed a formal *Motion to Dismiss* based on the expiration of the statute of limitations and states that such an omission, coupled with Kimball Glassco's participation in the litigation, constitutes a waiver of the defense. In doing so, Shanks would have this Court believe that (1) she had no idea of Kimball Glassco's assertion of the defense and that (2) Kimball Glassco participated in the litigation of the merits of the case or otherwise advanced litigation. Nothing could be further from the truth. Kimball Glassco (1) asserted the defense in its initial pleadings; (2) consistently reaffirmed its position with regard to the defense over and over again throughout the period between the filing of its Answer and the hearing on the *Motion to Dismiss*; and (3) specifically

asserted the defense at the hearing on the *Motion to Dismiss*.<sup>1</sup> In fact, Shanks was so aware of Kimball Glassco's position on the matter that Shanks even propounded discovery to Kimball Glassco with a sole focus on Kimball Glassco's entitlement to governmental immunity. No other topics were discussed in the written discovery. The merits of the case were never mentioned.

As previously stated, **"a party who seeks to [assert an affirmative defense] after a long delay will not ordinarily be found to have waived the right [to assert the defense] where there has been no participation in, or advancement of, the litigation process."** *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 180 (¶¶ 41, 44) (Miss. 2006) (emphasis added). Kimball Glassco's participation in this case - which included the filing of an *Answer* asserting the affirmative defense of immunity and responding to discovery related solely to its status as a governmental entity - can only be described as minimal *at best* and, according to Mississippi caselaw, even minimal participation in a lawsuit coupled with delay in the pursuit of the defense will not constitute waiver of the defense. *Lucas v. Baptist Memorial Hospital - North Mississippi, Inc.*, 997 So.2d 226 (Miss. App. 2008). Regardless, however, Kimball Glassco's participation in the case was clearly not in furtherance of the litigation of the merits thereof, in stark contrast to the cases cited by Shanks in support of her arguments in favor of waiver. Again, Shanks was never once led to believe Richardson or Kimball Glassco would not be pursuing the defense. To the contrary - Shanks was consistently reminded of Kimball Glassco's position on the matter. Again, because there has been no delay in the pursuit of the affirmative defense of the expiration of the statute of limitations in this case *coupled with* active participation in the litigation of the merits of the case, Kimball Glassco has not waived the affirmative defense and

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<sup>1</sup> Kimball Glassco's joinder in Richardson's *Motion to Dismiss* at the hearing thereon is clear from the transcript and from the subsequent order of the trial court on the motion. \*



the trial court's contrary holding was made in error.

**CONCLUSION**

As previously stated in the Appellant's original brief, for Richardson or Kimball Glassco to have waived their right to assert the affirmative defense of the expiration of the statute of limitations, there must have been some active participation in the litigation on their part. Because neither party participated in the advancement of the subject litigation nor became involved in the litigation of the merits of the case, there has been no waiver of the affirmative defense. As such, the ruling of the trial court in this regard must be reversed.

RESPECTFULLY submitted this the 12<sup>th</sup> day of September, 2010.

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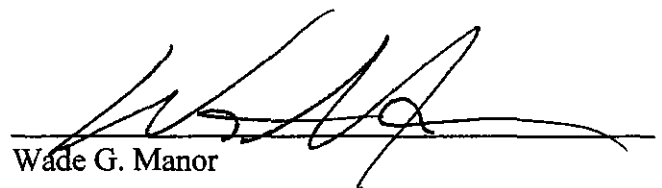
CERTIFICATE OF SERVICE

I, Wade G. Manor, one of the counsel of record for Appellants, Kimball Glassco Residential Center, Inc. and Vera Richardson, do hereby certify that I have this date caused to be delivered, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief* to the following:

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Hon. Albert Smith  
Circuit Court Judge for the Second  
Judicial District of Bolivar County, Mississippi  
P. O. Drawer 478  
Cleveland, MS 38732

THIS the 17<sup>th</sup> day of September, 2010.

  
Wade G. Manor