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INTRODUCTION

The Appellee brought a medical malpractice action against the Appellants based on a claim of negligence as it relates to radical cancer surgery performed on the Appellee on June 3, 2002. The Appellant, Dr. Resnick, removed the kidney and ureter of the Appellee because he believed that a kidney stone in Appellee's proximal ureter was a tumor. Even though the Radiologist on the diagnostic study interpreted the study as a kidney stone, Dr. Resnick interpreted it as a tumor and removed the kidney. This is true even though a previous CT scan demonstrated that the mass contained in the proximal ureter was a kidney stone. As a result, on May 28, 2003, a 180-day letter was hand delivered to both Appellants, Dr. Resnick and University Urologists of Cleveland, Inc. extending the time frame to file a complaint.

STATEMENT OF FACTS

The facts pertinent to the issues raised in this appeal are not in dispute. On November 14, 2003, within the 180-day time period, the Complaint in this matter was filed.¹ Thereafter, on January 12, 2004 the clerk's office docketed and presumably mailed notice to the Appellee that there was a failure of service on the Appellants, Dr. Resnick and University, because their certified mail went unclaimed.² However, Appellee's attorney denies receiving this notice.

Shortly thereafter, Appellants' attorney contacted the Appellee's attorney and requested a leave to plead. Such request was consented to by the Appellee and the

¹Supp-1

²Supp-53

Appellants' Leave to Plead was filed on February 10, 2004.³

On February 12, 2004, the Appellants filed an Answer to the Appellee's Complaint denying the allegations and setting forth affirmative defenses and requesting a jury trial.⁴ The Appellants were somehow able to file an answer without ever receiving a copy of the complaint from the Appellees.

On May 6, 2004, a case management conference was held and in accordance with Local Rule 21.1(A),⁵ Appellants' attorney attended with full authority to enter into a binding case management order on behalf of the Appellants.⁶ At the case management conference, a discovery cut off date was set, the parties' expert report due dates were scheduled, a dispositive motion date was scheduled, a final pretrial was scheduled and the trial was scheduled for April 13, 2005.⁷

Thereafter, expert reports were exchanged, numerous depositions were taken, interrogatories were exchanged and Appellants filed numerous motions.⁸ On November 13, 2004, the Deposition of Dr. Resnick was taken and the Doctor demonstrated an extremely proficient knowledge and understanding of the allegations in the Appellee's Complaint.⁹

³Second Supp-1

⁴Supp-5

⁵A copy of Local Rule 21(A) is attached to the Appendix at 1.

⁶See, Supp-52

⁷Second Supp-31

⁸See Supp- 49-53.

⁹Supp-51

Dr. Resnick was able to completely defend his actions of taking out a noncancerous, perfectly healthy kidney and ureter from the Appellee.

On December 2, 2004, Appellants filed a stipulation as to expert witness disclosure deadlines to which the Appellee agreed.¹⁰ On January 28, 2005, Appellants filed a Motion for Partial Summary Judgment.¹¹ On February 1, 2005, the Appellants filed a Motion for an Extension to Produce Additional Expert Reports which the Court denied.¹² On February 28, 2005, the Appellants stipulated that the Appellee would have leave for additional time to respond to the Appellants' Motion for Summary Judgment.¹³ On March 22, 2005, the Court denied the Appellants's Motion for Summary Judgment.¹⁴

Equally important, attached to the complaint were interrogatories. The Appellants were able to answer these interrogatories even though they were never served with the complaint. Nevertheless, the Interrogatories contained the following question and answer:

Interrogatory No. 10

If you are asserting any affirmative defenses, state the factual basis for those defenses.

Answer:

Objection. The affirmative defenses in the pleadings were set forth by counsel for Defendant and thus fall squarely under the

¹⁰Supp-52

¹¹*Id.*

¹²Supp- 51-52

¹³Supp-51

¹⁴ *Id.*

work-product doctrine. Parties are not entitled to discovery of the thoughts and impressions which form the basis of the affirmative defenses raised by another party's counsel. Furthermore, Civil Rule 26 does not provide the discovery of any facts upon which parties premise their affirmative defenses.¹⁵

At no time did the Appellants answer this interrogatory by stating that service of process was defective because the Appellants were never served.

Equally important, since this matter was filed on November 14, 2003, the deadline for service for statute of limitation purposes was November 14, 2004. A trial on the merits was set for April 13, 2005.¹⁶ The dispositive motion deadline was set for January 28, 2005.¹⁷ However, the Appellants waited until the eve of trial on April 4, 2005, to file their motion.¹⁸

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1.

AN ACTION IS COMMENCED FOR THE PURPOSE OF APPLYING THE STATUTE OF LIMITATIONS ON THE DATE SERVICE IS OBTAINED OR WHEN A PARTY SUBMITS TO THE COURT'S JURISDICTION SUCH THAT A DEFENDANT WAIVES THE AFFIRMATIVE DEFENSE OF INSUFFICIENCY OF SERVICE OF PROCESS WHEN HE FILES AN UNTIMELY MOTION TO DISMISS.

Rule 3(A) of the Ohio Rules of Civil Procedure states that a "Civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a

¹⁵Second Supp-24.

¹⁶Second Supp-31.

¹⁷*Id.*

¹⁸Supp-13.

named defendant.”¹⁹ In interpreting this rule, courts must be mindful of Civil Rule 1(B).

Rule 1(B) states that the Civil Rules: “Shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.”²⁰ Hence, the Civil Rules: “Shall be construed and applied” so as to advance “The expeditious administration of justice.”²¹ The primary goal of construction and application of the Civil Rules is “to effect just results.”²² The elimination of (1) “delay,” (2) “unnecessary expense,” and (3) “all other impediments to the expeditious administration of justice” are means to that end.²³

In commenting on the Civil Rules, this Court has stated that the primary goal of “effecting just results” is closely tied to “the spirit of the Civil Rules,” which it described as “the resolution of cases upon their merits, not upon pleading deficiencies.”²⁴ Cases should be decided on the merits rather than on mere technicalities. Therefore, emphasis is to be placed upon liberal construction rather than upon technical interpretation.²⁵

The Appellants rely on *Women's Care, Inc. v. Belcher*²⁶ to stand for the proposition that the

¹⁹Ohio R. Civ. P. 3(A).

²⁰Ohio R. Civ. P. 1.

²¹Ohio R. Civ. P. 1 staff notes.

²²*See Id.*

²³Ohio R. Civ. P. 1 staff notes.

²⁴*Peterson v. Teodosio*, 34 Ohio St. 2d 161, 175, 297 N.E.2d 113 (1973).

²⁵Ohio R. Civ. P. 1 staff notes.

²⁶No. 2004-CA-0047, 2005-Ohio-543, 2005 WL 327553 (Ohio App. 5th Dist. Feb. 9, 2005).

spirit and purpose of the civil rules is to guarantee the efficient and equal administration of justice such that justice will not tolerate a blanket disregard of the civil rules.²⁷ However, the *Belcher* court also stated that when determining whether the spirit or purpose of the civil rules is being disregarded, courts are guided in this determination by the fundamental principal that courts should decide cases on their merits.²⁸

I. AN ACTION IS COMMENCED FOR THE PURPOSE OF APPLYING THE STATUTE OF LIMITATIONS ON THE DATE SERVICE IS OBTAINED OR WHEN A PARTY SUBMITS TO THE COURT'S JURISDICTION.

In *Akron-Canton Regional Airport Authority v. Swinehart*²⁹ this Court stated that the filing of an answer without proper service constitutes both an appearance in the matter and consent to the personal jurisdiction of the Court.³⁰ In *Swinehart*, the plaintiff filed an appropriation action against two individuals, Swinehart and Sengpiel.³¹ The trial court dismissed the action based upon improper service.³²

This Court found that even though service was improper, the defendants filed a joint answer.³³ Consequently, this Court refused to dismiss the action holding that since an answer was

²⁷*Id.* at ¶30.

²⁸*Id.*; citing *DeHart v. Aetna Life Ins. Co.*, 69 Ohio St. 2d 189, 431 N.E.2d 644 (1982); *In re Estate of Reeck*, 21 Ohio St. 3d 126, 488 N.E.2d 195 (1986).

²⁹62 Ohio St. 2d 403, 406 N.E.2d 811 (1980).

³⁰*Id.* at 408, 406 N.E.2d at 812.

³¹*Id.* at 403, 406 N.E.2d at 812.

³²*Id.* at 404, 406 N.E.2d at 813.

³³*Id.* at 407-08, 406 N.E.2d at 815.

filed an appearance was made and the defendants consented to the personal jurisdiction of the court.³⁴

Subsequent to the *Swinehart* decision, this Court in *Maryhew v. Yova*³⁵ stated that a request by the defendant for a leave to plead did not constitute a general appearance resulting in a submission to the Court's jurisdiction.³⁶ However, this Court in *Maryhew* did leave the door open for a determination that other acts constitute a submission to the court's jurisdiction. Specifically, this Court stated that personal jurisdiction over the defendant may be acquired either by certain acts of the defendant or his legal representative.³⁷

Thereafter, in *Allis-Chalmers Credit Corp. v. Herbolt*³⁸ the Tenth District Court of Appeals held that an action: "Commences for purposes of applying the statute of limitations, on the date service is obtained or **the party submits to the Courts jurisdiction.**"³⁹ Thus, if proper service is not obtained but the defendant submits to the court's jurisdiction within the limitation period, then service is deemed to have occurred and the statute of limitations will be satisfied.⁴⁰

Equally important, prior to the decision handed down herein the Eighth District Court of

³⁴*Id.* at 408, 406 N.E.2d at 815.

³⁵11 Ohio St. 3d 154, 464 N.E.2d 538 (1984).

³⁶*Id.* at 155, 464 N.E.2d at 540.

³⁷*Id.* at 156, 464 N.E.2d at 540.

³⁸17 Ohio App. 3d 230, 479 N.E.2d 293 (1984).

³⁹*Id.* at 235-236, 479 N.E.2d at 299 (emphasis added).

⁴⁰*See Id.*

Appeals held that courts are loath to find the defense of insufficient service of process preserved if the defendant appears at court proceedings and addresses the merits of the case despite insufficient service of process.⁴¹

Furthermore, in the Eighth District Court of Appeals case of *Garnett v. Garnett*,⁴² service upon the defendant of a motion to show cause was defective.⁴³ Thus, the Defendant filed a reply stating that the plaintiff failed to invoke the Court's jurisdiction and further stated that his appearance was not to be construed as a waiver of his right to receive proper service of process.⁴⁴

The Court of Appeals found that even though the record demonstrated that the Defendant made every effort to preserve his objection to defective service, it also showed that he gave substantive testimony at the hearing and submitted an income and expense statement.⁴⁵ The Court found that these acts, directed at the merits of the motion, established that the defendant voluntarily submitted himself to the court's jurisdiction and waived his objection to defective service.⁴⁶ The reasoning used by the *Garnett* court enjoys a healthy existence in courts throughout the country, with several state and federal courts having embraced it.⁴⁷

⁴¹*Surgical Services, Inc. v. Cremeans*, 2004-Ohio-2330, 2004 WL 1047584, (Ohio App. 8th Dist. May 6, 2004) at ¶10.

⁴² No. 50857, 1986 WL 8625 (Ohio App. 8th Dist., Aug 7, 1986).

⁴³*Id.* at *1.

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*See, e.g., Faulks v. Crowder*, 99 S.W. 3d 116 (Tenn 2003); *Lybert v. Grant County, State of Washington*, 141 Wash. 2d 29, 1 P.3d 1124 (2000); *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732 (7th Cir.1991); *Santos v. State Farm Fire & Cas. Co.*, 902

Based on the above rationale, the Eighth District Court of Appeals overruled its previous decision in *Holloway v. Gen. Hydraulic & Machine, Inc.*⁴⁸ and found that the Appellants herein, by their actions, “voluntarily submitted themselves to the court’s jurisdiction and waived [their] objection to defective service.”⁴⁹ However, the Appellants argue that the Court of Appeals erred in reassessing its previous position in *Holloway* which relied on this Court’s ruling in *First Bank of Marietta v. Cline*⁵⁰

The basis of Appellants’ argument is that this Court in *Cline* addressed precisely the issue in the case *sub judice*.⁵¹ Specifically, Appellants argue that the *Cline* Court must have been aware that at the trial court level, the defendants had engaged in discovery, prepared for trial and an actual trial on the merits took place.⁵² The Appellants argue that since the *Cline* Court must have been aware of these facts, then by implication the *Cline* Court must have made a determination that the *Cline* defendants did not waive the affirmative defense of a failure of service.⁵³ However, even a cursory review of the *Cline* decision does not support this conclusion.

F.2d 1092, 1096 (2d Cir.1990); *Marcial Ucin, S.A. v. S.S. Galicia*, 723 F.2d 994, 997 (1st Cir.1983); *Kearns v. Ferrari*, 752 F.Supp. 749, 752 (E.D.Mich.1990); *Burton v. Northern Dutchess Hosp.*, 106 F.R.D. 477, 481 (S.D.N.Y.1985); *Tuckman v. Aerosonic Corp.*, 394 A. 2d 226, 233 (Del.Ch.1978); *Joyner v. Schiess*, 236 Ga. App. 316, 512 S.E.2d 62 (1999).

⁴⁸No. 82294, 2003-Ohio-3965, 2003 WL 21714608 (Ohio App. 8th Dist July 24, 2003).

⁴⁹Supp-38

⁵⁰12 Ohio St. 3d 317, 464 N.E.2d 567 (1984).

⁵¹See Brief of Appellant at 8.

⁵²*Id.*

⁵³*Id.* at 8-9.

There were two narrow issues that were certified by this Court in *Cline*.⁵⁴ These issues were: “First, whether service of process by publication was proper, and, second, whether the defense of insufficiency of service, although properly raised by motion, is waived by failure to request a pretrial hearing on the motion.”⁵⁵ In addressing the second issue, this Court stated that Civil Rule 12(D) does not require a party to request a preliminary hearing.⁵⁶ Hence, this Court concluded that the Defendant: “Did not waive the defense of insufficiency of service **by choosing not to ask for a pretrial hearing**”⁵⁷

Nowhere in the majority opinion can it be found that the Plaintiff raised the issue of a waiver as it relates to participation in the litigation process. Likewise, nowhere in the majority opinion did this Court address the issue of a waiver as it relates to the participation in the litigation process. Consequently, the Eighth District Court of Appeals was correct when it determined to reassess its previous decision in *Holloway* after reviewing *Cline*.

II. A DEFENDANT WAIVES THE AFFIRMATIVE DEFENSE OF INSUFFICIENCY OF SERVICE OF PROCESS WHEN HE FILES AN UNTIMELY MOTION TO DISMISS.

In the case at bar, the Appellate Court correctly found that the Appellants waived their affirmative defense of insufficiency of process.⁵⁸ However, it is conceded that the Appellants have cited several cases that seem to indicate a disagreement with this ruling. Nonetheless, as Justice

⁵⁴*Cline*, 12 Ohio St. 3d at 317, 466 N.E.2d at 568.

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.* (emphasis added).

⁵⁸Supp- 38-39.

Brown in the dissenting opinion in *Maryhew*, stated:

Attack upon the manner of service of process has become a perverted channel of defense that has been manipulated by defendants. It has been a basis for deliberate stalling by defendants, through taking leaves to plead, and used for the purpose of misleading plaintiffs and avoiding resolution of legal conflicts on their merits by causing the statute of limitations to intervene during the stalling period. Under such facts defendants should be estopped from denying service of process, and thereby profiting by their own deception. While no court should permit its authority to be extended over persons against whom it has no jurisdictional claim, **it is also true that no court should forbid the resolution of conflicts on the merits of a case when the parties to the action are fully aware of its pendency, by some participation in the proceedings.**⁵⁹

Justice Brown further noted:

The defendant delayed attacking the sufficiency of service of process and jurisdiction over her person until after the statute of limitations had run, although defendant's counsel obviously knew of such irregularity before the one-year limitation period had expired for plaintiffs to perfect service of process. A delay of months in filing a motion to dismiss for insufficiency of service of process and for lack of jurisdiction over defendant, especially where the two-year statute of limitations has run in the meantime, is not using the keys to the courthouse promptly and should result in a denial of the motion.⁶⁰

Finally, Justice Brown stated that the main purpose of service of process requirements is to provide notice to a defendant of a pending legal action and to the allegations involved in that action.⁶¹ This purpose mandates that defects in service of process be disregarded where there is actual notice evidenced by defendant's participation in the proceedings.⁶² As will be demonstrated, other jurisdictions have sided with Justice Brown's reasoning.

⁵⁹*Maryhew*, 62 Ohio St. 2d at 161, 406 N.E.2d at 544. (emphasis added).

⁶⁰*Id.* at 161, 464 N.E.2d at 544.

⁶¹*Id.* 161, 464 N.E.2d at 544.

⁶²*Id.*

In the case of *East Mississippi State Hosp. v. Adams*⁶³, decided on January 17, 2007, the Mississippi Supreme Court ruled on the identical issue that is before this Court. In *Adams*, the plaintiffs filed a wrongful death suit on July 2, 2003 in which the defendants answered and asserted the affirmative defense of insufficiency of service of process.⁶⁴ The case proceeded through discovery, motions to compel were filed, status conferences were held, and additional discovery was conducted.⁶⁵ Almost two years later on June 9, 2005, the defendants filed a motion to dismiss based on insufficiency of process and the expiration of the statute of limitations.⁶⁶

In ruling on the motion to dismiss, the trial judge agreed that the defendants were not properly served and that the statute of limitations had run but refused to dismiss the action, stating that the dilatory actions of the Defendants caused them to waive their defense.⁶⁷ Specifically, the trial court found that a Defendant must timely pursue the defense of insufficient service of process as raised in its answer and that waiting until after two years of litigation would cause a waiver of this defense.⁶⁸

In upholding the trial court's ruling, the Mississippi Supreme Court noted that the Mississippi Courts of Appeals had reached a different result. Specifically, the Mississippi Courts

⁶³ ___ So2d ___, 2007 WL 114190 (Miss. 2007). A copy of this decision can be found in the Appendix at 5.

⁶⁴*Id.* ___ So2d at ___, 2007 WL 114190 at *1, ¶4.

⁶⁵*Id.* ___ So2d at ___, 2007 WL 114190 at *1-*2, ¶¶4-5.

⁶⁶*Id.* ___ So2d at ___, 2007 WL 114190 at *2, ¶5.

⁶⁷*Id.* ___ So2d at ___, 2007 WL 114190 at *2, ¶6.

⁶⁸*Id.*

of Appeals have held that once 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, nor even by participation in a trial on the merits.⁶⁹ However, in overruling their appellate courts, the Mississippi Supreme Court stated that although the defendants may have literally complied with the Civil Rules by raising its affirmative defense in its answer, the Defendants did not comply with the spirit of civil rules because the defendants fully participated in the litigation of the case for more than two years without actively contesting jurisdiction in any way.⁷⁰ Therefore, there was a waiver of the affirmative defense of insufficiency of process.⁷¹ In accordance with this decision, other courts have ruled that there can be a waiver of the affirmative defense of insufficiency of process.

In *Watkiss & Campbell v. Foa & Son*,⁷² the Utah Supreme Court required that even though the affirmative defense of service of process is stated in an answer, any motion to dismiss based on that defense must be presented for decision early in the litigation process and at the same time as other dispositive motions are made so as to promote judicial efficiency and to reduce litigation expenses.⁷³ If such a motion is not timely filed, then the affirmative defense of defective service of process is barred by waiver.⁷⁴

⁶⁹*Id.* ___ So2d at ___, 2007 WL 114190 at *3, ¶10.

⁷⁰*Id.* ___ So2d at ___, 2007 WL 114190 at *4, ¶11.

⁷¹*Id.*

⁷²808 P.2d 1061 (Utah,1991), *rev'd on other grounds, Gillett v. Price*, 135 P.3d 861 (Utah, 2006) .

⁷³*Foa & Son*, 808 P.2d at 1067.

⁷⁴*Id.*

The Georgia Courts of Appeals have held that after a party has properly raised the defense of sufficiency of process, it may be found waived if the party later engages in conduct so obviously indicative of an intention to release a known right or benefit that no other reasonable explanation of such conduct is possible.⁷⁵ This is true when a party participates in discovery and waits until midway through trial before raising the issue again.⁷⁶ Finally, this doctrine of waiver enjoys a healthy existence in courts throughout the country with other federal and state courts embracing the concept in many different forms.⁷⁷

In the case *sub judice*, by initially asserting the defense of deficient service of process in their answer, Appellants acknowledged a right that they had which could have been exercised by filing a timely motion to dismiss. However, the Appellants by their conduct of affirmatively engaging in discovery, litigating the case on the merits and by waiting to the eve of trial to file their motion to dismiss long after the dispositive motion deadline had passed, establishes a "voluntary relinquishment" of a known right.

⁷⁵*Oasis Goodtime Emporium I, Inc. v. Cambridge Capital Group, Inc.*, 234 Ga. App. 641, 642, 507 S.E.2d 823, 825 (1998).

⁷⁶*Id.*

⁷⁷See, e.g., *Lybbert v. Grant County, State of Wash.*, 141 Wash. 2d 29, 39, 1 P.3d 1124, 1129 - 1130 (2000)(waiver of service of process can occur if the defendant's counsel has been dilatory in asserting the defense); *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732 (7th Cir.1991) (observing that "[a] party may waive a defense of insufficiency of process by failing to assert it seasonably"); *Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1096 (2d Cir.1990); *Marcial Ucin, S.A. v. S.S. Galicia*, 723 F.2d 994, 997 (1st Cir.1983); *Kearns v. Ferrari*, 752 F.Supp. 749, 752 (E.D.Mich.1990); *Burton v. Northern Dutchess Hosp.*, 106 F.R.D. 477, 481 (S.D.N.Y.1985); *Peoples Gas Light & Coke Co. v. Austin* 147 Ill.App.3d 26,36, 497 N.E.2d 790, 797(1986) (when a defendant files an appearance and participates in discovery waives his right to object to lack of diligent service.); *Tuckman v. Aerosonic Corp.*, 394 A.2d 226, 233 (Del.Ch.1978).

Further, the Appellants complied with Local Rule 21(A) by giving their attorney full authority to enter into a binding case management order. All of these acts, which were directed at the merits of the case, establish that the Defendants voluntarily submitted themselves to the Court's jurisdiction and waived any objection as to defective service. Consequently, by completely litigating this matter to the eve of trial, the Appellants' participation conferred upon them the same status as a party personally served with process.

Moreover, the Appellants' argument produces a fiction that places form well above substance, a result that the Civil Rules never intended to produce. The Appellants argument does not serve the interest of public policy or judicial economy because it disregards the Civil Rules' purpose to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.⁷⁸

A ruling that overturns the Appellate Court's decision will not eliminate delay. A defendant could wait until this matter is fully prepared for trial, then on the day of trial file a motion that could have been brought earlier in the litigation.

A ruling in favor of the Appellants will not eliminate unnecessary expense, rather it will promote unnecessary expense. Both parties to an action will incur the expense of developing exhibits for trial, preparing experts for trial and the ordinary and necessary expenditures associated with preparing any case for trial. In a complicated medical malpractice case, such expenses could well exceed \$100,000.00.

Finally, a ruling that overturns the Appellate Court's decision would not be an expeditious administration of justice. A motion to dismiss should have been brought prior to the dispositive

⁷⁸See, Ohio R. Civ. P. 1(B).

motion deadline. By allowing such motions to be brought on the eve of trial would extend the duration of cases rather than ending them at the earliest possible moment.

A similar judicial economy issue regarding the waiver of affirmative defenses was addressed by the Washington Supreme Court in *King v. Snohomish County*.⁷⁹ Although *King* does not address the issue of the waiver of insufficiency of process, it does weigh in heavily on policy concerns.

In *King*, the plaintiffs filed a complaint in which the defendant answered raising eleven affirmative defenses.⁸⁰ Thereafter, the parties were involved in 45 months of litigation and discovery.⁸¹ During the litigation the parties each moved for summary judgment, a mediation was conducted, 18 discovery depositions were taken, and the defendant sought four continuances.⁸²

During discovery the Plaintiffs served an interrogatory to the Defendant that asked: "If the defendant intends to assert any defense(s), affirmative or otherwise, to this action, please state the nature of the defense(s), and the basis for each defense."⁸³ The Defendant answered: "Objection, vague and confusing."⁸⁴ The Plaintiffs did not seek to compel a response to the interrogatory.⁸⁵

⁷⁹146 Wash.2d 420, 47 P.3d 563 (2002).

⁸⁰*Id.* at 423, 47 P.3d at 565.

⁸¹*Id.*

⁸²*Id.*

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

A mere three days before trial the Defendant filed a motion to dismiss.⁸⁶ The motion was denied and the case proceeded to trial.⁸⁷ On appeal the Washington Supreme Court upheld the Trial Court's ruling.

In upholding the trial court's ruling, the Washington Supreme Court stated that the defendant's assertion of its procedural defense was inconsistent with its behavior for the four years prior to trial.⁸⁸ First, although the defendant did raise its affirmative defense, it later failed to clarify that defense in response to an interrogatory which the Defendant claimed was vague.⁸⁹ Further, even though the Defendant filed a motion for summary judgment, the Defendant never raised the affirmative defense in a motion to dismiss until three days before trial.⁹⁰

As a result, the Washington Supreme Court held that allowing a defendant to preserve any and all defenses by merely citing an exhaustive list does not foster the just, speedy, and inexpensive resolution of an action.⁹¹ Both parties engaged in extensive, costly, and prolonged discovery and litigation preparation.⁹² Consequently, the Washington Supreme Court held that it was an effective administration of justice to uphold the trial court's ruling.

In the case at bar, the Appellants' assertion of its defense is inconsistent with its prior

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸*Id.* at 424-425, 47 P.3d at 566.

⁸⁹*Id.*

⁹⁰*Id.* at 425, 47 P.3d at 566.

⁹¹*Id.* at 426, 47 P.3d at 566.

⁹²*Id.*

behavior. When asked in an interrogatory to state the factual basis for its affirmative defenses, the Appellants' answered with an objection. The Appellants filed a Motion for Summary Judgment that did not include the insufficiency of process defense.

Moreover, the deadline for service for statute of limitation purposes was November 14, 2004. The dispositive motion deadline was January 28, 2005, a full two months after the service deadline. However, the Appellants waited until April 4, 2005 to file their motion. This was almost four months past the deadline for service and two months past the dispositive motion deadline.

Both parties engaged in extensive, costly, and prolonged discovery and litigation preparation. To allow the Appellants the right to preserve the defense of insufficiency of process by merely citing it in an exhaustive boilerplate list of defenses does not foster the just, speedy, and inexpensive resolution of a case. Consequently, it will not be an effective administration of justice to overturn the Appellate Court's ruling.

The Appellants assert that the Court of Appeals decision herein is tantamount to requiring defense counsel to do as little as possible in defending a case where service of process has not been perfected.⁹³ Further, Appellants argue that the Court of Appeals ruling places the duty upon the Defendant to assist the Plaintiff in perfecting service.⁹⁴ However, a Defendant would have to do neither if they did not file an answer.

If the Appellants were not served, then they were under no duty to file an answer. Thus, if they would not have filed an answer until service was perfected, they would not have to either defend the case or assist the Plaintiff in perfecting service. However, once the Defendant filed an

⁹³Appellants Merit Brief at 4.

⁹⁴*Id.* at 16.

answer and unreasonably delayed filing a motion to dismiss, then based on the above authority, the Defendant should be found to have waived the affirmative defense of insufficiency of service.

Proposition of Law No. 2.

BASED ON THE DOCTRINE OF LACHES, THE APPELLANTS SHOULD BE PREVENTED FROM ASSERTING THE AFFIRMATIVE DEFENSES OF INSUFFICIENCY OF SERVICE OF PROCESS AND STATUTE OF LIMITATIONS WHEN THE DEFENDANT FILES AN UNTIMELY MOTION TO DISMISS AFTER THE DISPOSITIVE MOTION DEADLINE HAS PASSED AND A MERE NINE DAYS BEFORE TRIAL.

To protect the integrity of the judicial system and in defending the orderly administration of justice, this court should use the concept of laches to prevent parties from playing fast and loose with rules of court. When a party takes procedurally inconsistent positions during the pendency of a matter, such parties should not be rewarded for their conduct that calls for the needless investment of time and expense for all parties involved, the plaintiff, defendant, counsel for both parties, and the courts itself.

Appellants undertook a course of action reflecting a clear intent to affirmatively litigate the case on its merits while possessing actual knowledge that service was improper. Nonetheless, the Appellants litigated this matter as if service of process was obtained. The actions of the Appellants included filing an answer, complying with Local Court Rule 21(A), engaging in discovery, retaining experts, deposing experts out of state, fully litigating this matter, failing to properly answer Appellee's Interrogatory Number 10 and filing their Motion to Dismiss 66 days after the dispositive motion deadline. All of these actions led the Appellee to believe that service of process was not at issue.

I. BASED ON THE DOCTRINE OF LACHES, THE APPELLANTS SHOULD BE PREVENTED FROM ASSERTING THE AFFIRMATIVE DEFENSES OF LACK OF SERVICE OF PROCESS AND STATUE OF LIMITATIONS.

This Court has stated that the elements of laches are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for such delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party.⁹⁵

To succeed on a laches defense, the person for whose benefit the doctrine will operate is required to show that he has been materially prejudiced by the delay of the person asserting the claim.⁹⁶ However, delay in asserting a right does not of itself constitute laches.⁹⁷ It must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced.⁹⁸

A. The Appellants Committed Unreasonable Delay in Filing Their Motion to Dismiss in Which There Is No Excuse for the Delay.

In the case at bar, the Appellants waited 66 days after the dispositive motion deadline to present their motion. Such motion was presented a mere nine days before trial. There is no excuse for such delay.

Appellants could have achieved the same result sought by their Motion to Dismiss by simply filing their motion immediately after November 14, 2004, the deadline in which the Appellee had to serve the Appellants. However, instead the Appellants vigorously defended this matter after November 14, 2004 and waited until April 4, 2004 to file their Motion to Dismiss.

⁹⁵*Carter v. City of North Olmsted*, 69 Ohio St.3d 315, 325, 631 N.E.2d 1048, 1056 (1994).

⁹⁶*Id.*

⁹⁷*Bank One Trust Co., N.A.*, 131 Ohio App.3d at 55, 721 N.E.2d at 496.

⁹⁸*Id.*

B. The Appellants Had Actual or Constructive Knowledge That the Appellees Would Both Be Injured and Prejudice by Appellants' Delay in Filing Their Motion to Dismiss.

The Appellants knew or should have known that waiting to file their motion to dismiss would cause the Appellee to be injured in the form of expending considerable sums of money in litigating this matter after the dispositive motion deadline.

As stated above, the Appellants could have immediately filed their brief after November 14, 2004 when the statute of limitations expired. However, they chose to wait until nine days before trial and 66 days after the dispositive motion deadline to file their brief. Thus, a substantial amount of time and expense were involved in both prosecuting and defending this matter in those 66 days leading up to trial. Such time and expense served no useful purpose, except perhaps, to create the false impression that Appellants intended to defend the case on its merits and that service of process was obtained.

The Appellants never requested a copy of the complaint nor a copy of the discovery requests that were attached to the complaint. Nevertheless, the Appellants answered the complaint and responded to all written discovery. Since the Appellants expended considerable time, energy and money to fully litigate and defend this matter, then the only reasonable and logical conclusion is that service of process was obtained.

Further, the Appellee, believing service was obtained due to the Appellants' actions, did not request the Appellants to be served by ordinary mail. Hence, the Appellee's claims were dismissed with prejudice such that the Appellee cannot have his day in court.

Based on the Appellants' actions and delay in filing their motion, the Appellee has been materially prejudiced. Consequently, the doctrine of laches applies and the Defendant should be

prevented from arguing both insufficiency of service of process and the statute of limitations.

Proposition of Law No. 3.

WHEN A DEFENDANT FILES AN UNTIMELY MOTION TO DISMISS AFTER THE DISPOSITIVE MOTION DEADLINE HAS PASSED AND ON THE DAY OF TRIAL, A TRIAL COURT ABUSES ITS DISCRETION BY GRANTING THE MOTION TO DISMISS.

A trial court abuses its discretion when it allows a defendant to file a Motion to Dismiss after the dispositive motion deadline has passed and on the day of trial where the Plaintiff is substantially prejudiced. The purpose of the Civil Rules is to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.⁹⁹ A trial judge, in allowing the Defendant to be heard on its Motion to Dismiss, violates all three principles.

First, by allowing a motion to dismiss to be filed, the trial court does not eliminate delay, rather it rewards delay. By allowing a motion to dismiss to be untimely filed, the trial court causes a party to fully prepare their case for trial only to dismiss it after the statute of limitations has expired. Hence, a defendant is rewarded for his delay in filing a motion to dismiss where the statute of limitations has run. This is not using the keys to the courthouse promptly.

By allowing the untimely filing of a motion to dismiss, the trial judge does not eliminate unnecessary expense, rather it causes unnecessary expense. Both parties will incur the expense of developing exhibits for trial, preparing experts for trial and the ordinary and necessary expenditures associated with preparing a case for trial.

Finally, the acceptance of an untimely motion to dismiss is not an expeditious administration

⁹⁹Ohio R. Civ. P. 1(B).

of justice. It is a delay of justice that causes economic hardship on the Plaintiff. Consequently, by allowing a motion to dismiss to be brought after the dispositive motion deadline and on the morning of trial violates the principals as set forth in the Civil Rules. Such action constitutes an abuse of discretion by violating the long held principles of eliminating delay, unnecessary expense and the expeditious administration of justice.

CONCLUSION

The Appellee respectfully requests that this Court uphold the Appellate Court's ruling and hold that the Appellants should be prevented from asserting the defense of lack of service of process based on the Appellant's actions and their delay in filing their Motion to Dismiss.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellee and Second Supplement to Brief has been forwarded by regular U.S. Mail this 31st day of January, 2007 to the following:

William A. Meadows, Esq.
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101 Prospect Ave., West
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A handwritten signature in black ink, appearing to read 'Nicholas A. Papa', with a large circular flourish at the end.

Nicholas A. Papa 0059612
Attorneys for Appellee,
Frank Gliozzo

APPENDIX

counter proposals, if any, in writing; however, only those findings of fact and conclusions of law made by the Court shall form part of the record.

(2) Upon motion of a party made within ten (10) days after the filing of the findings, the Court may amend the findings, make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial. When findings of fact are made in actions tried by the Court without a jury, the question of the sufficiency of the evidence to support the findings may be raised whether or not the party raising the question has made an objection in the trial Court to such findings or has made a motion to amend or a motion for judgment.

20.0 COURT FILES AND PAPERS

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No person (except a judge of the Court) without consent of the Administrative Judge or the judge to whom the case is assigned shall remove any Court papers, files of the Court or any of the contents of a file from the custody of the Clerk.

21.0 CASE MANAGEMENT AND PRETRIAL PROCEDURE

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For the purpose of insuring the readiness of cases for pretrial and trial, the following procedure shall be in effect. Within ninety (90) days after suit is filed, the case shall be set by the Court for a case management conference to establish case management procedures to prepare the case for an effective final pretrial. At that time the Court will take appropriate action on the service, leaves to plead, time limitations for discovery, scheduling a date for the pretrial hearing and any other steps warranted under the circumstances.

A pretrial conference shall be conducted in all civil cases prior to being scheduled for trial, except in actions for injunctions, foreclosures, marshalling of liens, partition, receiverships and appeals from administrative agencies.

PART I: Case Management Conference.

(A) In addition to the judge the case management conference may be conducted by the Bailiff or Judicial Staff Attorney, at the Court's option. The case management conference may be conducted in person or telephonically, according to the court's preference. All counsel attending must have full authority to enter into a binding case management order. Parties are not required to be present.

(B) Notice of the case management conference shall be given to all counsel of record by mail and/or telephone from the Court not less than fourteen (14) days prior to the conference. Any application for continuance of the conference shall be addressed to the Court to whom the case has been assigned.

(C) If chief trial counsel wishes to attend and is not available at the time scheduled by the Court, and if he or she is unwilling to send other counsel authorized to enter into a binding case management order, then counsel shall have the obligation to reschedule the case management conference to take place within 30 days of the originally scheduled case management conference with the concurrence of all counsel and the Court. Failure to obtain such concurrence will result in the case management conference being held as originally scheduled. A case management order may be entered binding all counsel.

(D) The following decisions shall be made at the case management conference and all counsel attending must have full authority to enter into a binding case management order:

(1) Each case shall be categorized in terms of type (i.e., personal injury, contract, malpractice, commercial, collection, products liability etc.); complexity of facts and legal issues presented; anticipated difficulty in obtaining and completing discovery; and dollar amount in controversy.

(2) Based on information determined by discussion of issues in (D)(1), above, a definite discovery schedule shall be agreed upon by all parties for the completion of all discovery.

(3) Determination shall be made concerning immediate assignment of the case to arbitration upon agreement of counsel or upon order of the Court if the Court personally conducts the case management conference. The Court shall set a date certain as to when the case shall be referred to arbitration. The Court may also set a date for trial in the event an appeal is taken from the arbitration.

(4) A definite date for exchange of expert witness reports shall be determined pursuant to Rule 21.1.

(5) A definite date for the filing of all motions which date shall not be later than seven (7) days before the final pretrial conference.

(6) The date for the final pretrial conference shall be set by the Court.

(E) At the conclusion of the case management conference, a case management order shall be prepared and signed by all counsel and submitted to the Court for signature. This order shall include definite dates for Part I (D)(1)-(6) of this rule. This order shall be journalized and binding on all parties.

(F) If any new parties are added to the litigation subsequent to the case management order, then the Court shall set another case management conference with all parties following the requirements of Part I (A)-(E) of this rule. The new case management order shall supersede any prior case management order.

PART II: Final Pretrial Conference.

Upon order of the Court or request of any party, the Court shall set a day for a settlement conference within 30 days of the request.

The purpose of this conference is to effect an amicable settlement. Therefore, all parties must be present or, with permission of the Court, be available by telephone and have full settlement authority. All settlement conferences shall be conducted by the assigned judge.

A party shall be entitled to request only one settlement conference.

PART III: Final Pretrial Conference.

(A) The purpose of this conference is to effect an amicable settlement, if possible, to narrow factual and legal issues by stipulation or motions; and to set a date certain for trial. All final pretrial conferences shall be conducted by the assigned judge.

(B) All plaintiffs must be present or, with permission of the Court, be available by telephone with full settlement authority. Each defendant or a representative of each defendant must be present or, with permission of the Court, be available by telephone with full settlement authority. If the real party in interest is an insurance company, common carrier, corporation or other artificial legal entity, then the chosen representative must have full authority to negotiate the claim to the full extent of plaintiffs demand. Plaintiffs demand must be submitted to counsel for defendant at least

14 days prior to the final pretrial conference.

(C) Counsel attending the conference must have complete authority to stipulate on items of evidence and admissions.

(D) If the Court concludes that the prospect of settlement does not warrant further Court supervised negotiations, then the Court shall act on any other matters which come before it at that time and efforts shall be made to narrow legal issues, to reach stipulations as to facts in controversy and, in general, to shorten the time and expense of trial. The Court may enter a pretrial order to become part of the record of the case embracing all stipulations, admissions and other matters which have come before it. The Court shall at that time determine whether trial briefs should be submitted and shall fix a date when they are to be filed.

(E) Each party shall submit a pretrial statement at least seven (7) days in advance of the final pretrial setting forth the following:

- (1) Statement of facts and legal issues;
- (2) Statement of real factual and legal issues in dispute;
- (3) Stipulations;
- (4) List of non-expert trial witnesses with a brief summary of expected testimony;
- (5) List of expert trial witnesses with reports attached;
- (6) Special legal problems anticipated;
- (7) Estimated length of trial;
- (8) Pretrial motions contemplated;
- (9) Special equipment needs for trial.

(F) If the Court shall determine that the case is suitable for arbitration at the pretrial, then the Court may so order the referral to the arbitration list. At the same time the Court may set a trial date in the event an appeal is filed from the arbitration award.

(G) A trial date shall be set by the Court not later than 180 days after the final pretrial.

(H) Any judge presiding at a pretrial conference or trial shall have authority:

- (1) After notice, dismiss an action without prejudice for want of prosecution upon failure of plaintiff and/or his counsel to appear in person at any pretrial conference as required by Part III (B) of this Rule.
- (2) After notice, order the plaintiff to proceed with the case and decide and determine all matters ex parte upon failure of the defendant to appear in person or by counsel at any pretrial conference or trial, as required by Part III (B) of this Rule.
- (3) The failure of an attorney to comply with the provisions of Part III (E) without good cause shown may subject the attorney to sanctions, including a fine of up to One Hundred Dollars

(\$100.00) to be paid by the attorney to cover the costs of opposing counsel's appearance at the pretrial.

(4) The failure of an attorney to appear within thirty (30) minutes of a scheduled settlement or pretrial conference may subject the attorney to sanctions in the amount of Two Hundred Fifty Dollars (\$250.00) unless good cause is shown. If the Court awards sanctions, the attorney is personally responsible for payment of the sanction.

(5) The sanctions contained in (H)(1)-(4) should not be imposed until a reasonable attempt is made by the Court or opposing counsel present at the pretrial to contact the missing counsel by telephone to determine whether that counsel's non-compliance with these rules can be reasonably explained.

(I) In the event the judge is not present in Court within thirty (30) minutes of the time set for a settlement or pretrial conference, counsel and the parties scheduled for that conference may depart without sanctions.

Amended 07/01/2003

21.1 TRIAL WITNESS

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PART I: Expert Witness

(A) Since Ohio Civil Rule 16 authorizes the Court to require counsel to exchange the reports of medical and expert witnesses expected to be called by each party, each counsel shall exchange with all other counsel written reports of medical and non-party expert witnesses expected to testify in advance of the trial. The parties shall submit expert reports in accord with the time schedule established at the Case Management Conference. The party with the burden of proof as to a particular issue shall be required to first submit expert reports as to that issue. Thereafter, the responding party shall submit opposing expert reports within the schedule established at the Case Management Conference. Upon good cause shown, the Court may grant the parties additional time within which to submit expert reports.

(B) A party may not call a non-party expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. It is counsel's responsibility to take reasonable measures, including the procurement of supplemental reports, to insure that each report adequately sets forth the non-party expert's opinion. However, unless good cause is shown, all supplemental reports must be supplied no later than thirty (30) days prior to trial. The report of a non-party expert must reflect his opinions as to each issue on which the expert will testify. A non-party expert will not be permitted to testify or provide opinions on issues not raised in his report.

(C) All non-party experts must submit reports. If a party is unable to obtain a written report from a non-party expert, counsel for the party must demonstrate that a good faith effort was made to obtain the report and must advise the Court and opposing counsel of the name and address of the expert the subject of the expert's expertise together with his qualifications and a detailed summary of his testimony. In the event the non-party expert witness is a treating physician, the Court shall have the discretion to determine whether the hospital and or office records of that physician's treatment which have been produced satisfy the requirements of a written report. The Court shall have the power to exclude testimony of the expert if good cause is not demonstrated.

(D) If the Court finds that good cause exists for the non-production of a non-party expert's report, the Court shall assess costs of the discovery deposition of the non-complying expert against the party offering the testimony of the expert unless, by motion, the Court determines such payment

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Briefs and Other Related Documents

East Mississippi State Hosp. v.
 AdamsMiss.,2007.Only the Westlaw citation is
 currently available.

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 RELEASED FOR PUBLICATION IN THE
 PERMANENT LAW REPORTS. UNTIL
 RELEASED, IT IS SUBJECT TO REVISION OR
 WITHDRAWAL.

Supreme Court of Mississippi.

EAST MISSISSIPPI STATE HOSPITAL and the
 Mississippi Department of Mental Health

v.

Codell ADAMS and Levord Adams, Individually,
 and on behalf of all the Heirs at Law of Joe Cephus
 Adams, Deceased.

No. 2005-IA-01899-SCT.

Jan. 18, 2007.

Background: Brothers of patient who died in
 state-operated nursing home brought wrongful death
 action against state hospital and the Mississippi
 Department of Mental Health (MDMH), alleging
 that defendants negligently caused patient's death.
 The Circuit Court, Lauderdale County, Robert
 Walter Bailey, J., denied defendants' motion to
 dismiss or for summary judgment. Defendants
 appealed.

Holdings: The Supreme Court, Cobb, P.J., held
 that:

(1) as an issue of first impression, service of process
 was insufficient because it was not made on
 Attorney General, but

(2) defendants waived defense of insufficient
 process by participating in litigation.

Affirmed.

[1] States 360 ⇐204

360 States

360VI Actions

360k204 k. Process. Most Cited Cases

Service of process on chief executive officers of
 state hospital and Mississippi Department of Mental
 Health (MDMH) was insufficient, in wrongful death
 action against the hospital and MDMH, under rule
 requiring delivery of summons and complaint to
 Attorney General for service upon the "State of
 Mississippi or any one of its departments, officers
 or institutions," in the absence of subsequent
 service on the Attorney General within 120 days of
 the filing of the complaint. Rules Civ.Proc., Rules
 4(d)(5), 4(h).

[2] States 360 ⇐204

360 States

360VI Actions

360k204 k. Process. Most Cited Cases

State hospital and Mississippi Department of
 Mental Health (MDMH) waived their defenses of
 insufficient process and insufficient service of
 process, in wrongful death action brought by
 brothers of patient who died in state nursing home,
 when they participated in the litigation and failed to
 pursue the defenses for two years after timely
 raising them. Rules Civ.Proc., Rule 4(d)(5).

Lauderdale County Circuit Court, Robert Walter
 Bailey, J.

Brett Woods Robinson, attorney for appellants.
 Charles W. Wright, Jr., attorney for appellees.

Before COBB, P.J., DIAZ and RANDOLPH, JJ.
 COBB, Presiding Justice, for the Court.

*1 ¶ 1. East Mississippi State Hospital (EMSH), a
 division of the Mississippi Department of Mental

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Health (MDMH), operates the Reginald P. White Facility, which is a licensed nursing home. Joe Cephus Adams (decedent) was admitted to the White Facility and during the short time he was a resident, he was involved in a number of altercations with other residents. One month after he was admitted, he was found unresponsive, and died two days later. An autopsy revealed his death was caused by blunt force trauma to the head.

¶ 2. Codell Adams and Levord Adams (plaintiffs), brothers of the decedent, filed a wrongful death suit against EMSH and MDMH (collectively referred to as defendants). The defendants answered and raised numerous affirmative defenses. Two years after the complaint and answer were filed, after extensive discovery was undertaken, the defendants filed a motion to dismiss and alternately for summary judgment, challenging the service of process claiming, *inter alia*, it was inadequate because the Mississippi Attorney General was not served as required by M.R.C.P. 4(d)(5). The plaintiff responded by arguing that defendants waived the right to challenge insufficiencies related to process. The trial judge denied defendants' motion to dismiss, and we granted them permission to bring this interlocutory appeal pursuant to M.R.A.P. 5. After thorough review of the record, we affirm the judgment of the trial court and remand for further proceedings consistent with this opinion.

FACTS

¶ 3. The underlying relevant facts are undisputed. On June 11, 2002, the decedent was transferred from Laurel Wood Center and admitted to Reginald P. White Nursing Facility, a licensed home for the aged and infirm. While he was a resident, there were several incidents in which he and others were injured, and there were reports of the decedent hitting other residents and other residents hitting him. On July 10, 2002, the decedent became unresponsive and was taken to Rush Hospital Emergency Room, and was transferred to the University of Mississippi Medical Center where he died on July 12. An autopsy report revealed the cause of death as blunt force trauma to the decedent's skull.

¶ 4. On July 2, 2003, the plaintiffs filed this wrongful death suit against EMSH and MDMH, alleging the defendants' negligence proximately caused the decedent's death because they had notice of the risk of other patients physically abusing the decedent, but failed to exercise the requisite degree of care and skill in his care, treatment, and security. The defendants answered on August 22, 2003, stating, *inter alia*, that the plaintiffs' attempts at process were insufficient and inadequate and should be dismissed pursuant to Rules 12(b)(4) and 12(b)(5), M.R.C.P.^{FN1}. They reserved the right to amend their answer to raise other defenses. The case proceeded into the discovery phase, and on October 11, 2004, defendants filed a motion for summary judgment asserting immunity from liability under the discretionary function exemption found in Miss. Code Ann. Section 11-46-9(1)(d).

*2 ¶ 5. Subsequently, the case proceeded through motions to compel, for status conferences, and additional discovery. On June 9, 2005, defendants filed a motion to dismiss or alternatively for summary judgment, based on M.R.P.C. 4(d)(5)^{FN2} and the expiration of the statute of limitations, as well as insufficiencies related to process and the discretionary function exemption previously raised. In this motion, defendants asserted for the first time that service was inadequate because the plaintiffs served Dr. Ramiro Martinez, Administrator and Chief Executive Officer of EMSH, on behalf of EMSH, and served Carol F. Thweatt,^{FN3} Senior Attorney for the MDMH, instead of serving the Mississippi Attorney General pursuant to M.R.C.P. 4(d)(5).

¶ 6. The trial judge agreed that the Attorney General should have been served, but held that the "dilatatory actions of the Defendants, after the initial assertion of the general defenses of insufficient process and insufficient service of process, waived the defenses." The trial court further said: As the precedent makes clear, a Defendant must timely pursue the defenses of insufficiency of process and insufficient service of process in their answer. However, the Defendants did not affirmatively pursue the matter until after two years of litigation and after the Defendants filed a Motion for Summary Judgment, defending the case on the

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merits.

Service on process on Attorney General

After finding the defendants waived their defenses regarding process, the trial court denied their motion to dismiss and ultimately concluded that there were genuine issues of material fact in dispute which prevented summary judgment.

ANALYSIS

¶ 7. This Court is presented with an issue of first impression, as this is our first time to address M.R.C.P. 4(d)(5) which requires service of process on the Attorney General when suit is filed against the State of Mississippi or any one of its departments, officers or institutions. Here, there was no attempt to serve the Attorney General, even after the plaintiffs were made aware of this requirement by the defendants' motion to dismiss or grant summary judgment. Intertwined with that requirement is the waiver issue. Namely, whether a defendant can generally raise defenses of insufficient process and service of process in the answer and then subsequently waive those defenses by failing to actively and specifically pursue them while participating in the litigation.

¶ 8. Defendants argue they preserved the defenses in their answer and therefore the trial court should have granted their motion to dismiss. On the other hand, the plaintiffs maintain that "the Defendants have participated in substantial discovery in the form of interrogatories, production requests, depositions, designation of experts, scheduling order, and trial date order, all of which occurred from the filing of the lawsuit on July 2, 2003 until [the trial court's denial in September 2005]." Although the plaintiffs admit the general defenses were raised in the defendants' answer on August 22, 2003, they argue they were not specifically pursued until their June 9, 2005, motion to dismiss, or in the alternative for summary judgment. The plaintiffs further argue that defendants' participation in the litigation and failure to pursue the insufficiencies related to process, especially the service upon the Attorney General, constituted a waiver.

*3 [1] ¶ 9. EMSH is an institution operated under the jurisdiction and control of MDMH pursuant to Miss.Code Ann. Section 41-4-11(2) (Rev.2005). Further, MDMH was created as a department of the State in Miss.Code Ann. Section 41-4-5 (Rev.2005). M.R.C.P. 4(d)(5) provides that the summons and complaint shall be served together "[u]pon 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." We agree that the trial court was correct in holding this provision applied, rather than M.R.C.P. 4(d)(8), which applies to "any governmental entity not mentioned above." We also agree that the trial court was correct when it determined process was insufficient because the plaintiffs served the Chief Executive Officers of MDMH and the EMSH rather than the Mississippi Attorney General, and there was no subsequent effort to correctly serve process on the Attorney General within 120 days of the filing of the complaint as required by M.R.C.P. 4(h). Defendants referred to M.R.C.P. 12(b)(4) (pertaining to insufficiency of process) and M.R.C.P. 12(b)(5) (pertaining to the insufficiency of service of process) in their answer and affirmative defenses, but did not specifically refer to M.R.C.P. 4(d)(5) until their motion to dismiss. But our inquiry does not end there.

Waiver of defenses

[2] ¶ 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

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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.

*4 ¶ 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.

SMITH, C.J., WALLER, P.J., DIAZ, EASLEY, CARLSON, GRAVES, DICKINSON AND RANDOLPH, JJ., CONCUR.

FN1. M.R.C.P. 12(b)(4) pertains to insufficiency of process; 12(b)(5) pertains to insufficiency of service of process.

FN2. M.R.C.P. 4(d)(5) requires delivery of a copy of the summons and complaint to the Attorney General of the State of Mississippi when the State of Mississippi or any one of its departments, officers or institutions is being sued.

FN3. The summons actually listed Dr. Albert Randel Hendrix, Administrator and Chief Executive Officer of the MDMH, but this is of no consequence here.

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Briefs and Other Related Documents (Back to top)

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