IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00373-COA

KENNETH JOHNSON **APPELLANT**

v.

JOHN PAUL LEE, M.D. AND MEDCO HEALTH SOLUTIONS OF DUBLIN, INC. **APPELLEES**

DATE OF JUDGMENT:	02/01/2008
TRIAL JUDGE:	HON. MARCUS D. GORDON
COURT FROM WHICH APPEALED:	SCOTT COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	MARK D. MORRISON
ATTORNEYS FOR APPELLEES:	MILDRED M. MORRIS JOSEPH GEORGE BALADI JAMES A. BECKER TIMOTHY LEE SENSING J. COLLINS WOHNER
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
TRIAL COURT DISPOSITION:	GRANTED SUMMARY JUDGMENT FOR FAILURE TO CREATE A QUESTION OF FACT BY TIMELY DESIGNATING AN EXPERT AND FOR LACK OF JURISDICTION
DISPOSITION:	AFFIRMED - 09/08/2009
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KING, C.J., BARNES AND ISHEE, JJ.

ISHEE, J., FOR THE COURT:

¶1. The present appeal stems from two orders entered by the Circuit Court of Scott County. In the first order, the circuit court granted summary judgment in favor of Dr. John Paul Lee. The circuit court found that Kenneth Johnson had failed to designate an expert

witness at least sixty days prior to trial; therefore, Johnson could not prove that Dr. Lee was negligent. In the second order, the circuit court granted the motion to dismiss of Medco Health Solutions, Inc. (Medco). The circuit court found that service of process upon Medco Health Solutions of Dublin (Medco of Dublin) by certified mail was improper; therefore, the circuit court did not have jurisdiction over Medco. Johnson filed a motion for reconsideration, but prior to the hearing on his motion, he filed a notice of appeal.[1] Johnson cites the following alleged points of error:

I. Whether the circuit court erred in granting Dr. Lee's motion for summary judgment and dismissing Johnson's Motion for Continuance of Trial Setting and Entry of Scheduling Order.

II. Whether the circuit court erred in granting Medco's motion to set aside the entry of default and to dismiss.

Finding no error, we affirm the circuit court's orders.

FACTS AND PROCEDURAL HISTORY

¶2. On July 24, 2005, Johnson was involved in a one-car accident, which resulted in him suffering injuries. He later filed a complaint on July 3, 2007, in the circuit court, alleging that the proximate cause of the accident was the improper changing of his blood pressure medication by Dr. Lee and Medco of Dublin.[2] Summons was issued on the day that Johnson filed his complaint, and service of process was accomplished on all of the named defendants. The proof of service showed that Medco of Dublin was served via certified mail on July 31,

[1] Pursuant to Rule 4(d) of the Mississippi Rules of Appellate Procedure, this Court entered an order requesting that the circuit court dispose of the motion for reconsideration. The circuit court then entered an order denying Johnson's motion for reconsideration.

[2] Johnson also named as defendants, Daiichi Sankyo, Inc., and Forest Laboratories, Inc., but they are not part of the present appeal.

2007. The circuit court set the trial date for February 6, 2008.

¶3. Johnson never received an answer from Medco of Dublin; therefore, he requested an entry of default, which the clerk filed on October 3, 2007. Thereafter, on October 12, 2007, Johnson filed a motion for default judgment.

¶4. On December 28, 2007, claiming to have learned about the pending lawsuit during a discussion with Dr. Lee's counsel, Medco made a special appearance and filed a motion to set aside the entry of default and to dismiss. Medco asked that the claim be dismissed for insufficient service of process. According to Medco, Medco of Dublin was a fictitious name that was registered for the purpose of doing business in Ohio. Medco claimed that it never received process, which had been improperly sent to its operation in Ohio. Medco also claimed that Vincent Smith, who signed for the certified letter, was not "an officer, a managing or general agent, or . . . any other agent authorized by appointment or by law to receive service of process." M.R.C.P. 4(d)(4). Medco pointed out that it was a New Jersey corporation that had registered to do business in Mississippi, and Johnson should have served process on its registered agent, CT Corporation System, to have proper process in Mississippi. Since Medco was never properly served, it argued that Johnson's claim should have been dismissed because Medco of Dublin was not a proper party and because Medco was not properly served within 120 days of the filing of the complaint. The circuit court agreed and granted Medco's motion to dismiss.

¶5. Regarding the second order, Dr. Lee filed a motion for summary judgment on December 20, 2007. In the motion, Dr. Lee argued that Johnson had not designated any expert witnesses at least sixty days before trial, as required by Rule 4.04(A) of the Uniform

Rules of Circuit and County Court. The circuit court agreed and found that Johnson had failed to timely designate an expert; therefore, he did not have an expert to testify at trial. The circuit court found that without expert testimony, Johnson could not establish that Dr. Lee committed medical malpractice. Therefore, the circuit court found that there was no genuine issue of material fact and granted Dr. Lee's motion for summary judgment.

¶6. Johnson filed a motion for reconsideration after the circuit court entered the judgments adverse to him. However, before the circuit court held the hearing on the motion, he filed a notice of appeal on both judgments.

DISCUSSION

I. Dr. Lee's Motion for Summary Judgment

¶7. Johnson's first issue is with the circuit court's decision to grant Dr. Lee's motion for summary judgment. Johnson argues that instead of granting summary judgment, the circuit court should have ordered a continuance to allow him to designate an expert. Johnson claims that on or about November 19, 2007,[3] the circuit court set the date for trial as February 6, 2008. This left Johnson approximately two weeks to designate an expert in order to be in compliance with Rule 4.04(A)'s sixty-day rule. Johnson argues that a mere two weeks to designate an expert, combined with the fact that the case had only been pending for approximately seven months when the circuit court dismissed it, was sufficient reason for the court to grant a continuance.

¶8. According to the supreme court, "where the matter at issue is not within the scope of

[3] The docket lists the trial date as having been set on November 14, 2007.

a layperson's common knowledge[,] negligence can be proven in a medical malpractice action only where the plaintiff presents medical testimony establishing that the defendant physician failed to use ordinary skill and care." *McMichael v. Howell*, 919 So. 2d 18, 24 (¶15) (Miss. 2005) (quoting *Powell v. Methodist Health Care-Jackson Hosps.*, 876 So. 2d 347, 348 (¶4) (Miss. 2004)). If a plaintiff fails to produce expert medical testimony to support his medical malpractice claim, it is proper for the circuit court to grant summary judgment. *Id*. at (¶16).

¶9. While Johnson does not dispute that he needed to designate an expert to prove his case, he points out that in his responses to the first set of interrogatories, he mentioned that he "may rely upon the expert medical opinions and observations of" Drs. Calvin Ramsey and Gayle Harrell. However, Johnson's response to Dr. Lee's motion for summary judgment did not designate any expert witnesses. Johnson did not fully designate any expert witness until his January 30, 2008, filing of his supplemental discovery responses, in which he named Dr. Ramsey as an expert witness. Dr. Lee asserts that the circuit court was correct in ruling that merely mentioning two doctors as possible expert witnesses, as Johnson did in his response to the first set of interrogatories, was not sufficient to designate them as expert witnesses.

¶10. This Court reviews a trial court's grant or denial of summary judgment under a de novo standard. *Brooks v. Roberts*, 882 So. 2d 229, 231 (¶7) (Miss. 2004) (citing *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So. 2d 1037, 1040 (¶8) (Miss. 2003)). To succeed on a motion for summary judgment, the moving party must show that there are no genuine issues of material fact. *Id*. at 231-32 (¶7). We will reverse the trial court's grant of summary judgment if we find that triable issues of fact exist. *Id*. at 232 (¶7) (citing *Bowie*, 861 So. 2d

at 1041 (¶8)).

¶11. In Dr. Lee's interrogatory number three, he requested that Johnson identify any person he expected to call as an expert for trial. On September 21, 2007, Johnson responded to the interrogatories and stated that he had not yet made a determination as to whom he would call as an expert at trial. However, he said he might rely on the opinions of Drs. Ramsey and Harrell. Following this interrogatory answer, Johnson took no further steps to designate an expert for trial until he filed a supplemental response on January 30, 2008 – approximately a week before the trial date.

¶12. To be in compliance with Rule 4.04(A), Johnson needed to designate an expert for trial by December 10, 2007. He failed to do so, and after Dr. Lee filed his December 20, 2007, motion for summary judgment, Johnson waited an additional month and ten days before taking any further action to designate an expert. In the hearing on the motion to reconsider this matter, the circuit judge stated that he was reluctant to refuse to accept Johnson's expert, knowing that it would be the end of Johnson's case. Nevertheless, the circuit court found that Johnson had not properly designated an expert witness in time; therefore, it was not proper to allow the expert testimony at trial. Despite Johnson's claim that he did not have adequate time to disclose an expert witness after the trial date was set, the circuit court noted that Johnson had about two weeks from the date the trial was set to designate an expert witness. Additionally, Johnson had more than four months from the date he filed suit until Rule 4.04(A) barred his expert witness's testimony. Johnson has shown no special circumstances that caused his delay in designating an expert.

¶13. We find no error with the circuit court's ruling in light of Johnson's failure to properly

designate an expert or to show any special circumstances that would have allowed the circuit court to grant him additional time to designate an expert. Following the circuit court's refusal to allow Johnson's expert witness, Johnson had no expert medical testimony on which to base his claim for medical malpractice. Lacking such expert medical testimony, it was proper for the circuit court to grant summary judgment in favor of Dr. Lee. Accordingly, we find that this issue is without merit.

II. Medco's Motion to Set Aside the Entry of Default and to Dismiss

¶14. Next, Johnson takes issue with the circuit court's granting of Medco's motion to set aside the entry of default and to dismiss. Johnson argues that service of process upon Medco of Dublin was proper because it was the party with whom he had dealt. He also argues that there was good cause for what he refers to as the "alleged defects" in the service of process. Based on his arguments, Johnson concludes that the proper action on the part of the circuit court would have been to set aside the clerk's entry of default and grant him leave to amend his complaint and substitute the "purportedly proper" defendant – Medco. Despite Johnson's conclusion that it would have been proper for the circuit court to set aside the clerk's entry of default against Medco of Dublin, he argues that it was not proper for the court to have done so based on a motion by Medco. He argues that Medco of Dublin was the named defendant; therefore, it was the only defendant who could have requested that the entry of default be set aside.

¶15. "[A]ctual knowledge by a defendant of the pendency of a suit against him is immaterial, 'unless there has been a legal summons or a legal appearance.'" *Brown v. Riley*, 580 So. 2d 1234, 1237 (Miss. 1991) (quoting *McCoy v. Watson*, 154 Miss. 307, 315, 122 So.

2d 368, 370 (1929)). "Jurisdiction is not obtained by a defendant's informally becoming aware that a suit has been filed against him." *Sanghi v. Sanghi*, 759 So. 2d 1250, 1257 (¶33) (Miss. Ct. App. 2000) (citing *Mansour v. Charmax Indus., Inc.*, 680 So. 2d 852, 855 (Miss. 1996)). A plaintiff's failure to properly serve process upon a defendant, coupled with that defendant's failure to voluntarily appear, prevents the circuit court from entering judgment against him. *Id*. "A court must have jurisdiction [and] proper service of process in order to enter a default judgment against a party. Otherwise, the default judgment is void." *McCain v. Dauzat*, 791 So. 2d 839, 842 (¶7) (Miss. 2001) (citing *Arnold v. Miller*, 26 Miss. 152, 155 (1853)). The circuit court is afforded no discretion in the case of a void judgment; it must set aside such judgment. *Id*. (citing *Sartain v. White*, 588 So. 2d 204, 211 (Miss. 1991)).

¶16. According to Rule 55(c) of the Mississippi Rules of Civil Procedure: "For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." In the present case, the circuit court found good cause to set aside the entry of default – service of process was not perfected on Medco. Instead, Johnson served process via certified mail on Medco of Dublin, which was nothing more than one of Medco's facilities in Ohio. Had Johnson properly investigated his claim, he would have discovered that Medco was registered to do business in Mississippi and had a designated agent for service of process in Mississippi. There was good cause shown to set aside the entry of default – Medco of Dublin was not a proper party, and Medco was never properly served with process. We find no error with the circuit court's decision to set aside the clerk's entry of default because Johnson's failed to properly serve process on Medco.

¶17. We also see no merit to Johnson's argument that the circuit court should have allowed Johnson to substitute Medco in his complaint in the place of Medco of Dublin and allowed him an additional 120 days to serve process on Medco. To substitute a defendant, Rule 15(c) of the Mississippi Rules of Civil Procedure provides: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Additionally, Rule 15(c) requires that:

> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:
>
> > (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and
> >
> > (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

Applying Rule 15(c), Johnson's proposed amended complaint did arise out of the same transaction. However, there was no evidence in the record that Medco received any notice of the institution of the present action until after the time period for service of process had expired. At the hearing on the defendants' motions, the attorney for Medco informed the circuit court that Medco did not receive notice of the lawsuit until December 14, 2007. This was after the 120-day period for service of process, which had expired by the beginning of November 2007. This was also reflected in Medco's motion to set aside the entry of default

and to dismiss. Therefore, Johnson failed to meet the requirements of Rule 15(c), and the circuit court properly denied his request to amend his complaint.

¶18. Furthermore, without a proper defendant in the present case, Johnson's reliance on Mississippi Rule of Civil Procedure 4(h) is also misplaced. Rule 4(h) provides that the trial court shall dismiss a case if service of the summons and complaint is not made upon a defendant within 120 days after filing the complaint unless the party who was to serve process can show good cause for why service was not made within that period of time. In the present case, there was no defendant that Johnson failed to serve within 120 days of filing the complaint. There is no doubt that Johnson timely served process upon Medco of Dublin. The problem was that Johnson did not exercise due diligence in researching the proper defendant before filing his claim. We have already found that Johnson did not satisfy the requirements of Rule 15(c) to amend his complaint to name Medco as the defendant. Therefore, seeing as Medco was not a defendant in the case, it was not error for the circuit court to refuse to allow Johnson to serve Medco with process, and Rule 4(h) is inapplicable.

¶19. Based on the forgoing, we find no error with the circuit court's refusal to amend Johnson's complaint to name Medco as the defendant. We also find no error with the circuit court's decision to set aside the clerk's entry of default against Medco of Dublin and to dismiss Johnson's complaint against Medco of Dublin. Accordingly, we find that this issue is without merit.

¶20. **THE JUDGMENT OF THE CIRCUIT COURT OF SCOTT COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

KING, C.J., LEE AND MYERS, P.JJ., GRIFFIS, BARNES, ROBERTS,

CARLTON AND MAXWELL, JJ., CONCUR. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

IRVING, J., DISSENTING:

¶21. Kenneth Johnson filed his complaint on July 3, 2007. A scheduling order was never entered. It appears that the trial judge, without input from either of the attorneys for the parties, set the case for trial on February 6, 2008. It further appears that, when Dr. John Paul Lee's motion for summary judgment was filed, the parties were involved in discovery, or at least that is what Johnson contends. On these facts, I cannot agree that the trial judge did not abuse his discretion in refusing to grant a continuance of the trial date and in not allowing discovery to proceed. Accordingly, in my judgment, the trial judge erred in disallowing Johnson's expert, who was tendered to Dr. Lee a week prior to trial, and in granting summary judgment. I also believe the trial judge erred in not allowing Johnson to pursue a claim against Medco after Johnson learned that Medco was the real party in interest. Therefore, I dissent. In my view, the trial judge should have granted Johnson's motion for a continuance and for the establishment of a scheduling order. The judge should have allowed Johnson to amend his complaint to assert a claim against Medco.

¶22. In his response in opposition to Dr. Lee's motion for summary judgment, Johnson wrote, inter alia, the following:

> First and foremost, this case is not ripe for summary dismissal as to any party-Defendant at this juncture as the parties and their counsel are presently engaged in the discovery process, including but not limited to, the exchange of written interrogatories, etc., as well as the attempted scheduling of depositions. Indeed, counsel for Dr. Lee and the undersigned were working together to set Plaintiff's deposition at the time of the preparation and filing of the instant Motion. Written discovery responses are currently outstanding between Plaintiff and the Defendants, and further, it recently appears that

counsel has finally been retained to represent the Medco Defendant. Thus, this case is in the discovery stages, and while the same has only been pending since July 2007, it is anticipated that trial preparations can be completed, with assistance of all counsel concerned, within a reasonable period of time so that a decision as to any dispositive motion can be made on the merits in due course.

3.

Second, as this Court is well-aware, the present February 6th trial setting, relied so heavily upon by opposing counsel to trigger the 60-day requirement under Rule 4.04, was set by the Court, a setting that was issued as a matter of course, without regard to the status of discovery and preparedness of counsel for a trial on the merits. Because of counsel's collective efforts to engage in further discovery, the undersigned forwarded a proposed Order continuing the current trial setting to counsel for Dr. Lee, but rather than respond to and/or sign the same, the instant motion was filed in an effort to obtain a procedural advantage en route to a dismissal. See, Exh. "A" attached hereto.

4.

Further, the Court's Order setting this case for trial on February 6, 2008, is dated November 19, 2007, and after giving due consideration for receipt by mail, merely afforded Plaintiff approximately 2 weeks in which to more fully designate experts so as to comply with Rule 4.04's 60-day deadline. As a practical matter, and given the number of prior cases set on this Court's docket during the upcoming term (approximately 100), it is near certainty that this matter cannot and will not be tried on February 6th. Thus, a continuance of the present setting, entry of a scheduling order and the completion of discovery in a timely manner are appropriate as "special circumstances" clearly exist as contemplated by Rule 4.04. See, Brennan v. Webb, 729 So. 2d 244, 247 ([Miss.] Ct. App. 1998) (Exclusion of expert witness under Rule 4.04, where fatal to case, is a sanction of last resort and thus appropriate where "special circumstances" existed).

5.

Lastly, as set forth in Plaintiff's discovery responses dated September 21, 2007, Drs. Calvin Ramsey and Gayle Harrell have both been identified as likely expert witnesses at trial. See, Exhibit "A" to Dr. Lee's Motion. However, as noted above, because of the incomplete status of discovery in this matter, no final opinions have been reached by either physician, and thus complete MRCP 26 disclosures have not been made, beyond the information

> provided in the aforementioned discovery responses. To date, neither Dr. Lee nor his counsel have requested dates upon which to depose either physician, nor has any Motion to Compel been filed to obtain supplemental responses as to these experts. Thus, this Defendant cannot argue any real prejudice as it has been advised of the identity of Plaintiff's likely trial experts, yet has sought no further discovery relative to their specific opinions as to liability.
>
> 6.
>
> Plaintiff respectfully submits that the instant dispositive Motion is premature, at best, and thus should be denied for the reasons set forth herein above. Alternatively, Plaintiff requests that this Court hold said Motion in abeyance, but in any event, compel the parties and their counsel to enter into a mutually agreeable Scheduling Order with extended deadlines for discovery, expert designations and motions, as well as a trial setting during either the May or October 2008 terms of court. No prejudice will be visited upon Dr. Lee by requiring him and his counsel to defend this action on the merits in due course, especially considering the fact that the same has been pending a mere 6 months.

¶23. In fairness to Dr. Lee and to the trial judge, I should point out that Dr. Lee's counsel took issue with Johnson's assertion that discovery was ongoing. Therefore, I assume in this dissent that discovery was ongoing only to the extent that Johnson initiated discovery after the case was set for trial. I find nothing particularly bothersome about this since no discovery order was in place.

¶24. Also, in his response in opposition to Dr. Lee's motion for summary judgment, Johnson attached a copy of a letter that he sent on December 14, 2007, to Dr. Lee's counsel. In the letter, Johnson's counsel wrote:

> Dear [counsel for Dr. Lee]:
>
> As you are probably aware, the above captioned matter is on [the trial judge's] docket for February 6, 2008. Obviously, we are not in a position to proceed to trial and will need to continue the same from the [c]ourt's docket. To that end, I have prepared and enclose an Agreed Order Continuing Trial Setting. Please sign the enclosure and forward same to [other counsel] for his signature

and return to me for filing.

Please feel free to contact me should you have questions concerning this matter.

As I understand the facts, counsel for Dr. Lee did not respond to the letter, choosing instead to file, six days later, his motion for summary judgment on behalf of Dr. Lee. It should be pointed out that Johnson's letter to Dr. Lee's counsel was sent approximately three weeks following the date of the judge's order setting the case for trial. It is unclear when the order was received by counsel for Johnson.

¶25. In his motion for summary judgment, Dr. Lee relied upon the provisions of Rule 4.04 of the Uniform Rules of Circuit and County Court. His motion was filed December 20, 2007, just ten days after designating his own expert. The principal argument in his motion for summary judgment was that under Rule 4.04, Johnson was required to designate his expert at least sixty days prior to trial. I find this argument particularly interesting, because Dr. Lee himself failed to comply with this rule. As stated, according to the docket entry, he designated his expert on December 10, 2007. When the calculation is done, it is clear that Dr. Lee's designation fell two days short of the required sixty days. While this is a matter of law, not of equity, I am nevertheless reminded of the maxim that he who seeks equity must do so with clean hands.

¶26. It is significant, in my view, that the case was not old and that there had not been violations by Johnson of any specific order prior to the Draconian remedy meted out to him for violating Rule 4.04. Therefore, based on these facts and the additional fact that the law prefers that matters be tried on their merits, I am of the view that the trial judge abused his

discretion in not allowing Johnson's expert to testify because he was not designated sixty days prior to trial. Any possible prejudice inuring to Dr. Lee because of Johnson's late designation could have been readily cured by continuing the case, as requested by Johnson, to allow Dr. Lee to depose the expert if he so desired. Of particular interest is the fact that neither Dr. Lee, in his rebuttal to Johnson's response in opposition to Dr. Lee's motion for summary judgment, nor the trial judge mentioned anything about prejudice to Dr. Lee as a basis for not allowing either the continuance or the late designation of Johnson's expert.

¶27. I also believe that the trial judge erred in dismissing Medco. It seems quite obvious to me that this was a case of mistaken identity, as, based on documentation attached to Johnson's response in opposition to Medco's motion to dismiss, Johnson was reasonable in his assumption that Medco of Dublin was the proper party. More specifically, Johnson was sent a prescription change notification on Medco's letterhead. In the upper left-hand corner of the letterhead was the following: Health Solutions of Dublin, Blazer Parkway, Suite B, Dublin, Ohio 43017-3308. In the notice, Johnson was given a contact for additional information at the following address: Medco Health Solutions of Dublin, Attention: HCO Claims Inquiry, 5151 Blazer Parkway, Suite B, Dublin, OH 43017-3308. On these facts, I cannot believe that Medco was not placed on notice via the summons that was served on Medco of Dublin that it was the real party in interest. Nor can I believe that Medco did not learn about the case until approximately six months after it was filed. Further, it is clear to me that Medco knew or should have known that, but for a mistake concerning its identity as the proper party, the action would have been brought against it. In my judgment, the trial judge should have allowed Johnson to amend his complaint to substitute or add the proper

party, and the amended complaint should have related back to the date of the filing of the original complaint as allowed by Rule 15(c) of the Mississippi Rules of Civil Procedure.

¶28. For the reasons presented, I dissent. Accordingly, I would reverse and remand.