IN THE COURT OF APPEALS 10/15/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00270 COA

CONSOLIDATED WITH

NO. 94-CA-00679

ABBOTT LABORATORIES

APPELLANT

v.

TILGHMAN H. PROSSER A/K/A TILGHMAN M. PROSSER

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

MANDATE ISSUED: 6/5/97

SOUTHWICK, J., concurring

The majority's opinion is a well-reasoned explanation of defects in the chancellor's refusal to set aside the default judgment. Remanding for further proceedings is also exactly correct. I write separately because of a disagreement over a non-dispositive element in the majority's opinion, but an element that has significance in the long-term interpretation of one of our rules of civil procedure.

Service of process in this case was by certified mail. The majority relies on that fact to hold that it "in effect" was service under Rule 4(c)(5). I agree that the plaintiff was entitled to use certified mail to effect service under that subpart of Rule 4, but the plaintiff's summons explicitly limited itself to Rule 4(c)(3). Upon such numerical nuances did the trial court turn the decision on whether a $6 million judgment should be left in place by default.

I would hold that establishing clarity in the obligations of a party who receives a summons is the purpose of our service rules. Greater zeal could have been exercised by the initial defense attorney

who looked at the summons. Still, an attorney who receives a summons that says that it is being served only under Rule 4(c)(3), should be able to measure his response by the terms of Rule 4(c)(3). To the contrary, the trial court and the majority here finds that the attorney fatally errs to rely on the rule stated in the summons. The mischief that can be created by such an interpretation is proved in this case, even though I sincerely believe no such intent was in the mind of the plaintiff. We should not create a rule that advantages those who might in the future desire to mislead. All involved, the majority here, even the chancellor below, believed the summons was at least confusing. I would limit the requirements imposed on the recipient to those stated in the rule that the sender decides to cite. There was no proper service of process. For that additional reason the default judgment should have been set aside.

FRAISER, C.J., COLEMAN AND MCMILLIN, JJ., JOIN THIS SEPARATE OPINION.