IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CA-01388-COA

Y-D LUMBER COMPANY, INC. **APPELLANT**

v.

HUMPHREYS COUNTY **APPELLEE**

DATE OF JUDGMENT:	03/12/2007
TRIAL JUDGE:	HON. JANNIE M. LEWIS
COURT FROM WHICH APPEALED:	HUMPHREYS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	BOYD P. ATKINSON
ATTORNEY FOR APPELLEE:	NO BRIEF FILED
NATURE OF THE CASE:	CIVIL - OTHER
TRIAL COURT DISPOSITION:	PRIORITY OF GARNISHMENTS DETERMINED
DISPOSITION:	AFFIRMED IN PART; REVERSED AND REMANDED IN PART - 02/10/2009
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

ROBERTS, J., FOR THE COURT:

¶1. Y-D Lumber Company, Inc., (Y-D) appeals the Humphreys County Circuit Court's "determination of priority of garnishments" of the wages of Lawrence Browder, Chancery Clerk of Humphreys County. Y-D argues that all prior garnishors' services of process on Humphreys County were defective, and as a result, its garnishment must necessarily be satisfied first. After careful review, we must conclude that the circuit court erred when it determined that priority of garnishments is based on service of the writ rather than the filing of the writ. Accordingly, we reverse the circuit court's decision that the six prior garnishors

properly served Humphreys County with process, and we remand this matter to the circuit court for further proceedings. Additionally, we must find that the circuit court should have ordered Y-D to join the six prior garnishors before the circuit court determined priority.

FACTS AND PROCEDURAL HISTORY

¶2. Y-D obtained a default judgment against Browder and attempted to collect on that judgment. Having successfully suggested a writ of garnishment, Y-D was required to serve Browder's employer – Humphreys County – with process. Because Browder was then the Chancery Clerk of Humphreys County, Y-D was required to serve the Sheriff of Humphreys County. Miss. Code Ann. § 11-35-11(2) (Rev. 2004).

¶3. The record does not contain Humphreys County's answer, but it appears that Humphreys County responded and informed Y-D that multiple judgment creditors had pre-existing garnishments against Browder and that those garnishments took priority over Y-D's garnishment.[1] In response, Y-D filed what it termed a "motion to determine priority of garnishment." Although Y-D disputed Humphreys County's response, Y-D did not expressly contest Humphreys County's answer pursuant to Mississippi Code Annotated section 11-35-45 (Rev. 2004). Y-D claimed that Humphreys County was incorrect in its position that Y-D's garnishment was last in priority, but the crux of Y-D's motion was its request that the

[1] As mentioned, the record before us does not contain a copy of Humphreys County's answer. However, the circuit clerk's docket sheet indicates that Humphreys County filed its answer on October 5, 2006. Y-D's motion to determine priority of garnishments stated, "Humphreys County filed an answer, a copy of which is attached hereto." Additionally, the transcript of the hearing on Y-D's motion references that Humphreys County "stated that there was already six different garnishments ahead of Y[-]D."

circuit court establish actual priority. Y-D argued that the priority of garnishments was based on the order that a garnishor serves process upon a garnishee. Y-D reasoned that it should have first priority because it properly served the sheriff while the other six garnishors failed to serve the sheriff.

¶4. Y-D later successfully moved to supplement the record. Y-D submitted copies of the six prior writs of garnishment.[2] The record only contains two returns of service of process. In one, a process server served a writ on a Humphreys County Justice Court judge. In the other, a process server served a writ on a Humphreys County deputy chancery clerk. Additionally, the record only contains answers to two of those six writs.

¶5. After the circuit court conducted a hearing on Y-D's motion, the circuit court fulfilled Y-D's request to determine priority of garnishments – albeit not in the manner Y-D would have preferred. The circuit court determined that priority of the garnishments was based on the date that each was filed. The circuit court also determined that the portion of Browder's wages that were paid to the IRS was not a garnishment, but it was instead a voluntary wage withholding.

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[2] Three of the prior writs of garnishment have handwritten notes that could indicate that those garnishments have been satisfied. For example, the earliest-filed writ of garnishment was for $2,748.01. There are handwritten notations on the copy of that writ indicating six payments of $400 from February through July 2000 and one payment of $348.01 on August 2000. We do not mention this to suggest that the writ has, in fact, been satisfied. Instead, we mention this merely to point out that there is at least some indication that it may have been satisfied. Two other writs have similar handwritten notations.

¶6. Aggrieved, Y-D appeals and claims that the circuit court erred when it determined the priority of garnishments based on the filing date. Y-D revisits its argument before the circuit court. That is, Y-D argues that because the six prior garnishors failed to serve process upon the Sheriff of Humphreys County, its garnishment should take priority over the other garnishments.

¶7. Before we begin our analysis of this appeal, we must address the fact that Browder filed a brief and Humphreys County failed to file a brief. Humphreys County is the appellee in this matter. That is, garnishment is a proceeding between the successful plaintiff, now the judgment creditor and garnishor, and a garnishee. *See Folse v. Stennett-Yancey*, 757 So. 2d 989, 991-92 (¶14) (Miss. 2000). Browder, the original defendant and now the judgment debtor, is not a party to the garnishment proceedings. *Id*. Even so, Browder filed an appellee's brief. Browder is not a party to these proceedings, and he had no standing to file a brief. Accordingly, Browder's brief is stricken from the record.

STANDARD OF REVIEW

¶8. "This Court uses a de novo standard of review when passing on questions of law." *Ellis v. Anderson Tully Co.*, 727 So. 2d 716, 718 (¶14) (Miss. 1998). Although we might take Humphreys County's failure to file a brief as an admission of error, we are not required to do so if we "can say with confidence, after considering the record and brief of appealing party, that there was no error." *State v. Maples*, 402 So. 2d 350, 353 (Miss. 1981) (quoting *Burt v. Duckworth*, 206 So. 2d 850, 853 (Miss. 1968)). Furthermore, this court "may, at its

option, notice a plain error not identified or distinctly specified" by the parties. M.R.A.P. 28(a)(3).

WHETHER THE TRIAL COURT ERRED IN ITS DETERMINATION OF GARNISHMENT PRIORITY.

¶9. Mississippi Code Annotated section 11-35-24(1) (Rev. 2004) provides that "[w]here more than one garnishment has been issued against an employee of a garnishee, such garnishee shall comply with the garnishment with which he was first served." Subsequent garnishments are to be paid only after prior garnishments are fully satisfied. Miss. Code Ann. § 11-35-24(3) (Rev. 2004).

¶10. Pursuant to Mississippi Code Annotated section 11-35-9 (Rev. 2004), "[a] writ of garnishment . . . shall be served as a summons is required by law to be executed . . . ." The Mississippi Rules of Civil Procedure allow that service of a summons may be waived "with the same effect as if [the party] had been duly served with process, in the manner required by law on the day of the date thereof." M.R.C.P. 4(e). Waiver can be explicit, or it can result from failure of the garnishee to object to the sufficiency of service in its responsive pleading. M.R.C.P. 12(b)(4).

¶11. Where service of a writ of garnishment is insufficient on its face, the date of service for garnishment purposes is the date of effective waiver. *Roy v. Heard & Simmons*, 38 Miss. 544, 545 (1860). If the prior garnishors' services of process on Humphreys County were defective, the date of service for each is the day Humphreys County waived the defense of

insufficient service of process by filing an answer to that garnishor's writ. Accordingly, the circuit court's determination that priority was based on the date of filing is patently incorrect.

¶12. Additionally, the circuit court erred when it did not require Y-D to join the prior garnishors in its motion. Rule 19(a) of the Mississippi Rules of Civil Procedure sets forth as follows:

> A person who is subject to the jurisdiction of the court shall be joined as a party in the action if: (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

M.R.C.P. 19(a)(1)-(2). Rule 19(a) goes on to state that "[i]f he has not been so joined, the court *shall order* that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff." M.R.C.P. 19(a) (emphasis added).

¶13. The record at trial only contained two of Humphreys County's answers to the prior writs of garnishment. Because the record does not contain any indication that Humphreys County filed an answer incident to the writs of the prior garnishors, we cannot determine if waiver occurred in each instance – much less *when* waiver occurred. We cannot assume that a garnishee actually waived complete service of process by filing an answer. Humphreys County does not have the same incentive to answer as a non-state or non-municipality defendant, because there can be no default judgment against such a defendant for failing to

answer a writ of garnishment. Miss. Code Ann. § 11-35-13 (Rev. 2004). We certainly cannot assume that a garnishee waived service of process in the same sequential or chronological order that the prior garnishors attempted service of process.

¶14. In the event that waiver of service of process actually occurred, and that it occurred in an order that does not comport to the order in which the prior garnishors attempted to serve process, the circuit court's resolution could absolutely "impair or impede" the prior garnishors' abilities to protect their interests. The circuit court cannot fully and completely determine priority without first requiring that Y-D join the prior garnishors. Without question, the prior garnishors had a significant pecuniary interest in the disposition of Y-D's motion to determine priority and the circuit court's subsequent fulfillment of that request.

¶15. Accordingly, this Court: (1) affirms the circuit court's decision regarding the character of the IRS voluntary wage withholding, (2) reverses the circuit court's decision that priority of garnishments is based on the date of filing, and (3) remands this matter to the circuit court. Upon remand, the circuit court must require that Y-D join the prior garnishors as parties, determine the status of those garnishments, determine whether Humphreys County filed an answer to each writ of garnishment without raising insufficiency of service of process, and prioritize the garnishments (including Y-D's) based on the date that Humphreys County waived service of process.

¶16. **THE JUDGMENT OF THE CIRCUIT COURT OF HUMPHREYS COUNTY IS AFFIRMED IN PART AND REVERSED AND REMANDED IN PART. ALL COSTS OF THIS APPEAL ARE DIVIDED EQUALLY BETWEEN THE PARTIES.**

LEE, P.J., GRIFFIS, BARNES AND CARLTON, JJ., CONCUR. KING, C.J., CONCURS IN PART. MYERS, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY KING, C.J., AND ISHEE, J. IRVING, J., NOT PARTICIPATING.

MYERS, P.J., CONCURRING IN PART, DISSENTING IN PART:

¶17. I concur with the majority insofar as it concludes that the circuit court erred in finding that the priority of garnishments is determined by the date of filing, rather than service of the writ on the garnishee. I also concur with the majority's holding that, where service on the garnishee is facially defective, the date of service is the day that the garnishee effectively waives service. I cannot, however, join the majority's decision to reverse and remand, because I would place the burden of proof on Y-D Lumber Company, Inc., and it is evident that Y-D failed to meet that burden.

¶18. The majority correctly rejects Y-D's argument that the prior garnishors' services of process were irredeemably defective because they were not served on the Sheriff of Humphreys County. As Y-D has relied entirely on this erroneous argument, it only put on proof to support this particular theory. The record is therefore insufficient to determine the priority of garnishments because Y-D failed to prove that it was entitled to relief vis-a-vis the other garnishors.[3] The majority rewards this failure by offering Y-D another bite at the apple on remand, instructing the trial court simply to determine the true priority of garnishment. This result is not equitable, nor is it required by our law, as I shall explain.

[3] When I speak of the "other garnishors," I do not include the IRS.

¶19. When an employer is faced with multiple garnishments on the wages of its employee, Mississippi Code Annotated section 11-35-24(2) (Rev. 2004) provides that:

> Any such conflicting or subsequent garnishments on an employee of the garnishee shall be returned to the court issuing such writ of garnishment with a statement by the garnishee that a previous garnishment is in effect. Such statement shall operate as a stay of the subsequent garnishment until satisfaction of any prior garnishments has been made.

The statute does not elaborate on how a garnishor might challenge this "statement" by the garnishee that a prior garnishment is in effect, if the garnishor believes it is untrue. The majority offers no guidance, and it appears to hold that once a motion to determine priority of garnishments is filed, the impetus is on the trial court to determine priority of garnishments notwithstanding the contestant's failure to make its case. This result, however, is not demanded by statute, nor is supported by precedent in Mississippi law. No authority is cited requiring it. In this respect, I cannot fault the majority, as there does not appear to be any authority directly on point.

¶20. Nonetheless, consistency with our garnishment law requires that we place the burden of proof squarely on the contestant, Y-D. Although the statute does not clearly define the form of the section 11-35-24(2) "previous garnishments statement" of the garnishee, it does provide that when previous garnishments are in effect, on receiving the writ of garnishment, the garnishee "shall" return it to the issuing court "with a statement . . . that a previous garnishment is in effect." This statement is, for all intents and purposes, an answer or a part

of the answer of the garnishee.[4] It should, therefore, be contested as an answer of the garnishee must be contested.

¶21. Under our law, the answer of a garnishee is taken as true unless contested by the garnishor. *Grenada Bank v. Seligman*, 164 Miss. 168, 173, 143 So. 474, 475 (1932). Once contested, the burden of proving the answer false lies with the contestant. *Id.* The issue before the trial court is also expressly limited to the truth or falsity of the answer, and the contestant must specify in writing "in what particular he believes the answer to be incorrect." Miss. Code Ann. § 11-35-45 (Rev. 2004).

¶22. If we take Y-D's "motion to determine priority of garnishments" as a contest of the County's answer, the majority's disposition of the case is indefensible. The trial court erred not only in its application of the statute, but more fundamentally in purporting to determine the priority of garnishments, as Y-D did not meet its burden to prove the order stated in the County's answer untrue. Remand is not required, and the trial court's decision granting Y-D's motion to determine priority of garnishments vis-a-vis the other garnishors should be reversed and rendered, allowing the order stated in the County's answer to stand.[5] The

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[4] Although the record does not contain Humpreys County's answer, it is evident from the record that the County actually incorporated the "previous garnishments statement" required by section 11-35-24(2) into its answer. Indeed, at times, the proceeding was described as a contest of the County's answer to Y-D's writ of garnishment.

[5] I feel I should address the issue of mandatory joinder of the other garnishors. Clearly, the trial court should have joined the prior garnishors, as the majority states, but this error does not require remand. It is harmless to the other garnishors because Y-D failed to make its case and the trial court should not have adjudicated the priority of garnishments. Thus, allowing the County's answer to stand cannot prejudice the other garnishors; it would

decision of the trial court should otherwise be affirmed. Accordingly, I respectfully concur in part and dissent in part.

KING, C.J., AND ISHEE, J., JOIN THIS SEPARATE OPINION.

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leave them in exactly the same position they would have been had Y-D not brought this contest.