2005-CA-01952

IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

HILDA PATSY SPURGEON AND
OTTIS JEROME SPURGEON — PLAINTIFFS/APPELLANTS

VS. — CAUSE NO. 2005-CA-01952

EDWIN G. EGGER, M.D. — DEFENDANT/APPELLEE

APPELLEE BRIEF OF DEFENDANT/APPELLEE
EDWIN G. EGGER, M.D.

On Appeal from the Circuit Court of Washington County, Mississippi

ORAL ARGUMENT NOT REQUESTED

Submitted by:

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VS.	**CAUSE NO. 2005-CA-01952**
EDWIN G. EGGER, M.D.	**DEFENDANT/APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. This representation is made in order that the justices of the Supreme Court or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Hilda Patsy Spurgeon, Plaintiff.
2. Ottis Jerome Spurgeon, Plaintiff.
3. William R. Armstrong, Jr., Esq., Attorney at Law, Jackson, Mississippi, counsel for Hilda Patsy and Ottis Jerome Spurgeon.
4. Edwin G. Egger, M.D., Defendant.
5. Tommie Williams, Esq., Upshaw, Williams, Biggers, Beckham & Riddick, LLP, counsel for Edwin G. Egger, M.D.
6. Clinton M. Guenther, Esq., Upshaw, Williams, Biggers, Beckham & Riddick, LLP, counsel for Edwin G. Egger, M.D.
7. Steven C. Cookston, Esq., Upshaw, Williams, Biggers, Beckham & Riddick, LLP, counsel for Edwin G. Egger, M.D.
8. Honorable Margaret Carey-McCray, Circuit Judge.

Respectfully submitted,

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Counsel for Defendant/Appellee
Edwin G. Egger, M.D.

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STATEMENT REGARDING ORAL ARGUMENT

The facts relevant to the issues raised on appeal are straightforward and the legal authorities which control the arguments asserted are firmly established. Accordingly, Appellee Edwin G. Egger, M.D., waives oral argument regarding the present appeal and respectfully requests that the Spurgeons' request for oral argument be denied.

STATEMENT OF ISSUES

The sole issue of this appeal concerns whether the trial court abused its discretion in dismissing the Spurgeons' Complaint because they failed to show good cause why service of process was not made within 120 days from the filing of their Complaint.

STATEMENT OF THE CASE

A. Nature of the Case.[1]

On April 20, 2004, Appellants Hilda Patsy and Ottis Jerome Spurgeon ("the Spurgeons") filed a Complaint in the Circuit Court of Washington County, asserting claims for medical negligence and loss of consortium against Appellee Dr. Edwin G. Egger, Kings Daughter's Hospital and Robert Coleman, CRNA., stemming from an April 24, 2002 cataract surgery performed on Mrs. Spurgeon. CP: 3-4. The Spurgeons filed suit without providing sixty (60) days prior written notice of their intention to bring the action as required by required by Miss. Code Ann. § 15-1-36(15), which was not mailed to Dr. Egger until almost five (5) months *after* suit was filed. CP: 79-80, 106.

On August 10, 2004, 112 days after filing suit, the Spurgeons had process issued and their private process server delivered a copy of their Summons and Complaint to Dr. Egger's office

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[1] Record citations are in the following format: Materials from the Clerk's papers are denoted by the initials CP, followed by the page number ascribed by the Clerk. Materials contained in the Record Excerpts are denoted by the initials RE. Citations to the transcript from the hearing on Dr. Egger's Motion to Dismiss are denoted by the initial T.

assistant, Amanda Boozer. CP: 39, 106, 108. Although Dr. Egger was at his office at the time, the Spurgeons' process server did not ask to see Dr. Egger and made no attempt to personally serve him with the Summons and Complaint. CP: 108, 121. Ms. Boozer was not, and had never been, authorized or designated by Dr. Egger as his agent for service of process or to accept a summons or process on Dr. Egger's behalf. CP: 106.

On September 9, 2005, Dr. Egger moved the trial court to dismiss the Spurgeons' Complaint on the grounds that: (1) Dr. Egger was not personally served with process within 120 days after the filing of the Complaint as required by M.R.C.P. 4 and (2) the Spurgeons did not give Dr. Egger 60 days prior written notice of the intention to bring the action pursuant to Miss. Code Ann. §15-1-36(15). CP: 21-23.

A hearing on Dr. Egger's Motion to Dismiss was held by the Honorable Margaret Carey-McCray on July 26, 2005. T: 1-36. After considering the substantial evidence, including argument of counsel, witness testimony at the hearing and the papers and pleadings on file in the Circuit Court, the trial court entered a Final Judgment of Dismissal pursuant to M.R.C.P. 12(b)(5) on the grounds that service of process was insufficient and the Spurgeons failed to show good cause why service was not made within 120 days of the filing the of their Complaint as required by M.R.C.P. 4. CP: 129-130.

At the Spurgeons' request, the trial court did not address the effect of the Spurgeons' failure to give the required Miss. Code Ann. 15-1-36(15) notice prior to filing suit. T: 3-8, 34.

This appeal followed. CP: 131.

B. <u>Statement of Facts</u>.

On April 20, 2004, the Spurgeons filed a Complaint in the Circuit Court of Washington County, asserting claims of medical negligence and loss of consortium against Appellee Edwin G.

Egger, Kings Daughter's Hospital and Robert Coleman, CRNA. CP: 3-8. The claims asserted in the Spurgeons' Complaint stemmed from an April 24, 2002 cataract surgery performed on Mrs. Spurgeon. CP: 3-4. Although Miss. Code Ann. §15-1-36(15) states that "[N]o action based upon the healthcare provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days prior written notice of the intention to bring the action," such notice was not provided to Dr. Egger prior to the initiation of suit. CP: 106. Instead, the Spurgeons purported to give notice pursuant to §15-1-36(15) on September 9, 2004 -- over five months ***after*** suit was filed. CP: 78-80.

Although the Complaint was filed on April 20, 2004 (4 days before the applicable statute of limitations ran), summonses for each of the Defendants were not issued until August 10, 2004 -- 112 days after the Complaint was filed. CP: 1. The Spurgeons' retained Dennis Faust, a professional process server, to serve their Summons and Complaint. CP: 114. On August 10, 2004, Mr. Faust delivered the Spurgeons' Summons and Complaint to Amanda Boozer, Dr. Egger's office assistant. CP: 108, 112. Ms. Boozer was not, and had never been, authorized or designated by Dr. Egger as his agent for service of process or to accept a summons or process on Dr. Egger's behalf. CP: 106, 129; T: 21-22.

Although Dr. Egger was at the office when these documents were delivered to Ms. Boozer, Mr. Faust did not ask to see Dr. Egger, nor did he make any attempt to personally serve the Summons and Complaint on Dr. Egger. CP: 108; T: 22. Prior to Ms. Boozer's receiving a copy of the Complaint, Dr. Egger had not received prior notice, written or otherwise, of either the Complaint or the Spurgeons' intention to file the underlying lawsuit against him. CP: 106. Further, although he was not inaccessible to personal service of process, Dr. Egger was not personally served with the Summons and Complaint in this matter until July 7, 2005. CP: 1, 106, 116.

Although he admittedly did not personally serve Dr. Egger, Mr. Faust purportedly filled out a Proof of Service on August 11, 2004, indicating that he personally delivered copies of the Spurgeons' Summons and Complaint to Dr. Egger. CP: 40, 112, 121. This Proof of Service was not filed in the trial court and made part of the record until June 15, 2005, when the Spurgeons responded in opposition to Dr. Egger's September 9, 2004 Motion to Dismiss. CP: 21-23, 35-40. Mr. Faust later confirmed through affidavits that, contrary to the sworn assertions set forth in his Proof of Service, he did not in fact personally serve Dr. Egger. CP: 40, 112, 121. Instead, in the past he had served doctors by delivering summonses and complaints to members of their staffs, which is what he did here. CP: 40, 112, 122-123.

On August 13, 2004, counsel for Dr. Egger wrote to confirm their representation of Dr. Egger in connection with Mrs. Spurgeon's claim, to advise that Dr. Egger was involved in a bankruptcy proceeding and to express a willingness to investigate the Spurgeons' claims. CP: 41. Dr. Egger's counsel further indicated that, upon receipt of additional information regarding Dr. Egger's bankruptcy proceeding, they intended to file documentation with the Clerk in Washington County in an effort to invoke the automatic stay.[2] CP: 41.

The 120 day tolling period provided for in M.R.C.P. 4 ran on August 18, 2004 and the 4 days remaining on the statute of limitations began running again, expiring on August 22, 2004.

On September 7, 2004, Dr. Egger, through counsel, served a Motion to Dismiss the Spurgeons' Complaint on the following grounds:

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[2] According to the docket of the U.S. Bankruptcy Court for the Northern District of Mississippi, Edwin G. Egger filed under Chapter 11 of the Bankruptcy Act on March 29, 1999, almost three years prior to the April 24, 2002 surgery giving rise to the Spurgeons' claims. CP: 4, 77. Dr. Egger's case (No. 99-21448) was still open on April 20, 2004, the date the Spurgeons initiated their Complaint. CP: 77.

1. The Complaint herein was filed on April 20, 2004, four (4) days prior to the expiration of the applicable statute of limitations. However, Dr. Egger was not personally served with process within 120 days after the filing of the Complaint (that is, on or before August 18, 2004), nor has he been personally served with process, despite the fact that Dr. Egger has not been inaccessible or beyond service of process. Therefore, no good cause has been shown why such service of process was not properly made upon Dr. Brawner [sic] within the required 120 days. Accordingly, pursuant to Mississippi Rules of Civil Procedure 4 and 12(b)(5),(6), the action should be dismissed.

2. In addition, when Dr. Egger was not served with process on or before August 18, 2004, the statute of limitations began to run and expires four days later, on August 22, 2004. The Complaint was also filed in violation of Section 15-1-36(15) Miss. Code Ann., 2003, which requires that no action based upon an alleged healthcare providers professional negligence may be begun unless the Defendant has been given at least 60 days prior written notice of the intention to begin the action. This action was begun without providing Dr. Egger with the statutorily required 60 days prior written notice of intention to file suit.

3. Therefore, because the facts that the statute of limitations has now expired, and the Plaintiff failed to comply with the requirements of Section 15-1-36(15), above mentioned, the claim should be dismissed, with prejudice.

CP: 21-22.

Then, in an effort to invoke the automatic stay provisions of 11 U.S.C. §362(a), counsel for Dr. Egger served a Suggestion of Bankruptcy on September 9, 2004. CP: 21-23. The trial court never issued an order staying the matter in response to Dr. Egger's Suggestion of Bankruptcy and a Withdrawal of the Suggestion of Bankruptcy was filed on Dr. Egger's behalf on February 17, 2005. CP: 1, 21-23, 29.

Despite the fact that the statute of limitations and the 120 day time limit for service under M.R.C.P. had long since passed, the Spurgeons personally served Dr. Egger with the Spurgeons' Summons and Complaint on July 7, 2005–nearly 10 months after Dr. Egger first put the Spurgeons on notice, through his Motion to Dismiss, that he had not been personally served. CP: 1, 21-23, 116. Prior to the time their appellate brief was filed in this Court, the Spurgeons never requested an

extension of time to effect service of process. CP: 1; also see the Spurgeons' Brief at p. 17.

A hearing on Dr. Egger's Motion to Dismiss was held by the Honorable Margaret Carey-McCray on July 26, 2005. T: 1-36. Among the papers and pleadings in the record for the trial court's consideration at the time of the hearing were nine (9) affidavits discussing the procedural posture of the case, including the facts and details concerning the delivery and ultimate service of the Summons and Compliant. Included among these were five (5) affidavits from the Spurgeons' counsel, two (2) affidavits from the Spurgeons' process server, Dennis Faust, one (1) affidavit from Dr. Egger's office assistant, Amanda Boozer, and one (1) affidavit from Dr. Egger. CP: 35-44, 45-44, 77-83, 106-107, 108-109, 112-113, 114-120, 121-122 and 123-128. Neither these affidavits nor any evidence in the record establish that the Spurgeons or their counsel spoke with Mr. Faust or received his executed (and false) Proof of Service prior to August 18, 2004, when the 120 day tolling period of M.R.C.P. 4 expired. *Id.*

At the hearing on Dr. Egger's Motion to Dismiss, the trial court heard testimony from Amanda Boozer, who was called as a witness by the Spurgeons. T: 15-23. Among other things, Ms. Boozer confirmed that:

- She was a medical assistant for Dr. Egger on August 10, 2004. T: 14.
- An unidentified man came into the office on August 10, 2004 and gave her some papers for Dr. Egger. T: 15.
- The man who brought the papers was not in uniform, did not ask to see Dr. Egger and did not ask Ms. Boozer if she was authorized to accept service of process for Dr. Egger. T: 21.
- Ms. Boozer did not know what the papers delivered to her were. T: 19.
- Ms. Boozer was not authorized by Dr. Egger to accept a summons and complaint or any legally binding documents for him. T: 17, 22.

At the hearing, the Spurgeons' objected to the trial court addressing the portion of Dr. Egger's Motion to Dismiss based on the failure to give statutory notice prior to filing suit as required by Miss. Code Ann. §15-1-36(15) and asked the trial court to withdraw that issue from consideration. T: 3-8, 34. Acceding to the Spurgeons' request, the trial court did not address the Spurgeons' failure to comply with Miss. Code Ann. 15-1-36(15) as a separate ground for dismissal. T: 34.

After considering the evidence, including the argument of counsel, witness testimony at the hearing and the papers and pleadings on file in the Circuit Court, the trial court entered a Final Judgment of Dismissal pursuant to M.R.C.P. 12(b)(5) because service of process was insufficient pursuant to M.R.C.P. 4 and the Spurgeons failed to show good cause why service was not made within 120 days of filing the of their Complaint as required by M.R.C.P. 4. CP: 129-130.

This appeal followed. CP: 131.

SUMMARY OF THE ARGUMENT

The trial court properly considered the substantial evidence before it, including the arguments of counsel, witness testimony and the papers and pleadings on file in the trial court, and determined that service of process pursuant to M.R.C.P. 4 was insufficient, that the Spurgeons had failed to show that good cause existed for failure to serve the Summons and Complaint within 120 days after filing and that the Spurgeons' Complaint was subject to dismissal.

ARGUMENT

A. Standard of Review.

Mississippi Rule of Civil Procedure 4(h) requires proper service of a summons upon a

defendant within 120 days after the filing of a Complaint.[3] Rule 4(h) is intended to require plaintiffs to timely submit their claims to a court for appropriate judicial review. *Holmes v. Coast Transit Auth., 815 So.2d 1183 (Miss. 2002).* Exceptions to this requirement are only permitted upon a showing of good cause or excusable neglect. *Mitchell v. Brown, 835 So.2d 110, 112 (Miss. App. 2003).*

The determination of whether "good cause" exists is a "discretionary ruling on the part of the trial court and entitled to deferential review of whether the trial court abused its discretion and whether there was substantial evidence supporting the determination." *LeBlanc v. Allstate Insurance Company, 809 So.2d 674, 676 (Miss. 2002)*(citing *Rains v. Gardner, 731 So.2d 1192, 1196 (Miss. 1999)*). It has been explained that "[g]ood cause would appear to require at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules normally does not suffice, and some showing of good faith on the parties seeking an enlargement and some reasonable basis for noncompliance within the time specified is normally required." *Moore v. Boyd, 799 So.2d 133, 137 (Miss. App. 2001).*

The excusable neglect standard is very strict and the plaintiff bears the burden of establishing good cause. *Id. at 36* (citing *Black v. Carey Canada, Inc., 791 F.Supp. 1120, 1126 (S.D. Miss. 1990)*); *see also, Holmes v. Coast Transit Auth., 815 So.2d 1183, 1185 (Miss. 2002).* The Mississippi Supreme Court has mandated that "good cause can never be demonstrated where the plaintiff has not been diligent in attempting to serve process." *Montgomery v. Smithkline Beecham*

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[3] M.R.C.P. 4(h) provides: Summons: Time limit for service. If a service of the Summons and Complaint is not made upon a Defendant within 120 days after the filing of the Complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that Defendant without prejudice upon the Court's own initiative with notice to such party or upon motion.

Corp., 910 So.2d 541, 545 (Miss. 2005)(citing *Bang v. Pittman, 749 So.2d 47, 52 (Miss. 1999)).*

B. The Circuit Court Properly Applied Its Discretion In Dismissing the Lawsuit and Finding that Plaintiffs Failed to Show Good Cause Why Service of Process Was Not Made Within the 120 Day Period After the Filing of the Complaint.

Here, it is uncontradicted that the Spurgeons did not properly comply with M.R.C.P. 4(h)'s requirement that their Summons and Complaint be served within 120 days of filing. Instead, the Spurgeons take the position that failure to properly serve Dr. Egger was due to the following three circumstances beyond their control, which established "good cause" for failing to effect timely service of their summons and complaint: (1) reliance on a process server they retained to serve their Summons and Complaint; (2) lack of notice of a defect in service and (3) the belief that the automatic stay provisions of 11 U.S.C. § 362 prevented further prosecution of their claims. See the Spurgeons' Brief at pp. 11-12.

The Complaint in question was filed on April 20, 2004. CP: 1. Pursuant to M.R.C.P. 4, the Spurgeons had until August 18, 2004 to properly effect service. This was not done. As discussed more fully below, "good cause" for failure to serve the Complaint does not exist for any of the stated reasons and dismissal of the Spurgeons' Complaint was proper.

1. The Spurgeons' Purported Reliance Upon the Conduct of Their Private Process Server Does not Establish Good Cause for Their Failure to Timely Effect Service.

First, conceding that process was not sufficient, the Spurgeons contend that they acted in good faith by employing a process server who misled them into thinking that service was properly effected on Dr. Egger. See the Spurgeons' Brief at p. 12. In support of this argument the Spurgeons contend, numerous times in their brief, that Mr. Faust: (1) prepared a Proof of Service indicating that he had personally served Dr. Egger and (2) reported to Mrs. Spurgeon's attorney that he had accomplished service. *Id.* at 1, 4-5, 8, 11-12 and 16. Thus, the Spurgeons argue that failure of their

process server to properly serve Dr. Egger, coupled with their lack of knowledge of the defect in service until the 120 days expired, establishes good cause for extending the deadline. See the Spurgeons' Brief at pp. 11-12.

Although it indicates that it was signed by Mr. Faust on August 11, 2004, the Proof of Service upon which the Spurgeons rely was not filed with the trial court until June 15, 2005, when it was submitted as part of the Spurgeons' Opposition to Dr. Egger's September 9, 2004 Motion to Dismiss. CP: 35-40. **At a minimum, to support the argument that good cause existed for failure to timely serve their complaint based on their process server's false Proof of Service and assurances that Dr. Egger was served, it was incumbent on the Spurgeons' to establish they received (and relied on) this false information prior to August 18, 2004. This, they failed to do.**

Despite the fact that they reference Mr. Faust's false Proof of Service and misrepresentations several times in their brief and their counsel submitted no less than six (6) affidavits in the trial court discussing the facts and details surrounding the attempt to serve Dr. Egger, the record is void of evidence establishing that the Spurgeons (or their counsel) received either the Proof of Service from Mr. Faust or assurances from him that Dr. Egger was served prior to August 18, 2004, when the 120 day tolling period provided for in M.R.C.P. 4 expired. Accordingly, even if the conduct of their own process server could serve as the basis for establishing good cause for failing to timely serve their complaint–which, as discussed below, it does not – the Spurgeons have failed to sustain their burden of establishing the most fundamental fact upon which their reliance argument is based -- *i.e.*, when they or their counsel received a Proof of Service or assurances from Mr. Faust that service was effected. "Good cause" for failure to timely effect service is not established by reliance not proven to exist.

Here, there is no proof in the record that, prior to August 18, 2004, the Spurgeons (1) received a copy of Mr. Faust's false Proof of Service or (2) spoke with him and received assurances that Dr. Egger was served. This, coupled with the fact that process was not even issued until 112 days into Rule 4's 120 day tolling period and the Spurgeons never requested an extension of time to serve process as allowed under M.R.C.P. 6--even after they were apprised that service was improper -- confirms that the Spurgeons cannot establish that they were diligent in serving process. As such, the trial court acted well within its discretion in finding that they failed to show good cause for failing to timely effectuate service. See, *Bang v. Pittman, 749 So.2d 47, 52 (Miss. 1999)*(a plaintiff must be diligent in serving process if he is to show good cause in failing to serve process within 120 days).

Even if the Spurgeons had established that they (or their counsel) spoke to Mr. Faust to confirm service and/or received his executed Proof of Service before August 18, 2004–proof of neither of which exists – misplaced reliance on their own process server does not provide good cause for their failure to timely serve process. Here, the Spurgeons elected not to have the Circuit Clerk deliver the summons to the Sheriff for service as set forth in M.R.C.P. 4(a)(1)(B) and instead undertook responsibility for service as provided in M.R.C.P. 4(a)(1)(A) and 4(a)(2). As such, the process server used was not a duly authorized officer of the court charged with the responsibility of serving process but, instead, an individual hired by the Spurgeons and acting as their agent.

While no Mississippi cases directly on point were located, authorities from other jurisdictions discussing similar scenarios have determined that it is a plaintiff's responsibility to monitor the activity of a process server and take reasonable steps to assure that a defendant is timely served. See generally, *Cox v. Sandia Corp., 941 F.2d 1124 (10th Cir. 1991); Braxton v. United States, 817 F.2d 238 (3rd Cir. 1987)* and *Sheets v. Schlear, 132 F.R.D. 391 (D.N.J. 1990)*. Simply put, misplaced

reliance upon a process server that service was properly effected does not establish good cause for failure to timely serve process. *Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3rd Cir. 1987).*

Indeed, under facts essentially mirroring those at issue here, the Third Circuit Court of Appeals has addressed whether reliance upon the word of a process server constitutes good cause for failing to meet the 120 service requirement of F.R.C.P. 4(j). *Lovelace v. Acme Markets, Inc., 820 F.2d 81, 83 (3rd Cir. 1987).* In *Lovelace,* the plaintiff contended that he "had good cause to excuse his failure to serve process within the 120-day period. To support that contention . . .[plaintiff] alleged that he was misled by the representation of . . .[the process server] that process had been served on time when in fact it had not been." *Id.* at 83. Nonetheless, the Third Circuit upheld the district court's finding that such reliance did not constitute good cause because "the burden to ensure proper and timely service rested upon . . .[plaintiff] and his attorney" and additional steps to ensure service should have been taken. *Id.*

The reasoning set forth in the authorities cited above should apply where, as here, the following facts are established. The Spurgeons did not ultimately have process issued until August 10, 2004–112 days after their complaint was filed. CP: 1.[4] Then, rather than have the circuit clerk deliver the summons to the sheriff for service as provided for in M.R.C.P. 4(a)(1)(B) and 4(c)(2), the Spurgeons to retained Mr. Faust, their own private process server.

Despite the fact that Dr. Egger was in the office on the day service was attempted, Mr. Faust did not ask to see him to personally serve him with the summons and complaint. CP: 108. Mr. Faust was not in uniform at the time and, prior to delivering the summons and complaint to Ms. Boozer, he did not identify himself, did not identify the documents he was delivering and did not ask Ms.

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[4] Conceivably, had the Spurgeons promptly issued and served their summons and complaint their current predicament could have been avoided.

Boozer if she was authorized to accept the summons and complaint on Dr. Egger's behalf. CP: 108; T: 15, 19, 21. Apparently oblivious to the service requirements under Mississippi law, Mr. Faust simply delivered the summons and complaint to Amanda Boozer, one of Dr. Egger's assistants, a routine that he admitted to following when attempting to serve other doctors in the past. CP: 122.

Finally, and perhaps most importantly, despite the fact that there were only 8 days left to effect service (after which 4 days remained prior to the expiration of the statute of limitations), nothing in the record establishes that the Spurgeons spoke to Mr. Faust or received a copy of the executed Proof of Service prior to the expiration of the 120 day time limit on August 18, 2004.[5]

Again, "[A] plaintiff must be diligent in serving process if he is to show good cause in failing to serve process with in 120 days." *Bang v. Pittman, 749 So.2d 47, 52 (Miss. 1999).* Further, neither ignorance of the rules nor inadvertence or mistake of counsel will suffice to establish excusable neglect for failing to timely effect service of process. *Moore v. Boyd, 799 So.2d 133, 137 (Miss. App. 2001).*

Here, no evidence in the record that the Spurgeons' fulfilled their responsibility to provide oversight for Mr. Faust, confirm that he understood the service requirements under Mississippi law or monitor his activity. Likewise, there is no proof that the Spurgeons took reasonable steps to assure that Dr. Egger was timely served or that they, at a minimum, received a false Proof of Service

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[5] Contrary M.R.C.P. 4(f)'s dictate that "[t]he person serving the process shall make proof of service thereof to the court promptly," the Proof of Service here was not filed in the trial court until June 15, 2005, when the Spurgeons responded to Dr. Egger's September 9, 2004 Motion to Dismiss. CPP: 21-23, 35-40. Although the Spurgeons now complain that Dr. Egger's motion did not explain the basis for the challenge to service, that is simply not the case. See the Spurgeons' Brief at p. 11. Dr. Egger's motion explicitly requested an order of dismissal because he: (1) was not personally served with process and (2) was not given pre-suit notice pursuant to Miss. Code Ann. §15-1-36(15). CP: 21-23. Affidavits explaining the true facts surrounding the Spurgeons defective attempt to serve process were submitted on June 22, 2005 to address the false statements set forth in Mr. Faust's Proof of Service filed on June 15, 2004. CP: 35-40, 104-113.

or assurances from Mr. Faust prior to August 18, 2004 that Dr. Egger was properly served. Finally, although Dr. Egger's September 7, 2004 Motion to Dismiss confirmed that he was not properly served with process, the Spurgeons did not properly serve Dr. Egger until July 7, 2005. CP: 21-23, 116. And, until they filed their appellate brief, the Spurgeons never sought leave of Court pursuant to M.R.C.P. 6 to extend the 120 day time for service to have Dr. Egger properly served. CP: 1; see also, the Spurgeons Brief at p. 17.

Under these circumstances, the Spurgeons cannot establish that the trial court abused its discretion in finding that they failed to demonstrate that good cause exists for their failure to timely serve process.

2. The Spurgeons' Claims Were Not Automatically Stayed Due to Dr. Egger's Bankruptcy, Dr. Egger Did Not Conceal the Defect in the Service of Process And Dr. Egger Is Not Estopped From Arguing Otherwise.

Next, the Spurgeons take the position that Dr. Egger's attorneys concealed the defects in service then prevented them from further prosecution of their case by putting them on notice of Dr. Egger's bankruptcy. See the Spurgeons' Brief at p.8, 14. As discussed more fully below, neither argument establishes that the trial court abused its discretion in finding the Spurgeons failed to establish good cause for failing to timely serve their Complaint.

As a starting point, trial courts in the State of Mississippi have jurisdiction to determine whether a pending action is stayed by a ruling of a bankruptcy court. *Overbey v. Murray, 569 So.2d 303, 307 (Miss. 1990)*. Indeed, the Mississippi Supreme Court has offered the following suggestions for proceeding with pending state court litigation that might be affected by the filing of a bankruptcy petition:

1. The debtor should file a Suggestion of Bankruptcy and a certified copy of the bankruptcy petition with the clerk of the state court in which the litigation is pending;

2. The state court should stay all actions until it is shown that the litigation is no longer stayed by 11 U.S.C. §362 or that the stay has been lifted by the bankruptcy court;

3. The state court should consider deferring close questions involving the applicability of exceptions to the automatic stay under 11 U.S.C. §362(b) to the bankruptcy court.

Id.

The Spurgeons' suggestions notwithstanding, the automatic stay provisions of the Bankruptcy Act were not "invoked" by Dr. Egger's attorneys in the August 13, 2004 correspondence in question. See the Spurgeons' Brief at p. 14; see also, CP: 41. The Spurgeons' acknowledged as much in a submission to the trial court, wherein they took the position that "Defendant Egger has invoked the stay of the Bankruptcy Act, from September 9, 2004 until voluntarily invoking lift of stay on February 17, 2004 . . . ." CP: 82. By September 9, 2004, the time for service under M.R.C.P. 4 and the statute of limitations had both expired.

Moreover, despite the fact that they now argue that they were prevented from prosecuting their claims between counsels' reference to the bankruptcy stay in an August 13, 2004 letter and Dr. Egger's purported Withdrawal of Suggestion of Bankruptcy on February 17, 2005, the Spurgeons were clearly undeterred. Specifically, on September 13, 2004, the Spurgeons served Dr. Egger with a notice pursuant to Miss. Code Ann. § 15-1-36(15) of intention to file suit and, on October 10, 2004, they filed a certification of consultation pursuant to Miss. Code Ann. § 11-1-58(1)(a). CP: 90, 100-102. These documents were served and filed by the Spurgeons in an effort to meet the procedural prerequisites for maintaining their suit and prosecuting their claim. Clearly, nothing in counsel's August 13, 2004 letter-- which merely "advised that Dr. Egger is currently involved in a bankruptcy proceeding," that Dr. Egger was being represented by another attorney in that matter and that, upon receipt of additional documentation, counsel would file documentation in the trial court

in an attempt to invoke the stay provisions of the Bankruptcy Act-- excused the Spurgeons from properly effecting service. CP: 41.

In addition, as discussed above, the proper procedure suggested by the Mississippi Supreme Court for invoking the automatic stay provisions of 11 U.S.C. §362 is for the debtor to file a Suggestion of Bankruptcy, followed by an Order by the trial court staying the action. See, *Overbey v. Murray, 569 So.2d 303, 307 (Miss. 1990)*. Here, Dr. Egger's attorneys filed nothing in the trial court attempting to invoke the automatic stay prior to August 18, 2004 and the trial court did not enter an order staying the action prior to that date.[6] CP: 1. Because there was no request to or order from the trial court staying the action and process was not served prior August 18, 2004, the Spurgeons' Complaint was subject to dismissal at that time. As such, the Spurgeons arguments regarding the purported invocation of the bankruptcy stay do not establish good cause for their failure to timely effect service.

Further, and perhaps more importantly, subsection 1 of §362(a) only prevents the commencement or continuation of actions that were or could have been commenced against the debtor ***before*** he filed a bankruptcy petition. 11 U.S.C. §362(a). Contrary to the Spurgeons' argument, the automatic stay is not all encompassing. Proceedings or claims that arise post-petition are not subject to the automatic stay of §362(a). See generally, *Holland America Insurance Company v. Succession of Roy, 777 F.2d 992, 996 (5th Cir. 1985)*(§362(a) inapplicable to insurers' interpleader action where fire at debtor's storage facility giving rise to claims did not occur until after

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[6] Although a Suggestion of Bankruptcy was filed, this was done after the time for service had expired and the trial court never entered an Order staying the action in response to Dr. Egger's suggestion. CP: 1, 24-25. As such, neither the August 23, 2004 correspondence from Dr. Egger's counsel nor the Suggestion of Bankruptcy filed by Dr. Egger on September 9, 2004 are relevant to the disposition of the claims asserted herein. CP: 24-25, 42. Simply put, the Spurgeons' Complaint was not served by August 18, 2004 and was subject to dismissal after that date.

Chapter 11 petition filed); *R & R Services, Inc. v. Mo-Ark Towing Company, Inc., 36 B.R. 126, 128 (E.D. Mo. 1983)*(automatic stay does not operate to prevent plaintiff from filing suit against debtor in appropriate non-bankruptcy court to attempt to recover damages from postpetition activities); *In re: Hudson Oil Company, Inc., 100 B.R. 72, 77 (E. Kan. 1989)*(postpetition claims are not subject to automatic stay); *Rodriguez v. Biltoria Realty, LLC, 203 F.Supp.2d 290, 292 (E.D. N.Y. 2002)*(claims that arise postpetition are not subject to the automatic stay of §362(a)); *Taylor v. First Federal Savings & Loan Ass'n of Monessen, 843 F.2d 153 (3rd Cir. 1988)*(the automatic stay is not intended to bar proceedings for postpetition claims that could not have been commenced before the petition was filed); *Bellini Imports, Limited v. Mason & Dixon Lines, Inc., 944 F.2d 199, 201 (4th Cir. 1991)*(automatic stay did not bar institution of action arising out of alleged postpetition conduct); *Broadcast Music, Inc. v. Game Operators Corp., 107 B.R. 326, 327 (D. Kan. 1989)*(automatic stay did not prevent claims based on alleged conduct which occurred after the filing of bankruptcy petition).

Here, Dr. Egger filed under Chapter 11 of the Bankruptcy Act on March 29, 1999 and his case (No. 99-21448) was still open on April 20, 2002, the day the surgery was performed on Ms. Spurgeon which gave rise to the claims asserted in the Spurgeons' suit. CP: 77. Despite counsels' misunderstanding of the bankruptcy stay provisions (CP: 24-25, 41, 47, 91), the automatic stay provisions of 11 U.S.C. §362(a) did not operate as a stay of the underlying suit which would have prevented the Spurgeons from properly and timely effecting service of process.

Just as counsels' August 13, 2004 letter did not prevent the Spurgeons from prosecuting their claims, it likewise did not conceal defects in their efforts to serve process. Again, counsels' letter merely acknowledged representation of Dr. Egger with respect to their claims, advised that Dr. Egger was involved in a bankruptcy case and confirmed a willingness to investigate the Spurgeons'

claims. CP: 41.

Arguments similar to those advanced by the Spurgeons were rejected by the Mississippi Supreme Court in *Holmes v. Coast Transit Authority, 815 So.2d 1183 (Miss. 2002),* where a plaintiff argued that good cause existed for failure to timely effect service because, "by engaging in discovery and settlement negotiations, the defendant improperly lulled him into believing it had accepted service." *Id. at 1186.* The Court rejected this argument and found that the trial court did not abuse its discretion dismissing the complaint. *Id. at 1187.*

Under Mississippi law, in the absence of process on a defendant, even though the defendant may know of the pendency of the action, defendant's knowledge of the existence of the action does not supply the want of requirements with valid process. *Mosby v. Gandy, 375 So.2d 1024, 1027 (Miss. 1979).* Here, nothing in counsels' August 13, 2004 letter suggested or implied that Dr. Egger was served, that an answer was forthcoming, that the proper service requirements were excused or that any defenses based on insufficient service were waived. CP: 41. Likewise, nothing in the letter excused the Spurgeons from either properly effecting service or providing oversight and monitoring the activities of their process server. Simply put, the purported misplaced reliance on any indefinite statements in the letter in question does not establish good cause for untimely service of process.

In a final effort to avoid the preclusive effect of their failure to timely serve their Complaint, the Spurgeons suggest that Dr. Egger is estopped to deny the existence of his attempted invocation of the automatic stay provisions of 11 U.S.C. §362. See the Spurgeons' Brief at p.14-16.

The doctrine of equitable estoppel is applied cautiously and the party claiming estoppel "has the burden to establish the facts necessary to constitute it." See, *EB, Inc. v. Smith, 757 So.2d 1017, 1022 (Miss.App. 2000); Brown v. Pittman, 51 So.2d 732, 734 (Miss. 1971).* A party asserting equitable estoppel must show: (1) that he has changed his position in reliance upon the conduct of

another and (2) that he has suffered detriment by his change of his position in reliance upon such conduct. *EB, Inc. v. Smith, 757 So.2d 1017, 1021 (Miss.App. 2000)*(quoting *PMZ Oil, Co. v. Lucroy, 449 So.2d 201, 206 (Miss. 1984)).*

It is well established that "[E]very fact essential to an estoppel must be clearly and satisfactorily proved by a preponderance of the evidence. Where the evidence is evenly balanced, the burden of proof is not sustained." *Jackson Rapid Delivery Service, Inc. v. Jones Truck Lines, Inc., 641 F.Supp. 81, 86 (S.D. Miss. 1986)*(citing *Marshall v. Marshall, 138 So.2d 482, 483 (Miss. 1962)*). Finally, the doctrine of estoppel was established "to protect a party from a loss which, but for the estoppel, he could not escape and was never intended to work a positive gain to the party invoking the same. *State v. Butler, 21 So.2d 650, 653 (Miss. 1945).*

The facts in the record establish that equitable estoppel does not apply here. As an initial matter, for a representation to be the basis of an estoppel it must amount to a representation of material facts as opposed to a representation made as to a matter of law. *Barnett v. Getty Oil Company, 266 So.2d 581, 587 (Miss. 1972).* Likewise, "the general rule is well settled that in order to furnish the basis of an estoppel, a representation or assurance must relate to some present or past fact or state of things as distinguished from mere promises or expression of opinion as to the future. A true statement as to the present intention of a party with regard to his future act is not the foundation upon which an estoppel may be built . . . The reason on which the doctrine of estoppel rests wholly fails when the representation relates only to a present intention or purpose of a party, because, its nature being uncertain and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent cause of action." *Cook v. Farley, 15 So.2d 352, 357 (Miss. 1943)*(quoting *19 Am. Jur. 656, Sec. 52, Equitable Estoppel)*[emphasis supplied].

Clearly, the comments made by Dr. Egger's counsel implying that the automatic stay provisions of the bankruptcy act could and would be invoked do not support the Spurgeons' estoppel argument. CP: 41. Simply put, these comments encompassed both a legal opinion and a statement of future conduct –neither of which establish a claim of estoppel. When August 18, 2004 came and went without an order from the trial court staying the action or proper service effectuated on Dr. Egger, the Spurgeons' lawsuit was subject to dismissal.

Moreover, at the time of counsel's August 13, 2004 letter, certain details concerning Dr. Egger's bankruptcy, such as whether Ms. Spurgeon's claim "was or could have been commenced before the commencement of [Dr. Egger's bankruptcy] case,"[7] were available as part of the public record in his bankruptcy case. Indeed, the Spurgeons' subsequently confirmed through the docket of the U.S. Bankruptcy Court for the Northern District of Mississippi that Dr. Egger filed under Chapter 11 of the Bankruptcy Act on March 29, 1999, and that his case was still open on April 20, 2002 when Ms. Spurgeon underwent the surgery that gave rise to her claims. CP: 77. Where, as here, the parties were equally informed as to the essential facts or where the means of knowledge were equally open to them, the courts will not give effect to estoppel. *Barnett v. Getty Oil Company, 266 So.2d 581, 587 (Miss. 1972).*

Finally, the purpose of an estoppel is to afford a defense against an inequitable loss rather than to support an affirmative action for positive gain. *Perkins v. Kerby, 308 So.2d 914, 917 (Miss. 1975).* Thus, estoppel is applied cautiously and is to be used as a shield, not a sword. *First Investors Corp. v. Rayner, 738 So.2d 228, 233 (Miss. 1999)*(further citations omitted).

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[7] As noted by the Spurgeons in their Brief at p.13, the automatic stay provided for in 11 U.S.C. §362(a) extends only to "commencement or continuation, including the issuance or service of process, of a judicial, administrative or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title." [emphasis supplied].

The Spurgeons contend that Dr. Egger made certain that they could not proceed further by filing a Suggestion of Bankruptcy after filing his Motion to Dismiss. See the Spurgeons' Brief at p. 11. Thus, the Spurgeons were clearly on notice of the defective service by at least September 9, 2004, when Dr. Egger filed his Motion to Dismiss. CP: 21-23. Along those lines, it is worth repeating here that when process was issued on August 10, 2004, the Spurgeons had only 8 days left in which to serve their Complaint, after which the four days remaining on the statute of limitations would begin to run again.

The potential effect filing a Suggestion of Bankruptcy aside, the Spurgeons do not explain why, although Dr. Egger filed his Withdrawal of Bankruptcy on February 17, 2005, they did not: (1) respond to his Motion to Dismiss until June 15, 2005; (2) properly effect service until July 7, 2005; or (3) request and extension of time to effect service until they filed their appellate brief with this Court. CP: 29-30, 35-44, 116; see also, the Spurgeons' Brief at p. 17. Again, "good cause can never be demonstrated where the plaintiff has not been diligent in attempting to serve process." *Montgomery v. Smithkline Beecham Corp., 910 So.2d 541, 545 (Miss. 2005)*(citing *Bang v. Pittman, 749 So.2d 47, 52 (Miss. 1999)*). The doctrine of estoppel should not apply to support an affirmative action for positive gain by giving the Spurgeons an unlimited amount of time to do what is required by the Mississippi Rules of Civil Procedure. *Perkins v. Kerby, 308 So.2d 914, 917 (Miss. 1975).*

In an attempt to further support their estoppel argument, the Spurgeons' also cite *Jarvis v. City of Stillwater, 732 P.2d 470 (Ok. 1987)*, a case in which the Oklahoma Supreme Court considered whether the City of Stillwater was estopped from asserting a procedural time bar to a plaintiff's claim because he was allegedly induced by a letter from the City's counsel to delay bringing his action. *Id. at 472.* Specifically, similar to the issue presented here, counsel for the City wrote plaintiff's counsel to confirm his representation, request medical information and mention that

he was going to investigate the matter. *Id.* The Oklahoma Supreme Court concluded that applicable law narrowly structures the method for bringing a claim against a municipality and upheld the trial court's grant of summary judgment, finding that the letter from the City's counsel did not fall into any of the variations that would support its claim for equitable estoppel. *Id.* Indeed, the *Jarvis* case is substantially similar to *Holmes v. Coast Transit Authority, 815 So.2d 1183 (Miss. 2002)*, wherein the Mississippi Supreme Court found that "good faith negotiations do not constitute good cause for failure to effect timely service of process under M.R.C.P. 4(h)."

Then, without further discussion of the case, the Spurgeons cite the following quote from *Irvin's Hatcheries, Inc. v. Garrott, 168 So.2d 52 (Miss. 1964)*:

> Where the summons was attempted to be issued at the time the declaration was filed, though there be a defect, the time of the institution of the suit is nevertheless thereby fixed by the attempted issuance and return of the summons. This also applies where the process was issued immediately, though served on someone other than the designated agent for the receiving of the service of process.

See the Spurgeons' Brief at p. 15, quoting *Irvin's Hatcheries, Inc., 168 So.2d at 57.*

The *Irvin's Hatcheries* case concerned whether, for statute of limitations purposes, an action was commenced when filed or when process was issued. *Id. at 707.* Aside from the fact that it was addressing a point that is not before the Court here, the *Irvin's Hatcheries'* court's conclusion that an action was commenced by filing the complaint and issuing service of process was impliedly overruled by *Irby v. Cox, 654 So.2d 503 (Miss. 1995)*, wherein this court held that the filing of the complaint, even without service of process, tolls the statute of limitations for the 120 day period allowed in M.R.C.P. 4(h). See also, *Fortenberry v. Memorial Hosp. at Gulfport, Inc., 676 So.2d 252, 254 (Miss. 1996)*(recognizing implied overruling). As such, the Spurgeons reliance on *Irvin's Hatcheries, Inc. v. Garrott* is misplaced.

Finally, the Spurgeons cite *Black Hawk Heating & Plumbing Co., Inc. v. Turner, 50 F.R.D. 144 (D. Ariz. 1970),* wherein the United States District Court from Arizona discussed the potential scope and application of Federal Rule of Civil Procedure 4(d)(1) and concluded that, "[I]n cases where actual notice of suit has been received by Defendant, Rule 4(d)(1) should be liberally construed to effect service." See Spurgeons' Brief at p.16. The *Black Hawk Heating* case is not analogous to the facts before the Court; accordingly, the Arizona court's reasoning does not support the Spurgeons' argument.

Specifically, in *Black Hawk Heating*, the plaintiff attempted to serve process on an individual defendant by leaving the process documents with the defendant's adult daughter at an apartment which the defendant argued was not his "residence or usual place of abode" because he had previously moved from the apartment with the intent never to return. *Id. at 145-147.* However, the facts indicated that the apartment was still the defendant's residence as he: (1) still paid rent, (2) still had furniture in the apartment and his automobiles nearby, (3) still received mail at the apartment and (4) had not notified the apartment manager of a move. *Id.* Based on those facts and a finding that the defendant had evaded service and had actual knowledge of the lawsuit against him, the court denied his motion to dismiss the complaint or quash service on him. *Id.*

For a number of reasons. the facts *Black Hawk Heating* are distinguishable from those presented here. For instance, at issue in *Black Hawk Heating* was abode service under the 1970 version F.R.C.P. 4(d)(1),[8] which allowed effective service "by leaving a copies [of the summons and complaint] at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein . . . ." Thus, under that provision, service was proper so long as

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[8] Which is now F.R.C.P. 4(e)(2).

it was left at the defendant's normal abode with a person of suitable age and discretion then residing therein.

Here, the Spurgeons attempted to effect personal service on Dr. Egger pursuant to M.R.C.P. 4(d)(1)(A), which allows service only upon defendant personally or an agent authorized by appointment or by law to receive service. M.R.C.P. 4(d)(1)(A). As discussed above, it is uncontradicted that the Summons and Complaint at issue here was delivered to Amanda Boozer on August 10, 2004 and Dr. Egger was not served with process until July 7, 2005. CP: 1, 116. At the time Mr. Faust delivered the Summons and Complaint, he did not identify himself to Ms. Boozer, made no effort to identify the patterns and practices of Dr. Egger's office with regard to the delivery of legal documents and made no effort to clarify that Ms. Boozer understood what was taking place or the nature of the act of delivering the Summons and Complaint. CP: 108; T: 15-23.

From the facts in the record, there is nothing to suggest that Ms. Boozer had either expressed or implied authority to receive process on behalf of Dr. Egger. See *Cooley v. Brawner, 881 So.2d 300 (Miss.App. 2004)*(evidence in record insufficient to establish that receptionist in doctor's office was agent for purposes for receiving service of process). As such, the Spurgeon's have failed to established that service was proper under M.R.C.P. 4(d)(1) and the reasoning set forth in *Black Hawk Heating & Plumbing Co., Inc. v. Turner, 50 F.R.D. 144 (D. Ariz. 1970)* does not establish "good cause" for their failure to effect timely service.

CONCLUSION

The Spurgeons did not complete service within 120 days of the filing of their Complaint and failed to persuade the trial court that good cause existed for failing to effect service. For the reasons stated above, Dr. Egger submits that the Spurgeons have failed to establish that the trial court abused its discretion in finding that process was insufficient and that the Spurgeons failed to establish good

cause for their failure to timely serve process. Accordingly, Dr. Egger respectfully submits that the trial court's Final Judgment of Dismissal should be affirmed.

RESPECTFULLY SUBMITTED, this the 21 day of February, 2007.

EDWIN G. EGGER, M.D.

BY: _____

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CERTIFICATE OF SERVICE

I, Steven C. Cookston, of counsel to defendant, hereby certify that I have this day mailed, with postage prepaid, a true and correct copy of the above and foregoing document unto:

Hon. William R. Armstrong, Jr.
1675 Lakeland Drive, Suite 304
Jackson, MS 39216

CERTIFIED this the 21 day of February, 2007.

_____
STEVEN C. COOKSTON