IN THE MISSISSIPPI SUPREME COURT

No. 2005-CA-01952

HILDA PATSY SPURGEON and OTTIS JEROME SPURGEON

Plaintiffs/Appellants

vs.

EDWIN G. EGGER

Defendant/Appellee

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

On Appeal from the Circuit Court of Washington County, Mississippi

William R. Armstrong, Jr.
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Attorney for Appellants

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the following persons have an interest in the outcome in this case. These representations are made in order that the justices of the Mississippi Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Hilda Patsy Spurgeon
Appellant

Ottis Jerome Spurgeon
Appellant

William R. Armstrong, Jr.
Attorney for Appellants

Hon. Margaret Carey-McCray
Trial Court Judge

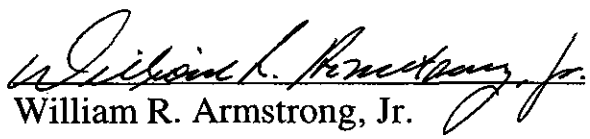
Edwin G. Egger
Appellee

Clinton M. Guenther, Esq.
Attorney for Appellee

Tommie Williams, Esq.
Attorney for Appellee

Steven C. Cookston, Esq.
Attorney for Appellee

Upshaw, Williams,
Biggers, Beckham & Riddick
Attorneys for Appellee


William R. Armstrong, Jr.

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STATEMENT OF THE ISSUE

WHETHER THE TRIAL COURT ABUSED 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 WHEN SUBSTANTIAL EVIDENCE SHOWED:

(1) THAT THE RETURN OF SERVICE OF PROCESS ON DR. EGGER APPEARED BOTH TIMELY AND SUFFICIENT ON ITS FACE;

(2) THAT THE INSUFFICIENCY OF SERVICE OF PROCESS RESULTED FROM THE CONDUCT OF THE PROCESS SERVER IN SERVING AN ASSISTANT WHO LACKED AUTHORITY TO ACCEPT THE PROCESS;

(3) THAT BEFORE THE 120-DAY PERIOD FOR SERVICE EXPIRED, DR. EGGER REPRESENTED TO PLAINTIFFS THAT THE LAWSUIT WAS STAYED BY THE FILING OF A BANKRUPTCY CASE, PREVENTING FURTHER PROSECUTION OF THE CASE; AND

(4) THAT DR. EGGER CONCEALED THE DEFECT IN SERVICE OF PROCESS UNTIL THE 120-DAY PERIOD FOR SERVICE EXPIRED.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would be helpful to establish whether the conduct of the process server in improperly serving Dr. Egger's assistant and making a return of service showing timely service on Dr. Egger, and the conduct of Dr. Egger in concealing the defective service and notifying plaintiffs that he had filed a bankruptcy case staying the lawsuit constitute good cause for not serving process within 120 days.

STATEMENT OF THE CASE

On April 20, 2004, Hilda Patsy Spurgeon and her husband, Ottis Jerome Spurgeon, the Appellants, filed a complaint in the Washington County Circuit Court claiming medical negligence against Dr. Edwin G. Egger, the Appellee, and two other defendants. R. vol. 1, pp. 1; 3-8.

On August 10, 2004, 111 days after the filing of the complaint, Dennis Faust, a professional process server, served the summons and complaint by handing it to Dr. Egger's medical assistant at his office. R., vol. 1, p. 72, 104-109. The process server confirmed to plaintiffs' counsel that service of process had been accomplished on all of the defendants including Dr. Egger and his affidavit return of service also stated that he had personally delivered the summons and complaint to Dr. Egger. R. vol. 1, pp. 72, 114-115.

Three days later, on August 13, 2004 (114 days after the filing of the complaint), Dr. Egger's attorney sent plaintiffs' attorney a letter which confirmed that Dr. Egger had notice of the lawsuit and was defending it but concealed any complaint of defective service of process. The letter also invoked the stay of the Bankruptcy Act. R. vol. 1, p. 117; R.E., p. 10. At that time, five days remained for service under Rule 4.

On September 9, 2005, after the 120-day period for service of process after filing a complaint under Rule 4 expired, defendant Egger filed a motion to

dismiss alleging lack of service of process and insufficiency of service of process. On September 10 2005, Dr. Egger filed a Suggestion of Bankruptcy. R. vol. 1, p. 24.

On July 26, 2005, a hearing on Dr. Egger's motion to dismiss was heard before the Honorable Margaret Carey-McCray. Judge Carey-McCray found that Dr. Egger was not properly served because his medical assistant lacked actual or apparent authority to accept service of process, found that good cause had not been shown by plaintiffs for failing to timely serve process on Dr. Egger within 120 days of filing the complaint and granted Dr. Egger's motion to dismiss. R.E. pp. 4-6, 7-8; R., vol. 1, pp. 129-130; R. vol. 2, pp. 32-34.

Appellants timely filed a notice of appeal with the Mississippi Supreme Court. R., vol. 1, p. 131. Appellants will show that the circuit court's ruling was in error and, for that reason, should be reversed and remanded with instructions extending the period for service of process by five (5) days following remand.

STATEMENT OF THE FACTS

On April 24, 2002, Hilda Patsy Spurgeon was a patient of Dr. Edwin G. Egger and underwent cataract surgery. R. vol. 1, pp. 3-7. The cataract surgery was unsuccessful, caused damage to her left eye and caused her to undergo reconstructive surgery. *Id.* The complaint alleging negligence by the surgeon, Dr. Egger, King's Daughters Hospital, and Robert Coleman, an anesthetist, was filed on April 20, 2004 by Hilda Patsy Spurgeon and her husband, Ottis Jerome Spurgeon, four days before the expiration of the two year statute of limitation. R. vol. 1, p. 1; R.E. p. 2.

A professional process server, Dennis Faust, was hired to serve process for the plaintiffs. R. vol. 1, pp. 114-115. Dennis Faust is a retired highway patrolman who has been a professional process server for many years and came highly recommended. R., vol. 1, pp. 114, 121-122. The affidavit return of service of process made by the process server stated that Dr. Egger had been served personally by delivering a copy of the summons and complaint to him on August 10, 2006, which was eight days before the 120-day period for serving process under Rule 4 would have expired. R. vol. 1, p. 72.

Plaintiffs' attorney was also informed by Dennis Faust that he had served process on all of the defendants and, from the conversation with Dennis Faust,

Plaintiffs' attorney had no reason to believe that Dr. Egger had not been served. R. vol. 1, p. 115.

Three days later, on August 13, 2004, which was five days before the lapse of the 120-day period for serving process under Rule 4, Dr. Egger's attorneys contacted plaintiffs' attorney by letter. R. vol. 1, p. 73. The letter invoked the stay of the Bankruptcy Act, and stated that the attorneys' firm would be representing Dr. Egger in the claim, but concealed any claim of defect in the service of process. *Id.* The full text of the letter is:

> August 13, 2004
>
> Mr. William R. Armstrong, Jr.
> Attorney at Law
> 1675 Lakeland Drive, Suite 308
> Jackson, MS 39216
>
> RE: Hilda P. Spurgeon
>
> Dear Mr. Armstrong:
>
> Clint Guenther and I will be representing Dr. Egger in connection with Ms. Spurgeon's claim.
>
> First, be advised that Dr. Egger is currently involved in a bankruptcy proceeding. Mr. Martin Kilpatrick of Greenville is representing the doctor in that proceeding. As soon as we can contact Mr. Kilpatrick and obtain a copy of the petition, we will file that with the clerk in Washington County invoking the automatic stay.
>
> We are willing, during the time that this case is stayed, to investigate your claim against the doctor, but in order to do so, we will need copies of Ms. Spurgeon's medical records. If you will agree to provide those records, we would appreciate it.

If you need anything from us in the meantime, please don't hesitate to call.

Sincerely,
UPSHAW, WILLIAMS, BIGGERS,
BECKHAM & RIDDICK, LLP

S/Tommie Williams
Tommie Williams

R. vol. 1, p. 73 ; R.E., p. 10.

Dr. Egger's attorneys also wrote a second letter to Plaintiffs' counsel, dated August 23, 2004, stating that process had been served on Dr. Egger on August 11, 2004, that Dr. Egger was in bankruptcy, that the stay would be invoked and that he was willing to investigate the claim during the time the case was stayed. R. vol. 1, p. 74, 114-115.

On September 9, 2004, Dr. Egger's attorneys filed a motion to dismiss on grounds of lack of personal service of process and insufficiency of service of process on Dr. Egger. R. vol. 1, p. 21. No affidavits supporting the motion to dismiss were filed until June 22, 2005. R. vol. 1, pp. 104-109.

On September 9, 2004, Dr. Egger's attorneys served plaintiffs' counsel with a Suggestion of Bankruptcy stating that "this case is/must be stayed until further order of the U.S. Bankruptcy Court". R. vol. 1, p. 24.

On June 22, 2005, Dr. Egger filed affidavits of Amanda Boozer, Dr. Egger's medical assistant, and Dr. Egger, which stated the factual basis for the claim of defective service of process. R. vol. 1, pp. 104-109.

These affidavits stated that the summons and complaint had been delivered, not to Dr. Egger, but to his medical assistant, Amanda Boozer, and that Dr. Egger had not authorized her to accept service of process. R. vol. 1, pp. 104-109. Amanda Boozer also testified that when Dr. Egger asked for Mrs. Spurgeon's chart to be pulled he told her that it was a lawsuit. R. vol. 2, p. 20.

The circuit court granted the defendant's motion to dismiss finding that service of process to Dr. Egger's medical assistant was insufficient and that service had not been made within the 120 days after filing of the complaint and that plaintiffs had not shown good cause why such service was not made within that period. R.E. pp. 4-6, 7-8; R., vol. 1, pp. 129-130; R. vol. 2, pp. 32-33.

STANDARD OF REVIEW

When reviewing fact-based findings, the Mississippi Supreme Court will examine whether the trial court abused its discretion and whether there was substantial evidence supporting the determination. However, a decision as to whether to grant or deny an extension of time based on a question of law will be reviewed de novo. *Holmes v. Coast Transit Authority*, 815 So.2d 1183, 1185 (Miss. 2002) (citing *Rains v. Gardner*, 731 So. 2d 1192 (Miss. 1999).

SUMMARY OF THE ARGUMENT

Hilda Patsy Spurgeon had no notice of any claim of defective process until after the 120-day period for service of process had run and the two-year statute of limitations had run. Hilda Patsy Spurgeon reasonably relied on the representations and return made by an experienced professional process server that process had been made personally on Dr. Egger on August 10, 2004, within 120 days of filing the complaint. Dr. Egger received the process which had been left with his assistant, obviously contacted his attorney, but then concealed the defective service of process when his attorney wrote to plaintiffs' attorney on August 13, 2004. Dr. Egger's attorney's letter told plaintiffs' attorney that a bankruptcy case had been filed and the stay was in effect, which meant that plaintiffs were barred from further prosecution of the lawsuit by filing a motion for additional time or reserving process until stay was lifted or the case closed. It also meant that plaintiffs' rights were preserved because the statute of limitations was tolled by August 13, 2004. If these facts were not true, they were misleading.

These facts established good cause for not effectuating service within 120 days.

LAW AND ARGUMENT

WHETHER THE TRIAL COURT ABUSED 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 WHEN SUBSTANTIAL EVIDENCE SHOWED:

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(4) THAT DR. EGGER CONCEALED THE DEFECT IN SERVICE OF PROCESS UNTIL THE 120-DAY PERIOD FOR SERVICE EXPIRED.

According to the Mississippi Rules of Civil Procedure:

> If a service of the summons and complaint is not made upon the 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.

Miss. R. Civ. P. 4(h) (emphasis added).

A plaintiff can serve a defendant outside of the 120 days prescribed in Rule 4(h) for "good cause" shown. The Mississippi Supreme Court, interpreting this Rule has held that: "To establish 'good cause' the plaintiff must demonstrate 'at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel usually does not suffice.'" *In re Holtzman*,

823 So.2d 1180 (Miss. 2002), (quoting *Sys. Signs Supplies v. United States Dep't of Justice*, 903 F.2d 1011, 1013 (5th Cir. 1990)).

A determination of "good cause" under Rule 4(h) of the Mississippi Rules of Civil Procedure is a finding of fact subject to appellate review pursuant to an abuse of discretion standard. It must be supported by substantial evidence.

In reviewing a determination of "good cause" for service of process outside of the 120 day time frame set forth in M.R.C.P. 4(h), this Honorable Court must determine whether there was substantial evidence supporting the lower court's finding. *Rains v. Gardner*, 731 So.2d 1192 (Miss. 1999). While deferential review is given to the trial court's determination, it must be supported by substantial evidence.

A review of the record of the hearing in this case reflects that the trial court inquired as to why "good cause" had not be shown under M.R.C.P. 4(h), but did not specify the basis for finding that "good cause" had not been shown. R.E. pp. 4-6, 7-8; R. vol. 1, pp. 129-130; R. vol. 2, pp. 32-34. Hilda Patsy Spurgeon submits that the circuit court in fact had insufficient support for its finding of lack of good cause in light of Dr. Egger having invoked the stay of the Bankruptcy Act within 120 days of the filing of the complaint and that, accordingly, this finding was an abuse of discretion and should be reversed.

Rule 4(h) does not define good cause but leaves it to the discretion of the trial court. Excusable neglect has been held to constitute good cause. *Bang v.*

Pittman, D.D.S., 749 So. 2d 47, 51 (Miss. 1999) citing *Watters v. Stripling*, 675 So. 2d 1242, 1243 (Miss. 1996); *Holmes v. Coast Transit Authority*, 815 So. 2d 1183 (2002). In *Watters v. Stripling*, 675 So.2d 1242 (Miss. 1996), the Mississippi Supreme Court cited the U.S. Court of Appeals for the fifth circuit in holding that to establish "good cause" the plaintiff must demonstrate "at least as much as would be required to show excusable neglect." *Watters v. Stripling*, 675 So.2d at 1244.

"Rule 4(h) does not require that a motion for additional time for service of process be filed within 120 days of the filing of the complaint." *Webster v. Webster*, 834 So.2d 26, 28 (Miss. 2003). W*ebster* further held that:

> Our rule states that if the 120-day period has elapsed without effecting service of process, "the action shall be dismissed ... upon the court's own initiative with notice to such party or upon motion." M.R.C.P 4 (h). The comments state that the complaint will be dismissed "unless good cause can be shown as to why service could not be made." The rule therefore provides that the plaintiff will have an opportunity to show good cause after the 120-day period has elapsed. Why else does rule 4(h) require that notice be given to the plaintiff before the court can dismiss the complaint? The requirement of notice being given contemplates a response to the notice. A motion for additional time [FN4] is an appropriate response to the notice.
>
> > FN4. Such a motion should be supported by evidence (in the form of affidavits or documents) upon which a court can made a determination of whether good cause exists for failing to serve process in a timely manner. (*Bang v. Pittman*), 749 So.2d (47) at 52 (Miss. 1999).

834 So. 2d at 29.

In this case, Mrs. Spurgeon had no opportunity to file a motion for additional time because she was not aware of any challenge to process until Dr. Egger filed his motion to dismiss, after the 120-day period expired. R. vol. 1, pp. 72, 114-116. Even that motion did not explain the basis for the challenge to service of process because no affidavits were filed with it, or subsequently, until June 22, 2005. R. vol. 1, pp. 104-109. After the motion to dismiss was filed, Dr. Egger made sure Mrs. Spurgeon could not proceed further by filing a Suggestion of Bankruptcy. R. vol. 1, p. 24.

Distinguished from the facts of this case are the cases in which the plaintiff did not attempt to serve process within the 120-day period: *LeBlanc v. Allstate Insurance Company*, 809 So.2d 674 (Miss. 2002); *In re Holtzman*, 823 So.2d 1180 (Miss. 2002).

Mrs. Spurgeon had three reasons for late service: (1) reliance on a professional process server who purportedly effected timely service of process on Dr. Egger, made a return of service affidavit reflecting personal service of process on the defendant, and also informed Mrs. Spurgeon's attorney that he had personally served the defendant; (2) Mrs. Spurgeon and her attorney had no notice of the defect in service and Dr. Egger's attorneys did not inform them of it; and (3) Mrs. Spurgeon's attorney was given notice by Dr. Egger's attorneys, within 120 days of the filing of the complaint, that Dr. Egger had filed a

bankruptcy case and the stay was in effect, preventing further prosecuting the case as a matter of law. R. vol. 1, 91, 114-116.

These facts demonstrate good cause why service was not made, meeting the "excusable neglect" standard. *Watters v. Stripling*, 675 So.2d 1242 at 1244. Accordingly Appellants met the burden of showing good cause for failing to properly serve process within 120 days of the filing of the complaint and the case should not have been dismissed.

Although process was not sufficient, Mrs. Spurgeon had acted in good faith by employing a professional process server to serve process and doing so in time to have personally served Dr. Egger within 120 days of filing the complaint. R. vol. 1, p. 72, 114-115. Mrs. Spurgeon failed to accomplish service on August 10, 2004 only because of the actions of the process server which were to improperly deliver process to Dr. Egger's medical assistant who accepted it without authority. R. vol. 1, p. 72, 115. The process server also reported the accomplishment of service to Mrs. Spurgeon's attorney and made a return of personal service on Dr. Egger. R. vol. 1, p. 72, 115. Although the service of process attempted August 10, 2004 was insufficient, the insufficiency was not known to Mrs. Spurgeon's attorney. R. vol. 1, p. 115.

Then, by letter dated August 13, 2004, Dr. Egger's attorney gave notice to Mrs. Spurgeon's attorney that Dr. Egger had filed a bankruptcy case which stayed the lawsuit. R. vol. 1, p. 73; R.E., p. 10. Dr. Egger, through the letter,

communicated facts to Mrs. Spurgeon's attorney which meant that the action was stayed and continuation of it was barred by court order, tolling the statute of limitation.

11 U.S.C. §362 [Automatic Stay] provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of --
>
> (1) the commencement or continuation, **including the issuance or employment 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 added].

This representation by Dr. Egger's attorney, who acted as his agent, communicated within 120 days of the filing of the complaint, had the effect of barring continuation of the lawsuit under the provisions of 11 U.S.C. §362. By not pointing out that service of process was defective because Dr. Egger's medical assistant had no authority to accept it, Dr. Egger also concealed the defective nature of service of process by not mentioning it.

As a matter of law, the filing of a bankruptcy creates a court-ordered stay under 11 U.S.C. § 362 which prohibits continuation of a lawsuit until stay is lifted. Under the then-applicable law the stay is effective from the moment of filing whether or not a party has actual notice. *Brockington v. Citizens and S.*

National Bank of S.C. (In re Brockington), 129 B.R. 68, 70 (Bankr. D.S.C. 1991). Serving process on a lawsuit is a violation of the stay, and if the stay is violated the violation may subject a party to actual and punitive damages. 11 U.S.C. §362 (h). In addition, the filing of a bankruptcy case tolls the statute of limitations. Mississippi Code Ann. § 15-1-57 (Rev. 2003). On August 13, 2004, based on Dr. Egger's attorney's letter stating that he had filed a bankruptcy and would invoke the stay, the statute of limitations had been tolled and would be extended as a matter of law after stay was lifted or the case closed or was dismissed.

The actions of Dr. Egger's attorney are those of an agent, and are imputable to Dr. Egger. By invoking the stay of the Bankruptcy Act in communications with plaintiffs' attorney, and by later filing a Suggestion of Bankruptcy, Dr. Egger is estopped to deny the existence or scope of the stay he represented as staying the continuation of the lawsuit or to complain of plaintiffs' reliance on it. The letter either invoked a stay with a scope which prohibited continuation of the lawsuit, or it was misleading. The essential elements of equitable estoppel are:

> Conduct and acts, language or silence, amounting to a representation or concealment of material facts, with knowledge or imputed knowledge of such facts, with the intent that representation or silence, or concealment be relied upon, with the other party's ignorance of the true facts, and reliance to his damage upon the representation or silence.

Chapman v. Chapman, 473 So. 2d 467, 470 (Miss. 1985). "It is sufficient if the acts of the party sought to be estopped, although made without subjective intent

to mislead, were, objectively speaking, calculated to mislead, and did mislead." *Id.*

In *Jarvis v. City of Stillwater*, 732 P.2d 470 (Okla. 1987), the Oklahoma Supreme Court opined that a question of fact as to whether the defendant is estopped from raising a statute of limitations defense is raised when the plaintiff alleges "any false, fraudulent or misleading conduct, or some affirmative act of concealment to exclude suspicion and preclude inquiry, which induces one to refrain from timely bringing an action." 732 P.2d at 472.

Erving's Hatcheries, Inc. v. Garrott, 168 So.2d 52 (Miss. 1964) stated:

> 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. *Wood v. Peerey*, 179 Miss. 727, 176 So. 721; *Frederick Smith Enterprise Co., Inc. v. Lucas*, 204 Miss. 43, 36 So.2d 812 (1948).

Erving's Hatcheries, Inc. at 712.

In *Blackhawk Heating & Plumbing Co., Inc. v. Turner*, 50 F.R.D. 144 (D. Ariz. 1970), process was served upon a defendant's daughter at an apartment where defendant had formerly lived, but where he no longer lived at the time of process. Although the daughter was not the agent for the defendant because defendant no longer lived there, the court held that this effected service was sufficient to constitute "good cause" for untimely service. The court said:

> In case where actual notice of suit has been received by defendant, Rule 4(d)(1) should be liberally construed to effectuate service. *Nowell v. Nowell*, 384 F.2d 951 (5th Cir. 1967), *cert. denied*, 390 U.S. 956, 88 S.Ct. 1053, 19 L.Ed.2d 1150 (1968); *Karlsson v. Rabinowitz*, 318 F.2d 666 (4th Cir 1963); *Rovinski v. Rowe*, 131 F.2d 687 (6th Cir. 1942); *Hysell v. Murray*, 28 F.R.D. 584 (S.D. Iowa 1961); *Frasca v. Eubank*, 24 F.R.D. 268 (E.D. Penn. 1959); *Blane v. Young*, 10 F.R.D. 109 (N.D. Ohio 1950); *Zuckerman v. McCulley*, 7 F.R.D. 739 (E.D. Mo. 1947); *Skidmore v. Green*, 33 F.Supp. 529 (S.D.N.Y. 1940); See, 2 J. Moore, Federal practice ¶4,11[2] (1967); 4 C. Wright & A. Miller, Federal Practice and Procedure §1096 (1969).

Blackhawk at 145.

This is not a case of simple inadvertence, mistake of counsel, or inexcusable dilatory conduct. Hilda Patsy Spurgeon reasonably relied on the representations and return of process made by an experienced process server. Before the 120-day period for serving process and statute of limitations expired, Dr. Egger's attorney told plaintiffs' attorney that a bankruptcy case had been filed and the stay was in effect. The representations of the attorneys of Dr. Egger that the lawsuit was stayed by the Bankruptcy Act were intended to be believed and acted upon and were entitled to be relied on by plaintiffs' attorney. These representations either invoked a stay as a matter of law or they were misleading.

Plaintiffs contend that their reliance on the return and representations of the professional process server regarding having made timely service of process, and on Dr. Egger's representations that the lawsuit was stayed by the filing of a bankruptcy case, was justified under the circumstances of this case and rises to the level of excusable neglect, which the courts have found to be within the

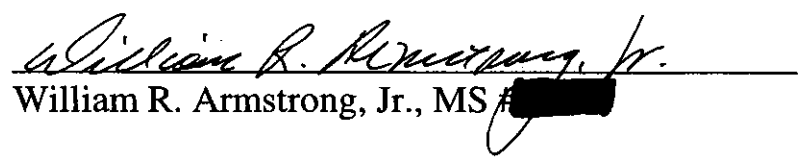
statutory limits of "good cause" for plaintiffs failing to serve process within 120 days of the filing of the complaint.

CONCLUSION

The defendant was granted a dismissal on the grounds that the plaintiffs/appellants failed to effect proper service upon him in a timely fashion.

Consequently, as plaintiffs have shown good cause why service was not made within the 120 day period, Hilda Patsy Spurgeon and Ottis Jerome Spurgeon respectfully request that this Honorable Court overrule the circuit court's judgment of dismissal and remand this case with instructions granting plaintiffs/appellants five (5) days from date of remand to effect service of process.

Respectfully Submitted:



William R. Armstrong, Jr., MS [redacted]

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Attorney for Plaintiffs/Appellees

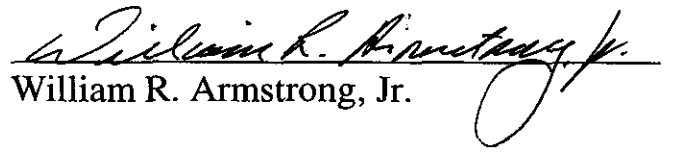
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been mailed, by placing same in the U.S. Mail, with proper postage affixed hereto, to the following individual:

Steven C. Cookston, Esq.
UPSHAW, WILLIAMS, BIGGERS,
BECKHAM & RIDDICK, LLP
Post Office Drawer 8230
Greenwood, MS 38930

Honorable Margaret Carey-McCray
Circuit Court Judge
P. O. Box 1775
Greenville, MS 38702-1775

Signed this 27th day of November, 2006.



William R. Armstrong, Jr.