

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2007-IA-00615-SCT**

MICHAEL L. FOSS, M.D.

Appellant\Defendant

v.

**DOROTHY WILLIAMS, Administratrix of the
ESTATE OF PETER D. PRICE, DECEASED**

Appellee\Plaintiff

**CERTIFICATE OF
INTERESTED PERSONS REQUIRED BY RULE 28(a)(1) of M.R.A.P.**

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

RE

- a. Dorothy Williams, Appellee/Plaintiff
- b. Michael L. Foss, M.D. Appellant/Defendant
- c. Estate of Peter D. Price, Deceased, Appellee/Plaintiff
- d. Everett T. Sanders, Sanders Law Firm, Counsel for Appellee/Plaintiff
- e. L. Carl Hagwood, Esq., Wilkins, Stephens & Tipton, Counsel for Appellant/Defendant
- f. Jason E. Dare, Esq., Wilkins, Stephens & Tipton, Counsel for Appellant/Defendant
- g. Bradley K. Overcash, Esq., Wilkins, Stephens & Tipton, Counsel for Appellant/Defendant
- h. Honorable Albert B. Smith, Coahoma County Circuit Court Judge

This 22nd day of January, 2008.


EVERETT T. SANDERS

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STATEMENT OF THE ISSUE

- I. WHETHER THE TRIAL COURT ABUSED IT DISCRETION IN GRANTING PLAINTIFF'S MOTION TO EXTEND THE TIME PERIOD FOR SERVING DR. FOSS AND DENYING DR. FOSS' MOTION TO DISMISS

STATEMENT OF THE CASE

Plaintiff filed her complaint in this matter on July 19, 2006. On November 15, 2006, process was issued for Dr. Foss by the Circuit Clerk of Coahoma County, Mississippi and he was served on the 17th of November, 2006 in Harrison County, Mississippi. On December 6, 2006, Dr. Foss filed a motion to dismiss pursuant to Rule 4(h) of the Miss. R. Civ. P., challenging timeliness of the service of process. On March 15, 2007, Plaintiff served Dr. Foss' with a response to Dr. Foss motion to dismiss and moved the trial Court pursuant to counsel Rule 6(b)(2) of the Miss. R. Civ. P. to extend the time period for the service of process. The Court conducted a hearing on March 15, 2006 on Dr. Foss' motion to dismiss and Plaintiff's response and entered an Order on March 28, 2007 denying Defendant Foss' motion and finding that Plaintiff had good cause for not serving Defendant Foss within the 120 day time period. Defendant Foss is prosecuting this interlocutory appeal from the trial Court's Order of March 28, 2007.

Plaintiff's response indicated, *inter alia*, that "Plaintiff's Counsel had attempted and thought he had engaged the service of a local attorney to assist with the litigation of this case. After the Complaint was filed there was some apparent confusion regarding who was going to be responsible for having process issued and served. It came to Counsel's attention on or about November 14, 2006 by way of one of his staff members that process had not issued and the defendants had not been served. However, with the assistance of a local attorney from this jurisdiction, process was issued and all of the defendants were served within the 120 day time period with the exception of this defendant." (RE p 21-22) Plaintiff, also, moved the Court "...to enlarge the service period for one day pursuant to Rule 6(b)(2) of the Mississippi

Rules of Civil Procedure for the foregoing reasons and for other good cause and/or excusable neglect to be further shown."

After conducting a hearing¹, the Court made a finding of good cause² and entered an Order stating, among other things, "that Defendant"s Motion to Dismiss is denied because Plaintiff had good cause for not serving Defendant within the 120 day period required by Rule 4 (h) of the Mississippi Rules of Civil Procedure."(RE p.24)

¹ In addition to the transcript quoted by Appellant/Defendant the following exchange took place:

BY THE COURT: Okay, so—who filed the complaint.

BY MR. SANDERS: I filed the complaint.

BY THE COURT: Okay. And your understanding was that Mr. Turnage was getting it served?

BY MR. SANDERS: Yeah. He drafted – we – when I say "I filed it," we signed off on it. And his office and my office had been talking back and forth handling it. And we were – based upon what my folks told me, we were under the impression that they were going to get it served and apparently they were under the impression that we were going to get it served. And when –

BY THE COURT: Who physically took it to the courthouse?

BY MR. SANDERS: Mr. Turnage physically took it to the courthouse.

BY THE COURT: Where is he today?

BY MR. SANDERS: Well, he's decided that he's not going to be involved in the case, I guess. (RE Ex 12, p. 4-5)

...

² BY THE COURT: Okay, I'm going – for the record , I'm going to find that you had good cause. There was no mistake. And draw me an order denying his motion do dismiss. (RE Ex 12, p 6)

SUMMARY OF THE ARGUMENT

The trial did not abuse its discretion in extending the time period for service on Defendant Foss and finding that Plaintiff had good cause for not serving Defendant Foss within the initial 120 day period required by Rule 4(h) of the Mississippi Rules of Civil Procedure.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING
PLAINTIFF'S MOTION TO EXTEND THE TIME PERIOD FOR SERVING
DR. FOSS AND DENYING DR. FOSS' MOTION TO DISMISS

Plaintiff/Appellee submits that the trial Court did not abuse its discretion in extending the time period by one day to allow for service of process on Dr. Foss. In fact, Rule 6 (b) of the Mississippi Rule of Civil Procedure allows the trial Court in the exercise its discretion to extend the time period for the service of process. Rule 6(b) provides, *inter alia*, the following:

When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, **the court for cause shown may at any time in its discretion** (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, *or* (2) **upon motion made after the expiration of the specified period permit the act to be done where failure to act was the result of excusable neglect.** (emphasis added)

This Court has recognized that when reviewing a trial Court ruling in connection with the application of Rule 6(b) it will apply an abuse of discretion standard. In the case of *In re:*

Holtzman 823 So.2d 1180, 1182, this Court stated the following:

A determination of what constitutes "good cause" to extend the time period in which to serve process 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 in support of the determination. *Rains v. Gardner*, 731 So.2d 1192, 1197 (Miss.1999). The trial court enjoys wide discretion to enlarge the time for service of process both before

and after the actual termination of the allotted time. See Miss. R. Civ. P. 6(b) & cmt.; *see also Woods v. Allied Concord Fin. Corp.*, 373 F.2d 733, 734 (5th Cir.1967); *Crumpton v. Hegwood*, 740 So.2d 292, 293 (Miss. 1999).

(Emphasis added)

In the case sub judice, counsel for the Plaintiff sought to associate local counsel in order to avoid the very circumstances which exist with reference to this case. However, in the process some confusion arose regarding who had the responsibility for securing the process and having the defendants served. Counsel for Plaintiff was under the impression that in conjunction with filing the Compliant, the office of the local attorney would handle the issuance and service of process. Apparently, it was thought that the matter was being handled by Plaintiff's counsel.

When it came to Counsel's attention on November 14, 2006 that Dr. Foss , nor any of the other defendants had been served, arrangements had to be made to have the process issued as well as secure process servers in Coahoma and Harrison Counties. Counsel made a diligent effort to secure process, have it delivered to the Biloxi, Mississippi and served on Dr. Foss within the allotted time period. This was an extremely difficult considering Coahoma and Harrison Counties are each over 200 miles in opposite directions from Counsel for Plaintiff's office.

Although process was received by the server prior to the expiration of the 120 days, he was not able to locate Dr. Foss until the following day.

While Counsel for Plaintiff has to accept the ultimate responsibility for the failure to timely serve defendant in this case, it was Plaintiff's Counsel's reliance on third parties created that the situation caused Defendant not to be served with in the allotted time period. Under this factual scenario, the Court acted within its sound discretion in extending the time period for one day. This decision did not prejudice the rights of Dr. Foss in any respect. The Court's decision is clearly supported by the facts.

CONCLUSION


For the foregoing reasons, Plaintiff/ Appellee urges this Court find that the trial Court did not abuse its discretion in granting an extension of time and to dismiss this appeal.

CERTIFICATE OF SERVICE

I, EVERETT T. SANDERS, do hereby certify that I have this day served via U.S. Mail, postage prepaid a true and correct copy of the foregoing Brief of Appellee on:

L. Carl Hagwood, Esq.
Jason E. Dare, Esq.
Bradley K. Overcash, Esq.
Wilkins, Stephens & Tipton, P.A.
P.O. Box 4537
Greenville, MS 38704-4537

This the 23rd day of January, 2008.


EVERETT T SANDERS

CERTIFICATE OF FILING

I, EVERETT T. SANDERS, certify that I have this day delivered via U.S. Mail, postage pre-paid, the original and three copies of, Brief of Appellee, on January 22, 2008, to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi, 39201.


EVERETT T. SANDERS