

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

**MICHAEL L. FOSS, M.D.**

**APPELLANT / DEFENDANT**

**VS.**

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

**APPELLEE / PLAINTIFF**

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**INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF  
COAHOMA COUNTY, MISSISSIPPI  
HON. ALBERT B. SMITH, CIRCUIT JUDGE**

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**REPLY BRIEF OF APPELLANT / DEFENDANT MICHAEL L. FOSS, M.D.**

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## INTRODUCTION

Plaintiff has conceded that she failed to serve Dr. Foss with summons within 120 days of filing suit as mandated by MISS. R. CIV. P. 4(h). In her Brief to this Court, Plaintiff misstates the issue on appeal, the standard of review for the issue on appeal and submits facts for the first time on appeal, which are not supported by the evidence. Each of these will be addressed in Dr. Foss' Reply Brief.

I. **ISSUE ON APPEAL - WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED DR. FOSS' MOTION TO DISMISS BY FINDING THAT THE PLAINTIFF HAD GOOD CAUSE TO VIOLATE THE 120-DAY PROVISION OF MISS. R. CIV. P. 4(h).**

Plaintiff incorrectly asserts that the issue on appeal is whether the trial court "abused its discretion in granting Plaintiff's Motion to extend the time period for serving Dr. Foss" pursuant to MISS. R. CIV. P. 6. *Appellee Brief*, page 5. Dr. Foss filed his Motion to Dismiss premised on Plaintiff's failure to timely serve him with process on December 12, 2006 (CP 1 : 13-16) and filed his Re-Notice of Hearing on January 26, 2007. (CP 1 : 19-20). At the hearing on March 15, 2007, Plaintiff presented her unsigned Response to Defendant Michael L. Foss, M.D.'s Motion to Dismiss to the trial court judge, however, did not file the Response until March 26, 2007, the same date the trial court judge signed the Order denying Dr. Foss' Motion. *Response* (CP 1 : 21-23); *Order* (CP 1 : 24); *Hearing Transcript* (CT 1 : page 3, lines 2-3). Plaintiff now claims on appeal that the trial court considered and granted her "Motion for Extending the Time Period for Serving Dr. Foss," which allegedly was contained in her Response.

Plaintiff's Response to Dr. Foss' Motion to Dismiss was not filed with the Coahoma County clerk of court until eleven (11) days after the hearing on the Motion, and assuming *arguendo* it

contained a Motion for Extension of Time, sufficient in form pursuant to MISS. R. CIV. P. 7 and 11, such "Motion for Extension of Time" was not noticed for hearing and was not considered by the trial court in ruling on Dr. Foss' Motion to Dismiss. At the hearing on Dr. Foss' Motion, the trial court only considered Dr. Foss' Motion regarding MISS. R. CIV. P. 4(h), as evidenced by the following:

**BY THE COURT:** ...state your good cause for the record, for being one day late.

(CT 1 : page 3, lines 21-23).

**BY THE COURT:** Okay, I'm going - - for the record, I'm going to find that you [Plaintiff] had good cause. There was no mistake. And draw me an order denying his [Dr. Foss'] motion to dismiss.

(CT 1 : page 6, lines 2-5).

Moreover, the Order prepared by Plaintiff and entered by the trial court further evidences that the trial court only ruled upon Dr. Foss' Motion to Dismiss pursuant to Rule 4(h) as follows:

**IT IS, THEREFORE, ORDERED AND ADJUDGED** 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.

*Order* (CP 1 : 24).

The only ruling made by the trial court was the denial of Dr. Foss' Motion to Dismiss according to Rule 4(h). Therefore, the only issue that can be on appeal is whether that ruling was in error. Because the trial court never ruled on Plaintiff's Motion for Extension, assuming *arguendo* one was filed, Plaintiff's Appeal Brief misstates that her Motion for Extension is at issue in this appeal.

## II. STANDARD OF REVIEW - DE NOVO

“The denial of a motion to dismiss [for failure to serve process within 120 days pursuant to Rule 4(h)] presents a question of law, which we review de novo.” *Bacou-Dalloz Safety, Inc. v. Hall*, 938 So. 2d 820, 822 (¶ 9) (Miss. 2006) (citing *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 988 (Miss. 2004)).

Plaintiff alleges that the standard of review on appeal is abuse of discretion, citing *In re Holtzman*, 823 So. 2d 1180 (Miss. 2002). In *In re Holtzman*, the plaintiff filed suit and failed to serve summons within the requisite 120 days pursuant to Rule 4(h). After the 120-day time limit expired, the plaintiff filed a motion for extension of time, which the trial court denied. *In re Holtzman*, 823 So. 2d at 1181 (¶ 2). In affirming on appeal and citing to Miss. R. Civ. P. 6(b), the Mississippi Supreme Court held that “[t]he trial court enjoys wide discretion to enlarge the time for service of process both before and after the actual termination of the allotted time.” *Id.* at 1182 (¶ 6). This ruling was the result of the language of Rule 6(b), which provides that:

The court for cause shown may at any time *in its discretion* . . . 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. . . .

MISS. R. CIV. P. 6(b) (emphasis added).

Similar to the plaintiff in *In re Holtzman*, the plaintiff in *Bacou-Dalloz supra* also failed to serve the defendant with summons within the required 120-days. The plaintiff in *Bacou-Dalloz*, however, never filed for an extension of time and the trial court instead ruled on, and denied, the defendant’s motion to dismiss for failure to timely serve process pursuant to Rule 4(h). *Bacou-Dalloz*, 938 So. 2d at 822 (¶ 7). In reversing on appeal, the Mississippi Supreme Court held that:

The denial of a motion to dismiss presents a question of law, which we review *de novo*. *Harris v. Miss. Valley State Univ.*, 873 So.2d 970, 988 (Miss.2004). We review any findings of fact made by the circuit court for abuse of discretion. *Holmes v. Coast Transit Auth.*, 815 So.2d 1183, 1185 (Miss.2002).

*Id.* at (¶ 9).

The only finding of fact the trial court made in its Order was that Plaintiff failed to serve summons on Dr. Foss within 120 days after filing suit. This finding of fact is a discretionary ruling and entitled to review on appeal for abuse of discretion. The Plaintiff, however, has never contested that she failed to serve Dr. Foss with summons within 120 days. Pursuant to *Bacou-Dalloz supra*, the trial court's denial of Dr. Foss' Motion to Dismiss, which is the only motion and ruling on appeal, presents a question of law that this Court should review *de novo*.

### **III. FACTS REGARDING SERVICE OF SUMMONS ON DR. FOSS AND "GOOD CAUSE" ANALYSIS.**

Plaintiff's "good cause" analysis to the trial court was as follows:

**BY MR. SANDERS:**

I talked with Ellis Turnage, and we were working on the case. And in fact, he drafted pleadings. What happened was that *apparently my office was supposed to take care of the service of the process*, and we thought he was taking -- his office was taking care of it. And we found out just -- as the pleadings reflect, we found out just two days before the time period expired that they had not been served. So we immediately called and got together and got them served. We served everybody except Dr. Foss, which was served on the one day beyond the 121.

(CT 1 : page 3, line 29 - page 4, line 13) (emphasis added). For the first time on appeal, Plaintiff now makes the allegation that "[a]lthough 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." *Appellee Brief*, page 6. This was not presented to the trial court to consider in its "good cause" determination and, more

importantly, there is no evidence in the record to support these allegations.

The facts regarding service of summons on Dr. Foss are that Plaintiff had summons issued on November 15, 2006 (*i.e.* - the 119<sup>th</sup> day) and did not have it served until November 17, 2006 (*i.e.* - the 121<sup>st</sup> day). (CP 1 : 11-12). Plaintiff now claims that she delivered Dr. Foss' summons to the process server on November 16, 2006, or on the 120<sup>th</sup> day, but the process server could not find Dr. Foss until the next day.

When the Plaintiff filed her Complaint against Dr. Foss in Coahoma County, Mississippi on July 19, 2006, she correctly noted Dr. Foss' residence in Harrison County, Mississippi. She knew when she filed suit that Dr. Foss would have to be served with summons in Biloxi, Harrison County, Mississippi. It took Plaintiff 48 hours to serve Dr. Foss with summons once she had it issued, and it took the process server 24 hours to serve Dr. Foss with summons once he received it (assuming *arguendo* he received summons on November 16, 2006 as Plaintiff alleges).

The reason Plaintiff failed to timely serve Dr. Foss with summons was not due to the distance between Coahoma County and Harrison County or the process server dropping the ball. The reason Plaintiff failed to comply with the mandates of Rule 4(h) is because she waited until the last minute (*i.e.* - the 119<sup>th</sup> day) to begin the process of having Dr. Foss served.

In *Powe v. Byrd*, 892 So. 2d 223 (Miss. 2004), this Court held that the standard for showing good cause in Mississippi is very high. *Powe*, 892 So. 2d at 226 (¶ 11). In *Powe*, the plaintiff provided the process server a copy of his summons and complaint with one day remaining in his 120-day Rule 4(h) deadline. *Id.* at 225. Process was not served, however, until three days after the expiration of same. *Id.* Similar to the Plaintiff's argument made for the first time herein, the plaintiff in *Powe* tried to shift blame for her non-compliance with Rule 4(h) to the process server.



*Id.* at 226. The *Powe* Court held that “waiting until the last day to serve process on a defendant does not constitute good cause. Powe knew that it was of the utmost importance to have process served on or before that day and did not accomplish same.” *Id.* at 227.

In *Bang v. Pittman*, 749 So. 2d 47 (Miss. 1999)<sup>1</sup>, the plaintiffs did not begin any attempts to serve Pittman with process until the 117<sup>th</sup> day after their suit was filed. *Bang*, 749 So. 2d at 49 (¶¶ 5-8). Process was not served on the defendant until the 122<sup>nd</sup> day. *Id.* at 50 (¶ 10). The plaintiffs were able to put on proof that their process server attempted to serve Pittman at his office; attempted service on Pittman’s wife, who initially agreed to accept summons, but later refused; and later called Pittman’s office and was informed he and his wife were in Mobile, Alabama. *Id.* at 51 (¶ 21). The *Bang* Court analyzed 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 or ignorance’ of the rules usually does not suffice.” *Id.* at 51 (¶ 19) (quoting *Watters v. Stripling*, 675 So. 2d 1242, 1243 (Miss. 1996)). Because the plaintiffs “knew where to find Pittman and failed to serve him during the 120 day period,” they were not “diligent in serving process.” *Id.* at 52 (¶ 25).

Plaintiff herein waited for 119 days before she had summons issued for Dr. Foss. The reason given for the delay was that Plaintiff’s counsel on appeal “apparently . . . was supposed to take care of the service of process,” but thought Plaintiff’s local counsel was handling it. Plaintiff has never alleged that Dr. Foss “evaded process or engaged in misleading conduct.” See *Montgomery v. Smithkline Beecham Corporation*, 910 So. 2d 541, 545 (¶ 13) (Miss. 2005). Similar to *Powe* and

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<sup>2</sup> Overruled by *Cross Creek Productions v. Scafidi*, 911 So. 2d 958 (Miss. 2005), “to the extent [*Bang*] states that good cause is required . . . when [a] motion for additional time is filed within the initial 120-day period.

*Bang supra*, Plaintiff just waited until the last minute to serve process on Dr. Foss and failed to timely perfect service. The *Powe* Court's ruling is all that needs to be considered by this Court on appeal - "[W]aiting until the last day to serve process on a defendant does not constitute good cause." *Powe*, 892 So. 2d at 227.

Where a plaintiff waits until the last minute to attempt service on a defendant and is unsuccessful, her actions do not constitute due diligence and her delay in attempting service cannot be good cause. *See Powe & Bang supra*. Because Plaintiff failed to serve Dr. Foss with summons prior to the expiration of her 120-day period proscribed by Rule 4(h) and she failed to show good cause for her failure to the trial court, this Defendant respectfully requests that the trial court's ruling be reversed, and this Court render a judgment of dismissal in Dr. Foss' favor.

### **CONCLUSION**

Pursuant to each of the foregoing sections and all authority and analysis in this Defendant's Appellant Brief, Michael L. Foss, M.D. prays this Court reverse the ruling of the Circuit Court of Coahoma County, Mississippi, and render a judgment of dismissal in his favor.

**RESPECTFULLY SUBMITTED**, this 14<sup>th</sup> day of February, 2008.

**L. CARL HAGWOOD, MBN**  
**JASON E. DARE, MBN**

**BY:**

  
\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I, JASON E. DARE, one of the attorneys for Dr. Foss, certify that I have this day delivered via U.S. Mail, postage prepaid, a true and correct copy of the foregoing document to the following:

Honorable Albert B. Smith  
Circuit Court Judge  
PO Drawer 478  
Cleveland, MS 38732

Everett T. Sanders, Esq.  
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PO Box 565  
Natchez, MS 39121-0565

**THIS**, the 14<sup>th</sup> day of February, 2008.



A handwritten signature in black ink, appearing to read 'JASON E. DARE', is written over a horizontal line.

**JASON E. DARE**

**CERTIFICATE OF FILING**

I, JASON E. DARE, certify that I have this day delivered via U.S. Mail, postage pre-paid, the original and three copies of, and a floppy disc containing, Brief of Appellant / Defendant Michael L. Foss, M.D., on February 14, 2008, to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi, 39201.



A handwritten signature in black ink, appearing to read 'JASON E. DARE', is written over a horizontal line.

**JASON E. DARE**