

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

In Re: BRIEF OF APPELLANT / DEFENDANT, MICHAEL L. FOSS, M.D.

CERTIFICATE OF INTERESTED PERSONS

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 disqualification or recusal:

1. **Michael L. Foss, M.D.**, Appellant / Defendant
2. **Dorothy Williams**, Appellee / Plaintiff
3. **Estate of Peter D. Price, Deceased**, Appellee / Plaintiff
4. **L. Carl Hagwood, Esq.**, of Wilkins, Stephens & Tipton, P.A., Counsel for Appellant / Defendant
5. **Jason E. Dare, Esq.**, of Wilkins, Stephens & Tipton, P.A., Counsel for Appellant / Defendant
6. **Bradley K. Overcash, Esq.**, of Wilkins, Stephens & Tipton, P.A., Counsel for Appellant / Defendant
7. **Everett T. Sanders, Esq.**, of Sanders Law Firm, Counsel for Appellee / Plaintiff
8. **Honorable Albert B. Smith**, Coahoma County Circuit Court Judge

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STATEMENT OF THE ISSUES

- I. 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)

STATEMENT OF THE CASE

Plaintiff filed her medical malpractice / wrongful death Complaint in this case against Dr. Foss on July 19, 2006. *Complaint* (CP 1 : 2-8) Dr. Foss was not served with summons for Plaintiff's Complaint until November 17, 2006 (*i.e.* - 121 days following the filing of the Complaint). (CP 1 : 11-12). Dr. Foss responded to Plaintiff's Complaint on December 12, 2006 by filing a Special Appearance Motion to Dismiss and had his Motion set for hearing on January 23, 2007. (CP 1 : 13-18). The hearing was re-noticed on January 26, 2007, and the hearing was scheduled to commence on March 15, 2007. (CP 1 : 19-20). Plaintiff's Response to Dr. Foss' Motion was filed the day of the hearing, and the first time counsel for Dr. Foss had an opportunity to review the pleading was during the hearing. (CP 1 : 21-23) (CT 1 - page 3, lines 2-5).

At the hearing on Dr. Foss' Motion to Dismiss, the trial court requested Plaintiff's "good cause" explanation, to which Plaintiff replied:

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 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 on the on day beyond the 121.

(CT 1 : page 3, line 29 - page 4, line 13). The trial court found that Plaintiff's actions exhibited "good cause" and denied Dr. Foss' Motion to Dismiss by order dated March 28, 2007. (CP 1 : 24) (CT 1 : page 6, lines 2-5). Defendant herein appeals the ruling of the Circuit Court of Coahoma County, Mississippi.

SUMMARY OF THE ARGUMENT

Rule 4(h) mandates that service of summons and the complaint be made within 120 days after the filing of the complaint except where “the party on whose behalf such service was required [can] show good cause why such service was not made within that period.” MISS. R. CIV. P. 4(h). In this case, Dr. Foss had to be served with the Summons and Complaint by November 16, 2006. Dr. Foss was served on November 17, 2006, after the expiration of the 120-day period, with no attempts by Plaintiff to timely serve this Defendant. Therefore, the only means by which Plaintiff could avoid dismissal of her suit against Dr. Foss was by showing “good cause.” To show “good cause,” 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.” *Bacou-Dalloz Safety, Inc. v. Hall*, 938 So. 2d 820, 823 (¶ 12) (Miss. 2006). Moreover, “[g]ood cause’ can never be demonstrated where a plaintiff has not been diligent in attempting to serve process.” *Montgomery v. Smithkline Beecham Corporation*, 910 So. 2d 541, 545 (¶ 13) (Miss. 2005). “In demonstrating good cause and diligence, a plaintiff must show that he or she has been unable to serve process because a defendant evaded process or engaged in misleading conduct, or for some other acceptable reason....” *Montgomery*, 910 So. 2d at 545 (¶ 13).

Plaintiff claims “good cause” through a “mis-communication” her counsel had with another lawyer as to who was responsible for serving Dr. Foss with summons. The record, however, is uncontradicted Plaintiff knew on the 118th day that there had been no service on Dr. Foss, yet she took no action. The “mis-communication” between Plaintiff’s counsel regarding who would serve Dr. Foss and Plaintiff’s waiting until after the 120 day time limit had expired to take any action towards serving this Defendant cannot constitute “good cause” or “diligence.” *See Powe v. Byrd*,

892 So. 2d 223, 227 (Miss. 2004) (“[W]aiting until the last day to serve process on a defendant does not constitute good cause.”). For these reasons, Dr. Foss is entitled to a dismissal without prejudice.

ARGUMENT

I. 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)

The sole issue before this Court is whether Plaintiff showed "good cause" for not serving Dr.

Foss with summons within 120 days after filing suit pursuant to Rule 4(h), which reads as follows:

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.

MISS. R. CIV. P. 4(h). Because Plaintiff neither moved the trial court for an extension of time to serve Dr. Foss with process nor served Dr. Foss with process within 120 days of filing suit on July 19, 2006, Rule 4(h) requires dismissal of Plaintiff Complaint against Dr. Foss where Plaintiff failed to prove "good cause" for her failure. *See Cross Creek Productions v. Scafidi*, 911 So. 2d 958, 960 (¶¶ 5 - 7) (Miss. 2005).

A. STANDARD OF REVIEW.

The denial of a "Motion to Dismiss for failure to serve process within 120 days pursuant to M.R.C.P. 4(h)" is a "question of law" that this Court review *de novo* on appeal. *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). Findings of fact made by the trial court are reviewed "for abuse of discretion." *Bacou-Dalloz Safety*, 938 So. 2d at 822 (¶ 9) (citing *Holmes v. Coast Transit Auth.*, 815 So. 2d 1183, 1185 (Miss.2002)). Where this Court finds the trial court's discretion was "abused or . . . not supported by substantial evidence," the trial court's ruling should be reversed. *Long v.*

Mem'l Hosp., 2007 WL 2948975, at *2 (¶ 5) (Miss. Oct 11, 2007).

B. DR. FOSS WAS NOT SERVED WITH PROCESS WITHIN 120 DAYS OF THE FILING OF PLAINTIFF'S COMPLAINT.

Pursuant to the *Mississippi Rules of Civil Procedure*, a plaintiff must serve process on the defendant within 120 days of the filing of a complaint in the matter. Miss. R. Civ. P. 4(h). It is undisputed that Plaintiff failed to serve process within the prescribed 120 day period. It is likewise undisputed that Plaintiff never requested an extension of time to serve process from the trial court. Because Plaintiff's Complaint was served on Dr. Foss 121 days after its filing, it is uncontested that Plaintiff violated Rule 4(h).

C. PLAINTIFF FAILED TO SHOW GOOD CAUSE FOR HER FAILURE TO SERVE PROCESS ON DR. FOSS WITHIN 120 DAYS.

At the hearing on Dr. Foss' Motion to Dismiss, counsel for the Plaintiff attempted to articulate the Plaintiff's good cause for her failure to serve process within the 120-day period as follows:

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

BY MR. SANDERS: Well, you Honor, it was a product of, uh, I had initially spoken with an attorney up here in terms of associating him and, uh --

BY THE COURT: Who did you talk with?

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 case of the service of 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 on the on day
beyond the 121.

(CT 1 : page 3, line 29 - page 4, line 13) (emphasis added).

For Plaintiff to prove “good cause,” she “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.” *Bacou-Dalloz Safety*, 938 So. 2d at 823 (¶ 12) (citing *Webster v. Webster*, 834 So. 2d 26, 28 (Miss.2002)). This Court has analyzed the question of good cause and ruled that diligence on the part of a plaintiff is required, and that “[g]ood cause’ can never be demonstrated where a plaintiff has not been diligent in attempting to serve process.” *Montgomery v. Smithkline Beecham Corporation*, 910 So. 2d 541, 545 (¶ 13) (Miss. 2005). “In demonstrating good cause and diligence, a plaintiff must show that he or she has been unable to serve process because a defendant evaded process or engaged in misleading conduct, or for some other acceptable reason....” *Montgomery*, 910 So. 2d at 545 (¶ 13) (citing *Holmes*, 815 So. 2d at 1186).

In *Bacou-Dalloz Safety*, the Mississippi Supreme Court reversed the trial court’s denial of defendant Bacou-Dalloz’s Motion to Dismiss premised on Rule 4(h). The plaintiffs attempted to serve summons within the 120 day time period via certified mail on this out-of-state defendant corporation, but served it on the wrong agent for service of process at the wrong address. *Bacou-Dalloz Safety*, 938 So. 2d at 821 (¶¶ 2-4). The complaint and summons was returned to plaintiffs by the wrong agent prior to the running of the 120 days, but plaintiffs did not make a second attempt at service until well over one year after the expiration of the 120-day deadline. *Id.* at (¶ 6). The *Bacou-Dalloz* Court held that filing by plaintiffs of a motion for additional time to serve process prior to the running of the 120-day time frame was “recommended” and would exhibit

“diligence [to] support an allegation that good cause exists for failure to serve process timely.” *Id.* at 823 (¶ 13) (citing *Webster*, 834 So. 2d at 29). Based on the facts presented, however, the *Bacou-Dalloz* Court found plaintiffs attempts at service showed “a lack of good cause far beyond excusable neglect,” and rendered judgment in favor of the defendant, dismissing it without prejudice. *Id.* at 823 (¶ 14).

In *Powe v. Byrd*, 892 So. 2d 223 (Miss. 2004), the Mississippi Supreme 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 on 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 the 120-day period. *Id.* 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.

The Plaintiff in the case at bar has not demonstrated diligence required by the cases cited above. The only claim Plaintiff has made regarding good cause is that her counsel miscommunicated with another counsel which of them would serve summons on Dr. Foss. Plaintiff made no attempt to determine whether service had been perfected until 118 days after her Complaint was filed, then made no attempt to serve Dr. Foss within the 120 day time limit. Plaintiff did not attempt to file a Motion for Additional Time within the 120 day time limit, despite her knowing that service had not been perfected.

Plaintiff has put forth no facts indicating that she was unable to serve process because Dr. Foss evaded process or engaged in misleading conduct, but instead has only alleged inadvertence or

mistake of counsel. *See Montgomery and Bacou-Dalloz Safety supra*. In *Bacou-Dalloz Safety*, the plaintiff at least attempted to serve the defendant within the 120-day time limit proscribed by Rule 4(h), but did so on the wrong registered agent at the wrong address. The *Bacou-Dalloz Safety* Court still reversed the trial court's denial of the defendant's motion to dismiss holding that the plaintiff's actions were "far beyond excusable neglect." In the instant action, the Plaintiff did nothing for 118 days because of a mis-communication between her counsel and made no attempt to serve Dr. Foss within 120 days. Similar to *Powe supra*, the Plaintiff herein waited until the last minute to determine whether Dr. Foss had been served with summons, and failed to timely serve Dr. Foss.

The "good cause" provision of Rule 4(h) does not suspend a plaintiff's duty to be diligent in serving a defendant with process. Where Plaintiff takes no action whatsoever for 118 days, then fails to effect service until after the expiration of the 120-day period because of a mis-communication between her counsel, Plaintiff has failed to show the level of diligence required by Rule 4(h). For these reasons, Dr. Foss respectfully requests that this Court reverse the ruling of the Circuit Court of Coahoma County, Mississippi and render judgment in favor of Dr. Foss, dismissing Plaintiff's Complaint against him without prejudice.

CONCLUSION

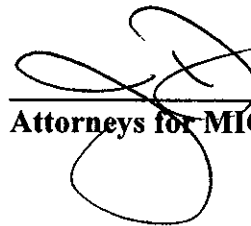
Because Plaintiff failed to serve Defendant Michael Foss, M.D. within 120 days after her Complaint was filed, Miss. R. Civ. P. 4(h) required that her Complaint against this Defendant be dismissed unless she showed "good cause" for her failure. The undisputed evidence in this case is that Plaintiff's failure to even attempt timely serve on Dr. Foss was the result of a "mis-communication" between her counsel regarding who would have Dr. Foss served. Plaintiff waited until the last minute to determine that Dr. Foss had not been served with summons, then she took

no action to either timely serve this Defendant or acquire additional time from the trial court in which to perfect service. Pursuant to the opinions in *Bacou-Dalloz Safety, Montgomery and Powe supra*, Plaintiff's actions do not constitute "good cause" or "diligence" in attempting to serve Dr. Foss with summons, and therefore, this Defendant is entitled to a dismissal without prejudice. Defendant Michael Foss, M.D. prays this Court reverse the Circuit Court of Coahoma County's denial of his Motion to Dismiss and render a judgment of dismissal in his favor.

RESPECTFULLY SUBMITTED, this 29th day of October, 2007.

L. CARL HAGWOOD, MBN [REDACTED]
JASON E. DARE, MBN [REDACTED]
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BY:



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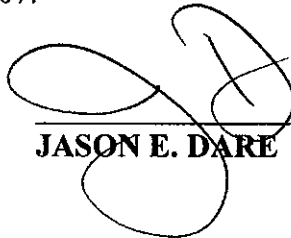
CERTIFICATE OF SERVICE

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.
Sanders Law Firm
PO Box 565
Natchez, MS 39121-0565

THIS, the 29th day of October, 2007.



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 October 29, 2007, to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi, 39201.



JASON E. DARE