

**IN THE STATE OF MISSISSIPPI SUPREME COURT**

**CAUSE NO. 2008-TS-00507**

**DORI WORTHY**

**APPELLANT**

**VERSUS**

**DR. TIMOTHY J. TRAINOR**

**APPELLEE**

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**APPEAL FROM THE CIRCUIT COURT  
OF PEARL RIVER COUNTY, MISSISSIPPI  
FIFTEENTH JUDICIAL DISTRICT**

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**BRIEF OF APPELLEE,  
DR. TIMOTHY J. TRAINOR**

**ORAL ARGUMENT REQUESTED**

Submitted by:

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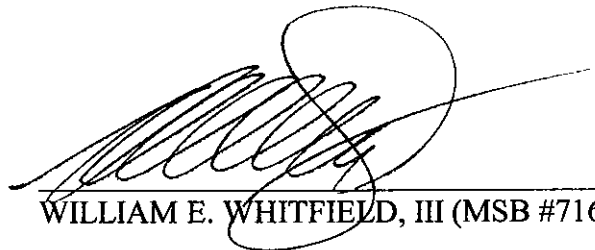
**DR. TIMOTHY J. TRAINOR**

**APPELLEE**

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel for Dr. Timothy J. Trainor certifies the following parties have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Dr. Timothy J. Trainor - Appellee
2. William E. Whitfield, III and Anna J. Hall of Copeland, Cook, Taylor & Bush, P.A. - Counsel for Appellee
3. Dori Worthy - Appellant
4. Rayford G. Chambers, Chambers & Gaylor, PLLC - Counsel for Appellant
5. Honorable Prentiss G. Harrell, Circuit Court Judge of Pearl River County, Trial Judge



WILLIAM E. WHITFIELD, III (MSB #7161)

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## **STATEMENT OF THE ISSUES**

- I. TRIAL COURT'S DECISION TO DENY DORI WORTHY'S REQUEST FOR  
EXTENSION OF TIME TO EFFECT SERVICE OF PROCESS WAS PROPER.

## **STATEMENT OF THE CASE**

### **A. Course of Proceeding and Disposition in the Court Below**

Dori Worthy (the Plaintiff and Appellant; hereinafter "Worthy") filed her Complaint on or about February 7, 2007, in the Circuit Court of Pearl River County, Fifteenth Judicial District, against Dr. Timothy J. Trainor (one of the Defendants and Appellee; hereinafter "Trainor") seeking to recover damages for medical negligence allegedly arising out of his care of Worthy in 2002. Process for Dr. Trainor was issued on the same date that the complaint was filed (February 7, 2007). Trainor filed a Motion to Dismiss based upon insufficiency of process and insufficiency of service of process of a non-resident which the trial court granted. Worthy opposed the motion arguing that process was proper, and alternatively arguing that "good cause" existed for an extension of time to serve process upon Trainor. The hearing on the motion was held before the trial court on December 3, 2007, and the Court by Order dated February 19, 2008, granted the Defendant's motion ostensibly denying the Plaintiff's request for an extension of time for lack of "good cause" shown.

### **B. Statement of the Facts**

Worthy filed her Complaint on or about February 7, 2007 (R.20), and asserted a cause of action against Trainor *et al* (and others) for medical negligence arising out of his medical care of Worthy in 2002. Trainor is (and was at all times during the operative facts of the complaint) an adult resident citizen of Pearl River, Louisiana and is also a medical doctor licensed to practice medicine under the laws of the State of Mississippi and the State of Louisiana, with his places of business including locations in Picayune, Mississippi; Slidell, Louisiana; and Covington, Louisiana.

Worthy's first attempt at service of process was on May 14, 2007, (though process was issued on February 7, 2007, over ninety days prior the first attempt at process); however, was unsuccessful, because Trainor's office "was now" in Slidell according to the process server (R. 15). This "return" was filed on May 15, 2007. Worthy then later attempted service upon Dr. Trainor on or about June 4, 2007 (just a few days shy of 120 days) by service of the Summons and Complaint upon his business address in Slidell, Louisiana, by *certified mail*, and addressed to "Timothy Trainor, 58515 Pearl Acres Road, Slidell, LA 70461." The receptionist at this business address, Anna Russo, apparently signed for the copy of the Summons and Complaint to Trainor.(R. 84). The "return" on this process was not filed until August 6, 2007, (just a few days shy of 180 days) which was accompanied by an "affidavit of counsel" that process was accomplished on an unstated date as of August 3, 2007 (though process was never accomplished upon Trainor to this day). No request for any extension of time prior to the later service of process was ever made and when the green card was returned. No request was ever made for an extension of time to serve process until a Response of the Plaintiff was made to the Defendant's motion to dismiss. While Worthy maintains she requested and paid for restricted delivery (R. 85), it is clear by Anna Russo's signature that the delivery was not restricted to Trainor nor was the appropriate box checked on the "green card" that "restricted delivery" as was required under the Rule (Rule 4 (c)(5)). This failure clearly gives evidence of non-compliance with that the Rule.

Trainor entered his appearance objecting to service of process and filed a Motion to Dismiss based upon insufficient and ineffective service of process on a non-resident on or about August 27, 2007 (R. 60) which was subsequently granted on February 19, 2008. (R.123) By the

Court's order dismissing the claim against Trainor, the trial court clearly denied the Plaintiff's request for a "nunc pro tunc" extension of time to serve process.

### **SUMMARY OF THE ARGUMENT**

Worthy contends on appeal that she is entitled to a reversal of the Circuit Court's denial of her motion for additional time to effect service of process because circumstances within the case rise to the level of "good cause."

Even though Rule 4(c)(5) mandates that service of process on a non-resident natural person be effected through "restricted delivery," her diligent efforts, Worthy contends, entitle her an additional sixty days in which to serve Trainor. Worthy also raises the argument that because she made an attempt to serve Trainor at his office in Mississippi and then requested and paid for, though did not receive, restricted delivery service to his office in Louisiana, she be afforded the benefit of the "good cause" exception in Rule 4(h) to escape dismissal. It is clear from the record though that "good cause" does not exist because of the untimeliness of the process and similarly of the Plaintiff's request, augmented by the fact that the evidence of her argument for "good cause" is simply not appropriately verified (see "green card" where the box "restricted delivery" is not checked, nor is there evidence that it was actually requested).

There is a marked distinction between service upon a non-resident defendant and service upon a non-resident natural person defendant under Rule 4 of the Mississippi Rules of Civil Procedure. The former requires only that the Summons and Complaint be mailed certified mail, return receipt requested. The service upon a non-resident natural person, however, requires a much stricter adherence to due process standards and requires that the Summons and Complaint be mailed clearly marked "restricted delivery."



Worthy attempted to serve Trainor by certified mail, return receipt requested at his Louisiana office. Trainor has never been served. The receptionist's signature was accepted (by the Plaintiff) in lieu of Trainor's signature. Worthy did not re-attempt to serve Trainor correctly, noting the deficiency, within the 120-day period pursuant to Rule 4(h), so Trainor properly moved to dismiss the complaint against him for these allegations that occurred five years before. Worthy now appeals the final judgment entered by the trial court in denying her request for an extension of time seemingly accepting the fact that process is objectively deficient.

### **STANDARD OF REVIEW**

The standard of review for the grant or denial of a request for an extension of time pursuant to Rule 4(h), if based on fact and not law, is "abuse of discretion." The decision therefore of the trial court is thus entitled to "deferential review." *Rains v. Gardner*, 731 So. 2d 1192, 1998 (Miss. 1999). The finding of fact is left to the discretion of the trial court as to whether there is, "good cause or excusable neglect for delay in serving process under Rule 4(h)." *Long v. Memorial Hospital*, 969 So. 2d 35, 38 (Miss. 2007). *See also, Montgomery v. Smithkline Beecham*, 910 So. 2d 541, 544-45 (Miss. 2005).

### **ARGUMENT AND AUTHORITIES**

#### **I. TRIAL COURT'S DECISION TO DENY WORTHY'S REQUEST FOR EXTENSION OF TIME TO EFFECT SERVICE OF PROCESS WAS PROPER.**

Service upon a non-resident defendant may be accomplished by sending a copy of the Summons and Complaint to the person to be served by certified mail, return receipt requested- "restricted delivery." "Where the defendant is a natural person, the envelope containing the Summons and Complaint *shall* be marked '*restricted delivery.*'" (*emphasis added*). MISS. R. CIV. P. 4(c)(5). Trainor is a natural person, non resident, contemplated clearly by the Rule.

Worthy failed to assure and require that the medium utilized by her mandated “restricted delivery,” and to deliver the Summons and Complaint to the defendant (Trainor) personally as was required.

“Service of process on a non-resident defendant is jurisdictional, requiring *strict* compliance with statutory procedures.” (*emphasis added*). *Lexington Insurance Co. v. Buckley*, 925 So. 2d 859 (Miss. Ct. App. 2006). A court does not obtain jurisdiction simply because a defendant has informally become aware of a suit filed against him. *Morrison v. Miss. Dept. of Human Services*, 863 So. 2d 948, 953 (Miss. 2004). Even if the defendant is aware of a pending suit against him, that knowledge is immaterial, “unless there has been a legal summons or a legal appearance.” *Brown v. Riley*, 580 So. 2d 1234, 1237 (Miss. 1991).

“The burden is on the plaintiff to show good cause as to why the service was not made within the 120 days.” *Hensarling v. Holly*, 2007 WL 1599555 (Miss. App.) “Good cause” is difficult to establish. This Court has made it clear that, “simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice.” *Webster v. Webster*, 834 So. 2d 26, 28 (Miss. 2002). For “good cause,” the plaintiff must show, “at least as much as would be required to show excusable neglect.” *Id.* To be sure, “the excusable neglect standard is a very strict standard.” *Holmes v. Coast Transit Auth.*, 815 So. 2d 1183, 1186 (Miss. 2002).

In this case, counsel’s not marking the envelope as “restricted” or at the very least marking the green card in the appropriate box as restricted, is precisely the type of inadvertence this Court anticipated in *Webster*. Further, the very document that attempted to confirm process was *patently deficient* on its face and clearly gives evidence alone of its deficiency. It is the responsibility of the transmitting party that selects the method of process, to confirm compliance with the Rule. It is not the role of the Post Office to divine the requirements of counsel who is

required to comply with the mandate of law. Rather than taking the steps necessary to rectify clearly deficient service upon its return to counsel, the green card was attached to a “return” and filed as if valid accompanied by an affidavit of counsel, despite the conspicuous signature of a third party not associated with this case and not the defendant.

Rule 4(c)(5) is explicit in its “restricted delivery” requirement and for good reason. Prior notice is fundamental when a person stands to suffer from official action and, thus, notice is the most significant factor of all process. *Brown* at 1237. A “complete absence of service of process offends due process and cannot be waived.” *Morrison* at 953.

Not serving Trainor at the correct address the first time and then not serving him correctly pursuant to Rule 4 the second time does not rise to the level of “good cause” necessary to elude the stringent requirements of Rule 4(h). This Court has already found a plaintiff who attempted service on a defendant only twice – once at an incorrect address then once at the correct address well outside the 120-day time period – to be without good cause. “Plaintiffs’ inaction, without adequate explanation, shows a lack of good cause far beyond excusable neglect.” *Bacou-Dalloz Safety v. Hall*, 938 So. 2d 820, 823 (Miss. 2006).

While there is no rule dictating when a motion for an extension of time must be filed, this Court has repeatedly emphasized that, “a diligent plaintiff should file such a motion within the 120-day time period. Such diligence would support an allegation that good cause exists for failure to service process timely.” *Webster*, 834 So. 2d 26 at 29. *See also, Montgomery v. Smithkline Beecham*, 910 So. 2d 541 (Miss. 2005); *Bacou-Dalloz Safety v. Hall*, 938 So. 2d 820 (Miss. 2006).

If Worthy were in fact diligent, she most certainly would have included a request for an additional period of time to complete service of process under Rules 4 and 6 of the Mississippi

Rules of Civil Procedure *within the time remaining for service* rather than waiting until well after Trainor filed his Motion to Dismiss. Instead, after receiving the green card evidencing notice that Trainor was not served properly under the Rules, Worthy waited over *ninety days* (by filing her response to the Defendant's motion to dismiss) to come forward with any reason for or recognition of the fact that service was deficient.

### **CONCLUSION**

As "good cause" cannot be established in this case for all the foregoing reasons, this Court should affirm the Trial Court's denial of Worthy's request for an extension of time and further affirm the dismissal of her claim as against him.

Respectfully submitted,

DR. TIMOTHY J. TRAINOR

BY: COPELAND, COOK, TAYLOR & BUSH, P.A.

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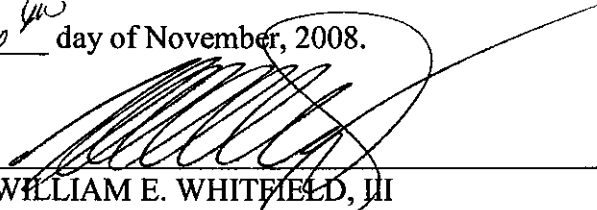
**CERTIFICATE OF SERVICE**

I, WILLIAM E. WHITEFIELD, III, of the law firm of COPELAND, COOK, TAYLOR & BUSH, P.A., do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the within and foregoing Brief of Appellee to the following at his record mailing address:

Honorable Prentiss G. Harrell  
Pearl River Circuit Court Judge  
P.O. Box 488  
Purvis, MS 39475

Rayford G. Chambers, Esq.  
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SO CERTIFIED, this the 26<sup>th</sup> day of November, 2008.

  
\_\_\_\_\_  
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