IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CARLA STUTTS, PLAINTIFF APPELLANT

VS. NO. 2008-CA-01866

JANICE MILLER and
JACI MILLER, DEFENDANTS APPELLEES

APPEAL FROM THE CIRCUIT COURT OF ALCORN COUNTY, MISSISSIPPI

REPLY BRIEF

(Oral argument not requested)

Thomas L. Sweat, Jr.
Attorney at Law
612 ½ Waldron Street
Corinth, MS 38834
662-287-5549
Bar No. 08102

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

Rule 4(h) Mississippi Rules of Civil Procedure

INTRODUCTION

This is the Appellant's response to Appellees' brief. As the court will recall, Appellant filed a complaint against Appellees for damages and injuries resulting from an automobile accident on September 24, 2004. Present counsel was employed on September 19, 2007, and suit was filed on September 20, 2007, four days prior to the expiration of the statute of limitations.

Extensive efforts were made by Appellant to locate and serve the Appellees, but despite those efforts, process was not completed until January 24, 2008, 126 days after the complaint was filed. Appellees filed for a motion to dismiss, alleging that the statute of limitations had expired, and the trial court dismissed Appellant's complaint without due consideration of the evidence of "good cause" presented by Appellant for failing to serve process within 120 days.

GOOD CAUSE

Appellees have made numerous assertions that challenge the "good cause" Appellant has alleged for not serving process within 120 days. The Appellant believes she has demonstrated more than an abundance of good cause for failing to serve the Appellees with process within the 120 days required by Rule 4(h) of the Mississippi Rules of Civil Procedure. In fact, she believes she did everything humanly possible to locate the Appellees so that process could be served. Appellant consulted public records, she contacted public officials, she contacted individuals in the community who are knowledgeable about the general public, she contacted the local courts, and she used debt-collection computer software designed to find addresses and employers of individuals. In addition, Appellant's attorney had practice law in the community for 20 years at this time, had served as Alcorn County Prosecutor for eight years, and had served as Corinth Municipal Prosecutor for sixteen years at the time, and who was unable to locate the Appellees through his individual efforts. See affidavit of Thomas L. Sweat, Jr. The Appellant is at a loss to know what else could have been done to locate the Appellees. The Appellant showed diligence and good faith in attempting to serve process on the Appellees. If Appellant's efforts

do not establish good cause for failing to serve process within 120 days, she wonders what efforts could possible satisfy this standard.

Appellees have cited Foss v. Williams, 993 So.2d 378 (Miss.2008) in their brief for other reasons, but Appellant notes that in Foss at page 379 the Mississippi Supreme Court notes with regard to good cause for late service of process, "This Court has recognized several instances where good cause exists; when the failure is a result of the conduct of a third person; when the defendant has evaded service of process or engaged in misleading conduct; when the plaintiff has acted diligently; when there are understandable mitigating circumstances; or when the plaintiff is proceeding pro se or in forma pauper is." In the present case, Appellant has demonstrated diligence in attempting to locate the Appellees, and there certainly are understandable circumstances in that the Appellees were unable to be located due to the fact that they did not own real property; they had moved with no records of their new address; they did not have a telephone listed in the telephone directory; the address on their drivers' licenses, car registration and court records was out of date; they did not have normal employment which was reflected in public records; at least one relative did not

know their address; and knowledgeable public officials did not know how to locate them.

On page eight of Appellees' brief Appellees criticize Appellant's efforts in serving process indicating that Appellant only made one attempt at service of process in the fall of 2007, and that a single attempt at service of process does not demonstrate good cause. This argument certainly is disingenuous, for the reason that further attempts were not made was because the Appellees could not be located. Once an address was obtained, they were served immediately.

On page ten of Appellees' brief they criticize Appellant's efforts to locate Appellee by referencing efforts cited in Fortenberry v. Memorial Hospital at Gulfport, 676 So.2d 252 (Miss.1996). Appellees denigrate Appellant's efforts cited above, and note Fortenberry hired a private investigator and contacted the medical licensure board, among other things.

Alcorn County, Mississippi, is a rural community with a population of approximately 35,000. There are no private investigators in Alcorn County. There is nothing comparable to a medical licensure board for the Appellees. The persons and institutions which Appellant contacted were the most likely places to obtain information about people

living and working in this community. Obviously, investigative techniques have to be adjusted according to location. Techniques which may work in Jackson, or on the Gulf Coast, may not be appropriate in the northeast Mississippi hills. The Appellant believes she used the appropriate investigative techniques for her locale.

On page seven of Appellees' brief, Appellees cite Webster v. Webster, 834 So.2d 26 (Miss.2002) for the proposition that filing a motion for additional time to serve process bolsters the allegation that good cause exists for failure to serve process timely. Appellant believes that the procedural mechanism of a motion for additional time is no substitute for substantive, good faith efforts to locate and serve a defendant, which Appellant has demonstrated abundantly above. Furthermore, Appellees have admitted that Rule 4(h) does not require a motion for additional time.

On pages nine and ten of Appellees' brief they state, "While plaintiff has provided various affidavits to support her assertion that she exercised good faith, many of those affidavits and notes documenting plaintiff's alleged attempts to locate the Millers are either not dated at all or are dated after the expiration of the 120 day period and the statute of limitations. Therefore, these attempts

cannot be considered in the determination of whether the trial court abused its discretion in determining that the plaintiff did not show good cause for her failure to timely serve defendants."

Appellant submitted ten affidavits in support of its opposition to the Appellees' motion to dismiss, all of those affidavits referencing action taking during the fall of 2007 within 120 days of the date the complaint was filed. While many of the five exhibits submitted pertaining to process (B-F) were not dated, with one exception all corroborate statements made in the affidavits referenced above which relate to activities within the relevant 120 day period. For example, Exhibit B, concerning contact with the Alcorn County Tax Collector; Exhibit C, concerning contacts with both constables; Exhibit D, concerning contact with the Alcorn County Justice Court; and Exhibit F, concerning use of debt collection software Accurint and Search America corroborate the statements made by Kelly White in her affidavit. Exhibit B, concerning contact with the Tax Collector's Office, also corroborates statements made by Heather Crabb in her statement. Ms. Crabb also is a relative of the Appellees. Exhibit D, concerning contact with the Justice Court, also corroborates statements made by Carol Derrick

in her affidavit.

Appellants admit Exhibit E is dated outside the 120 day period. Appellant believes, however, that this demonstrates that she never ceased searching for Appellees, and that she has been forthright about the timing of her efforts.

DE NOVO REVIEW

Appellees argue in Section IV A of their brief that that the standard of review in this case is whether the trial court abused its discretion, not de novo review. Appellant believes a question of law is presented, which requires de novo review.

The lower court's opinion, which is only two pages long, appears to place inordinate importance on Appellant's failure to file a motion for extension of time, which Appellees' admit is not required by Rule 4(h). The lower court states on page two of its opinion, "Applicable law is clear that a failure to effect service of process during the 120 days, coupled with no motion for extension of time, bars Plaintiff's claims against Defendants....".

Furthermore, also on page two of the opinion the lower court states, "Pursuant to the terms of Rule 4(H), as well as Mississippi case law, the Plaintiff's Complaint stood dismissed without prejudice on January 18, 2008, 120 days

after it was filed. The Supreme Court of Mississippi stated, 'if the defendant is not served during the 120 day service period, the statute begins to run again.' Heard v. Remy, 937 So.2d 939, 942 (Miss.2006)." Since this statement by the lower court does not indicate that dismissal of an action under Rule 4(h) requires judicial action -- it is not automatic -- and that it does not reflect that a "good cause" determination must be made before an action is dismissed, this reflects a misunderstanding or misinterpretation of the rules of procedure, which must be addressed de novo.

Finally, Appellees have cited Foss v. Williams above for another proposition, but Appellant notes in the dissent at page 382 Justice Carlson cite a relevant principle of law concerning de novo review thusly, "The standard of review is clear. When reviewing a trial court's grant or denial of a motion to dismiss, this court applies a de novo standard of review. Burleson v. Lathem, 968 So.2d 930, 932 (Miss.2007) citing Scaggs v. GPCH-GP, Inc., 931 So.2d 1274, 1275 (Miss.2006); Park on Lakeland Drive, Inc. v. Spence, 941 So.2d 203, 206 (Miss. 2006); McLendon v. State, 945 So. 2d 372, 382 (Miss.2006); Monsanto Co. v. Hall, 912 So.2d 134, 136 (Miss.2005)." See also Parmley v. Pringle, 976 So.2d 422 (Miss.App. March 4, 2008); Shelton v. Lift, Inc.,

967 So.2d 1254 (Miss.App., Oct. 9, 2007); and Doleac v. Real Estate Professionals, LLC, 911 So.2d 496 (Miss.2005) for the same proposition. The matter which is now before this court is Appellees' Motion to Dismiss.

ABUSE OF DISCRETION

The Appellees argue that the standard for review in this case is whether or not the lower court abused its discretion, and not a de novo review. Notwithstanding the arguments made above, and while not accepting that this is the proper standard for review, Appellant believes this standard was breached also. While Appellant's counsel has the greatest respect for the trial court judge, having practiced before him as a Chancellor and as a Circuit Judge, in addition to considering him a personal friend, circumstances require a disagreement with him in the present case.

Appellees state on page four of their brief, "The Appellate court should only examine whether the trial court abused its discretion and whether there was substantial evidence supporting the trial court's determination that the plaintiff failed to show good cause for failing to serve the defendants within the 120 day deadline." In its Order granting the Appellees' motion to dismiss, the lower court perfunctorily states on page two, "In addition, the

Plaintiff's subsequent affidavits fail to establish 'good cause' as contemplated by Rule 4(h) or case law." There was no reference or recitation of any evidence whatsoever to support this conclusion. Thus, there is not "substantial evidence supporting the trial court's determination."

In a recent case decided by the Mississippi Supreme Court referenced above, Foss v. Williams, the Court upheld a decision by the trial court judge that "good cause" for failure to serve process in a timely fashion had been demonstrated when one of the Plaintiff's attorneys asserted that there had been confusion between that attorney and an associate attorney as to who was responsible for having process served. It would appear the effort in serving process in Foss, which was upheld by this Court, pales in comparison to the efforts of Appellant in this case to locate and serve Appellees. Appellant believes ignoring or overlooking the exhaustive and good faith efforts of Appellant in serving process in this case was an abuse of discretion. As will be remembered, process was in fact completed only 126 days after the complaint was filed in spite of the difficulties encountered.

The Appellees have cited Hensarling v. Holly, 972 So.2d 716 (Miss.Ct.App.2007) for the proposition that if a

trial judge does not make specific findings of facts, that the appellate court assumes he made the necessary findings to support his verdict. However, this case clearly can be distinguished from the present case before the Court on its facts.

CONCLUSION

The Appellant made exhaustive efforts to serve process on Appellees in this case, but in spite of these efforts, was unable to locate the Appellees until 126 days after the complaint was filed. The Appellant exercised diligence and good faith in her efforts, which clearly establish "good cause" for failing to serve process within 120 days. Accordingly, the Appellant's complaint should not have been dismissed, and the statute of limitations should not have begun to run again.

The standard of review in this case should be do novo, for a question of law is to be considered, that is, the interpretation and implementation of Rule 4(h) of the Mississippi Rules of Civil Procedure. In addition, since this appeal concerns a motion to dismiss, de novo review is necessary.

Finally, while Appellant does not concede that abuse of discretion is the appropriate standard when reviewing the trial court's actions in this case, Appellant believes

the trial court's failure to consider the extensive efforts of Appellant in attempting to serve process demonstrates an abuse of discretion in determining whether "good cause" was established for failing to serve process within the 120-day period set forth in Rule 4(h). The lower court should be reversed, with the case being remanded to the trial court for further proceedings.

This the 24th day of August, 2009.

Respectfully submitted,

THOMAS L. SWEAT, JR.,
Attorney for Appellant

Thomas L. Sweat, Jr.
612-½ Waldron Street
Corinth, Mississippi 38834
(662) 287-5549
Bar No. 08102