

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-TS-00507

DORI WORTHY

APPELLANT

VERSUS

DR. TIMOTHY J. TRAINOR

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF PEARL RIVER
COUNTY**

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

**RAYFORD G. CHAMBERS, MSB [REDACTED]
CHAMBERS & GAYLOR, PLLC
2660 RIDGEWOOD ROAD SUITE 600 (39216)
P.O. BOX 12393
JACKSON, MISSISSIPPI 39236-2393
(601) 914-0248
(601) 914-0255
rchambers@cglawpartners.com**

COUNSEL FOR THE APPELLANT

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-TS-00507

DORI WORTHY

APPELLANT

VERSUS

DR. TIMOTHY J. TRAINOR

APPELLEE

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.

Dori Worthy

Appellant

Rayford G. Chambers
Tony R. Gaylor

Attorneys for Appellant

Dr. Timothy Trainor

Appellee

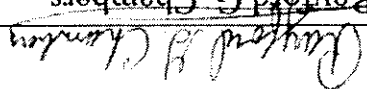
William E. Whitfield, III

Attorney for Appellee

Hon. Prentiss G. Harrell

Circuit Judge, Pearl River County, Mississippi

SO CERTIFIED, this the 29th day of October, 2008.


Rayford G. Chambers

Counsel for Appellant

TABLE OF CONTENTS

Certificate of Interested Persons.	1
Table of Contents	3
Table of Authorities.	4
Statement of Issues.	5
Statement of the Case.	6
Summary of the Argument	9
Standard of Review	10
Argument.	11
Conclusion	13
Certificate of Service.	15

TABLE OF AUTHORITIES

<i>Bennett v. McCaffrey</i> , 937 So. 2d 11 (Miss. 2006)	10
<i>Montgomery v. Smithkline Beecham</i> , 910 So.2d 541 (Miss. 2005)	10,12
<i>Holmes v. Coast Transit Authority</i> , 815 So. 2d 1183 (Miss. 2002)	10
<i>Long v. Memorial Hospital at Gulfport</i> , 969 So. 2d 35 (Miss. 2007)	10
<i>Foss v. Williams</i> , 2007-IA-00615-SCT (Sept. 2008)	12
<i>Holmes v. Coast Transit Authority</i> , 815 So.2d 1183, 1885 (Miss. 2002)	12

RULES

Mississippi Rule of Civil Procedure 4(h).	12
---	----

TREATISE

4B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1137, at 342 (3d ed. 2000)	12
---	----

STATEMENT OF ISSUES

- I. The Circuit Court of Pearl River County erred in denying Appellant's request for extension of time to effect service of process of the Complaint upon Appellee.**

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition in Court Below

This is an appeal from an order of the Circuit Court of Pearl River County, Mississippi granting dismissal for ineffective service of process to the Appellee and denying Appellant an extension of time to effect service of process. The Court may look to the order for an understanding of the disposition of this case. However, for a complete factual and procedural understanding of this matter, the Appellee will recite and incorporate herein certain facts for purposes of clarification of arguments of her brief.

In short, the Appellant, Ms. Worthy, brought suit for medical malpractice against the Appellee. The malpractice occurred during the course and treatment of Ms. Worthy while she was a resident of the state of Mississippi. All treatments with Dr. Trainor occurred within the State and more specifically, within Pearl River County. Following the proper procedure for bringing a medical malpractice claim, notice of intent to sue was properly served upon Dr. Trainor at his office in Mississippi where he had been treating Ms. Worthy. (C.P. 89). Likewise, after the lawsuit was commenced, service was attempted upon Dr. Trainor at his Mississippi office, but was returned by the sheriff's

department. (C.P. 14-19). Thereafter, it was discovered that Dr. Trainor was actually, a Louisiana resident and no longer had a practice in Mississippi. Service was attempted pursuant to Rule 4(c)(5) for an out of state resident. Restricted delivery of said service was paid for and requested, however, said delivery was not made restricted by the postal service. (C.P. 85). Someone in Dr. Trainor's office accepted service of the Complaint and thereafter, Dr. Trainor moved to dismiss. Ms. Worthy, requested and extension of time to of sixty (60) days, to reserve Dr. Trainor, on the grounds that she attempted to have him served at his Mississippi office, upon learning that he no longer had said office service was attempted by restricted certified mail, and additionally there was no proof presented that the envelope carrying the Complaint was not actually stamped "restricted." Notwithstanding, the trial court dismissed the complaint and denied Appellant's request for additional time to serve.

On February 7, 2007, Ms. Worthy filed a complaint against the Appellee in the Circuit Court of Pearl River County, alleging medical malpractice. (C.P. at 3). On May 14, 2007, the Summons for Dr. Trainor was returned by the Pearl River Sheriff's department with "office now in Slidell, LA" written on the bottom. (C.P. 14-16) .

Thereafter, service was attempted via certified mail which was served on

someone at Dr. Trainor's office on June 4, 2007. (C.P. 48-50). On July 18, 2007, Dr. Trainor filed a Motion for Additional Time to respond to the Complaint. (C.P. 42-44). On July 26, 2007, an Agreed Order was entered allowing Dr. Trainor an extension of time. (C.P. 47). On August 28, 2007, Dr. Trainor filed his Combined Motion to Dismiss and Memorandum of Authorities in Support Thereof based on alleged ineffective service of process. (C.P. 60). On September 24, 2007, Appellant filed her Response to Defendant Dr. Timonty J. Trainor's Motion to Dismiss and therein alternatively requested and extension of time to reserve the Complaint. (C.P. 77).

The circuit court, after a hearing on December 3, 2007 (T. at 1-11), entered a final judgment dismissing plaintiff's claims without prejudice on February 22, 2008, concluding in essence that there was not good cause to allow an extension of time to serve the Complaint. It is from this decision that Ms. Worthy has chosen to appeal, arguing that the circuit court below erred in denying her request for an extension of time to serve the Complaint.

SUMMARY OF THE ARGUMENT

Ms. Worthy is entitled to a reversal of the Circuit Court's denial of her motion for additional time to serve the Complaint. Service was attempted on Dr. Trainor at his Mississippi location where he had treated Ms. Worthy and where the "intent to sue" notice was served and accepted. Upon learning that Dr. Trainor was no longer in Mississippi, service was attempted upon him in Louisiana via restricted certified mail. Someone other than Dr. Trainor accepted service via certified mail even though restricted mail was paid for at the post office. As such, the circuit court below erred in denying Ms. Worthy's request for an extension of time to serve the Complaint based upon the instant facts.

STANDARD OF REVIEW

The Mississippi Supreme Court's position is clear on the standard of review for matters like the one *sub judice*.

This Court leaves to the discretion of the trial court the finding of fact on the existence of good cause or excusable neglect for delay in serving process under Rule 4(h). Where such discretion is abused or is not supported by substantial evidence, this court will reverse. However, where the trial court's judgment involved the interpretation of legal principles, and reverse where it finds the trial court in error. ***Bennett v. McCaffrey***, 937 So. 2d 11, 14 (Miss. 2006). See also ***Montgomery v. Smithkline Beecham***, 910 So. 2d 541, 544-45 (Miss. 2005); ***Holmes v. Coast Transit Authority***, 815 So. 2d 1183, 1185 (Miss. 2002).

Long v. Memorial Hospital at Gulfport, 969 So. 2d 35, 38 (Miss. 2007).

ARGUMENT

I. The Circuit Court of Pearl River County erred in denying Appellant's request for extension of time to effect service of process of the Complaint upon Appellee.

Miss. Rule of Civil Procedure 4(h) provides:

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 notice.

"In order to establish that good cause exists for late service, a plaintiff must have made a diligent effort to effect service." *Montgomery v. SmithKline Beecham Corp.*, 910 So.2d 541, 546 (Miss. 2005). Initially in this matter, service was attempted by the Pearl River Sherriff's Department at the address where Dr. Trainor provided the medical services and also where the statutory "intent to sue" letter was served. Upon return receipt by the Sherriff's department informing Ms. Worthy that Dr. Trainor was now located in Slidell, Louisiana, service was attempted restricted via certified mail. Both service attempts were made within the 120 day allowance provided by Rule 4(h). The record reflects that someone else in Dr. Trainor's office signed for the certified mail, but what is void is why. It is clear and undisputed that "restricted" mail was paid for and

requested at the post office. There was no envelope presented to establish that it was or was not actually stamped "restricted delivery". (T. 8).

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 pauperis.

Foss v. Williams, 2007-IA-00615-SCT (Sept. 2008); ***Holmes v. Coast Transit Authority***, 815 So.2d 1183, 1885 (Miss. 2002); (quoting 4B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1137, at 342 (3d ed. 2000)).

In this matter service was attempted to serve Defendant Trainor at 809 Goodyear Blvd., Picayune, MS 39466-3221, but said process was returned by the Pearl River County Sheriff's Department. Additionally, the Proof of Service from the Pearl River Sheriff's Department informed plaintiff that Dr. Trainor was now in Louisiana. This was the first time that Plaintiff was aware that Dr. Trainor was located in Louisiana and not Mississippi. In fact, Dr. Trainor's Mississippi address is where the statutory notice of claim and intent to file suit were sent and received. After the location of Dr. Trainor was identified, service

was again attempted. "Restricted" delivery was requested and paid for at the post office, but the postal deliver allowed someone else in Dr. Trainor's office to accept process. The multiple attempts at service, the lack of knowledge that Dr. Trainor was no longer located at his previous location in Mississippi where he treated Ms. Worthy and where the statutory notice requirements were fulfilled, coupled with the request and payment for "restricted" delivery has to amount to "good cause" under Rule 4(h).

Accordingly, the Appellant submits that the court below erred in denying her motion for additional time to serve the complaint. The Appellant would request that this matter be remanded to the court below and Appellant granted an additional sixty (60) days to serve her Complaint.

CONCLUSION

Under these unique facts wherein a former local defendant conducts business in this State, vacates the State and service is attempted by several measures, this Court should be very hesitant to shut the courthouse doors on a plaintiff that has diligently attempted to act in accordance to the rules of court. This Court should REVERSE the decision of the circuit court below, and REMAND this matter to the Circuit Court of Pearl River County for further proceedings.

RESPECTFULLY SUBMITTED,

DORI WORTHY

BY: Rayford G. Chambers
RAYFORD G. CHAMBERS, [REDACTED]
ATTORNEY FOR THE APPELLANT

OF COUNSEL:

CHAMBERS & GAYLOR, PLLC
2660 Ridgewood Road Suite 600 (39216)
P.O. BOX 12393
JACKSON, MISSISSIPPI 39236-2393
601.914.0248
601.914.0255
rchambers@cglawpartners.com

CERTIFICATE OF SERVICE

I, Rayford G. Chambers, hereby certify that I have this day caused to be mailed by United States mail, postage pre-paid, a true and correct copy of the above and foregoing instrument to the following counsel of record:

William E. Whitfield, III
Copeland Cook Taylor & Bush
2781 C.T. Switzer Sr. Drive Suite
Biloxi, MS 39531

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

This 28th day of October, 2008.



RAYFORD G. CHAMBERS