

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-TS-01866

CARLA STUTTS

PLAINTIFF-APPELLANT

versus

JANICE MILLER and
JACI MILLER

DEFENDANTS-APPELLEES

ON APPEAL FROM THE
CIRCUIT COURT OF ALCORN COUNTY, MISSISSIPPI

BRIEF OF JANICE MILLER AND JACI MILLER,
APPELLEES

ORAL ARGUMENT NOT REQUESTED

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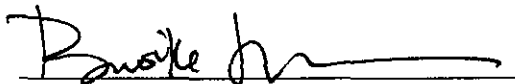
DEFENDANTS APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities 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. Carla Stutts— Plaintiff/Appellant.
2. Thomas L. Sweat, Jr., 612-1/2 Waldron Street, Corinth, Mississippi 38834 – counsel for Plaintiff/Appellant.
3. Honorable James L. Roberts, Jr., District One Circuit Court Judge, P.O. Drawer 1100, Tupelo, Mississippi 38802 – Presided over this matter.
4. Janice Miller – Defendant/Appellee.
5. Jaci Miller – Defendant/Appellee.
6. Robert F. Stacy, Jr., Esq., Brooke Newman, Esq., Daniel Coker Horton & Bell, P.A., 265 North Lamar Boulevard, Suite R, Post Office Box 1396, Oxford, Mississippi, 38655 – Counsel for Defendants/Appellees.

THIS the 14th day of July, 2009.


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I. STATEMENT OF THE ISSUES

- A. The proper standard of review is whether the trial abused its discretion and whether there was substantial evidence supporting the trial court's ruling.
- B. Rule 4(h) of the Mississippi Rules of Civil Procedure requires dismissal of a case if the summons and complaint is not served within 120 days of 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.
- C. The trial court made the proper judicial determination concerning the "good cause" that must be shown if process is not served within 120 days as set forth in Mississippi Rules of Civil Procedure Rule 4(h).
- D. Good cause was not established by the plaintiff for her failure to serve process on defendants within 120 days of service of the filing of the Complaint as required by Mississippi Rules of Civil Procedure 4(h).
- E. The Court did not abuse its discretion or otherwise make an improper determination in determining that the plaintiff failed to establish good cause for failing to serve process within 120 days as required by Mississippi Rules of Civil Procedure 4(h).
- F. Mississippi Rule of Civil Procedure 4(h) does not require a request for additional time if good cause has been shown for failure to serve process within the 120-day deadline.
- G. The plaintiff's "legal policy" arguments, while eloquently championing the cause of the plaintiffs' bar, have no place in the strict application of M.R.C.P. 4(h) required by Mississippi case law.

II. STATEMENT OF THE CASE

This claim arises out of an automobile accident that occurred on September 24, 2004, between Carla Stutts and Jaci Miller, Janice Miller's daughter.¹ Plaintiff Carla Stutts alleges that she was traveling West on Highway 72 in Corinth, Mississippi, when Jaci Miller attempted to turn left onto Alcorn Drive and failed to yield the right of way to Stutts.² Plaintiff has alleged that Jaci Miller's mother, Janice Miller, is jointly and severally liable for the plaintiff's damages as Jaci

¹ R. at 5.

² R. at 6.

Miller was a minor at the time of the alleged accident.³

The subject automobile accident occurred on September 24, 2004.⁴ According to MISS. CODE ANN. § 15-1-49, plaintiff was required to file an action regarding the above mentioned incident within three years. Plaintiff filed the Complaint on September 20, 2007, four days prior to the expiration of the statute of limitations.⁵ The statute of limitations was tolled for 120 days after the Complaint was filed, but the 120 days ran on January 18, 2008. Summonses were issued for Janice Miller and Jaci Miller on September 20, 2007, but were not served on either defendant until January 24, 2008, six (6) days after the 120 day period expired and two (2) days after the statute of limitations ran.⁶ Without filing any motion requesting leave and without re-filing or filing any amendment to the Complaint, plaintiff had summonses re-issued for defendants on March 12, 2008, and served on defendants on April 10, 2008.⁷ Again, this service was improper under the Rules and was outside of both the 120 day period and the statute of limitations.

Due to the fact that the Complaint was not served upon defendants within 120 days of the Complaint being filed, it stood dismissed as of January 18, 2008, 120 days after it was filed pursuant to Rule 4(h) of the Mississippi Rules of Civil Procedure and applicable case law. Upon the expiration of the 120 days, the statute of limitations began to run again and expired on January 22, 2008. Therefore, under no set of facts does the plaintiff have a valid claim against either defendant, and the Complaint was properly dismissed with prejudice pursuant to Mississippi Rules

³ *Id.*

⁴ R. at 5.

⁵ R. at 5.

⁶ R. at 12-15.

⁷ R. at 28-31.

of Civil Procedure 12(b)(5) and/or 12(b)(6).

III. SUMMARY OF THE ARGUMENT

The plaintiff has asserted that she had good cause for failing to serve defendants within the 120 days required by M.R.C.P. 4(h), and, accordingly, that the trial court abused its discretion in granting defendants' Motion to Dismiss. The trial court exercised its discretion and properly ruled that the plaintiff had ample time to serve defendants and did not demonstrate good cause and diligence for failing to serve defendants within the requisite period of time. Additionally, due to the fact that the plaintiff did not serve defendants within 120 days of filing the Complaint, the three year statute of limitations that was tolled once the Complaint was filed began to run at the expiration of the 120 days and expired prior to defendants' being served. The trial court's ruling that plaintiff failed to demonstrate good cause for her failure to timely serve defendants is entitled to deferential review and is supported by substantial evidence. Therefore, the trial court's ruling must be affirmed.

IV. ARGUMENT

A. The proper standard of review is whether the trial abused its discretion and whether there was substantial evidence supporting the trial court's ruling.

The Supreme Court of Mississippi in *Holmes v. Coast Transit Authority* held "[t]he trial court's finding of fact on the existence of good cause for the delay in the service of process has been deemed a discretionary ruling . . . and entitled to deferential review on appeal. When reviewing fact-based findings, [the Appellate Court] will only examine 'whether the trial court abused its discretion and whether there was substantial evidence supporting the determination.'"⁸ The *Holmes* Court went on to say that "a decision to grant or deny an extension of time based

⁸ *Holmes v. Coast Transit Auth.*, 815 So. 2d 1183, 1185 (Miss. 2002); citing *Rains v. Gardner*, 731 So. 2d 1192, 1197-98 (Miss. 1999).

upon a question of law will be reviewed *de novo*.”⁹

The plaintiff in *Foss v. Williams* made the same argument concerning the standard of review that the subject plaintiff has asserted. Dr. Foss argued that the standard of review should have been “*de novo* and not abuse of discretion because the issue was whether to grant an extension of time.”¹⁰ However, the Supreme Court of Mississippi stated, “the trial court . . . did not grant an extension of time; it simply ruled that it would not dismiss Williams’ complaint with respect to Dr. Foss based on its finding that good cause existed for Williams failure to serve process timely.”¹¹ The same analysis applies to the subject case. Due to the fact that the trial court decided to dismiss the plaintiff’s case based upon its finding that the plaintiff did not demonstrate good cause for failing to serve process timely, the proper standard of review is abuse of discretion.

Additionally, the plaintiff asserts that the trial court’s determination that the statute of limitations begins to run again automatically at the expiration of the one-hundred twenty days for service of process is a question of law which requires *de novo* review. The plaintiff fails to cite any precedent for said argument. Clearly, the subject case involves the trial court’s finding of fact on the existence of good cause for delay in service of process and, therefore, is a discretionary ruling which is entitled to deferential review on appeal. 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 defendants within the 120 day deadline.

⁹ *Id.*

¹⁰ *Foss v. Williams*, 993 So. 2d 378, 308 (Miss. 2008).

¹¹ *Id.*

B. Rule 4(h) of the Mississippi Rules of Civil Procedure requires dismissal of a case if the summons and complaint is not served within 120 days of 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.

Mississippi Rule of Civil Procedure 4(h) requires that a case be dismissed without prejudice if “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 could not show good cause why such service was not made within that period . . . ” Prior decisions by the Supreme Court of Mississippi have made clear that “a failure to serve process within 120 days only caused the complaint to be dismissed if the plaintiff could not show good cause for failing to meet the deadline.”¹² The *Holmes* Court stated “filing a complaint tolls the applicable statute of limitations 120 days, but if the plaintiff fails to serve process on the defendant within that 120 day period, the statute of limitations automatically begins to run again when that period expires. . . . A plaintiff who does not serve the defendant within the 120 day period must either re-file the complaint before the statute of limitations ends or show good cause for failing to serve process on the defendant within that 120 day period; otherwise, dismissal is proper.”¹³

In the instant case, the plaintiff filed the complaint on September 20, 2007, and had 120 days from that date in which to serve process on defendants. The 120 day period expired on January 18, 2008, with no service on defendants being accomplished by plaintiffs. Instead, defendants were served six days after the 120 day period expired and two days after the statute of limitations ran. The trial court found that plaintiff failed to show good cause for the tardy service, and, therefore, dismissed the plaintiff’s claims pursuant to the Mississippi Rules of Civil

¹² *Holmes*, 815 So. 2d at 1185.

¹³ *Id.*; citing *Watters v. Stripling*, 675 So. 2d 1242, 1244 (Miss. 1996); see also *Brumfield v. Lowe*, 744 So. 2d 383, 387 (Miss.Ct.App. 1999).

Procedure and applicable case law cited above. Additionally, the plaintiff failed to request any extension of the 120 day period at any time, particularly prior to the expiration of the 120 days. Based upon the fact that no extension was requested by plaintiff to serve defendants, plaintiff did not re-file her Complaint prior to the expiration of the statute of limitations, and the fact that plaintiff failed to show good cause for serving defendants, the trial court properly exercised its discretion in dismissing the plaintiff's claims against defendants with prejudice.

C. The trial court made the proper judicial determination concerning the "good cause" that must be shown if process is not served within 120 days as set forth in Mississippi Rules of Civil Procedure Rule 4(h).

The Supreme Court of Mississippi has "held that, at a minimum, a plaintiff attempting to establish 'good cause' must show '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.'¹⁴ A leading treatise states that good cause is likely (but not always) to be found when the plaintiff's failure to complete service in a timely fashion is a result of the conduct of a third person, typically the process server, the defendant has evaded service of the process or engaged in misleading conduct, the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstances"¹⁵ The plaintiff bears the burden of establishing that it is entitled to "the good cause relaxation of the 120 day limit."¹⁶ "'Good cause' can never be demonstrated where plaintiff has not been diligent in attempting to serve process. . . . In demonstrating good cause and diligence, a plaintiff must show that he or she has been unable to serve process because the defendant evaded process or engaged in misleading conduct, or for some

¹⁴ *Holmes*, 815 So. 2d at 1186.

¹⁵ *Id.*; citing Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedures* §1137, at 342 (3d ed. 2000).

¹⁶ *Id.*

other acceptable reason . . . ”¹⁷ The Supreme Court recognized in *Montgomery v. Smithkline Beecham Corp.* that “if it appears that process cannot be served within the 120 day period, a diligent plaintiff will request additional time to serve process and that such a request supports a later allegation that good cause existed for the failure to effect timely service.”¹⁸ Additionally, the Supreme Court of Mississippi has further stressed that “a plaintiff should seek authority for extensions from the court rather than unilaterally making this decision for himself.”¹⁹ In *Webster v. Webster*, the Supreme Court of Mississippi held that the appropriate response to notice that the action is to be dismissed for failure to serve within the 120 day deadline is a motion for additional time.²⁰ The *Webster* Court went on to say that “[a]lthough we hold that a motion for additional time may be filed after the 120-day time period has expired, a diligent plaintiff should file such a motion within the 120-day period. Such diligence would support an allegation that good cause exists for failure to serve process timely. Indeed, in *Moore v. Boyd*, the Court of Appeals found that excusable neglect is a ‘very strict standard’ and the plaintiff *should have* filed a motion for additional time within 120 days of filing the complaint.”²¹ Importantly, any difficulty that may have prevented successful service outside the 120 day deadline will not be considered by the court.²²

The trial court’s determination that the plaintiff failed to show good cause for failure to

¹⁷ *Davis v. South Sunflower County Hosp.*, 956 So. 2d 1103, 1105 (Miss. Ct. App. 2007); citing *Montgomery v. Smithkline Beecham Corp.*, 910 So. 2d 541, 545 (Miss. 2005).

¹⁸ *Montgomery*, 910 So. 2d at 547-48.

¹⁹ *Id.* at 545.

²⁰ *Webster v. Webster*, 834 So. 2d 26 (Miss. 2002).

²¹ *Id.* omitting internal citation; citing *Moore v. Boyd*, 799 So. 2d 133 (Miss. Ct. App. 2001).

²² *Montgomery*, 910 So. 2d at 545.

comply with the 120 day deadline to serve the defendants was proper and was not an abuse of discretion. The plaintiff did not at any point file a motion requesting an extension of time in which to serve defendants, even after defendants' Motion to Dismiss was filed. A diligent plaintiff exercising good faith should at least file a brief motion requesting an extension of time in order to protect his or her interests. Interestingly, the plaintiff's affidavits which plaintiff claims evidence good cause, indicate that a single attempt at service was made in the fall of 2007, but that no further attempt to serve defendants was made until the day before the statute of limitations ran. This is certainly not evidence of good cause. The defendants did not evade process or engage in any misleading conduct whatsoever. Due to the fact that the plaintiff neither served defendants within the 120 days for service of process filing the complaint, nor showed good cause for their failure to do so as required by M.R.C.P. 4(h), the trial court properly granted the defendants' Motion to Dismiss.

Further, the plaintiff asserts that the authors of the Mississippi Rules of Civil Procedure did not intend that the failure to serve process within 120 days would result in the litigation being ceased. The plaintiff bases this argument on the fact that dismissal pursuant to Rule 4(h) is "without prejudice" versus "with prejudice." However, this argument ignores the fact that in most cases, the failure to serve within 120 days does not result in an immediate termination of the litigation, but instead gives the plaintiff the opportunity to re-file suit within the remaining time left in the statute of limitations. However, in the instant case, because plaintiff only filed suit four days before the statute of limitations ran, the litigation only continued for four days after the 120 day period expired. Given the fact that the plaintiff took one thousand ninety one days to file suit, the resulting dismissal is not too harsh a result. Additionally, the Court of Appeals of Mississippi in *Shelton v. Lift, Inc.* held that it was not reversible error for a trial judge to dismiss a case with prejudice when the plaintiff failed to serve defendant within the prescribed period resulting in the

expiration of the statute of limitations.²³ The *Shelton* Court held that the plaintiff had suffered no prejudice as a result of the dismissal with prejudice instead of a dismissal without prejudice as articulated in M.R.C.P. 4(h) due to the fact that the statute of limitations had run. The same analysis applies to the subject case. The fact that the trial court's dismissal was with prejudice instead of without prejudice was not reversible error as the statute of limitations had already run by the time plaintiff served defendants.

D. Good cause was not established by the plaintiff for her failure to serve process on defendants within 120 days of service of the filing of the Complaint as required by Mississippi Rules of Civil Procedure 4(h).

The plaintiff failed to show good cause for her failure to serve defendants within the 120 day deadline as required by the Mississippi Rules of Civil Procedure. "In Mississippi, the finding of a trial court concerning whether or not there was good cause for the delay in serving process is a discretionary ruling. . . . Such rulings are entitled to a deferential review on appeal."²⁴ The appellate court "will only inquire whether the trial court abused its discretion and whether substantial evidence supported its conclusion."²⁵ As discussed above, the plaintiff failed to show good cause for her failure to comply with Rule 4(h)'s 120 day deadline for service of process after the filing of a complaint. While plaintiff has provided various affidavits to support her assertion that she exercised good faith, many of the 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

²³ *Shelton v. Lift, Inc.*, 967 So. 2d 1254, 1256 (Miss. Ct. App. 2007).

²⁴ *Davis*, 956 So. 2d at 1104-05.

²⁵ *Whitten v. Whitten*, 956 So. 2d 1093, 1096 (Miss. Ct. App. 2007).

not show good cause for her failure to timely serve defendants. For instance, Exhibits “B” and “D” to plaintiff’s Brief in Support of Plaintiff’s Opposition to Defendants’ Motion to Dismiss contain no date whatsoever. Exhibit “F” similarly contains no date whatsoever and the two dates on Exhibit “E” are after both the 120 day deadline and the statute of limitations expired. Additionally, a diligent plaintiff that was aware that her complaint was filed only four days prior to the expiration of the statute of limitations that was exercising good faith would have, at a minimum, requested an extension from the court to serve the defendants outside of the 120 day deadline. However, the plaintiff made no such request, even after the defendants filed their Motion to Dismiss.

Additionally, many of the plaintiff’s alleged “attempts” to locate defendants simply consist of asking various random individuals if they knew the defendants. These are not the investigative measures that have been held by the Court in other cases to be considered good cause. For instance, in *Fortenberry v. Memorial Hospital at Gulfport*, one of the rare instances in which the Court has determined that good cause existed for a plaintiff’s failure to serve a defendant within 120 days of filing a complaint, the plaintiff contacted the medical licensure board, hired a private investigator, sent multiple letters to the court advising of the difficulty in locating the defendant, and requested multiple extensions.²⁶ The plaintiff in the subject case has done none of these things. Given the fact that the plaintiff’s “attempts” do not demonstrate the effort exercised by other plaintiff’s in which the Court has found good cause coupled with the fact that many of the plaintiff’s “attempts” to locate the defendants either occurred after the 120 day deadline expired or there is no date provided for the occurrence of such attempts coupled with the fact that plaintiff failed to request any extension, the trial court did not abuse its discretion in determining that the

²⁶ *Fortenberry v. Memorial Hospital of Gulfport*, 676 So. 2d 252 (Miss. 1996).

plaintiff failed to show good cause for failing to serve defendants within the 120 days allowed by Rule 4(h).

E. The Court did not abuse its discretion or otherwise make an improper determination in determining that the plaintiff failed to establish good cause for failing to serve process within 120 days as required by Mississippi Rules of Civil Procedure 4(h).

The trial court did not abuse its discretion or otherwise make an improper determination in ruling that the plaintiff failed to establish good cause for failure to serve process within the 120 days as required by Mississippi Rule of Civil Procedure 4(h). Plaintiff asserts that the trial court abused its discretion by failing to make a more detailed finding of fact in its ruling on the good cause issue. However, plaintiff failed to provide any citation to authority which requires that the trial court provide a specific finding of fact as to its ruling. Additionally, Mississippi Rule of Civil Procedure 52(b) provides that a court, “upon motion of a party filed not later than ten days after entry of a judgment or entry of findings and conclusions, or upon its own initiative during the same period, . . . may amend its findings or make additional findings and may amend the judgment accordingly.” In other words, should plaintiff have desired an additional explanation of the court’s ruling, it could have requested said explanation within ten days of the entry of the court’s order. However, plaintiff failed to request such an explanation. In *Hensarling v. Holley*, the Court of Appeals of Mississippi held that “when a trial judge does not make specific findings of fact, we will assume that the trial judge made all findings of fact that were necessary to support his verdict.”²⁷ Therefore, despite the fact that the trial court did not give a lengthy explanation of the reasoning behind its ruling, the appellate court will assume that the trial court made all of the findings of fact that were necessary to support his verdict. The trial court did not abuse its discretion in determining that the plaintiff failed to serve defendants in a timely fashion pursuant

²⁷ *Hensarling v. Holley*, 972 So. 2d 716, 721 (Miss. Ct. App. 2007) (omitting internal citations).

to M.R.C.P. 4(h).

F. Mississippi Rule of Civil Procedure 4(h) does not require a request for additional time if good cause has been shown for failure to serve process within the 120-day deadline.

Plaintiff's Issues identified as 5 through 7 and discussed in Brief of the Appellant on pages 20 through 22 in subsection E are all addressed in this subsection as they all concern the same issue: whether Rule 4(h) requires a request for additional time to be made if good cause has been shown.

The Supreme Court of Mississippi has clearly stated that "Rule 4(h) does not require that a motion for additional time for service of process be filed within 120 days of the filing of the complaint,"²⁸ but Mississippi case law suggests that a prudent plaintiff that wants to insure compliance with the rules will seek an extension from the court when he or she has exercised good faith in an attempt to serve process within the 120 day deadline, but has been unable to do so.²⁹

"The strict language of Rule 4(h) suggests that 'good cause' can only be shown after the expiration of the 120-day period - and then, only to demonstrate why such service was not made within that period. The Mississippi Rules of Civil Procedure do not provide for prospective good cause, that is, good cause which extends into the future, and there is no provision for extending the time for service of process. Indeed, this Court has stated that although there is no requirement of a motion for additional time, 'the better method to be utilized in future cases would be for plaintiffs counsel to seek authority for extensions from the court, rather than unilaterally making this decision himself.'"³⁰

The *Montgomery* Court went on to say:

"[t]his Court's holding in *Webster* did not expand the rules and create a new right to seek an additional period of time for service of

²⁸ *Webster*, 834 So. 2d at 28.

²⁹ *Id.* at 29.

³⁰ *Montgomery*, 910 So. 2d at 545.

process; but rather provided a practical and logical suggestion for one factor a court could consider when trying to determine whether a plaintiff has been diligent. Stated another way, a plaintiff who - prior to expiration of the service period - files a motion representing that he or she has been unable to serve process, will more likely succeed in demonstrating diligence than a plaintiff who does nothing. Either way, however, the plaintiff must demonstrate diligence.”³¹

In other words, M.R.C.P. 4(h) does not require that a motion for an extension of time ever be filed, but the Court has specifically stated that a filing such a motion can be utilized by a plaintiff in demonstrating the diligence necessary to establish good cause for failing to serve process within the required period of time. However, this issue is moot due to the fact that the plaintiff neither requested an extension, nor demonstrated good cause for failure to serve process in the required time.

The plaintiff relied on *Fortenberry v. Memorial Hospital at Gulfport*, a Supreme Court of Mississippi case decided over twelve years ago, in an attempt to show that they have demonstrated good cause for failing to serve defendants in the required period of time, and thus, their case was improperly dismissed.³² *Fortenberry* involves a medical malpractice action in which the plaintiff was unable to locate and serve process on a defendant because he had moved from the Mississippi Gulf Coast to Oxford, Mississippi. Over the course of the year, the plaintiff amended the complaint, obtained two extensions from the court, hired a private investigator, contacted the State Medical License Board, and wrote letters to the court advising of his difficulty in locating the defendant. The Supreme Court of Mississippi still held that the proper procedure for ensuring that one does not run afoul of the rules is to file for and obtain extensions of time from the court. Additionally, the Court noted that the plaintiff’s counsel “was clearly aware of the rules” as he

³¹ *Montgomery*, 910 So. 2d at 546.

³² *Fortenberry*, 676 So. 2d at 252.

had requested multiple extensions and had kept the court apprised of his difficulty in locating the defendant even after the extensions of time expired.

The plaintiff in the subject case has not demonstrated the same type of "good cause" and has not shown knowledge of the rules as the plaintiff did in *Fortenberry*. First, the plaintiff never filed a single motion requesting an extension of time in which to serve defendants, even after defendants' Motion to Dismiss was filed. A diligent plaintiff should at least file a brief motion requesting an extension of time in order to protect his or her interests. Further, only three of the notes attached to plaintiff's Response to defendants' Motion to Dismiss were dated, and two of those entries are dated after the 120 days expired and the statute of limitations had run. As a matter of fact, the plaintiff's exhibits, including Exhibits "A" through "F," failed to conform to the requirements of support or evidence that may be considered in either a Motion to Dismiss or a Motion for Summary Judgment. As such, defendants requested that the trial court strike these exhibits from the record and not consider them in support of the plaintiff's Response to defendants' Motion to Dismiss.

In further contrast to *Fortenberry*, the plaintiff has not shown a knowledge of the rules. The plaintiff initially served their complaint on defendants after the expiration of the 120 days allowed in Rule 4(h) without applying for or obtaining an extension from the court. After defendants filed their Answer and Defenses raising insufficiency of process and service of process as a defense, plaintiff had summonses reissued on March 12, 2008. Plaintiff had not filed any motion requesting leave nor filed any amendment to the complaint, yet plaintiff served defendants with the complaint again on April 10, 2008. Again, as evidence of a lack of knowledge of the rules, this service was improper under Rule 4(h) and was outside of both the 120 day period and the statute of limitations. Therefore, dismissal of the plaintiff's complaint by the trial court was proper. Regardless of whether the court requires a request for extension of time to be made by

plaintiff seeking to serve a defendant outside of the 120 day deadline, the plaintiff's complaint was properly dismissed due to the fact that the plaintiff failed to demonstrate good cause and failed to request an extension before or after the 120 day deadline.

G. The plaintiff's "legal policy" arguments, while eloquently championing the cause of the plaintiffs' bar, have no place in the strict application of M.R.C.P. 4(h) required by Mississippi case law.

Despite the plaintiff's eloquent policy argument, the fact remains that "[t]he burden is upon the plaintiffs to demonstrate good cause for failure to timely serve process. . . . The standard is strict, and requires diligence."³³ "Even when a plaintiff will be caused to lose a right of action because of the running of the statute of limitations, the 120 day limitation period established by Rule 4(h) must be observed by the courts."³⁴ The Supreme Court of Mississippi, in *Watters v. Stripling*, held "[t]he fact that dismissal may work to preclude this action because of the running of the statute of limitations is of no consequence."³⁵ The Court of Appeals, in *Lucas v. Baptist Memorial Hospital - North Mississippi, Inc.*, held that "[t]hough statutes of limitations may sometimes have harsh effects, it is not the responsibility of the State, nor the other potential defendant, to inform adverse claimants that they must comply with the law."³⁶

The plaintiff asserts that the Court should apply common sense instead of the clear law dictated by both M.R.C.P. 4(h) and Mississippi precedent. If the common sense that plaintiff suggests is applied, the Court can address the fact that the plaintiff waited one thousand ninety one days to file her complaint and then did not serve the defendants until after the expiration of the 120

³³ *Montgomery*, 910 So. 2d at 547-48.

³⁴ *Id.* at 552; citing *Watters*, 675 So. 2d at 1244.

³⁵ *Watters*, 675 So. 2d at 1244.

³⁶ *Lucas v. Lucas*, 997 So. 2d 226, 234 (Miss. Ct. App. 2008).

days allowed by Rule 4(h). If the plaintiff is as diligent as she claims, then why did she wait almost 3 years to file her lawsuit? If she was so intent on having her claim litigated, one would think that she would have taken action sooner and not waited until the last minute to pursue her claims. The fact remains that the plaintiff sat on her laurels until four days before the statute of limitations expired and then expected that she would be able to easily locate the plaintiffs to serve them with a complaint. When that did not happen, the plaintiff made no request for court assistance despite a multitude of cases that suggest that a motion for extension of time is a prudent measure for a diligent plaintiff. The plaintiff's "common sense" arguments do not overcome these clear facts.

V. CONCLUSION

The trial court's decision to grant defendants' Motion to Dismiss was proper for multiple reasons. First, the fact is clear that the plaintiff failed to serve either defendant within the 120 day deadline dictated by M.R.C.P. 4(h). Second, the plaintiff did not at any time request additional time in which to serve defendants. Third, the plaintiff did not demonstrate good cause for failing to serve defendants in the requisite period of time. Last, due to the fact that the plaintiff did not demonstrate good cause for failing to serve defendants within 120 days of filing the complaint, the three year statute of limitations began to run again and expired prior to service of process being accomplished on defendants. Therefore, the trial court properly exercised its discretion in granting defendant's Motion to Dismiss and the trial court's order dismissing the plaintiff's Complaint with prejudice should be affirmed.

Respectfully submitted,

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BY: 
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VI. CERTIFICATE OF SERVICE

I, Brooke Newman, of counsel for Appellees, Janice Miller and Jaci Miller, pursuant to M.R.A.P. 25, do hereby certify that I have this day sent, via Federal Express, the original and three (3) copies of the above Appellees' Brief, to the Clerk of the Mississippi Supreme Court and have mailed a true and correct copy of the same to the following:

Thomas L. Sweat, Jr., Esq.
612-1/2 Waldron Street
Corinth, MS 38834

Hon. James L. Roberts
P.O. Drawer 1100
Tupelo, MS 38802-1100

THIS, the 14th day of July, 2009.



BROOKE NEWMAN