IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PATRICIA SHAVER — APPELLANT

VERSUS — NO. 2009-CA-00174

FRANKIE BLACKWELL — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
HANCOCK COUNTY, MISSISSIPPI
HONORABLE JERRY O. TERRY, CIRCUIT JUDGE
DOCKET NO. 07-00249

BRIEF OF APPELLEE

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Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PARTIES

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 justices of the Court of Appeals may evaluate possible disqualifications or recusal:

1. Frankie Blackwell Bruggeman, Defendant/Appellee
2. Patricia Shaver, Plaintiff/Appellant
3. Melinda O. Johnson of the law firm of Allen, Cobb, Hood & Atkinson, P.A., counsel for Defendant/Appellee, Frankie Blackwell
4. Carl D. "Todd" Campbell, III of the law firm F. Gerald Maples, P.A., counsel for Plaintiff/Appellant, Patricia Shaver
5. The Honorable Jerry O. Terry, Hancock County Circuit Court Judge

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Attorneys for Defendant/Appellee,

FRANKIE BLACKWELL

MELINDA O. JOHNSON (9498)

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF APPELLEE

COMES NOW, the Defendant/Appellee, FRANKIE BLACKWELL, by and through her undersigned counsel of record, Allen, Cobb, Hood & Atkinson, P.A., and files this, her Brief of Appellee, and in support thereof would show unto this Honorable Court the following, to-wit:

STATEMENT OF THE ISSUES

WHETHER THE CIRCUIT COURT'S ORDER OF DISMISSAL IS SUPPORTED BY THE LAW AND THE EVIDENCE

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT GOOD CAUSE DID NOT EXIST FOR PLAINTIFF'S FAILURE TO SERVE PROCESS

WHETHER DEFENDANT WAIVED HER RULE 4(h) DEFENSE BY MINIMAL PARTICIPATION IN WRITTEN DISCOVERY

STATEMENT OF THE CASE/FACTS

A. Nature of Case, Course of Proceedings:

The underlying action stems from a rear end car wreck that occurred on July 21, 2004 on the off-ramp from I-10 leading to Mississippi Highway 603 in Hancock County. Plaintiff was driving a 2000 Chrysler Sebring and was rear ended by a 2000 Ford Focus that was driven by Defendant. (Appellee's R.E. at 1-8). As documented on the Mississippi Uniform Crash Report completed regarding this wreck, Plaintiff had no complaint of pain or injury at the scene of this wreck. (Appellee's R.E. at 3). Just fifteen (15) days shy of three (3) years later, on or about July 6, 2007 Plaintiff filed her complaint against the Defendant. (R. at 3). On that same date, a summons was issued to Frankie Blackwell at 31 F. Anderson Road, Perkinston, Mississippi 39573. (R. at 7). The Defendant's address was obtained from the Mississippi Uniform Crash Report, which was then about three years old. (Appellee's R.E. at 5). The summons was mailed

to the Stone County Sheriff's office. On July 19, 2007, the return of the summons was filed that indicated, "after diligent search and inquiry, the within named Frankie Blackwell could not be found in Stone County, this the 13th day of July, A.D. 2007." (R. at 8). Also noted thereon in handwriting was "moved to Colordo" [sp]. On November 14, 2007, one hundred and thirty one (131) days after filing the complaint, Plaintiff filed her Motion for Additional Time to Serve complaint, wherein she requested an extension of time to serve process pursuant to Rule 4(h) for an additional sixty (60) days in which to serve the Defendant. (R. at 9-10). The basis for this Motion was that "Frankie Blackwell, formerly resided at 31 F. Anderson Road, Perkinston, MS, the Stone County Civil Sheriffs Office was unable to serve defendant at this address, and plaintiff requires additional time to locate defendant to effectuate proper service." On that same date, Plaintiff's counsel presented a proposed Order Granting Extension of Time to the Court which was signed on November 15, 2007 and filed on November 19, 2007. (R. at 11). The Order allowed "Plaintiff be granted an additional sixty (60) days from the date of this Order within which to obtain service of process upon the Defendants in the above captioned matter." The record reveals no activity for the next fifty (50) days.

Apparently the Plaintiff forwarded to the Clerk an original and two copies of a summons to be re-issued to Frankie Blackwell on January 8, 2008, filed January 9, 2008. (R. at 12). This summons contained the identical "Last Known Address" for Perkinston, Mississippi as the previous summons. This summons contained handwriting thereon indicating "mailed Fed Ex in pre pd env." There is no return filed to indicate whether service was attempted with this summons. On January 14, 2008, Plaintiff filed her second motion for additional time to serve complaint. (R. at 13-14). The basis for this motion was "Frankie Blackwell, formerly resided at 31 F. Anderson Road, Perkinston, MS, the Stone County Civil Sheriffs Office was unable to serve defendant at this address, and plaintiff requires additional time to locate defendant to

effectuate proper service, plaintiff previously was granted an additional 60 days to effectuate such service, but would show that Defendant Blackwell has just been located living in Colorado and in order to complete service the Plaintiff must arrange for a process server in that state to serve the petition." This second motion was served one hundred and ninety-two (192) days after the complaint was filed and exactly sixty (60) days after the Court's order granting sixty (60) days to effectuate process was signed. On that same date, January 14, 2008, Plaintiff's counsel presented a proposed order granting extension of time within which to obtain service of process to the Court which was signed on January 18, 2007 and filed on January 23, 2008. (R. at 17). The order provided "Plaintiff be granted an additional ten (10) days from the date of this order within which to obtain service of process upon the Defendants in the above captioned matter."

On January 14, 2008, a summons was issued to "Frankie Blackwell, 11418 Ames Court, Westminster, CO 80020." (R. at 16). On February 11, 2008, a summons and affidavit of service was filed which indicates that "on 01/20/2008 at 9:21 PM," the summons and complaint were served on Frankie Blackwell by the process server by "leaving the documents at Defendant's usual place of abode with Robert Bruggemern." [Sp.] who is the Defendant's spouse. (R. at 18). Without addressing whether this method of service of process was proper for an out of state Defendant, upon information and belief service of the summons and complaint took place one hundred and ninety-eight (198) days after the complaint was filed in this matter.

B. Circuit Court's Disposition

On March 19, 2008, Defendant filed a motion to dismiss or, in the alternative, motion for summary judgment pursuant to Miss. R. Civ. P. 4(h). (R. at 24-73). Thereafter, on March 31, 2008, Defendant filed her answer asserting, among other things, that the Defendant had not been properly served with process pursuant to Rule 4(h) of the Mississippi Rules of Civil Procedure as a copy of the summons and complaint for damages were not served upon Defendant within 120

days after the filing of the complaint for damages. (R. at 83). By agreement of counsel, Defendant filed a notice of hearing on May 15, 2008 setting Defendant's motion to dismiss or, in the alternative, motion for summary judgment pursuant to Miss. R. Civ. P. 4(h) for hearing before Circuit Court Judge Lisa P. Dodson on August 8, 2008. (R. at 85). Unfortunately, on August 7, 2008, counsel was notified by phone call from the Court Administrator for Hancock County that the scheduled hearing date was cancelled by the Circuit Court Judge. Undersigned counsel wrote counsel for the Plaintiff on September 4, 2008 proposing five (5) additional dates to reschedule the hearing for Defendant's motion to dismiss or, in the alternative, motion for summary judgment pursuant to Miss. R. Civ. P. 4(h). (Appellee's R.E. at 9). Counsel for the Plaintiff responded on September 5, 2008, stating that the proposed "October date is already taken, but the date of December 5, 2008 is available." (Appellee's R.E. at 10). After a conflict arose with the December 5, 2008 proposed date, by agreement of counsel, the Defendant filed her re-notice of hearing re-scheduling the motion to dismiss for hearing before Circuit Court Judge Jerry O. Terry on December 12, 2008. (R. at 90). Shortly after Plaintiff's counsel agreed to a proposed date to reschedule the hearing on the pending motion to dismiss, on October 2, 2008 his office sent a letter to undersigned asking for responses to the discovery propounded to the Defendant by the Plaintiff on February 22, 2008. (Appellee's R.E. at 11). Defendant responded to Plaintiff's requests for production of documents on December 3, 2008. (R. at 92-93). Defendant never answered the interrogatories propounded by the Plaintiff. While awaiting the hearing date for the pending motion to dismiss, Defendant propounded interrogatories and requests for production of documents on September 24, 2008. (R. at 87-88). Without objection, Plaintiff answered the written discovery propounded by the Defendant on November 18, 2008. (R. at 89). Defendant never waived or abandoned nor communicated any waiver or abandonment of the pending motion to dismiss and pursued having same heard by the circuit

court in a timely manner. Any delay in getting the motion to dismiss heard was not of Defendant's making and was due to unforeseen difficulties in docketing a mutually convenient date among parties and conflicts that arose with the circuit court's schedule in Hancock County. The hearing on Defendant's motion to dismiss was held as re-noticed on December 12, 2008. Plaintiff filed a memorandum in opposition to defendant's motion to dismiss on December 15, 2008, three days following the hearing. (R. at 94-96). Plaintiff did not attempt to show "good cause" for her failure to serve Defendant in either her memorandum in opposition to defendant's motion to dismiss or through oral argument at the hearing. The Plaintiff instead argues only that the Defendant moved out of state, married and changed her last name during the three years following the subject wreck and those circumstances were "a complication." (Tr. 7). Plaintiff does not elaborate as to how these circumstances affected the attempts, if any, to properly serve process on the Defendant. Further, Plaintiff cites as evidence of "diligence" her filing of two, albeit admittedly untimely, motions for additional time to serve complaint as justification for the failure to serve process within 120-days. (Tr. 7). After consideration, on January 8, 2009, the circuit court filed its order of dismissal which accurately set forth the facts, standard of review, conclusions of law and found that "Plaintiff has not demonstrated good cause for failing to serve process within 120 days of filing the complaint." (R. at 97-99). It is from this order of dismissal that the Plaintiff now appeals.

SUMMARY OF THE ARGUMENT

Rule 4(h) of the Mississippi Rules of Civil Procedure provides that where service of the summons and complaint are not made upon a defendant within 120 days after filing of the complaint and the plaintiff cannot show good cause why such service was not made within that period then the action shall be dismissed as to that defendant without prejudice. It is undisputed that the Plaintiff failed to serve the Defendant with the summons and complaint within 120 days

after filing the complaint. There is no genuine issue of material fact that exists in this case. The circuit court properly found that "Plaintiff has not demonstrated good cause for failing to serve process within 120 days of filing the complaint." The Defendant did not waive her Rule 4(h) defense in this matter by minimal participation in written discovery. The Defendant actively pursued her Rule (h) defense and did not contribute to any delay in having her motion to dismiss heard. Therefore, the circuit court's order of dismissal was proper and should be affirmed.

ARGUMENT

STANDARD OF REVIEW

This Court has previously held that a trial court's finding of fact on the existence of good cause or excusable neglect for delay in service of process has been deemed "a discretionary ruling... and entitled to deferential review" on appeal. *Montgomery v. SmithKline Beecham Corp.,* 910 So.2d 541, 544-45 (Miss 2005), *citing Rains v. Gardner*, 731 So.2d 1192, 1197-98 (Miss. 1999). When reviewing such fact-based findings, the Court will "only examine whether the circuit court abused its discretion and whether there was substantial evidence supporting the determination." *Id.* The trial court's decision will not be reversed unless the trial court's discretion is abused or is not supported by substantial evidence. *Long v. Memorial Hospital at Gulfport,* 969 So.2d 35, 38 (Miss. 2007), *citing Bennett v. McCaffrey*, 937 So.2d 11, 14 (Miss. 2006). Where the trial court's judgment involves the interpretation of legal principles, this Court will conduct a de novo, or plenary, review of its interpretation, and reverse only where it finds the trial court in error. *Id.* Here the circuit court's order of dismissal was based on a fact-based finding rather than on interpretation of legal principals, therefore, the deferential standard of review should apply.

I. THE CIRCUIT COURT'S ORDER OF DISMISSAL IS SUPPORTED BY THE LAW AND THE SUBSTANTIAL AND UNCONTRADICTED EVIDENCE

It is undisputed that Plaintiff did not serve the summons and complaint on the Defendant within 120 days after filing of the complaint. Rule 4(h) of the Mississippi Rules of Civil Procedure provides:

> **(h) Summons: Time Limit for Service.** 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. (Emphasis added).

The circuit court's order of dismissal of defendant without prejudice cites the following uncontested facts: 1) On July 6, 2007, Plaintiff filed a complaint against Defendant due to a car accident which occurred July 21, 2004; 2) On the day the complaint was filed, a summons was issued to Defendant in Perkinston, Mississippi, however, Defendant could not be found; 3) The summons return noted that Defendant moved to Colorado; 4) On November 14, 2007, approximately 131 days after filing the complaint, Plaintiff filed a motion for additional time to serve the complaint; 5) An order was entered November 15, 2007 allowing Plaintiff sixty additional days to obtain service of process; 6) the summons was re-issued to no avail; 7) On January 18, 2008 Plaintiff filed her second motion for additional time to serve; 8) The motion was granted on January 18, 2008 and gave Plaintiff ten additional days to obtain service; 9) On January 20, 2008, Defendant was served by leaving documents with her husband at their home in Colorado. (R. at 97-99). In addition to those facts cited by the circuit court in its order of dismissal, there are numerous additional facts that are not in dispute in this case. Obviously, Plaintiff did not serve the summons and complaint on the defendant within 120 days after filing of the complaint. Plaintiff had notice of Defendant's relocation to Colorado as early as July 19,

2007; however, no action documented by the record was taken by the Plaintiff for 118 additional days. At that point, November 14, 2007, one hundred and thirty one (131) days after filing the complaint, Plaintiff filed her first motion for additional time to serve complaint. It is undisputed that this initial motion for additional time to serve complaint was not timely filed within 120 days after filing the complaint. Further, the Defendant's uncontradicted affidavit establishes that she has not avoided or evaded service of process in this matter. (R. 73, Tr. 7). To the contrary, the Defendant's unrefuted affidavit shows that she left a forwarding address with her local United States Postal Service in Stone County prior to moving to Colorado and she has not hidden her current residence from public records. (R. 73, Tr. 5). The Circuit Court's order of dismissal was proper pursuant to Miss. R. Civ. P. 4(h) and is supported by the substantial uncontested facts in this case.

II. THE CIRCUIT COURT'S FINDING THAT GOOD CAUSE DID NOT EXIST FOR PLAINTIFF'S FAILURE TO SERVE PROCESS IS NOT AN ABUSE OF DISCRETION

The law is clear that a complaint shall be dismissed for failure to serve process within 120 days unless Plaintiff can show "good cause" for failing to meet the deadline; the Plaintiff bears the burden of establishing good cause. Miss. R. Civ. P. 4(h), *Kingston v. Splash Pools of Mississippi, Inc.*, 956 So.2d 1062, 1064 (¶ 6) (Miss.Ct.App. 2007). In order to demonstrate good cause, a 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). There are several instances where the Court has previously recognized the existence of "good cause," specifically: "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*, 993 So.2d 378, 379 (¶ 6) (Miss.

2008), *citing Holmes v. Coast Transit Authority*, 815 So.2d 1183, 1186 (Miss. 2002). None of the recognized instances apply to the facts of this case. To the contrary, the facts and procedural history in this case do not support Plaintiff's assertion that she was diligent and faced mitigating circumstances.

With regard to Plaintiff's claim of diligence, the record reflects Plaintiff made only one (1) attempt to issue the summons or to serve Frankie Blackwell with the summons and complaint within the allotted 120-day period. (R. 7). The return pertaining to that initial attempt was dated July 13, 2007 and was filed July 19, 2007 and indicated that Defendant could not be located in Stone County and "moved to Colordo." [Sp.] (R. 8). Nevertheless, it was not until January 8, 2008 that Plaintiff requested a second summons to be issued to the Defendant; unexplainably at the same Perkinston address. (R. 12). It appears from review of the record that no attempt at service of the January 9, 2008 summons was made. A third summons was requested on January 14, 2008, this time for the Colorado address, and was ultimately served six (6) days later. (R. 18-19). Plaintiff's inaction without adequate explanation demonstrates lack of good cause on the part of Plaintiff far beyond excusable neglect. *Bacou-Dalloz Safety, Inc. v. Hall*, 938 So.2d 820, 823 (¶13, 14) (Miss. 2006)(dismissal proper where plaintiffs made only two attempts at service and failed to file the recommended motion for extension of time within the 120-day time period). Plaintiff claims in her brief that she "diligently attempted to locate Defendant," however, she provides no specifics and the record is silent as to her actual attempts.

Plaintiff further asserts in support of her claim of diligence that she moved the court for extensions of time in which to perfect service. As stated previously, it is not disputed that Plaintiff failed to file a motion for extension of time within the allotted 120-day time period. The time to serve process may be extended provided the motion for additional time for filing service of process is filed before the expiration of the 120-day time period following filing of the

complaint. *Kingston v. Splash Pools of Mississippi, Inc.*, 956 So.2d 1062, 1064 (¶ 8) (Miss.Ct.App. 2007), *citing Mitchell v. Brown*, 835 So.2d 110, 112 (¶ 10) (Miss.Ct.App. 2003). The 120-day time limit lapsed on November 3, 2007, eleven (11) days prior to when Plaintiff filed her first motion for additional time to serve complaint. (R. 9-10). Failure to file the motion for additional time within the 120-day time period further supports a finding of lack of diligence on the part of Plaintiff.

In *Montgomery v. Smithkline Beecham Corp.*, 910 So.2d 541, 546 (¶ 17) (Miss. 2005), Plaintiffs filed their first and second motions for additional time within the 120-day rule or within the extended period, however, the third motion for additional time was filed after the expiration of the second extension. Although the Plaintiffs had three orders granting an extension of time to serve process entered by the circuit court and argued that the circuit court was "bound by its own order granting an extension of time to serve process," the Mississippi Supreme Court disagreed and held that Plaintiffs did not demonstrate good cause for failing to serve process within 120 days of filing the complaint or within the subsequent extension periods, and affirmed the circuit court's dismissal of the action. *Id.* at ¶¶ 10, 28.

In *Lucas v. Baptist Mem. Hosp.-North Miss., Inc.*, 997 So.2d 226 (¶ 6) (Miss. App. 2008), the plaintiff failed to serve process during the 120-day time period set forth in Rule 4(h) of the Mississippi Rules of Civil Procedure or within the additional 120-day time period granted by the trial court in response to a motion for additional time. Plaintiff argued that he demonstrated "good cause" for failure to timely serve the hospital as plaintiff's counsel was "experiencing severe difficulties within his practice" that prevented him from obtaining process sooner. *Id.* Citing other holdings on the topic, the Court found that plaintiff's counsel's heavy caseload during the period did not establish "good cause." *Id.* at ¶ 10, *citing Moore v. Boyd*, 799 So.2d

133, 136 (¶ 7) (Miss. Ct. App. 2001), *LeBlanc v. Allstate Ins. Co.*, 809 So.2d 674, 677 (¶ 14) (Miss. 2002), *Heard v. Remy*, 937 So.2d 939, 944 (¶ 21) (Miss. 2006).

Plaintiff argues that there are understandable mitigating circumstances in this case that made it very difficult to locate Defendant and these circumstances establish good cause or excusable neglect for her failure to timely serve the Defendant. The only mitigating circumstances identified by Plaintiff are that Defendant married and changed her name and moved to Colorado. This argument has been previously considered and addressed by the Court of Appeals in *Kingston v. Splash Pools of Mississippi, Inc.*, 956 So.2d 1062, 1063 (¶ 3) (Miss.Ct.App. 2007). In that case, during the year and eleven months between the initial filing of the complaint and ultimate service of process, defendant Donna Parker Withrow remarried and changed her name and address. *Id.* Just like the Plaintiff in this case, Kingston cited difficulties in serving process because Withrow had changed her name but Kingston provided "no specifics as to how, when and where the process server made attempts to effectuate service of process were given to the court, and an affidavit from the process server was not provided to show any sort of detail that could have demonstrated good cause." *Id.* at ¶¶ 4, 10. Similar to the hearing in the present case, no evidence was presented to the circuit court to establish good cause "beyond broad assertions of diligence." *Id.* at ¶ 8. The Court commented that some level of detail is required to demonstrate a showing of good cause in that a plaintiff 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." *Id.* at ¶ 11 *citing Watters v. Stripling*, 675 So.2d 1242, 1243 (Miss. 1996) (*quoting Systems Signs Supplies v. U.S. Dep't of Justice*, 903 F.2d 1011, 1013 (5th Cir. 1990). Because the record is void of any detail of diligent effort made to serve process in the present case, this Court should likewise hold that the lower

court did not abuse its discretion in dismissing this case for failure to serve process within 120 days as prescribed by Miss. R. Civ. P. 4 (h).

Similar to the facts set forth in *Mitchell v. Brown*, 835 So.2d 110, 112 (¶ 7) (Miss. Ct. App. 2003), it appears that the Plaintiff obtained the Defendant's Perkinston address for service of process from the Mississippi Uniform Crash Report that was, at the time of the filing of the complaint, almost three years-old. (R. at 7, Appellee's R.E. at 5). Obviously the Plaintiff made no effort to verify that address through the United States Post Office as Defendant left a forwarding address the month prior, June 2007, when she moved to Colorado. (R. at 73). Also, the Defendant's mother, Annie Anderson, who was a passenger in the Defendant's car at the time of the subject wreck, was named in the Mississippi Uniform Crash Report and her address was noted therein; "34 F Anderson Road, Perkinston, MS." (Appellee's R.E. at 5). The record is silent as to whether Plaintiff attempted to contact Ms. Anderson to inquire as to her daughter's address. The Court of Appeals affirmed the circuit court's dismissal of Mitchell's complaint based on Rule 4(h) of the Mississippi Rules of Civil Procedure as that ruling was supported by substantial evidence showing that Mitchell failed to carry his burden of establishing good cause or excusable neglect. *Id.* at ¶ 9. The circuit court's dismissal of Plaintiff's complaint in this case should likewise be affirmed.

Plaintiff cites *Fortenberry v. Memorial Hosp. at Gulfport, Inc.*, 676 So.2d 252, 256 (Miss. 2008) as an example of "good cause" where the defendant doctor had moved and was "difficult to locate." The *Fortenberry* case is distinguishable from this case in that Fortenberry met his burden of proof regarding good cause in that he filed two timely requests for extension of time to serve the doctor and he provided detail pertaining to his efforts to locate the doctor, specifically, by contacting several hospitals, all defense counsel of record, and the state medical license board and ultimately he hired a private investigator. *Id.* at 255. Plaintiff in this case has

not provided any detail of efforts, if any that she made to locate Defendant after learning that Defendant had moved to Colorado. To the contrary, Defendant has provided a sworn affidavit establishing that she was not "difficult to locate," in that she left a forwarding address with her local post office before moving to Colorado. (R. 73).

Likewise, Plaintiff relies on *Jenkins v. Oswald,* 3 So.3d 746, 747 (Miss. 2009) as an example of reasonable diligence to locate a defendant who moved out of state. In that case, Oswald actually appeared at the motion to dismiss hearing and testified that in an attempt to locate defendant Jenkins she did the following: filed an official inquiry with the United States Postal Service; hired a process server in Florida; conducted monthly internet searches via "Google;" periodically received reports from Jenkins's friends; attempted to discover whether Jenkins had re-obtained a Mississippi driver's license; confronted Jenkins and requested his cell phone number when she "ran into him" at a grocery store but later determined the cell number was "inactive;" and checked the Secretary of State site to see if he was affiliated with any valid business. *Id.* at ¶¶ 5-6, 14. Further, Jenkins testified at the hearing and the chancellor concluded that based on his testimony Jenkins "did not have an address that would be easily ascertained through" Google and searching telephone books. *Id.* at ¶ 11. Again with regard to this case, the record is void as to specifics of any effort, attempts, or inquiry, if any, Plaintiff made to locate and serve Defendant in this case. To the contrary, the record in the present case reflects that Defendant's address in Colorado could be easily ascertained through simple inquiry with the local office of the United States Postal Service.

Plaintiff cites *Foss v. Williams*, 993 So.2d 378, 379 (¶ 2) (Miss. 2008) presumably in support of her argument that she demonstrated "good cause." The facts and procedural history in the case at bar are very different from the *Foss* case, most notably in that Dr. Foss was served on the 121st day where this Defendant was served on the 198th day after the complaint was filed.

Further, in *Foss* the plaintiff argued that the one day delay in service was a result of the conduct of a third person, local counsel. Plaintiff has made no such argument in this case.

Plaintiff claims that this case is similar to *Bennett v. McCaffrey,* 937 So.2d 11 (Miss. 2006) to the extent it addresses the timing of a request for extension of time to serve the Defendant. In *Bennett,* the Court found that McCaffrey's failure to seek a second extension of time to serve process until 92 days after the expiration of the first extension period was the result of "excusable neglect." *Id.* at ¶ 15. Unlike the Plaintiff in this case, McCaffrey established good cause for her delay in serving Bennett and "used every means possible to place Bennett on notice of the lawsuit pending against him." *Id.* Upon learning that Bennett's address was incorrect, McCaffrey continued to search for Bennett's correct address by looking in the phone book, using the internet, and through inquiry with the United States Post Office, subpoenaed Bennett's insurer, and attempted to serve Bennett by publication. *Id.* at ¶ 10. Again, in this case, Plaintiff has failed to provide any details, specific dates, or other information regarding attempts she made to place Defendant on notice of this lawsuit.

Under the specific facts of this case, the circuit court did not abuse its discretion in granting the Defendant's motion to dismiss or in the alternative, motion for summary judgment. Other than broad and unsubstantiated representations of diligence by the Plaintiff, the record is silent as to details of efforts made to serve process. The law is clear that a complaint shall be dismissed for failure to serve process within 120 days unless Plaintiff can show "good cause" for failing to meet the deadline. Miss. R. Civ. P. 4(h). The Plaintiff bears the burden of establishing good cause and she has failed to meet that burden given her silence as to specific information regarding attempts to locate and serve Defendant. There is no specific showing by the Plaintiff that Defendant's marriage and name change and relocation to Colorado prior to the filing of this lawsuit adversely affected her attempts at serving process in this lawsuit. To the contrary,

Defendant left a forwarding address before moving and has not hidden her current address from public records. As such, Defendant requests that this Court find that the circuit court did not abuse its discretion in dismissing this case for failure to serve process within 120 days as prescribed by Miss. R. Civ. P. 4 (h) and affirm the dismissal of this matter.

III. THE DEFENDANT DID NOT WAIVE HER RULE 4(h) DEFENSE

The Plaintiff argues that the Defendant waived her objection to insufficiency of process by participating in litigation; specifically written discovery. By making that argument the Plaintiff entirely ignores an equally important factor to the analysis required for a successful waiver of defense argument. Specifically, there are no allegations by the Plaintiff that the Defendant abandoned or delayed pursuit of her motion to dismiss based on insufficiency of process. It is undisputed that the Defendant promptly and timely filed a motion to dismiss, or in the alternative, motion for summary judgment. Defendant, in response to the prompting and request of Plaintiff's counsel through telephone calls and letters, admittedly responded to pending requests for production of documents. (Appellee's R.E. at 11). No answers to interrogatories were filed by this Defendant. Plaintiff should not now be allowed to argue that she was prejudiced by the Defendant's participation in written discovery when she herself insisted upon that participation. *See Price v. Clark*, 2009 WL 2183271 (¶¶ 39-40) (Miss. 2009) (plaintiff not allowed to argue that defendants waived immunity defense by not raising it where plaintiff requested that defendant not file any responsive pleadings until she was able to ascertain which defendants were subject to immunity). Further, after the hearing on the pending motion to dismiss was continued once, by the lower court's request, and only after Plaintiff's counsel had already agreed to re-set the motion hearing in December 2008, Defendant propounded interrogatories and requests for production of documents to the Plaintiff. However, the written discovery in this case did not account for any delay in the litigation nor did it delay the pending

hearing on Defendant's motion to dismiss. There were no depositions, discovery motions or hearings, scheduling orders or settlement negotiations that transpired between when the Defendant filed her motion to dismiss and when that motion was eventually heard by the circuit court.

Again, Plaintiff has not shown that participation in written discovery, without more, was sufficient to constitute a waiver of Defendant's Rule 4(h) defense. The Court's opinion in *MS Credit Ctr., Inc. v. Horton*, 926 So.2d 167 (¶ 41-45) (Miss. 2006) addressed the situation where the failure of a defendant to pursue a defense coupled with active participation in the litigation process constituted waiver of the defense as a matter of law. Although addressing a right to compel arbitration, the Court noted that their holding in *Horton* would apply to any defense that would result in dismissal or terminate litigation. *Id.* at ¶ 44. The Court held that "although participation in the litigation is an important factor to be considered, more is required to constitute a waiver." *Id* at ¶ 41. Further, "ordinarily, neither delay in pursuing the right to compel arbitration nor participation in the judicial process standing alone, will constitute a waiver." *Id.* Specifically, "a party who invokes the right to compel arbitration and pursues that right will not ordinarily waive the right simply because of involvement in the litigation process." *Id.* Considering whether a party has pursued a defense the Court explained "a party need only assert it in a pleading, bring it to the court's attention by motion, and request a hearing once a hearing is requested, any delay by the trial court in holding the hearing would not constitute a waiver." *Id.* at ¶ 45, FN 9. The Court found in *Horton* that the defendant unjustifiably delayed pursuit of their right to compel arbitration for 240 days or 8 months, plus substantially engaged in the litigation process by consenting to a scheduling order, engaging in written discovery, and conducting Horton's deposition before filing its motion to compel arbitration. *MS Credit Ctr., Inc. v. Horton*, 926 So.2d at ¶¶ 41, 45. For that reason the Court upheld the circuit court's denial

of the defendant's motion to compel arbitration. The facts in this case are dissimilar to those in *Horton* as this Defendant pursued her Rule 4(h) defense and did not participate in litigation to the extent set forth in *Horton.*

Applying the holding in the *Horton* case and its progeny to this case, this Court should hold that Defendant has not waived her right to pursue her motion to dismiss based upon Rule 4(h). Defendant clearly pursued her defense in that she asserted it on March 19, 2008 in her motion to dismiss pursuant to Miss. R. Civ. P. 4(h), thereafter raised the defense in her answer, and set her motion to dismiss for hearing on the first mutually convenient and available hearing date for Hancock County. The delay by the circuit court in holding the hearing does not constitute a waiver. After the hearing was continued by the circuit court, Defendant obtained new hearing dates and after conference and agreement with Plaintiff's counsel re-scheduled the hearing for the next mutually convenient hearing date in December. Plaintiff does not allege nor do the facts support prejudice from any unreasonable delay in bringing the Rule 4(h) issue before the circuit court for adjudication. *See also, Spann v. Diaz*, 987 So.2d 443 (¶¶ 11,15) (Miss. 2008) (applying the *Horton* decision, the Court found that even though the attorney participated in the litigation by agreeing to a scheduling order and deposing Plaintiff, a delay of seventy-one days to file a motion for summary judgment based on the statute of limitations defense was not a substantial and unreasonable delay nor did counsel waive his right to raise the statute of limitations as an affirmative defense), *Holmes v. Coast Transit Authority*, 815 So.2d 1183, 1186 (¶ 10) (Miss. 2002) (engaging in discovery and settlement negotiations does not constitute good cause for failure to effect service within 120 days of the filing of the complaint). As stated in *Horton*, a party who invokes a defense and pursues that defense will "not ordinarily waive the right simply because of involvement in the litigation process." *MS Credit Ctr., Inc. v. Horton*, 926 So.2d at ¶ 41.

Participation in written discovery in this litigation was minimal and does not, by itself, constitute full participation in litigation sufficient enough to support a waiver of Defendant's Rule 4(h) defense. In the recent decision of *Lucas v. Baptist Mem. Hosp.-North Miss., Inc.*, 997 So.2d 226 (¶ 4) (Miss. App. 2008), the Defendant filed a motion to dismiss asserting insufficiency of process pursuant to Rule 4(h) for failure to serve process within 120-days of filing the complaint. The plaintiff argued that the hospital waived its insufficiency of process defense by its active participation in the litigation. *Id.* at ¶ 19. The Court found the hospital's action in filing an acknowledgment of receipt of summons and complaint, filing of an answer to the complaint, filing a separate motion to dismiss for improper venue, filing a response to Plaintiff's motion to strike affirmative defense, and issuance and service of several subpoenas for medical records to third parties "constituted only minimal participation in the litigation; none of these actions can be seen as a waiver of the affirmative defenses." *Id.* at ¶ 20. The Court found that the described minimal participation coupled with a nine-month delay between the defendant's answer and its motion to dismiss did not constitute a waiver of the defense. *Id.*

Plaintiff relies solely upon *East Miss. State Hosp. v. Adams*, 947 So.2d 887 (Miss. 2007) in support of her argument that Defendant's participation in written discovery constituted a waiver of her objections to insufficiency of process. The facts and procedural history in the case at bar are very different from *Adams*. In *Adams*, the defendant waited two years to assert "for the first time" through a motion to dismiss that service was inadequate for failure to serve the Attorney General pursuant to Miss. R. Civ. P. 4(d)(5). *Id* at ¶ 5. By that time, the case had proceeded through motions to compel, status conferences, written discovery, depositions, designation of experts, scheduling order, trial date order, and defendant had filed and opposed various motions including a motion for summary judgment asserting immunity. *Id* at ¶¶ 4-5, 8, 11. Quoting *Horton*, the Court found that the defendant's two year delay in pursuing its defenses

"*together with*" its full participation in litigation constituted a waiver of the defenses. *Id* at ¶ 12 (Emphasis added). In the case at bar, the Defendant did not participate in motion practice, outside of the subject motion to dismiss, no depositions were scheduled or taken, the parties did not designate experts, and no trial date was scheduled. Further, as stated before, there was no delay on the part of the Defendant in pursuing her motion to dismiss and Plaintiff suffered no prejudice as a result of Defendant's actions. *See also Manhattan Nursing & Rehab. Center, LLC v. Williams,* 2009 WL 2370783 (¶ 12) (Miss. App. 2009)(nursing home did not waive its right to arbitration by seeking limited depositions and the resident did not show they suffered delay or prejudice), *Century 21 Maselle and Associates, Inc. v. Smith*, 965 So.2d 1031, 1038 (¶ 12) (Miss. 2007) (although Century 21 propounded written discovery the waiver exception did not apply because Smith "offered no evidentiary basis for the lower court to find detriment or prejudice either by incurred legal expense or procedural delay").

The present case also differs from *Whitten v. Whitten*, 956 So.2d 1093 (Miss. 2007) in that the defendant father in that case waited two years or until after the statute of limitations had expired before filing a motion to dismiss, and during those two years he not only engaged in written discovery but also discussed settlement and deposed the plaintiff in his case. In this case, the Defendant did not substantially participate in litigation and there was no delay in the pursuit of her motion to dismiss. For all the forgoing reasons, the Defendant requests that the Court find that Defendant did not waive her defense of insufficiency of service of process by minimal participation in written discovery, and that the Court affirm the lower court's entry of dismissal in this action.

CONCLUSION

Under the facts present in this case, the circuit court did not abuse its discretion in entering its order of dismissal as Plaintiff failed to demonstrate good cause for failing to serve

process within 120 days of filing the complaint. The credible substantial undisputed facts show that Plaintiff was not diligent in her pursuit of service of process on Defendant. Plaintiff has failed to provide details pertaining to efforts at service of process. Regardless of Defendant marrying, changing her name and moving to Colorado, Plaintiff has not shown that those circumstances contributed to the delay of service of process. Defendant did not waive her defense of insufficiency of service of process by participation in written discovery. The Defendant's participation in this case was minimal and Defendant did not delay pursuit of her motion to dismiss. The Plaintiff was not prejudiced by the written discovery that she herself insisted on conducting. The circuit court's ruling was supported by substantial evidence, therefore, the Defendant respectfully requests that this Court defers to the circuit court's holding and affirm the circuit court's order of dismissal.

RESPECTFULLY SUBMITTED, this the 26th day of August 2009.

Respectfully submitted,

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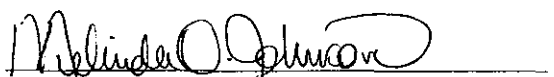
Attorneys for Defendant/Appellee,

FRANKIE BLACKWELL



MELINDA O. JOHNSON (9498)

CERTIFICATE OF SERVICE

I, Melinda O. Johnson, attorney for Defendant/Appellee, FRANKIE BLACKWELL, certify that I have this day forwarded the above and foregoing ***Brief of Appellee*** to the Clerk of this Court and have served a copy of same by U.S. Mail with postage prepaid on the following persons at these addresses:

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This, the 26th day of August 2009.

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