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SUMMARY OF THE ARGUMENT

Plaintiff-Appellant re-urges all points raised in her Appellant Brief. Plaintiff-Appellant files this Reply Brief to address some of the arguments made in the Appellee Brief of Defendant Frankie Blackwell. Specifically, contrary to Defendant's assertions and in contrast to cases with significantly more egregious delays in service, good cause and understandable mitigating circumstances existed for failure to serve the Complaint timely, especially considering the minimal delay in filing a motion for extension of time in the context of a defendant moving out of state and changing her name.

Regarding the assertion that the Defendant's action in propounding discovery did not delay the proceedings, Plaintiff never alleged in her Appellant Brief that the propounding of discovery caused any delay, assuming such an argument bore any relevance to the issues now before the Court. Rather, Plaintiff simply urges that Defendant's participation in litigation constitutes a waiver of her failure to serve timely argument in the light of service being ultimately accomplished.

ARGUMENT

Good Cause and Understandable Mitigating Circumstances Exist

Plaintiff Patricia Shaver respectfully disagrees with the Circuit Court's decision that the totality of steps taken to effect service of process failed to cure an eleven day service defect, particularly in light of Mississippi jurisprudence allowing flexibility in accomplishing service of process under Rule 4(h) of the Mississippi Rules of Civil Procedure. As this Honorable Court has previously held, the following are instances where good cause was recognized to have existed: "when a third person's conduct resulted in the failure; when the defendant evaded service of process or engaged in misleading conduct; when plaintiff acted diligently; when understandable mitigating circumstances existed; or when the plaintiff proceeded *pro se* or *in*

forma pauperis.” *Holmes v. Coast Transit Auth.*, 815 So.2d 1183, 1186 (Miss. 2002) (quoting 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1137, at 32 (3d ed. 2000)). The provision concerning *pro se* plaintiffs obviously does not apply and Plaintiff does not allege any specific act or omission of any third party. While Plaintiff respectfully suggests that this Court not give too much weight to the statement in Defendant’s self-serving affidavit that she did not evade service, Plaintiff does not allege and has not alleged any conscious attempt of the Defendant to evade service or engage in misleading conduct.

Instead, the significant language in Defendant’s affidavit has nothing to do with her claim of not evading service, but rather the time of her move. Defendant states she moved to Colorado in June 2007. The Complaint in this matter was filed on the 6th of July, 2007. While the returned summons dated July 17, 2007 contains an undated handwritten notation that the Defendant moved to Colorado, no additional information was available. Defendant presupposes that her new address was immediately and publically accessible. Such a statement assumes that public records, electronically-accessed postal service change requests and other computer-based research tools will immediately display changes in address (and the record is silent as to the availability of Defendant’s new address in the time immediately after the Complaint was filed). Although Defendant may not have consciously avoided service, the very act of her moving out-of-state, combined with a marriage and name change so close in time to the filing of Plaintiff’s Complaint, makes Plaintiff’s difficulty in effecting timely service understandable under the circumstances. Such conditions rise to the level of “understandable mitigating circumstances,” especially considering how minimal the delay was in this case. *See Holmes v. Coast Transit Auth.*, 815 So.2d at 1186 (internal citations omitted). *See also, Jenkins v. Oswald*, 3 So. 3d 746 (Miss. 2009) (upholding denial of motion to dismiss for failure to serve for almost five (5) years after filing the Complaint).

Even with cases that the Defendant alleges are similar to the matter *sub judice*, distinctions can be made. For instance, Defendants cites *Kingston v. Splash Pools of Mississippi, Inc.*, 956 So. 2d 1062, 1063 (Miss. Ct. App. 2007), as proof that a name change and change of address does not equal good cause. (Appellee's Br. At 11). *Kingston* is immediately distinguishable in that service was not made until a year and eleven months despite the fact that the Defendant (apparently) remained in Mississippi, while Plaintiff *sub judice* made service approximately 198 days after the filing of the Complaint, and within an extension of time granted by the Trial Court, on the Defendant who moved out-of-state, before or after her name change.

Also distinguishable is another case cited by Defendant, *Bacou-Safety, Inc. v. Hall*, 938 So. 2d 820, 823 (Miss. 2006), where the plaintiff did not serve defendant with a complaint for 619 days, and did not request additional time. The cases are simply not the same. Here, Plaintiff service was made in Colorado more than a year earlier than the plaintiffs in *Kingston* and *Hall* and unlike the plaintiffs in *Kingston* and *Hall*, Plaintiff *sub judice* filed multiple motions for extension of time and service. Plaintiff Patricia Shaver had only an eleven day gap in service on a Complaint filed fifteen days before the statute of limitations ran and service was ultimately made in Colorado within an extension granted by the Circuit Court. Thus, there were no glaring examples of neglect as in *Hall*.

Similarly, Defendants attempts to analogize the facts of another case, *Mitchell v. Brown*, 835 So. 2d 110, 112 (Miss. Ct. App. 2003), to the matter *sub judice*. (Appellee's Br. at 12). In *Mitchell*, the Plaintiff obtained the Defendant's address from the accident report and as in the matter *sub judice*, the accident had occurred some time ago. Plaintiff only relied on the accident report to request the summons in her initial attempts at service; information of Defendant's recent move to Colorado was eventually made available to Plaintiff's counsel (though the exact location and the fact that Plaintiff married and changed her name was not immediately

discoverable). Confirming that Defendant's move from Stone County was not a temporary move prompted earlier by Hurricane Katrina damage in George County and finding Defendant's address in Colorado were the problems. Plaintiff was not ignorant of the problems with the Perkinson address given the Sheriff's return; rather, Plaintiff was unable to immediately cure the problem, especially considering Defendant's marriage and name change. Therefore, the present case is distinguishable from the facts of *Mitchell*.

Defendant further suggests that Plaintiff should have made an inquiry of Defendant's mother who was in the car and her address contained on the accident report. (Appellee's Br. at 12). As Mississippi does not have a direct action statute against insurance companies, a plaintiff must typically name the actual driver/alleged tortfeasor, not the insurance company that is usually responsible for the defense of a case involving allegations of negligence. With all due respect to Defendant's assertion, Plaintiff is skeptical that any defendant's parent, who may be unfamiliar with how insurance companies typically defend automobile accidents, would willingly provide a defendant's address to Plaintiff's counsel or the staff of Plaintiff's counsel.¹

Participation in Litigation Waives the Minor Defect in Service

Defendant's Appellee Brief (and relevant record excerpts in support) spends an inordinate amount of time discussing how Defendant's propounding of discovery did not delay the proceedings. Plaintiff does not make the claim that the Defendant's propounding of discovery delayed the proceedings, nor does Plaintiff make the claim that "[t]he delay by the

¹ As Rule 4.1 of the Mississippi Rules of Professional Conduct bars an attorney from knowingly making a false material statement of fact or law, a plaintiff's attorney probably should not misrepresent the need for such information as an address in hopes of obtaining the needed information from a family member or friend.

circuit court in holding the hearing... constitute[s] a waiver.” (See Appellee’s Br. At 17). Plaintiff simply points to the decision of this Honorable Court in *East Miss. State Hosp. v. Adams*, 947 So. 2d 887 (2007) that participation in litigation can result in a waiver of a procedural issue such as allegedly inadequate or tardy service.

Here, it is not any delay caused by the participation of the Defendant in litigation, as Plaintiff does not attribute any delays with the hearing date to the Defendant. Instead, Plaintiff asserts that it is the participation in the litigation with a pending motion to dismiss for failure to serve timely that waives the failure to serve motion, particularly as service was eventually accomplished and accomplished within an extension of time granted by the Circuit Court.

As the parties were not under any kind of scheduling order, there was no need for the Defendant to propound discovery on the Plaintiff. Defendant was not in any danger of losing any rights and the record is silent as to whether the Defendant had any time-sensitive discovery concerns that needed to be addressed prior to the hearing on the motion to dismiss.

CONCLUSION

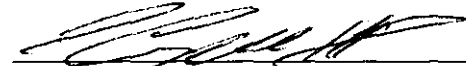
Plaintiff’s delay in seeking an extension of time in which to serve the Complaint was minimal. Plaintiff exercised diligence in filing two Motions for Extension of Time in which the serve the Complaint and ultimately served the Complaint within the second extension of time. Plaintiff ultimately served the Complaint less than 200 days after filing, despite the fact that the Defendant married, changed her name and moved an unspecified location in Colorado the month before the Complaint was filed. Considering Plaintiff’s efforts in resolving the lack of service despite the very recent move of the Defendant, the Circuit Court abused its discretion in dismissing Plaintiff’s suit. Vacating the Circuit Court’s decision is also appropriate in light of this Court’s recent decision in *Jenkins v. Oswald*. Additionally, the Defendant waived this

minimal defect in service (and service was ultimately accomplished) by participating in litigation, namely propounding discovery on the Plaintiff.

For the above reasons, as well as those alleged in Plaintiff's Appellant Brief, the decision of the Hancock County Circuit Court should be vacated, and this matter remanded for further proceedings.

RESPECTFULLY SUBMITTED, this 9th Day of September 2009,

F. GERALD MAPLES, P.A.



CARL D. "TODD" CAMPBELL, III
MS BAR NO. 102856
365 CANAL STREET, SUITE 2650
NEW ORLEANS, LOUISIANA 70130
PHONE: 504-569-8732
FAX: 504-525-6932
EMAIL: tcampbell@fgmapleslaw.com

ATTORNEY FOR THE PLAINTIFF-
APPELLANT PATRICIA SHAVER

CERTIFICATE OF FILING AND SERVICE

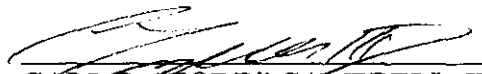
I hereby certify that I on this day I forwarded the above and foregoing Reply Brief of the Appellants by placing the original and three copies of same, along with an electronic version of same on CD-ROM, in an envelope addressed to the Clerk of the Mississippi Supreme Court, and mailing same via Federal Express, postage prepaid. I further certify that on this day, I have served a copy of same by U.S. Mail, postage prepaid on the following:

Honorable Jerry O. Terry
Circuit Court Judge
Hancock County Circuit Court
3068 Longfellow Drive
Bay St. Louis, MS 39520

Melinda O. Johnson, Esq.
Allen, Cobb, Hood & Atkinson, P.A.
Post Office Drawer 4108
Gulfport, MS 39502-4108

Karen Ladner Ruhr, Clerk
Hancock County Circuit Court
152 Main Street, Suite B
Bay St. Louis, MS 39520

This, the 9th day of September 2009.



CARL D. "TODD" CAMPBELL, III
(MS #102856)
F. GERALD MAPLES, P.A.
365 CANAL STREET, SUITE 2650
NEW ORLEANS, LOUISIANA 70130

ATTORNEY FOR THE APPELLANT
PATRICIA SHAVER